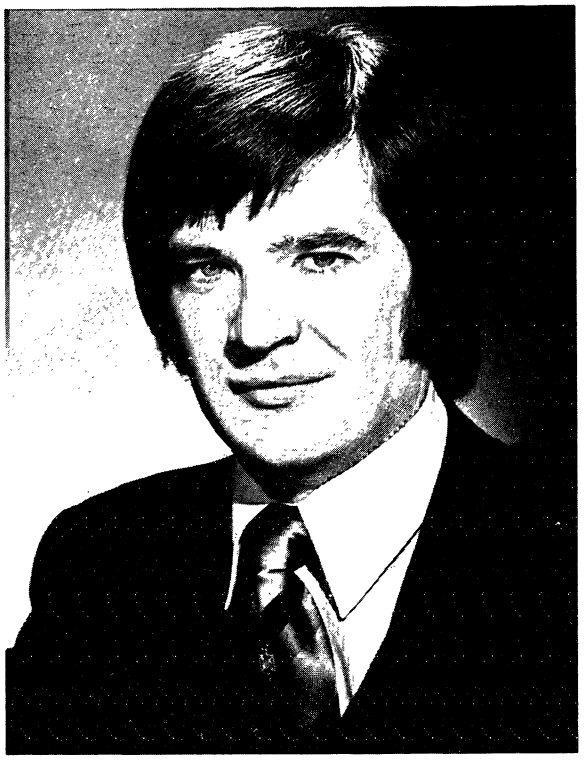
** "BLESS AND KEEP THE MAGISTRATES"



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(** "That it may please thee to bless and keep the magistrates, giving them grace to execute justice and to maintain truth")

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When the newly appointed justice of the peace stands in the Supreme Court in William Street and says, "I, A.B. swear by Almighty God that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second Her Heirs and Successors lawful sovereigns of the United Kingdom and of this State of Victoria . . . I, A.B., swear by Almighty God that as a justice of the peace for Victoria I will at all times and in all things do equal justice to all men and discharge the duties of my office according to law and to the best of my knowledge and ability without fear favour or affection", he is, not only taking the same type of oath as a judge of the superior court itself but also, continuing the centuries-old tradition of the judges and magistrates of our common law heritage.

Now a justice of the peace is not a judge and some may even think that he should not be a magistrate: The great constitutional historian, Frederic William Maitland, said, at the turn of the century, "He is cheap, he is pure, he is capable but he is doomed: he is to be sacrificed to a theory, on the altar of the spirit of the age". He was speaking of justices of the peace and was reflecting certain opinions of the time.

However, his words could usefully be applied to today and to Victoria, for now we hear, and have heard for some few years, fresh voices of doom.

But Maitland was wrong and it is the writer's contention that the ill-informed reformers, the few inexperienced lawyers who have not thought things through, and the politicians looking for a diversion (and attacking justices is a great way of obtaining extensive media coverage), are also wrong. In England, the justices reached a low point in their authority at the end of the nineteenth century, but then, "the pendulum started swinging back towards them", and they grew in power and prestige. It is suggested that this is the position at the present time in Victoria, and that the criminal justice system not only has a place for, but also vitally needs, the lay magistrate.

This paper will examine the workings of the system which uses lay magistrates, and will suggest how we might get better value from it. At this stage it may be worthwhile to define our terms and clear up a misconception at the same time. That is the almost common belief in Australia that there is a difference between a magistrate and a justice of the peace. In this regard one should begin by quoting the definition of magistrate in the law dictionary used at university (and other) law schools in this country. This definition of a magistrate given by Osborn is a, "judicial officer having a summary jurisdiction in matters of a criminal nature; a justice of the peace". And the standard introductory text used by Australian law students says, "Justices of the Peace are honorary magistrates".

An English writer (himself a stipendiary magistrate) has said of justices, "for six centuries these have constituted, as they do today, a correct description of all magistrates". The terms mean (and have since the eighteenth century) virtually the same thing. "The titles are now more or less used interchangeably". It is as correct in law and in fact to call a justice a magistrate, as it is to call a stipendiary magistrate (or judge) a justice. And when the Anglican Church prays, "to bless and keep the magistrates" they are praying for justices of the peace, not just the stipendiaries.

Justices of the peace have been with us for over six hundred years (nearly eight hundred if we count the establishment of the custodes pacis as the starting point). Many other ancient institutions have had their day but still the justices (like our monarch and our parliament) remain. To answer the question as to why justices have lasted we can consider the comment of Lord Hailsham (a former Lord Chancellor) that, "the lay magistracy survives because it gives satisfaction, and on the whole it gives satisfaction because it dispenses justice of a high quality". Henry Cecil (Judge Leon) has described justices as those "who traditionally have discharged this office for hundreds of years with considerable success", and a Command Paper referred to them as having "brought commonsense, sympathy and a wide range of experience of life and affairs" to the courts.

Herbert Mannheim saw justices as preventing the excesses of government power when he said, "torture could exist only in countries without lay magistrates" and the basic introductory law text used in Australian universities states, "The English still believe that the role of the honorary justice is important in the general democratic structure of the State". But these days, particularly in Australia, it is fashionable to deride the honorary, (as though payment of mere money will guarantee knowledge, competence and wisdom — a glance at our parliaments would be enough to disillusion anyone on this point), and press for replacement of our excellent and unique system which has served us well for six centuries.

Those who wish to abolish justices and who would disagree with the writer's earlier contention, that "their activities are such an essential and integral part of our common law heritage that we tamper with

it at our peril", should look to their history for a few clues and many lessons. Whenever a would-be dictator has sought to strengthen his power and control he has, as a first step, moved against the honorary justices (in any country fortunate enough to have them — where they do not exist the new tyrant's job is that much easier). Cromwell removed the justices who stood in his way (parliament came a little later) and, in more recent times, Hitler abolished the lay magistracy following the Russian example two decades earlier of how to centralize authority and take all power away from the people. Now it is not suggested that those proposing that Victoria should be rid of the justices are doing so to assist any upcoming dictator, (though their actions, if successful, would help pave the way for one), but rather their enthusiasm for throwing the baby out with the bath-water stems from ignorance of our history and culture and a lack of understanding of our legal system.

That there may be faults with our present system is admitted but it is suggested these can be remedied and an improved lay magistracy would be far better than anything yet proposed to take its place. The justices have had their vicissitudes from when, "at the height of their power . . . they were the most influential class of men in England", and Chaucer said, "as Justices at the Sessions none stood higher", to Edmund Burke referring to them, as "the scum of the earth". Even Henry Fielding (himself a barrister and a magistrate) said in one of his novels, "so many arbitrary acts are daily committed by magistrates", and "in executing the laws . . . many justices of the peace suppose they have a large discretionary power, by virtue of which . . . they often commit trespasses, and sometimes felony, at their pleasure". Their decline from the time of the execution of Charles the First was such that, "at the time of the great Reform Bill the Justices were in danger of being reformed out of existence". But the justices survived this (as did the House of Lords the Judicature Act), and today in England no one would seriously consider abolishing them.

But, in Victoria, criticism is voiced from time to time of the lay magistrates. The writer has heard this from barristers, solicitors, lecturers, clerks of court, stipendiaries, and even a Supreme Court judge — though not, surprisingly enough, from defendants, witnesses or other members of the lay public. The criticism falls into four main areas. The first is not so much a criticism but a refusal to accept that justices do act as magistrates in court, the second that justices are influenced too much by the police, the third that the wrong types are chosen to be lay magistrates, and the fourth that they are ignorant of the law. Criticism is not always welcomed but as the late Lord Atkin said, "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men". Here Lord Atkin was referring to the entire court structure, superior and inferior, and to judges of all station. Interestingly enough, Lord Hailsham said, "by far the bitterest complaints I received as Lord Chancellor were about professional judges and magistrates and not about lay magistrates". Now although an author (himself a judge) can say, "justices try millions of cases . . . the percentage of which complaint is made is trifling" the criticisms which are made cannot, and should not, be ignored but rather honestly looked at, and truthfully, and forcefully, answered. Perhaps the main problem with justices in this country is that they do not respond constructively to censure, with the result that too few people, including lawyers, both academic and professional, know much about what they do.

To look at the four main points, one finds the first in the studied non-recognition of the fact that justices exist. This ranges from the teacher or university lecturer telling his or her class that justices no longer sit in court, to legal articles and books leaving them only, "in a few residual areas", or "minor, auxiliary judicial functions". Even a recent Australian work on criminology states, "in some jurisdictions, and usually only in remote areas, two or more justices of the peace **may** constitute the court".

Apart from the out of sessions work of justices, (attestation and issue of documents, issue of summonses, authorization of arrest and search warrants, granting, fixing and admitting to bail — at any time of day or night), they do a considerable amount of court work in handling committals for trial, and in hearing offences triable summarily. Without discussing the writer's own experience, of sitting at a number of inner suburban courts, and hearing some thousands of cases, one only has to drive around to the various courts to see the amount of work handled by the justices. In addition to those justices who sit with stipendiary magistrates, any court, with any volume of work, will invariably have a second division (which takes half the cases), consisting of two or more justices of the peace. Alternatively one can look at the number of cases heard in magistrates courts in a year, and the number of stipendiary magistrates available, and it becomes quite clear the volume of work which is, of necessity, done by the lay magistrates.

Victoria has (at the time of writing) sixty-nine stipendiary magistrates (which is approximately twenty times the number needed, proportionately, for England and Wales). But it has two hundred and five courts, (of which about three quarters would be considered active) and hears over six hundred thousand cases a year — of these about half are criminal matters (both summary and indictable offences). Less than a third of these courts are in the metropolitan area, but these hear two-thirds of all the cases. According to Law Department figures 99% of all criminal cases are heard by magistrates courts, and which is higher than the 98% usually quoted for England. Now, even if one stipendiary magistrate can hear three or four or even five thousand cases a year. and even if he can sit at more than one court, it is obvious that there is more work than can be handled by our large number of paid magistrates. The gap is filled by the justice of the peace, who handles an appreciable proportion of the work that comes to magistrates courts. In 1968 this was estimated to be 22%, but, it is suggested, a more realistic figure today would be closer to 40% or 50%. Regrettably, the Law Department, for many reasons, does not keep an accurate tally here. But anyone doubtful of the latter figures only has to visit any clerk of courts, who will readily admit, whether or not he personally supports the retention of the lay magistracy, that, without the honorary justices, the entire system would collapse.

The second main criticism is that justices are influenced by the police, and the implication here is that justices would tend to favour the police in making judicial decisions. Now justices preceded the police by some centuries, and, before the idea of a separate police force became a reality, the justices "were the police, the judicial and the administrative authority for the country". Even when police constables were appointed "the constable became the agent of the justice in maintaining the peace", and "the policeman was obliged to serve the justice". When Victoria was first settled the original police constables were under, and controlled by, the justices. But, although started by the magistrates, police forces, in England and Australia, developed in their own right. In fact, as well as in theory, the justices and the police became separate. "As regular police forces developed the justices of the peace voluntarily relinquished their law enforcement duties, and confined themselves to deciding questions of law". Though the first Commissioners of Police came from the ranks of justices. And in Victoria, up until this century, a policeman often acted as Clerk of Petty Sessions (the name for magistrates courts until 1968).

However, because of this earlier association with the police, (and the use, earlier this century, in some jurisdictions, of the appalling term, Police Court), it is assumed, by some people, that magistrates courts support the police, and that those appearing before the bench do not receive a fair hearing. It is not only the weekly magazines which make such extreme statements on this matter, but also quite respectable politicians. In Summons 1976 we read that, the "accused may wonder whether he/she is being tried by the police", as the police generally act as prosecutors in magistrates courts, and this sometimes gives the impression that the courts are run by the police. (Magistrates have the power to refuse police to act as prosecutors — refer O'Toole v Scott (1965) AC 939; (1965) 2 All ER 240 and Ex parte Evans 9 QB 279 — but this is not done and there seems no good reason for doing so). We are told of the courts' "dependence on police", and that it "may feel a responsibility to support them in their duty, and thus more readily believe their evidence".

Even Britannica stated that the courts accepted police evidence and said unequivocally, "judges on the lowest level of the criminal law have a strong tendency to identify themselves with the police force". One could take this as a comment on the American scene, but many would apply it just as equally to our inferior courts here. But the biggest criticism is really aimed at the stipendiary magistrates in this respect. We are told that the stipendiary has spent his entire working life in close contact with the police, and that, "in many areas police prosecutors are the constant companions of the magistrates". The latter statement leads this author to then suggest that the magistrates and police "may discuss cases between themselves well before the matter comes on for hearing". The writer has worked with, and spoken to, many stipendiary magistrates, (as well as many more lay magistrates), and has never come across, nor even heard of, any such case where this has happened. In fact, all magistrates take great care to not associate with any members of the police force prior to the opening of court. One stipendiary told the writer, whilst he was gathering material for this paper, that he (the stipendiary) believed in dismissing a case now and then, just "to keep the coppers on their toes".

It would be fair to say that Henry Cecil's comment, that "the same tradition of integrity on the bench appears to exist among justices as it does among professional judges", could be applied in Victoria as equally as it is true in England. And, if the police do have any influence in magistrates courts, (which is doubtful), they would have far less sway with the justices, who are not associated with them professionally, do not see them outside court days and certainly never leave their "transport, meals and general well-being . . . in the capable hands of the police". The now quite separate functions of the police and the justices are exemplified by the requirement that persons arrested by the police must be brought before a justice (Crimes Act S.460.1), and that persons refused bail by the police can appeal to a justice (Bail Act S.10.2). In no way do the police control the justices.

In fact, "the law still recognises the obligation of a constable to obey the lawful orders of a justice of the peace". Though these orders would rarely, if now ever, be given, and the police and the justices walk their separate paths.

The third criticism is that the wrong people are appointed as justices of the peace. This stricture, perhaps coupled with the fourth criticism, is really the most important of them all. Lord Hailsham hit the nail on the head when he said, "the important thing is to get the right people". The justices started off strongly and the Statute of 1361 refers to the bench consisting of, "one lord and with him three or four of the most worthy in the county". A more recent author referring to the early justice states, he "would commonly be lord of the manor", and others have described them as "members of the gentry", "noblemen" and "local knights and gentry". But, nobles or not, "they were very substantial men", (though one would suppose they would have to be when "they combined the functions of county councils and half a dozen government departments" in addition to their local judicial activities).

Now times have changed from when magistrates would go on strike, in protest against a man "in trade" being appointed a justice, and even in conservative England the property qualification was abolished in 1906, and working men have been appointed to the bench from 1911. Though today an English writer can still say, that "although it is no longer obligatory for one of them to be a lord, few countries are unlucky enough to have no peers among their J.P.s". Even if we have few noblemen in Australia, it should be remembered that a good part of the respect for the early magistrates came from their being "chosen from the strongest and most stable elements of the gentry", and that this was confirmed by the Statute of 1439, because "some of the justices are of small behaviour (substance) by whom the people will not be governed". If "respect for law and confidence in the judicial system depend very much upon the conduct of cases in inferior courts", it is essential that public and practitioners have confidence in those appointed to the magistracy.

A former Lord Chancellor has said, "the key to the whole system is the method of appointment", and in England justices are appointed by the Lord Chancellor on behalf of the Queen, following the recommendation of a local committee, who consider and balance the necessary local factors, so that those appointed will receive local acceptance. In Victoria, appointments are made by the Governor-in-Council, following the request of the Attorney-General, who would have received a recommendation from the proposed justice's local member of parliament, and often a petition from local residents. The requirements are unexceptional enough. They include age (35 to 65), character (of good repute and free from any convictions), community experience and service and, in more recent times, availability. It is suggested that none of the above require alteration but that availability and willingness to actively serve, in addition to ability should be more thoroughly considered.

At the time of writing, Victoria has 5236 justices of the peace, (approximately four times the proportionate English number). Estimates as to how many of these are active range from 10% to 20%, depending on whether the figures are quoted by court staff or by the justices themselves. Although over 70% of justices (3854) are members of their association, certainly most of these are inactive. Regrettably, some justices regard the appointment as a "poor man's knighthood", or "a reward for public service like a sort of junior OBE", and do nothing other than add J.P. to their name. In making appointments it would be far better to consider what the proposed justice can offer to the bench rather than treat it as a reward for many years of loyal (and sometimes, political) service, which although commendable in itself, does nothing to enhance the workings of the criminal justice system.Standing in the community may be hard to define in the Australian context, but it nevertheless is still relevant and essential. We may not be able to insist that justices "possess divine justice", but it is foolish to consider appointing those who cannot hold the respect of the public.

In this regard it would not be unreasonable that a minimum standard of education and knowledge be required. Although this has never been a formal requirement, it should be remembered that, in earlier days those appointed had a level of education and knowledge considerably above that of the general community. It is essential that those appointed as justices have the ability and capacity to handle the onerous and responsible task of making judicial decisions which can greatly affect people's lives. This in addition to the "sense of responsibility ... to discharge their difficult duties with care and fairness".

The fourth point of criticism is that the justices know no law. In this country it has never been required, nor expected, that legal qualifications be necessary. "In fact, in Australia, it is rare for justices of the peace to have such training". In certain cases justices must decline to hear a matter because of this. In any event, justices who completed a law degree would be a little disappointed, in that, in four years of full-time study, only about 50 hours would be spent on criminal law — and most of this on matters which are dealt with in the higher courts. Though this disappointment would be shared by any newly admitted lawyer, who wished to specialize in criminal law, or even act as an advocate in magistrates courts. Many legal practitioners are open in saying that most of their knowledge came from practice, so in reality the justice who sits regularly, (and may hear perhaps a thousand or more cases a year), is receiving a sound legal training.

But some formal training is needed. Although Henry Cecil has stated, "I do not personally think that too much (if any) training is good for a justice", and Lord Hailsham has said, "training ... is of much smaller importance" training has come to stay in contemporary England. There justices give an undertaking that they will undergo a course of training within a year of taking up their appointment. This training consists of practical, as well as theoretical, work and covers civil and domestic matters, (rarely heard by justices in Victoria), as well as criminal. They also have a special course for those sitting in the Juvenile Court. Now the Royal Victorian Association of Honorary Justices (which interestingly enough was formed in 1910, ten years before the equivalent English association) conducts two excellent courses. The basic course (now in its twelfth year) is conducted in the evenings over a period of thirteen weeks, at the University of Melbourne. The advanced course is over a period of seven weeks, at Monash University. Both courses attract leading barristers, stipendiaries, justices and academics as speakers.

But, not all justices attend these courses. Though, it would be fair to say that, those who intend to be active on the bench make the effort to come. It would be entirely reasonable for these courses to be made compulsory. These, coupled with regular attendance at court, would bring about a great improvement in the quality of justice meted out in the magistrates court. The rationale for justices being lay people is not that they should not know the law, but, rather, that they be neither lawyers nor government servants. It should be remembered that the Statute of 1361 formally establishing the office of justice of the peace provided that the bench should consist of, not only the lord and the most worthy, but also, "some learned in the law". The early justices in fact, "had a fairly good knowledge of elementary law", and this at a time when they "had dealt mainly with the poorer classes". These days, when their "customers" are much better educated than previously, and many know something of the law, it is necessary and vital that justices be better trained in this area. If society is to believe, as did Thomas Jefferson, that the "safe depository of the ultimate powers of the society" is to be the "people themselves", then it should follow his advice "to inform their discretions". Nothing less is good enough.

Before leaving the area of animadversion it may be worthwhile looking briefly at the role government plays in, and the control it may exercise over, the courts. Right from the beginning justices were appointed to preserve the peace throughout the kingdom. But, though they were seen as agents of the king in the administration of justice, they were not regarded as instruments of a strong central government. They combined "local independence and central control", and Henry Fielding, (who was Chief Magistrate of Bow Street), could say, "it may be so in London; but the law is different in the country". At times, when governments felt they needed more power, the central administration of the day would try to prevent certain cases being heard by the justices. "The throne of Elizabeth was too unsteady and the political situation much too dangerous for the council to resign the trial of political offences into the hands of the country justices". (The same policy is sometimes carried out here.)

When the idea was first proposed, that stipendiary magistrates be appointed, this was attacked by the public as serving to increase government power, and they were seen as "servants of the Government, instead of dependent guardians of the public interest". Swift, in commenting on government judicial appointments, said, "those in power, who know well how to choose instruments fit for their purpose, take care to recommend and promote out of this clan a proper person ... when his patron's disposition is understood ... either to condemn and acquit". Although this happened well over a century ago, the same sort of comments are made today, and we read that, "the method of selection of magistrates is also dubious from the point of view of detachment and impartiality", and of "the court bureaucracy ... handing out enough convictions ... to satisfy the police and the government". The latter statement here on proceedings in Victorian courts contrasts with the English view that the courts do not follow the government of the day, nor "still less do they run with the civil servants of the day". Though, of course, the English author is writing of their courts, which are controlled by justices of the peace.

Now in Victoria the stipendiary magistrates (of whom we have a great number) are public servants, and they can be accused (although unfairly) of "inbreeding" and having to "conform" to the government machine. In relation to the recent "Freeway" cases we read that "a conscious decision appears to have been made within the magisterial bureaucracy (or by their political masters?) to go easy". Even if "clerks of court informed lawyers ... there would be no further dispensation of prison terms" (which is doubted by the writer), the fact remains that there is concern about "the political role

that magistrates courts can assume". It has long been a tradition of our way of life that the judiciary be independent, and this independence should extend to the "lesser judges". The stipendiaries in England think of themselves as the equivalent on the criminal side as the judges in the County Court, (though they also regard themselves, unlike their Australian brethren, as there "to help the existing justices rather than to supplant them"), and it has been suggested, at times in this country, that the stipendiary magistrates should form some sort of judicial college, free from the public service.

We can assume that magistrates courts, by whatever name they are called, will be with us for quite a time yet, and the question is, of course, from where are the magistrates to come. They can come from three places: civil servants (with or without legal training or full legal qualifications), lawyers (who are not public servants), or laymen (with or without legal training).

The government can continue appointing stipendiary magistrates, (from the public service), until they displace the justices of the peace. Some see this as a modern, and inevitable, trend, although, in England, many towns which had stipendiaries have not replaced them, and, in America, over half the states have justice of the peace courts. This method would, no doubt, be supported by the clerks of court, anxious for promotion, who see the continuation of the lay magistracy as inimical to their career prospects.

The second choice is to open the magistracy to the legal profession, from outside the public service. There is great resistance to this in Victoria from the clerks of court who, quite naturally, wish to continue the closed shop situation, where only qualified clerks from the courts branch are eligible for appointment as stipendiaries. Their point is a valid one. They have had (often twenty years) experience in the system, have passed the necessary examinations (i.e. nine law subjects) and have served their apprenticeship. It has been suggested that if the bench was open to the lawyers there would be little incentive to be a court clerk, and standards in the area could very well fall. And there seems no great enthusiasm on the part of the public for such a move. If the public are suspicious of public servants it is equally true that they are cautious of lawyers.

Mannheim said that, "a system of criminal justice administered entirely by professional lawyers stands condemned in the light of history as well as in that of practical experience" and an English commission stated, "it would now be impracticable and, indeed, undesirable, to seek to replace our lay magistrates by a professional and stipendiary system"; (in England stipendiary magistrates are barristers or solicitors of seven years standing). Henry Cecil (himself a judge) has said, "is it better to have third — or fourth — rate lawyers deciding these cases or laymen . . . the standard of justice would in my view be lowered if lay magistrates were replaced by inexperienced or incompetent professional magistrates".

The third, and it is suggested the preferred, choice is to have a mainly lay bench, such that legal writers here could say, as they do for England, "Magistrates Courts are usually composed of two or more justices of the peace". "The common people with whom they have to deal" should be dealt with by lay magistrates (with whatever qualifications are considered appropriate) who can better understand, and relate to, them, than either public servants or lawyers (no matter however well-intentioned the latter two groups may be).

There has been a decline in jury trials, (where twelve lay people are the judges — at least, of fact), over the last hundred years, and a consequent increase in the jurisdiction and work of the magistrates courts. It is clearly in the interests of the public, and those who may find themselves in court, (and who, these days, in the age of the motor car, will go a lifetime without so doing), that they be dealt with by their own people, and by accepted community standards. Henry Cecil has described justices as "really a sort of superior and select jury". If we are to have a system, where the vast majority of trials do not go before a jury, we owe it to the people to ensure that, as far as possible, they will have their cases heard by an experienced and competent lay bench. (In Victoria we had, prior to 1956, a Special Jury for certain cases — these jurors having higher qualifications than the ordinary jury).

Now it is not suggested that this could, or should, be done overnight, or that we should replace our present stipendiaries. What is proposed though is that no more stipendiaries be appointed, and that the use, and powers of, justices of the peace be gradually, but surely, increased. This is no reflection at all on stipendiary magistrates, (or senior clerks of court), but a realization of the fact that, at the present time, we are rapidly moving towards a public service bench, and, that unless the "Australian trend" is reversed, we shall, within a generation, find that we have, for all practical purposes, lost the lay magistracy; which would be a tragedy for this country.

The above proposition raises a number of issues. The immediate one is that if lay magistrates are to control the courts, then they must be better trained and better appointed. An immediate first step is to find out exactly how many justices are needed. A study would probably indicate that the number required would be between six and eight hundred at the present time. As there are over 5000 now, it is suggested that say 80% o. these, (i.e. the number who do not exercise their judicial powers), — and this could perhaps be as high as 90% — be removed. This could be done in one of two ways. One, and perhaps harsh, way would be to withdraw the commission from those who do not sit on the bench (this is done in England). The other (and, in view of the past, perhaps preferable) way would be to divide justices into two groups: those who will sit in magistrates courts (the true lay magistrate) and those who will perform only ministerial or administrative duties — both of them retaining the appellation J.P. It could then be decided at a later date, (when the dust had settled), whether to continue with the dual appointments set out above or to create a new position for those who would perform non-judicial duties, (somewhat like a commissioner for affidavits). Whatever was decided here, those removed or transferred could be regarded in much the same way as the English regard those on their supplemental list. The intention being, in time, that all those entitled to be called J.P. would, in fact, be active magistrates. If not, they would cease to be justices.

Existing, and future, justices should receive better training. Though it may be fair to say that most of those who have completed the existing training courses mentioned earlier, and who sit regularly, (i.e. weekly or fortnightly), may not need much initially in this area. Appointments to the bench should be more difficult to obtain, and those selected should be chosen for ability, capacity and knowledge, in addition to the factors mentioned earlier. Higher standards are necessary at the starting point. It would, of course, be necessary to cease the practice of automatically appointing as justices presidents and mayors, (Magistrates Courts Act S.16), — unless it was decided to retain this for local reasons but then the ex-officio should sit only with two other justices or a stipendiary magistrate. It should be a requirement that justices sit a minimum number of times a year. In England, if a justice does not sit 26 times a year, he loses his commission, and a similar condition here would benefit both the bench and the justice.

Unfortunately, at the present time, in some areas, it is not all that easy for a justice to sit on the bench. In some cases, "the new justice almost has to shoulder his way into the court", and, as "nobody lays down any instructions or guide-lines", the new justice is often left floundering, and the keen appointee wonders why he was commissioned in the first place. Some find that there is an established bench who, regrettably, do not want new blood. Others, unfortunately, are deterred from sitting on the bench by the attitude of the local stipendiary, (who may refuse to have justices in "his" court), or the clerk of courts, (who can easily prevent a justice from sitting). The Melbourne Magistrates' Court is an example here, and there are many others. To use an expression used in a royal commission, the actual running of the court is a situation where "the law and the practice are consequently at odds". Justices, in theory, can sit at any magistrates court in Victoria, (although they do not have jurisdiction in all cases), but, in practice, whether they sit depends on the whim of the stipendiary and the clerk.

At present the power of justices is restricted in law, as well as in fact. A number of statutes require that a stipendiary magistrate sit, and, in some cases, sit alone. In practice, in many courts, the stipendiary magistrate further restricts the cases that can be heard by the justices, so that anything considered to be serious or controversial, by the stipendiary or clerk, is not given to the justices, who may then be listening to minor traffic matters all day — whereas, their brothers, in the next suburb, may be deciding cases where prison terms are to be imposed.

It is suggested that a bench of two justices, (provided they have completed the suggested training or have some legal qualification), be given statutory power to hear and determine all cases that, at present, can be heard by a stipendiary magistrate. In addition, it is suggested that administrative directions be given by the Law Department to court staff, that lists (when there is a division of the court) be divided equally with regard to type and seriousness of offence. Perhaps, in order to not revolutionize things too much, defendants could be given the right to demand trial before a stipendiary magistrate for those offences which now have (by statute) to be heard by a stipendiary. At the present time there are a number of offences which give a right to trial by judge and jury, (Magistrates Courts Act S.69), and others which give a right to go before a stipendiary magistrate, (such as the Motor Car Act S80). Though in the writer's experience he has never seen a defendant (including those charged with indictable offences) refuse trial by the justices. Now whether this is because, "the real price one pays for a lay magistracy is, of course, undue lenience", or because they feel more secure being judged in their own courts by their own people is difficult to say with any exactness. But, as very few defendants would know the sentencing practice of various benches, it would be safe to say the latter would be closer to the truth. (Though a comparison of the English and Victorian acquittal rates at various courts would have any civil libertarian opting for a lay bench).

Now, although there is provision for a justice of the peace to sit alone, (Magistrates Courts Act S.6.1.c.), this is rarely done, and, even

then, it must be by consent. A recent book on criminology states, "as a general rule stipendiary magistrates sit alone, although sometimes they sit with one or more honorary justices of the peace". It is suggested that it would be better if the sitting with one or more justices was the norm. This not only helps in the training of the justices, (for stipendiary magistrates have a wealth of experience and if justices do not sit with them "one important source of knowledge is cut off"), but also brings the community into the composition of the bench. One author has said that, "the more serious the decision the more likely it is to be made by one man alone" and, for that reason, a bench of two (or even three) is preferable. Apart from this, it must be a comfort for a stipendiary to have someone with him to share the burden. As an English writer has said, "few men have the ability to remain good tempered and patient when they take courts day after day".

The role of the clerk should not be forgotten. He is there to advise on matters of law, though he "must carefully abstain from interfering in the conduct of cases" — "the decision of the court must be the decision of the justices and not that of the justices and their clerk". The clerk plays a very important part in the court. Though, unlike his British counterpart, he is (generally) not a qualified lawyer, but rather a public servant, who commenced work with the law department at a comparatively early age, and has passed some law subjects. In most cases he looks forward to promotion to the bench, and, if we are to reduce (through effluxion of time), the number of stipendiaries, it is necessary that an acceptable career path be open to him. This is really the subject for another paper but in general one needs to have a high standard of experience and legal knowledge in this area to preserve the proper continuity of legal and administrative expertise at the courts. If this means paying them more than they now receive, so be it.

In England justices sit, not only in magistrates courts but also, at the Crown Court to help determine sentences and to decide appeals. (These Crown Courts replaced the old Quarter Sessions). In Victoria, justices used to be able to sit at General Sessions until 1968, when the criminal jurisdiction of this court was given to the County Court, and justices were prevented from sitting. The English justices sit with the Crown Court judge and can, in fact, outvote him on matters of sentence. They play a very real part in the administration of justice at this higher level, and the experience has proved this to be beneficial to the courts and to the public. It is to be hoped that, with a more active and qualified lay bench, the County Court Act in Victoria will be amended to allow justices to return to this court.

☆ ☆ ☆

"We beseech thee to hear us good Lord."

☆ ☆ ☆

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