HOW EQUITY REACHED THE COLONIES

THE HON JUSTICE B H MCPHERSON CBE*

If in the 17th century you had been planning an overseas colony of your own,[1] it might be supposed that one of the first things to do would be to extend the national legal system to your territorial acquisitions abroad. It was the course adopted by the imperial powers of Spain, France and Holland in the government of their overseas possessions. In this respect, however, England was an exception. The period between the founding of the first successful settlement in Virginia in 1607 and the retrocession of Hong Kong in 1997, which marked the effective end of British imperial rule, spans four centuries less a single decade. Yet it was only in the last quarter of that period, beginning in or about 1900, that anything like a definite policy prevailed of imposing English law on British territorial possessions overseas.[2]

Historians are still debating why this should have been so.[3] It was not because of antipathy to English law on the part of the settlers themselves. Among the grievances identified by our revolting American cousins in their Declaration of Independence in 1776 was that the tyrant King George III had abolished "the free system of English laws in a neighboring province" in order to establish an arbitrary government in its place.[4] Two years earlier, the Continental Congress in 1774 had been insisting that the Thirteen Colonies were entitled to the benefit of the common law of England and of such English statutes as existed at the time of colonisation.[5] Independence was asserted by the Americans not because they were being forced to submit to English law, but because their rights as British subjects were being denied to them.[6] They wished their laws to be more, not less, English. No less than the Declaration of Independence itself, it has been claimed, was cast in the form of a bill in Chancery.

* Justice of Appeal, Court of Appeal, Supreme Court of Queensland. This paper was originally presented at the 2004 WA Lee Equity Lecture hosted by the Faculty of Law, Queensland University of Technology.

1 This is not as absurd as it now seems: all early English settlements or "plantations" were private enterprise ventures.

2 The extension was effected principally under the *Foreign Jurisdiction Act* 1890 (53 & 54, Vict c 37) in the case of the many protectorates declared in Africa and the Pacific in or about that time.

3 It has recently been suggested that English law was incapable of being extended outside the realm: D J Hulsebosch, 'The Ancient Constitution and the Expanding Empire' (2003) 21 *Law and History Review* 439; but it was extended to Wales by Parliament in 1535 (27 Hen 8, c 26) and 1542 (34 & 35 Hen 8, c 26); and applied in Ireland "by degrees" after the English invasion in the time of Henry 2: *The Case of Tanistry* (1608) Davies Reports 78, 108 (Evans transl, Dublin 1762).

4 The Declaration of Independence of the Thirteen Colonies, July 4 (1776), H S Commager, *Documents of American History* (Prentice Hall, 9th ed, 1973) 101.

5 Declaration and Resolves of the First Continental Congress October 14, 1774. Commager, above n 4, 83 (Resolves 5 and 6). *Parker v Simpson* (1902) 62 NE 401, 408 (Mass).

6 J P Reid, *Constitutional History of the American Revolution: The Authority of Rights* (University of Wisconsin Press, vol I, 1995) 161-168.

The complaint that "a neighboring province" was being deprived of English law was a reference to s 8 of the *Quebec Act 1774*.[7] In the aftermath of the Treaty of Paris 1763, which confirmed British victory in the Seven Years War, English law was extended by the Crown[8] to the captured and ceded French and Spanish territories[9] of the New World including Quebec. Ironically, the first occasion on which Parliament at Westminster exercised its legislative power to impose a legal system on an overseas territory was, by s 8 of the *Quebec Act*, not to introduce English law but to restore to the French Canadians their own French civil law, the ancient Custom of Paris. It had at first been replaced by English law introduced by Royal Proclamation issued in October 1763. The only other occasions in imperial history on which the British Parliament acted in so direct a manner was in legislating for the application of English law to Newfoundland in 1792[10] and to eastern Australia in 1828.[11] Elsewhere during this period it was left to the colonial legislatures in British settlements to make their own laws on the subject. They invariably chose English law. What else would you expect them to have done?

In the matter of extending English law to British settlements abroad, imperial policy may be characterised as for the most part one of utter and complete inertia. In default of action by Parliament or the Crown, it was left, as so often it is, to the courts and the legal profession to fill the gap. In a famous opinion given in 1720, Richard West, recently appointed counsel to the Board of Trade and Plantations in London, advised that the common law of England was also the common law of the plantations. *Let an Englishman go where he will*, he declared with scant regard for gender equality, *he carries as much of law and liberty with him as the nature of things will bear.*[12] Two years later, in an appeal[13] probably from Barbados,[14] the Privy Council officially indorsed the principle that English people (which meant anyone, including Irish and even Scots, born in the British empire) who went to settle in the overseas dominions of the Crown took their [English] laws with them. Widely disseminated through publication of Blackstone's *Commentaries*[15] in 1765, this colonial birthright theory still dominates thinking about the transmission and reception of English law abroad. In fact, closer scrutiny shows that, everywhere it prevails today, imported English law rests on a legislative foundation of some kind. The only clear exception is the American state of Connecticut.

The principal weakness of the colonial birthright theory is its lack of precision. Among other matters, the exact content of what was transmitted in this manner remains

---

7 14 Geo 3, c 83 (UK).

8 Royal Proclamation of October 7, 1763: Commager, above n 4, 47-50. The Crown had power independently of Parliament to legislate for conquered territories (but not free settlements) by virtue of the prerogative: *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377.

9 Which were French Canada and the ceded islands of Grenada, St Vincent, Dominica; and Spanish Florida.

10 Judicature Act 1792; 32 Geo 3, c 46, s 1 (Upper Canada).

11 Australian Courts Act 1828; 9 Geo 4, c 83, s 24. Newfoundland and New South Wales were classified as settlements, but at the time they lacked representative legislatures of their own.

12 G Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain* (Reed & Hunter, vol 2, 1814) 209.

13 *Anonymous* (1722) 2 P Wms 75; 24 ER 646.

14 B H McPherson, 'The Mystery of Anonymous' (2001) 75(3) *ALJ* 169, 176.

15 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1st ed, 1765-1769) 104-105.

uncertain. The Privy Council decision in 1722[16] referred to "English laws", as did Blackstone when he wrote in 1765. On the face of it, this would embrace all branches of English law. However, Richard West and others who spoke or wrote about it at the time, generally referred to a birthright or inheritance only in the "common law", as did most of the many reception statutes enacted for the states of the USA in the late 18th and 19th centuries. Taken literally, this meant that the whole of English statute law, together with the law of admiralty, ecclesiastical (meaning principally probate) law, and equity were left behind. Furthermore, it is not easy to conceive of English law as we know it without including some basic early statutes; but in the 18th century there was much debate, both in England and America, about whether any English statutes at all had been carried to the colonies. In 1735 Sir John Randolph, eminent colonial-born Attorney-General of Virginia, thought it a "great weakness" in the lawyers of New York to suppose that any English statutes were in force in the colonies.[17] The common law, he said, "must be the only rule".[18] As late as 1757, the Crown Law Officers[19] in London shared his opinion in advising on the general inapplicability of English statutes to Nova Scotia,[20] which had been settled in 1749. Chronologically, the next British settlement to be established overseas was New South Wales less than 40 years later in 1788.

If English statutes were at that time not believed to reach the colonies as part of the common law birthright or inheritance, it is difficult to see how equity, admiralty or probate law could have done so. This was only one of several obstacles to the reception in the colonies of non-common law forms of English law. Another was the statement in Sir Edward Coke's *Fourth Institutes*,[21] approved by the Privy Council in *Re Colenso, Lord Bishop of Natal*[22] in 1864, that, except by statute, a new court could not be created to proceed otherwise than according to the common law. It was said there to be "a constitutional principle or rule" that legislation was needed to establish a court to administer equity as distinct from the common law.[23] Fortunately for Australia, this requirement had already been recognised in time to ensure inclusion in the *New South Wales Act 1823*[24] of an express provision[25] that the Supreme Court about to be created by the Third Charter of Justice should be a court of equity, with all the power of the Lord Chancellor to administer equitable jurisdiction as in England.[26] It is primarily to

---

16 Anonymous above n 13.

17 Quoted in W Smith, *The History of the Province of New York* (Belknap Press/Harvard University Press, vol 1, 1972) 265-266.

18 Ibid.

19 Henley A-G and Yorke S-G.

20 Chalmers above n 12, (vol 1) 198.

21 4 Co Inst 97, citing *Perrott's Case* (1585) 4 Co Inst, at 87.

22 (1865) 3 Moo PC (NS) 115, 162; 16 ER 43, 57.

23 There had been previous Law Officers' opinions to this effect: see *Historical Records of Australia* (Library Committee of the Commonwealth Parliament, Series IV, vol 1, 1914-25) 638-639 (Sir John Richardson (1826)). W Forsyth, *Cases and Opinion on Constitutional Law and Various Points of English Jurisprudence* (Stevens & Haynes, 1869) 172-174 (Scarlett A-G and Tindal S-G (1828)).

24 (UK) 4 Geo IV, c 96.

25 This provision, however, failed to invest the common law authority of the Lord Chancellor's jurisdiction, which included his powers over infants and lunatics: see *New South Wales Act 1823* (UK) 4 Geo IV, c96 s 9. J M Bennett and A C Castles, *A Source Book of Australian Legal History: Source Materials from the Eighteenth to the Twentieth Centuries* (Law Book, 1979) 115 (opinion of Pedder CJ).

26 Sir F Jordan, 'Chapters on Equity in New South Wales' (1947) 6th ed *Select Legal Papers* 7-8. The earlier civil court created by letters patent of 1814 with equity jurisdiction had no statutory backing, and was probably irregular: cf Jordan.

this statutory provision that, as a matter of history, the Supreme Court of Queensland ultimately traces its equitable jurisdiction. It was as well that it was incorporated in the Act of 1823 because, in extending English law to New South Wales, s 24 of the *Australian Courts Act 1828*[27] referred only to the reception or application of "all *laws* and statutes" in force in England. Interpreting statutes was a common law monopoly, and in those days, a court composed of common lawyers might readily have held that such a description did not include equity.

In the matter of jurisdiction in equity, colonies founded before the 19th century were not always as well catered for as eastern Australia. Various factors combined to produce this result in addition to those already mentioned. One was that the development in equity of a set of recognisable legal principles is commonly dated to the period following the Restoration, beginning in 1675 when Lord Nottingham received the great seal as Lord Chancellor.[28] Before his term of office as Chancellor, there were those like John Selden who ridiculed the measure of equity according to conscience as resembling the Chancellor's foot;[29]implying that it was a collection of unsystematic and arbitrary decisions that varied with the personal outlook and impressions of each succeeding holder of that office. There were, in consequence, few textbooks or reports devoted to the topic, and not much of substance readily capable of being carried to the early colonies in America and the West Indies. Many of those colonies had been settled in the first 60 or so years of the 17th century before Lord Nottingham's work of systematising equitable principles took place. If Selden's jibe had any validity, the Chancellor's foot could not be simply detached and carried abroad. There are some American decisions that treat equity as part of the colonial birthright;[30] but they do not appear until the middle of the 19th century, which was well after equity had matured and become an accepted and indispensable element of the English legal system.

Another factor that is said to have militated against the reception of equity was the attitude of some of the early American settlers. Many of them, especially those who settled in New England, were Puritans who had reason to distrust courts sitting without juries and administering a legal system identified in their minds with abuses of royal power in Stuart times. Dean Roscoe Pound ascribed their hostility in part to the Old Testament predilections of the Massachusetts settlers.[31] The problem with that explanation is that it does not sit comfortably with other evidence. In fact, opposition to the reception of equity in Massachusetts increases the further one departs from the Puritan era. Before 1700, the local colonial assembly was much more receptive to the exercise of jurisdiction in equity than were the Massachusetts judges of the 19th century.[32] In contrast, the neighbouring colony and later state of Connecticut, while no less Puritan in outlook, had few qualms about providing equitable remedies. Pennsylvania, whose origins were decidedly not Puritan but Quaker, presents a pattern similar to that of Massachusetts.[33] The people of Upper Canada (now Ontario), which

27 9 Geo 4, c 83.

28 W S Holdsworth, *A History of English Law* (Methuen, vol 6, 1936-72) 539-548. J H Baker, *Introduction to English Legal History* (Butterworths, 3rd ed, 1990) 127-128.

29 J Selden, *Table Talk* (London 1821) 52. "Equity", he said, "is a roguish thing".

30 *Wells v Pearce* (1853) NH 503, 512 (New Hampshire). *Parker v Simpson* (1902) 62 NE 401, 408 (Mass). *Glanding v Industrial Trust Co* (1945) 45A 2d 553, 555 (Del).

31 R Pound, *The Formative Era of American Law* (Little, Brown, 1938) 155.

32 A J Dimond, 'The Development of Equity Jurisdiction in Massachusetts' (1995) 1 *Supreme Court Hist Soc J* 22, 41.

33 S N Katz, 'The Politics of Law in America: Controversies over Chancery Courts and Equity Law

was settled by loyalist refugees fleeing the United States, were predominantly Anglican in outlook. Ontario had no regular equity jurisdiction for the first 40 years after its foundation in 1791.[34]

Finally, there is India, not renowned for the puritan tendencies of its people or of the British who went there. It had a record of resisting equity which strangely resembles that of Massachusetts and Pennsylvania. As late as 1903, the Privy Council still felt able to say that the law of India, "knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England".[35] And this was even after trusts had been introduced to India by statute in 1882. The basic principle as stated in *Tagore v Tagore* was that in India "there could be but one owner, and if the property was vested in a trustee, then he was the owner".[36]

There were other, more compelling reasons than either religion or social factors to explain why some early American colonies were not receptive to equity. One, which has already been suggested, is that at first equitable rules were not altogether easy to identify. A related reason was that in the 17th and 18th centuries the reservoir of qualified Chancery practitioners in London and Dublin was, numerically speaking, so small that it would have been quite impracticable in any of the colonies to establish and maintain courts of specialist equity judges and practitioners having the skills needed to service them. As Governor Bellingham of New York complained in 1699, no one there knew how to hold a court of equity.[37] Until quite late in the period, it was rare for even colonial courts of common law to be constituted of judges with any kind of formal legal training,[38] which for a long time was available only at the Inns of Court in London. Early colonial courts, both criminal and civil, in America were composed of lay justices of the peace sitting with lay jurors.[39]

Even so, in the islands of the West Indies and in some of the later American colonies, mainly in the south, an equity jurisdiction was recognised from the beginning. There it was administered by the colonial Governor sitting alone or, more often, with members of the Executive Council.[40] So it was in Barbados, as well as in Virginia, from the beginning right up to independence in 1776. It was unusual for those persons to be

---

in the Eighteenth Century' in D Fleming & B Bailyn (eds), *Law in American History* (1971) 266-272, in *Law in American History* (eds Fleming & Bailyn; Harvard, 1971). J H Smith & L Hershkowitz, 'Courts of Equity in the Province of New York: The Cosby Controversy' (1972) 16 *Am J Leg Hist* 1, 31. See also the Appendix to *Dallas's Reports*, in 1 US 489-495.

34 W R Riddell, *The Bar and the Courts of the Province of Upper Canada or Ontario* (Macmillan, 1928) 160-168.

35 *Webb v MacPherson* (1903) 30 LR Ind App 238, 245.

36 M P Jain, *Outlines of Indian Legal History* (Tripathi Private, 5th ed, 1990) 445-447. M C Setalvad, *The Common Law in India* (Stevens, 1960) 56-59.

37 W N Sainsbury (ed), *Calendar of State Papers Colonial Series, 1574-1660, Preserved in the State Paper Department of Her Majesty's Public Record Office* (Longman, Green, 1860) vol 18 § 845, 378.

38 L W Labaree, *Royal Government in America a Study of the British Colonial System Before 1738* (Frederick Ungar Publ, 1930) 383.

39 T Skyrme, *History of the Justices of the Peace* (Barry Rose, vol 3, 1991) 93-168 (North America and West Indies). This continued to be the position in Barbados as late as 1823, when a Parliamentary Commission of Inquiry visited and reported on judicial establishments in the West Indies.

40 Labaree, above n 38, 380.

professionally qualified, or to possess any form of legal education. The rationale for having the local Governor administering equity rested on the slender basis that, having custody of the great seal of the colony, he was credited with all the powers of the Lord Chancellor[41] who held the great seal in England.

Nowadays, such an arrangement would be condemned for mixing executive and judicial authority; but it was not until much later that the separation of powers came to be esteemed as a necessary political virtue. Colonial judges, and specifically colonial chief justices, continued after appointment to the bench to sit in the executive council and sometimes even in the colonial assembly, which together with the governor formed the local legislature. The Governor and his councillors also sat as the court of errors and appeals from decisions of the common law courts in the colony, subject to a further appeal to the Privy Council. Assisted by part-time councillors some of whom were practising lawyers, this arrangement survived in some colonies well into the 19th century,[42] as it also did, for example, in Rhode Island and Connecticut.[43] Thomas Day's reports of cases decided in Connecticut in 1802-1809 are sometimes at pains to point out that a named councillor did not sit on a particular appeal because of his being engaged in it as counsel for one of the parties. Would that such useful traditions had been preserved for the profit of judges everywhere; but, to make a success of it, one would need to remain on good terms with one's judicial colleagues and avoid taking more than a fair share of the available briefs.

For local political reasons, the system by which the colonial governor sat as chancellor in equity came under serious challenge in some colonies during the 18th century. In response to popular demand and with encouragement from the Board of Trade in England, successive royal governors began to exercise their equitable jurisdiction as chancellors early in 18th century New York.[44] They did so on the strength of the royal prerogative which the Crown asserted over the administration of colonial justice, but without obtaining authority from the local legislative assembly, which entered a strong protest against this innovation as they claimed it to be.[45] In support of their position they invoked the passage in Coke's *Fourth Institutes*, to which reference has already been made,[46] that a court administering equity could be established only by statutory authority and not by force of Crown prerogative alone.[47]

The complaints in New York might eventually have died down had not Sir William Cosby arrived late from England to take up his appointment as Governor of the colony in 1732. Pending his advent, one Rip Van Dam, the senior executive councillor, acted as governor, for which according to prevailing practice he received the salary and

41 By force of 5 Eliz, c 18, by which the Lord Keeper of the great seal of England was invested with the authority and jurisdiction of the Lord Chancellor. See Chalmers above n 12, 166 (Richard Jackson QC, 1772). Riddell, above n 34, 161.

42 Riddell, above n 34, 190-192. In Ontario, this state of affairs was not completely brought to an end until 1849: ibid, at 192.

43 See the list of names in *Day's Reports*, at 227, of members of the Supreme Court of Errors held at Hartford in June 1806, which consisted of the Governor, Lt-Governor, and 12 Assistant Councillors.

44 J H Smith and L Hershkowitz, 'Courts of Equity in the Province of New York: The Cosby Controversy 1732-1736' (1972) 16 *Am J Leg Hist* 1, 10-11.

45 Ibid, at 8-13.

46 Above, n 21.

47 Smith & Hershkowitz, above n 44, 23.

perquisites otherwise payable to the governor.[48] On his belated arrival in New York, Cosby produced a new royal instruction entitling him to half of the amount which Van Dam had received for performing that office. Van Dam refused to hand over, asserting that neither Cosby nor the King could deprive him of his rights by force of a mere royal instruction,[49] which lacked the force of law.

Cosby, who seems to have been cunning as well as greedy, prepared to sue Van Dam for money had and received to his use. Then, as now, New York was not wanting in able lawyers or clever politicians. Cosby was advised he would fail at common law before a New York jury, and in equity royal governors had firm instructions from the imperial government not to sit as chancellor or in other matters in which they were personally interested.[50] He therefore proclaimed a sitting of the Supreme Court in its Exchequer jurisdiction, which in New York the Court had statutory power to exercise as part of its “Westminster” jurisdiction.[51] In England the Exchequer of Pleas had an equity side, in which it sat without a jury[52] and the assumption was that a similar power existed in New York.

When the Supreme Court of New York consisting of three judges came to sit in Exchequer, Chief Justice Morris, who happened also to be the leader in the assembly of the “popular party” opposing the Governor, delivered a prepared judgment in which he declared the sitting to be a nullity. The second judge DeLancey J delayed for a day or two before delivering judgment to the opposite effect. The third judge Phillipse J waited until the following term before joining DeLancey to confirm that the jurisdiction existed. Pausing only to condemn his colleagues’ reasons as “mean, weak and futile”, Morris departed, announcing that he would sit no more in matters of equity. Shortly afterwards Cosby removed him from office and appointed DeLancey to be Chief Justice in his stead.[53] Colonial judges, it must be remembered, held office at pleasure[54] and not during good behaviour. When on a later occasion it was sought to challenge the commissions of DeLancey CJ and Philipse J because they held office at pleasure, the Court retaliated. Announcing that, if counsel did not recognise them, they would not recognise counsel, the judges promptly disbarred him.[55] Let it not be assumed that the power no longer exists.

Morris, who appealed unsuccessfully to the Privy Council against his removal, was meanwhile conducting a vigorous campaign against Cosby through the press using the services of a printer named Peter Zenger. Governor Cosby responded by having Zenger prosecuted for seditious libel, in a trial that earned such renown it was later reported in

48 Labaree, above n 38, 79-80.

49 Smith & Herskowitz, above n 44, 17-18. Cosby had delayed his departure in order to take part in some profitable ventures, and Van Dam was planning to set off the proceeds of those ventures against Cosby’s claim.

50 Labaree, above n 38, 384. Sainsbury above n 37, vol 19 (1701) § 246(ii); vol 21 (1703) § 578.

51 For the origins of this jurisdictional formula (which incorporated the jurisdiction of the three superior courts of common law at Westminster), see P M Hamlin & C E Baker, *Supreme Court of Judiciary of the Province of New York, 1691-1704* (NY Historical Society, vol 1, 1952) 51-57, who trace it to the Jamaica *Courts Act* of 1681. The Westminster formula was adopted in establishing all of the Australian colonial Supreme Courts.

52 W H Bryson, *The Equity Side of the Exchequer its Jurisdiction, Administration, Procedures and Records* (Cambridge Univ Pr, 1975).

53 Smith & Herskowitz, above n 44 19-30.

54 Labaree, above n 38, 388-396. *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482.

55 Smith & Hershkowitz, above n 44, 41.

Howell's English *State Trials*.[56] Zenger, who was represented by Andrew Hamilton specially summoned from Philadelphia, was triumphantly acquitted,[57] thereby paving the way for adoption of the American rule that truth is a complete defence to libel.[58] The imperial government was planning to recall Cosby when he died of consumption. Rip Van Dam, it appears, succeeded in keeping his money.

By then, however, the Pennsylvania Assembly had been so inspired by New York's example that, encouraged by Andrew Hamilton, they challenged the jurisdiction of their own governor to sit as a chancellor in equity without legislative sanction.[59] As a result, it was well into the 19th century before Pennsylvania established a complete Chancery jurisdiction by legislation of its own.[60] By contrast, in New York the governor's chancery jurisdiction survived fitfully until independence, when it was reconstituted by legislation as a separate court of equity with a succession of able chancellors, of whom one of the first was James Kent, author of the famous *Commentaries on American Law*. New York's separate chancery court eventually fell victim to the reforming activities of the great David Dudley Field, whose Procedure Code of 1848 sparked off the movement that led to the Judicature Act in England in 1873 and here in Queensland in 1876.[61] We were, so far as I can ascertain, the first place outside England to adopt it.

Meanwhile, even in Massachusetts things were slowly beginning to change. With no equity court, the common law courts were given only limited powers to "chancer" or relieve against penal bonds and to enforce a mortgagor's equity of redemption.[62] It was, however, not until 1817 that trusts were made enforceable there by a statute which was judicially interpreted not to extend to implied or resulting trusts.[63] In several of the north eastern states recognition of equitable rights was strictly limited by statute to cases in which there was no adequate remedy at law.[64] Great were the judicial efforts employed to demonstrate that a comparable remedy existed at common law.

When in 1918 John Pomeroy Jr came to write the fourth edition of his father's great *Treatise on Equity Jurisdiction* in the United States, he listed 14 of the 48 states in which the reformed Judicature Act procedure had still not been adopted.[65] Massachusetts did not finally unify its equity and common law rules of procedure until 1974.[66] In Delaware a Chancellor, assisted now by several vice-chancellors, continues to administer equity in a separate court. Having successfully captured much of the

56 (1735) Howell's *State Trials* 675-723. See also S N Katz (ed), *A Brief Narrative of the Case and Trial of John Peter Zenger by James Alexander* (Belknap Pr 1963).

57 For his success in the trial, Hamilton was granted the freedom of the City of New York.

58 Katz, above n 56, 29-35, which contains an excellent account of the legal issues involved. The case aroused widespread comment from lawyers elsewhere in the empire, as can be seen from the correspondence in Howell's *State Trials*. Katz accepts that the jury verdict was contrary to English law at that time.

59 Ibid at 269-270.

60 S G Fisher, 'The Administration of Equity through Common Law Forms', (1885) 1 *Law Quarterly Review* 455.

61 B H McPherson, *The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure* (Butterworths, 1989) 160-162.

62 E H Woodruff, 'Chancery in Massachusetts (1889)' 5 *Law Quarterly Review* 370, 372-374.

63 Dimond, above n 32, 30-31. J N Pomeroy, *A Treatise on Equity Jurisdiction as Administered in the United States of America* (Bancroft-Whitney, 1918-19) § 315.

64 Woodruff, above n 62, 30-32. Pomeroy, above n 63, vol 1, §§ 216-222; §344.

65 Pomeroy, above n 63, § 286.

66 Dimond, above n 32, 42.

nation's corporations law business, including I now notice News Corporation, the Delaware Chancery court remains a flourishing institution.[67] But it is now just about the only one of its kind that survives. Coming closer to home, it was only in 1970 that the Supreme Court Act in New South Wales finally abandoned[68] what some were unkindly calling its "jurisdictional schizophrenia" of separate courts of law and equity. Elsewhere in the former empire, tiny Prince Edward Island, home of the book and television series *Anne of Green Gables*, retained a separate Chancellor until as late as 1975, when that judicial office was finally abolished and the equity jurisdiction was absorbed into the Supreme Court.[69] Even in London, the ancient office of Lord Chancellor has been threatened with extinction in the light of recent reform proposals, but now appears to have survived at least in name. The Chancellor in Delaware may yet prove to be the last in the world to bear the title.

It can therefore be seen that there were always obstacles to the reception of equity in jurisdictions to which English law was applied. At first, it was the difficulty of knowing whether equity existed as a set of legal rules at all, or of saying what they were. Then there was the problem of whether equity was part of the common law birthright which English settlers carried with them when going abroad. To resolve that question, courts in the United States were in the end compelled to say that "common law", when used in legislation providing for its adoption locally, included not only statutes,[70] but equity as well.[71] A further obstacle was the approval given by the Privy Council in *Re Colenso*[72] in 1864 of the "constitutional principle" that, except by statute, a court cannot be established to proceed otherwise than according to the common law. A similar rule prevails in the United States where, as John Pomeroy observed, a superior court is always presumed to be invested with jurisdiction at common law, but not in equity unless it is expressly conferred by statute.[73] We have Sir Edward Coke to thank for this glaring instance of common law jealousy; but it was nothing to what he felt (and did) to the jurisdiction of the admiralty court in England.[74]

What, I think, finally put paid to the debate about the reception of equity abroad was the enactment of the Judicature Act.[75] If, as that legislation provided, a court is required to administer law and equity concurrently in the same proceedings,[76] it must necessarily possess jurisdiction in both forms,[77] the more so if, in the case of conflict between them, equity is to prevail.[78] The final chapter in this quaint story came with another decision

---

67 Quillan & Hanrahan, 'A Short History of the Delaware Court of Chancery', (1993) 18 *Del J Corporations Law* 819.

68 *Supreme Court Act 1970* (NSW).

69 *Judicature Act 1974* (SA), s 9(1). H T Holman, *The Early History of the Court of Chancery in Prince Edward Island* (unpubd thesis: Univ of New Brunswick).

70 *Commonwealth v Knowlton* (1816) 2 Mass 530. *Sackett v Sackett* (1829) 8 Pick 309, 316. *Bogardus v Trinity Church* (1833) 4 Paige 178, 198-199. *Coburg v Harvey* (1864) 18 Wis 156, 162. Cf also in Australia, *Booth v Booth* (1935) 53 CLR 1, 29-30, 32.

71 See (as examples only) *Martin v Superior Court* (1917) 168 P 135, 135-137 (Cal). *Sound v Hike* (1952) 56 So 2d 462, 466 (Fla).

72 Lord Bishop of Natal (1865) 3 Moo PC (NS) 115, 162.

73 Pomeroy, above n 63, vol 1 § 282, at 530.

74 Coke, above n 21, 136-142. *Waring v Clarke* (1847) 46 US (5 How) 441, 452-453, 458.

75 *Judicature Act 1876* (Qld); 40 Vic No 6.

76 *Judicature Act 1876* (Qld) s 4(8).

77 See *Urbach v Urbach* (1937) 73 P 953, 960-961 (Wyo).

78 *Judicature Act 1876* (Qld), s 5(11).

of the Privy Council, this time on appeal from Alberta in 1919[79] holding that a superior court of general jurisdiction impliedly has power to afford all the relief and remedies recognised by the legal system, even if the jurisdiction to do so has not been specifically conferred on it.[80]

How did equity reach the colonies? It may perhaps have been carried there by virtue of the colonial birthright doctrine. Or, as in Australia, by force of statute. Or because common law includes equity. Or as a result of the Judicature Act. Or because all superior courts of general jurisdiction have implied jurisdiction to apply equity in all matters properly before them.

We may not always be able to say when or which of these; but this at least is true. Somehow at some time, by one or other of these means or perhaps all of them, equity succeeded in reaching those places where English law or its derivatives now prevail. We are all the better, and some of us perhaps the richer, for its being so.

---

79 *Board v Board* [1919] AC 956, 962-963, affirming and approving [1918] 2 WWR 633, 648-652 (Supreme Court has divorce jurisdiction although not explicitly invested).

80 In Queensland, the District Courts and Magistrates Courts do not qualify as "superior" courts within this scheme of things; but s 242 of the *Supreme Court Act 1995* (Qld) preserves s 2 of the *Judicature Act 1876* (Qld), which provides that the rules now enacted in Part 13 are to be in force in all courts in Queensland within their respective jurisdictional limits.