THE LEGAL TRADITIONS OF AUSTRALIA AS CONTRASTED WITH THOSE OF THE UNITED STATES*

by

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The legal system imported to a new country is affected by the physical conditions of that country. Professor Schwartz says of American law, 'the decisive facts on which the law had to be based were the seemingly limitless expanses of land and the wealth and variety of natural resources'.[1] In Australia, the law bears the imprint of the limitless expanse of the land, but also of the poverty of the soil, the arid climate, and the absence of resources except minerals.

It is necessary to bring home to Americans certain facts about Australia. It is about the size of the United States, excluding Alaska.

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*This is a revision of an address given to the Comparative Law Club of the Law School of the University of Kansas at Lawrence, Kansas, in November 1979.

[1] *The Law in America*, McGraw Hill Book Co., New York, 1974, p. 17.

It extends from ten degrees, forty-one minutes south to forty-three degrees, thirty-nine minutes south; and from a hundred and thirteen degrees, nine minutes east, to a hundred and fifty degrees, thirty-nine minutes east. It is the driest, flattest and most barren land of comparable size on earth. Though rich in many minerals it is very deficient in oil and timber. In general, where there is abundant water the soil is poor. The rainfall, except in the south-east and south-west and in the far north, is deficient and is everywhere extremely capricious. The difference between precipitation and evaporation is one-fifth of the world continental average. It is basically an extremely poor country, and the apparent wealth of Australia is due solely to the application of western technology and science to selected parts, to its mineral wealth, and to the use of huge areas for its pastoral industry. The northern beef cattle areas require on an average forty acres to support one beast, and the stations in these areas have to carry fifty to a hundred thousand animals to be economic. Victoria River Downs in the northern territory has an area of about fourteen thousand square kilometers and on that one hundred thousand cattle graze.

The huge area of the country could be rapidly occupied because the aboriginal population presented no serious obstacle to the white man. They were peculiarly susceptible to disease and easily crushed by force where they resisted the seizure of their lands and water holes. The Royal Navy dominated the seas from the Battle of Trafalgar in 1805 to the end of the nineteenth century. There was, therefore, in Australia no danger of external enemies, nor was there any possibility of any aboriginal

resistance receiving foreign support. The only obstacles to the occupation of the country by the white man were physical and demographic. The physical obstacles, except shortage of water, were not great. There were no high mountains, no impenetrable forests except on the east coast. There were no dangerous wild animals, few poisonous reptiles. The country was fit only for a pastoral economy. About fifty years after 1813, when for the first time the settlers found a way over the rugged mountains about thirty miles west of Sydney, the whole of the land of Australia capable of carrying sheep or cattle was held in vast pastoral holdings by men who have been called 'shepherd kings'. Where the pastoralist went, the law had to follow, and it did.

The population was sparse. Local institutions outside the centres of government which were all on the coast were almost nonexistent, and the vast inland was controlled in a fashion by police under the direction of the executive backed up by small military forces supplied by Great Britain. Though there were bushrangers, it can be said that at no stage were the authorities not in effective control. As a result, there were never any locally organised police forces or courts or educational systems. From the coastal ports where the capital cities of the states now are and the original settlements were made, unbroken lines of communication to the limits of the settlement carried the one system of law and law enforcement, namely, by the police and public servants of the state. These lines, in consequence of the small population, reached over immense distances. They were employed by the pastoralists and later the miners for taking their products to the coast for export

and bringing back their supplies. This pattern initially dictated by the poverty of the country has never changed. Australia is the most heavily urbanised country in the world with almost all industry, commerce, finance and education, law and order, concentrated in and operating from the state capital at the original place of settlement. Thus, in all states except Tasmania and Queensland, it is necessary to obtain, for example, a grant of probate in the capital city, where-ever the property of the deceased is. Though the judges of the Supreme Court go on circuit, most litigation is conducted in Sydney and not only the Supreme Court judges but all the District Court judges in New South Wales live in Sydney, the capital, and go out from time to time to administer justice in the hinterland. In New South Wales we have the Torrens system, and every transfer has to be recorded in Sydney. It must be remembered that there are parts of New South Wales six or seven hundred miles from Sydney.

The United States has a totally different pattern of administration. An Australian coming to the United States is genuinely surprised by the luxurious growth of local authorities, each apparently with its own police, courts, taxes and almost daily elections. In Australia there are no courts or police except those of the state or the Commonwealth. Neither the members of the courts nor the police nor their controllers are elected. There is not in Australia anything like the same tradition of self help in the law; for example, lynching is unknown in Australia and to my knowledge has never existed, though I concede that the settlers did conduct massacres of the native population. However, even in this

field the government exercised considerable control and where caught, Europeans massacreing natives were tried and sometimes hung.

Unlike America, Australia has always been a very orderly country with relatively few disturbances leading to loss of life. The few that have occurred have provided themes for literature, so that Australian literature is a most misleading document from which to judge the effectiveness of Australian law. There has undoubtedly been a rebellious tradition in Australia. The bulk of the population in its first fifty years were convicts, and they undoubtedly nourished deep hatreds of the authorities. But the authorities in Australia have never lost effective control over the continent, nor was the centralised authority originally created ever effectively broken down.

The next fundamental distinction between Australian and American law is that in Australia there has never been a revolution or an attempt at a revolution. Whereas in America there not only was a revolution in which the country was born, but also a successful suppression of an attempted secession; in Australia there was nothing remotely similar. Australia, therefore, does not have to pretend that power comes from the people. The polity has an historical legitimacy which America does not have. America has the legitimacy derived from a successful revolution and a successful resistance to an attempted secession of part of its original constituent membership. Since I have been in America, I have been surprised on a number of occasions when I have been asked what was an Australian's view of the justification for

law. This is a kind of question which has no meaning for those who do not have to rely on a revolutionary situation or conquest unless they have to argue with anarchists or nihilists. It is a question which is now being asked in Australia by spokesmen for the aboriginal population. To this, of course, there is only one answer - that is, successful conquest of the aboriginal people, which is not a justification to them. However, for the European population in Australia, the authority is based on powers which have been legitimate for nearly a thousand years, and therefore it is not necessary in Australia to appeal to God or the people or to any other source. The law is there and has always been there, and its origins are historically based in the powers of the British Parliament, going back to ancient times.

Though Australia has emerged as an independent state, it has done so slowly and reluctantly. It clamoured for control of its internal affairs, but it was too conscious of its weakness in the world and was too obsessed with the millions in Asia which are so close to our shores to want to break down the power of the British Empire in any way. It has in the main opposed the fissiparous tendencies which have long been at work in the British Commonwealth. For example, it was not until 1942 that it adopted the Statute of Westminster, that charter for the dissolution of the British Empire, which was enacted in 1931. Its lawyers have, in fact, been imperialists rather than nationalists, and such nationalistic steps as it has taken have been in the main belated adjustments to pressures exerted elsewhere. It is true that

it has had nationalists in recent times associated with the Labor party, but I think it can be said that they have not represented the common, the generally held view of Australian people. The popularity with which they have been received in countries which have been anxious to break down British power gives no indication of the extent to which they did represent the views of the average Australian.

Australia is a country which has obtained the advantages of independence without having to fight for it. But winning without having to fight for something carries with it some disadvantages. The United States, having had to formulate an ideology in order to rally the revolutionary forces and to present a justification for its stand to the world, and later having had to clarify that ideology to nerve its soldiers to die for the Union, has produced an ideological constitution and an ideological legal system which is for many purposes a great source of strength. For example, when I was in Cornell, Professor Summers of Cornell Law School listed to me a number of fundamental good objectives to be pursued by judges, one of which was promoting democracy. I cannot recall any decision of any Australian court which would give the slightest support for the view that such a line of reasoning appealed to or would be entertained by it. Similarly, there are no authorities, as far as I know, which list not promoting democracy as a legitimate judicial goal. Australian courts are professedly ideologically neutral, whereas it is clear that in the United States it is regarded as a duty of courts to be committed to certain ideological causes embodied in the constitution. Marxist and

American scholars can no doubt discover that the Australian courts have ideological commitments, and further draw the conclusion that the protestations of ideological neutrality are merely for the purpose of disguising their real objectives. This is a very complex question which it is not possible to discuss here, but there is no doubt that the professed adoption of ideological neutrality with its intended rejection of avowedly teleological arguments has important results for the tone of the legal system.

The decision not to include in the constitution guaranteed rights was a conscious one. The founding fathers had before them as their basic draft the American constitution and excised from it substantially the whole of its Bill of Rights. The condition of the aboriginal population might have suggested the need for something like the 14th and 15th amendments, but the Commonwealth was excluded from having powers in relation to aborigines except in the Territories, of which originally there were none, and they were kept wholly under the control of the States. This was rectified in 1967, but no guarantees were then inserted in their favour.

The tone of the High Court of Australia and the tone of the Supreme Court of the United States are fundamentally different. The High Court of Australia has remained a conservative court. It has shown little desire to support radical change or to assert independence from the mainstream of English law. In the last few years there has been some tendency to abandon this attitude, but looking at the last seventy-

five years of law in the High Court, it can be said that the Australian High Court has been anxious to adhere and to see that Australian courts also adhered to the principles enunciated in Great Britain.

The judges of the High Court of Australia have professed to apply this ideological neutrality to the construction of the constitution. Though they from time to time emphasise the document they are construing is a constitution, it has also been said of them that they construe the constitution exactly as they would a will. In some politically sensitive cases it would be hard to maintain that they did not give effect to their political views, but I would think it is true to say that they have striven to overcome their political commitments.

It was my privilege to attend a conference of American legal philosophers at which an eminent professor urged that judges should be encouraged to strive for the right results irrespective of mere words. This is the cry of those who claim to be progressive legal thinkers. It could be used to justify the decisions of the Supreme Court which invalidated laws against child labour,against restrictions on hours of work and the New Deal. It requires the canonisation not only of Mr. Justice Douglas but of Mr. Justice Peckham or Mr. Justice McReynolds, all of whom were championing what appeared to them right. For my part, I hope our High Court continues to ignore the clamour coming from some academics to model itself on the Supreme Court of the United States.

The fact that the constitution has been construed as an ordinary British statute has meant that it has not acquired the sacred aura which surrounds the American constitution. The constitution is not an enunciation of moral principles, nor does it provide the guidelines for polity. The constitution has been difficult to amend not because it is regarded as in any way sacred but because it has to be altered by a referendum, and a referendum is a profoundly conservative institution. The citizens of Australia tend to be sceptical and resistant to enthusiasm, outside sport, and their instinctive reaction to any suggested constitutional change is simply to say no.

It is one of the startling phenomena of the modern world that it seems to be accepted that constitutions and legal systems should proclaim the ideological commitment of the states that adopt them. Most of these commitments are hypocritical. The most vicious tyrannies of the Third World are conducted under constitutions which profess the most noble aims, so that to all other faults, hypocrisy is added. Basically Australia has managed to maintain a reasonably civilised standard of local political behaviour without following this pattern. There are signs that this modern disease is coming to Australia, and there are demands that we should have introduced into our constitution a substantial body of guaranteed rights. So far, however, nothing has come of this.

Since I have been in America I have been often asked how liberty survives as neither the Commonwealth nor the States has a bill of rights

embodied in a constitution which cannot be altered. It survives in part by being supported by positive laws and by inherited sentiments in its favour. There are laws which favour liberty, for example, the habeas corpus acts. In New South Wales, the legislature has recently strengthened the position of an applicant for bail, and it has laws directed against discrimination on account of sex or race. The maintenance of these laws depends largely upon the vigilance of the people.

The judiciary has an important part to play, but the part which it plays depends upon adopting the exact opposite technique from those beloved by American liberals, that is, in insisting on the strict construction of all laws and keeping the laws tied to their historical origins and purposes. Liberty survives as it historically got its start by reason not of broadsweeping, often meaningless declarations, but interstitially, in the cracks and holes of the coercive armory of the state, such cracks and holes being discovered by lawyers and declared by an independent judiciary. Liberty is founded on black letter law.

There have been a number of important illustrations of how such an approach facilitates liberty. One good example is shown by the history of the Communist Party Dissolution Act of 1950. This was an act of the Commonwealth Parliament passed to make it illegal for the Communist Party to function as a political organisation and dissolve it. The Commonwealth has no express power to legislate for

political parties. In order to appreciate the situation it must be remembered that the Communist Party had in 1949 brought on a crippling strike in Australia. Using their power in the coal mining unions, the waterside workers' unions and the seamen's union, they had brought Australia almost to its knees. The Labor government, the leader of which was Mr. Chifley, had vigorously fought them using troops to work the open cut mines in order to prevent the total cessation of the production of electric power. Also, the Korean War had begun at the time the act was passed and was being considered by the High Court. The situation was therefore that the Communist Party had organised a real attempt at the coercion of the Australian government, and its principals overseas had begun a war in which Australia was engaged.

The act was alleged to be valid as an exercise of the defense power because of the Korean War, and the implied power of the state to defend itself against subversive forces. The court, the Chief Justice Sir John Latham alone dissenting, would have none of this, holding that defense power only applied to defense against external enemies, and refusing to apply the authorities which gave the executive wide discretion when the defense power could properly be invoked, to internal subversive threats. The most vigorous rejection of the right to use either the defense power or the power to protect against internal subversion came from judges who were known as extreme conservatives. In the end, the Communist Party won the case because the court rejected popular pressure and read the constitution in a strict and narrow way. During the First and Second World Wars the very conservative chief

justices of New South Wales rejected all patriotic pressure on the part of lawyers for the government and required precision in the drafting of regulations and charges. In other words, they resisted current enthusiasm to defend liberty.

In Australia, a strong case could be made for the view that the best protectors of liberty have been those who give narrow construction to acts and the Constitution and who are usually known to be political conservatives. In the United States it seems that it is assumed that the protection of liberty can only take place if judges are professed liberals who are prepared to give what are far-fetched constructions to constitutional guarantees. As the United States is the teacher of the new nations which have not been absorbed into the Communist bloc, the doctrines expressed in its schools are of world importance. To revolutionaries, self abnegation or self control of any kind is an anathema, but I would suggest that Americans who teach them might give some consideration to the Anglo-Australian doctrine that judges should really try to be neutral.

The more recent cases concerning effective liberties have shown them to be protected by similar methods of construction. Though not as far as I know listed in formal collections of human rights, the right to a telephone and to postal services are among the real requisites of liberty. In Australia, telephone and postal services are government owned. Under the inspiration of the United Nations, the Australian government issued directions that a certain Rhodesian propaganda agency

in Sydney be deprived of both. The majority of the High Court held that this could not be done unless the regulations expressly so provided. Whatever view one may have of the white Rhodesians, the UN demand that their supporters be not heard is a demand for thought control and the conservative Australian judges who refused to pay any attention to pressure in the name of the UN in construing Australian acts and regulations were in my opinion making a notable constribution to the maintenance of real liberty in our society.

I concede that strict construction does not always favour the cause of liberty. Last year the Supreme Court of New South Wales, in a case called *Smith v. Commissioner of Corrective Services* [1978] 1 N.S.W.L.R. 317, had to deal with application by a criminal challenging the conditions under which he was being held pending trial. His argument depended on the construction of the words of a New South Wales statute. The very same words appeared in the constitution of Oklahoma and California. Our court was treated to some rousing rhetoric from the courts of both states, interpreting them as giving rights to prisoners as to how they were to be held in jail. However, the act in New South Wales was derived from an act in the United Kingdom which was designed to deal with a particular deficiency in the law of evidence. Not being in the constitution, these words had to be construed in the light of the general pattern of legislation in New South Wales. So construed, they had nothing to do with the general rights of prisoners except when they wanted to testify in court.

The next fundamental difference is that Australian law, despite the existence of six states with six legislatures and a Commonwealth with another legislature, has none of the diversity of American law. Australia has not had to face the problem presented by such states as Louisiana, Texas and California where a different system of law was in existence when they became part of the Union. The uniformity is very great. The factors which produced and maintained this uniformity were: (1) the adoption of English law at a particular stage of the development of each state; (2) the fact that from all Australian states to the present time there is an appeal to the Privy Council and that prohibition of appeals from the High Court to Privy Council has only recently been enacted; (3) the dominance of English traditions in the training and organisation of the profession throughout the country; (4) in the High Court Australia has a court which is the final court of appeal directly or indirectly from all ordinary courts.

New South Wales was founded as a penal colony and the extent to which the law of England was applicable to a penal colony was a subject of much debate. By an act of the Imperial Parliament, 9 George IV, Chapter 83, it was enacted that the laws and statutes in force in England at the passing of that act on 25th July 1828 were to be applied to the administration of justice in the courts of New South Wales and Tasmania so far as the same could be applied. The question of the applicability of particular laws and statutes was left to the courts to determine. Similar provision was made for South Australia and West Australia, though the dates were different. However, there were

no significant changes in English law between the various dates. These problems are still with us.

In the last decade the courts of every state have been called upon to decide what is known in Australia as the rule in *Searle v. Wallbank*, [1947] A.C. 341, that a landowner adjoining a highway has immunity from responsibility for his livestock straying upon the highway, was a rule which could be applied and was still in force in the respective states. The Supreme Courts of Queensland, New South Wales, Victoria and South Australia decided it was, the Courts of Tasmania and Western Australia decided to the contrary. I was a member of the court which decided it was in New South Wales (*Kelly v. Sweeney*, [1975] 2 N.S.W.L.R. 720). The High Court has now decided that the rule in *Searle v. Wallbank* does apply (*S.G.I.C. (S.A.) v. Trigwell*, [1979] 53 A.L.J.R. 656).

In *Dugan v. Mirror Newspapers Ltd.*, decided 19th December 1978, the majority of the High Court (Barwick, C.J., Gibbs, Stephen, Mason, Jacobs and Aickin, J J., Murphy J. dissenting) held that the rule of English law that an attainted felon could not sue in the courts until he had served his sentence or received a pardon was suitable to the conditions of the colony of New South Wales in 1828 despite the fact that the population consisted largely of convicts who had been let at large. Dugan had been convicted of murder but his sentence had been commuted and while in gaol he took proceedings against a newspaper for defamation. Though the New South Wales legislature had abolished

many of the incidents of conviction for felony murder, it had not given an attainted felon the right to sue and the majority of the court held that the judgment entered for the paper in the Supreme Court of New South Wales was correct.

After the colonies acquired legislatures, the infant colonies adopted many English statutes without alteration, and the tendency of all colonies was to follow English legislation relating to property, other than land, commerce, torts, procedure and evidence, with little variation. During the late nineteenth century and the beginning of this century, English legislation related to trade unions and workers' compensation was copied.

The states made original experiments affecting the law of real property. Beginning in South Australia in 1856, the Torrens system of registered title to real estate spread directly to all colonies, and by far the greatest part of land in Australia alienated from the crown is held under registered title, or is in the process of being so held. The states also adopted similar laws protecting disinherited spouses and children. Company law is uniform throughout the continent. The law of marriage and divorce is now embodied in federal acts and is absolutely uniform. Even when it was the concern of the states, the differences were small. Australia has had no Reno. There are substantial differences between the states in certain fields, particularly those governing the actual right to claim alienation of land from the crown and in the control of liquor. The criminal law, textually and as administered, varies considerably between the states.

However, all in all, the uniformity which exists between the states is more notable than the differences.

The Privy Council remains to this day a living relic of the now destroyed system of imperial institutions by which during the nineteenth century the British effected substantial co-ordination of the laws of a quarter of the earth. One of the objectives of the Privy Council was to promote the uniformity of law throughout the empire. The Board said in *Trimble v. Hill* [1879] 5A.C. 342 at 345, a decision on appeal from Australia,'it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same'. The High Court of Australia accepted this principle in full and on a number of occasions reversed its own previous decisions to bring them into line with decisions not only of the Privy Council, by which of course it was bound, but also of the House of Lords and the English Court of Appeal. Thus in 1926 it reversed a previous decision of its own given in 1917 (*Hunt v. Korn,* 24 C.L.R. 1, reversed by *Sexton v. Horton,* 38 C.L.R. 240) because the Court of Appeal in England had overturned the decisions upon which the earlier case had been founded. Knox C.J. and Starke, J. said:

> Unless some manifest error is apparent in a decision of the Court of Appeal this Court will render the most abiding service to the community if it accepts that Court's decisions, particularly in relation to such subjects as the law of property, the law of contracts and the mercantile law, as a correct statement of the law of England until some superior authority has spoken. [(1926) 38 C.L.R. 240 at 244].

In 1943 it reversed previous decisions of its own in order to follow a decision of the House of Lords, the Chief Justice, Sir John Latham quoting the passage from *Trimble v. Hill* referred to above. Only in 1963 did the High Court refuse deliberately to follow a decision of the House of Lords, and it did so with considerable reluctance. In *Parker v. The Queen*, 111 C.L.R. 610 at 632 the Chief Justice, Sir Owen Dixon, speaking for the court said:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept.

The whole basis for subservience of Australian law to the common law as declared by the House of Lords was swept away by the Privy Council itself when on appeal from the High Court of Australia in *Australian Consolidated Press Limited v. Uren* [1969] 1 A.C. 590 at 641, it said:

> There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction.

As appeals to the Privy Council from the High Court have now been abolished but some particular appeals from the Supreme Courts of the states can be taken to the Privy Council, difficult questions of authority have arisen. The High Court has laid it down that in any conflict between the High Court and the Privy Council the courts below the High

Court should follow it, leaving it to resolve that conflict. It has now taken upon itself to ensure the uniformity of Australian law.

The evaluation of the effect of the Privy Council upon Australian law is yet to be done. The existence of a superior court has a constricting effect upon a lower court, and this type of constriction by a foreign court offends nationalistic sentiments. On the other hand, the forcible hitching of the legal system of a small state to one of the great legal systems of the world has provided stimulus to us. The development of the law of torts and contracts in so far as it had been effected by the judiciary has been largely guided by English leadership. That leadership would have operated anyway without the existence of the Privy Council, but its existence guaranteed its success. The casuistical methods employed by the courts to adjust and modify the law work most effectively if there are competing doctrines confronting them. In a relatively provincial country (though very litigious) such as Australia, the tendency to lapse into self satisfaction has been restrained by the continual presence of a major legal system, not as a distant exemplar, but as a continual force for change.

The High Court of Australia enjoys a position of greater formal power than does the Supreme Court of the United States, in the Australian legal structure. It can receive appeals directly or indirectly from all courts in Australia. There is no question of any matter of New South Wales state law being finally determined by the Supreme Court of New South

Wales. There is either an appeal as of right or an appeal by leave of the High Court. The High Court is therefore the final court of appeal on all legal questions in Australia subject only to the remnants of the power of the Privy Council. The arise of different and conflicting doctrines in the state Supreme Courts is regarded by the High Court as one of the reasons for granting leave.

The profession has in all states derived its principles, traditions and standards from those in England, and the standards and the approach to the law are remarkably uniform. According to Schwartz, the legal profession in the United States has been devastated twice, first by the Revolution when many of the leading lawyers were Tories and secondly by the Jacksonian movement which proceeded on the basis that any person of good character should be able to practise law, and also that judges should be elected. Australia has not experienced any disasters of this kind. The profession has had a history of continually being required to possess professional standards, and judges have always been appointed by the executive. Initially appointed for life, now they are appointed in some states until the age of seventy, in other states until the age of seventy-two. In 1977 the Constitution was amended so that henceforth Commonwealth judges will hold office until they reach the age of seventy subject to good behaviour. Removal of a Supreme Court or a Federal judge on the grounds of absence of good behaviour requires an affirmative vote by both Houses of Parliament. Only one judge since the colonies obtained internal self government in the fifties of last century has ever been so removed.

A consequence of this was that the great efforts made in America by the great law schools to raise the standards of the profession had not been required in Australia. An average standard of professional competence and also of judicial competence has been maintained. However, because the great efforts required in America have not been needed, Australia has not had institutions of the immense scholastic strength which America has had in its great law schools. It not having been necessary to rescue Australia from legal chaos, and the law not having obtained that immense importance which it has in America, not only internally but externally because America is a world power, law schools have been ill-financed and the standard has in the main been mediocre. We have not had in Australia any analogues of Story, Williston or Scott. Australian law being simpler and Australian authority being clearer and narrower than American, law teaching has tended to be expository rather than creative. The law has not been such a wonderful quarry for the scholars as has American law, but it has probably been better for the subject. What is good for the law professor is not necessarily good for the litigant.

The way the law works is dictated by the procedure and practice of the courts. Appellate procedure and practice affects the evolution of the law as new law emerges principally from the decisions of the intermediate and final courts of appeal. The manner, therefore, of presenting appellate cases has an important effect on the evolution of the law.

In Australia, appellate argument even in the High Court is almost wholly oral. Even in constitutional cases there are no written briefs. The rules permit written argument, but I cannot remember any important case where written argument has been presented except in a supplemental way. In the appeal division of New South Wales in difficult cases the court calls upon counsel to present written summaries of argument and lists of authorities on which it is intended to rely at least forty-eight hours in advance of the date fixed for hearing. Our court has usually read the judgment under appeal and intervenes vigorously in the argument as it is being presented so that the case develops as a dialogue between the bench and the bar. In Australia there is a recognised appellate bar, that is, a small group of leading counsel known to solicitors as capable of handling the cut and thrust argument required by the court. The object of argument is to carve the case up so that it can be speedily disposed of. It has been my privilege to listen to a number of arguments in the Supreme Court of Texas, and one morning's argument in the Supreme Court of Kansas. I was struck by the kindness of the bench as compared with our own. There was no desire to dispose of a matter by one sharp uppercut. On the other hand, in Australia no case is summarily disposed of without argument as can happen in America. Every litigant it is assumed has the right to raise his voice in court and have the bench openly dispose of what he has to say. On an average, sixty per cent of all judgments are given immediately after argument without reservation, and in a very large number of cases, whether the judgment is reserved or given extempore, all judges set out their views. In the High Court, except

in matters involving procedure, single judgments are almost unknown. Though in Australia we are not as efficient as they are in the Court of Appeal in England, where I am told eighty-five per cent of all judgments are extempore, we have in the main followed the English tradition. Any judgment in the High Court involving constitutional issues is reserved, and a high percentage of other judgments.

It would not be right to conclude without dealing with the effect of American law upon Australia. When in 1890 the founding fathers were faced with choosing a model for the Constitution of the Commonwealth, they looked to the Constitution of the United States, and it provides the basic layout for the division of powers between the Commonwealth and the states. Radical changes were made and in fact the Commonwealth constitution works very differently from the American. In the course of the elaborate debates which went on for a decade, during which the text of the Australian constitution was settled so that it could be presented to the Parliament of the United Kingdom, a large number of lawyers acquired an intimate knowledge of American constitutional law, as it had been developed up to that time. The early judges of the High Court participated in the drafting of the constitution and particularly in the first decade after Federation on many issues, decisions of the Supreme Court of the United States on your constitution were decisive in the construction of that of the Commonwealth. However, in 1920 a legal revolution was effected in Australia, the doctrine of immunity of instrumentalities which had been borrowed from the decisions of the Supreme Court of the United States,

decisions since overruled in the United States, was rejected, and the current doctrine that the constitution is simply a British statute and to be so construed, was adopted. Since then American influence has almost disappeared, though one judge of the High Court is endeavouring to revive it. In the last six or seven years a Restrictive Trade Practices Act based on the anti-trust acts of the United States has been enacted. And in this field American influence is strong and the counsel in these cases have to master American law.

However, there is one way in which American exercises immense influence. That is through the great institutional treatises which have emerged from its law schools. No important decision on the law of evidence is given without reference to Wigmore or MacCormick, on contracts without reference to Williston or Corbin. In the field of trusts I would never think of giving a judgment on a novel point without reading what Scott has to say. The Restatement is also regularly referred to.

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