THE OFFICE OF MASTER*

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Before dealing with the present office of Master of the Supreme Court it may be of interest if I relate something of the history of the position in Tasmania.

The only other Master of the Supreme Court was Joseph Hone, who held office between the years 1824 and 1836 and again between 1840 and 1857.

Hone, a barrister of Grays Inn, was appointed Master in Chancery for the Colony of Van Diemen's Land by Letters Patent dated 21 December 1823 at a salary of £400 *per annum* payable out of fees received. A despatch from Downing Street on 5 January 1824 indicated his duties as Master. These were as follows:

1. Taxing costs in actions at law and suits in equity.
2. Investigating all accounts.
3. Reporting to the Court on all disputed questions of fact in equity matters except such as might be referred to a jury.
4. Preparing conveyances, leases, etc., for the approval of the Court.
5. Attending to the management of estates of minors, lunatics, etc.
6. Taking depositions of witnesses not taken in open Court.
7. Attending in Court to assist the Judge as to the practice and procedure of the Court.

He arrived in Van Diemen's Land in 1824 with his family. In 1825 his salary was increased to £600. In 1826-1827 he was also acting as Attorney-General and there is a record of him advising upon the title to a distillery near Cascades. Between the years 1831 and 1836 he held a number of other offices: Coroner, Chairman of Quarter Sessions and Chairman of the Commission for the settlement of Claims to Grants. His position as Master was regularised pursuant to the Charter of Justice in 1831. In 1836 he resigned as Master to become Commissioner for Investigation of Titles and the office was in abeyance until 1840. In 1839, the year in which both his wife and daughter died, Hone was appointed a Commissioner of the Insolvent Court, but he vacated that office in 1840 upon being reappointed as Master. The Judges and the

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Attorney-General had been unanimous in their conviction that the office of Master should again be filled.

Chief Justice Pedder, on 5 June 1840, reported to Lord Russell, the Secretary of State for Colonies, concerning the reappointment of a Master. His Honour's recommendation took the following form:

> When the office was suppressed in 1836 the duties of it amounted to practically little more than the taxing of Bills of Costs and this duty having been performed by the Registrar, the Judges undertook to perform the others.
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> But since that time the business on the Equity side of the Court has much increased and the greater numbers of the references which would have gone to a Master have been made to me, and I must confess that partly owing to my own inexperience of the practice of a Master's office and the inexperience of most of the professional gentlemen in this place, and partly to difficulties arising from the general state of titles in this Colony, and to the impossibility of going with care and individed attention through the various papers which are brought into my office and of deciding at once, and in the midst of other business, upon the various applications made to me a considerable delay and some expenses have been incurred which might have been saved. In one suit the examinations of two of the parties only as to their accounts occupy several skins of parchment closely written and referring to their answers which also must be consulted.
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> On such matters I am applied to when the attorneys please, frequently as I am coming out of Court during Criminal Session or Civil Sitting or in term time and when perhaps I have in addition to attending to the Legislative Council or as it happened last year the Executive Council. For my own part therefore I should earnestly desire to see a Master appointed. I hope I shall not be considered to be transgressing the limits of my duty if I add that I would most especially recommend that a practising Barrister or Solicitor be appointed to this office. My own experience leads me to the conviction that it is necessary that the Master should have no fellowship with the practitioners.
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> It would be highly desirable that the office should be filled by an English Barrister who has been educated for the Chancery Bar, but I must add that I do not think that such a man would accept the appointment unless the salary were increased or he were allowed to receive the fees of his office.
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> Pedder C.J.

Hone is reported as living in Macquarie Street opposite All Saints Church in 1846. He remained Master until 1857 when the office was abolished by the Act then known as the Abolition of the Master Act but now known as the Supreme Court Act 1857. The 'Hobart Town Advertiser' of Friday 4 December 1857 stated that the object was to carry out a reduction and because the office of Master in Chancery had been abolished in England. At this time Puisne Judge Horne was President of the Legislative Council and a note in the same issue of the 'Advertiser' reported: 'Mr. Mann read a note from the President indicating that he was detained in the Supreme Court but would come to the House as soon as his duties there ended.'

Hone died at Hobart in 1861 at the age of 77. The family tombstone can still be seen in St. David's Park against the Harrington Street wall.

The office of Master was revived by the Supreme Court Act 1959 which permitted one person to be appointed both as Master and as Registrar.

The jurisdiction of the Master is prescribed in an amendment to the Supreme Court Civil Procedure Act 1932.[1] This amendment added a new paragraph to section 197 permitting the judges to make rules of court empowering the Master sitting in chambers to do:

> . . . any such thing and to transact any such business and to exercise any such jurisdiction in respect thereof as by virtue of any enactment, custom, rule, or practice of court may be done, transacted, or exercised by a judge in chambers, other than—
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> (a) a matter affecting the liberty of the subject;
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> (b) appellate jurisdiction, including review of a taxation of costs by an officer of the court other than the Master;
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> (c) an application for a writ of *certiorari*, prohibition, or *mandamus*;
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> (d) an application for an injunction or for a *mandamus* under subsection (12) of section eleven;
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> (e) an application relating to the custody of children; and
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> (f) an originating summons—
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> (i) involving the construction of a will or settlement;
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> (ii) under the Testator's Family Maintenance Act 1912; or
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> (iii) involving a question of title to property other than, where the application is under the Married Women's Property Act 1935, personal property.

Rules were subsequently made (a new Order 60A) giving the Master jurisdiction in conformity with this enactment, and providing for appeals from the Master to a judge in chambers. The nature of such appeals was judicially determined by Gibson J. in the recent case of *re K. R. Wood & Co.*[2] His Honour there held that an appeal from the Master under our rules is in the nature of a rehearing and not of an appeal in the strict sense and that a judge on such an appeal has full power to receive further evidence. His Honour's conclusion proceeded from a comparison with the English rules[3] and the application of the English decisions of *Cooper* v. *Cooper*,[4] *Evans* v. *Bartlam*[5] and *Miller* v. *Miller*.[6]

By section 14 of the Supreme Court Civil Procedure Act 1932 the civil jurisdiction of the Supreme Court can be exercised by:

A Full Court,
Single judges in Court,
Single judges in chambers.

As the Master can do anything (subject to the statutory exceptions) which may be done by a judge in chambers, he exercises the jurisdiction of the Court when sitting in chambers. Thus it is that where an Act refers to an application being made 'to the Court' the Master can deal

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1 Supreme Court Civil Procedure Act 1959, s. 7.

2 Tasmanian Supreme Court 9/8/62, unreported.

3 R.S.C., O. 54.

4 [1936] W.N. 205.

5 [1937] A.C. 473.

6 [1961] P. 1.

with it if it can be dealt with by a judge in chambers and so long as it is not within the list of statutory exemptions. Examples of such applications are:

(a) Applications under section 22 of the Legal Practitioners Act 1959.

(b) Applications to stay proceedings under section 6 of the Arbitra- Act 1892.

(c) Applications to extend the time for instituting proceedings under section 65A of the Traffic Act 1925.

Of course, where a statute or a rule of court refers to anything being done by 'a judge' then the Master can also deal with it provided it can be done in chambers and is not within the exceptions. For example, Order 38, rule 47 (as amended by Statutory Rule No. 50 of 1962) allows an assessment of damages to be made by the Court or a judge with or without a jury. Provided that no jury is required, such an assessment can be done by the Master in chambers. This is because section 26 (2) of the Supreme Court Civil Procedure Act 1932 provides that:

> subject to the Rules of Court, any damages recoverable in an action, which are to be assessed by a judge sitting without a jury under an interlocutory judgment, may be assessed by a judge sitting in Court (whether the sitting is a civil trial sittings or not) or in chambers.

It should also be remembered that under Order 15 rule 7 (in connection with applications for leave to enter final judgment) the action itself may, with the consent of the parties, be disposed of by the Master. This enables an action to be disposed of comparatively speedily and cheaply.[7]

The position under the Matrimonial Causes Act 1959 (C'wth) with regard to the Master and Registrar is interesting. Certain functions have been given to registrars under the new rules. A registrar as such is authorised to make orders for substituted service, amending pleadings, extending time, assessment of maintenance pending the disposal of proceeedings and so on.[8] It can be argued that some of these functions are of a judicial nature. If the investment of this jurisdiction were challenged upon this ground, the High Court might hold it to be invalid.[9] Prior to the passage of the Commonwealth Act, the Registrar of this Court did not have (or was not meant to have) any judicial functions as such, unless the taxing of costs preserved to the Registrar by the Supreme Court Act 1857 is regarded as a judicial function. Therefore, if the Registrar has in fact been given judicial powers under the Commonwealth legislation there must be some constitutional justification for it. Furthermore, it would seem on the authority of a long line of

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[7] Full details of the practice are contained in the notes to the English R.S.C., O. 14, r. 7. See *Annual Practice*, 1963, p. 273.

[8] Matrimonial Causes Rules, 1960 (C'wlth) rr. 65, 91, 204, 318.

[9] *E.g.*, the power to extend time, r. 318. See *James* v. *Dep. Comm. of Taxation* (1957) 97 C.L.R. 23. But see *Nicholls* v. *Nicholls* (1962) 3 F.L.R. 478.

constitutional authority that the legislative authority of the Commonwealth to invest State Courts with Federal jurisdiction does not enable Parliament to regulate the internal organisation of those Courts.[10]

The Master's position, as distinct from that of the registrar, is different. By virtue of section 197 (1) VA of our Supreme Court Civil Procedure Act 1932 he has concurrent jurisdiction with the judges as to all chamber business subject to the statutory exceptions. Rule 9 of the new Matrimonial Causes Rules 1960 (C'wth) provides that certain matters may be dealt with in chambers—some in 'private chambers' and some in 'public chambers'. There are no Commonwealth Rules prescribing how the chamber business is to be exercised and therefore, by virtue of section 127 of the Act, the procedure of our Court applies. That is to say, the Master may deal with any matter which he is empowered to deal with under our Order 60A, rule 1. However, the Chief Justice has given a Practice Direction that the Master cannot deal with matters which have to be dealt with in 'public chambers' (unless he makes a consent order pursuant to rule 316) nor with the following matters in private chambers:

(a) evidence by affidavit, unless the Master's Order is expressed 'unless otherwise ordered by the trial judge';

(b) applications for leave to intervene;

(c) applications to enforce orders by attachment (*i.e.*, of the person, as it affects the liberty of the subject).

The Master therefore has, with these exceptions, a jurisdiction in private chambers which is co-extensive with that of a judge, and has wider powers than a registrar. For example, *he can dispense* altogether with service under section 121 of the Act (either with or without conditions) whereas a registrar under rule 65 can only order substituted service.

Two recent articles in *The Law Quarterly Review* have dealt with the offices of the Queen's Bench Master and the Chancery Master in England.[11] The jurisdiction of the Master in Tasmania is substantially the same as that of both of these offices, and in both places one of the Master's functions is to be available to advise on practice and procedure. In this latter respect the English system is more formal than ours: there, on the Queen's Bench side at any rate, one of the Masters sits as Practice Master on one day each week while solicitors or their clerks or counsel attend him. In England the Masters have jurisdiction to try any action by consent: here it is only found in Order 15, rule 7 in relation to applications for final judgment. Their jurisdiction under the Married Women's Property Act is not limited as is that of our Master.

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10 *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481; *Bond* v. *G. A. Bond & Co. Ltd.* (1930) 44 C.L.R. 11.

11 A. S. Diamond, 'The Queen's Bench Master' (1960) 76 L.Q.R. 504. R. E. Ball, 'The Chancery Master' (1961) 77 L.Q.R. 331.

The fact that the Master's office in Tasmania is combined with that of Registrar of the Court, Registrar of Companies, etc., and Sheriff, means that he has a wider variety of administrative and advisory functions than his English counterparts. It also precludes him from dealing with inter-pleader summonses in which the Sheriff is involved.

On the equity side, the Master's functions in Tasmania consist mainly of accounts, enquiries and proceedings in lunacy. In England, there is a special Master of the Court of Protection to deal with lunacy applications and to perform other functions in lunacy which are done by our Public Trustee. Matters relating to the guardianship and adoption of infants, which appear to form a sizeable portion of the jurisdiction of the Chancery Masters in England, are expressly excluded from the Master's jurisdiction in this State.

As appears from the articles of Masters Diamond and Ball, the office of Master, in one form or another, has been functioning in England for something like 800 years. Today, its presence there enables the whole of the judicial work of England to be handled by something like 62 judges. When the office was revived in Tasmania it was hoped that pressure on the judges would be relieved and that the hearing of chamber applications would be expedited. I think that both of these aspirations have been realised. Although parties have a right to come before a judge in chambers instead of the Master, there have been few cases in which this has been exercised. The Master provides an effective means for helping to achieve speedier justice, not only in hearing summonses but also in taking accounts and conducting inquiries and assessments of damages. Thus he can play no insignificant part in the administration of the law.