THE COMMON LAW—TEARS IN THE FABRIC

By F. K. H. MAHER*

The Attorney-General of the Commonwealth of Australia (Mr Nigel Bowen, Q.C.) announced on 5 September 1967, that his government intended to move to restrict appeals to the Privy Council from this country. The principal restriction would be to give the High Court of Australia a power of final and conclusive decision on all matters within the jurisdiction of Federal Courts.[1] Ever since the early days of the Commonwealth the High Court has declined—with one exception—to grant a certificate under section 74 of the Commonwealth Constitution to appeal to the Privy Council on disputes between the Commonwealth and the States *inter se*.[2] Otherwise, subject to certain procedural requirements, the Judicial Committee has been a final tribunal on both private and public law.

The Privy Council (Limitation of Appeals) Act 1968 (Cth) passed through the Commonwealth Parliament in July 1968. It contains only four enacting sections, the essential one being section 3, which provides in a negative fashion, that special leave to proceed to the Privy Council from a decision of the High Court may be granted only where that decision was on appeal from a State Supreme Court not exercising federal jurisdiction and where the decision of that State court did not involve interpretation or application of the Commonwealth Constitution or a Commonwealth law.[3]

Introducing the second reading the Attorney-General said: 'In this short measure the Commonwealth Parliament is being asked to take an historic first step towards the establishment of the High Court as the final court of appeal for Australia'.[4]

The new limitations are far from complete. Most issues concerning the general common law, as well as those involving interpretation of State statutes, will continue to be open to adjudication by the Privy Council.

There is apparently no way in which the Commonwealth can prevent appeals going direct to the Privy Council from State Supreme Courts; and no individual States have yet decided to follow the Commonwealth's lead and seek ways of cutting these last links. Indeed, Sir Henry Bolte, the Premier of Victoria, has already announced that his government will continue in the ancient ways. The trend towards diversity has been gathering

* M.A., LL.B. (Melb.); Barrister and Solicitor of the Supreme Court of Victoria; Reader in Law in the University of Melbourne.

[1] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 September 1967, 834-838

[2] *Attorney-General (Cth) v. Colonial Sugar Refining Co. Ltd* (1913) 17 C.L.R. 644.

[3] A full account of the implications of the Act was set out by the Solicitor-General of the Commonwealth (Mr A. F. Mason Q.C.) in (1968) 3 *Federal Law Review* 1. Editorial, (1969) 42 *Australian Law Journal* 38.

[4] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 March 1968, 568.

strength in the last twenty years. Now that Australia has joined Eire, Canada, India and South Africa, there remains only New Zealand among the great former Dominions that allows the Judicial Committee the last word on all its litigation. Probably very few Australian disputes will henceforth be decided outside Australia.

These actions, which would have caused explosive protests thirty years ago—or even ten years ago—made only a tiny bang. No sharp debate followed; though there were words of both approval and disapproval in legal circles. In general people accepted it as inevitable. The Attorney-General was doubtless well informed when he spoke of 'the growing body of public opinion, both in the legal profession and amongst the people generally, that the stage has been reached when steps should be taken . . .'. And Mr A. G. Whitlam, the Leader of the Opposition, approving the move, quoted a Gallup poll result of September 1965 that 81 *per cent* of Australians favoured cutting out these appeals.[5]

So much for political action. At the same time equally important movements had been visible on the judicial front.

In June 1966, the High Court of Australia had delivered judgment in *Uren v. John Fairfax and Sons Pty Ltd*[6] (seven months after argument had been heard). The whole Court agreed that, in a defamation action where the defendant has shown a contumelious contempt for the rights of the plaintiff, a jury is entitled to award exemplary damages. All the judges considered that the same principle might be applicable to any claim in tort, although a narrow majority concluded that the issue before them was not such a case for exemplary damages and the actual dispute was sent back for retrial as to the proper amount of damages.

The chief interest of this decision was that four members of the High Court considered that the House of Lords in *Rookes v. Barnard*[7] had unduly limited the situations in which a jury was free to award exemplary damages and thus had, in effect, 'changed the law of England'. For this reason they could not regard *Rookes v. Barnard*[8] as stating the principle in a form acceptable to courts in Australia.

Uren's case[9] followed close on *Skelton v. Collins*[10] where the High Court's view of the law concerning damages to be awarded to a plaintiff who was unconscious of the injuries he had sustained, differed from that of some superior English courts, including one decision of the House of

[5] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 September 1967, 834-838.

[6] (1966) 40 A.L.J.R. 124. Uren brought two actions on similar grounds which were heard together in the Supreme Court of New South Wales and in the High Court of Australia. Following the decision of the High Court the action against John Fairfax and Sons Pty Ltd was not proceeded with; but the other action, against Australian Consolidated Press Ltd, went on appeal to the Privy Council: *Australian Consolidated Press Ltd v. Uren* (1967) 41 A.L.J.R. 66.

[7] [1964] 2 W.L.R. 269.

[8] *Ibid.*

[9] *Uren v. John Fairfax & Sons Pty Ltd* (1966) 40 A.L.J.R. 124.

[10] (1966) 115 C.L.R. 94.

Lords.[11] The judges had set forth frankly and fully the attitudes that the High Court ought to take in future towards English decisions with which they disagreed. These pronouncements in turn had followed on the debate which had taken place among jurists following the flat refusal of the High Court in *Parker v. The Queen*[12] to recognize for Australia some of the propositions laid down by the House of Lords in *D.P.P. v. Smith.*[13]

These three utterances within three years compelled examination of the situations in which our courts are likely to dissent from English judgments. It would be absurd to forecast many major disagreements, or to assert that Australian judges have embarked on an extensive project of legal apartheid. Refusal to follow has so far arisen from a belief that the English Courts had departed from the traditional doctrine, and thus at some recent time had altered the common law.[14] Therefore, a development which appeared unsound historically, or unsuited to local experience, might not henceforth be accepted as correctly stating the common law for Australia. By 'unsound' is indicated that certain nineteenth (or twentieth) century decisions had departed from the spirit, or had unduly limited or enlarged the scope, of the older propositions. Discord rarely arises from debate about the existence of the fundamental principle but about the extent to which it has been wrongly applied or misunderstood.

Nevertheless, these conflicts of views among appellate courts do raise the question of how far the common law will continue to be common to all the Queen's subjects. The differences have disclosed opposing approaches to similar situations. So far there has been no official pronouncement by the members of the High Court on their general policy; though both Sir Victor Windeyer and Sir Douglas Menzies have indicated some very significant lines of thought in public addresses.[15]

In *Skelton v. Collins*[16] four justices (Kitto, Taylor, Windeyer and Owen JJ.) asserted that, although the High Court acknowledges the strong persuasive effect of high English judgments, it is not bound either by their decisions or by their reasoning. Moreover, they added, other Australian courts should adopt the same approach whenever there is a clear conflict between English and Australian decisions exactly in point. Some latitude

[11] *Wise v. Kaye* [1962] 1 Q.B. 638; *H. West and Son Ltd v. Shephard* [1964] A.C. 326. (It is noteworthy that each of these decisions was arrived at by a majority). In the same case the High Court refused to follow the decision of the Court of Appeal in *Oliver v. Ashman* [1962] 2 Q.B. 210, that damages for loss of earning capacity should not include the period by which the plaintiff's life expectancy had been shortened.

[12] (1963) 111 C.L.R. 610, 632.

[13] [1961] A.C. 290. Professor R. Cross has rightly reminded lawyers that the decision, in many respects, contains very sensible interpretations. Cross, 'Recent Developments in the Practice of Precedent—The Triumph of Common sense' (1969) 43 *Australian Law Journal* 3.

[14] As in *Uren v. John Fairfax & Sons Pty Ltd* (1966) 40 A.L.J.R. 124. For the discussion among lawyers generally, see *Record of the Third Commonwealth and Empire Law Conference* (1966). The Conference was held in Sydney in 1965.

[15] Windeyer, 'Unity, Disunity and Harmony in the Common Law' (1966) 10 *New Zealand Law Journal* 193. Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *Australian Law Journal* 79.

[16] (1966) 115 C.L.R. 94.

was left open to lower courts where a House of Lords *decision* was at variance with contrary *dicta* of the High Court. It was fully recognized by Kitto J. that—concerning decisions of the House of Lords—the High Court 'has always recognized and must necessarily recognize their peculiarly high persuasive value'.[17]

Not much was added to these statements of policy in *Uren v. John Fairfax & Sons Pty Ltd*,[18] but there was a firm reinforcement of the new position. It was then made clear to the lower courts that they should accept a High Court decision in preference to a contrary one of the House of Lords. Again the issue was perhaps not one of basic principles: it concerned the estimation of damages. In both cases, however, one finds an underlying assumption that it is possible for the common law to have taken different paths since the establishment of an Australian court system one hundred and forty years ago. Indeed, in *West's case*[19] the House of Lords was itself divided and Menzies J. in *Skelton's case*[20] preferred to follow *West's case*.[21] But majorities decide: and the majorities do not here agree.

In *Skelton's case*[22] Windeyer J. referred directly to a judgment of the Privy Council in 1927, which had pronounced that 'the House of Lords . . . is the supreme tribunal to settle English law, and that being settled, the colonial court is bound to follow it'.[23] His Honour then added succinctly: 'This proposition is not true for the Commonwealth of Australia'.[24]

Additional justification for an independent role has now come from English courts themselves. When the House of Lords announced in 1966 that it would hold itself free to depart from its previous decisions, the aura of infallibility of these decisions for Australian courts was sensibly diminished. Moreover, when the issue in Mr Uren's action reached the Privy Council by special leave to appeal, the Board made it quite plain that it also regarded the issue of exemplary damages as one for the High Court of Australia itself to settle:

> The issue before their Lordships becomes therefore whether the High Court while being abundantly justified in recognizing 'the exemplary principle' in the award of damages ought to have agreed that such awards of exemplary damages should only be made in cases falling within the limited categories which were described in *Rookes v. Barnard*.[25]

In this issue the Privy Council had three courses open: to uphold the High Court's view, to support the contrary view of the House of Lords, or,

[17] *Skelton v. Collins* (1966) 115 C.L.R. 94, 104 *per* Kitto J. Owen J. similarly *ibid.* 138.
[18] (1966) 40 A.L.J.R. 124.
[19] *H. West & Son Ltd v. Shephard* [1964] A.C. 326.
[20] *Skelton v. Collins* (1966) 115 C.L.R. 94, 124.
[21] *H. West & Son Ltd v. Shephard* [1964] A.C. 326.
[22] *Skelton v. Collins* (1966) 115 C.L.R. 94.
[23] *Robins v. National Trust Co. Ltd* [1927] A.C. 515.
[24] *Skelton v. Collins* (1966) 115 C.L.R. 94, 134.
[25] *Australian Consolidated Press Ltd v. Uren* (1967) 41 A.L.J.R. 66, 72.

while upholding the High Court's view for Australia, to leave the matter undetermined for other jurisdictions, *e.g.* New Zealand. It chose the last. In so doing it rejected or distinguished three arguments about the need for uniformity. First, it said, there may be different lines of development. 'Development may gain its impetus from any one and not from one only of these parts . . .'.[25a] Second, uniformity is less desirable in some areas than in others, for example, international trade. Third, a question may arise as to whether the legal position in one country is 'well settled' (as was that of the effect of awards of exemplary damages in Australia). The conclusion reached was: 'Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable'. This is cautious approval (with triple negatives); and the caveat was added: 'Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it'.[26]

But the situations will surely be few in which the Privy Council will be easily persuaded that the High Court has been guilty of 'faulty reasoning' or 'misconceptions'.

Sir Douglas Menzies (a member of the High Court since 1958) has acknowledged that the Privy Council has not stretched out to grasp jurisdiction in Australian cases but has been conservative and responsive to Australian national sentiment, both in construing section 74 itself and in granting leave to appeal.[26a] On section 92 (where it has been most criticized) the Privy Council had reversed the High Court three times and affirmed it twice on the five appeals. Some errors having been corrected, the High Court was left free 'without eager interference from the Privy Council, to develop the law in its own traditional style, that is to consider each case and decide it upon its own facts.[27] Moreover, it has neither in public nor private law been arbitrary.

The process of parting has been slow and gradual—and may be usefully, though briefly, reviewed. There were some periods in the last century, and even early in the present century, when our courts showed some self-confidence.[28] Until 1960, however, they usually fell in with decisions of the House of Lords and the Court of Appeal.

The evolution of a degree of self determination has been described elsewhere.[29] The first portent for the future occurred in 1937, when the High

[25a] *Ibid.* 73. [26] *Ibid.* 74.

[26a] Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *Australian Law Journal* 79.

[27] *Ibid.* 83.

[28] Especially in *Gannon v. White* (1886) 12 V.L.R. 589 (Supreme Court of Victoria) and *Williamson v. N.S.W. Marine Assurance Co.* (1856) 2 Legge 975. Other cases are noted in *The Australian Digest 1825-1933* (1938) xvi 626 *sqq.*

[29] *The British Commonwealth* (1952) ii. This volume, edited by G. W. Paton, is devoted to Australia and deals with the period until 1952. Campbell, 'The Decline of the Jurisdiction of the Judicial Committee of the Privy Council' (1959) 33 *Australian Law Journal* 196. Professor Campbell deals mainly with events after 1900. St John, 'Lords Break from Precedent: An Australian View' (1967) 16 *International and Comparative Law Quarterly* 808. This article deals with more recent events.

Court found itself so strongly opposed to a Court of Appeal decision that it declined to accept it.[30] But this remained for many years almost a single note of disharmony. From an attitude of deference the High Court gradually moved to a belief in its own competence—and then to the view that it should be prepared to find its own solutions to Australian disputes (subject, of course, to the declarations of law by the Privy Council).[31]

When, in 1941, the High Court again overruled one of its own decisions on a matter of divorce law in deference to the opposite view of the Court of Appeal, Dixon J. (as he then was) summarized the principles on which he then thought the High Court should act.[32] One might arrange them as follows:

(a) For the sake of uniformity, if it believed English courts were not likely to change their views, it should apply their ruling. (It should try to interpret similar statutes in the same way). To formally dissent it was not enough that the High Court should still believe that it had originally been right.

(b) It should be careful not to introduce 'into Australian law a principle inconsistent with that which has been accepted in England'.

(c) If, however, what was involved was only a particular *application* of an agreed principle, no harm could come from the High Court adhering to its decision. There are bound to be divergencies in such applications and they matter little.

In 1943 the High Court repeated its desire to do everything possible to achieve uniformity, even to the extent of overruling its own decisions—this time as a gesture of respect to the House of Lords.[33]

After the Second World War some Court of Appeal interpretations were doubted; then some decisions of the Court of Criminal Appeal. But every effort was made to preserve harmony with appellate English tribunals. Not until 1963 did a case arise[34] of direct repudiation of a House of Lords decision, when Dixon C.J. for the High Court announced that their Lordships in *D.P.P. v. Smith*[35] had stated propositions which would not be followed in Australia. His words then recall similar phrases he had employed back in 1937, when the High Court rejected the Court of Appeal's views on certain aspects of rights to enter upon land:

[30] *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605 in opposition to *Hurst v. Picture Theatres Ltd* [1915] 1 K.B. 1. Latham C.J. *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605, 623, considered that '*Hurst's case* is manifestly wrong'. Dixon J. stated that the errors upon which it is founded are fundamental (*ibid.* 636).

[31] For some interesting proposals for improvement, Cowen, *Isaac Isaacs* (1967) 139-140. *Re Arcade Hotel Pty Ltd* [1962] V.R. 274, 278, represented the traditional deference to the House of Lords just before *Parker's case* (*Parker v. The Queen* (1963) 111 C.L.R. 610).

[32] *Waghorn v. Waghorn* (1941) 65 C.L.R. 289, 297. Dixon C.J. may have had in mind only decisions of courts lower than the House of Lords; but he does talk of a view of the law that 'has been taken in England'.

[33] *Piro v Foster* (1943) 68 C.L.R. 313. For a prophetic note concerning the dangers of uniformity for the sake of uniformity, Brett, (1955) 29 *Australian Law Journal* 121.

[34] *Parker v. The Queen* (1963) 111 C.L.R. 610.

[35] [1961] A.C. 290.

> It is because the decision tends to destroy the 'confederacy' of principles and 'corrupteth the fountain', not merely the stream, that I think that, although a decision of the Court of Appeal, we ought not to follow it.[36]

The blunt declaration in *Parker's case*[37] is thought by some commentators to have precipitated the announcement in 1966 that the House of Lords would regard itself as free to reconsider its own previous decisions.[38] One further effect was to bring to a critical point the discontent with the role of the Privy Council: for the same judges generally also sat in the House of Lords. There were editorial surmises in the *Australian Law Journal* in March 1966 that the great majority of 'persons having an informed opinion on the matter' favoured abolition of such appeal, and some speculation on ways in which this might be done.[39] Subsequently the Privy Council itself arranged that dissenting opinions might be delivered and that Australian judges should sit more frequently on the Board. But these changes came too late. The high cost of appeals, the long delays, the difficulties of English judges trying to appreciate the constitutional and social implications of their decisions in Australia convinced some lawyers and some judges that the High Court would be better fitted to mould the law to Australian national requirements, especially in its constitutional aspects.[40]

Indeed, the Privy Council itself has now suggested a wider function for the High Court. In a decision handed down in July 1967 on the much-debated section 92 of the Commonwealth Constitution, the Board stated its full agreement with the settled views of the High Court—from whose judgments it quoted extensively—and concluded by saying that other issues (largely those of evidence about local conditions) were matters 'peculiarly within the province of the High Court and their lordships are content to accept their view of the matter'.[41]

A new trend has been visible for some years—and not only in the cases

[36] *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605, 637.

[37] *Parker v. The Queen* (1963) 111 C.L.R. 610.

[38] This view is favoured by Mr E. St John in the article cited *supra* n. 25. A loyal Scot, Professor T. B. Smith, insists that this 'recantation was a by-product of the endeavours of the Scots Law Commissioners to have Scots law declared unaffected by this indefensible doctrine'. Smith, (1968) 82 *Harvard Law Review* 490, 492.

[39] Editorial, (1966) 39 *Australian Law Journal* 358. Reference was there made to an article by Nettheim, 'The Power to Abolish Appeals to the Privy Council from Australian Courts' (1965) 39 *Australian Law Journal* 39, in which various legislative possibilities were examined. On the number and influence of Privy Council decisions on constitutional issues Sawer, *Australian Federalism in the Courts* (1967) 33-34.

[40] Professor R. M. Jackson finds that it is hard to say whether the Privy Council has been a satisfactory tribunal. There were strong Canadian criticisms in 1951, and Lord Simon then made suggestions for its improvement—*The Machinery of Justice in England* (5th ed. 1967) 93. He gives figures to show that appeals generally had fallen from 122 in 1937 to 39 in 1965, of which only seven came from Australia (*ibid.* 93 n.1.) This figure agrees with estimates made by Professor Enid Campbell in Campbell, 'The Decline of the Jurisdiction of the Judicial Committee of the Privy Council' (1959) 33 *Australian Law Journal* 196, 209, that whereas in the period 1925-1931 an average of some 20 cases a year went to the Judicial Committee, the average had fallen to six between 1949-1959.

[41] *Freightlines and Construction Holding Ltd v. State of New South Wales* [1967] 3 W.L.R. 749, 769.

discussed above. There is a fairly long list now of matters on which Australian courts have embarked on courses not shown on English judicial charts. Professor Colin Howard in 1962 pointed to certain areas of criminal law in which a different pattern had become plain. He prophesied correctly that *D.P.P. v. Smith*[42] would not be accepted here. He specified several examples of an independent line: the qualified defence to a charge of murder by way of excessive use of force in defence of person or property, irresistible impulse as to sanity, provocation as a defence to offences less than murder, mistake of fact as a defence in bigamy cases and probably (over a far wider area), rules of evidence, the doctrine of issue estoppel in criminal law generally, and the notion of implied malice in murder.[43]

The authors of the first Australian edition of a celebrated English textbook on contract announced in their preface in 1966:

> The Australian Law of Contract, although largely founded upon the English law, is in a number of important respects not identical with it. It is true that as far as common law principles are expressed or reflected in the case-law, Australian judges treat the English decisions with respect, and if not as binding, at least as having persuasive authority. Yet even here one finds currents of Australian judge-made contract law moving sometimes in a different direction.[44]

Surveying the conflict between the House of Lords and the Privy Council on the question of the privilege of the Crown to withhold documents, the Supreme Court of Victoria in 1961 affirmed emphatically that it was bound to prefer the Privy Council.[45] It went on to demonstrate the unsatisfactory consequences of *Duncan v. Cammell Laird*[46] with the clear inference that, even without Privy Council authority, it would not have supported the House of Lords' approach.[47]

Differences have appeared in some aspects of torts law. Windeyer J., in the High Court, adopted in *McHale v. Watson*[48] a view of trespass contrary to the English decision in *Fowler v. Lanning*.[49] On the action *per quod servitium amisit* for the loss of services of a railway's employee the

[42] [1961] A.C. 290

[43] Howard, 'An Australian Letter—More Developments in the Law of Homicide' (1962) *Criminal Law Review* 435. Howard, *Australian Criminal Law* (1965).

[44] Cheshire and Fifoot, *The Law of Contract* (1966) Preface. This *Australian Edition of Cheshire & Fifoot* is edited by J. G. Starke and P. F. P. Higgins.

[45] *Bruce v. Waldron* [1963] V.R. 3. In 1966 the Supreme Court of New South Wales overruled itself to reach the same result *Ex p. Brown, re Tunstall* [1966] 1 N.S.W.R. 770.

[46] *Duncan v Cammell, Laird & Co. Ltd* [1942] A.C. 624. The restrictions were made in what Lord Denning has called the 'trilogy of cases' including *In re Grosvenor Hotel, London (No. 2)* [1965] Ch. 1210.

[47] *Conway v. Rimmer* [1967] 1 W.L.R. 1031. Interestingly the English Court of Appeal has on various occasions distinguished *Duncan v. Cammell, Laird & Co. Ltd* [1942] A.C. 624 and restricted the Crown's privilege even more rigorously than the Australian courts. Now the House of Lords subsequently has reduced this area of Crown privilege to very small proportions.

[48] (1964) 111 C.L.R. 384.

[49] [1959] 1 Q.B. 426.

Australian High Court in 1959 was itself divided. The majority clearly considered that the view of the Court of Appeal, that 'servant' in this area was confined to 'menials', was not historically justified. Dixon, C.J. came to the same conclusion, after studying the earlier authorities; but he was still willing for the sake of uniformity to defer to modern English decisions which 'depend not a little' on a Privy Council decision.[50]

As to standards of proof in non-criminal cases, the High Court had taken a nonconformist line when it insisted that the degree of proof required never went beyond that established on a balance of probabilities. It is interesting that the House of Lords has now rejected the views of lower English courts and laid it down that proof beyond reasonable doubt cannot be required in matrimonial causes. The majority of their Lordships favoured the view of the High Court, rejected a Court of Appeal decision, and explained away *dicta* previously expressed in the House of Lords itself.[51]

Australian judges employ the same techniques of statutory interpretation as their English brethren: the results on similar statutes are usually the same. But not always: an Australian writer has shown how differently similar Acts dealing with charitable trusts have been applied here.[52] Marked divergencies occur naturally in constitutional law: for written constitutions (especially federal constitutions) raise issues about the validity of statutes which are absent in England.

The latest Australian text-book on administrative law reveals a number of contrasts in the attitudes to the exercise of official powers and duties, especially the use made of the prerogative writs and other remedies. Here, too, local experience and convenience are more cogent but the results do differ—even among courts which respect to the value of the English precedents.[53]

Now that the direct influence in Australia of the Privy Council, the House of Lords and the Court of Appeal has somewhat declined, a new chapter has begun. What now is to become of the unity of the common law?

One member of the High Court who has had occasion to comment on these developments is Sir Victor Windeyer, himself a legal historian of note. Addressing the New Zealand Law Conference in April 1966 he reviewed the circumstances in which the common law had taken root and flourished in this overseas land. He emphasized that continuity was most valuable but also that 'what we call the common law of England is not the law of a land but the law of a people . . . It is not the law of a place, but

[50] *Commissioner for Railways (N.S.W.) v. Scott* (1959) 102 C.L.R. 392, 398. The Privy Council decision was *Attorney-General (N.S.W.) v. Perpetual Trustees Co (Ltd)* (1955) 92 C.L.R. 113.

[51] *Blyth v. Blyth* [1966] A.C. 643.

[52] Cullity, 'Charities—The Incidental Question' (1967) 6 *M.U.L.R.* 35.

[53] Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966). For many differences in statute law between the two countries, Sawer, *The Australian and the Law* (1968).

the customs of our race'.[54] He distinguished an 'enforced uniformity' and an 'effective' but voluntary uniformity: our courts must look to a body of doctrine and a general tradition.

Notable as have been the pronouncements of the High Court in the last decade, they have respected that body of doctrine and that tradition. They exhibit no brusque reaction against an aspect of 'neocolonialism': no threats have been made to play a radical role. The political decisions may have some connection with the position in which, according to Professor Geoffrey Sawer, 'political relations between the Australian and British Governments were cooler last year than at any time since the rows between Mr Curtin, Dr Evatt and Mr Churchill in 1941-42'.[55] But there is no evidence that the judges are of the same temper. There is nothing here like the South African judicial revolution, in which continual and determined efforts are being made to destroy the influence of the English common law.[56] Nor is there with us yet that detached and rather distant respect which a United States court today might pay to an English tribunal. Rather there are ties of many kinds which will preserve continuity.

Australia has no large native culture which necessarily derogates from or cuts into the common law, (as in India, Pakistan, West Africa or the West Indies). Nor are there solid blocs of racial or religious custom as in India, Israel, Canada which make uniformity difficult. It has a population almost entirely European in origin; it has not set up a Republic within the Commonwealth nor codified more than a small part of the law. In so many ways there are fewer barriers to our understanding and happy acceptance of the common law. If other countries with greater diversity of traditions—Eire, Israel, Ceylon—still cling to so much of this law, even more do we wish to preserve our legacy.[57] It was more than a polite formality that the Attorney-General acknowledged that 'many notable contributions to the working of our Federal Constitution have been made' by the judgments of the Privy Council.[58]

Familiarity often breeds respect. Mutual respect is growing with increased knowledge of one another's laws. Dr F. H. Lawson had observed

[54] Windeyer, 'Unity, Disunity and Harmony in the Common Law' (1966) 10 *New Zealand Law Review* 193, 199. Braybrooke, *The Future of Precedent* (1967). An address given by Professor E. K. Braybrooke to Australian University Law Teachers Association. He demonstrates that, despite its enlarged discretion, the House of Lords itself has so far exhibited a cautious temper, and that even the Supreme Court of the United States had very rarely overruled its previous decisions. The High Court here has in the main been slow to reverse engines, although it has never regarded itself as rigidly fettered.

[55] In a letter to the London *Times* (reprinted in the Melbourne *Herald* 5 February 1968).

[56] Luntz, *Annual Survey of South African Law* (1964) 473-476; Proculus Redivivus, 'South African Law at the Cross Roads or What is Our Common Law' (1965) 82 *South African Law Journal* 17.

[57] 'The Migration of the Common Law' (1960) 76 *Law Quarterly Review*—a series of articles—is helpful on this development.

[58] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 October 1967, 834-835.

in 1961 that 'some Australian decisions are of extraordinary interest and power'.[59] Salmon L.J. in 1967, pointed out that there were many cases reported from countries belonging to the British Commonwealth

> in which the question has been considered as to whether or not the fact that the plaintiff behaved badly can diminish damages which are awarded as compensation for physical injury . . . For my part, I entirely accept what was said in the High Court of Australia in *Fontin v. Kaltapodis*. It was an exceptionally strong court consisting of Sir Owen Dixon C.J., McTiernan and Owen JJ.[60]

Many tributes to the learning of overseas judges have followed in the train of those generous words of Viscount Simonds, when he affirmed his agreement with a judgment of Fullagar J. 'with every line and every word of it . . . having read and re-read it with growing admiration'.[61]

Goldman v. Hargrave[62] was hailed by an English commentator as another example where an appeal from Australia has set the stage for important developments in the law of torts. (The Privy Council upheld the High Court's explanation of the duty of care of an occupier upon whose land arises some hazard to his neighbour—in this case a bushfire that began accidentally.) It was said: '[t]he present case could prove a starting point for similar developments in English law'.[63]

The English Court of Appeal in 1966 considered issues very similar to those in *Skelton's case*[64] and referred to the reasoning of the High Court with 'the utmost respect' although they regarded themselves as so bound by higher English authority as not to be able to adopt that reasoning in the instant case.[65]

Again in 1968 that same court actually repudiated decisions of the formerly styled Court of Criminal Appeal on the law of bigamy. The Australian courts had steadfastly declined to accept those decisions as stating the true law as to the significance of an honest belief, though a mistaken one, about certain facts which, if correct, would have excused the person contracting a second marriage. Now the Court of Appeal has accepted as

[59] Lawson, *The Rational Strength of English Law* (1951).

[60] *Lane v. Holloway* [1967] 3 W.L.R. 1003, 1011. *Fontin v. Katapodis* (1962) 108 C.L.R. 177. In *Lane v. Holloway* [1967] 3 W.L.R. 1003, 1012 Winn L.J. added the graceful compliment: 'the decision of the High Court of Australia is not only correct but also affords, as so often is the case with decisions of that court, most lucid and authoritative guidance for this court in the decision of the present appeal'.

[61] *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446, 472

[62] [1967] 1 A.C. 645.

[63] Roberts, 'Negligence Liability—A Glimpse of New Vistas' 30 *Modern Law Review* 445, 448.

[64] *Skelton v. Collins* (1966) 115 C.L.R. 94.

[65] *Andrews v. Freeborough* [1966] 3 W.L.R. 342, 350 *per* Willmer L.J.; 'Any views expressed by the High Court of Australia must clearly be treated with the utmost respect'. See also Lord Parker's reference in *R. v. Patents Appeal Tribunal ex p. Swift & Co.* [1962] 2 W.L.R. 897, 902; '. . . lucid and persuasive treatment [of the High Court]. As far back as 1937 Australian cases concerning the effect of homemade wills were referred to Clauson J. *Re Messenger's Estate* [1937] 1 All E.R. 355 And in 1961 Diplock J. had welcomed the citation of Commonwealth cases especially in the commercial courts (see references Wortley, *Jurisprudence* (1967) 96).

a sound expression of the common law the Australian decision of *Thomas v. The King*.[66] 'The decisions of the High Court of Australia, even when so constituted (on this occasion including Latham C.J. and Dixon J.) may be persuasive only—but how persuasive they are!'[67] On the other hand some members of the House of Lords have since spoken in a fashion that throws doubt on judicial attitudes to this area of *mens rea*. Lord Reid's speech in dissent provided the only expression of the opposite propositions, when he referred to Sir Owen Dixon, 'than whom there is no greater authority on questions of legal principle'.[68] There are other examples in recent years of citation from Australian decisions.[69]

The traffic in ideas is flowing in both directions. The High Court, for example, had disagreed with certain English decisions holding that a court possessed a power to grant an injunction against a private person to remedy defective machinery of enforcement in a statute. The English Courts continued to grant applications by the Attorney-General almost as a matter of course, where other remedies had not proved successful. The disagreement resulted largely from opposing views of the settled principles on which equity was considered to have acted. The High Court in 1965 reversed its position and accepted the English view that injunction is a weapon to be more readily used to compel obedience.[70] The same Court now has also adopted fully the principles of natural justice set forth in *Ridge v. Baldwin*.[71]

Both the High Court and the House of Lords had at almost the same time to reconsider the doctrine of the *jus tertio quaesitum*. They reached generally the same conclusions, and Lords Pearce and Upjohn referred in *Beswick v. Beswick*[72] with approval to the judgments earlier delivered in the High Court.

The English have a reputation for transforming the extraordinary into the commonplace and of making revolutions without outward show. The insistence of common lawyers on taking each case as it comes will also tend to lessen the impact of changes as they do occur. It is therefore likely that developments (whether deviations in detail or diversification of rules) will come forward within the tradition and in accord with its canons of

[66] (1937) 59 C.L.R. 279.

[67] *R. v. Gould* [1968] 2 W.L.R. 643, 649 *per* Diplock L.J.

[68] *Warner v. Metropolitan Police Commissioner* [1968] 2 W.L.R. 1303, 1310 *per* Lord Reid.

[69] *Bastable v. Bastable* [1968] 1 W.L.R. 1684. *Dass v. Marsh* [1968] 1 W.L.R. 756; *R. v. Burgess* [1968] 2 W.L.R. 1209; *Patel v. Comptroller of Customs* [1965] 3 W.L.R. 1221; *Attorney-General v. Clough* [1963] 2 W.L.R. 343, 351.

[70] *Cooney v. Ku-ring-gai Municipal Council* (1963) 114 C.L.R. 582.

[71] *Banks v. Transport Regulation Board (Vic.)* (1968) 42 A.L.J.R. 64.

[72] *Beswick v. Beswick* [1968] A.C. 58; *Coulls v. Bagot's Executor and Trustee Co.* (1967) 40 A.L.J.R. 471. In the judgments delivered in the House of Lords in *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175, both Lord Upjohn and Lord Wilberforce cited the judgment of Sholl J. in *Brennan v Thomas* [1953] V.L.R. 111 and other Australian decisions about the status of the deserted wife. The Privy Council has also expressly approved the Australian approach to the admissibility of confessions in criminal cases. *Chan Wei Keung v. The Queen* [1967] A.C. 160; the Australian decision was *Basto v. The Queen* (1954) 91 C.L.R. 628.

development—not contrary to that tradition or its techniques. Where the local data are different, it will become normal to find different solutions being reached by the local courts. The common law may well come to mean that which is common in principle throughout the common law area. Lord Denning has frequently expressed such sentiments—as he did in *Conway v. Rimmer*[73] when he referred to the reviews of other Commonwealth Courts on an aspect of Crown privilege:

> When we find that the Supreme Courts of those countries, after careful deliberation, decline to follow the House of Lords—because they are satisfied it was wrong—that is excellent reason for the House to think again. It is not beneath its dignity, nor is it beyond its power, to confess itself to have been in error. Likewise with this court. We should draw on the wisdom of those overseas, as they in the past have drawn on ours. Thus we shall do our part to keep the common law a just system—yes, a just and uniform system—throughout its broad domain.[74]

On the other hand, should England join the European Community, then the common law even at its source will surely suffer many changes. Professor Gower, of the English Law Commission, has already indicated that aspects of the law of contract will need to be recast to harmonise commercial law with the rules prevailing in Europe: and this process will probably extend soon into other areas such as banking, taxation and company organization. Extensive codification in England, which may not be suited for imitation in detail here, would also lead to disunity.[75]

II

I have borrowed as a suitable title for this paper an apt metaphor which Sir Douglas Menzies[76] employed when he said that

> the decisions of the House of Lords, the High Court and the Privy Council together have had the unfortunate consequence of tearing the fabric of the common law, even though it may be thought that the rent is but small. The importance of the decision of the Privy Council (in *Uren's Case*) is the recognition that the common law may not be the same in Australia as it is in England.[77]

Common lawyers suspect too broad generalizations. Judges occasionally affirm that it is not their function to 'rationalize the law'; yet at this critical moment, advice and pronouncements on the topics raised by the developments indicated above would enlighten perplexed minds. The query: 'What is the Common Law?' now requires a sophisticated and constructive response.

It is not enough to hint that it is a mysterious process which only the

[73] [1967] 1 W.L.R. 1031. [74] *Ibid.* 1037.
[75] Editorial, (1967) 42 *Australian Law Journal* 110. Wortley, *Jurisprudence* (1967).
[76] Menzies, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 *Australian Law Journal* 79.
[77] *Ibid* 84.

High Priests understand and cannot adequately communicate, even to lawyers—or that the changes that plainly occur are the fruit of occult judicial intuitions—or (worse still) that the judges 'change the rules whenever they wish but pretend they are doing nothing of the sort'.

Sir Owen Dixon, for whom the common law was 'an ultimate constitutional foundation', saw the need for renewed attempts to explain the system even if that led to some abstractions of thought and language. Speaking back in 1935 he used language most relevant to the present hour:

> The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalization and developed by analysis. But it is a mistake to regard such ideas as not more than philosophic theories supplied *ex post facto* to explain a legal structure which has already been brought into existence by causes of some other and more practical nature. On the contrary, sometimes the conceptions, even though never analysed and completely understood, obsess the minds of the men who act upon them. Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action. Further, when such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originated have gone. They enter into combinations with other conceptions and contribute to the construction of new systems of law and of government.[78]

In both England and Australia these fundamental conceptions are not likely to disappear, though they will sometimes be applied differently to reach opposite results.

The new approach was outlined by Windeyer J. in *Skelton v. Collins*.[79] He pointed out

> it is, of course impossible for anyone to say that a decision of the House of Lords is wrong in the sense of not a correct decision according to the law of England prevailing in England.[79a]

He added, however, that

> how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself. This Court is the guardian for all Australia of the *corpus juris* committed to its care by the Imperial Parliament.[80]

Until now lawyers could get along without asking too many questions as to what the *corpus juris* consists of. We had learned that the common law was evidenced and expounded in the cases; one could tell what it was by analysing the precedents. Now it becomes more important to recognize that not all the precedents are to be relied on. Some are contrary to other

[78] Dixon, *Jesting Pilate* (1965) 38.
[79] (1966) 115 C.L.R. 94.
[79a] *Ibid.* 134.
[80] *Ibid.*

precedents; some are badly formulated; others again are not effective in new situations that have arisen.

The High Court in future will recognize certain English decisions as reflecting authentic doctrine, and repudiate others. Greater uncertainty now prevails for those persons—judges, practitioners, law teachers—whose business it is to peer into the future. What criteria will the court now rely on? For what reasons will it be likely not to follow statements set forth in the books of the law? Because they are historically 'unsound'? Because they were due to faulty reasoning? Because they were decided by a 'weak' court? Because social needs are different in Australia today? If English decisions are to be persuasive only, what kind of arguments will best persuade?

'There are propositions', said Dixon C.J. (referring to *D.D.P. v. Smith*),[81] 'laid down in that judgment which I believe to be misconceived and wrong. They are fundamental . . .'[82] These words may provoke lawyers to further enquiries:

(a) Will there be significant degrees of wrongness? Must it corrupt the fountain and not merely the stream? Can 'fundamental' be described, even if not defined?

(b) When one speaks of a 'body of law', does one include not only the principles but also every rule? If not, what kind of rules are most likely to prove permanent?

(c) Is there any period of *time* at which a proposition was supposed to have been clearly established? Since our 'inheritance' began officially in 1828 does that date have any magical significance? Is that particular formulation malleable enough for later development?

These are not 'merely academic' questions. When the practical man says 'academic' he may mean that the issue has not arisen, may never arise, is one of words only, is so abstract that it has no relation to life, or is not the practical man's business to solve. None of these descriptions is valid here. These possibilities we now consider are vital to the concrete problems courts will encounter and have to settle whenever one counsel asserts: 'this is the law in our books'—and the other denies it. For example, how far will Australian courts now consider themselves bound by *Searle v. Wallbank*,[83] *Cavalier v. Pope*,[84] *or Foakes v. Beer*,[85] all of which have suffered severe criticism?

Basically, it could be argued, nothing has changed. The task of Australian courts will be substantially the same as that which has always confronted judges in examining precedents. If they follow English decisions it will be because they believe that the decisions correctly express the common law. The same difficulties will have to be met: whether one is to follow the reasoning or only the actual decision; whether a particular expression in a judgment is open to variation; which of two competing principles is to be preferred; the value of certainty as against that of flexi-

[81] [1961] A.C. 290.
[82] *Parker v. The Queen* (1963) 111 C.L.R. 610, 632.
[83] [1947] A.C. 341. [84] [1906] A.C. 428. [85] (1884) 9 App. Cas. 605.

bility in the circumstances; the reasonableness of distinguishing a case on the facts, and so forth. It is widely accepted that principles must develop with changing circumstances; nor has the High Court ever regarded itself as strictly bound by its previous decisions. A *dictum* of Isaacs C.J. is often cited, 'It is not, in my opinion, better that the court should be persistently wrong than that it should be ultimately right'.[86]

The needs of development and of diversity will of themselves bring about differences in practical decisions. The common law will continue to provide new problems for its interpreters; it will remain, in the frequently quoted words of Diplock L.J.,[87] 'a maze and not a motorway'. But the cases are yet too few to enable one to prophesy the probable lines of divergence or the considerations that may move the courts to dissent.

As to decisions of the House of Lords, they now have no strictly binding force; but they never had such force; what has disappeared was a convention. What is happening is that the utterances of their Lordships will remain highly influential but will not be automatically followed either in their findings or their reasoning. Thus, late in 1968, the High Court had to determine for the first time issues similar to those decided by the House of Lords in the *Hedley Byrne case*.[88] In his judgment in *Evatt's case*,[89] Barwick C.J. confessed his indebtedness to the speeches in the House of Lords. Nevertheless, as he said, 'I do not think that a discussion of these reasons of their Lordships' several approaches to that question, though in the result it did not fall for decision, is an appropriate course, as I see this matter, for me to follow'.[90]

He went on to carry the general principles of liability for advice or information somewhat further, up to the stage of removing several of the restrictions which English courts had placed on such liability. For example, one could be liable even when one has only volunteered advice without a prior enquiry; he would not regard an express disclaimer as invariably exempting from responsibility; nor (with support from Menzies J.) did he think it always essential for a speaker to profess a special skill. The whole emphasis of the High Court was that the fundamental notion of one person being obliged to *trust* another should be kept highly flexible, especially 'as appropriate to current times in Australia'.[91]

So far what little has emerged indicates that the sharpest differences from the conclusions of English courts will arise in three types of situation: (a) those where an Australian superior court considers that an English court (other than the Privy Council) has misunderstood a settled doc-

[86] *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 C.L.R. 261, 278.
[87] *Morris v. C. W. Martin & Sons Ltd* [1965] 3 W.L.R. 276, 286.
[88] *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465.
[89] *The Mutual Life & Citizens' Assurance Co. Ltd v. Evatt* (1968) 42 A.L.J.R. 316.
[90] *Ibid.* 319.
[91] Editorial, (1968) 42 *Australian Law Journal* 281, 283. In this excellent editorial it was said: 'The judgments examine *Hedley Byrne* not in order to find the correct principles which that case has established but rather as a decision of outstanding assistance to the court in formulating the law for this country'.

trine, (b) those in which Australian conditions can fairly be said to be manifestly different, and (c) those in which the *ratio* of an old decision has disappeared.

(a) It becomes clear, on a careful reading of the High Court judgments in *Uren v. Fairfax*,[92] that the judges were not satisfied that the restriction of exemplary damages in *Rookes v. Barnard*[93] was in keeping with existing doctrine.

For example Taylor J. deals with Lord Devlin's view that to award exemplary damages was to admit the anomaly of the civil law being used for purposes of punishment better served by the criminal law; it was now necessary to remove this anomaly. After closely reviewing the cases cited in the House of Lords, Taylor J. doubted if 'such a far-reaching reform' was thereby justified. He could find no authority for the claim that an award of exemplary damages should be restricted to Lord Devlin's three categories. He found precise difficulties with the formulation of each category; but stated his view more broadly:

> The measure of research disclosed by the observations in *Rookes v. Barnard* takes no account of the development of the law in this country, where frequently this Court has recognized that an award of exemplary damages may be made in a much wider category of cases than that case postulates.[94]

Menzies J. observed that the limitations imposed by the House of Lords 'would involve a radical departure from what has been regarded as established law' and cited both English and Australian *dicta* in support. 'My examination of the English and Australian authorities has not shown that before *Rookes v. Barnard* the common law in relation to exemplary damages was as the House of Lords has now stated it to be'.[95] Owen J. in similar vein thought that Lord Devlin's propositions 'are not in accord with the common law as it has always been understood in this country'.[96]

This approach is not different from Lord Reid's analysis of the *Nakkuda Ali case*[97] when he said this part of that judgment 'was given under a serious misapprehension of the effect of the older authorities and therefore cannot be regarded as authoritative'.[98]

(b) Plainly the Privy Council cannot be expected now openly to abdicate all its responsibility and merely apply a rubber stamp to High Court decisions. If it decides in a particular case to recognise a due diversity in the common law it will presumably do so on the ground of differences in social conditions.

This was one rationale, expressed in *Uren's case*,[99] although their Lordships did not receive or require argument that exemplary damages were

[92] (1966) 40 A.L.J.R. 124, 131, 132.
[93] [1964] A.C. 1129.
[94] *Uren v. John Fairfax & Sons Pty Ltd* (1966) 40 A.L.J.R. 124, 132.
[95] *Ibid.* 136. [96] *Ibid.* 141.
[97] *Nakkuda Ali v. Jayaratne* [1951] A.C. 66.
[98] *Ridge v Baldwin* [1964] A.C. 40, 79.
[99] (1966) 40 A.L.J.R. 124.

more needed in Australia than in England to punish reckless defamors; nor could such argument be easily presented. Conditions at large affecting private law are very similar to both countries today, (however different they were in 1828). Yet the High Court has emphasized possibilities of such difference—either generally or in any particular instance. Windeyer J. in *Skelton's case*[1] set out some of the differences that could affect damages in general:

> This Court must consider the question for itself; and all the more so, it seems to me, if the decision in England was reached after reference only to English decisions, not to the state of the law elsewhere, and seemingly to meet only economic and social conditions prevailing in England. And too what is said is less persuasive when law is as it were fluid and when the conditions which it is being developed to meet are not the same in England and Australia. The law of damages, especially damages for personal injuries, is of that kind. It is a branch of the law in which further developments and fresh refinements in the application of principles are still going on; and the backgrounds against which it operates are not the same in England and Australia. Various circumstances locally known as existing in any community, such as welfare services, pensions, hospital aid, sick pay, rates of wages and so forth, are taken into account directly or indirectly, deliberately or unconsciously, by judges and juries when assessing damages for personal injuries. Uniformity and solidarity of law throughout the countries inhabited by British peoples may up to a point be a good in themselves. But too much store can be set upon uniformity of law when it operates in conditions that are not uniform.[2]

In another field, that of public administration, social history and social organization have produced quite different structures of government activity from those in contemporary England. It has been stated that 'in England the fact that a man is a Minister of the Crown or a high-ranking public servant will of itself command for him a greater deference than it would in Australia', and that this is not without influence on administrative law. 'The suggestion that this is a sociological fact carries no implication that this is based on justifiable or sound grounds'; nevertheless Australian judges who have to determine the constitutional validity of statutes are inclined to read them more critically than do their English brethren.[3]

(c) Arguments that suggest that certain doctrines no longer represent the common law will have a mixed reception. On the one hand, Australian judges are not eager to disturb settled doctrines.

For instance, the High Court had the chance of reworking the doctrines about privity of contract at precisely the same time as the English courts were grappling with it.[4] The results were about the same: the traditional

[1] *Skelton v. Collins* (1966) 115 C.L.R. 94.
[2] *Ibid.* 135. Professor G. Sawer speaks of the surprising lack of differentiation between English and Australian developments in torts law: Sawer, *The Australian and the Law* (1968) 240-241.
[3] Brett and Hogg, *Cases and Materials on Administrative Law* (2nd ed. 1967) 394.
[4] The High Court in *Coulls v. Bagot's Executor & Trustee Co.* (1967) 40 A.L.J.R. 471. The House of Lords in *Beswick v. Beswick* [1968] A.C. 58.

views were unshaken. Again a few years earlier, in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd*[5] a majority of the High Court, including both Dixon C.J. and Fullagar J., refused to tamper with the precept that only parties to a contract may sue on it. They admitted the force of the argument that the rule was never intended to apply to modern contracts between shipping companies carefully drawn by lawyers. But Their Honours were not convinced that the situation was so different that the older attitude could be now repudiated. Neither judge could be accused of mere antiquarianism, yet both recognized some norms as so ancient in the law, so independent of particular facts, that the chain of historical continunty could not be abruptly severed by the judicial sword.

On the other hand, the judgments contain numerous *dicta* that stress the need for continuous and watchful re-working of the older material. Even apart from English decisions such as *Bourne v. Keane*,[6] and *Bowman v. Secular Society*,[7] no Australian court for a long time would have considered Christianity as being 'part of the law' in Australia. Australian judges have generally been alert to study and appreciate the history of common law doctrines.

In this regard, the High Court exhibits two marked features. First, the argument before it has generally been very thorough; extensive reference has been made to the older cases often with full analyses of their historical growth. Second, its individual judges usually have enjoyed a much longer term on the bench than their English counterparts. Since it began hearing cases in 1904, three judges have sat each for some thirty-six years, three others for twenty-six years or more. (They would appear to be appointed earlier in life than appellate judges in England.) Sir Owen Dixon was on the bench (except for a few years during World War II) from 1929 to 1965. This has resulted in a strong continuity of doctrine and a reliance on the reasoning of previous cases as well as the actual decision—(especially in constitutional matters). There have been some interesting illustrations in recent years of this kind of searching historical appraisal. For example, Dixon C.J., though in *Scott's case*[8] he could have contented himself with the Privy Council's support for his opinions on the status of menial servants, dug deeply into the earlier cases in order to demonstrate what he conceived as the inadequacy of certain modern judgments of the Court of Appeal. Again in *Cardy's case*[9] the High Court swept away, for reasons of principle and modern convenience, much outdated law about licensees and invitees, and returned to the original tenor of the principles concerning the duties of occupiers of land.

The position with regard to the Privy Council is more definite. From now on the Judicial Committee will have a more limited jurisdiction: most

[5] (1956) 95 C.L.R. 43.
[6] [1919] A.C. 815.
[7] [1917] A.C. 406.
[8] *Commissioner for Railways (N.S.W.) v. Scott* (1959) 102 C.L.R. 392.
[9] *Commissioner for Railways (N.S.W.) v. Cardy* (1960) 104 C.L.R. 274.

matters of federal constitutional law will not come before it. There are indications that it will, even in those matters where its supremacy remains, not seek to lightly overrule the High Court. Yet is decisions remain formally and imperatively binding. In this new relationship the High Court will doubtless continue to prefer its own decisions to mere *dicta* of the Privy Council (as it has already done).[10] Again, it may seek to distinguish Privy Council formulations more widely, especially if they have been decided on appeal from those areas in the British Commonwealth where conditions of life are quite divergent. Barwick C.J. has made it plain.[11] for example, that even apart from the authority of the Board,[12] the High Court would have declined to follow *Nakkuda Ali.*[13]

More serious tensions may occur in two respects.

(a) Is the High Court obliged to follow not only a *decision* of the Judicial Committee but also *its reasoning*?

What element is binding in a precedent has long been strongly debated. Professor Goodhart's contention that it was the actual decision (the 'order') based on the material facts, was refuted by the more orthodox who maintained that, while the decision is effective enough on its own class of facts, the reasons for the finding, the statements of principle, are what a later court must chiefly listen to. Lord Upjohn expressed this view in the *Chancery Lane Safe Deposit case*:[14]

> My Lords, we are not bound to follow a case merely because it is indistinguishable upon the facts. A decision even in your Lordships' House is binding on your Lordships only because it lays down some principle of law or for its reasoning on some particular facts.[15]

Australian lawyers recall the rebuke delivered by the High Court to the Supreme Court of Victoria in *Deakin v. Webb.*[16] The Supreme Court, attempting at the same time to be loyal both to the Privy Council and to the High Court, had announced that, while it accepted the actual decision of the latter, it was not bound by its reasoning. To the High Court this was a clear negation of the essential feature of precedent:

> If the reasons may be disregarded and treated as mere *obiter dicta*, because in the opinion of the court, the same conclusion might have been reached by another road, the value of judgments as expositions of the law would be sensibly diminished.[17]

To return to *Banks v. Transport Regulation Board (Vic.)*[18] there is an

[10] *Rejfek v. McElroy* (1965) 112 C.L.R. 517.
[11] *Banks v. Transport Regulation Board* (Vic.) (1968) 42 A.L.J.R. 64, 68.
[12] *Durayappah v. Fernando* [1967] 2 A.C. 337.
[13] *Nakkuda Ali v. Jayarante* [1951] A.C. 66.
[14] *Chancery Lane Safe Deposit and Offices Co. Ltd v. Inland Revenue Commissioners* [1966] A.C. 85, 128.
[15] *Ibid.* Similarly Lord Reid *ibid.* 110.
[16] (1904) 1 C.L.R. 585.
[17] *Deakin v. Webb* (1904) 1 C.L.R. 585, 605 *per* Griffith C.J.
[18] (1968) 42 A.L.J.R. 64.

interesting *dictum* by Barwick C.J. (discussing the *Nakkuda Ali case*).[19] He sees it as primarily a conclusion reached on special facts: 'In my opinion, at most, this decision would bind this Court in the case of a statutory provision made in like terms and with respect to a comparable subject matter'. This is orthodox comment: but His Honour then added: 'This Court is not bound by the process of reasoning followed by their Lordships and in this respect is entitled to observe that its basis in a radical respect was erroneous'.[20] Admittedly the term 'reasoning' can be ambiguous, implying either the reasons (as principles) underlying the result, or the logical thought-procedures from premiss to conclusion. But, in either sense, that observation is striking. If precedent is confined to the actual decision in the concrete case, one is free to speculate widely as to the law behind the scene, to construct one's own *ratio decidendi* and to treat as *dicta* almost all of the opinions set out in the report. The answer may be that the principle of any decision is eventually ascertainable, no matter how concealed by words, poorly expressed or however clumsily applied. None of the other Justices in the case spoke on this particular topic, but none dissented.

(b) What if the Privy Council decision is an old one, or has been strongly criticized?

Since it is free to overrule its own decisions there will be cases when an argument could be put that the High Court should anticipate such an overruling. Thus those parts of the judgment which were directed to the 'void-voidable decision' in *Durayappah's case*[21] are not easily reconciled with recent pronouncements in English courts and have been assailed (for example, strongly by Professor Wade).[22]

Similar confusion exists as to whether certain contracts create a lease of land or only a licence. Lord Denning, for the Privy Council, following some earlier cases in the Court of Appeal, held in a judgment delivered on 16 December 1959, that the main test of a lease was not the payment of rent or exclusive possession but the intention of the parties.[23] Two months previously in a judgment naturally not cited to their Lordships, the High Court of Australia had unanimously stated that the proper test was exclusive possession. The High Court did derive some support from other English *dicta*; but Windeyer J. declared that 'if there be any decision which goes further and states positively that a person legally entitled to exclusive possession for a term is a licensee and not a tenant, it should be disregarded, for it is self-contradictory and meaningless'.[24]

[19] *Nakkuda Ali v. Jayaratne* [1951] A.C. 66.
[20] *Banks v. Transport Regulation Board (Vic.)* (1968) 42 A.L.J.R. 64, 68 *per* Barwick C.J.
[21] *Durayappah v. Fernando* [1967] 2 A.C. 337.
[22] Wade, 'Unlawful Administrative Action: Void or Voidable' (1967) 83 *Law Quarterly Review* 499; *Ridge v Baldwin* [1964] A.C. 40 (House of Lords); *R. v. Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd* [1966] 1 Q.B. 380 (Court of Appeal); *Durayappah v. Fernando* [1967] 2 A.C. 337 (Privy Council).
[23] *Isaac v. Hotel de Paris* [1960] 1 W.L.R. 239.
[24] *Radaich v. Smith* (1959) 101 C.L.R. 209, 223.

Another case that points up possible tensions is *Wong v. Benning*,[25] decided by the Court of Appeal of the New South Wales Supreme Court, also in 1968. On the first issue—whether the doctrine of *Rylands v. Fletcher*[26] extended to personal injuries—the Court unanimously agreed that it did, notwithstanding strong *dicta* of Lord Macmillan in *Read v. Lyons*,[27] Their Honours considered that 'the general weight of authority favours, although not always enthusiastically . . .' this extended view. On the second issue, whether the defendant corporation was protected by the statute, they were divided. Wallace and Jacobs JJ. followed the Privy Council in the *Northwestern Utilities case*[28] (1930). Walsh J., however, said he was 'unable to reconcile the course of authority in the High Court . . . with the propositions advanced' in the *Northwestern Utilities case*.[29] He was influenced especially by *Thompson v. Bankstown Municipal Council*[30] decided by the High Court in 1953. Although Wallace and Jacobs JJ. were able to distinguish these decisions, Walsh J. was unable to do so, and concluded: 'on the point now under discussion I find guidance in both decision and *dictum* in the High Court which I think I must follow . . .'.[31]

In *Gale v. Federal Commissioner of Taxation*[32] the High Court was faced with the conflict between two of its own previous decisions[33] (in 1941 and 1945 respectively) and that of the House of Lords in *Sneddon v. Lord Advocate*[34] (1954). Fullagar J., with whom Dixon C.J., Kitto and McTiernan JJ. concurred, believed that the Australian decisions were very unsatisfactory and that he should follow *Sneddon's case*.[35] The priority of his reasons is significant 'in the fact that (with the greatest respect) I think that it is right, and that it gives us opportunity for correction. The second reason is that, if this case, or any case raising the same question, were to go on appeal to the Privy Council, there is a high degree of probability that it would be decided in accordance with *Sneddon's Case*'.[36] The High Court has nevertheless refused to accept what Professor Rupert Cross described as 'the doctrine of implied overruling'. In the *Utah Construction case*[37] Barwick C.J. expressed disapproval of the attitude of the Supreme Court of New South Wales based on a prediction of what either the Privy Council or the High Court might do if a precise issue should come in the future for determination by either or both of these bodies. As His Honour put it:

[25] (1968) 88 W.N. (N.S.W.) Pt. 2 88.
[26] (1868) L.R. 3 H.L. 330.
[27] [1947] A.C. 156.
[28] *North Western Utilities Ltd v. London Guarantee and Accident Coy Ltd* [1936] A.C. 108.
[29] *Ibid.*
[30] (1953) 87 C.L.R. 619.
[31] (1968) 88 W.N. (N.S.W.) Pt. 2 88, 102.
[32] (1960) 102 C.L.R. 1.
[33] *Trustees Executors and Agency Co. Ltd v. Federal Commissioner of Taxation* (1941) 65 C.L.R. 134 (*Teare's case*); *Vicars v. Commissioner of Stamp Duties* (1945) 71 C.L.R. 309.
[34] [1954] A.C. 257.
[35] *Ibid.*
[36] *Gale v. Federal Commissioner of Taxation* (1960) 102 C.L.R. 1, 17.
[37] *Jacobs v. Utah Construction and Engineering Pty Ltd* (1966) 116 C.L.R. 200.

> It is not, in my opinion, for a Supreme Court of a State to decide that a decision of this Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with reasoning of the Judicial Committee in a subsequent case. If the decision of this Court is to be overruled, it must be by the Judicial Committee, or by this Court itself. It cannot be treated by a Supreme Court as if it were overruled. The matter is, of course, different where this Court's decision is not precisely in point and comparison has to be made merely between two lines of reasoning: see in this connexion (*Rejfek* v. *McElroy* (1965), 112 C.L.R. 517).[38]

Doubtless ways will be found of harmonizing such differences. However, the burden of choosing may not be so easy for every judge. If he is sitting, say in the Supreme Court of a State, he knows well that on many matters an appeal from his decision may go either to the Judicial Committee or to the High Court. If there is no binding decision directly in point, he will have to speculate and predict.

One example may suffice. The Court of Kings Bench in *Dutton v. Poole*[39] (1678) held that a person could sue on a contract to which she was not a party. This view was approved by Lord Mansfield in 1776. Eighty-five years later—well after the establishment of an Australian judicial system—*Tweddle v. Atkinson*[40] apparently 'settled the law' to the contrary and has ever since been regarded as the last word on the point. Are we in Australia now free to ignore it? It was generally agreed in *Beswick v. Beswick*[41] that it would make better sense if *Dutton's case*[42] were preferred to *Tweddle's case*,[43] but that an English court could not now do that, despite Lord Denning's contention that the latter decision turned on questions of procedure and special facts. Before *Coulls's case*[44] it might have been argued that *Dutton's case*[45] represented the common law received in Australia in 1828 and that we were thus still free to adopt the older doctrine. Now, after *Coulls's case*,[46] this argument is apparently untenable. Windeyer J. considered that 'the law was settled either way' by 1828 and that 'looking at the common law in its original setting' did not necessarily determine what it is to be today.[47]

Thus it is too early to answer the great questions: Is the common law a coherent body of principles? Is it only a collection of cases and rules? Or, again, is it simply a way of approaching legal problems, a set of traditional attitudes? Perhaps it is all of these things.

The unity of principles seems likely to endure, while diversity will show itself increasingly in separate standards and rules in each Commonwealth

[38] *Ibid.* 207. Cross, 'Recent Developments in the Practice of Precedent—The Triumph of Common Sense' (1969) 43 *Australian Law Journal* 3, 5.
[39] *Dutton v. Poole* (1677) 2 Lev. 210.
[40] *Tweddle v. Atkinson* 1 B. & S. 393, 396.
[41] *Beswick v. Beswick* [1968] A.C. 58.
[42] *Dutton v. Poole* (1677) 2 Lev. 210.
[43] *Tweddle v. Atkinson* 1 B. & S. 393.
[44] *Coulls v. Bagot's Executor & Trustee Coy* (1967) 40 A.L.J.R. 471.
[45] *Dutton v. Poole* (1677) 2 Lev. 210.
[46] *Coulls v. Bagot's Executor & Trustee Coy* (1967) 40 A.L.J.R. 471.
[47] *Ibid.* 484-485. Some interesting observations were recently made on this very point by Windeyer J. in *Ollson v. Dyson* (1969) 43 A.L.J.R. 77, 88.

country. Maitland's summary of the borrowings of Bracton from the *corpus juris* of Roman law is perhaps apt here:

> The main debt is less palpable, for what he has converted to his own use is spirit rather than substance, not these or those rules, but a method of reasoning about law, perceiving the interdependence of rules, of making them take their place as members of a body.[48]

Our borrowings from the *Corpus Juris Anglicanum* are more substantial than a direct legacy. We have received a body of law as declared but also capable of development in our own hands. We subscribe to a theory by which principles remain as part of the process by which we come to know reality ever more fully. Sir Victor Windeyer can praise Coke's famous phrase 'out of the old fields cometh the new corn', yet in another context point to the absurdity of the notion that 'the principle of *Donoghue v. Stevenson*, decided in the House of Lords in 1932, by a majority of three to two, became law in Sydney Cove on 26th January 1788'.[49]

Roscoe Pound in 1921, referring to the United States, described 'the working over' of the common law materials, 'when we received such part of the common law as was applicable to the new world'. His confident conclusion was that

> it is not an accident that common law principles, as they were fashioned in the age of Coke, have attained their highest and most complete logical development in America and that in this respect we are and long have been more thoroughly a common law country than England itself.[50]

It is an interesting thought for Australian lawyers to meditate on!

[48] Maitland, *Bracton's Note Book 1* 9-10 (cited by McIlwain, *Constitutionalism Ancient and Modern* (1961) 68.)

[49] Windeyer, 'Unity, Disunity and Harmony in the Common Law' (1966) 10 *New Zealand Law Journal* 193, 196. *Skelton v. Collins* (1966) 115 C.L.R. 94, 134.

[50] Pound, *The Spirit of the Common Law* (1921) 41, 42.