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MINGLING THE WATERS

PERSONALITIES, POLITICS AND THE MAKING OF THE SUPREME COURT OF JUDICATURE

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1. THE JUDICATURE ACTS

THE Judicature Acts have been described as "the most sweeping reform in the history of the English courts".[1] The last in a series of major reforms in the administration of civil justice which began in the wake of Henry Brougham's celebrated speech of 1828, they created a structure which endured without substantial change for almost a century. They hastened the eclipse of the civil jury, settled the mode of taking evidence and the form of pleadings, ensured the dominance of the single judge system and after much debate determined the hierarchy of appeals. Most famously, they also ended the peculiarly inconvenient institutional separation of common law and equity by incorporating the several courts dispensing common law and equity (along with the civilian courts) into a single Supreme Court of Judicature.[2]

This junction is usually described as "fusion", a term which was productive of much misunderstanding at the time and whose scope and meaning continues to be disputed.[3] In every division of this Court judges dispense legal or equitable doctrines and remedies as appropriate to the case, but the orthodox view remains that expressed by Ashburner in a metaphor which retains its currency more because it is memorable than apposite—indeed it is singularly unpicturable: "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their

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[1] R. Stevens, "The Final Appeal: The Reform of the House of Lords and Privy Council" (1964) 80 L.Q.R. 343–369, at 351. They rapidly became the model for the major colonies: G. Taylor, "South Australia's Judicature Act Reforms of 1853" (2001) 22 Journal of Legal History 55–84, at 55.

[2] W.S. Holdsworth, *A History of English Law*, vol. 15, by A.L. Goodhart and H.G. Hanbury (London 1965), pp. 121–138; Sir J.I.H. Jacob, "The Judicature Acts, 1873–75—Vision and Reality", in *The Reform of Civil Procedure* (London 1982), pp. 301–322.

[3] There is an excellent recent discussion in A. Burrows' inaugural lecture, *We Do This at Common Law But That In Equity*.

waters".[4] In the medium term at least, Ashburner proved a better prophet than Maitland, who had predicted that "[t]he day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice that it is a well-established rule administered by the High Court of Justice".[5]

But the orthodox view, as T.G. Watkin perceptively observed, "is arrived at by looking at what the courts have done since the Acts rather than at what the courts are capable of doing as a result of them".[6] Whatever the supposed "intention of Parliament", it was truly said that, "[t]he fate of the Acts now depends for the most part on the persons who will be administering them. A hostile, obstinate, or reactionary Bench, and a reluctant Bar, might do much to nullify the whole scheme".[7] Maitland later acknowledged that it was the conservatism of the judges that had falsified his predicted outcome, and in the crucial field of contract law Professor Atiyah suggests that for a time equitable doctrines and influences were almost eclipsed.[8]

The debates over the judicial role of the House of Lords and Privy Council and their subsequent workings have been carefully examined by modern scholars,[9] but law was also made, and the meaning of fusion was marked out, at less exalted levels. This article explores the attempts of the creators of the legislation, chiefly Lord Selborne and Lord Cairns, and others to influence the outcome through the structure of the new Supreme Court of Judicature and the selection and deployment of its judges.

2. The creation of the supreme court of judicature

The Judicature Commission was established under Lord Cairns's chairmanship following a speech by Sir Roundell Palmer, the future Lord Selborne, in September 1867, and made its first report on 25 March 1869.[10] The most striking feature is that it discards the approach to blending the two systems of law and equity which had hitherto prevailed. Since that approach had emanated from the work of commissions and committees whose terms were confined

[4] W. Ashburner, *Principles of Equity*, 2nd edn. (London 1933), p. 18. It was probably derived from Lord Westbury's speech in Parl. Debs. 3rd s. vol. 201 col. 1573 (30 May 1870).
[5] *Equity* (Cambridge 1913), quoted by P.M. Perell, *The Fusion of Law and Equity* (Toronto and Vancouver 1990), p. 19.
[6] "The Spirit of the Seventies" (1977) 6 Anglo-American Law Review 119–127, 120.
[7] (1875–6) 1 Law Magazine and Review (4th s.) 3.
[8] J. Getzler, "Patterns of Fusion", in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), pp. 157–192, pp. 164–165; P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1982), pp. 671–674.
[9] L. Blom-Cooper and G. Drewry, *Final Appeal: a Study of the House of Lords in its Judicial Capacity* (Oxford 1982); R. Stevens, *Law and Politics: the House of Lords as a Judicial Body, 1800–1976* (London 1979).
[10] First Report, P.P. 1868–9 [4130] XXV (hereafter *First Report*).

either to courts of law or of equity, it is not surprising that it took the form of conferring common law powers (*e.g.* to hold jury trials, to award damages) upon courts of equity and equitable ones (*e.g.* to issue injunctions, to order discovery) upon courts of common law.[11] This approach was now decisively rejected in favour of a single, unified court where omnicompetent judges would deploy whatever doctrine and use whatever remedy met the needs of the case.[12] While this could be presented as a logical culmination of the piecemeal measures already adopted,[13] it had much more radical implications, not least for constitutional relations, since the unified court would require a novel degree of central direction. It also marked the rejection of two arguments which would have had the effect (intended on the part of some of their supporters) of delaying action. One was that the bringing together of the courts should await the completion of the new court buildings which would house them;[14] the other was that doctrinal fusion, whether in the form of a code or a digest, must logically precede institutional fusion.[15]

A year or so after the report appeared Lord Hatherley, the Liberal Government's Lord Chancellor, brought in two bills to implement its main proposals.[16] Seldom has a minister made such a sorry mess of an important measure. Hatherley's notion of consulting the judges had been to send them a copy of the bills without any accompanying invitation to comment; nor had he made any effort to secure the co-operation of Cairns, whose double role as chairman of the Commission and Conservative leader in the Lords made his assistance indispensable.[17]

[11] According to Holdsworth, *History of English Law*, vol. 12 (London 1938), pp. 585–605, and vol. 15, p. 122, this was a reversion to the policy of the early 18th century, departed from in the ill-advised incursion into substantive fusion on the part of Lord Mansfield and Sir William Blackstone.

[12] *First Report*, pp. 6–9.

[13] See *e.g.* (1869) 27 L.M. & R. 5. Dr. Getzler concludes a magisterial overview of the process thus: "law and equity were successfully fused at the remedial and procedural level by reforms stretching back at least a century before the Judicature Acts. Those statutes were a consolidating exercise focusing on the administration of justice; they were not really a new departure even at the level of procedure, bearing in mind the cross-breeding of equitable styles of procedure into the common law since the time of Lord Mansfield and the slow elimination of significant jury discretions". (see note 8 above, p. 191). This perhaps overstates the practical effect of the statutory reforms of the mid-19th century.

[14] The position adopted by Lord Chief Justice Cockburn, *Our Judicial System* (London 1870), p. 1. The saga of the new royal courts of justice threatened to be interminable.

[15] The line which had been taken by the Chancery judges, including Sir W. Page-Wood (as Hatherley then was), on Lord Campbell's bill of 1860 to give common law courts enlarged equitable powers: C.F. Trower, "The Growth of the 'Prevalence' of Equity" (1879–80) 5 L.M. & R. (4th s.) 127–147, at 140. See also Sir J.D. Coleridge (Attorney-General), "The Attorney-General's Address on Law Reform" (1872) 1 L.M. & R. (2nd s.) 795–811.

[16] High Court of Justice Bill, House of Lords State Papers 1870 (32) IV; Appellate Jurisdiction Bill, H.L.S.P. 1870 (37) III.

[17] Cockburn, *Our Judicial System*, pp. 58–59; Parl. Debs. 3rd s. vol. 200 cols. 2013–2015 (29 April 1870).

Worse, the High Court of Justice Bill was a mere skeleton with just 25 clauses, a brevity made possible by clause 13, which left all matters concerning the selection, distribution and transfer of business, pleadings, evidence, vacations, costs, law reporting and such to be settled by rules which were to be made by the judges, prescribing only that the rulemakers should have regard to four considerations, the most important being that all proceedings should be transferable between divisions and that procedure in the several divisions should be assimilated as closely as possible. The structure of the Court was to be as the Commission had recommended: 21 judges under the overall presidency of the Lord Chancellor, sitting in five divisions, each under a lord president (the Lord Chancellor and Lord Chief Justice being two of these) and each with a quorum of three and a maximum of five.[18] Provision was also made for full sittings of the High Court with at least seven judges to take place. Each division would have complete jurisdiction and the powers of all the existing superior courts, but like the report, the Bill gave no indication how conflicts between the rival doctrines, rules and procedures should be resolved—that also was left to the rules. The measure was to become operative on 1 November 1871 or earlier by order in council.[19]

The Bill ran into sustained and severe opposition. From the common law side the weightiest broadside was fired by the Lord Chief Justice, Sir Alexander Cockburn, in a lengthy response which he published in pamphlet form shortly after the second reading.[20] Cockburn claimed to be an enthusiast for fusion, but his was the brand of fusion that the Commission had rejected, enlarged jurisdiction and powers for the existing courts. He was prepared to accept the principle that where existing rules of law and equity clashed the latter should prevail, but with disarming simplicity envisaged that once the common law had purged itself of its former defects by absorbing equitable corrections, there would no longer be any need for a separate equity and even the very name might disappear.[21]

In important respects however, Cockburn's stance was deeply conservative. Much of his fire was directed at the way the Bill moved power and patronage away from the chiefs of the common law

[18] High Court of Justice Bill, cl. 3.

[19] *Ibid.*, cl. 2. When the county courts were given a limited equity jurisdiction by the County Courts (Equitable Jurisdiction) Act 1865 (28 & 29 Vic. c. 99), it was not thought necessary to offer any guidance on how to resolve conflicts.

[20] *Our Judicial System*, 4 May 1870. On the 13th Parliament received a letter in which Cockburn transmitted the views of the judges, in effect declining to assist with the Appellate Jurisdiction Bill, which had also run into trouble: H.L.S.P. 1870 (309) XIII; Stevens, "Final Appeal", 344–345.

[21] He made capital out of Hatherley's apparent change of front (see note 15 above): *Our Judicial System*, pp. 17–19; Cockburn to Selborne, 7 February 1873, Lambeth Palace Library, *Selborne MSS*, vol. 1865, f. 215.

courts and bestowed them on the Lord Chancellor: "[t]he inherent vice of this Bill ... is that it essentially compromises the independence of the Superior Courts",[22] giving dangerous power to the executive. The ruling idea was "to swallow up the Judges of England, leaving the Court of Chancery, though under the new and high-sounding name of a High Court of Justice ... to reign exclusively supreme".[23] Quite how this would come about under rules requiring a majority of the bench, where common law judges outnumbered the others, Cockburn did not explain, but for him it was clearly the preservation of the separate courts which counted far more than any concerns over the infiltration of equitable doctrines.

Cockburn's stance provided a rallying point for conservatives on the common law side, but members of the equity bar were equally dismayed by the Bill and three former Lord Chancellors, Chelmsford, Westbury and Cairns, condemned the absence of detailed provisions on what they regarded as key points.[24] Hatherley made hasty concessions, particularly to Cockburn. The criminal jurisdiction of the Queen's Bench was exclusively reserved to its successor division; the chiefs' patronage was preserved for the time being; the "prevalence of equity" clause appeared in successive forms and court structures were more elaborately defined; but it was too little and too late.[25] It was vain for Hatherley to claim the support of the attorneys and the law journals when what counted was the backing of the great legal luminaries of the day.[26] When Cairns maintained his opposition progress became impossible and the Bill was withdrawn.[27]

Selborne replaced the ailing Hatherley in September 1872 and was at pains to seek the views of the judges on a revised bill which was "the work of my own hands".[28] As far as the High Court was concerned, his Supreme Court of Judicature Bill, presented to the Lords on 13 February 1873, did not differ much in essentials from Hatherley's, but it was a vastly more elaborate scheme and one which Cairns had already approved in outline.[29] Opposition this time could not rest upon the absence of detail.

Even so, there was suspicion, wariness and fear on both sides of the law/equity divide. On the face of it the common lawyers had

[22] *Our Judicial System*, p. 46.
[23] *Ibid.*, p. 21.
[24] Parl. Debs. 3rd s. vol. 200 cols. 180–181, 188 (18 March 1870), 2039, 2046 (29 April 1870).
[25] Successive versions of the Bill are in H.L.S.P. 1870, IV.
[26] Parl. Debs. 3rd s. vol. 201 col. 1588 (30 May 1870). See also his claim that the bills had been approved by a large majority at a meeting of the Law Amendment Society: *ibid.*, col. 1566.
[27] Both bills passed the Lords but neither made any progress in the Commons. For the fate of the Appellate Jurisdiction Bill see Stevens, "Final Appeal", 346–347.
[28] *Memorials, Personal and Political* (2 vols. London 1898), vol. 2, p. 298.
[29] P.P. 1873 (443, 501, 567) V; Parl. Debs. 3rd s. vol. 214 cols. 331–360 (13 February 1873); Cairns to Selborne, 3 February 1873, *Selborne MSS*, vol. 1865, f. 209.

more to fear. The Judicature Commission, despite its substantial common law representation, was suspected of being the creature of the Lord Chancellor and the bills which it spawned might be interpreted as exhibiting a marked equity bias.[30] The jury itself was felt to be at risk; the loose and sprawling equity system of pleading would triumph over the more rigorous common law practice; Chancery's single judge system would displace the sittings in banc, and in cases where doctrines collided, equitable rules would prevail. Yet despite what was portrayed as the "triumph of equity",[31] many leading men on that side had grave forebodings, and it was the equity bar which produced the only collective action, a petition to the Lord Chancellor in 1873.[32]

Their fears centred on the structure of the new courts and the number of judges. It was one thing to enact that judges should be able to deploy legal and equitable rules in every case but quite another to induce them to abandon settled habits and predilections. In the debates on the 1870 bill the Master of the Rolls, Sir John Romilly, an advocate of the most expansive sort of fusion, reminded his audience that until 1841 the Court of Exchequer had had a common law side and an equity side and drew its judges from both bars, yet in his view, "the Judges, endowed with all the powers, and entrusted to exercise all the functions necessary for determining actions at law and suits in equity, were more sedulous in keeping up the distinction than any other Court in the kingdom".[33] Subsequently courts of equity had been empowered to use juries and common law courts permitted to give effect to equitable defences, but Sir George Osborne Morgan was not alone in maintaining that the powers had been largely ignored on both sides; the jury box had actually been taken down in the Vice-Chancellors' Court as redundant[34] and it was widely believed that the common law judges had disdained to make use of their enlarged powers.[35] Following

[30] See *e.g.* the speech of Dr. Ball, Parl. Debs. 3rd s. vol. 216 cols. 885–891 (12 June 1873). Sir William Erle, a former Chief Justice of the Common Pleas, Sir Raymond Blackburn and Sir M.E. Smith, judges of Queen's Bench and Common Pleas respectively, Sir John Karslake and J.R. Quain were among the original members. Baron Bramwell and Sir Robert Phillimore were added later, according to (1868–1869) 12 S.J. 489–493, because the Chancery element was felt to be too strong.

[31] *E.g.* (1874) 1 The Law 3–15.

[32] *The Times*, 1 May 1873; Stevens, "Final Appeal", 352. A series of articles by G.W. Hemming in The Saturday Review on this alarmist theme was said to have been influential: (1873) 8 L.J. 193.

[33] Parl. Debs. 3rd s. vol. 200 col. 187 (18 March 1870).

[34] *Ibid.*, vol. 216 cols. 664–668. Lord Cairns' Act of 1859, which had empowered courts of equity to award damages, had been unambitiously applied: J.A. Jolowicz, "Damages in Equity—A Study of Lord Cairns' Act" [1975] C.L.J. 224–252.

[35] Among many examples see (1873) 55 L.T. 10; R.M. Pankhurst, (1877) Transactions of the National Association for the Promotion of Social Science 250; (1873) 35 Saturday Review 267; C.L. Neate, (1868) T.N.A.P.S.S. 217–225; W.E. Finlason, "Illustrations of our Judicial System" (1873) 2 L.M. & R. (2nd s.) 208–210; (1874) 3 L.M. & R. (2nd s.) 190.

Cockburn's lead and John Day's standard work on the Common Law Procedure Acts,[36] H.C. Lopes and others argued that the common law courts had never been given full equity powers, but then they had shown no desire for them.[37]

The equity bar's arguments were certainly tainted by self-interest. Equity lawyers were wont to assert that theirs was a subtle and esoteric craft which needed specialist training. John Holker scorned this claim with characteristic sarcasm: "[s]ome members of the equity bar seemed to think that the principles of Equity were so abstruse, so recondite, and so mysterious, that it took a long time for the most brilliant intellect to master them, and they emitted the most pitiable cries at the idea of entrusting them to Common Law Judges".[38] W.S. Harcourt was similarly dismissive and more importantly, Selborne asserted that since Eldon's time the two jurisdictions had become ever more separate and equity jurisprudence had deteriorated.[39] It was arguable that, despite some able judges, equity had lost much of its creative impulse and as a force for legal development was now overshadowed by the common law courts.

Certainly in the age of Blackburn, Willes and Bramwell the common law was being developed with vigour and confidence. But while the cry of "equity in danger" was implausible if it implied that its refined jurisprudence was imperilled by the crudity of the common law, it was credible in terms of sheer numbers. Chancery had only four judges of first instance, whereas each common law court had five puisnes and a chief. If the courts were commingled and both codes had to be applied, the equity judges would clearly be outnumbered and it would fall to common law judges to dispense such equity as they chose.[40]

The real fear was that they would not choose. They had seldom done so under the Common Law Procedure Acts; some of them had been openly contemptuous in Baron Parke's day[41] and Bramwell for one remained so to the very end of his long career; in *Salt* v. *Marquis of Northampton* in 1892,[42] he was offensively, provocatively and obtusely scornful of the equity of redemption, the centrepiece of mortgage jurisprudence, and in an earlier case he

[36] *The Common Law Procedure Acts*, 4th edn. (London 1872), introduction.
[37] Parl. Debs. 3rd s. vol. 216 col. 844 (12 June 1873); "Ought the Judicature Bill to Pass?" (1873) 2 L.M. &. R. (2nd s.) 534–540.
[38] Parl. Debs. 3rd s. vol. 215 col. 876 (12 June 1873). For an anecdote of the equity bar's condescending attitude see (1883) 1 Pump Court 81.
[39] (1872–3) 17 S.J. 191; Parl. Debs. 3rd s. vol. 215 cols. 1273–1274 (1 May 1873).
[40] (1873) 35 Saturday Review 705; (1873) 8 L.J. 252; (1873) 55 L.T. 40.
[41] (1883) 18 L.J. 676.
[42] [1892] A.C. 1.

had affected complete ignorance of equitable assignments.[43] Barons Martin and Cleasby demonstrated a similar wilful ignorance and the story was told of Mr. Justice Grove that at an assize sermon, hearing the reading from the bible promise the people equity he uttered in a stage whisper, "poor people".[44] Against this background it is understandable that both Westbury and Cairns showed sympathy with the equity bar petition, particularly as Selborne's Bill withdrew the Lord Chancellor from the Chancery Division.[45] Sir Richard Malins V.-C. was the only judge on either side to oppose the Bill publicly, but Selborne admitted that in canvassing the judges he found the equity ones were less supportive and could only boast that "I disarmed at least active opposition".[46]

Given this distrust, it was widely acknowledged that the actual meaning of fusion, a notably elastic concept, would depend largely upon how the Supreme Court was constituted, both at first instance and as an appeal court; how many judges there were from each side, and who they were.

3. The High Court

The Judicature Commissioners' first report had recommended that in order to ease "the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer should for the present retain their distinctive titles; and should constitute so many Chambers or Divisions of the Supreme Court ...." However, "[a]ll the Judges of these Courts will become Judges of the Supreme Court; and every Judge (with the exception of those who are to sit in the Appellate Court ...), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice". Accordingly, Hatherley's Bill proposed five divisions, each under a lord president—corresponding to the three common law courts and the Court of Chancery with another, smaller one comprising the judges of probate, and divorce. He emphasised however that there would be no "wall of division, so to speak, between any one Court and another; but that there shall be a free circulation of Judges from

[43] [W.D.I. Foulkes], *A Generation of Judges by their Reporter* (London 1886), p. 131. See also the "vehement diatribe" against equity in *Preston* v. *Doria* referred to in Finlason, "Illustrations of Our Judicial System"(see note 37 above) p. 210.

[44] W. Willis, *Sir George Jessel* (London 1893), pp. 18–19; R. Bosanquet, *The Oxford Circuit* (Oxford 1951), p. 28.

[45] Parl. Debs. 3rd s. vol. 215 cols. 1263–1270 (1 May 1873); T. Nash, *The Life of Richard, Lord Westbury* (2 vols. London 1888), vol. 2, p. 252.

[46] (1875–6) 60 L.T. 105; Selborne, *Memorials*, vol. 2, p. 301.

one division to another . . ."[47] The structure might be altered by order in council and the distribution of business between divisions by rule. Though the omission of any distinct role for the Chief Justice of the Common Pleas, the Chief Baron of the Exchequer and the Master of the Rolls implied that this was temporary,[48] it was criticised by Cairns and others as tending to perpetuate separate modes of practice and thinking.[49]

Selborne's approach differed little from Hatherley's in this respect, and he was strongly criticised for yielding too much to the onslaught made by Cockburn.[50] His Bill retained the divisions, initially four but with the fifth, Probate, Divorce and Admiralty (A.P. Herbert's "court of wrecks"), restored during its passage.[51] Selborne sought by listing them as first, second etc. divisions to counter the claim that this was simply gathering up the existing courts and spreading them out again under an umbrella,[52] but the hallowed names were restored by an amendment proposed, curiously enough, by Cairns,[53] with the Queen's Bench tactfully first in the list rather than Chancery.[54] Even the chiefs recovered their role as heads of division, though express provision was inserted in the Commons for their abolition upon a vacancy. The Attorney-General, Sir J.D. Coleridge, claimed credit for having saved the great offices, and defended them as desirable prizes for the profession, an argument which implied that they would be retained even if their former courts lost their identity completely.[55]

Selborne had retained the power to alter the divisions by order in council, but there was understandable scepticism about this, for not only was the Attorney-General (while assuring the House that it was a temporary arrangement) careful to add that it was not intended to create a mere "hotchpot", but the Government refused

[47] *First Report*, p. 9; High Court of Justice Bill, H.L.S.P. 1870 (32) IV; Parl. Debs. 3rd s. vol. 200 col. 170 (18 March 1870).
[48] High Court of Justice Bill. cc. 3, 13.
[49] Parl. Debs. 3rd s. vol. 200 cols. 186 (Sir John Romilly M.R., 18 March 1870) and 2039 (Lord Cairns, 29 April 1870).
[50] *E.g.* (1873) 35 Saturday Review 232.
[51] Supreme Court of Judicature Bill, H.L.S.P. 1873 (14) VII, and Lord Chancellor's amendments; Supreme Court of Judicature Act 1873 (36 & 37 Vic. c. 66), s. 31.
[52] "The Working of the Judicature Acts" (1875–6) 1 L.M. & R. (4th s.) 5–6.
[53] Supreme Court of Judicature Bill, H.L.S.P. 1873 (89, 736) VII. A Commons amendment to remove the names was lost by 20 to 55: Parl. Debs. 3rd s. vol. 217 cols. 1874–1877 (7 July 1873).
[54] Cairns' amendment had put Chancery first and this was criticised by common lawyers in the Commons: Parl. Debs. 3rd s. vol. 217 cols. 1874–1875, H.C. Raikes and G. Whalley, 7 July 1873. Presumably Selborne felt that to keep that order would lend credibility to Cockburn's allegations.
[55] Supreme Court of Judicature Act 1873, s. 32; J.D. Coleridge to his father, 16 July 1873, E.H. Coleridge, *The Life and Correspondence of John Duke Coleridge, Lord Chief Justice of England* (2 vols. London 1904), vol. 2, pp. 218–219. A Commons amendment to abolish the chiefs of Common Pleas and Exchequer was lost by 96 to 152: Parl. Debs. 3rd s. vol. 216 cols. 1597–1605 (30 June 1873).

to remove a requirement of consultation with the proposed Council of Judges; as Henry James said, if change were left to the judges it would never happen and the fact that Cockburn and Sir William Bovill, Chief Justice of the Common Pleas, gave their general approval to the Bill strengthened these doubts.[56] On the other hand, the Solicitor-General, Sir George Jessel, defending the decision not to create an additional Vice-Chancellor, was emphatic that "the Chancery Division was not meant to be permanent, but merely transitional; and it was hoped, in a short period, perhaps about ten years, to obtain this result—that both practitioners and Judges would have become sufficiently familiar with the principles of Equity to administer it in a satisfactory manner in all the Courts".[57] If that division was to have a finite span, so presumably would the common law ones. The P.D. & A. might not, since suitors were to be compelled to go there, whereas for the rest they might choose their division, subject to the court's power to reallocate a case for its own convenience.[58] The Bill itself set out the allocation of business *pro tem*, but thereafter it would be settled by rule.[59]

A second important structural issue was whether cases should normally be heard by a single judge, as in Chancery, or before the judges in banc, as at common law. The Commissioners, after a fairly even-handed treatment of the subject, had come down in favour of the former, but to avoid a violent transition proposed that in the common law divisions the powers of a single judge should be limited to those conferred by general orders or by the parties' consent; they recommended, however, that sittings in banc have three judges instead of four.[60]

Hatherley's Bill had left this contentious issue to be settled by rule and Selborne's, creating an equivalent to banc in the Divisional Court, cautiously preserved it for "such matters as are not proper to be heard by a single judge".[61] To emphasise the unity of the Court this was also applied to the Chancery Division,[62] but the Act of 1873 also contained a significant proviso allowing a two man court where "through pressure of business or other cause [three] may not conveniently be found practicable".[63] Neither

[56] Parl. Debs. 3rd s. vol. 216, cols. 1600–1602, 1879 (30 June, 7 July 1873); Bovill to Selborne, 7 February 1873, Cockburn to Selborne, 15 February 1873, *Selborne MSS*, vol. 1865, ff. 213, 215.
[57] Parl. Debs. 3rd s. vol. 216 cols. 1587–1588 (30 June 1873).
[58] Supreme Court of Judicature Act 1873, ss. 3, 5.
[59] *Ibid.*, s. 33.
[60] *First Report*, p. 10.
[61] Supreme Court of Judicature Act 1873, s. 40.
[62] Criticised in the House of Commons by G.B. Gregory, a London solicitor: Parl. Debs. 3rd s. vol. 216 col. 668 (9 June 1873).
[63] Supreme Court of Judicature Act 1873, s. 40.

Selborne nor Cairns had much time for sittings in banc[64] and s. 17 Judicature Act 1876 sought to reduce the number of what were appeals in fact if not in name by making single judge hearings the rule "so far as is practicable and convenient". Many of the problems which arose from a shortage of judge power were attributed to the common law judges' stubborn attachment to collective decision-making and Cockburn in particular ensured that it remained the norm in the Queen's Bench Division.[65]

Sitting, whether alone or in banc, in divisions which closely resembled their former courts during what was optimistically described as a transitional period, the judges would determine how far fusion was actually effected. The selection and distribution of judges was therefore crucial to the outcome.

In 1868 there were three Vice-Chancellors and fifteen common law puisnes (recently augmented by three to provide for the trial of election petitions).[66] As their first report was not comprehensive in its coverage, the Judicature Commissioners did not indicate whether the proposed reorganisation would require more, or fewer judges, but Gladstone's ministry had a strong bent towards retrenchment in public offices and, while common law vacancies continued to be filled as usual, suspicions were aroused by a lengthy delay in replacing Lord Justice Selwyn in the Court of Appeals in Chancery.[67]

Hatherley's Bill expressly limited the number of judges in the High Court to a maximum of 22, which might be reduced by order in council. Selborne's went further, reducing the number of puisnes by promoting three of them to the Court of Appeal and leaving the vacancies unfilled.[68] The justification was that the election business had proved much smaller than had been anticipated.

Victorian Lord Chancellors did not have a free hand in judicial appointments since the Prime Minister was responsible for choosing the chiefs and appeal judges. Selborne was fortunate, since Gladstone claimed that "my invariable practice has been to consult and to defer to Lord Hatherley with respect to such judicial appointments as it fell to me to submit to the Queen".[69] Cairns did not have such freedom, and in any event political considerations

[64] *E.g.* Parl. Debs. 3rd s. vol. 226 cols. 761–765 (9 August 1875).
[65] *Ibid.*, 3rd s. vol. 258 cols. 587–588, (10 February 1881, Sir H. James, Attorney-General).
[66] Election Petitions Act 1868 (31 & 32 Vict. c. 125), s. 11(8).
[67] Parl. Debs. 3rd s. vol. 201 cols. 1597–1599 (30 May 1870). Selwyn died on 11 August 1869 and James was appointed on 4 July 1870. Gladstone was insistent that judges be transferable between divisions: H.C.G. Mathew (ed.), *The Gladstone Diaries*, vol. 8 (Oxford 1982), p. 277.
[68] Supreme Court of Judicature Bill 1873, cl. 6.
[69] Gladstone to Selborne, 2 November 1872, *Selborne MSS*, vol. 1865, f. 166.

were never wholly absent even in the choice of puisne judges.[70] Party services gave some barristers a strong claim to the bench, while others found preferment postponed, or in rare cases like the unfortunate Arthur Cohen forfeited, through the government's reluctance to risk the loss of a parliamentary seat.[71] Then too, the Law Officers had established an expectation if not a convention that they would be offered the chiefships and the Treasury devil was understood to have a claim to a puisne judgeship.[72] Furthermore, a Chancellor might have little knowledge of those candidates who had not practised alongside him and if, like Hatherley, he did not like to consult the chiefs, his choice might not be well informed.[73] With no compulsory retirement from the bench and a small number of judges, only a Chancellor as durable as Eldon or Halsbury might hope to recast the bench to his liking.

With the notorious exception of Sir Robert Collier, judicial appointments in the early 1870s were unremarkable and uncontroversial.[74] The only ones which might be regarded as forwarding the fusionist tendency were those of J.R. Quain, a very active member of the Judicature Commission, and William Grove, whose patent expertise Hatherley felt might be advantageous.[75] However, in 1873 pressure grew for an expansion of the Chancery bench. This stemmed partly from congestion resulting from the illness of Vice-Chancellor Wickens but partly too from the fear that equity would be swamped by the more numerous common law judges.[76] The Government resisted enlargement, arguing that the arrears were temporary and declining and that before long judges would be sufficiently learned in both law and equity to be moved around to wherever the demand existed.[77]

However, they had more sympathy for a suggestion originating in G.W. Hemming's influential letter to *The Times* and taken up in the petition of the equity bar, that the imbalance should be

[70] The only detailed study of a 19th century ministry's judicial appointments is that of Lord Halsbury's by R.F.V. Heuston in *Lives of the Lord Chancellors, 1885–1940* (Oxford 1964), pp. 36–66. See also H.J. Hanham, "Political Patronage at the Treasury 1870–1912" (1960) 3 Historical Journal 75–84.

[71] Lord Oxford [H.H. Asquith], *Memories and Reflections* (2 vols. London 1928), vol. 1, p. 84.

[72] J. Ll. Edwards, *The Law Officers of the Crown* (London 1964), pp. 320–321.

[73] Sir J. Hollams, *Jottings of an Old Solicitor* (London 1906), pp. 164–165. On Hatherley's disinclination to consult see Coleridge to Selborne, 25 December 1872, *Selborne MSS*, vol. 1865, f. 196 and (1872) 1 L.M. & R. (2nd s.) 156.

[74] The propriety of Collier's notional appointment to the Common Pleas in November 1871, solely to qualify him to be made a salaried member of the Judicial Committee of the Privy Council, was much debated: P.A. Howell, *The Judicial Committee of the Privy Council, 1833–1876* (Cambridge 1979), pp. 151–153.

[75] *D.N.B., Supplement*, vol. 2, pp. 371–372; *The Times*, 3 August 1896.

[76] Besides several references in *The Times* for 1873, see (1872–3) 17 S.J. 204, 511 and Parl. Debs. 3rd s. vol. 215 cols. 1258–1292 (1 May 1873). Vice-Chancellor Malins was particularly outspoken: (1873) 8 L.J. 267.

[77] See note 58 above.

redressed by appointing equity men to vacancies on the common law bench.[78] On 9 June 1873 Osborne Morgan moved an amendment that each common law division should contain at least one equity judge. It was seemingly accepted by Coleridge (A-G) in rather curious language: "The Judges ... had loudly called for help. In effect they had said 'If we are to be turned into Courts of Equity, for God's sake send us some men who understand Equity, and do not leave us a prey to distinguished Equity counsel.'"[79] Coleridge certainly created the impression that the judges' pathetic plea would be answered,[80] but the possibility of a new Vice-Chancellor was quashed in the resumed committee stage on 30 June, Jessel (S-G) attempting to dissipate the notion that there were serious arrears in Chancery with sleight of hand that convinced no-one.[81] Moreover, as Sir John Goldsmid pointed out next day, since it was no longer proposed to translate three puisnes to the appeal court, it would only be when their number was reduced to twelve by natural wastage that vacancies would be filled up, so that the expectation held out by Coleridge was greatly devalued.[82] In the event Coleridge actually opposed Morgan's amendment, which he withdrew, complaining with some justification that he had been "jockeyed" and revealing that the Solicitor-General had warned him not to count on the promise.[83] Coleridge, who had seemingly gone beyond his brief, was uncomfortable in defending a clause which actually went to reduce the number of puisnes and which the lawyers on both sides of the House disliked, and to make matters worse he also had to introduce another change, sending bankruptcy cases to the Exchequer rather than the Chancery because of the congestion in the latter.[84]

The immediate problem in Chancery was solved by Wickens' death and his replacement by Charles Hall in November 1873. Hall owed his selection to his labours in drawing up the rules to accompany the new legislation but he was not an inspiring choice, a plodding practitioner unlikely to bring larger horizons to the bench.[85]

[78] (1873) 55 L.T. 93. See also Hemming's articles in (1873) 35 Saturday Review 267, 705.
[79] Parl. Debs. 3rd s. vol. 216 cols. 640–654 at 647 (9 June 1873). He had to make it clear that he had not received any actual representation from the judges: (1872–3) 17 S.J. 663.
[80] (1873) 35 Saturday Review 739; (1873) 8 L.J. 303; (1872–3) 17 S.J. 628.
[81] Parl. Debs. 3rd s. vol. 216 cols. 1586–1589 (30 June 1873).
[82] *Ibid.*, col. 1624 (1 July 1873).
[83] *Ibid.*, cols. 1635 (1 July 1873), 1880–1881 (7 July 1873).
[84] *Ibid.*, cols. 1885–1889 (7 July 1873). It was said that the number of equity judges was "practically ... the only question of principle now at issue": (1873) 8 L.J. 349.
[85] *Generation of Judges*, pp. 128–129. A Times editorial pronounced that if Selborne had been able to find anyone versatile in law and equity he might have chosen him without objection: (1874) 3 L.M. &. R. (2nd s.) 35. Gladstone felt Richard Baggallay would have been a better choice if his professional reputation had equalled Hall's: to Selborne, 26 October 1873, *Selborne MSS*, vol. 1866, f. 55.

However, although Selborne was limited in his freedom of manoeuvre by Gladstone's desire to economise on the judicial establishment, he was soon able to advance his desire for fusion in a very striking way. Early in 1874 Baron Martin resigned from the Court of Exchequer and Selborne replaced him with R.P. Amphlett. The appointment came as a surprise but it was a shrewd one. Amphlett was a Conservative M.P. who had taken an active, moderate part in the debates on the Bill. He also had something of a reputation for bankruptcy expertise and would help answer the critics of the Exchequer's new role;[86] most significantly, he was an equity practitioner of good, though not outstanding repute whose intrusion into a common law division—the first, as was widely mentioned, since Mouncey Rolfe in 1839—signalled the intention to make fusion a reality.[87] Amphlett hesitated, aware that some of the Exchequer Barons had little love for equity, and that at 63 it was not a job to be undertaken lightly, but in the end he accepted. Had he known that the bankruptcy business would not materialise, that the Judicature Acts would be postponed for another two years and that much of his time would be spent on heavy railway cases, he might have refused.[88]

Within a month the Liberals had gone out and Cairns was Lord Chancellor. As one writer observed, the Judicature Acts seemed to have a fatal effect on the judges, for in barely six years Cairns had ten appointments to make.[89] However, before any vacancies arose, the second reading of the Supreme Court of Judicature Act (1873) Amendment Bill 1875 in the Commons had seen Henry James criticise the clause which imposed the reduction in numbers in the light of allegedly unprecedented arrears in the courts; in private the Chief Baron took the same line.[90] In the first half of 1875 the Court of Common Pleas lost two puisne judges, Sir Henry Keating resigning unprompted on health grounds and Sir George Honyman being persuaded to follow suit. Coleridge, who had succeeded Bovill as Chief Justice of the Common Pleas in November 1873, secured one good replacement by asking for Sir Thomas Archibald to be transferred from Queen's Bench, which he said was already strong; the power to enforce transfers was not in place yet and Archibald sought the consent of his fellow judges before assenting.[91] This

[86] *Generation of Judges*, pp. 128–129. Amphlett had been mentioned as an outside possibility to become a law officer in 1873: (1873) 2 L.M. & R. (2nd s.) 1125.

[87] (1874) 3 L.M. & R. (2nd s.) 189. Rolfe, the future Lord Chancellor Cranworth, was an Exchequer Baron from 1839 to 1850, when he became a Vice-Chancellor.

[88] *Generation of Judges*, pp. 128–129; *D.N.B.*, vol. 1, p. 367; (1883) 18 L.J. 676.

[89] *Generation of Judges*, p. 22. They are listed on p. 167.

[90] Parl. Debs. 3rd s. vol. 225 cols. 953–954 (5 July 1875), and see also a similar attack in the previous session, vol. 219 col. 1037 (5 June 1874); Kelly to Cairns, 8 February 1875, PRO PRO 30/51/10, *Cairns MSS*.

[91] Keating to Cairns, 13 January 1875, Coleridge to Cairns, 22 January, 2 February 1875, Archibald to Cairns, 27, 29 January 1875, *Cairns MSS*.

offset the arrival in the Common Pleas of the elderly and unpopular J.W. Huddleston, who had compelling political claims on the party.[92] In return for the loss of Archibald, Cockburn was offered a selection of names and chose W.V. Field, Henry Hawkins having apparently declined.[93] Then in April Sir Gillery Pigott died, leaving a vacancy in the Exchequer. Cairns decided to transfer Huddleston (presumably with Coleridge's consent) from the Common Pleas, and what he did with that vacancy far eclipsed the surprise at Amphlett's appointment.

The Law Times, perhaps alerted to what might be coming, urged that fusion had not gone far enough for there to be any justification in looking to the equity bar,[94] but Cairns evidently differed for, "to the astonishment of the profession" he offered the place to Nathaniel Lindley, a Chancery silk practising in Hall's court.[95] The choice was the more surprising since Cairns had not the excuse of a special skill that Selborne had had with Amphlett, but Lindley was highly regarded and *The Law Journal* said that Coleridge had expressly asked for an equity expert for his court.[96] Both of these appointments could be seen to be giving effect to the expectation that had been held out to Morgan and they were generally acknowledged to have turned out extremely well;[97] both men were quite quickly promoted to the Court of Appeal.

At this time Cairns also concluded that it was unrealistic to effect the reduction in first instance judges that had been planned and the clause, still in the Bill when it was reintroduced in 1875, was replaced by a recital (s. 3) that it was not expedient "for the present", Harcourt and Gladstone having vainly fought the battle for economy.[98] Consequently, when the Judicature Acts came into force on 1 November 1875 there was no longer an obstacle to filling up vacancies, though none actually occurred until the following autumn, when both Quain and Archibald died after short periods in office, creating openings in what were now the Queen's Bench Division and Common Pleas Division respectively, while the promotion of two Exchequer judges to the Court of Appeal created another, filled by Hawkins, a pure common law man and an

[92] Huddleston's political claims stemmed from his heavy outlay on Norwich elections (W.G. Thorne, *The Still Life of the Middle Temple* (London 1892), pp. 317–320). He had used his position as an M.P. to put pressure on the government to procure Honyman's resignation: Coleridge to Cairns, 2 February 1875, *Cairns MSS.*

[93] Cockburn to Cairns, 29 January 1875, *Cairns MSS.*

[94] (1875) 59 L.T. 1.

[95] *D.N.B., Twentieth Century*, (*1912–21*), pp. 335–337, at 336–337.

[96] (1875) 10 L.J. 303. Unfortunately there is no correspondence about this appointment in the Cairns papers.

[97] *E.g.* Coleridge to Cairns, 14 October 1876, *Cairns MSS.*

[98] Parl. Debs. 3rd s. vol. 225 cols. 962–963 (5 July 1875), 1591–1606 (16 July 1875).

unpopular choice with his fellow judges.[99] Hardinge Giffard refused the Queen's Bench and the place was given to Henry Manisty, a deserving man but rather elderly and a known opponent of the Judicature Acts.[100] *The Law Journal* related the rumour that an equity judge would succeed Archibald in the Common Pleas, but this seems improbable; Lindley was already there and it was the only common law division with an equity judge.[101] In fact Henry Lopes was chosen and completed a trio of the least inspiring appointments that Cairns made. There was no evidence in the choice of these conservative common lawyers of a furtherance of the policy of infiltrating equity into the common law bench.

Continued pressure for an additional Chancery judge eventually bore fruit in 1877, though *The Times*, which had been among its proponents, noted that the astonishing celerity of Sir George Jessel as Master of the Rolls had made it less necessary.[102] Rumour had it that Field would be transferred from the Queen's Bench with Charles Butt replacing him there but rumour was wrong.[103] Cairns opted for a straightforward choice, Edward Fry of the equity bar, the first Chancery judge to be styled Mr. Justice.[104] Subsequent common law appointments were equally orthodox: the immensely gifted Charles Bowen to the Q.B.D. in 1879 and, less successfully, Fitzjames Stephen, man of letters and jurist, to the Exchequer in the same year.[105]

Selborne returned to office in April 1880 and in November made his first judge, Sir C.J. Watkin Williams replacing Lush in the Queen's Bench on the latter's promotion to the Court of Appeal.[106] In September Kelly, the octogenarian Chief Baron of the Exchequer had died, shortly followed by Cockburn, the sexagenarian Chief Justice of the Queen's Bench, creating a long awaited opportunity to carry fusion a step further.[107] Despite opposition from

[99] Bosanquet, *Oxford Circuit*, p. 37. Quain died on 12 September, Archibald on 18 October.

[100] *The Times*, 1 Dec. 1890. Seemingly Cairns and Cockburn each thought the other regarded Manisty as too old: Cockburn to Cairns, 30 September 1876, *Cairns MSS.*

[101] (1876) 11 L.J. 10. However, Coleridge had written to Cairns on 14 October, "only let us have a man from equity", *Cairns MSS.*

[102] 21 November 1877.

[103] (1877) 12 L.J. 237, 251.

[104] Appointed under the authority of the Supreme Court of Judicature Act 1877 (40 & 41 Vic. c. 9).

[105] Besides his transcendent gifts, Bowen had a claim stemming from being Treasury counsel, while Stephen had been in the running for Solicitor-General in 1873: D. Duman, *The English and Colonial Bars in the Nineteenth Century* (London 1983), p. 103; Heuston, *Lives of the Lord Chancellors*, p. 44.

[106] M.P. for Denbigh Boroughs 1868–80. He was a strong defender of the old court structure and trials in banc: (1880–1) 6 L.M. & R. (4th s.) 174–190; *D.N.B.*, vol. 61, p. 384.

[107] G.R. [Lord] Askwith, *Lord James of Hereford* (London 1930), p. 105. Gladstone had extracted waivers from both law officers upon their appointment: Duman, *English and Colonial Bars*, p. 103. He also suggested that if the office of Chief Baron was not to be filled up, Cairns, Cockburn, Jessel (M.R.) and the Attorney-General should be consulted: to Selborne, 24 September 1880, *Selborne MSS*, vol. 1867, f. 120.

traditionalists among the judges (who voted by 20–5 for the changes),[108] a petition from the bar and, rather surprisingly, vigorous dissent from the former Home Secretary Assheton Cross and the usually progressive Henry Fowler, an order in council abolishing the two chiefs' posts and amalgamating the common law divisions into an enlarged Queen's Bench Division was carried by 178 votes to 110.[109] In place of the chiefs two puisnes were appointed. One was J.C. Mathew of the common law bar[110] but Selborne used the other vacancy to augment the equity element in the Queen's Bench. He chose Sir Henry Mather Jackson, sometime leader in the Court of Chancery of the Palatinate of Lancaster, who had acquired most of Amphlett's business in Vice-Chancellor Bacon's court. The unfortunate Sir Henry died within a week of his appointment and without ever taking his place upon the bench[111] and presumably Selborne could see no obvious successor of a similar kind, for he turned to L.W. Cave, noted mostly for his expertise in bankruptcy.[112]

That Selborne had not abandoned his policy became evident later in the year when Lindley was promoted to the Court of Appeal and was replaced by Ford North. North had followed Jackson in the Duchy Court and had the further advantage of having attended Winchester College, Selborne's own *alma mater*.[113] Unlike Jackson's, this selection was said by *The Law Times* to be likely to create disappointment at the common law bar, since common lawyers were never appointed to the Chancery Division.[114] It conceded that "the only consolation is, that men of learning and ability alone are selected", but this was generous to North, since the equity bar felt that there were several better men.[115] Perhaps this selection suggests that Selborne had lost touch with the bar; at all events within two years he felt it expedient to transfer North to the Chancery Division, his place in the Queen's Bench being taken by his fellow sportsman A.L. Smith, a judge of very different stamp. This suggests that North had disappointed the Chancellor's expectations, and he proved a mediocre Chancery judge, "somewhat narrow and timid", carrying caution to extremes, fussy and pedantic. He usually got things right but his slowness led to

[108] PRO LCO 1/59; P.P. 1880–1 (C.781) LXXVI.
[109] Parl. Debs. 3rd s. vol. 258 cols. 572–612 (10 February 1881).
[110] *D.N.B., Twentieth Century (1901–11)*, pp. 589–590.
[111] *The Times*, 10 March 1881; F.R. Boase, *Modern English Biography* (6 vols. Truro 1892–1903), vol. 2, pp. 32–33. However, according to (1883) 1 Pump Court 99, this post had first been intended for Arthur Cohen but Gladstone refused to risk a by-election.
[112] *D.N.B., Supplement*, vol. 1, pp. 398–399.
[113] *Who Was Who, 1897–1915*; (1881) 16 L.J. 517.
[114] (1881–2) 72 L.T. 1.
[115] *The Times*, 14 October 1913.

complaints and his reputation is indicated by the fact that three judges appointed later were promoted ahead of him.[116]

Whether Selborne would have persisted with cross-jurisdiction appointments cannot be known. Certainly his last choice, Alfred Wills for the Queen's Bench in August 1884, was perfectly orthodox.[117] Needless to say, there is no such policy to be found in Halsbury's time. A sympathetic writer opined that "the plan had done its work. Equity had obtained a firm footing on the bench beside common law",[118] but it would be sixty years before any further set of cross-division appointments came about, and then it was common law judges being put into the P.D.&A. as a sort of apprenticeship;[119] from the 1880s to the present day, the judgeships of Chancery and Queen's Bench have been the exclusive province of practitioners at their respective bars. Of course, barristers are now more broadly educated and any judge would be competent to dispense equitable as well as legal doctrines (though some have been markedly unwilling to do so). Nevertheless it is remarkable how rapidly and thoroughly the divisional divide was recreated; at the turn of the century even the Chancery bar was said to be quite distinctive in dress and manner; there was no fusion there.[120]

4. The court of appeal

It was, of course, the arrangements for bringing cohesion to the untidy and illogical provision for appeals in the various courts that enmeshed the movement for reform of the judicature in political controversy and did much to enervate it and drain it of the impetus needed to tackle effectively the even more challenging problem of provincial justice. Forces of conservatism not only regrouped effectively in defence of the House of Lords but were heartened by the success of that rearguard action to resist what had seemed the juggernaut driven by Cairns and Selborne.[121]

During this struggle the proposed composition of the court of appeal underwent several permutations, thus:

1. Judicature Commission, 1st Report, 1867[122]

   Lord Chancellor [L.C.], Master of the Rolls [M.R], Chief Justices of Queen's Bench and Common Pleas and Chief

[116] *Ibid.* He has no entry in the *Dictionary of National Biography* and was one of the few judges not featured in the series on "The Bench" in the Strand Magazine, 1896.
[117] (1884–5) 2 Pump Court 54.
[118] *Generation of Judges*, p. 31.
[119] Besides the future Lord Denning, they included several promoted County Court judges.
[120] "The Bar" (1896) Strand Magazine; A. Underhill, *Change and Decay* (London 1938), p. 87.
[121] Stevens, "Final Appeal".
[122] *First Report*, p. 20.

Baron of the Exchequer [Chiefs], Lords Justices of the Court of Appeals in Chancery [L.JJ.Ch.], three common law puisnes: total ten.

2. Administration of Justice Bill, 1870[123]

   L.C., M.R., Lord Chief Justice of Queen's Bench [L.C.J.], L.JJ.Ch., two Lords Justices of Appeal [L.JJ.], three puisnes: total ten.

3. Supreme Court of Judicature Act 1873[124]

   L.C., M.R., Chiefs, L.JJ.Ch., two L.JJ.: total nine.

4. Supreme Court of Judicature Act 1875[125]

   L.C., M.R., Chiefs, L.JJ.Ch., one Justice of Appeal [J.A.]: total seven.

5. Appellate Jurisdiction Act 1876[126]

   L.C., M.R., Chiefs, L.JJ.Ch., J.A., three further J.A.s: total eleven.

6. Supreme Court of Judicature Act 1881[127]

   L.C., M.R., L.C.J., President of P.D.&A., five L.JJ.: total nine.

These changes were, in part, reflections of differences on several major matters of policy. One was whether the court should sit in divisions, and if so of what size. The Commissioners had proposed divisions of three or more, and it is difficult to see how a unitary court could have coped with the volume of business which might be expected, but some common lawyers argued that divisional courts of appeal would not command the same authority as the Exchequer Chamber when reviewing a decision of a court sitting in banc.[128] Since Selborne and Cairns wanted an end to sittings in banc they had little sympathy with this view and the only concession was to enable the court of appeal to enlarge itself when

[123] Parl. Debs. 3rd s. vol. 200 cols. 171–172 (18 March 1870). Cairns persuaded Hatherley to ten members rather than nine because of the Lord Chancellor's other duties. Cockburn called it "a very crude scheme", to Cairns, 11 June 1870, *Cairns MSS*.

[124] Supreme Court of Judicature Bill, cl. 6, H.L.S.P 1873 (45) VII; Parl. Debs. 3rd s. vol. 216 col. 1729 (9 July 1873). Selborne declined Cairns' suggestion to make the Master of the Rolls a purely appellate judge: Cairns to Selborne, 18 April 1873, in E. Heward, *A Victorian Law Reformer, A Life of Lord Selborne* (Chichester 1998), p. 142.

[125] 38 & 39 Vic. c. 77. The Bill had proposed three Justices of Appeal, two chosen from the salaried members of the Privy Council: Parl. Debs. 3rd s. vol. 223 col. 585 (9 April 1875); for the changes see page 595 below.

[126] 40 & 41 Vic. c. 59.

[127] 44 & 45 Vic. c. 68, ss. 2–4, and see page 597 below.

[128] Parl. Debs. 3rd s. vol. 217 cols. 45–50 (8 July 1873).

a difference of opinion emerged.[129] A second point of contention was whether, in addition to the great officers, the appeal court should comprise only judges of appeal (like the Court of Appeals in Chancery) or should be made up from the puisnes of the High Court, like the Exchequer Chamber. The latter was favoured by Coleridge, who disliked the notion of a judicial hierarchy, and those who mistrusted the accumulation of patronage in the Lord Chancellor.[130] Hatherley's Bill combined both elements, but all subsequent schemes featured a body of permanent appeal judges, although the puisnes retained an auxiliary role.[131]

The third question of principle was who should deal with appeals from law and equity respectively. What was originally envisaged was an undifferentiated court, with appeals from any quarter being heard by judges from any background. That this was Hatherley's ideal is clear from the way he filled up vacancies in the Court of Appeals in Chancery caused by the deaths of Sir C.J. Selwyn and Sir G.M. Giffard. Selwyn's replacement was one of the Vice-Chancellors, Sir William James,[132] but Giffard's was more adventurous.

George Mellish was one of the leaders of the common law bar, whose state of health (he was very gouty and not robust) suggested he was due for the less strenuous demands of the bench, but he had already refused a judgeship in 1868 because he could not face the strain of nisi prius and circuit work. By making him a Chancery appeal judge Hatherley contributed directly to the creation of a composite appeal court; indeed it seems Mellish would have been chosen ahead of James but for Hatherley having heard reports of his ill-temper, occasioned largely by the pain he constantly suffered. With the proposed appeal court now evidently still some way off, he would bring a common law mind to bear on equity matters.[133] The appointment seems to have been well received and although often in pain and a notorious interrupter of counsel, Mellish complemented James well. In tandem for seven

[129] Supreme Court of Judicature Act 1873, s. 53. This may explain the four man sittings of the Court of Appeal in 1875–6 which puzzled Sir Robert Megarry: "The Vice-Chancellors" (1982) 98 L.Q.R. 370–405, at 392.

[130] Parl. Debs. 3rd s. vol. 216 col. 891 (12 June 1873, Dr. Ball); vol. 217 cols. 223–225 (12 June 1873); "Ought The Judicature Bill To Pass?" (1873) 2 L.M. & R. (2nd s.) 534–540.

[131] Supreme Court of Judicature Act 1875, s. 4; Appellate Jurisdiction Act 1876, s. 19, Supreme Court of Judicature Act 1881, s. 11. Selborne's attempt in 1881 to expand their role met with opposition and had to be withdrawn: Parl. Debs. 3rd s. vol. 263 cols. 628–632 (12 July 1881), and see vol. 269 cols. 447–453 (11 May 1882), vol. 271 cols. 1227–1228 (3 July 1882), vol. 272 col. 1168 (20 July 1882).

[132] Megarry, "Vice-Chancellors", 387–388.

[133] *D.N.B.*, vol. 37, pp. 1220–1221; *Generation of Judges*, pp. 109–111; J.B. Atlay, *The Victorian Chancellors* (2 vols London 1908), vol. 2, p. 122; Hollams, *Jottings*, p. 165. Hatherley was grateful to Mellish for chairing a meeting of the Law Amendment Society which approved his proposals: Parl. Debs. 3rd s. vol. 201 col. 1566 (30 May 1870).

years they restored the reputation of the Court and set a good example of co-operation across the divide.[134]

However, when Selborne produced his scheme, equity lawyers voiced concerns that the big common law majority would mean a common law bench overturning decisions of the Vice-Chancellors and Master of the Rolls. The knowledge that the Rolls had recently been offered to Coleridge, an indication that in the future even this would not be their preserve, can only have added to these anxieties.[135] To meet this objection it was conceded that one division would hear equity appeals and the other those from common law, a significant retreat from the idea of an omnicompetent court; presumably it was understood that the divisions would be manned according to their business.[136]

Selborne's court never sat and it is rather curious that he voiced a concern that the court Cairns proposed in 1875 would be badly short of permanent equity lawyers.[137] There was a lengthy debate in the Commons, and here it was the common lawyers who again objected that the court would be too weak to command their respect and that their divisional court decisions would be reversed by a small and predominantly non-common law bench.[138] In the face of these criticisms the Government conceded that the new judges should not come from the Privy Council as intended, but resisted James's amendment that two of the three should be from the common law bench. At the report stage however they placated the common lawyers by settling for only one new appeal judge, empowering the Lord Chancellor to call upon each common law division to supply a judge at need. In this form the clause passed and became effective on 1 November 1875.[139]

Cairns and Coleridge were in agreement that each of the divisions should contain a mixture of common law and equity men[140] and Selborne's concerns were met by the appointment as the

[134] *D.N.B.*, vol. 37, pp. 1220–1221; E. Manson, *Builders of Our Law in the Reign of Queen Victoria*, 2nd edn. (London 1904), p. 268; V.V. Veeder, "A Century of Judicature", in *Select Essays in Anglo-American Legal History* (rep., London 1968), vol. 1, pp. 730–826, at p. 803; G.R. Rickards, (1877–8) 3 L.M. & R. (4th s.) 55–65.

[135] Parl. Debs. 3rd s. vol. 216 cols. 664 (9 June, Morgan), 844, 861 (12 June, Baggallay, Amphlett). Romilly had announced his wish to retire before the Bill's introduction and the offer had been made to the Attorney-General. Coleridge said he knew too little equity, though it was uncharitably rumoured that he had been pressured into declining. Jessel, the Solicitor-General, was the second choice, but to avoid an election Romilly delayed his resignation and the Lord Chancellor sat at first instance: Gladstone to Selborne, 24 March 1873, 11 August 1873, Coleridge to Selborne, 25 December 1872, *Selborne MSS*, vol. 1865, ff. 253, 196, vol. 1866, f. 9; Coleridge to his father, 15, 17 December 1872, 4 August 1873, *Life and Correspondence*, vol. 2, pp. 216–220.

[136] Parl. Debs. 3rd s. vol. 216 col. 1734 (3 July 1873, Jessel, Solicitor-General).

[137] *Ibid.*, vol. 223 cols. 593–594 (9 April 1875).

[138] *Ibid.*, vol. 225 cols. 953–991 (5 July 1875).

[139] *Ibid.*, cols. 974–983 (5 July 1875); Supreme Court of Judicature Act 1875, s. 4.

[140] Parl. Debs. 3rd s. vol. 223 cols. 1498–1503 (23 April 1875).

new Justice of Appeal of the Attorney-General, Sir Richard Baggallay, wearied by his labours with the Bill.[141] This meant, however, that all three permanent appeal judges were from equity and Coleridge and Kelly were so affronted when they found the Master of the Rolls and Sir William James in charge of the two divisions that they threatened to refuse to sit.[142] It is therefore not surprising that when the Appellate Jurisdiction Bill, intended finally to settle the judicial role of the House of Lords, appeared in 1876, the composition and strength of the "Intermediate Court of Appeal", was vigorously criticised.[143] In reply to Selborne's complaint that the selection of puisnes to sit in the court was invidious, Cairns explained that it was done in rotation and by seniority,[144] but in the Commons Disraeli, in a speech remarkable for a silkily disingenuous rewriting of recent history, conceded that it needed strengthening and after more attacks from the common law side it was agreed to add three permanent judges from their ranks.[145] In October 1876 Sir George Bramwell, Sir Balliol Brett and Sir Richard Amphlett were promoted, dignified as Lords Justices in the following year.[146] So, with two three-man divisions made up from six Lord Justices (three from each side, though Amphlett was, so to speak, amphibious) and five *ex officio*s (though it was not expected that the Lord Chancellor would sit frequently since, to compound the oddity of his situation, he was also the president of the House of Lords Judicial Committee),[147] the modern Court of Appeal was born.[148]

The divisions in the court usually (though by no means invariably) comprised a mixture of common law and equity men, two to one in favour of the quarter from which the appeal reached them. The mixture did not always work smoothly. Underhill recalled an interchange between James and Brett (the latter for once an innocent party) where James protested at having a judge ignorant of equity in his court,[149] and some certainly did not enter into the spirit of the adventure. Bramwell, predictably, adhered to his invincible distaste for equitable doctrines, and Sir Henry Cotton, when called straight to the Court of Appeal to replace

[141] Baggallay to Cairns, 4 October 1875, *Cairns MSS*, and 2 January 1878, PRO LCO 1/11; *D.N.B. Supplement*, vol. 1, p. 95.
[142] Coleridge to Cairns, 25 May 1876, *Cairns MSS*.
[143] The make up of the bench in the cases in the Law Reports shows puzzling variations in size and membership.
[144] Parl. Debs. 3rd s. vol. 227 cols. 909–912, 925 (25 February 1876).
[145] *Ibid.*, vol. 229 cols. 1680–1693 (12 June 1876), vol. 230 cols. 1153–1154 (7 July 1876).
[146] Supreme Court of Judicature Act 1877 (40 & 41 Vic. c. 9), s. 4.
[147] Selborne to Gladstone, 2 November 1881, *Selborne MSS*, vol. 1867, f. 190. Cairns sat on at least six occasions in 1876–7.
[148] Appellate Jurisdiction Act 1876 (39 & 40 Vic. c. 59), s. 15.
[149] Underhill, *Change and Decay*, pp. 86–87.

Mellish in June 1877, sat only on the equity side.[150] His was followed by another direct appointment from the bar, again a "like for like" one, when the unfortunate Amphlett resigned for health reasons and Disraeli made up to Lord Chelmsford for an old slight by choosing his son, Alfred Thesiger.[151] However, when Thesiger died prematurely in 1880 he was succeeded by a common lawyer, Sir Robert Lush, well respected but past his best.[152]

There was, however, good reason for this apparent change of policy. Selborne had determined upon changes to the court to accompany the abolition of the Chief Baron and Chief Justice of the Common Pleas.[153] A vacancy created by Bramwell's elevation to the Lords was left unfilled and the Judicature Act of 1881 prescribed that the Master of the Rolls should cease to sit at first instance, the President of the Probate, Divorce and Admiralty division would become an *ex officio* member of the Court of Appeal and the Lord Justices would be reduced from six to five.[154] The whole Court would henceforth call on four *ex officio*s and five Lord Justices for its two divisions, its membership in law/equity terms roughly equal in numbers, though with only three equity judges regularly sitting.[155] This was the balance that Selborne retained. Lush was followed in succession by the short-lived Sir John Holker[156] and the illustrious Bowen, both from the common law side; Lindley succeeded James when the latter died in June 1881 and when Brett became Master of the Rolls after Jessel's untimely death in 1883 it was Fry who took his place. Things only changed with Halsbury, who replaced Baggallay in December 1885 with the mediocre Lopes from the Q.B.D.[157]

The choice of Brett was to have important consequences for the attitude of the Court of Appeal to fusion questions. Selborne had already trailed the appointment of a common lawyer to the Rolls in the debates on the 1881 Bill, "so long as the Judges of the

[150] Manson, *Builders of Our Law*, pp. 298–299; *The Times*, 23 February 1892.

[151] *Generation of Judges*, pp. 112–114. Chelmsford, who had been Lord Chancellor in the previous Conservative administration, was rather brusquely passed over in 1868.

[152] *Ibid.*, pp. 25–28. Lush was presumably the judge who was so angered by the proposal in the Supreme Court of Judicature Bill 1881 to give the Master of the Rolls precedence in the Court of Appeal that he threatened to resign: Parl. Debs. 3rd s. vol. 263 cols. 1234–1238 (19 July 1881).

[153] See pp. 590–591 above.

[154] For the strange fluctuations in the President's position see Megarry, "Vice-Chancellors" 393–394.

[155] Supreme Court of Judicature Act 1881 (44 & 45 Vic. c. 68), ss. 2–4.

[156] A generous gesture by Selborne and Gladstone to a political opponent: Gladstone to Selborne, 2 September 1881, *Selborne MSS*, vol. 1867, f. 186; Oxford, *Memories and Reflections*, vol. 1, p. 75.

[157] There was discontent at the equity bar when Fry resigned in 1892 and was replaced by a Queen's Bench judge, Sir A.L Smith (*The Times*, 16 February 1899), but Halsbury does seem to have worked on the basis that there ought to be a reasonable proportion of Chancery men in the Court of Appeal: Heuston, *Lives of the Lord Chancellors*, pp. 59–60.

Court of Appeal were equally balanced"[158] but both law officers, Sir Henry James and Sir Farrer Herschell, declined.[159] According to Brett, Jessel "had been sent to dragoon the Court of Appeal into substituting equity for Common Law, but ... he ... and his Common Law colleagues would not have it",[160] and if Jessel "set himself the task of giving the most liberal operation to the principles of [the Judicature] Acts, and ... effected far more for the fusion of law and equity than the Acts themselves",[161] Brett seems to have been instrumental in reasserting the dominance of the common law.[162]

So in the Court of Appeal the attempt at fusion of personnel was abandoned early in favour of a balanced bench sittting in specialised divisions with a minority judge in each. The role of the minority judge in each division in the early years is one of several matters which might yield interesting findings.

5. The circuits

The reform of provincial justice was the great failure of the 1870s. That it needed reforming was scarcely doubted and at the root of the problem lay the attempt to meet the very different needs of criminal and civil justice through the same mechanism—the assizes. The former needed frequent gaol deliveries in country towns while the latter demanded extended or even permanent sittings in the few large towns where civil business was substantial. The hallowed and inflexible structure of the assizes satisfied neither requirement. Twice a year, at the conclusion of the short michaelmas and easter terms, judges accompanied by their circuit bar plodded dutifully round circuit itineraries little changed since their medieval origin, a pompous ceremonial entry being followed by criminal trials and then, in the time that remained, nisi prius actions. The civil cases were frequently found to be either few and trivial, but where, in the biggest towns, they were heavy and numerous they had either to be rushed through with unseemly haste or made remanets, to be heard at the next assize or in London. Moreover, some of the biggest

[158] Parl. Debs. 3rd s. vol. 263 col. 1238 (19 July 1881).

[159] Gladstone to Selborne, 21 March 1883, *Selborne MSS*, vol. 1868, f. 180; Askwith, *Lord James*, p. 116; Heuston, *Lives of the Lord Chancellors*, p. 97. There was probably no truth in the rumour that it had been offered to Horace Davey, a Chancery silk: Parl. Debs. 3rd s. vol. 277 col. 1108 (30 March 1883).

[160] Underhill, *Change and Decay*, p. 87.

[161] *Generation of Judges*, p. 177.

[162] *D.N.B., Supplement*, vol. 1, pp. 264–266; Atiyah, *Rise and Fall of Freedom of Contract*, pp. 671–674. Atiyah states that the Court of Appeal usually sat as a single division, but at least in the mid-1880s, Baggallay headed the court hearing Chancery appeals: *The Times*, 14 November 1888.

towns had no assize at all—Birmingham and Sheffield were glaring omissions from the circuits.[163]

All but the fiercest traditionalists acknowledged that this would no longer do in the railway age. The Judicature Act 1873 added a third assize for selected towns and Assheton Cross, who as Home Secretary had responsibilities for criminal justice, managed to impose a fourth.[164] This did not satisfy the advocates of more radical civil justice reforms, but they were fatally divided in their aspirations. Some businessmen (and a few lawyers) wanted "tribunals of commerce", composed mostly or exclusively of laymen, to resolve commercial disputes; others were enthusiasts for greatly enlarged County Court jurisdiction; others again demanded permanent sittings of superior court judges in Liverpool, Manchester and other great cities.[165]

The Commissioners had dealt cursorily and tentatively with these questions in their first report, recommending minor improvements to the assizes and promising a further, more detailed examination. However, when they did tackle it they were unable to reach agreement, except almost unanimously to reject tribunals of commerce,[166] and lamely concluded in their final report that it was "inexpedient to prolong our enquiry into these matters", merely endorsing their original modest suggestion for grouping smaller towns for civil cases on assize.[167] There was no consensus for change sufficient to pass a Parliament teeming with lawyers.[168] Even bills for none too expansive County Court extensions foundered, while on the criminal side it proved equally impossible to overcome judicial opposition to major extensions to quarter sessions jurisdiction:[169] for all the doom-laden predictions of conservatives the assizes would remain substantially inviolate.[170]

Even rather modest changes provoked fierce resistance, for vested interests, local and professional, came charging to the defence of the existing order. The abolition of the Home Circuit and consequent re-arrangements for Surrey proved immensely and

[163] J.S. Cockburn, *A History of English Assizes, 1558–1714* (Cambridge 1972); Holdsworth, *History of English Law*, 5th ed. vol. 1 (London 1931), pp. 276–285. There is a useful contemporary account by J. Kinghorn in (1875) 59 L.T. 347 ff.
[164] R. Stevens, *The Independence of the Judiciary* (Oxford 1993), pp. 11–17.
[165] H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto 1985), pp. 56–61; P. Polden, *A History of the County Court, 1846–1971* (Cambridge 1999), pp. 74–83.
[166] *First Report*, p. 15 ff.; Third Report, P.P. 1874 [C.957] XXIV.
[167] Fifth Report, P.P. 1874 [C.1090] XXIV, p. 1.
[168] Duman, *English and Colonial Bars*, p. 170.
[169] Polden, *History of the County Court*, pp. 77–80; Judges' Committee Report, P.P. 1878 (311) LXIII.
[170] "The abolition of assizes is a mere matter of time" (1876–7) 62 L.T. 343.

discouragingly troublesome,[171] and in 1878 a committee of judges charged by Cairns with considering various means of making the system work better produced a largely negative report which included an uncompromising rejection of the fourth (winter) assize.[172] The judges renewed these attacks repeatedly until Halsbury, more indulgent than his predecessors, gave way in 1888.[173] Judges themselves complained about the inefficiency of the circuits and several devised and discussed plans to rearrange them; they were also justifiably critical of the impracticality of the new system, which prescribed continuous sittings in London alongside forays around the circuits. However, their remedy was usually more judges and the abolition of the fourth assize rather than any more radical changes, and they were vehement in opposing extended or permanent provincial sittings.[174] Laymen, noting that the judges had contrived to shorten the length of the court's day and to protect the long vacation, were less impressed with these complaints.[175]

When the Judicature Acts came into effect towards the end of 1875 the future of the assizes was therefore still unresolved, so that circuit duty not only continued but had, by the imposition of the extra assizes and the more congested legal year, become more onerous. The railways had speeded up the judges' journeys and improved their comfort, but at the cost of eroding the traditional life of the circuits.[176]

The duty of going circuit had traditionally belonged to the chiefs and puisnes of the common law courts. When there were too few to carry out these duties, which involved a pair for each of the circuits, they might be augmented by a serjeant or from 1850 by a Q.C.[177] The assize judge presided over both criminal and civil trials and most had some experience of crime from their own days on circuit. However, the class of judges identified by David Lemmings, particularly those who went directly or in short order to the highest posts by way of Parliament and the government service, often had

[171] R. Cocks, *Foundations of the Modern Bar* (London 1983), pp. 135–144. The circuit reorganisations at this time also involved the creation of a seventh circuit.
[172] P.P. 1878 (311) LXIII. Background and discussion papers are in PRO LCO 1/4–10.
[173] Stevens, *Independence of the Judiciary*, pp. 16–17.
[174] There are abundant materials on this subject in PRO LCO 1/4–10 and in the professional journals for the period.
[175] *E.g.*, they "came late, lunched long, tried slowly and rose early": C. Warton, Parl. Debs. 3rd s. vol. 265 col. 745 (23 August 1881). For their rejection of proposals to curtail the long vacation see Stevens, *Independence of the Judiciary*, p. 15.
[176] According to Atlay, *Victorian Chancellors*, vol. 2, p. 418, the Judicature Acts "killed the circuits". See also J. Kinghorn, "The Decline of Circuit Life" (1879–80) 5 L.M. & R. (4th s.) 335–377 and Cocks, *Foundations of the Modern Bar*, p. 152.
[177] Assizes Act 1850 (13 & 14 Vic. c. 25).

less experience of circuit life and criminal trials unless they had been law officers.[178]

There were also Exchequer Barons chosen from the equity bar. Alexander Thomson is one example, coming to the bench by way of a mastership in Chancery without any significant common law experience.[179] The criminal law was held in such low esteem that these men were expected to pick up what experience they needed on the job and no-one seems to have been unduly concerned at giving the power of life and death to them. In the 19th century the increase in commercial work meant that even on the common law side there were barristers whose income and reputation gave them a strong claim to judicial office and who seldom stirred from Westminster Hall.[180] Yet although Mouncey Rolfe's appointment to the Exchequer in 1839 was accompanied by reassurances about his experience as recorder of Bury St. Edmunds,[181] it was said of Sir J.S. Willes that although "he had perhaps never been in a criminal court in his life before his appointment as a Judge, [he] was enabled by a few months' study of 'Russell on Crime' to become as competent to administer the criminal law as any barrister who had extensively practised at sessions".[182] Lush was another in this mould and Sir John Holker remarked more generally, with a question evidently intended as rhetorical, that "it constantly happened that Judges whose sole experience had been acquired as special pleaders or in civil cases went to the Assizes where they had to administer the criminal law, never, perhaps, having been engaged in a criminal case in their life, but did they fail in its administration on that account?".[183]

There was the important difference however, that Victorian common law judges all had to deal with juries, as their Chancery counterparts did not. Even so, when the judges resisted the devolution of more serious crimes to quarter sessions and insisted that such trials deserved the best judges, they clearly did not mean judges experienced in criminal law or practice.[184]

Hatherley's ill-starred Bill of 1870 exempted from circuit duty only those existing judges who were not obliged to go, and

[178] D. Lemmings, *Professors of the Law* (Oxford 2000), pp. 248–293, and "The Independence of the Judiciary in Eighteenth Century England", in P. Birks (ed.), *The Life of the Law* (London 1993), pp. 125–150.

[179] E. Foss, *The Judges of England*, vol. 8 (London 1864), pp. 373–374. Another example is William Alexander, Chief Baron 1824–31, *ibid.*, vol. 9 (1864), p. 74.

[180] W.S. Harcourt, (1872–3) 17 S.J. 191.

[181] Atlay, *Victorian Chancellors*, vol. 1, p. 59; (1883) 18 L.J. 676.

[182] W.S. Harcourt, Parl. Debs. 3rd s. vol. 216 col. 1574 (30 June 1873).

[183] *Generation of Judges*, p. 25; Parl. Debs. 3rd s. vol. 216 col. 876 (12 June 1873).

[184] Examples of this viewpoint are Coleridge L.C.J., Parl. Debs. 3rd s. vol. 233 cols. 1063–1065; The Judges' Report on Circuit Proposals, P.P. 1878 (311) LXIII and Sir W. Phillimore, "The Assizes" (1886) 3 L.Q.R. 100.

Selborne's of 1873 expressly required all future judges appointed to the new High Court to undertake circuit duty if required. But while for the common law divisions the obligation was absolute as before, Chancery judges were only required to go circuit at the Lord Chancellor's request.[185] This had not been foreshadowed in the Judicature Commission's first report, and since the provision was not debated in Parliament and seems to have attracted little comment in the professional press, it is unclear whether it was included simply as a logical consequence of the omincompetence of the new court's judges or whether Selborne intended to ensure by this means that equity would be done on circuit as well as in London; in view of the unsettled future of provincial justice it seems unlikely that it was given much thought.[186] Moreover, since the 1873 Act included an exemption for the existing Vice-Chancellors and no additional Chancery appointments were envisaged, it was of no immediate importance.

However, when Amphlett was offered a judgeship in the following year, "[i]t required no small effort for a man at the age of 63, used only to the quiet practice of Lincoln's Inn, to undertake as a judge the conduct of the rather turbulent elements of Nisi Prius and the Criminal Courts" and not surprisingly he hesitated. However, "he had some forty years before attended sessions and was Chairman of Quarter Sessions for Worcestershire, which were useful to allay public fears."[187] It is odd that there were any fears: perhaps the common law bar was creating them.

Lindley lacked even Amphlett's experience, and *The Law Journal* voiced doubts about his aptitude for gaol deliveries and long special jury cases: "these are duties which severely tax new judges drawn directly from the front ranks of the common law bar. The due performance of them can hardly be expected from men altogether inexperienced in nisi prius and criminal trials".[188] Lindley shared these doubts. However, Sir George Denman, though unenthusiastic about fusion and presumably not best pleased with the intrusion of a Chancery man onto the bench of Common Pleas, generously volunteered to go on the summer circuit with him to assist him with crime.[189] Meanwhile Lindley sat in on trials at the

[185] High Court of Justice Bill 1870, cl. 22, H.L.S.P. 1870 (32) IV; Supreme Court of Judicature Act 1873, ss. 29, 37.

[186] It is not mentioned in articles on the circuits, *e.g.* (1874) 57 L.T. 168–169, 240–241, and the brief debate on circuit expenses in Parl. Debs. 3rd s. vol. 217 cols. 321–345 (14 July 1873) is unenlightening. However Chief Baron Kelly said that the chiefs should be relieved or they would be unable to sit in the Court of Appeal, and that two or three extra judges would be needed until the equity judges had become qualified to do the criminal work: Kelly to Selborne, 11 February 1873, *Selborne MSS*, vol. 1865, f. 219.

[187] *Generation of Judges*, pp. 128–129.

[188] (1875) 10 L.J. 303.

[189] *D.N.B., Twentieth Century, (1912–21)*, p. 337.

Old Bailey and he was careful to take an experienced clerk and marshal on circuit.[190] "Since his appointment he had been working every day from 6 a.m., and in all spare moments, at the criminal law. By his second circuit his mastery was sufficient to impress the former chief justice Erle".[191]

With only fifteen eligible common law judges and with the courts in London now staying at least partly open during the assize, Amphlett and Lindley could not have been spared their share in the circuits even if their brethren had wished to do so—which is unlikely. In fact, with a fourth assize, trials lasting longer and some judges having to remain in town, there were barely enough judges to go round, so the reduction in the number of puisnes in 1876 threatened to cause a real shortage on circuit. In 1873 Gladstone had defended relatively low salaries for the appellate judges because they would have no circuit duties,[192] but now that position could not be maintained and it was conceded at the Bill's committee stage that they would be obliged to go circuit. This duty was not extended to the surviving judges of the old Court of Appeals in Chancery, but seemingly did include Baggallay, appointed under the 1875 Act.[193] Baggallay was a Chancery man, but like Amphlett and Lindley he soon found himself doing circuit duties, as did Cotton, even though he had earlier declined to be the new Chancery judge because "I think it almost certain that the Judges of the other courts will insist on the new Judge going circuit".[194]

Cotton was right. The common law judges were in a state of righteous indignation about circuit duty. Some of this stemmed from the ill-feeling aroused by an incident at Chelmsford assizes and the evident disinclination of the Chancery judges to hold jury trials—seemingly reneging on their side of the fusion bargain.[195] But it was mostly about money. Going circuit was expensive, costing around £700 p.a., and though some of the rituals, particularly the obligation to give dinners to local dignitaries, were

[190] *Ibid.*, E. Bowen Rowlands, *In the Light of the Law* (London 1931), p. 94.

[191] *D.N.B.*, Rowlands (see note 190 above) says he also impressed the doyen of Old Bailey lawyers, Sir Harry Poland.

[192] Appellate Jurisdiction Act 1876, s. 15; Parl. Debs. 3rd s. vol. 217 col. 336 (14 July 1873, Gladstone); vol. 230 col. 1154 (7 July 1876, Attorney-General).

[193] Baggallay to Cairns, 2 January 1878, *Cairns MSS.*

[194] Cotton to Cairns, 17 April 1877, *ibid.* Cotton was made a Lord Justice on 28 June 1877.

[195] The Master of the Rolls had routinely been sending jury trials to nisi prius and when Huddleston found that his schedule at Chelmsford was thrown into disarray by one such, *Cave* v. *McKenzie*, he refused to try it. The Master of the Rolls advised the parties to petition the Court of Appeal, which disclaimed any power to decide between the judges. Jessel's ruthless use of this provision, order 19, was roundly condemned by Selborne and Cairns as well as the Lord Chief Justice, who denounced it as "contrary to the entire spirit of the legislation": Parl. Debs. 3rd s. vol. 230 cols. 1951–1959 (27 July 1876). For comment see (1876) 11 L.J. 425, (1876) 61 L.T. 75, 92.

criticised as archaic, they still had to be performed, and made a big hole in a salary of £5,000 p.a., especially now that there was an income tax.[196] True, when the two extra assizes were imposed allowances were conceded, since this imposed additional duties, but the Q.B. judges pointed out that they were now all judges of the same court with the same salary yet the Chancery judges did not go circuit, leaving them considerably better off.[197] This was not a matter that Selborne could do much about, for Gladstone and some of his cabinet regarded the puisnes as overpaid compared with other public servants of similar calibre;[198] indeed Selborne had to fend off Gladstone's attempt to give them only £4,000 p.a. It was therefore predictable that Cockburn's bid to get circuit allowances for the chiefs was rejected almost out of hand.[199]

A further anomaly surfaced when it was seen that the new Lord Justices of Appeal *would* receive a circuit allowance. This provision was seemingly inserted in some haste in the 1876 Act and without the Treasury being consulted;[200] perhaps intended only to persuade the initial three appointees to take up a post which gave them no extra salary, the drafting did not confine it to them and it is not surprising that the puisnes found it objectionable, as did Baggallay, whose unique situation—liable to go circuit but without the allowance—was a further complication.[201] The judges memorialised the Treasury in the spring of 1878 but were again rebuffed.[202] Meanwhile Sir Edward Fry had been appointed to the Chancery Division, *The Law Journal* predicting that if, as it expected, he was not made to go circuit it would upset the other judges.[203]

Under these circumstances it is not surprising that the common law judges insisted on both Chancery and Court of Appeal judges doing their share. It was for the judges, at an annual meeting, to sort out their circuit duties but presumably in view of the statutory provisions the Lord Chancellor had to agree to the release of the Chancery judge if not the Lord Justices too.[204] From 1878 a Chancery

[196] On dinners *etc.* see *e.g.* Parl. Debs. 3rd s. vol. 217 col. 340 (14 July 1873, G.W. Hunt).

[197] First raised in 1873: Parl. Debs. 3rd s. vol. 216 cols. 1579–1580 (30 June 1873, J.W. Henley) and col. 1748 (3 July 1873, H. Matthews); (1873) 8 L.J. 209.

[198] Gladstone to Selborne, 4 January 1873 and cabinet minute, 29 January: *The Gladstone Diaries*, vol. 8, p. 277 ff.

[199] Gladstone to Cockburn, 23 June 1873, *ibid.*, p. 344.

[200] Administration of Justice Act 1876, s. 15; memorandum of Queen's Bench judges and Treasury reply of 27 May 1878, PRO LCO 1/11.

[201] Baggallay to Cairns, 2 January 1878, PRO LCO 1/11.

[202] See note 200 above.

[203] (1877) 12 L.J. 251. The matter was raised in the Commons by W. Williams (Parl. Debs. 3rd s. vol. 233 col. 329 (22 March 1877), and see Coleridge L.C.J. at vol. 233 cols. 1063–1065 (13 April 1877).

[204] Supreme Court of Judicature Act 1873, s. 29; Brett to ? Home Secretary, (January 1876), PRO LCO 1/4. Those chosen normally picked their circuits in order of seniority ((1873) 2 L.M. & R. (2nd s.) 176) and were very touchy about any interference from the Lord Chancellor: K. Muir McKenzie to Selborne, 31 December 1883, PRO LCO 1/11. However,

judge and two or three Lord Justices were regularly to be found doing circuit duty, but even then resort had sometimes to be made to commissioners, including the retired judge Sir John Mellor.[205]

From the outset, amid the criticisms of the assize system and the teething troubles arising from the early attempts to integrate it with continuous sittings in London, there were particular complaints of delays in the Chancery Division and the Court of Appeal stemming from the absence on circuit of their judges.[206] In Chancery it was aggravated by a burst of popularity among suitors who now had a choice of divisions, uncharitably attributed by some to more generous solicitors' costs.[207] Whatever the cause it produced frequent complaints of a "block in Chancery", particularly serious in 1882 and 1883.[208] Allowing suitors a choice of forum soon became impracticable and under the powers given to the Lord Chancellor great tranches of suits were several times removed into the Q.B.D.[209] Within Chancery the arrangement whereby each judge had a separate court with its own bar and suitors might choose their judge was already the subject of frequent criticism and in November 1882 the right to choose was removed and cases allocated to judges in turn.[210] Even so, "the Division functioned more as a collection of separate courts than as a unitary division",[211] and since many cases were not suitable to be handed from one judge to another, the absence of a judge on circuit duty could cause serious delays; thus when Pearson went the Northern Circuit in 1883 he was pursued by a litigant needing a certificate.[212] To send a Chancery judge on circuit at all it was often necessary to have a common law judge take over his cases: Denman stood in for Fry in July 1880 and for Pearson in 1883, Field for Fry in 1882 and even Day, who took little interest in civil cases of any kind, let alone Chancery ones, could be found in Chancery chambers.[213]

Some, such as Baron Pollock, were praised for their performance, but these substitutions were not generally regarded as

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Pearson and Chitty seem to have had some say in their first circuit: Manson, *Builders of Our Law*, pp. 384–385.

[205] (1880) 70 L.T.1.

[206] *E.g.* Parl. Debs. 3rd s. vol. 230 cols. 1145, 1149 (7 July 1876); vol. 231 col. 961 (10 August 1876); (1882) 17 L.J. 301; *The Times*, 5 July 1882.

[207] Predicted by Mr. Justice Stephen ((1880–1) 70 L.T. 168), and acknowledged as a factor by the Attorney-General: Parl. Debs. 3rd s. vol. 282 col. 1420 (2 August 1883).

[208] *E.g.* Parl. Debs. 3rd s. vol. 278 col. 910 (23 April 1883); vol. 281 col. 774 (9 July 1883); vol. 282 col. 1417 (27 August 1883); (1883) 18 L.J. 383, 602; (1883) 75 L.T. 160.

[209] (1879) 14 L.J. 134; (1882) 17 L.J. 389; (1883) 18 L.J. 267; (1884) 19 L.J. 193.

[210] R. Neville, (1876) T.N.A.P.S.S. 241–247; (1882) 17 L.J. 359; *The Times*, 7 November 1882. It was said that those with good causes chose the Master of the Rolls' (Jessel's) court, while those with bad ones opted for Malins: Oxford, *Memories and Reflections*, p. 70.

[211] Megarry, "Vice-Chancellors", 396.

[212] (1882–3) 27 S.J. 629, and see also (1882–3) 74 L.T. 446.

[213] (1880) 15 L.J. 236; (1882) 17 L.J. 347, 557; (1883) 75 L.T. 209.

desirable manifestations of fusionist thinking;[214] in February 1883 *The Law Times* opined that "nothing could be more unsettled than the state of the cause list during the circuits" while *The Times* in July 1882 pronounced that "[t]he propriety of sending Chancery judges to try prisoners and leaving Common Law judges to administer equity is anything but obvious, and the experiment has not, so far as we are aware, been attended by any results other than those which usually follow from employing men in that which they are not accustomed to do".[215] Even Selborne was driven to acknowledge that it created a good deal of inconvenience.[216]

Things were little better in the Court of Appeal. The spectacle of a learned, scholarly judge like Cotton wandering round small market towns to try a few trumpery torts and crimes was unedifying[217] and the judges themselves were clearly unhappy with the arrangement, for at the end of 1879 it was rumoured that they would be making representations about its effect on the arrears in the Court of Appeal and in 1880 one pundit confidently predicted that it would be stopped within the year.[218] In a debate in 1881 Cairns showed himself ready to abandon the practice but Selborne was back on the Woolsack by then and both he and the Lord Chief Justice were strong supporters of it. Coleridge was opposed in principle to hierarchical distinctions among the judges, but for Selborne it was a means of underlining the essential unity of the Supreme Court of Judicature.[219]

Nevertheless within a couple of years their rearguard action had collapsed. Selborne needed to persuade the judges to some minor assize reforms and in July 1883 announced that the role of the Lord Justices and Chancery judges was under review. He had reluctantly concluded by now that, except perhaps for symbolic purposes, they must be relieved of circuit duty, but it was plain that the Queen's Bench judges would not consent to shouldering the whole burden without receiving allowances.[220] When the Judges' Council discussed circuits in December 1883 this question occupied them for an hour and they voted unanimously that it was "a severe embarrassment".[221] Since the puisnes were more numerous than the

[214] (1883) 18 L.J. 110.
[215] (1882–3) 74 L.T. 260; *The Times*, 5 July 1882.
[216] Selborne to Coleridge (draft), 21 November 1883, PRO LCO 1/5.
[217] (1879) 14 L.J. 90, 127.
[218] *Ibid.*, 377; *The Times*, 27 December 1880, letter of R.B.B.
[219] Parl. Debs. 3rd s. vol. 263 col. 629 (12 July 1881); vol. 271 cols. 1227–1231 (3 July 1882).
[220] (1883) 18 L.J. 383. Letters from several judges in PRO LCO 1/5 explicitly allude to the expenses question.
[221] Selborne to Coleridge (draft), 21 November 1883; printed memo. (no date) and minutes of meeting of 6 December, PRO LCO 1/5; *The Times*, 9 December 1883.

appeal judges whose allowances would be saved, this meant squeezing money out of the Treasury and Childers reminded Selborne in December of Gladstone's views on judicial salaries.[222]

Selborne however had a strong case. The continuing block in the courts meant that the demand for more judges was growing clamorous and circuit allowances were a lot cheaper than additional judges. However, what forced a rapid settlement was the position of Mr. Justice Butt. Charles Butt, a rather uninspiring choice as the second judge in the P.D.&A. in 1883,[223] was the first in this position liable to go circuit. A piece of abysmal drafting in the 1875 Act had limited this duty to "when the state of business in the division allows", without answering the all-important question of who should decide when it did.[224] The Lord Chancellor contended that he should, and Butt did go on circuit twice,[225] but the President, Sir James Hannen, grumbled and when Butt found himself in the frame again in the spring of 1884 he flatly refused, arguing that it was for the Division to determine its own needs.[226] Selborne replied that such an interpretation would undermine the principles of the Judicature Acts and that a Queen's Bench judge could be requisitioned for the P.D.&A. if Butt's absence caused problems, as one journal had already claimed it would.[227]

But Selborne's position was weak and Butt knew it. Threats of amending legislation with vague hints that the great ports might then demand a permanent judge were mere bluff, since to bring the question of circuit liability before Parliament would be courting trouble.[228] By this time the judges were, "in an excitable state"[229] according to the Master of the Rolls, having rejected the Treasury's offer, which required them to relinquish their marshals, and they were evidently mutinous. The Lord Chancellor's secretary, Sir Kenneth Muir McKenzie, was summoned to Brett's country house for talks and a deal was finally struck which saved the marshals. On 10 June 1884 this was embodied in a Treasury minute, coupled

[222] H.C.E. Childers to Selborne, 21 December 1883, PRO LCO 1/11. In the House of Commons Henry Fowler made a strong criticism of this obstacle to a settlement: Parl. Debs. 3rd s. vol. 283 cols. 168–172 (11 August 1883).

[223] *The Times*, 27 May 1892. Gladstone was unenthusiastic, to Selborne, 10 April 1884, *Selborne MSS*, vol. 1868, f. 180.

[224] Supreme Court of Judicature Act 1875, s. 8.

[225] Butt to Selborne, 10 April 1884, PRO LCO 1/11. He enjoyed some aspects, A.H. Engelbach, *Anecdotes of Bench and Bar* (London 1913), p. 255.

[226] Butt to Selborne, 10 April 1884, Selborne to Childers, ?2 April 1884, PRO LCO 1/11.

[227] Selborne to Butt, 3, 6 April 1884, PRO LCO 1/14; (1884) 77 L.T. 212. The objection had also been made in Parliament by F.A. Inderwick of the Admiralty bar: Parl. Debs. 3rd s. vol. 281 col. 1914 (19 July 1883); vol. 283 col. 175 (11 August 1883).

[228] Selborne to Butt, 6 April and reply of 10 April, PRO LCO 1/14. This episode is alluded to by Stevens, *Independence of the Judiciary*, p. 13, but misdated to 1882.

[229] Brett to Selborne, 11 April, Muir McKenzie to Selborne, 12 April, PRO LCO 1/11. Negotiations are in PRO LCO 1/5.

with some minor changes which would "effect such an economy in the expenditure of the judicial time that the judges of the Court of Appeal, and of the Chancery Division and of the P.D.& A. Division may, as far as possible, be relieved from circuit business". This would relieve the pressure "and indeed, block of business [which] now exists".[230]

So the ending of the practice of sending all Supreme Court judges on circuit was officially attributed to the logistical problems it created in their own courts,[231] but the orotund voice of *The Times* pointed to another drawback:

> An unsuccessful experiment will be thus abandoned. It was supposed, a few years ago, when vague, crude notions about mysterious, unmixed good flowing from "fusion" were rife, that it would be a signal gain to take lawyers conversant with all the niceties of company or patent law, specific performance or injunctions, and set them, without any training or preparation, to try the criminals of a mining district or decide the petty disputes of rustics. The result has not been edifying. Judges who were all that could be wished when doing congenial work at Lincoln's Inn were seen to little advantage in the strange position in which they were, much against their wishes, placed; and they will be glad to be released from the performance of circuit duty.[232]

As we have seen with Amphlett and Lindley, common law barristers, who often seemed unconcerned at the plight of those accused of crimes who were forced to wait many months before the red judge arrived on assize, professed great doubts about the ability of equity trained judges to handle criminal trials.[233] In all, nine men from this background went circuit between 1876 and 1884. After Amphlett and Lindley there were Baggallay and Cotton from the Court of Appeal and from the Chancery Division Fry (in the Court of Appeal from 1883), Kay, Chitty, Pearson and North. By the time the practice was ended there had been references in Parliament to "scandalous miscarriages of justice",[234] and in the law journals to it being "something of a scandal",[235] besides a measured criticism from Serjeant Ballantine, a celebrated veteran of circuit life.

[230] (1883–4) 28 S.J. 2. Some judges' responses to the final offer are in PRO LCO 1/5 and minutes of the Judges' Council on 10 June are in PRO LCO 1/11.

[231] On 12 April Brett had written to Selborne that the block in the Court of Appeal, Chancery Division and P.D. & A. was so bad that if their judges went circuit there would be a complete breakdown. Selborne forwarded this to the Treasury on 26 May and Childers (5 June) acknowledged that it was decisive in swaying the Treasury: PRO LCO 1/11.

[232] 11 June 1884. Compare its earlier strictures in 5 July 1882.

[233] *E.g.* (1878) 13 L.J. 531; Parl. Debs. 3rd s. vol. 244 cols. 1451 (21 March 1879, G.O. Morgan), 1457 (J.R. Bulwer). The Lord Chancellor did point out that 1/4 of accused persons at assizes were acquitted: Parl. Debs. 3rd s. vol. 243 cols. 1394–1400 (18 February 1879).

[234] Parl. Debs. 3rd s. vol. 285 col. 1402 (13 March 1884, C. Warton).

[235] (1881–2) 26 S.J. 52, and see also (1883) 18 L.J. 110.

Ballantine was careful not to criticise individual judges by name but he supported his general remarks with topical allusions which contemporaries would have readily been able to identify, writing that "[t]he public have had their attention called to two recent cases connected with the administration of the criminal law." One of the judges in question is probably Fry, but the other is not easily identifiable.[236]

It was not just Chancery judges who were sometimes found wanting in criminal cases, for the much admired Sir Charles Bowen found a jury impervious to even the broadest irony, resulting in a fortuitous acquittal.[237] Nor were all equity judges bad on circuit. Lindley won over the doubters and obituaries described Kay as "as competent on circuit as in chambers", and decidedly more successful than his colleagues in that role.[238] A rather double-edged compliment to Chitty was that he surprised the bar with his knowledge of criminal and common law,[239] while Pearson too was said to have been perfectly sound.[240] On the other hand Pym Yeatman, prejudiced and unreliable but not to be discounted, alluded to the dreadful decisions of Cotton, Fry and North.[241] In an echo of Willes, Yeatman alleged that Fry claimed to have mastered the criminal law in a few weeks, and Fry's own account was that though he had dreaded circuit he came to like it and found that the experience helped him in the Court of Appeal.[242] His work is said to have impressed the bar, although he experienced an embarrassing difficulty in his first attempt to don the black cap.[243]

The judge who seems to have embodied all that the critics disparaged in equity judges was Ford North and it is one of his unhappy experiences which generated the story which entered the folklore of the bar and earned him the soubriquet "old bloody waistcoat".

North's unfamiliarity with circuit practice had already involved him in an imbroglio with the bar at Worcester in January 1882, for

[236] W. Ballantine, *Some Experiences of a Barrister's Life* (London 1883), pp. 336–337, 372–375. It seems, although the language is ambiguous, that he is referring to two different judges. One of the cases mentioned, from Staffordshire, was alluded to by North J. in his address to the grand jury at Gloucester on 6 February 1882, *Gloucester Journal*, 11 February 1882.
[237] Manson, *Builders of our Law*, p. 409.
[238] *D.N.B., Supplement*, vol. 3, p. 56; *The Times*, 17 March 1897.
[239] Manson, *Builders of our Law*, p. 385; *D.N.B., Second Supplement*, vol. 2, p. 2, and see (1883, September) Pump Court 9.
[240] M. Cookson, "Mr. Justice Pearson" (1886) 2 L.Q.R. 373–376. According to Manson, *Builders of our Law*, pp. 384–385, he had never addressed a jury or cross-examined a witness.
[241] (1896) 1 Judicature Quarterly Review 47. Asquith called Cotton and Pearson "two of the primmest 'high-brains'" of the time: *Memories and Reflections*, p. 71.
[242] *D.N.B., Twentieth Century (1912–21)*, pp. 200–203.
[243] *Ibid.*, Thorne, *Still Life of the Middle Temple*, p. 324.

which he had to apologise,[244] and his ignorance of slang such as "robert" for a policeman and of the music hall stars of the day soon became a matter for comment.[245]

The story of the bloody waistcoat takes different forms in different versions[246] but the fullest is, curiously, the last, in Bosanquet's *Oxford Circuit*, published as late as 1951:

> ... the climax came ... at Gloucester Assizes in which a man was charged with the murder of his child. The infant, so the evidence ran, was squalling on its mother's knees when the prisoner came up in a violent and quarrelsome mood and hit the baby sharply under the chin, thereby dislocating its neck. It was shortly after that a neighbour came in and seeing what had happened, turned on the prisoner and said, "Get out, you brute, you have killed your child." To which the prisoner replied, "Give me my bloody waistcoat and I'll get out." Naturally enough, no special reference was made to this remark by counsel in the case. When, however, the judge came to sum up after reviewing the rest of the evidence, he said to the jury, "Now, gentlemen, there is one matter which has not been alluded to either by counsel for the prosecution or the defence to which I must draw your attention, and that is the admission by the prisoner that there was blood upon his waistcoat."[247]

Bosanquet claimed to have had this account from A.J. Ram, who was in the next door court at the time, and although I have not been able to locate it in the local newspapers, so that the place or the time may be wrong, it is probably true in essentials.[248] North may also have been the "eminent Chancery judge" in an equally damning story retailed by a legal journal in 1884, who "remarked lately during a murder case on the northern circuit, 'But there is one important witness who has most unaccountably not been called—the prisoner's wife, who was present and saw indisputably the whole of the occurrence.' "[249] As Bosanquet suggests, such stories did much to discredit Selborne's experiment, even though they are understandably not alluded to in discussions on the question.

[244] (1882) 17 L.J. 58.
[245] Bosanquet, *Oxford Circuit*, p. 71; A.F. Engelbach, *More Anecdotes of Bench and Bar* (London 1915), p. 102.
[246] Engelbach, *Anecdotes*, p. 255 and G. Alexander, *The Temple of the Nineties* (London 1938), p. 193. No doubt there are others.
[247] Pp. 71–73.
[248] The British Newspaper Library copies of the contemporary Gloucester newspapers are not all in a condition to be produced.
[249] (1884) 2 Pump Court 5. The other candidate seems to be Kay.

6. Conclusion

So within a decade all three modes of mingling the streams of law and equity by judicial mixed bathing had ended. After Brett's promotion and Baggallay's retirement, the Court of Appeal was under the leadership of common lawyers in both divisions; the divisions of the High Court were staffed entirely from their respective bars, and apart from the forays of equity judges to Liverpool and Manchester, it was the common lawyers who went circuit as of old.[250]

Though Selborne put a brave face on it, both he and Cairns would probably have conceded that the restructuring of civil justice fell well short of their hopes. The rules and practice of the different divisions were far from uniform and the allocation of business only encouraged doctrinal separation. A detailed scrutiny of the reported decisions and practice is needed to elucidate precisely what degree of doctrinal and procedural fusion did come about, and who was responsible. In particular, an examination of the early years of the Court of Appeal, focussing both on the role of individual judges and on the effect of different combinations, would probably yield worthwhile results. It is clear that the full potential for fusion was not exploited. The story however is certainly more complicated—and more interesting—than accounts that are pitched in traditionally narrow terms suggest.

[250] There were exceptions. Bigham substituted for Stirling in the Chancery Division in 1904, but was not thought to be a success (Bosanquet, *Oxford Circuit*, p. 73) and J.A. Foote wrote in 1911 that "we are accustomed to the spectacle of Chancery judges who have cleared their own lists, and are brought in to assist their brethren in the King's Bench Division in the despatch of 'non-juries'": *Pie Powder* (London 1911), pp. 184–185. Lord Justice Bowen went the midland circuit in 1893 (Atlay, *Victorian Chancellors*, vol. 2, p. 418 n.1) and there may be other instances, but it was not a regular occurrence.