JUDICIAL PROBLEMS IN A GROWING STATE

THE EXTENT OF JUDICIAL WORK IN N.S.W.

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Little attention is given in current legal literature to problems involving procedures, administration, costs and jurisdiction of courts, both criminal and civil. Unfortunately this tendency to lack of interest in the practical problems of courts is particularly noticeable in relation to those courts which administer the criminal law. We have, I believe, reached a point in the growth of this State's legal system where much serious thought ought to be given to the actual machinery of judicial administration to ensure that, with the ever-increasing growth of litigation, the adaptation of procedures both criminal and civil to deal with problems of a rapidly changing world is made.

That the actual machinery of legal administration requires serious thought in a period of growth can be seen by an examination of some figures. In the State of New South Wales there are 128 men exercising judicial office as judges or magistrates. Of these the Industrial Commission provides 7 and the Workers' Compensation Commission 4, leaving the general litigious work of a state with a population of four million to be done by some 45 Supreme and District Court judges and 72 magistrates,[1] though some of the latter are engaged as chamber magistrates and upon industrial and other special work. Of the judges, it can with safety be asserted that over ninety *per cent* of the actions heard in the Supreme Court at *nisi prius* and a very great proportion of the District Court work is taken up with running-down cases.

In 1935 we had in New South Wales a chief justice and 10 Supreme Court judges; in 1945 the number was a chief justice and 11 judges; in 1950 a chief justice and 11 judges; in 1955 a chief justice and 18 judges; in 1959 a chief justice, 20 judges and 2 acting judges. In 1935 the District Court consisted of 9 judges; in 1945 it was 10; in 1950, 12; in 1955, 19; in 1959, 22.[2]

Some idea of the amount of the work of courts[3] in New South Wales can be gained from the following figures:

CASES TRIED AT MAGISTRATES' COURTS

1955	*1956*	*1957*	*1958*
254,487	271,172	307,824	323,097

in addition to the following number of cases in which parking offences

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* Of the Supreme Court of New South Wales.

[1] A list of judges in all jurisdictions in New South Wales appears in the 1959 *N.S.W. Law Almanac* 49, 56, 58, 59, and a list of Magistrates *id.*, 60, 61.

[2] *N.S.W. Law Almanac* 1935, 1945, 1950, 1955 and 1959.

[3] I have accumulated these figures from the *Commonwealth Year Books*, the *N.S.W. Year Books* and from the Bureau of Census and Statistics.

were settled by payment of fines to the Police Department without court appearances:

	61,179	163,921	237,811	315,058

SMALL DEBTS COURT

	1955	*1956*	*1957*	*1958*
Number of plaints entered	76,167	53,881	81,422	63,929
Number of judgments for Plaintiff	23,548	21,411	36,340	26,228

DISTRICT COURT

Number of Summonses Issued

	1955	*1956*	*1957*	*1958*
Metropolitan	27,236	31,857	38,337	46,500
Country	14,806	17,059	21,104	27,869
	42,042	48,917	59,441	74,369

The figures in the common law jurisdiction of the Supreme Court tell an amazing story. In 1945, 1,726 writs were issued at common law. By 1950, the number had grown to 4,384. In the five years between 1950 and 1955, the number more than doubled to 10,946. In 1956, the number was 14,464; in 1957, 16,728, while in 1958 the figure was 14,096. Fortunately, the work in the other jurisdictions of the court has not increased in anything like that proportion. The number of divorce petitions issued in 1945 in a jurisdiction where work might be expected to increase was 4,120; in 1950, 3,879; in 1955, 4,097; in 1958, 4,817. In the higher criminal courts, the figures do not reflect anything like the trend of the common law writs. In 1931, 1,711 persons were tried in the higher criminal courts; in 1950, the figure was 1,775; in 1955, 1,966; in 1958, 2,494. Nor has the total of persons convicted per 10,000 of population varied very much over the years, being 4.75 in 1931 and 4.71 in 1955.

Though the greater number of writs, summonses or plaints issued never come to trial, still those that do represent a very substantial amount of work. The economic, social and political implications of the huge quantity of judicial work done in this State serve to emphasize how vital it is to a living legal system that courts provide the highest degree of judicial efficiency, consistent with full and patient hearings, but that procedures are designed to ensure that full and patient hearings do not equate with inordinate costs and prolixity. It is also important that unnecessary and inordinate delays in the hearing of cases be prevented and that, as far as possible, cases be heard before tribunals presided over by men adequately qualified to deal with them. I also believe that the jurisdictions of the courts should be such, in relation to each other, that each set of courts in a judicial hierarchy takes those cases most suitable for it to determine in the public interest and in the interests of the parties. Increasing work and the numbers of men concerned involve increasing administrative control in the allocation of judicial work, a thing not easy to equate with judicial independence.

In any living legal system there must always be conflicting claims with other instruments of government for funds, and as between those conflicting claims there is always the possibility that judicial administration can become poor and shabby and that under-paid and over-strained judicial officers can be called on to exercise important jurisdictions. Unless lawyers particularly are aware that these problems exist, there is always the danger that standards can

be eroded from within. A harsh and unenlightened taxation policy that takes no account of the hidden expenses no judge can escape, on the one hand; and a policy of having to beg from government departments necessary facilities and to face frequent refusals, on the other hand, can both, over the years, break down learning, patience and independence much more effectively than overt attacks. In this State we are not free from either danger. The implications of the overt attack are obvious and would result in immediate action, even by those who are carrying out a policy unmindful of the fact that such a policy attacks the system from within. Erosion of standards can be much more dangerous, because unintended and unrealised.

The need for judges to be men of wide reading and general culture is not receding; rather is the demand increasing that we ought to have such a knowledge of history and philosophy of law as will fit us, in a scientific age, fully to realise the place of the law as an integral factor of government. The balance between freedom and order is a delicate one; to appreciate it, I believe that one must have a philosophy of law and that one must, within one's capacity, never cease to be a student. Except that it has to be widened considerably to include fields not then thought of, what Pleydell said to Colonel Mannering is as true now as when it was written. It will be recollected that when the latter commented on the barrister's books Pleydell said, "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[4]

PROBLEMS OF POPULATION GROWTH

It may, I believe, be fairly claimed that changing circumstances involved in the rapid increases of population and wealth and changing industrial conditions in many areas may necessitate a new approach, and particularly to the administration of criminal justice. Though the legal profession rarely shows itself to be vitally interested in the problems of criminal law administration, the public is. An unjust verdict by which an insurance company is called upon to pay £10,000 on a civil claim causes no ripple, but a public outcry about any conviction is always a possibility.

By 1975 it is predicted that the population of the County of Cumberland will be 2,458,560 and by 2010, 3,740,000.[5] This increasing urbanisation and the possibility of the development either at an adult or a juvenile level of "gangsterism" are going to present all those associated with the administration of the criminal law, whether as police, prosecutors or defending counsel, judges, penologists or those who, through their obligations in respect of the law or any of its cognate disciplines, have an interest in this topic, with serious problems in the way of the prevention, punishment and prediction of crime and the relations between mental ill-health and criminal behaviour. Those problems, in themselves, may cause us to ask ourselves whether the days are not passing when a thorough knowledge of the law was sufficient for a criminal judge or magistrate and whether he now needs to have, as well, some substantial knowledge of sociological and psychiatric disciplines. Balancing on the one hand the claims of individual liberty and the right of the individual not to be

[4] Sir Walter Scott, *Guy Mannering*, Ch. XXXVII.
[5] *Growth of Population in Australia in the County of Cumberland* (1959) 40.

imprisoned or punished except for a breach of the law, and on the other hand the right of the community to be protected against the predictable crime and against the possibility of any nests of crime at whatever level developing, the future of criminal law requires close thought. On the proper answer to the problems it poses depends, to a large extent, the safety and peace of many people. An outbreak of "gangsterism" because a community has failed to realize the importance of preventing and controlling crime and of supporting the agencies which prevent, detect and punish it, could be an uncomfortable state of affairs for a lot of people, especially if that ever led to the stage of minor civil war between the authorities and any particular group. Remote though the latter seems to be, it is never impossible.

Sheldon and Eleanor Glueck in their latest book, *Predicting Delinquency and Crime*, published in 1958,[5a] take as a premiss that criminal behaviour can be forecast almost as accurately as an insurance company figures the odds on accident and death. If that be true, it is a challenge to traditional legal thinking as to whether it would be possible to fit that idea into the rule of law in a free society.

Many areas now have large populations of New Australians who came to make their homes here with views of the law and its administration which are not the same as our traditional views. More and more of these people are becoming naturalised and, hence, entitled to serve on juries. Many of them come before courts as parties and witnesses. In the past, when Australian communities were small and closely knit, the fact that juries in some areas refused to convict or allowed themselves to be swayed by local considerations in cases of importance was not of such moment as it is now. But under present-day conditions, such a state of affairs might turn out to be dangerous in the extreme in areas where, in some parts, the population is largely migrant; a feeling that local juries will not convict Australians but will convict migrants, or will convict no one, can only lead to lawlessness.

THE STATUS OF THE CRIMINAL COURTS

Examination of the problem of the jurisdiction of criminal courts at all levels is, in my belief, an important sphere for legal research. We have in this State, of course, three levels of criminal administration. Firstly, there is the magistrate's court, to which the greater proportion of cases come and which, for most citizens, represents their only knowledge of standards of legal administration. The development of any widespread feeling that in such courts the police are always believed and the citizen never, or that if you plead not guilty you will get a heavier punishment to discourage others doing the same, or that magistrates are under such pressure that they do not give cases full hearings, cannot add to a public sense of the integrity of courts. Next are the Courts of Quarter Sessions, with jurisdiction to try all indictable offences except offences of treason and piracy, still capital, and the offences formerly capital until the Crimes Act of 1955.[6] Quarter Sessions, in addition, act as a general revising appeal tribunal from determinations of magistrates in criminal cases by way of re-hearing. Thirdly, there is the Supreme Court, which provides the Court

[5a] As reported in *Time*, Oct. 12, 1958. The writer regrets that this book has not yet been accessible to him in Sydney.

[6] Act No. 16 of 1955.

of Criminal Appeal, has jurisdiction in the prerogative writs, and under the Justices Act has jurisdiction on matters of law on appeals from magistrates by way of statutory prohibition and stated cases. The Supreme Court also has an original jurisdiction exercised at the Central Criminal Court and at the Assize in the country, with an unlimited jurisdiction to try all cases on indictment. Compared to the Courts of Quarter Sessions, quantitatively the Supreme Court does very little criminal work, though such work as it does is in respect of serious offences because in practice now, with very few exceptions, the only cases ever tried in the Supreme Court are those formerly capital.

The following tables, over the period ending on 30th June in each of the years 1956, 1957, 1958 and 1959, show the number of cases committed to the Supreme Court and the Courts of Quarter Sessions:

Central Criminal Court		
30.6.56	64	committed
30.6.57	69	,,
30.6.58	50	,,
30.6.59	58	,,
Circuit Criminal Court		
30.6.56	16	committed
30.6.57	15	,,
30.6.58	15	,,
30.6.59	33	,,
Metropolitan Quarter Sessions		
30.6.56	2552	committed
30.6.57	2837	,,
30.6.58	3792	,,
30.6.59	3154	,,
Country Quarter Sessions		
30.6.56	2577	committed
30.6.57	2690	,,
30.6.58	2901	,,
30.6.59	2714	,,

Formerly the Central Criminal Court dealt with conspiracy and other non-capital cases of great magnitude, but it is not now the practice, except in the case of the more important Commonwealth prosecutions such as *R.* v. *Seiffert*,[7] *R.* v. *Cody and Morrison*[8] for conspiracy, and *R.* v. *Sharkey*[9] for sedition. The Commonwealth law officers in these very large trials seem to prefer to lay the indictment in the Central Criminal Court, though State cases of the same magnitude would go to the Court of Quarter Sessions.

It is open to question whether, under our system, having regard to the fact that the Court of Criminal Appeal is a revising tribunal with a discretion to reduce sentence (s.3, Criminal Appeal Act,[10] *R.* v. *Gosper*,[11] *R.* v. *Davis*,[12] *R.* v. *Smith*[13]) or to increase sentence (s.5D, *R.* v. *Whittaker*,[14] *R.* v. *Herring*,[15] *R.* v. *Simpson*[16]), some of the Supreme Court judges who from time to time

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[7] (1956) 73 W.N. (N.S.W.) 358.
[8] This trial lasted at the Central Criminal Court for 69 days, between April and July, 1957.
[9] (1949) 79 C.L.R. 121.
[10] Act No. 16 of 1912.
[11] (1928) 38 S.R. (N.S.W.) 568.
[12] (1942) 42 S.R. (N.S.W.) 263.
[13] (1946) 63 W.N. (N.S.W.) 231.
[14] (1928) 41 C.L.R. 230.
[15] (1956) 73 W.N. (N.S.W.) 203.
[16] (1959) 76 W.N. (N.S.W.) 589.

comprise that tribunal get sufficient criminal law experience, see enough criminal juries in action, and become sufficiently aware of the work of such agencies as probation and parole.

It is fair to assert that work in the criminal jurisdictions is almost always done by courts lower in the judicial hierarchy than civil work of similar importance. This is not a criticism of those who do it, but an assertion on a matter of principle in relation to the levels of courts as between each other. The tendency is not new. It is not limited to this State. But I do suggest that it is a tendency which deserves critical thought because it in effect amounts to a public assertion on the part of government and the instrumentalities of government which administer the law that the criminal law is less important than the civil and that the deprivation of liberty and the infliction of punishment is less important than the payment of money.

That such a problem exists was recognised by the then Attorney-General during the debates on the Crimes Bill of 1955, when he said:[17]

> The Honourable Member for Woollahra will recall that many years ago it was the practice to commit many cases to the Circuit Courts which are, in effect, country sittings of the Supreme Court. I have discussed with the Chief Justice the desirability of having in the country more sittings of the Criminal Courts—the "Red" Judges—because of their greater prestige. It is proposed that not only the present capital cases but also a certain proportion of other serious cases shall be sent to the Circuit Courts so that the dignity and majesty of the law will be impressed upon the general public. I have also had a letter on the subject from the Bar Council. Cases more appropriate to a criminal court have sometimes, for reasons of convenience, been tried before the Quarter Sessions. The Government is anxious to increase the jurisdiction of the Central Criminal Court for the reasons that I have stated. The functions of the Supreme Court will not be whittled away, nor will the present capital cases be sent to the Quarter Sessions for trial.

On the same occasion, when a question was raised by the then Leader of the Opposition as to the undesirability of giving Courts of Quarter Sessions jurisdiction in murder and cases formerly capital, the Attorney-General said:[18]

> As soon as the Bill becomes law, instructions will be issued to the Bench of Magistrates that the present capital cases shall continue to be committed for trial to the Supreme Court or Circuit Courts. Even if a Magistrate failed to carry out this instruction the Attorney-General could change the venue.

The way that matter arose in the Legislative Assembly is not without interest. The Leader of the Opposition drew the attention of the Attorney-General to the widening of the limits of jurisdiction of Courts of Quarter Sessions which the 1955 amendment to the Crimes Act brought about, and claimed that the Supreme Court should retain exclusive jurisdiction in the formerly capital crimes. However, when the Attorney-General gave the assurance that instructions would be issued to the Bench of Magistrates, the Leader of the Opposition was content to accept that assurance. By s.568 of the Crimes Act,[19] before the 1957 amendment,[20] the Courts of Quarter Sessions had

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[17] *Hansard*, 3rd. Ser., vol. xii, p. 3302.
[18] *Ibid.*
[19] Act No. 40 of 1900. Though this Act has been amended many times, the first amendment to s.568 was by Act No. 13 of 1957.
[20] Act No. 13 of 1957.

jurisdiction in all non-capital matters, even those in which a sentence of penal servitude for life could be imposed. When the 1955 Crimes Bill[21] became law, by s.5 the death penalty was abolished for all crimes other than treason and piracy, without any consequential amendment to s.568, which meant that the Quarter Sessions had, for two years, jurisdiction in murder, rape and other formerly capital cases, until it was amended by s.11 of the Supreme Court Procedure Act, 1957, which excluded jurisdiction in all cases formerly capital. At the same time as the Quarter Sessions, presided over by a District Court judge, had jurisdiction to try a man for murder, the same judge, either sitting alone or with a jury, could not, except in effect by consent, preside over a trial in a case in which over £1000 was claimed because, though by s.3 of the District Courts (Amendment) Act of 1955,[22] the District Court was given unlimited jurisdiction, it was subject to the proviso that the defendant had an automatic right to transfer a claim for over £1000 to the Supreme Court. The District Courts (Amendment) Act of 1958[23] has continued this unlimited jurisdiction until July of 1961, when the matter will again come up for consideration, and unless there is then some legislation either continuing the the unlimited jurisdiction or increasing its jurisdiction otherwise, the jurisdiction of the District Court will again be limited to £1000.

LACK OF INTEREST IN CRIMINAL LAW

Professional lawyers usually are interested only in those fields or in those courts in which they practise, and the exigencies of professional work necessarily tend to restrict men's experience and interests to those areas. Usually civil litigation commands higher fees than criminal cases because the successful plaintiff in the motor car case gets his costs from the insured defendant; in the equity suit the litigants are usually people of means; whereas most (not all by any means) accused persons have not much money available to pay for legal representation. Furthermore and understandably, the solicitor with a large company, probate or conveyancing practice does not encourage criminal cases to come to his office. He probably would not know what to do if they did. There are judges, too, who regard criminal work as less important than civil.

These, I believe, are unhealthy signs because, though it is true that once in a while a criminal case causes great controversy, the day-to-day administration of the general criminal law represents the foundation of civil order. If the stage is ever reached when the ordinary criminal work of the courts becomes skimped and is regarded as of no importance it inevitably must diminish the prestige of the bench and the standards of those responsible for the conduct of prosecutions and the efficiency and status of the police force.

I believe there is not that informed interest among lawyers that there ought to be in the branch of the law which in addition to keeping peace and order sets the standard of administration in the eyes of most citizens. Lack of that interest and of appreciation of the importance of all aspects of the prevention, detection and punishment of crime can lead to an attitude that the outward aspects of the law are unimportant and that shoddily done criminal work does not matter anyhow. It is not a far cry from such an attitude to a positive view

[21] Now Act No. 16 of 1955.
[22] Act No. 24 of 1955.
[23] Act No. 11 of 1958.

that judicial independence is really unnecessary and that judges and magistrates are merely agents of the Executive and that the law is but one branch of the Public Service and is not one of the great instrumentalities of proper government.

Few people in this community would hold such a view but if for long enough people who ought to think about these problems do not do so they may find that we drift into a position where we accept as part of the normal order of things deteriorated judicial and police standards.

THE COSTS PROBLEM

Reasons for the tendency to treat the criminal law as less important than the civil can be found in the inescapable preoccupation of the profession with the latter and also because criminal administration concentrates costs at governmental levels where the heavy costs of administering justice can be seen to invite examination and reduction owing to the competing claims of other departments urgently requiring money for their projects.

The cost of civil litigation spreads considerably. In the commonest of its modern forms, the running-down case, one does not have a truly competitive insurance situation and from time to time premiums are adjusted by the Premium Rates Committee so that the cost of these cases is distributed over about a million cars and hence is pretty effectively dissipated. Where a civil claim is brought in the Supreme or District Courts all the expenses of witnesses, the fees to jurors, costs of investigation and preparation for trial and counsels' and solicitors' fees are paid by the parties. All the State does is to provide the court accommodation and officers, the judge and his staff, the Sheriff's Officer and the shorthand staff (but if the transcript is bought, part of this last cost is recouped). The State also receives court fees on writs, summonses, subpoenas, etc. to bring an action to trial, and for jury fees, which are set out in the second schedule of the Supreme Court's Rules of Court and in the first schedule to the District Courts Act.

Even if the plaintiff or defendant is indigent and sues or defends through the Public Solicitor the direct cost of the litigation to the State is substantially lessened by the provisions of s.14 of the Legal Assistance Act,[24] which makes the position of an assisted person in the way of the recovery of costs from the other side the same as if he were not assisted and provides for the payment of the costs of the Public Solicitor or of a solicitor paid by him to the consolidated revenue.

In criminal cases the State has the whole cost of the prosecution, the Clerk of the Peace, the Crown Prosecutor, the jury (12 not 4), their meals and in some cases their accommodation, the witnesses, the police investigation and, very frequently, the defence. Obviously the cost to the revenue of a civil trial is only slight compared with the cost of a criminal case of similar length.

Whether the changing social and economic conditions of the modern world may require some change in the rule that the Crown in criminal cases usually does not pay or receive costs raises some very difficult questions not capable of easy solution. Recently the question of the costs of a person charged with and acquitted of a crime was raised in the New South Wales Parliament. One

[24] Legal Assistance Act 1943, No. 17.

cannot see any real signs existing that there will be any change in the existing rule that an acquitted person is to bear the costs of his own defence. Logically it would seem to follow that if one had a system of providing for the costs of accused persons acquitted of charges there must, unless the cost of criminal law administration was to be inflated far beyond the present limits, be some correlative fund to which convicted persons would, in addition to other penalties, have to make some contribution. A slight increase in filing fees in the Supreme Court brought into existence the Suitors' Fund. It may be that an increase of fines and the allocation of a percentage of all fines to a special fund could provide for indemnity for persons charged with and acquitted of serious offences. However, that might present grave problems of practicality, because while about four-fifths of the number committed to metropolitan Quarter Sessions plead guilty, about 45 *per cent* of those who plead not guilty are acquitted. Whatever may be the future development in that regard, it appears certain that for a long time to come practically the whole cost of criminal law administration will fall on the State.

One cannot escape the conclusion that a system of determination of cases after full and patient hearings in open court can never be otherwise than expensive. The cost factor to the State in these cases is accentuated because, if the work of the criminal courts is going to be properly done by government officials, unless the rewards to them are adequate and reasonably high there will be a tendency for only persons who have failed in the profession or regard themselves as having no real chance of succeeding in it to take such appointments.

RELATIONS OF COURTS TO EACH OTHER

In both criminal and civil litigation, the Supreme Court, the Quarter Sessions and District Courts and the Courts of Petty Sessions have their own proper and important duties to fulfil, though some recent legislation and administrative policies have tended to blur the distinctions between them. At times the merger of the Supreme Court into the District Court has been suggested so that there would only be two ordinary sets of tribunals in the State, namely those presided over by magistrates and those presided over by judges. Such a state of affairs can work quite well in an area of small population which is substantially under-developed compared to the more populous areas of Australia or elsewhere. Considerations of cost and distance have resulted in the development of a system of Commissioners in Western Australia where magistrates preside over trials on indictment under special commissions issued to them.

However, experience in England, in Victoria and here emphasizes the necessity for an intermediate court dealing with matters of intermediate seriousness and importance. In Queensland at the time of a very famous dispute which involved the judges, the legal profession and the government of the day, the District Court was abolished by the Supreme Court Act of 1921, which incidentally provided that no future Supreme Court judge was to receive a pension. However, after some 37 years without the District Court it was found necessary in Queensland to revive it last year (the judges' pensions being restored at the same time) and to bring Queensland in line with the more advanced States of the Commonwealth. The famous McCawley litigation in the

Supreme Court, the High Court and the Privy Council provides a very interesting background to the Queensland legislation of 1921.[25]

In general, there is a rough and ready line of demarcation between the Courts of Petty Sessions, Quarter Sessions and District Court and the Supreme Court based on quite logical divisions of function. In theory it is the function of the Petty Sessions to deal with lesser crimes, preliminary inquiries by magistrates into indictable offences, dealing with indictable offences punishable summarily, small civil claims, Children's Court and maintenance matters, landlord and tenant and a bewildering variety of other small jurisdictions. The Courts of Quarter Sessions deal with indictable offences, except those which are now or were capital, and also hear appeals from magistrates and under special statutes, and the District Court has jurisdiction to hear civil claims as well as special types of appeals and applications under various statutes. The Supreme Court has unlimited original criminal and civil jurisdiction and within the State is the final court of appeal.

THE POSITION OF MAGISTRATES

A serious academic study of the position of the magisterial system of this State would seem to be indicated. For various historic reasons, magistrates have many ministerial functions associated with the keeping of the peace but in practice under modern conditions there has been a tendency to emphasize their judicial rather than their ministerial functions, though of course all the preliminary inquiries conducted by magistrates on committal matters are ministerial and not judicial. Until quite recently men appointed to the magisterial bench were not required to have legal qualifications but now before they can be appointed they have to possess qualifications equivalent to those required for admission as either barristers or solicitors, though no practice in the courts is essential and in most instances would be impossible as the method of appointment and promotion is within the Public Service from men who have gained their experience in the various Courts of Petty Sessions. Though theoretically a magistrate could be appointed from outside the Public Service (Justices Act s.7A),[26] subsection (4) of that section prevents the appointment of any person from outside the Public Service until the Public Service Board has reported that there is no person in the Public Service capable of performing the duties of the office. While in other places magistrates are appointed from the profession it might well be that in New South Wales, owing to the problems of finance involved, a system of magisterial appointment from the profession would be impracticable. The long-range implications of the recent application by the magistrates of this State, acting through an industrial union, to the Industrial Commission for an industrial award may well raise in the future important questions. It may provide in the future a field for research as to the proper relationship between an industrial tribunal and a group of men whose functions are mainly judicial and might agitate nice questions as to whether the value of judicial work can be estimated by an industrial tribunal, anyhow. However, I do not seek to comment on that matter or on the other important questions it raises as to the exact nature of the relationship between

[25] Queensland Act, 12 Geo. V. No. 15. See *McCawley* v. *The King* (1920) A.C. 691; (1920) 28 C.L.R. 106 reversing *McCawley* v. *The King, In re McCawley*, 26 C.L.R. 9, on appeal from the Supreme Court of Queensland (1918) Q.S.R. 63.

[26] Justices Act, 1902, new section inserted by Act No. 24 of 1909.

the members of the magisterial bench seeking an industrial award as Crown employees and the Crown.

The application to the Industrial Commission is instructive historically as showing how, by reason of circumstances, anomalies can develop in administration. At one stage in New South Wales there were Stipendiary and Police Magistrates, each with differing jurisdictions. Now all have the same jurisdiction, but there are apparently six different rates of salary payable to magistrates who exercise the same jurisdictions but in different areas.

In addition to the Stipendiary Magistrates exercising general jurisdiction in the metropolitan area and the country Stipendiary Magistrates with their headquarters in twenty country towns or cities and exercising the same general jurisdictions as the metropolitan magistrates, but on different salary rates, there are magistrates exercising special jurisdictions, such as the magistrates presiding over the Commonwealth Court of Petty Sessions and the Traffic Courts, the Special Magistrates at the Children's Court, the Licensing Magistrate, the Chief Industrial Magistrate, the Fair Rents Court Magistrates and the Coroners.

It is many years since there was any reassessment of the jurisdiction of magistrates in this State and it may be that some further examination of their powers, both ministerial and judicial, should be embarked on. The same magistrate who, in the Court of Petty Sessions, can send a man to gaol for two years, when he opens the Small Debts Court is limited to a jurisdiction of £50, but when he closes the Small Debts Court and opens the Tenancy Court he can, by an unappealable exercise of discretion on the facts, deal with property rights which might, in an individual case, run into many thousands of pounds.

LACK OF DEMAND FOR LAW REFORM

Though one could point to many anomalies in our system which would seem to call for re-examination, it is fair to say that there is no real demand (as distinguished from need) for procedural law reform in this State and that, speaking generally, the community and the profession seem not dissatisfied with things as they are, and though on occasion arising out of some particular matter there is strong criticism of an individual member or members of the judiciary, it rarely if ever passes beyond *ad hoc* criticism of action taken in a particular situation. I do not want to be taken as asserting that in particular fields there have not been valuable improvements; there have: but there is no strong pressure for wide reforms. In recent years in this State we have seen such valuable contributions as the Public Solicitor and Public Defender (and for both of these agencies praise is deserved), the Law Reform (Miscellaneous Provisions) Acts of 1944[27] and 1946[28] and the Suitors' Fund Act of 1951.[29] Very recently we have seen a very substantial improvement in the administration of the criminal law brought about by s.7 of the Crimes (Amendment) Act of 1955, which obviates the necessity of pointless examination of witnesses before a committing magistrate where the accused intends to plead guilty anyhow. Another great improvement in recent years has been the increasing use of transcripts of shorthand notes in Courts of Petty Sessions in

[27] Act No. 28 of 1944.
[28] Act No. 33 of 1946.
[29] Act No. 3 of 1951.

place of the old system of taking down depositions on the typewriter. This was brought about by the Justices (Amendment) Act of 1954.[30] One only has to be concerned in an appeal from a magistrate to realise the benefit of an accurate note compared to the inevitable mistakes and inaccuracies of a deposition taken down by a clerk on a typewriter.

THE APPELLATE COURTS AND THEIR PROBLEMS

One future field for serious thought lies, I believe, in the relations between the appellate work of the Supreme Court of this and other States and of the High Court. The Full Bench of this State exercises, sitting in Banco, its function of the guardian of the Constitution of New South Wales, controlling the courts other than itself by the prerogative writs, protecting personal freedoms by *habeas corpus*, exercising appellate jurisdiction from all its own jurisdictions and under the Criminal Appeal Act and the Justices Act and an appellate jurisdiction on questions of law from the District Court. But it is in no sense an ultimate Court of Appeal (though in some matters it is a final court), because of the existence of the Privy Council and the High Court, particularly the latter.

Though there has been a great increase in appellate work from Australia to the Privy Council in recent years and though the Privy Council is much more prepared to grant leave in Australian appeals than it formerly was, it is, I think, inescapable that for all practical purposes, and increasingly so in the future, the High Court will be the ultimate Australian appellate court. It is now taking the position as being the national appellate tribunal, and is doing so, in large measure, to the exclusion in their fields of the State Full Courts.

That such a tendency should take place is inescapable, and even if it were not inescapable it would seem to be desirable because, with the development of population, the improvement in transport and the greater extension of the economic life of one State into another, the problems of one State are becoming increasingly those of another State. People from one State spend much more of their time in other States than they did and there is an ever-increasing intercourse between them.

The stage, however, may be reached earlier than most of us expect when the burden of High Court work will become such that it cannot be dealt with by one court. What with its high constitutional and important taxation cases and its appeals from the rapidly developing Territories, it would be unreasonable to assume that there will be any shrinkage of work for the High Court—rather the reverse—which may mean that for purely pragmatic reasons some thought may have to be given in the future to some form of limitation of appeals to the High Court from State courts, so that the function of the High Court will be to act as the tribunal which attracts in this Commonwealth what might be called the high level development of the law, and unless some very important legal principle is concerned, it will not intervene.

One thing that is necessary in an ultimate tribunal is continuity of decision, a thing which it is impossible to obtain in a court which sits in two divisions. Every appellate court must contain within itself men whose approach to the law is different. Some appellate judges are much more liberal than others; some take the view that criminal appeals ought to be discouraged; others take the view that appellate courts ought to intervene to ensure an

[30] Act No. 32 of 1954.

orderly development of this branch of the law. It is my opinion that one gets the most balanced and harmonious development of the law by the impact of assent and dissent and often the dissentient opinions by a process of distinguishment become accepted, because judges are compelled, in courts where it is the practice to give a multiplicity of judgments, to give more critical evaluations of the bases of decision.

But if such an ultimate court sits in two divisions, one does not get the same impact of the acute minds one usually finds in ultimate appellate courts and one tends to find divergent growths of the law because one has not the advantage of dissentient views operating on another judge's mind in the same court.

There is some amount of support for the view that it is much more important that the law as stated by the courts be certain than that it be right, though it ought if possible be both. Lack of certainty, inconsistent decisions and the inability of people to know in advance when they decide to settle their legal transactions what the consequences are going to be are, though sometimes inevitable, not desirable. That is one reason why a continuity of membership of an ultimate appellate court is desirable; as between other courts it is, of course, impossible. In the High Court, changes in the constitution of the bench take place at comparatively long intervals, never involving more than one or two members at the same time: this tends to consistency of approach on the part of that tribunal. Consistency is not always possible even when you get the same man on the Bench, though it would be hard to find two more classic cases of inconsistency than *Victorian Insurance Co. Ltd.* v. *Junction North Broken Hill Mine*,[31] where Lord Wrenbury, for the Judicial Committee consisting of Lord Dunedin, Lord Atkinson and himself, delivered a judgment which in my belief is completely inconsistent with *Blatchford* v. *Staddon & Founds*,[32] in which Viscount Sumner, Lord Atkinson, Lord Wrenbury, Lord Carson and Lord Blanesborough, two years later and without reference to the earlier case, delivered judgments.

In support of my view that these two cases cannot be reconciled, I have the powerful opinion of Scrutton, L.J. in *Ellerbeck Colleries Ltd.* v. *Cornhill Insurance Co. Ltd.*,[33] where his Lordship said: "But in 1927 . . . the House of Lords reinvestigated the whole meaning of . . . (the material section)." His Lordship goes on to say that the opinion of the House of Lords "appears to me quite inconsistent with the Privy Council's view. . . ." Later he said "Lord Wrenbury, who had been clear in his views in the Privy Council case was a party to the House of Lords' decision . . . , (expressed views) which, it seems to me, are quite inconsistent with the views expressed in the Privy Council decision."

There is a very real but frequently unappreciated difference between the appellate functions of such a tribunal as the High Court, and those of the Supreme Court. Many cases come before the Supreme Court in its appellate jurisdiction which are re-hearings, which involve a re-examination of the facts and the exercise of discretions which are not at all apt in cases at a higher appellate level. If it be the function of the highest appellate courts to lay down principles of law and so to lay them down as to ensure as far as possible that there is a consistency of decision on legal principles throughout Australia, of necessity such a tribunal should not in the ordinary case act as

[31] (1925) A.C. 354.
[32] (1927) A.C. 461.
[33] (1932) 1 K.B. 401.

a revising tribunal on the facts. Much appellate work is purely factual such as appeals by way of rehearing, or on the weight of evidence,[34] or as to the sufficiency or insufficiency of sentence or the question of damages. Such work can involve no question of legal principle at all. It is only adding to an already over-burdened ultimate appellate tribunal unnecessary work when such types of appeal are taken to such a tribunal. How that state of affairs can be dealt with is a different matter. Section 73 of the Commonwealth of Australia Constitution gives the High Court jurisdiction with such exceptions and subject to such regulations as the Parliament prescribes to hear and determine appeals from all judgments, decrees, orders and sentences:

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council.

In the future inevitable circumstances are going to widen the scope of the exceptions and the regulations which Parliament will be required to prescribe. What form they will take is a political question to be decided in the future, but I am certain that it will be forced upon Australians because, if it is not undertaken, there will be a grave danger of the High Court being unable to perform its great constitutional function as the guardian of the document which brings it into existence and to which it owes all its powers. As Isaacs, J. said in the *Tramways Case*:[35]

> . . . this Court is not a common law Court, but a statutory Court. To the Constitution and the laws made under the Constitution it owes its existence and all its powers; and whatever jurisdiction is not found there expressly, or by necessary implication, does not exist. The Constitution does not in general terms, as in the case of the State Constitutions with reference to Supreme Courts, endow the High Court at a stroke with all the powers of the Court of King's Bench. Section 71 has been referred to as having that effect. But that is not so. Section 71 confers no jurisdiction whatever. It merely declares the separation of judicial authority from all other, and prescribes that it shall be exercised by judicial tribunals and not otherwise, and indicates the tribunals. But the section does not prescribe the limits of the judicial power, or confer jurisdiction upon any Court. That is left for the succeeding sections.

The federal system necessarily involves an ultimate federal court holding a position of vital importance, in which it has to protect the constitutional document against the competing claims of the central government and the States and of other pressure groups. Historically it has to develop the implications of the document under changing circumstances, requiring an approach not apt in the ordinary judge or court exercising jurisdiction in the day-to-day conduct of litigation. An appellate system which allowed the work of the High Court to be swamped by other litigation to the detriment of its constitutional work ought to be guarded against. Dixon, J., as he then was, stated in the

[34] The recent decision of the High Court in *Raspor* v. *The Queen* (1959) 99 C.L.R. 346, in which it refused leave to appeal from the Victorian Court of Criminal Appeal because nothing but a question of fact was involved, deals with the distinction between the weight of evidence and the lack of evidence to support a conclusion and, hence, deals with the difference between a question of law and one of fact.

[35] *The Tramways Case* (1914) 18 C.L.R. 54, 75.

Melbourne Corporation Case[36] the concept that lies at the root of the High Court's constitutional functions:

> The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss.51, 52, 107, 108 and 109.
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> In the many years of debate over the restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent exercise of the functions of the one or the other, it has often been said that political rather than legal considerations provide the ground of which the restraint is the consequence. The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.

Unless the High Court is going to be broken up into two divisions, which may not be possible under the Constitution as it now exists and which in any event would be undesirable, sooner or later the maintenance of its proper functions must involve some limitation on the right of appeal to the High Court so that in an increasing proportion of cases the State Full Courts at the apex of the judicial system of the States as independent entities shall become final tribunals. When that will happen, how it will happen, is a matter on which I would not seek to speculate even if it were proper for me to do so, but it does pose problems, political, constitutional and legal, which, I believe, are of high importance.

CONCLUSIONS

In the above pages I have only directed attention to a few of the things that have appeared to me during my years on the Bench as needing examination. There is no virtue in amendment for amendment's sake. As Sir Owen Dixon very shrewdly pointed out at the recent Perth Legal Conference, the effect of one set of law reforms is to create as many problems as you solve by the reforms which you introduce.

Another matter that can never be forgotten in the sphere of law reform is that a reform for which there is no need merely clutters up the statute book, like the equity sections of the District Courts Act[37] which, as far as I know, have never been invoked. Furthermore, though there is a field of law reform on the procedural side which is properly within the ambit of the activity of the

[36] *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31, 82.
[37] Part IIIA, added by Act No. 44 of 1949.

judges, most law reforms involve political considerations and some involve very serious economic considerations. For instance, the provision of a system for a pool of jurors to save administrative problems in respect of jurors might well be a matter proper to be considered by judges, but that is a very different thing from the judges publicly committing themselves to any views about the maintenance of the jury system or the introduction of majority verdicts by juries, such as exists in Tasmania. There, one moves into a field that is political. Again, though one may hold the view, or one may not, that what juries are in effect doing is administering, under the guise of the action for negligence, a system of national insurance based on a principle of absolute liability, the fact is that to abolish the concept of fault would be fraught with substantial economic consequences to insurance companies and to the community generally, perhaps not so much in relation to those actions which are brought but in relation to those actions which are not brought.

None of these things, however, absolves us from the obligation of thinking about the legal system, and particularly is that obligation great in respect of those who examine the law within the academic and professional fields. Particularly do I believe that it is necessary that anyone who desires, either as an academician or as a professional lawyer or as an administrator in any of the departments of government should have, as basic to his legal equipment, a philosophy of law and some knowledge of its history; for without either he is not really capable of understanding what it is and why it exists.