



## **What did the makers of the Judicature Acts understand by 'fusion'?**

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## What did the makers of the Judicature Acts understand by ‘fusion’?

MICHAEL LOBBAN

By the middle of 1851, the ‘fusion of law and equity’ had become ‘the slang of the day’.<sup>1</sup> In part inspired by the recent reforms in New York piloted by David Dudley Field, the reformist Law Amendment Society resolved in May that all justice could be administered in one tribunal under one procedural code and that, in cases of conflict, rules of equity should prevail over rules of law.<sup>2</sup> Nearly a quarter of a century later the Supreme Court of Judicature Act 1873 (U.K.) passed,<sup>3</sup> which paved the way for the creation of a single High Court unifying the existing superior courts in one body, which would operate according to a single set of Rules and in which equity was to prevail. The Chancery and common law courts were now fused into one; but whether this constituted a fusion of law and equity has remained a contested issue ever since.

In what follows, we will explore what reformers understood by ‘fusion’ in this era of reform, in order to understand what they thought the Judicature Act was meant to achieve. In some respects, the fusion of the judicatures was a natural outcome of half a century’s agitation by reformist lawyers, often crossing party lines, to modernise England’s archaic judicial system.<sup>4</sup> At the same time, by the 1870s the common law and Chancery bars had become quite distinct, with practitioners having a strong sense of the distinct nature of their courts. Although in the eighteenth century practitioners could find work on both sides of Westminster Hall, by the early nineteenth century the bar had become increasingly specialised.<sup>5</sup> The abolition of the equity jurisdiction of the Court of Exchequer in 1841 further reduced the opportunities for practice across jurisdictions, and by the middle of the century equity leaders were confining their practice to one of the Chancery courts. While common law men prided themselves on their forensic skills of testing truth through cross examination, the Chancery bar took the view

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<sup>1</sup> Anon., ‘The Lord Chancellor, The Law Reformers, and The Profession’ (1851) 42 Leg. Ob. 229, 230.

<sup>2</sup> ‘Society for Promoting the Amendment of the Law’ (1851) 17 L.T. 119, 119.

<sup>3</sup> 36 & 37 Vict. c. 66.

<sup>4</sup> For a view of law reform in the mid nineteenth century, see M. Lobban, ‘Henry Brougham and Law Reform’ (2000) 115 E.H.R. 1184.

<sup>5</sup> *O.H.L.E.*, vol. XI, 1050–1.

that its paper proceedings were generally more complex.<sup>6</sup> The common law court was an unfamiliar environment for many Chancery men, akin to stepping into a different world. Being about to appear in a copyright case in the Common Pleas, in November 1860 one member of the Chancery bar even felt it necessary to write formally to the Chief Justice, Sir William Erle, to ask whether there was any objection to his ‘wearing a moustache which he is desirous of continuing during the winter months’.<sup>7</sup>

As shall be seen, during the debates over fusion both Chancery lawyers and common law men worried about whether the reform might undermine distinctive, valuable features of their system. However, the divergent views over reform did not merely reflect the rival views of different practitioners. Law reformers themselves had different views of the nature of the problem to be solved. Some took the view that the distinction between law and equity was simply a product of a historical development during which the procedure of the common law courts had become ossified, and needed to be supplemented by a more modern and rational court. According to this view, both equity and common law courts applied systems of positive rules though equity’s were more appropriate to modern needs. Once the common law’s artificial forms and procedures were done away with, the argument went, a harmonious system would ensue naturally.<sup>8</sup> Others took the view that law and equity were distinct in their very nature. Not only did they deal with different kinds of rights – seen particularly in the distinction between legal and equitable property – but the very mentality of equity was distinct. Whereas the common law refined all its issues for determination by a jury, equity probed and directed the conscience of multiple parties in a way which could not be done by a jury, but needed the discretionary powers of a judge, exercised in accordance with the maxims of equity. For such reformers, there were limits to how far their procedures could be fused, since the matters dealt

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<sup>6</sup> As Sir Edward Sugden’s comments in Report of the Select Committee on Official Salaries, *H.C.P.P.* 1850 (611), XV. 179, 218, q. 2144.

<sup>7</sup> Letter from Coryton to Sir William Erle (13 November 1860), Bodleian Library, MS Don. c. 71, 91.

<sup>8</sup> See, for example, [T.H. Farrer], ‘The Severance of Law and Equity’ (1848) 8 *L. Rev. & Q.J. Brit. & Foreign Juris.* 62, which reviews C.F. Trower, *The Anomalous Condition of English Jurisprudence*, 1st edn (London: Hatchard and Son, 1848). See also the report of the Law Amendment Society’s Special Committee on Law and Equity Procedure: Anon., ‘Progress of Union of Law and Equity’ (1851) 14 *L. Rev. & Q.J. Brit. & Foreign Juris.* 143, 152–66. See also R. Bethell, ‘Inaugural Address’, in *Papers Read before the Juridical Society 1855–58* (London: Stevens, Stevens and Norton, 1858), 1–6 and his response to David Dudley Field in Anon., ‘Proceedings of Law Societies: Society for Promoting the Amendment of the Law’ (1851) 16 *L.T.* 352, 353 and his observations reported in Anon., ‘Proceedings of Law Societies: Juridical Society’ (1858) 32 *L.T.* 140.

with by Chancery judges would need the kind of machinery which had developed in their courts. A third view was held by those who felt that law and equity could be fused into one system, but that it would not occur naturally. Since the rules of law and equity were distinct and often in conflict, any complete fusion would require a codification of the relevant rules.

### **Early Debates over Fusion**

In the first half of the nineteenth century, calls for fusion were rare. Although Jeremy Bentham proposed a new code which would see no distinction between law and equity, his *pannomion* project was not taken up by reformers.<sup>9</sup> It was not until the late 1840s that works such as Charles Francis Trower's *Anomalous Condition of English Jurisprudence* helped put fusion back onto the agenda. Trower called for 'a fusion of the principles on which Legislation is to proceed'; and argued that since equity was based on a set of principles more suited to modern society, the legal ones should be merged into the equitable.<sup>10</sup> He also spent much time exposing the inefficiency and expense of sending parties to different courts and arguing for a simple uniform mode of procedure. This was a topic which was to take up most of the attention of reformers in the early 1850s.<sup>11</sup> The call for fusion continued to be made by reformers attached to the Law Amendment Society throughout this decade. In his first speech as Solicitor General, in February 1853, Richard Bethell told the Commons that in spite of the 'large portion' of Chancery reform effected in the previous year much remained to be done, and declared that he would himself 'never be content' without 'the consolidation of jurisdiction, and the administration of equity and common law from the same bench'.<sup>12</sup> Five years later, he argued that it should not be implemented gradually, but immediately and completely.<sup>13</sup> His fellow reformers also looked forward to greater fusion. 'The fusion of law and equity was certain to

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<sup>9</sup> One of his admirers, A.J. Johnes, did propose a union of the two jurisdictions in *Suggestions for a Reform of the Court of Chancery, by a Union of the Jurisdictions of Equity and Law with a Plan of a New Tribunal for Cases of Lunacy* (London: Saunders and Benning, 1834). Johnes later wrote a letter: 'On the Union of Law and Equity in relation to the County Courts' (1852) 15 L. Rev. & Q.J. Brit. & Foreign Juris. 313.

<sup>10</sup> Trower, *The Anomalous Condition of English Jurisprudence*, 73. This work may have been the first to use the word 'fusion' in England in relation to this topic. See also C.F. Trower, 'On the Union of Law and Equity' (1851) 15 L. Rev. & Q.J. Brit. & Foreign Juris. 107, 119.

<sup>11</sup> See Special Committee on Law and Equity Procedure, 'Second Report' (1851) 14 L. Rev. & Q.J. Brit. & Foreign Juris. 231; Anon., 'Fusion of Law and Equity' (1852) 16 L. Rev. & Q.J. Brit. & Foreign Juris. 184, 185.

<sup>12</sup> H.C. Deb., 14 February 1853, vol. 124, col. 96.

<sup>13</sup> Anon., 'Proceedings of Law Societies: Juridical Society' (1858) 32 L.T. 140. See also Anon., 'Juridical Society' (1858) 3 Sol. Jo. 33, 33, where he urged 'the consolidation of the principles of both law and equity'.

come in time', G.W. Hastings declared in 1859, 'and a uniform code of procedure would follow, of course'.<sup>14</sup>

But many in the profession were more cautious. Responding to Bethell, the *Law Times* observed that it did not yet 'understand what precisely are the changes desired, or even what are the precise things objected to'.<sup>15</sup> When reformers called for fusion, did they mean the fusion of legal and equitable rights, or of procedures or of judicatures? This journal not only felt that different legal and equitable rights could not be fused but also doubted whether the distinct procedures could be fused. As to the fusion of jurisdiction, it noted that the recent trend had been for greater specialisation of courts – such as the separation of bankruptcy from the Chancery. Bethell's projected fusion was if anything 'a policy contrary to the advance of civilisation'.<sup>16</sup> There was nothing illogical in one court determining that a trustee had property in certain assets (as when a trustee was sued in ejectment) and another court determining that the *cestui que trust* should have the benefit of it. Even in a fused court, these questions would need to be dealt with separately. Given the ever-expanding nature of judicial business, the *Law Times* was unconvinced by the project to give all courts complete jurisdiction.<sup>17</sup> Other voices were more progressive, but urged caution. The Metropolitan and Provincial Law Association argued that gradual reform was to be preferred to 'sudden and sweeping change' and supported measures which allowed the court before which a case was brought to determine the entire matter.<sup>18</sup> The *Solicitors' Journal* was also keen on proceeding cautiously.<sup>19</sup> It pointed out that New York's famous reforms had resulted in a large amount of litigation on technical points – often to resolve the question of which cases should go to a jury – and the lesson to be drawn from America was to avoid hasty fusion.<sup>20</sup>

The 1850s saw a number of steps taken by the legislature, on the recommendations of royal commissions appointed to reform the practice and procedure of the Chancery and the common law courts, to confer powers on each of the courts to deal completely with any case which commenced in them. The commissioners were cautious on the question of fusion. In its first report of 1852, the Chancery Commission admitted that it was often difficult to ascertain

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<sup>14</sup> Anon., 'Societies and Institutions: The Travers Lectures' (1859) 3 Sol. Jo. 536.

<sup>15</sup> Anon., 'The Fusion of Law and Equity' (1859) 32 L.T. 170, 170.

<sup>16</sup> *Ibid.*, 171.

<sup>17</sup> *Ibid.*, 170–1.

<sup>18</sup> Anon., 'Metropolitan and Provincial Law Association' (1858) 2 Sol. Jo. 977, 978.

<sup>19</sup> Anon., 'The Chancery Amendment Bill' (1858) 2 Sol. Jo. 518, 518.

<sup>20</sup> Anon., 'The Experience of New York' (1859) 3 Sol. Jo. 182, 182.

‘on which side of the boundary line between Law and Equity a particular case may range itself’.<sup>21</sup> However, the commissioners were wary of the proposal to remove the distinction between law and equity, taking the view that any such step ‘must be accompanied by a revision of the whole body of our Laws’.<sup>22</sup> They also felt that the distinct subject matter which went to equity would always need a distinct procedure, even if there were to be a single court.<sup>23</sup> They consequently recommended the more modest approach of conferring the jurisdiction exercised by the Chancery on the common law courts, and vice versa, to allow them to ‘administer complete justice’. The commissioners postponed discussion of the issue to their third report in 1856 (in part to see the effects of the Common Law Procedure Acts and the Chancery Amendment Acts). This report again reflected their cautious approach, with their main recommendations being to give the Chancery the power to award damages and to hear oral evidence. Any eventual fusion would arrive by slow steps.<sup>24</sup> The common law commissioners similarly felt that a ‘consolidation of all the elements of a complete remedy in the same court is obviously desirable’ in cases where the two sets of courts ‘operate upon the same subject matter in different ways’, or applied different forms of remedy.<sup>25</sup> Both courts were accordingly given some of the powers of the other court, notably in the Common Law Procedure Act of 1854 and Cairns’s Act of 1858.<sup>26</sup>

However, the piecemeal approach to assimilating the procedures of the courts proved both difficult and controversial. Neither the common law nor the equity judges showed great enthusiasm for using the powers newly conferred on them. By 1858, it was already evident that the common law judges were taking a restrictive view of their power to hear equitable pleas.<sup>27</sup> In this context, two attempts were made to confer greater powers on the common law courts, in areas where they had concurrent jurisdiction with equity. In 1858, Sir William Atherton introduced a bill to amend the 1854 Common Law Procedure Act to ‘remove doubts’ about the

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<sup>21</sup> *First Report Chancery Commissioners*, 2.

<sup>22</sup> *Ibid.*, 2.

<sup>23</sup> These objections made them doubt the very project of fusion, for ‘If the distinction in the procedure be preserved, the union of Equity and Common Law Courts would seem to effect a change more nominal than real’, *ibid.*, 3.

<sup>24</sup> This attitude can be seen in Edwin Field’s evidence, in which he argued that the first steps towards fusion were to be found in the assimilation of procedure: *Third Report Chancery Commissioners*, 54.

<sup>25</sup> *Second Report Common Law Commissioners*, 39.

<sup>26</sup> For more detail, see Lobban, ‘Preparing for Fusion’, 565.

<sup>27</sup> See, for example, *Mines Royal Society v. Magnay* (1854) 10 Ex. 489, 493.

common law courts' equitable power. The bill aimed to give them the same power regarding specific performance and injunctions as the Chancery held and to empower them to 'give the same Relief, absolute, conditional, or other, in Actions of Ejectment and all other Actions' as the Chancery could give. They were to have the same power to enforce their decrees as the Chancery; and the common law Masters were to have the same powers as the Chief Clerks in Chancery to deal with any matter referred to them.<sup>28</sup>

The bill caused some alarm among those – like the *Solicitors' Journal* – who regarded it not as a cautious step towards reducing the cost and inconvenience to litigators, but as a danger to the substantive law. In the view of this journal, the common law's technical system of pleading prevented it from being able to apply the 'larger and more liberal doctrines of courts of equity',<sup>29</sup> for while it was able to deal with simple facts giving rise to defined rights, it was unable to determine whether certain dealings were consistent with good faith or whether a court should exercise a discretionary power. Before common lawyers could begin to deal with equitable principles, their system of pleading would need to be changed. In its view, a simple edict that a common law court would have the powers of a court of equity would mean either that 'the jurisdiction will be tacitly dropped, or the whole equity system will be corrupted by being thrown bodily into the hands of courts and officers utterly unprepared' for this business.<sup>30</sup> It was particularly incredulous at the proposal that the common law courts be empowered to make orders restraining a party from setting up a legal title in cases of ejectment, directing the real title to be tried, as would be done in Chancery. 'It is intelligible that a court which recognises trusts should restrain the setting up in another court which refuses to acknowledge equitable states of a title not equitable good', it commented: 'But what can surpass the absurdity of a Court issuing an injunction against the production of particular evidence before itself?'<sup>31</sup>

Atherton's bill stalled, but the nature of the common law's powers to deal with matters of equity returned to parliament in 1860 in the wake of the third report of the common law commissioners. This report again disavowed any intention to deal with anything which was part of Chancery's exclusive jurisdiction; but reiterated the view that one court should be able to deal fully with each case before it. The commissioners regretted that the Common Law

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<sup>28</sup> Common Law Procedure Act Amendment Bill, *H.C.P.P.* 1857-8 (85), I. 419, 420-1, cll. 3, 5.

<sup>29</sup> Anon., 'Competition of Law and Equity' (1858) 2 Sol. Jo. 597, 597 (invoking J. Story, *Commentaries on Equity Pleadings* (London: Maxwell, 1838), 2.

<sup>30</sup> Anon., 'Competition of Law and Equity' (1858) 2 Sol. Jo. 597, 597.

<sup>31</sup> *Ibid.*, 598.

Procedure Act of 1854 had been too cautious, in not giving the courts the power to issue decrees of specific performance or to issue injunctions to prevent potential infringements of rights. They also wanted to extend the common law's powers to hear equitable pleas, so that the court would hear such pleas even where the conditional relief would be given in equity. They proposed that parties who could have raised equitable defences in a common law case should be prevented from going to equity after the case had commenced; for they were particularly concerned by the continued resort to equity to stop proceedings at law.<sup>32</sup> Only if the common law declared that it was unable to do justice should the case be allowed to go to equity. Less controversially, they proposed giving common law courts the power to relieve against forfeiture for non-payment of rent.

The commissioners' aim was not a fusion of the courts: rather, they claimed they had devised an 'effectual mode of putting an end to the contest between Courts of Common Law and Chancery by so distributing their jurisdiction as to render their interference with one another impossible'.<sup>33</sup> It would abolish the distinction 'between Common Law and Chancery Law' in those areas where the common law courts had jurisdiction – though it would not interfere in Chancery's own area. It would allow each court to confine its operation to the subject matters peculiar to each. There could be no conflict of jurisdiction since 'each court will be armed in itself with exclusive jurisdiction over the subject matter within its cognizance'.<sup>34</sup> However, the bill which embodied their ideas greatly alarmed the Master of the Rolls (Romilly) and the three Vice-Chancellors (Kindersley, Stuart and Wood), who realised that there was more at stake than simply giving the common lawyers the auxiliary powers of equity.<sup>35</sup> They were concerned that under this proposal, a plaintiff would be able to deprive a defendant of the benefit of having his equitable pleas considered by the judges most competent to deal with them, by taking the case to common law. Just as the *Solicitors' Journal* had in 1858, so the equity judges focused on the fact that the common law courts' procedures and structures were not competent to deal with the kinds of issues which went to equity. This had substantive ramifications: 'As long as the distinction exists between legal and equitable

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<sup>32</sup> See *Prothero v. Phelps* (1855) 7 De G.M. & G. 722; *Wild v. Hillas* (1858) 28 L.J. Ch. 170; *Kingsford v. Swinford* (1859) 4 Drew. 705; *Gompertz v. Pooley* (1859) 4 Drew. 448.

<sup>33</sup> *Third Report Common Law Commissioners*, 14.

<sup>34</sup> *Third Report Common Law Commissioners*, 14.

<sup>35</sup> One of the problems for suitors identified by the common law commissioners was that cases at common law could be 'stayed by injunction, upon the ground that there was something in the proceedings contrary to the law administered in the Court of Chancery, technically called Equity': *Ibid.*, 8.



interests', they argued, 'so long will two different courses of procedure be required'.<sup>36</sup> They also predicted that confusion would ensue, as courts of common law and equity would come to different conclusions on the same questions if these powers were conceded. They ended their letter by stating, 'We think no attempt should be made to alter our tribunals until a careful revision has been made of our whole law'.<sup>37</sup>

The common law judges responded by arguing that the changes proposed were much more modest than the equity men seemed to fear. The key question was the common law's inability to hear equitable pleas where the equity was 'conditional on something to be done *in futuro*, or on a contingency'.<sup>38</sup> The common law was unable to deal with such cases, since it had no power over a defendant who failed to perform the condition, having barred the plaintiff's claim. By conferring a power on the common law judges to enforce the condition, the impediment to their entertaining equitable pleas would be removed. The commissioners downplayed the threat to equity. To begin with, they noted that there was no intention to allow the common law courts to consider questions of equitable title to property.<sup>39</sup> They agreed that where the common law's machinery was inadequate, it could not deal with questions of equity. However, they argued that – apart from cases involving property, which were omitted from the bill – there were few cases where equitable rights could not be determined without multiple parties having to be brought before the courts, as the equity judges seemed to fear. They also seemed to concede that the principles of equity required specialist learning, but argued that the cases which would go to common law courts would only involve the simpler questions of equity.<sup>40</sup> The commissioners accepted that bringing law and equity into unison would be better done by substantive law reform rather than through 'a fusion of jurisdiction and procedure'; but they argued that such an approach would be to postpone reform indefinitely – to the 'Greek Kalends'.<sup>41</sup>

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<sup>36</sup> Anon., 'Observations on the Law and Equity Bill' (1860) 4 Sol. Jo. 408, 409.

<sup>37</sup> Anon., 'Observations on the Law and Equity Bill' (1860) 4 Sol. Jo. 408, 409.

<sup>38</sup> Anon., 'Law and Equity Bill: Memorial of the Common Law Commissioners Respecting this Bill' (1860) 4 Sol. Jo. 639, 639.

<sup>39</sup> Anon., 'Law and Equity Bill: Memorial of the Common Law Commissioners Respecting this Bill' (1860) 4 Sol. Jo. 657, 662.

<sup>40</sup> Anon., 'Law and Equity Bill: Memorial of the Common Law Commissioners Respecting this Bill' (1860) 4 Sol. Jo. 657, 663.

<sup>41</sup> *Ibid.*, 664.

Despite the apparently unambitious claims of the commissioners, much of the legal press was ambivalent about the reform. The *Law Times* defended the modern principle of the division of labour, which left specialist questions in the hands of experts, though it also felt that common law judges should be given the power to deal fully with the cases which came before them.<sup>42</sup> The *Solicitors' Journal's* main concern was not that the principle of fusion was wrong, but that the bill would 'destroy the larger and more comprehensive system' by transferring equitable cases to the common law, 'whose technical forms are utterly incapable of giving free play to equitable principles'.<sup>43</sup> The best way to obtain fusion was to give both sets of courts concurrent powers and give them time to accommodate their practice to their new duties, until it was seen on which foundation a single court of universal jurisdiction could be set up. The idea that there should continue to be separate courts – given the distinct nature of the cases which came before them – but with concurrent powers was attractive to other lawyers as well.<sup>44</sup>

The bill, sponsored by Lord Campbell, ran into trouble. In parliament, Lord St Leonards jumped to the defence of the equity side. While equity men had to know the rules of common law, since equity followed law, equity was 'utterly unimportant' for the common lawyer. Yet this bill (he argued) proposed 'to transfer a great mass of equity business to the common law Courts'.<sup>45</sup> Even that great old champion of reform, Lord Brougham, argued that 'there could not be a greater mistake than to suppose that a general fusion, as it was called, of law and equity was possible in this country'.<sup>46</sup> In the end, a much more modest bill passed, giving the common law courts power to relieve in cases involving the forfeiture of leases, but leaving the wider question of fusion for the future.

Despite the Law Amendment Society's great push for fusion in 1851, the debate over the next decade concentrated largely on the more modest proposals of reforming the procedures and powers of the courts in order to allow complete justice to be done in one court, in cases where there was concurrent jurisdiction but alternative remedies. The equity judges in particular remained sceptical over whether law and equity could be fused; certainly, they did not feel that there could be a fusion of law and equity without first seeing a reform of the procedures of the common law and a careful consolidation of the rules. At the same time, how

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<sup>42</sup> Anon., 'The Equity Judges on the Law and Equity Bill' (1860) 35 L.T. 38; Anon., 'The Fusion' (1860) 35 L.T. 157.

<sup>43</sup> Anon., 'The Fusion of Law and Equity' (1860) 4 Sol. Jo. 552, 552.

<sup>44</sup> See A.H. Houston, *The Fusion of Law and Equity* (London: Sweet, 1867).

<sup>45</sup> H.L. Deb., 22 June 1860, vol. 159, col. 839.

<sup>46</sup> *Ibid.*, col. 840.

far each court could be given the powers of the other without treading on to its proper territory remained controversial.

### **Hatherley's Judicature Bill**

In the late 1860s, reformers began to realise that the approach hitherto followed was unworkable. Litigants still had to deal with a multiplicity of courts, for the Chancery was still issuing injunctions to restrain cases at common law, even where an equitable defence might be pleaded there. Parties still ran the risk of being told by the House of Lords that cases taken to a court of equity should have been brought in a common law court, only to find that the statute of limitations barred their common law action. Addressing the Metropolitan and Provincial Law Association in 1865, H.J. Francis said, 'I have known the ablest counsel at the two bars to meet in consultation and with blank looks declare they did not know whether law or equity should be applied to'.<sup>47</sup> However, there remained divergent views of what fusion meant. While some took the view that the need for any division of business would disappear once 'the present artificial distinction between suits in equity and actions at law' was abolished,<sup>48</sup> others continued to argue that the business of the equity side would still be distinct.<sup>49</sup> Others still felt that there could be no assimilation of the courts without prior legislative preparation in the form of a code of laws.<sup>50</sup>

It was in this context of debate that a Judicature Commission was appointed in September 1867 to inquire 'into the operation and effect of the present separation and division of jurisdictions' and to consider 'uniting and consolidating' them.<sup>51</sup> The appointment of this commission followed a speech in the Commons in February 1867 by Sir Roundell Palmer, which called attention to the problems caused both by the exclusive jurisdiction enjoyed by a number of different courts, and by the problematic system of appeals. Its remit was consequently wider than the consolidation of law and equity, a topic which had not occupied

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<sup>47</sup> Anon., 'Societies and Institutions: Metropolitan Provincial Law Association: Some Remarks on the Fusion of Law and Equity' (1866) 10 Sol. Jo. 206, 207.

<sup>48</sup> Anon., 'Suggestions Addressed to the Judicature Commission' (1868) 12 Sol. Jo. 631, 632.

<sup>49</sup> See Houston, *The Fusion of Law and Equity*, and Anon., 'The Judicature Commission' (1868) 12 Sol. Jo. 621, 622.

<sup>50</sup> Anon., 'Societies and Institutions: Articled Clerks' Society: Codification' (1867) 11 Sol. Jo. 1041, 1041, reporting a lecture on codification by E. Charles to the Articled Clerks' Society.

<sup>51</sup> *First Report Judicature Commissioners*, 4.

much of Palmer's time in his speech.<sup>52</sup> The Commission issued its first report in March 1869. Its main concern was with the problems faced by suitors who still had to use multiple courts, despite the recent reforms. The commissioners illustrated the continuing problems caused by the existence of two courts by alluding to the litigation arising from the failure of Overend Gurney and Co., in which the liability of the same set of London Stock Exchange jobbers had to be determined by both the Exchequer Chamber and the Chancery Court of Appeal.<sup>53</sup> The commissioners were critical of a system whereby defendants were 'exposed to the risk of conflicting decisions' from 'Courts operating under different forms of procedure, and being controlled by different Courts of Appeal'.<sup>54</sup> They perceived a particular problem arising from complex company failures: in such cases, the liability of directors had 'frequently been brought into question in both jurisdictions and sometimes with opposite results'.<sup>55</sup> This convinced them that a tribunal was needed with 'full power of dealing with all the complicated rights and obligations springing out of such transactions', whether legal or equitable.<sup>56</sup> The commissioners also noted the 'strange working of a system of separate jurisdictions' in the county courts, which had a jurisdiction in common law, equity and chancery matters; but which dealt with them through distinct procedures and sent appeals to different courts.<sup>57</sup> The solution to the problem was not to be found in any further 'transfer or blending of jurisdiction between the Courts':<sup>58</sup> there had to be a single court.

What kind of fusion did this entail? The commissioners did not elaborate in detail on the kind of fusion they had in mind. On the one hand, the report's proposals relating to the structure of the new court suggested that the reform they had in mind was more one of procedure than substance, aimed at making life easier for the litigant rather than transforming the law. The report thus proposed that there be separate divisions, based on the existing courts,

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<sup>52</sup> Palmer had however defended the notion of an appeal court composed of lawyers with different specialisms: at this level 'a fusion of the two would be an absolutely good thing in itself': H.C. Deb., 22 February 1867, vol. 185, col. 849. Palmer's views were enthusiastically endorsed by *The Times*, which argued that 'a great deal would be gained by requiring every Judge to transact every kind of business': 'The Speech of Roundell Palmer', *The Times*, 25 February 1867, 8.

<sup>53</sup> *Coles v. Bristowe* (1868) L.R. 4 Ch. App. 3; *Grissell v. Bristowe* (1868) L.R. 4 C.P. 36.

<sup>54</sup> *First Report Judicature Commissioners*, 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Ibid.*, 8.

<sup>58</sup> *Ibid.*, 9.

with different classes of business going to the different divisions.<sup>59</sup> On the other hand, the commissioners' allusions to the Overend Gurney cases – and the rival approaches to misrepresentation developing in courts of law and equity – suggests that they sought a court which in which a unified set of substantive rules would emerge.

Less than a year after the report, Lord Hatherley announced to the Lords his plans to introduce legislation based on the recommendations of the Judicature Commission. It had become clear that 'the only plan is to intrust to one Court jurisdiction over the whole subject-matter of any cause'.<sup>60</sup> However while deprecating the existence of separate courts, Hatherley argued that the new court 'should have the power of dividing itself into separate divisions' in order that business could be assigned 'to that Court which shall seem most appropriate for it'.<sup>61</sup> This meant that 'you will still have a Court of Chancery, or a Court equivalent to the Court of Chancery – for, as to names, there is no great magic in them'.<sup>62</sup> The bill duly divided the High Court into five divisions which were named after the courts they were to replace, though the judges were given unlimited power to transfer proceedings from one divisional court to another.<sup>63</sup>

Hatherley did not lay very firm foundations for his measure. To begin with, he failed to consult the judges beyond sending them copies of the bill, resting content that their views had been sufficiently represented by the members of the Judicature Commission.<sup>64</sup> Moreover, the bill was very short on detail about how fusion was to be effected. Although the Lord Chancellor told the Lords that the procedure of the different divisions was to be assimilated 'so far as is possible', he left the details to be worked out by rules. Nor did the bill say anything regarding the relation between law and equity, leaving it entirely open as to which was to prevail in case of conflict. The maintenance of separate divisions and the absence of provisions relating to the substantive law suggested that the aim of the bill was largely procedural, designed primarily to solve the practical problem faced by litigants of needing to use different courts.

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<sup>59</sup> *Ibid.*, 10. See also Anon., 'The Report of the Judicature Commission – No. I' (1869) 13 Sol. Jo. 489, which stressed the need for distinct procedures.

<sup>60</sup> H.L. Deb., 18 February 1870, vol. 199, col. 510.

<sup>61</sup> *Ibid.*, col. 513.

<sup>62</sup> *Ibid.*, col. 514.

<sup>63</sup> High Court of Justice Bill, *H.L.S.P.* 1870 (32), IV.463.

<sup>64</sup> The *Law Magazine* criticised the Lord Chancellor for introducing the bill before the Judicature Commission had finished its work, and for giving only a skeleton procedure bill: Anon., 'The Lord Chancellor's Judicature Bills' (1870) 29 Law Mag. 152, 153.

Hatherley's initial bill was amended in April to address two areas of concern. First, there was concern among many Lords with the proposal to leave it to the judges to frame the Rules of Court. Lord Westbury objected that if the full implementation of the scheme had to await the agreement of the common law and equity judges on a set of rules, it could take forty years.<sup>65</sup> In response, Hatherley proposed to give the crown power to issue rules by Order in Council on the advice of the Privy Council. Secondly, the amended bill included a provision determining how conflicts between law and equity were to be resolved. An initial amendment was proposed in committee by Lord Penzance, to declare that 'The existing distinction between the principles upon which justice is administered in courts of law and the courts of equity is hereby abolished'. The principles acted on in equity were to 'be deemed part of the common law' and where common law principles conflicted with them, they were to be held 'restrained, modified, or wholly superseded' to the extent of such conflict. The proposed clause also provided that it was not to be construed to 'impair, alter, qualify, or in any way vary the rights of property' and that 'the relations hitherto recognized under the names of legal and equitable estate' should remain in full force.<sup>66</sup> The version which eventually found its way into the bill printed in early April was more modest, declaring that any jurisdiction hitherto exercised by the Chancery or Admiralty (otherwise than by statute) was to be declared part of the common law and to modify the common law to the extent to which it differed from it.<sup>67</sup> This formulation worried Lord Westbury,<sup>68</sup> who proposed a different formulation which was incorporated into the bill at the end of May: equity 'shall henceforth be blended and united with the common law of England' and 'control and modify the defects thereof', with the effect that 'equity and common law, so united as aforesaid, may be administered in all the aforesaid courts without difference or distinction'.<sup>69</sup>

Even as amended the bill was vague on the nature of the fusion, though it was clear that the shape of court would echo the existing division of common law and Chancery business. But did it entail fusion? It became evident over the summer of 1870 that there was a great deal of disagreement over what fusion entailed. Three approaches may be discerned. First, some took the view that there could never be a fusion of law and equity. Sir Richard Malins VC said

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<sup>65</sup> H.L. Deb., 18 March 1870, vol. 200, col. 176.

<sup>66</sup> *H.L.S.P.* 1870 (32a) IV.479.

<sup>67</sup> *H.L.S.P.* 1870 (72) IV.483.

<sup>68</sup> H.L. Deb., 29 April 1870, vol. 200, col. 2049-50.

<sup>69</sup> *H.L.S.P.* 1870 (72d) IV.507, 1870 (120) IV.513. It also provided that every right or defence available in equity should be available in any division of the High Court.

that any attempt to fuse law and equity would be as futile as any attempt to fuse the army and navy: one could no sooner imagine equity administered by a common law court than a warship sailing over land.<sup>70</sup> This was also the view taken by Lord St Leonards, who reiterated the opposition to fusion he had raised in 1860.<sup>71</sup> Even some supporters of the bill, such as Lord Penzance, felt that law and equity were essentially distinct. He rejoiced:

that this Bill provides for the re-distribution of business, by which the class of business which flows into the Common Law Courts shall find its way to the common law division, and the class of business which flows into the Courts of Equity shall find its way to the equity division of the Court.<sup>72</sup>

At the other end of the reformist spectrum, a second view was put forward which held that fusion was desirable, but that it could not be effected by the simple creation of a unified code of procedure. This was the position taken by Lord Romilly, who argued that substantive questions would need to be addressed. He gave as an illustration the rival views of courts of law and equity on estates for life without impeachment of waste. At common law, the tenant of such an estate was not liable for waste, yet in equity he could be restrained from making an inequitable use of his legal right. If the courts were to be fused, there would have to be one rule laid down: and it would be necessary to define exactly what was meant by ‘an estate for life without impeachment of waste’.<sup>73</sup>

A third intermediate view suggested that once a common court operating on a common procedure was set up, then substantive fusion would follow naturally. Some, such as Lord Cairns, argued that the difference between the systems was one of procedure rather than principle,<sup>74</sup> which meant that once procedure was reformed, fusion would follow. Others agreed that fusion could occur once a common procedure was created, but argued that there were distinctions of principle which could only be removed by careful distribution of the judicial personnel. As Lord Westbury pointed out, ‘the jurisdiction and principles of the one

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<sup>70</sup> Anon., ‘The Abortive Law Reforms’ (1870) 15 Sol. Jo. 67, 68.

<sup>71</sup> Lord St Leonards, *Observations on Transfer of Land Bill and other Law Bills in Parliament* (London: John Murray, 1870), 50–65, 112–20. See also *The Times*, 10 May 1870, 4.

<sup>72</sup> H.L. Deb., 18 March 1870, vol. 200, col. 185. See also his views in H.L. Deb., 29 April 1870, vol. 200, col. 2051, where he argued that ‘[s]o long as the substance and subject-matter of cases remain different, so long will one form of procedure be proper for one form of case, and a different form for another’.

<sup>73</sup> H.L. Deb., 29 April 1870, vol. 200, col. 2039.

<sup>74</sup> *Ibid.*, col. 2041.

set of Courts are almost *terra incognita* to the practitioners in the other'.<sup>75</sup> Complete fusion would require time, as equity lawyers educated the common lawyers in their principles.

A number of commentators in the press agreed that a full consolidation of the courts and their procedure would result in substantive fusion. The *Saturday Review* was critical of Lord Penzance's approach, taking his description of the reform to mean that the new court would be designed in such a way to empower the common law judges to cast off anything which savoured of equity, and to allow the equity side to transfer anything which savoured of law: '[t]he bandying of suitors from Court to Court will continue as now, but the operation will be a little more conveniently performed'.<sup>76</sup> In this journal's view, it was fatal to any scheme of fusion to keep the judges grouped in their divisions. Commenting on Lord Cairns's position, the *Law Times* agreed that there was no fundamental distinction between matters of law and equity. In its view, the only equitable matter the common law courts could not deal with was the discretionary trust, and this was only because it lacked the requisite administrative machinery. Unlike the *Saturday Review*, however, this journal supported the division of the court, observing that:

though a common law Judge may exercise the equitable or other peculiar jurisdiction in easy cases, there will often be others which it will be more safe and more proper to refer to the division more versed in such matters.<sup>77</sup>

The measure's chances of passing were fatally undermined by the intervention of the Lord Chief Justice, Cockburn, who in May 1870 published a pamphlet, *Our Judicial System*.<sup>78</sup> Cockburn's most pressing objections were not to the fusion of law and equity, for he admitted that distinction between them was an anomaly which needed to be removed and agreed that where they differed, law should follow equity.<sup>79</sup> His main objections were to Hatherley's proposal to give the Privy Council the power to make the rules, which was widely seen as an unconstitutional assumption of powers by the executive; and to the merger of the Queen's Bench's non-civil law jurisdiction (in respect of crime and the prerogative writs) into the High Court.<sup>80</sup> Paradoxically, he favoured the substantive fusion of law and equity much more than the union of criminal, public and civil law judicatures. However, he raised some telling

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<sup>75</sup> H.L. Deb., 18 February 1870, vol. 199, col. 523.

<sup>76</sup> Anon., 'The Chancellor's Law Reforms' (1870) 29 Sat. Rev. 400, 401.

<sup>77</sup> Anon., 'The Debate on the Judicature Bills' (1870) 49 L.T. 2, 3.

<sup>78</sup> (London: Ridgway, 1870).

<sup>79</sup> *Ibid.*, 4–5.

<sup>80</sup> *Ibid.*, 43.



questions about the nature of the proposed fusion of law and equity. He pointed out that it was entirely unclear from the bill whether it was intended to substitute equity for law where the two were in conflict, or whether the common law was to apply equitable principles to common law rights. Cockburn accepted that there was no reason why the common law should not recognise trusts or the married woman's separate property; there was no reason for different rules relating to the priority of creditors; nor any reason for formal deeds to be recognised at common law which were denied in equity. But like Westbury and Romilly, he argued that these were major questions which could not be settled by rules, but needed 'a careful collation of the two systems with a view to the blending of the two into something more complete and perfect than either'.<sup>81</sup> Soon after the publication of his pamphlet, Cockburn and the other common law judges also responded formally to the bill by sending series of resolutions to the Lord Chancellor, which largely reiterated Cockburn's position.<sup>82</sup>

Three different reactions to Cockburn's objections and the consequent failure of the bill can be identified, which echo the three positions already outlined. The first came from the *Solicitors' Journal*, which took a very conservative view of the aims of the bill. According to this journal, the bill was not intended to expand equity so that it would be applied to every case at common law. It simply sought to enact that every right existing at law or in equity should be enforceable in every court and that 'whenever the doctrines of law and equity are conflicted, the latter must prevail'.<sup>83</sup> This was a modest view of the changes envisaged: since, under the old divided system, the equitable rule would always prevail – albeit at some cost to the parties – this only ensured that the same result would obtain within one unified court. G.W. Hastings similarly told the Law Amendment Society that the bill did not change the law, but only the procedure.<sup>84</sup>

The second came from the *Saturday Review*, which feared the very kind of watering down of an ambitious reform which the Lord Chief Justice's pamphlet seemed to herald. This journal was convinced that the new system should be based on equitable procedure and be administered by men who understood equity, the system most adapted to the needs of modern

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<sup>81</sup> *Ibid.*, 27.

<sup>82</sup> Thus, they resolved that a 'careful collation of the Common Law and Equity Law' was needed, or at least the framing by parliament of clear principles on this issue. Willes J. (who did not attend the meeting) issued his own response. See Anon., 'The High Court of Justice Bill and the Appellate Jurisdiction Bill', *The Times*, 23 May 1870, 13.

<sup>83</sup> Anon., 'The Lord Chief Justice on the Judicature Bills' (1870) 14 Sol. Jo. 567, 567.

<sup>84</sup> Anon., 'Law Societies: Law Amendment Society' (1870) 49 L.T. 18, 18.

life. It was particularly concerned by Cockburn's view that one could simply leave it to the common lawyers to administer equity in 'Common Law Courts absolutely untouched with their old privileges and their old traditions'.<sup>85</sup> Left in the hands of the common law judges, equity would soon become unrecognisable. It was better to wait for a proper reform, it concluded, than to fail. As this journal saw it, equity was not simply a set of rules which common law judges could administer in their own courts: the tribunals which administered equity had to be 'informed with the spirit of Equity'.<sup>86</sup> This meant that they would have to sit side by side with the Chancery men: '[t]he fusion of Law and Equity is a practical impossibility without the fusion of the Courts'.<sup>87</sup>

The third reaction came from the Romilly and Lush, who were asked for their observations on the bills after their failure. Like Cockburn, they argued that much more attention needed to be paid to the substantive detail.<sup>88</sup> Romilly was particularly concerned by Westbury's provision that equity should be blended with and control the common law, and that every right and defence recognised in equity should be recognised in the High Court. He envisaged 'an enormous amount of litigation'<sup>89</sup> resulting from these changes, particularly from the rule that in cases of clash, equity was to prevail. According to the bill, where equity would relieve against them, the rules of common law were put an end to: 'But in putting an end to these rights Equity is shaken to her very foundations, which all rest upon those very rights'.<sup>90</sup> Romilly explained that '[t]he system of Equity is not a distinct system of law, but a personal interference with persons having legal rights, preventing them from making an unfair use of them'.<sup>91</sup> If the legal rights underpinning both systems were considered to be repealed, that might generate much confusion.<sup>92</sup> For Romilly, 'a fusion of law and equity can only be

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<sup>85</sup> Anon., 'The Fight for the Legal Championship' (1870) 29 *Sat. Rev.* 629, 630.

<sup>86</sup> Anon., 'The Judges and the Chancellor' (1870) 29 *Sat. Rev.* 696, 697.

<sup>87</sup> *Id.*

<sup>88</sup> 'Copy of the Observations of the Lord Chief Justice, the Master of the Rolls, and Mr Justice Lush on the High Court of Justice Bill and the Supreme Court of Appeal Bill', *H.L.S.P.* 1872 (57) XVIII.93.

<sup>89</sup> *Ibid.*, 13.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Romilly asked (*id.*) whether the legal estate of the mortgagee would be considered repealed: if the relevant section of the bill were regarded as 'a new Statute of uses' it would seem 'rather a considerable change in the law to be effected by a side wind, and will impose prodigious legislative duties on the 19 judges'. He added, 'It was established in *Kellock's case* [(1868) L.R. 3 Ch. App. 769], that a secured creditor having acquired at law an absolute right to a pledge, that right would not be interfered with in Equity till he had received the whole amount

accomplished, as it has been in India, by framing and passing a new code'.<sup>93</sup> 'The vice of the measure', Lush noted, 'consists in its dealing with the "fusion" as a matter of jurisdiction, instead of a matter of substantive law; thus making it the law of the Court, instead of the law of the land'.<sup>94</sup> He anticipated a dual system in future, where the law administered in the inferior courts would be different from that applied in the superior courts. Like Romilly, Lush argued that fusion had to be effected 'by way of substantive enactment' declaring what the law in each case should be. The general enactment in the bill – that equity should be blended with common law 'and control and modify the same' – would only cause confusion and litigation.<sup>95</sup>

In light of the experience of Hatherley's bill, the prospects for fusion did not look optimistic in the early 1870s. When Vernon Harcourt sought to put reform back on the agenda in July 1872, the Solicitor General, Sir George Jessel, poured cold water on the idea reminding the house of the 'universal disapprobation' given to the previous bill by the superior court judges.<sup>96</sup> Two months later, the Attorney General, Sir John Coleridge addressed the Social Science Association on the topic of law reform, defending a piecemeal approach to reform. Although he argued that it was barbaric and inconvenient to have two rival sets of courts, he added that law and equity were distinct by their nature and that the procedures used in each were adapted to their distinct nature. This did not make him hostile to fusion, but made him observe that the best way to obtain fusion would be through a code: 'Fusing law and equity by an enactment in terms that they shall be fused, and that whenever they conflict, equity shall prevail, appears to me ... an utterly impracticable and slovenly way of dealing with the question'.<sup>97</sup> Short of such fusion he advocated giving each court the powers of the other, in effect the policy of the previous decade.

### **Selborne's Judicature Bill**

Reform of the Superior Courts returned to the political agenda with the appointment of Roundell Palmer as Lord Chancellor (with the title of Lord Selborne) in October 1872. Unlike

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due to him, and that accordingly he could prove against a company in liquidation for the whole sum due, but if the legal right to both the pledge and the debt be destroyed, ... how can that case be supported?

<sup>93</sup> *Id.*

<sup>94</sup> *Ibid.*, 13-14.

<sup>95</sup> *Id.*

<sup>96</sup> H.C. Deb., 26 July 1872, vol. 212, cols. 1920 and 1933. See also Sir John Coleridge A.-G.'s response at cols. 1943-4.

<sup>97</sup> Anon., 'The Attorney General's Address on Law Reform' (1872) 1 Law Mag. 795, 800.

his predecessor, Selborne took care to consult the judges before introducing his bill. Cockburn and Romilly continued to argue for a more substantive fusion. Cockburn wished to see the distinction between law and equity removed:

for ever – even to the very name of Equity – by Equity being converted into Law – instead of the distinction being retained and the remedy for the short-comings of the Law – as distinguished from Equity – being sought in the fusion, not of the substantive law, but of jurisdiction.<sup>98</sup>

Romilly reiterated his desire to have a reform after the Indian model: every court should deal with the same matter, with cases commenced by simple plaints being heard by single judges. He also wanted business to be assigned to different courts alphabetically, so that it would be dealt with in different courts by rotation. ‘The subdivision and conflict of law has arisen principally from the division and substitution of different sorts of business amongst different courts’, he added, ‘and will arise again if not prevented’.<sup>99</sup>

Selborne’s bill aimed to overcome some of the objections raised by the lawyers in 1870, both in setting out rules of procedure in a schedule (which the judges were empowered to modify) and in preserving the old judicial titles. It provided that law and equity were to be ‘concurrently’ administered in the High Court and Court of Appeal. It stipulated that the court should give any plaintiff or defendant the same equitable rights or relief which would have been available in Chancery. The courts were to take note of all equitable estates, titles and rights, just as the Chancery would; and subject to the provisions giving effect to equitable rights, the courts ‘shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law’.<sup>100</sup> This overcame Romilly’s objections to the previous bill, that the triumph of equity would kill law. However like Hatherley’s bill, Selborne’s provided for divisions of the High Court reflecting the old pre-fusion courts.

It did not seek to codify law and equity, but it did set out ten areas where common law rules conflicted with equity and specified the solution. While it went into greater detail than

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<sup>98</sup> Selborne MSS. 1865, f. 215 (7 February 1873).

<sup>99</sup> He also proposed that every three or five years, a committee of the judges should harmonise the decisions of different Courts of Appeal ‘and make rules for the guidance of the Judges in future; after which previous decisions should not be cited. In this way you would gradually form one complete and consistent code’: Letter from Romilly to Selborne (undated), Selborne MS 1865, ff. 233-5. See also Romilly’s views expressed in H.L. Deb., 11 March 1873, vol. 214, col. 1723.

<sup>100</sup> *H.L.S.P.* 1873 (14) VII, s. 25.

Hatherley's bill in dealing with potential conflicts, the limited number addressed suggested that there was no perception in the government's mind that there was a general clash of doctrines which needed radical reconciliation, in the way Cockburn and Romilly thought. The initial bill did not include a general clause providing that in case of conflict or variance between rules of law and equity, the latter should prevail, though such a clause was introduced at the report stage.<sup>101</sup> Among the ten specific provisions, one provision was to solve the problem relating to conflicting rules on waste which Romilly had raised in 1870.<sup>102</sup> Other provisions related to conflicts in the way the courts dealt with the custody of children and time clauses in contracts. The bill also initially included a clause relating to conflicting approaches to misrepresentation. The proposed section 26(8) read:

In any suit or proceeding for damages or other relief on the ground of any untrue representation of fact, by reason of which any loss is alleged to have been sustained, it shall not be necessary to prove knowledge of the untruth of such representation by the person who made the same, if such person knew that information was being sought thereon by the person to whom the representation was made in any matter concerning his interest.

If this is an example of an attempt by Selborne to devise a rule which would fuse conflicting approaches in law and equity, it soon ran into trouble from a judge who felt it made an undesirable substantive change to the law. Lord Justice Mellish – a common lawyer who had been appointed a Chancery appeal judge – set out his objections to the Lord Chancellor. These included the objection that the clause would abolish 'the distinction which now prevails in Courts of Common Law between representations and warranties in the sales of personal chattels':

At present the rule of law well known to every broker, who draws up written contracts, is that whatever representations may have been made respecting the chattels during the negotiation of the bargain by the seller, he will not be bound to make them good, unless they are introduced into the contract as warranties, or unless the seller was guilty of fraud in making the representations. I think this rule of law ought not to be altered, first because it enables the parties to talk to each other freely during the negotiation,

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<sup>101</sup> Cockburn had suggested to Selborne the inclusion of such a clause: Selborne MS 1865, ff. 215-16.

<sup>102</sup> W.F. Finlason argued that the provision had been inserted to pacify Romilly, and he argued that it was unnecessary: W.F. Finlason, *An Exposition of Our Judicial System and Civil Procedure as Reconstructed under the Judicature Acts* (London: Longmans, Green & Co., 1877), 125.

secondly because if the parties intend that the seller should be liable in all events to make good his representations, there is a stipulation which is part of the contract, and ought to be inserted in the contract, and thirdly if the parties do not so intend, it is unjust to put a purchaser who has purchased goods at a lower price because he has got no warranty in the same position as if he had got a warranty.<sup>103</sup>

Although when Selborne brought the bill, he announced that it would ‘adopt the equitable rule as to liability for misrepresentation’,<sup>104</sup> the clause was dropped during the passage of the bill.

When the bill was first printed, it got mixed reactions.<sup>105</sup> The *Solicitors’ Journal* (whose articles on fusion were written by Arthur Wilson<sup>106</sup>) anticipated that the immediate effects of the measure would be slight, ‘the apparent object being, not to revolutionise – nay, scarcely even to reform – our judicature, but rather to supply it with the power of gradually effecting the needful reforms’.<sup>107</sup> While there would be a preponderance of common lawyers in the new court, the journal was confident that the Court of Appeal could ensure the purity of equity jurisprudence.<sup>108</sup> Commenting (anonymously) on the bill in the *Saturday Review*, G.W. Hemming (an equity man) described the fusion as nominal: for the allocation of business between divisions mimicking the existing courts was to ‘exclude all real union’.<sup>109</sup> ‘What is the use of saying that each Court shall have universal jurisdiction if rules are framed for distributing the business in precisely the same grooves which it has hitherto followed?’<sup>110</sup> He argued that the 1873 bill reflected Penzance’s view – that it was impossible to fuse the two. Hemming felt that the ‘hard, coarse doctrines of the Law must be merged and swallowed up in the higher, broader, and more refined principles of Equity’.<sup>111</sup> This could only be done by abandoning the idea that the names, constitution and personnel of the old courts should be maintained: there had to be equity judges sitting in each of the courts.

When the bill came on for a second reading in the Lords, Lord Hatherley explained what he understood fusion to mean. It did not mean any abolition of the distinction between

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<sup>103</sup> Selborne MS 1865, ff. 228-30.

<sup>104</sup> H.L. Deb., 13 February 1873, vol. 214, col. 340.

<sup>105</sup> Anon., ‘Societies and Institutions: Law Amendment Society: The Judicial System’ (1873) 17 Sol. Jo. 388, 389.

<sup>106</sup> They were reprinted as A. Wilson, *Equity and the Judicature Bill* (London: King & Co., 1873).

<sup>107</sup> Anon., ‘Societies and Institutions: Law Amendment Society: The Judicial System’ (1873) 17 Sol. Jo. 388, 389.

<sup>108</sup> Anon., ‘The Projected Law Reform’ (1873) 17 Sol. Jo. 361, 361.

<sup>109</sup> Anon., ‘The Lord Chancellor’s Bill’ (1873) 35 Sat. Rev. 232, 233.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

law and equity: '[t]here must be distinctions between legal and beneficial ownerships'.<sup>112</sup> The aim of the bill was the more modest one of allowing one court to have charge of any case brought before it from start to end. Some lords objected that the bill would simply preserve the old separate structures, with law and equity flowing in different channels. Selborne's response was to argue that parliament had to move 'by practical steps and degrees ... Time and experience were requisite to bring to perfection the union of law and equity'.<sup>113</sup> There was no intention merely to reproduce the old separate courts: the divisions were created for 'the more convenient dispatch of business only'.<sup>114</sup> The plan was not that all equitable questions should go to the Chancery Division, though he expected that the destination of the business would be to a 'great extent determined by the nature of the business and the experience acquired by the different Judges in administering that particular class of business'.<sup>115</sup> In the early stages of the reform at least, Selborne argued, it was better to classify the business according to its subject matter.<sup>116</sup>

Selborne's explanation seemed to suggest that the government had in mind a natural convergence of law and equity, which would follow a union of courts and procedures. However, this fuelled the fears of equity barristers that the preponderance of common law judges in the new court could result (as Hemming put it) in 'the deterioration of Equity jurisprudence'.<sup>117</sup> With seventeen common law judges and only four equity ones it would take two generations for the common law's numerical preponderance to be overcome, by which time the principles of equity jurisprudence would have been fatally damaged.<sup>118</sup> Hemming urged that equity jurisprudence rested on the court of Chancery and was preserved by its power to issue injunctions to prevent parties going to common law: this injunctive power (removed by the bill) needed to be maintained until the full fusion had been effected.<sup>119</sup> In a series of

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<sup>112</sup> H.L. Deb., 11 March 1873, vol. 214, col. 1717.

<sup>113</sup> *Ibid.*, 1731.

<sup>114</sup> *Ibid.*, 1733.

<sup>115</sup> *Ibid.*, 1734.

<sup>116</sup> 'He could not but think that under the Bill there would be abundant opportunity for administering equity in all the Divisions of the Court, while at the same time care was taken to adhere to the natural principles of classification, such as experience indicated as the most convenient to adopt in the first instance': *Ibid.*, cols. 1734-5.

<sup>117</sup> Anon., 'The Chancellor's Defence of his Bill' (1873) 35 *Sat. Rev.* 332, 332.

<sup>118</sup> *Ibid.*, 333.

<sup>119</sup> *Ibid.*, 332.

articles over the summer, he reiterated his objections to the Chancery side being ‘crippled’ by having its authority limited, while equity jurisprudence was confined to inexperienced hands in other divisions. Hemming protested against what he perceived to be the ‘degradation’ of the Chancery Division into a largely administrative tribunal and argued that each of the Vice-Chancellor’s courts should form the basis of a new division, since they were as much distinct courts as the common law ones.<sup>120</sup> While Hemming disowned any suggestion that he simply wanted to maintain the old separation, he was ambivalent about a form of fusion which he feared would undermine the specialist knowledge of equity.<sup>121</sup>

The wider equity bar was also alarmed. Both the silks and the juniors addressed letters to the Lord Chancellor and the members of the Lords’ select committee on the bill, expressing concern that the paramount powers of the Court of Chancery were lost under the bill. Like Hemming, they worried that the Lord Chancellor would not be part of this division and that much of its time would be taken up with administrative business. Rather than promoting fusion, the bill would endanger equity jurisprudence.<sup>122</sup> Lord Cairns shared the equity lawyers’ concern that the Lord Chancellor was not a member of the High Court, telling the Lords that the effect of the bill would be to reduce the number of primary equity judges. Since its aim was to bring about fusion, it was of the greatest importance that the Chancery court should not be weakened ‘either numerically or morally’.<sup>123</sup> He argued that just as a fusion of gold and silver with 15 parts silver and 4 parts gold would create an alloy which would be more silver than gold, so a fusion of 15 parts common law and 4 parts equity would result in the preponderance of the common law.

A number of common lawyers responded sceptically to the equity lawyers’ arguments. The *Law Magazine* was sceptical about the entire measure, seeking to rebut the notion that the common law was mere chicanery while equity was pure morality and to reject a reform they saw as subordinating the common law to equity. It was perfectly natural that the common law ‘should be made to absorb in a more complete matter Equity principles ... but that Equity the accessory should supplant Common Law the principal is not so’.<sup>124</sup> In the view of this journal,

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<sup>120</sup> Anon., ‘The Judicature Bill’ (1873) 35 Sat. Rev. 436; Anon., ‘The Judicature Bill’ (1873) 35 Sat. Rev. 705.

<sup>121</sup> His writings were gathered in G.W. Hemming, *Thoughts on the Fusion of Law and Equity, suggested by the Lord Chancellor’s Bill* (London: MacMillan, 1873). See also G.W. Hemming, ‘Equity, Law and Justice’, *The Times*, 15 May 1873, 12, in answer to W. Forsyth, ‘Law, Equity and Justice’, *The Times*, 12 May 1873, 13.

<sup>122</sup> The letters were published in ‘The Judicature Bill’ (1873) 17 Sol. Jo. 521, 521–3.

<sup>123</sup> H.L. Deb. 1 May 1873, vol. 215, col. 1265. See also Selborne MS 1865, f. 270 (18 April 1873).

<sup>124</sup> Anon., ‘Ought the Judicature Bill to Pass?’ (1873) 2 Law Mag. 534, 539.



all that was needed was an extension of the principles behind the Common Law Procedure Act of 1854. Other periodicals also took the common lawyers' side, albeit with greater enthusiasm for the measure. The *Law Times* was ready to concede that there should be an equity judge in each division, but was of the view that there was 'nothing mysterious or occult about equity jurisprudence'.<sup>125</sup> Nor did the *Solicitors' Journal* see equity as forming the larger part of modern jurisprudence: indeed, it commented that the notion that common law be merged into equity was akin to a proposal to merge Great Britain into Berwick upon Tweed, adding 'Equity, great as is its importance, and beneficial as is its influence, is, when compared with the Common Law, extremely limited in its range'.<sup>126</sup> The *Solicitors' Journal* agreed with Hemming that both legal and equitable forms of property would continue to exist after fusion, and that every court would have to recognise every kind of property. However, the only difficulty common lawyers would encounter would be in areas where legal and equitable doctrines were inconsistent (as in mortgages, fraud or undue influence). Since equity was not 'an aroma, nor a mystic tradition' but a body of positive law, it could be learned and applied by common lawyers.<sup>127</sup> They might occasionally make mistakes when applying the rules of equity, but that was the price which had to be paid for fusion.<sup>128</sup>

At the same time, the *Solicitors' Journal* was sceptical about plans to spread the equity judges across all the divisions, preferring to maintain a degree of specialisation. There was a natural division of labour, it argued, and it was 'impossible to suppose that Common Law Judges could manage the administrative business of the Court of Chancery, or work out a complicated suit with anything like the efficiency of Equity Judges'.<sup>129</sup> A similar view was put forward by William Forsyth. In Forsyth's view, the equity lawyers' opinions about the distinct nature of their jurisprudence were exaggerated.<sup>130</sup> At the same time, he argued that no one in their right mind would think of abolishing trusts and that it made sense to maintain a division of labour when it came to dealing with a subject as 'artificial and complicated' as trusts, even though every court should recognise all legal and equitable rights.<sup>131</sup>

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<sup>125</sup> Anon., 'The Law and the Lawyers' (1873) 55 L.T. 92.

<sup>126</sup> Anon., 'Mr Hemming on Fusion' (1873) 17 Sol. Jo. 496, 497.

<sup>127</sup> Anon., 'Fusion' (1873) 17 Sol. Jo. 513, 514.

<sup>128</sup> *Ibid.* Cf. Anon., 'Fusion' (1873) 17 Sol. Jo. 549, 552.

<sup>129</sup> Anon., 'Fusion' (1873) 17 Sol. Jo. 529, 530 answering a restatement of the equity bar's position by A.E. Miller Q.C., 'General Correspondence: Fusion' (1873) 17 Sol. Jo. 532.

<sup>130</sup> 'Law, Equity and Justice', *The Times*, 12 May 1873, 13.

<sup>131</sup> *Id.*

Selborne's response to the criticisms about the staffing of the divisions was not to increase the number of equity judges – which the Treasury would not allow – but to accept Cairns's proposal that the Lord Chancellor should be head of the Chancery Division (though it was not expected that he would sit often in that court).<sup>132</sup> For further reassurance, when the bill went to the Commons Sir John Coleridge reassured the equity men that the common law divisions should be strengthened from the outset with judges trained in equity.<sup>133</sup> This was not to be written into the legislation, but implemented informally. In fact, by the time the bill reached the Commons it was becoming increasingly clear that the ambitions of this bill – which preserved the old divisions with their distinct personnel, and which retained a preponderance of common law judges – were modest indeed. The spokesman for the equity men in the Commons, Osborne Morgan, feared that the bill would only effect only a paper fusion. It was not enough to enact that in cases of conflict, equity would prevail: it would be impossible effectually to fuse Law and Equity 'until all the Courts were provided with the same machinery'.<sup>134</sup> Vernon Harcourt also complained that the bill 'perpetuated and stereotyped the distinctions in the existing system' through the different divisions.<sup>135</sup> Harcourt wanted the old titles of the chiefs of the courts to be removed, so that the divisions would not reflect a law/equity distinction. Other members agreed that the bill kept everything 'in the old groove'.<sup>136</sup>

Responding to these criticisms, the law officers offered conflicting visions. Sir George Jessel, the Solicitor General, told the Commons that the Chancery Division was meant to be transitional rather than permanent, and that no additional staff were needed. In his view, as each side became acquainted with the other's doctrines so fusion would be effected.<sup>137</sup> Jessel's vision thus suggested an unproblematic fusion following naturally from the union of the present judicatures, somewhat like the view expressed by Cairns in 1870. Coleridge, speaking after him, took a different view: 'Law and Equity were two things inherently distinct, and the distinction was not capable of being destroyed by Act of Parliament'.<sup>138</sup> The aim of the bill was the rather more modest one of ensuring that parties were not sent from one court to another

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<sup>132</sup> See Anon., 'The Last Stage of the Judicature Bill in The Lords' (1873) 55 L.T. 21, 21.

<sup>133</sup> Anon., 'The Judicature Bill' (1873) 35 Sat. Rev. 770, 771.

<sup>134</sup> H.C. Deb., 9 June 1873, vol. 216, col. 666.

<sup>135</sup> H.C. Deb., 30 June 1873, vol. 216, cols. 1574-5.

<sup>136</sup> *Ibid.*, col. 1591 (C.E. Lewis).

<sup>137</sup> *Ibid.*, cols. 1587-9.

<sup>138</sup> *Ibid.*, col. 1601.

for a remedy. As he put it, ‘the object was not that Law and Equity should be fused, but that they should be concurrently administered’.<sup>139</sup>

## Conclusions

The Judicature Act created a single High Court, in which cases would be commenced in the same way in each division and in which each division had power to administer complete justice. There was a division of labour and the Chancery Division was given a distinct administrative machinery, adapted to dealing with the complicated questions arising from the execution of trusts and the distribution of estates. In the early years of the court, efforts were made to ‘mingle the waters’ by placing equity men in the common law side and vice versa. This reflected the ambition of men like Cairns and Jessel that once the judicatures were united and a common procedure created, there might be a gradual assimilation of common law and equity into one fused body of doctrine, as judges from one side imbibed the approach of the other and applied it to their developing law.

Certainly, the Judicature Act created conditions in which such an assimilation could occur. Once common law courts were free to use affidavit evidence and equity courts to use oral evidence when most appropriate, and once the civil jury had begun to decline (particularly after 1883), the structural and procedural distinctions which once hindered complete fusion began to be eroded. Nonetheless this was a slow process, which made it hard to think across categories: judges developing the law of negligence were still thinking of formulations to put to juries which judges dealing with breaches of trust were not. Moreover, the very nature of the 1873 reform created obstacles to such a fusion. The administrative machinery of the Chancery Division made it distinct.<sup>140</sup> Section 25(11) may have enacted that in case of any conflict, the equitable rule was to prevail: but its position at the end of a series of enumerated clashes indicated that it was designed to cover the kind of clear conflicts already enumerated, rather than heralding a rethinking of common law principles on equitable lines. The limits on fusion were perhaps best illustrated by the excision of the proposed rule on misrepresentation: and in 1889, in *Derry v. Peek*,<sup>141</sup> the House of Lords confirmed that common law view would

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<sup>139</sup> *Ibid.* Cf. his comments in H.C. Deb., 9 June 1873, vol. 216, col. 644.

<sup>140</sup> As Arthur Underhill put it, ‘No fusion of Law and Equity can make the same procedure applicable to the decision of an action for goods sold and delivered, and the administration of the property of a deceased millionaire’: A. Underhill, *A Practical and Concise Manual of the Procedure of the Chancery Division of the High Court of Justice Both in Actions and Matters* (London: Butterworths, 1881), vii-viii.

<sup>141</sup> (1889) 14 App. Cas. 337.

continue to be applied in cases where damages were sought even though an equitable view was available where rescission was sought. Despite the calls for a more thoroughgoing reform by men like Romilly, there was to be no wider rethinking of the law and equity division. Equity's traditionally exclusive jurisdiction – trusts – was to remain a distinctly 'equitable' matter.

Furthermore, as Patrick Polden has shown, within a decade of the legislation, 'the divisions of the High Court were staffed entirely from their respective bars', and for the most part 'it was the common lawyers who went circuit as of old'.<sup>142</sup> Even two decades after fusion, in 1896, one common law barrister could write of the Chancery men that 'they are a thing apart from the Common Law Bar, a society within themselves'.<sup>143</sup> If the procedures had been put in place for a natural convergence of the cultures of both bars, the force of habit and professional self-interest could also put a brake on how far there would be a complete fusion.

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<sup>142</sup> Polden, 'Mingling the Waters', 611.

<sup>143</sup> Quoted in *O.H.L.E.*, vol. XI, 1052.