PRECEDENT IN THE SOUTHERN HEMISPHERE*

By The Rt. Hon. Sir Garfield Barwick**

I am most honoured to have been asked to deliver this lecture in the series of the Lionel Cohen Lectures in this University. During the years I practised as an advocate I had the privilege and advantage of appearing in London on more than one occasion before a board of the Judicial Committee of Her Majesty's Privy Council of which Lord Cohen was a member. May I respectfully say that in the argument of cases before him I came to appreciate his knowledge of the law and the perceptiveness of his mind in the resolution of complex legal problems. I always appreciated his unfailing courtesy and patience with counsel even when perforce counsel in the course of duty had to put what his Lordship thought was a bad and even an untenable argument. Also, I came to know him personally and joined the wide circle of his friends. I am very delighted to be now participating in a public acknowledgement of Lord Cohen as a jurist and as a man.

But as well, I am honoured to be asked to speak to members of this University in this historic city. I am the more pleased that I have just heard your Dean say that you are now celebrating the twentieth anniversary of the foundation of your Law School, and that you are to move before the commencement of your next academic year to more commodious premises on such a notable and commanding site as Mount Scopus. Allow me to congratulate you on the past success of your school and of its graduates which include your distinguished Dean and to wish your school continuing success.

I follow in the steps of distinguished men who have spoken before me in this series of lectures. I can only hope that my offering this evening will not fall too far short of the standard which they have set. To attain it may be beyond me; to endeavour to emulate them is all I can really do.

I understand I am the first antipodean to be invited to participate in this series of lectures. Also I gather, for the reason to which I have just

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adverted, I shall be the last to deliver such a lecture in these premises. It seems appropriate therefore that I should respond to a suggestion which has been made to me that I take for my lecture some subject particularly Australian.

I know something of your interest in precedent and have thought that some Australian and New Zealand experiences in this field will be of interest to you, though perhaps not of immediate use in the solution of the problems which present themselves to you either now as you study or later as you practise and apply what you have learnt. I wish therefore in this lecture to tell you of some aspects of Precedent in the Southern Hemisphere. You will, of course, pardon an Australian for thinking that Australia and New Zealand may properly be identified with the Southern Hemisphere, as if they filled it entirely. But in truth they are the major countries exclusively following the common law in that hemisphere. As well they are the countries with whose law and legal systems I have most acquaintance.

You will all be familiar with the doctrine of precedent according to the law of England, a doctrine designed to give to the common law coherence, stability and perhaps predictability. Inferior courts are bound by the decisions of courts superior to them in the same hierarchy of courts. Final courts of appeal in any hierarchy as to all decisions, including their own, in general tend to observe the rule expressed as *stare decisis*. So does any court as to decisions of a court inferior to it in the same hierarchy. That simple statement, however, glosses over the difficult question which perhaps is not yet clearly settled as to what is the decision or, rather, how much of what is involved in a decision, binds as a precedent. As to this, you can find a useful discussion in Professor Rupert Cross' instructive volume, *Precedent in English Law*, of which there is a recent edition (1968). It is not my purpose in this lecture to develop that aspect of precedent though very tempted to do so.

You will observe that I have divided the rule as to precedent into two parts, one which spells out the rule for inferior courts as to decisions of courts superior to them in the same hierarchy, and another which treats of the rule for final courts of appeal able to review and reverse existing decisions, including their own decisions, and for all courts as to decisions of courts inferior to them. In strictness the rule *stare decisis* is, in my opinion, inappropriate to describe the duty of a court bound by the decisions of a superior court, or by its own decisions. It has no option but to follow such decisions. *Stare decisis* is more properly addressed as it seems to me to a court which is technically free to depart from existing decisions. In that group, as you will have observed, I have included all courts in relation to a decision of a court inferior to them. For those courts the rule is an expression of general policy, a general direction as to the preferred course where alternatives exist. If such a court agrees with the existing decision no question of using the rule arises. It is only when such a court thinks the existing
decision erroneous that a choice is necessary between overturning it or allowing it, though erroneous, to stand.

It is proper at the outset to notice the different process to be followed by final courts of appeal, as compared with that of inferior courts where there are or are said to be decisions claimed to be decisive of the matter in hand. Where it is said that there are such decisions, the first task of a court which would be bound by such a decision is one of research in which, as in the performance of all its functions, it both needs and is entitled to the utmost assistance of the practising profession. That research may be, in part, of a mechanical kind in which the indices and digests of the law are helpful but by no means always adequate. Individual memory derived from practice and wide reading is often invaluable. Having found binding authority the court bound by it has only to apply it. That is often, of course, the more difficult task, the part which gives rise to most appeals. If, however, nothing better than obiter dicta are found, the court needs then to consider the weight and validity of such expressions of opinion and, as well, to observe whatever tendencies in principle in relation to the matter in hand which the court can perceive in the decisions or the reasoning of the courts which are superior to it in the same hierarchy. After all, if the court is not compelled by binding authority and must decide for itself, it is, I think, in the public interest that it should endeavour to find that decision, if there be any choice, which it believes its superior court is likely to favour.

One naturally expects therefore, in general, a greater measure of reference to authority in the reasons for judgment of a court which is not a final court of appeal than would be found in the reasons for judgment of a court of the latter kind. In the former case, justification for its decision is to be found in existing authority and its application. In the latter case, the authority is more likely to be made by the court's own decision: but, even in that case the consonance of the decision with what I might call the flow and direction of the common law, as already accepted, may need to be indicated by reference in the reasons for judgment to past decisions or to the course of past decisions.

For the final court of appeal the task is somewhat different. It has, of course, the main mechanical task of research, though probably over a wider field than that which is appropriate to the court below. In this, it can properly expect the benefit of the work of the court below. Always, in my opinion, the assistance of legally trained librarianship, able to produce a bibliography of a subject, is of great assistance to such a court; and as the volume of the law reports continues to grow and the legal journals to proliferate both in number and in range of subject matter, such librarian assistance becomes well-nigh indispensable. Having found relevant authority the final court of appeal, perhaps not in every case, but at least in many cases, in my opinion, needs to consider the correctness and at times the appropriateness to current circumstances of the decision or decisions which if accepted would of them-
selves control the resolution of the case. One cannot doubt that the force of *stare decisis* is bound to be felt and respected by such a court in deciding a matter of general law. Indeed in such cases its weight can only be overcome in a clear case where the final court of appeal is convinced of the incorrectness or inappropriateness of the decision or decisions. Constitutional interpretation may, in my opinion, stand in a different situation. In the case of a final court of appeal Cardozo's words are particularly apt and applicable. He says, in *The Nature of the Judicial Process* (Yale, 1965) at pp. 19–21:

"None the less, in a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others."

I do not propose to go more deeply into these matters. What I have said suffices for the purpose I intend to pursue in the course of this lecture.

I want to speak of a problem in precedent which does not and, indeed cannot, arise within Great Britain. I might call it a colonial problem in precedent, not using the word "colonial" in a pejorative sense but as including in the description the former dominions and the now members of the British Commonwealth. To particularise that problem, it springs out of the circumstance that the courts of Australia and those of New Zealand were not at any point of time part of the judicial system of the United Kingdom but throughout belonged to a different hierarchy of courts altogether. For the courts of Great Britain, the House of Lords is the final Court of Appeal and by its decisions all the courts of Great Britain are bound. You will recall the historical steps by which Parliament became a
Court of Appeal and how the exercise of judicial power in respect of local matters by the Monarch through his Privy Council was brought to an end. You will also recall how the House of Commons lost to the House of Lords its place as a Court of Appeal so that in the end, the House of Lords became the final Court of Appeal for the United Kingdom. I mention these matters to remind you that a decision by the House of Lords is in form a resolution of a House of Parliament. As long ago now as 1861, there had emerged the view that such a resolution became the law of the land alterable only by Parliament as a whole—King, Lords and Commons. This was not a necessary view. Neither the fact that the House of Lords was the final Court of Appeal, nor the fact that its decision was a resolution of one of the Houses of Parliament demanded such a conclusion. In other matters, where no statute directs it, a resolution of one House does not become by its own force, the law of the land. But the contrary view in relation to the decisions of the House as a Court of Appeal hardened into settled doctrine in the year 1898 in the case of *London Street Tramways Company v. London County Council* [1898] A.C. 375. This was in substance *stare decisis* in a most rigid form. The resolution of the House was to stand though the Lords of Appeal were subsequently convinced of its error or inappropriateness: and the correction of it was to be left to Parliament when it should find time and inclination to do so. Recently, as you may have read, the Lord Chancellor, speaking on behalf of himself and the Lords of Appeal in Ordinary, made a historic statement as to the attitude of the House of Lords for the future to past appellate decisions of the House. I think it worth while at this point to quote in full what the Lord Chancellor said:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the special need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House." ([1966] 1 W.L.R. 1234.)

This announcement, though of necessity hedged round with cautionary language, does open the way to the correction of manifest error and the
deployment of common law principles to particular adjustments of the rights and obligations of the community conformably to current mores and prevailing social and economic conditions. In this connection it is worth pausing to note two passages from the speeches of Lord Reid which, though made before the Chancellor's announcement, give some indication of a willingness to utilize the power of a final appellate tribunal to develop the common law:

“I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases. But there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation. And if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that if it is relaxed, judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted.” (Myers v. Director of Public Prosecutions [1965] A.C. 1009 at p. 1021-22.)

“It is true that a strong Law Revision Committee recommended so long ago as 1937 (Cmd. 5449): ‘That where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name...’ (p. 31). And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential. So for the purposes of this case I shall proceed on the footing that the commonly accepted view is right.” (Beswick v. Beswick [1968] A.C. 58 at p. 72.)

The existence of such a power is emphasised and I would hope its use encouraged by the Lord Chancellor's statement.

If you will permit me to do so I would quote a passage from a recent judgment of my own in which I referred to the Lord Chancellor's announce-
ment. It will also serve as some indication of the current thinking of at least one Justice of the High Court as to the use to be made of the judicial power of decision exercisable by a final court of appeal. The case concerned the question whether a person can be liable at law for the consequence of advice gratuitously but negligently given to another:

"The matter so far as this Court is concerned is free of any binding authority. The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the court's task is to express what is the law on this subject as appropriate to current times in Australia. This will not necessarily be identical with the common law of England: see Australian Consolidated Press Ltd. v. Uren (1967) 41 A.L.J.R. 66, though it may always be preferable if substantial divergence between the two can be avoided. This inevitably means that the common law is what the court, so informed, decides that it should be, subject of course to correction by the Judicial Committee in a case in which Her Majesty's Privy Council retains jurisdiction. For, where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the court in general is to declare what the law is and not to decide what it ought to be. In such a case, in my opinion, the common law is as much in gremio judicis as ever it was, assisted and instructed now no doubt by all that has happened through the years of its growth: and thus in such a case the two positions of what is and of what should be are in reality coincident. But, of course, the court is not to depart from what it realizes the common law would provide in order to arrive at some idiosyncratic solution. So to do, is to attempt to legislate and to tread forbidden ground.

The House of Lords, as it seems to me, was in the position of being able thus to declare the common law when deciding Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465, even though at that time the Lord Chancellor's announcement of the year 1966 on behalf of the Law Lords had not been made: see [1966] 1 W.L.R. 1234. In that case there was no need in order to arrive at its conclusion for the House to overrule any decision of its own by which at that time it would have been bound; nor indeed was it necessary as their Lordships viewed the case to overrule any decision at all other than that in Le Lievre v. Gould [1893] 1 Q.B. 491, and that in Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164.

For the future, even where an existing decision of the House of Lords currently governs a matter which comes before it, it would seem that the House of Lords will be in the same situation as is this Court where no precise decision of the Privy Council governs the matter in hand. It will be free to overrule its own decision in order properly to
express the common law. The Lord Chancellor's statement of 26th July, 1966, in my respectful opinion, is a useful indication of the balance which needs to be sought between the maintenance of a stable system of law and the provision of rules which are appropriate to do and to ensure justice in current situations. It recognizes rightly, if I may respectfully say so, that the perpetuation of error by an ultimate court of appeal is not an indispensable nor a desirable feature of a stable system of law, grounded on judicial precedent." (M.L.C. Assurance Co. Ltd. v. Evatt (1968) 42 A.L.J.R. 316 at p. 318.)

But this does not mean that the judge is at liberty to give effect to his own personal view of what is right and just in the particular circumstance. His decision must be according to the principles of the law, which, it must be conceded, can at times work less than justice. Adherence to the principles of the law but not necessarily to particular decisions therein, is essential to the maintenance of an ordered society. As Cardozo said in his lecture from which I have already quoted (p. 141):

"The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains."

But through the period with which I will be dealing the House of Lords regarded itself as bound by its own decisions. No doubt, this rule led to the more ready acceptance of distinctions between a case under consideration and an earlier decision. By that means some advances in the law were made. But the existence of the rule is important to be borne in mind in what I have to say, that is to say, only an Act of Parliament of the United Kingdom could change the law settled by a decision of the House of Lords.

For the plantations, as the early colonies in America were called, and for colonies such as the Australian colonies, the judicial power of the Sovereign remained. Consequently, the Judicial Committee of the Privy Council, whose activities were and are regulated by the Judicial Committee Acts, 1833 and 1843, became the final Court of Appeal for the colonies, that is to say, became the top court in the hierarchy of each system of colonial courts. Orders in Council made by the Sovereign fixed the nature of the matters in which such an appeal could be brought as of right: but the power to grant special leave to appeal in any case remained, its exercise being recommended to the Sovereign by that Committee. The Committee is not bound by its own decisions, which constitute advice to the Sovereign, who in form and theory decides each appeal. However, as Viscount Haldane L.C. once
said: "But according to constitutional convention it is unknown and un-
thinkable that Her Majesty in Council should not give effect to the report of
the Judicial Committee who are thus in truth an appellate court of law."
The Committee is not bound by the decisions of the House of Lords or by
the decisions of any court in the hierarchy of the courts of which the House
of Lords is the head.

It was the existence of these two systems of courts with no settled and
binding rule to accommodate the decisions of each to the other, which formed
part of the ground of the developments in precedent to which I take this
opportunity to call your attention. The other part was the loosening of the
ties, or as some may have seen them, the bonds of Empire, and the emergence
of new nations within the British Commonwealth of nations, many of them,
including Australia, becoming, not merely out of national sentiment but out
of geographical location and economic considerations, conscious of separate-
ness and independence.

Generally speaking, a desire for uniformity of the common law throughout
what was then the British Empire led to the acceptance during the times of
that Empire by each of the court systems of the decisions of the other. The
interest of the British Government and of British investors in the maintenance
of such uniformity, particularly in so much of the common law and of
statutory interpretation as touched upon commercial activities, was obvious.
It was reflected in the attitudes of the English courts, including the Privy
Council, and it was broadly speaking both accepted and promoted by the
decisions of the colonial courts staffed as they were to a significant degree,
and particularly in early times by expatriate or, at any rate, English-trained
lawyers. Whilst no conflict of decision existed between the two judicial
systems, no problem arose. But there were occasions when radical differences
existed between the decisions of the House of Lords and the decisions of the
Privy Council. This situation still obtains, notwithstanding the fact that pre-
dominantly the members of the Privy Council who sit on boards of the
Judicial Committee are Lords of Appeal in Ordinary who, with the Lord
Chancellor, exclusively decide cases brought before the House of Lords in
its appellate capacity. Although these occasions of difference in decision were
few, their consequence reached far beyond the subject matter of decision.

I am intending to deal with the relationship which developed between the
colonial system of courts and those of Great Britain, in relation to precedent
and with a change in attitude of Australian courts to English precedent which
may be seen in the judgments of members of the High Court of Australia.
This change, though not exclusively due to it, broadly parallels and reflects
the steady growth of Australia away from a mere colonial situation to a
state of nationhood and independence. That passage has been a process
spread over a century and a half, characterised by gradualism, with no high
peaks of crisis or indeed any turning points marked by resounding circum-
stance. Along the path from colony to nation, however, one can see changes
of mind in the administration of the law with respect to the acceptance of precedents derived from Great Britain. The changes have been evidenced, principally, in the work of the Justices of the High Court. These, at times, almost tentative movements on the part of members of the High Court have not followed a steady or regular progression. There has been a deal of flux and reflux, as I hope the detail of this lecture will show. But a comparison of the commencement with the end of the period I shall cover, leaves no doubt that a change of a fundamental kind has occurred. The change has not only been manifest in the degree of acceptance of English decision or precedent, but in an increasingly critical attitude to the work generally of the English Courts, particularly that of the Court of Appeal.

First, I should say to you something about the court system of Australia. The country began as a colony on the east coast of Australia, unknown land in those longitudes until James Cook, the great navigator, filled in some of the eastern outline of the Australian continent of which the western end had suffered some discovery and received some delineation. Settlement took place in 1788: the original colony began primarily as a penal settlement, a place to which to transport persons convicted of offences for which the death penalty was the primary punishment, with transportation as a mitigation or merciful alternative. For a period of close on 40 years the colony remained under naval or military governorships, with military or paramilitary courts and without any representative government. Free settlers came early in the life of the colony and, in a relatively short time, outnumbered the involuntary immigrants. From very early times there was agitation for civil courts and ultimately these were conceded by the British Government. I won't trouble you with the historical detail because that is beside my present purpose. But the following should be noted: by virtue of legislation of the British Parliament in the reign of King George IV, the colonies of New South Wales and of Van Diemen's Land, which soon became the colony of Tasmania and is now the State of Tasmania, were each to be given a Supreme Court, with some provision for inferior courts. All the laws of England which in 1828 were appropriate to the then condition of the colonies became operative. Thus the common law and its system of precedent was clearly introduced into the new land. There was therefore no such room for difference of opinion as—I gather from Professor Yehezkiel Dror's interesting article (Vol. V of Studies in Law) published by your Faculty—has existed here in Israel as to the source of the doctrine of precedent in your court system.

The first colony set up on the eastern seaboard was divided progressively into four separate colonies. Two other colonies were inaugurated—one in the south and one in the west. Each of these new colonies in turn was given a Supreme Court and to each the common law was introduced. The six colonies developed side by side though at different rates of growth, both in terms of population and in their economies. In 1900, after much deliberation, they federated.
During the period from the commencement of the Supreme Court in each colony there was an appeal to Her Majesty's Privy Council in London. Each Supreme Court was bound by the decisions of the Privy Council. They were so bound, or at any rate regarded themselves as so bound, not only by decisions on appeal from their respective courts but by any decision of the Privy Council given in any appeal from any colonial court, e.g. from India, Canada and many other British possessions. I do not think this position was ever questioned in Australia in the period to which I am referring, i.e. the pre-federation colonial period, but there has been some discussion of the matter since. I shall later make brief reference to this. The colonial Supreme Courts also seem to have regarded themselves as bound by decisions of the House of Lords where there was no inconsistent decision of the Privy Council.

But the position could and did arise where a decision of the House of Lords disapproved an earlier decision of the Privy Council. That is to say, there was not only difference but a refusal by the one tribunal to accept the decision of the other. What should be done by the colonial courts in such a situation could not be determined by reference to any settled rule. The colonial court could make for itself an estimate of what the Privy Council itself was likely to do if and when the question arose before it, and decide it accordingly: or it might consider itself bound to follow the later decision of the House of Lords. So far as I am aware, this question did not arise for decision in any of the Australian colonial courts in the pre-federation period. Probably they observed the rule which was expressed in 1927, by Viscount Dunedin speaking for the Privy Council. He said:

"...when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the colonial court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board." (Robins v. National Trust Co. [1927] A.C. 515 at p. 519.)

This, with great respect, was a loose and inapt statement in using the expression "the colonial court, which is bound by English law". Precisely stated, the colonial court was bound by the decisions of the Privy Council—not by English law in the abstract or in general, though, of course, the function of the court, subject to the correction of the Privy Council, was to discover and declare the common law of England. No doubt, however, Viscount Dunedin's pronouncement not only represented a current opinion when made, but the views it expressed and which had been entertained over a long period of time, had had a considerable effect on decisions in Australia and New Zealand. In 1933 a Chief Justice of New Zealand regarded himself
as bound by the House of Lords (Myers C.J. in R. v. Seaton [1933] N.Z.L.R. 548). As late as 1962 the Court of Appeal in New Zealand had the question before it (Corbett v. Social Security Commission [1962] N.Z.L.R. 878). One of the three Judges of Appeal deciding the case thought that a decision of the House of Lords should be followed rather than that of the Privy Council. In fact, however, in that case, the Court by majority followed a decision of the Privy Council and not a later inconsistent decision of the House of Lords. The case involved the vital question of Crown privilege in respect of the compulsory production of documents and the conflict between the decision in Duncan v. Cammell Laird & Co. Ltd. [1942] A.C. 624, as modified by Glasgow Corporation v. The Central Land Board, 1956 S.C. (H.L.) 1, both decisions of the House of Lords, and Robinson v. State of South Australia (No. 2) [1931] A.C. 704, a decision of the Privy Council. It is of present interest to quote the pronouncements of the two Judges of the Court of Appeal who formed the majority:

"1) (Per North J.) In very exceptional circumstances, the New Zealand Court of Appeal would be justified in following a later decision of the House of Lords in preference to an earlier conflicting decision of the Privy Council, and particularly if the House of Lords had discussed the Privy Council decision and had pointed out in what respects it was of the opinion that the Board had erred. But even so, that course would only be justified if the case involved only principles of English law which are admittedly part of the law of New Zealand and there are no relevant differentiating local circumstances.

2) (Per Cleary J.) When deciding which of two inconsistent decisions, the earlier of the Privy Council and the later of the House of Lords, are to be followed by the New Zealand Court of Appeal, the question always is whether the Privy Council is likely to adhere to its own earlier decision. Where the House of Lords has made it plain how and in what respects error arose in the earlier case so that it would seem wholly unlikely that there could be any reversion to the earlier decision, the New Zealand Court should follow the decision of the House of Lords."

In contrast with those quotations I should cite a passage from a recent judgment of the Court of Appeal Division of the Supreme Court of New South Wales, part of the hierarchy of courts of which the High Court is the Australian head and by whose decisions the Supreme Court is bound. That Court said:

"As between the decision of the House of Lords and the Privy Council upon an appeal from an Australian court it seems to us that the law is that which is stated by the Privy Council. There is a direct appeal from the Supreme Courts of the States to the Privy Council which places the Board at the top of the hierarchy of Australian courts. 'It is the ultimate court of appeal in the hierarchy to which our courts belong' (Bruce v. Waldron [1963] V.R. 3, at p. 7). If we were to say we
would not follow the Privy Council we would be saying that we did not do so because we thought the Privy Council was wrong. It does not seem to us that we can do that simply because another court, albeit the House of Lords by which we are not bound, disagreed with the Privy Council. The House of Lords of course is not bound by the Privy Council (per Lord Reid in *Ridge v. Baldwin* [1964] A.C., at p. 77) but we are—at least on appeals from Australian courts. We would be making an independent decision of our own, strongly persuaded perhaps by the House of Lords. We do not think that is good enough.” (*Ex parte Brown; Re Tunstall* [1966] 67 S.R. (N.S.W.) 1 at p. 10.)

Perhaps the existence of an appeal to the High Court to which the parties may and more usually do appeal rather than to the Privy Council and where the matter may end without any further appeal and the obligation to follow the decision of the High Court, may in some measure explain the noticeable difference in the attitudes of the two courts. But as you will observe from the quotations I have made from the decision of the New Zealand Court of Appeal in 1962, that court has come to the position that whilst it is not bound in all circumstances to follow a decision of the House of Lords, it will do so in general. In exceptional circumstances it feels free to prefer a decision of the House of Lords, particularly where it can feel able to conclude that the Privy Council would itself review its own earlier inconsistent decision and adopt that of the House of Lords.

There is, of course, quite a different attitude to be adopted where there is no relevant decision of the Privy Council. Then quite clearly the Australian colonial court or a New Zealand court, which remained bound by a decision of the Privy Council in a case of the kind before it, might adopt for itself a decision or for that matter the reasoning of the House of Lords, not because it is bound by it, but because it is, in the opinion of the Australian or New Zealand court, a correct exposition of the relevant law. But I anticipate a little in so saying. The question in the past was whether the colonial court was bound in the event of a conflict of decision by the decision of the House of Lords. Viscount Dunedin said that they were and, as I have said, generally speaking, the Australian colonial courts and the New Zealand courts regarded the House of Lords as the final arbiter of the common law and indeed of statutory interpretation, where comparable statutory provisions exist. Looking back, it may seem strange that the courts of the Australian States and of New Zealand, as the colonies and, later, the dominions of Australia and New Zealand, obtained political autonomy as a step towards national independence, should have placed the development of their law in the hands of the Parliament of the United Kingdom, which, to a degree they did by treating themselves as bound by the decisions of the House of Lords, rather than decide for themselves what the common law for their own countries should be and thereafter await the activity of the Parliament in their own colony or
dominion for any change deemed locally advisable. But, no doubt, it seemed natural enough for those courts to take the course they did as the bonds of Empire had but recently, and then only partially, been loosened. Habits of mind born of that Imperial age not surprisingly persisted. The interest of the United Kingdom in maintaining uniformity of law within the Empire was not—as yet—seen to compete with the colonial or dominion interest in correctness and in appropriateness to the local social and economic conditions.

Thus, the solution of the problem posed by the existence of the two systems of courts in the British Empire was solved in what I might call the colonial period by the colonial courts accepting and following the decisions by the House of Lords, though not bound to do so, unless an inconsistent decision of the Privy Council existed—a decision by which they were bound but which, on occasion, they might feel free to disregard if the particular decision had been disapproved by the House of Lords.

But the question arose as to whether the colonial courts ought to regard themselves as bound by the decisions of the Court of Appeal in England. Before the federation of the colonies in 1900 the Supreme Court of each colony was the top court of the local hierarchy though subject to the Privy Council. The colonial Supreme Court regarded itself as coordinate with the Court of King’s Bench—later the King’s Bench Division—in England, and when the colonial Supreme Court sat in banc or as a Court of Appeal it regarded itself as coordinate with the Court of Appeal in the Supreme Court of Judicature in England.

This is perhaps best taken as the commencing point for my description of a steady movement in precedent in Australia, from a position where the Supreme Courts of the colonies followed decisions of the House of Lords, and the decisions of the Court of Appeal in England, to the point where the High Court of Australia came to regard itself as not bound nor even persuaded by the decisions of the House of Lords: and indeed decided in important respects otherwise than that House had decided.

I begin the narrative in 1877 when the oldest Supreme Court in Australia, that of the State of New South Wales, was 49 years old. It was set up in 1828. For those interested in such things, it could be mentioned that since the replacement in fairly recent times of a court in the West Indies, the Supreme Court of New South Wales is, as far as I know, the oldest remaining court of the common law order of courts, judicature having displaced those in the United Kingdom. It still operates under the Charter of Justice granted in 1828 under the Australian Courts Act, 1828 (9 Geo. 4 c. 83) (U.K.): and, if I may add, still retains the common law system of pleading. Whether or not these vestigia indicate a desirable state of affairs, I do not pause to consider.

In 1877 two sportsmen made an agreement in writing:

“. . . Mr. Glenister agrees to run 'Gaffer Gray' [which you will be pleased
to know is the name of a horse] against Mr. Trimble's 'Beacon' [another horse] for the sum of £500 a side, £200 of which is deposited in the hands of George Hill, which said deposit money will be forfeited unless the whole of the stake is made good on Monday evening, the 10th day of April, between the hours of 8 and 10 p.m."

You may know that my fellow countrymen are reputed to be inveterate gamblers but still it is not without interest that so large a bet should have been made on a horse race in the colony of New South Wales so long ago as 1877. Five hundred pounds of that day would represent a considerable sum in the dollars of this time. But Mr. Trimble had second thoughts. Before the day fixed for the race, he notified Mr. Hill that he revoked the authority to pay over the money and asked for the return of it. Mr. Hill did not respond. Relying on the terms of a local Gaming and Betting Act making all gaming and wagering contracts void, he refused to pay back the stake deposited with him. Mr. Trimble sued for the amount deposited. The primary court found for the defendant and the Supreme Court of New South Wales sitting in banc dismissed the plaintiff's appeal. But Mr. Trimble was insistent. He carried the matter to the Privy Council in London, no small matter when only sailing ships or embryonic steamships covered the 12,000-mile journey to London. Apparently Mr. Hill was not willing to venture so far, for the report of the appeal in the Privy Council says that he did not appear there. Their Lordships of the Privy Council thought that the plaintiff should succeed. They referred to and based themselves upon a decision of the Court of Appeal in England on an English act in identical terms with the colonial act affecting gaming and wagering contracts. Let me read you what their Lordships then said. When I reach the end of the story you will appreciate what a considerable change has taken place through the years without the Privy Council having at any time reversed this quotation.

"Their Lordship think the court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the colonial courts should also govern themselves by it. The Judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in the case of Hogan v. Curtis, 6 Sup. Court Rep. 292, but they might well have yielded to the high authority of the Court of Appeal which decided the case of Diggle v. Higgs, 2 Ex. D. 422, as the English court which decided Batty v. Marriott, 5 C.B. 819 would have felt bound to do if a similar case had again come before it." (Trimble v. Hill (1879) 5 App. Cas. 342 at pp. 344, 345.)

This view, probably appropriate to the then condition of the British Empire,
telescoped the two systems of courts, though in terms the decision was limited
to the statutory construction of legislative instruments in identical terms. But
its general approach was in line with the later judgment of Lord Dunedin.

The effect of the case of *Trimble v. Hill* (supra) and of the willingness
of the colonial courts to follow the House of Lords was to maintain some
uniformity of the common law and of statutory interpretation throughout
the Empire. But it did not precisely conform to the actual theory of precedent.
The colonial court might have decided, in the same sense as the English
Court of Appeal or of the House of Lords, as the case may be, whatever
its own view, on the footing that the Privy Council itself, influenced by the
decision of the House of Lords or of the Court of Appeal, would decide the
matter in that sense. But that involves a speculation which may or may not
have been justified; or the colonial court may have been convinced of the
propriety of the decision of the English Court of Appeal. But that again is
another matter. In point of the strict theory of precedent the Court of
Appeal was not in the same hierarchy as the colonial court which in con-
sequence was not in strictness bound by the decision of the Court of Appeal.
However, the decision of the Privy Council did bind the colonial courts. The
situation thus imposed upon the colonial courts by the Privy Council per-
sisted for very many years and where no relevant decision of the High Court
exists may be still thought by some, to govern the decisions of the Supreme
Courts of the States. At any rate it was the situation at the time of the
federation of the Australian colonies in 1900, which is the next event to which
I want to call attention.

In the year 1900 the colonists of all the Australian colonies federated and
joined in a new Commonwealth. The Parliament of the United Kingdom
passed the Constitution Act which erected the Constitution of Australia. This
Constitution is a Federal Constitution broadly after the pattern of the Con-
stitution of the United States but without its rigid separation of powers
and with the British system of responsible government engrafted upon it.

The Constitution erected the High Court of Australia under that name as
the Supreme Court of Australia. It is both the constitutional court and a
general court of appeal for all courts in Australia. The right of appeal from
the Supreme Courts and from other courts of the States from which in 1900
appeals could go to the Privy Council was constitutionally entrenched and
placed beyond the reach of any of the Parliaments—Commonwealth or State.
Thus, the immediate effect of federation upon the system of courts in the
several colonies, which under the Constitution became the States, was
to place the High Court into and make it part of the court system of each
State. Subject to appeal to the Privy Council, it became the top court in
each such system of courts.

But whilst under the Constitution, appeals in certain constitutional matters
could not be taken from the High Court to the Privy Council without the
approval of the High Court, the right of the Queen in Council to grant special
leave to appeal from the High Court was maintained by the Constitution, subject to the power of the Australian Parliament to make laws limiting the matters in which such leave could be sought. To anticipate a little, the power of limiting the matters in which such special leave to appeal might be granted by the Privy Council has recently been exercised by the Australian Parliament. In respect of matters initiated since 1st September 1968 and involving federal jurisdiction by whomsoever exercised, no such leave to appeal may be granted by the Privy Council. Thus, in respect of all constitutional matters and in all matters involving the exercise of federal judicial power, the High Court of Australia has become absolutely the final Court of Appeal unless the Court certifies a question as to the relative constitutional powers of the Commonwealth and States, or of one State and another, to be proper to be decided by the Privy Council rather than by itself. Power was taken in the Constitution for the Parliament to invest the courts of the States with federal jurisdiction. This, the Parliament had done. Australia has not followed the American pattern of parallel courts, State and federal. Thus, it is to the High Court that appeals may be brought and now can only be brought from State courts where they exercise federal jurisdiction. This covers a very wide area of the law, including the common law. For example, the High Court has jurisdiction in any case in which the Commonwealth is a party, no matter what the cause of action or the law to be applied. Further, the Court has a diversity jurisdiction where residents of different States sue each other. Again, such an action may involve any cause of action. Usually, such a case involves the common law and at least the law of one State. Although the opportunity to invoke the Court's diversity jurisdiction has been reduced by the Court's decision that corporations cannot relevantly be residents, there remains a considerable area of federal jurisdiction covered by the diversity jurisdiction. The courts of the States have been invested with federal jurisdiction in all matters in which the High Court could exercise jurisdiction. Thus, for example in matters between residents of different States, although otherwise they involve no federal question or element, the State court will be exercising federal jurisdiction and no appeal may be taken in the matter to the Privy Council but only to the High Court. But appeals can still be taken to the Privy Council both from the Supreme Courts of the States and from the High Court itself in matters involving only the law of a State which includes the common law in force in the State. It will at once be seen that a decision of the High Court on a matter of common law, decided in an appeal from a State court exercising federal jurisdiction, may well conflict with a decision of the Privy Council in an appeal either from the High Court or direct from a State in a matter involving only State law (including the common law).

Thus a new possibility of conflict of authority has been created: and of course, a new problem in precedent for a Supreme Court faced with antithetical decisions of the Privy Council and of the High Court. However,
the future is in a real sense, outside the scope of this lecture. I am more concerned with the past and its developments.

Legislation of the Australian Parliament has provided that appeals may be brought as of right, to the High Court with respect to every final judgment of a State court for or in respect of any sum or matter at issue amounting to or of the value of three thousand Australian dollars (approximately IL 11,760), or which directly or indirectly involves any claim, demand or question to or respecting any property or any civil right amounting to or of that value or which affects the status of any person under the laws relating to aliens, marriage, bankruptcy and insolvency.

Leave to appeal against any interlocutory judgment fulfilling any one of the abovementioned qualifications may be given by the High Court. Special leave may be given to appeal against any judgment—final or interlocutory—in any civil or criminal matter.

This addition of the High Court to the judicial system of each State, making it a second court of appeal in all matters civil and criminal, has had, as I think you will observe as I proceed, a far-reaching effect and influence on the development of doctrine as to precedent in the court systems of Australia. At once you will note that through the appellate provisions, the opportunity to pass upon the whole gamut of the law is afforded to the High Court. One of the principal effects of the creation of the High Court has been to enable uniformity in precedent to be achieved within and as between the judicial systems of the several States. Whilst some degree of comity in accepting one another's decisions existed between the courts of the several colonies and now exists between the courts of the States, the decisions of the courts of one colony or State did not and do not bind the courts of another. But through the circumstance that the High Court is part of each judicial system and that its judgments bind the courts of all the States no matter from what State the appeal in which the decision is given has come, much greater uniformity and evenness of the development of the law has been made possible through the existence of the High Court and by means of its decisions. This function of producing uniformity, particularly of the common law, which formerly it had been thought the Privy Council would perform within the former Empire, has been carried out by the High Court in relation to Australia.

Further, doctrines have been developed by the High Court, not always identical with English doctrines by which English courts are governed, but by which the courts of the States of Australia are bound. The possibility of flexible development of the common law appropriate to Australian conditions has been created by the ability of the High Court to review and—if need be—in a proper case to reverse its own decisions and also to reconsider and again—if need be—to depart from decisions of the English courts with respect to the common law, and also with respect to statutory interpretation.

Whether this development takes place to any and, if so, to what extent,
depends upon the willingness of the High Court, on appropriate occasions, to use this capacity to review and reverse. The choice may often be between an exercise of mere research and combination as to what and of what has been decided and an exercise of judicial power to decide what is the law. Later, you will notice that Sir Isaac Isaacs emphasises this obligation to the law rather than the obligation to perpetuate a decision.

I now turn to some judgments of the Justices of the High Court to illustrate the influence it has had on the development of precedent in Australia.

The High Court began sitting in 1903. In 1909 there came before the court an appeal from the Supreme Court of the State of Queensland involving the important question whether, having regard to the Married Women’s Property Act, 1882, of that State, a husband was liable for his wife’s post-nuptial torts. The Court decided that he was not. But there were decisions of the Court of Appeal in England to the contrary. In the course of giving his reasons for judgment, Sir Samuel Griffith, the first and very distinguished Chief Justice of the High Court, said this:

“This Court is not formally bound by the decision of the Court of Appeal in Earle v. Kingscote (1900) 2 Ch., 585, although the learned Chief Justice [of a State] was no doubt right in following it. And although it is, I think, expedient that the High Court should follow decisions of the Court of Appeal under ordinary circumstances, I do not think that it ought to do so when the decision in question has been doubted and regarded as open to question by the Court itself, and when it is founded on reasoning which does not commend itself to us. If, therefore, it were necessary to rely on this point I should be prepared to decline to follow the cases of Seroka v. Kattenburg, 17 Q.B.D. 177, and Earle v. Kingscote.” (Brown v. Holloway (1909) 10 C.L.R. 89 at p. 98.)

Later O’Connor J. said:

“There are therefore now standing two decisions of the English Court of Appeal against the view of the Statute which Mr. Graham has put forward, a view which after full consideration of the matter I believe to be right. The question then arises to what extent, if at all, is this Court obliged under these circumstances to follow the decisions of the English Court of Appeal? In matters not relating to the Constitution, this Court is, no doubt, bound in judicial courtesy by the decisions of the House of Lords, the tribunal of the highest authority in the British Empire. The Judicial Committee of the Privy Council is by Imperial Statute placed, as to matters within its jurisdiction, in effect at the head of the judicial system of every British possession outside the United Kingdom, and as to all matters within its jurisdiction we are bound by its decisions. Apart from those tribunals there is no court in the Empire whose decisions we are on any ground obliged to follow. The English Court of Appeal stands to this Court in much the same position as any
other tribunal where British law is administered by Judges of high attainments, great learning and wide experience. The judgment of such a tribunal when it expresses the considered opinion of its members must always carry very great weight in the estimation of this as of every other court in the Empire. It cannot, however, be said that the judgment of the Court of Appeal in *Cuenod v. Leslie* (1909) 1 K.B., 880 does express the considered opinion of its members. Although Lord Justice Fletcher Moulton is the only Judge who expresses dissatisfaction with the earlier decision, it is quite evident that the other members of the Court follow it not because they approve of the reasoning, but because it is a decision by which they consider themselves bound. Under these circumstances this Court is, I think, entitled to consider the important question of law raised by Mr. Graham on its merits, unhampered by any binding judicial authority.” (p. 102, 103.)

Three points of significance emerge—(1) the High Court was not to regard itself as bound by English decisions, other than those of the Privy Council, though in matters of general law in judicial comity it would in general follow the House of Lords; (2) the State Court rightly followed the decisions of the English Court of Appeal; and (3) the Justices of the High Court were themselves convinced of the error of the decision of the Court of Appeal but the reason they found for not following it was that it had been doubted by the Court of Appeal itself. Thus, early in its history the High Court began to perform a most important function in connection with precedent. It rightly assumed the position of an independent arbiter in Australia, though indicating its willingness, even possibly against its own firm conviction as to the law, to maintain uniformity of principle within the domain of the common law. The addition of a reason beside its own conviction for not following the Court of Appeal is indicative of the place at that time given to the desirability of uniformity of the general law throughout the King’s dominions.

In 1913 the High Court had to decide whether or not it would review and reverse one of its own prior decisions. It concluded that it could and in a proper case would do so. In the course of delivering judgment in the case which concerned an aspect of the industrial arbitration system of Australia, Mr. Justice Isaacs (later Sir Isaac Isaacs, Chief Justice of the High Court and later still a distinguished Governor-General of the Commonwealth and the first Australian to hold that office) said:

“As to the propriety of reconsidering our prior decisions at all, the question has been recently argued most exhaustively in a case now pending, and we are in a position to express our views upon it. It is, I apprehend, beyond question our duty to accept any rule laid down by the Privy Council on the subject of general judicial conduct. In some cases that body governs us, and in all others it affords an appropriate model for our guidance. Now, the Privy Council has never countenanced the doctrine that its
own decisions are not reviewable. It has never accepted the theory of the House of Lords as to the immutability of decisions of that tribunal, a theory which rests on a very special ground—namely, that House of Lords decisions are in the nature of acts of legislation. . . .

But *cessante ratione cessat lex*, and as no such constitutional theory applies to the Privy Council that body has never followed the consequential doctrine. In *Read v. Bishop of Lincoln* (1892) A.C., 644, at p. 655, after full consideration of the subject, Lord Halsbury L.C., as to previous decisions of the Judicial Committee, laid down for himself, Lord Hobhouse, Lord Esher, Lord Herschell, Lord Hannen, Lord Shand and Sir Richard Couch, the rule to be followed in these terms:

‘Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law.’

There we have laid down for us, by the tribunal by which we are in most respects controlled, that it is the primary duty of even that august tribunal, to consider for itself at the instance of every suitor before it, what is the law by which he is bound. A prior decision does not constitute the law, but is only a judicial declaration as to what the law is. The declaration, unless that of a superior tribunal, may be wrong in the opinion of those whose present function is to interpret and enforce the law; and if the reasons given appear when examined to be unsound, then, say the Judicial Committee, they are bound ‘to give effect to their own view of the law’; otherwise Judges arrogate to themselves the position of legislators. The Privy Council has in fact reconsidered its own decisions on various subject for various reasons, and has overruled them.” (*Australian Agricultural Co. v. Federated Engine-Drivers and Firemen’s Association of Australasia* (1913) 17 C.L.R. 261 at p. 274.)

Later he said:

“The oath of a Justice of this Court is ‘to do right to all manner of people according to law’. Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.” (p. 278)

The last sentence, uttered so long ago as 1913, is, I think, symptomatic of much current thinking. We have been through a period when the virtues (and they are no doubt virtues) of stability and predictability in the law have been paramount considerations in the decision of cases, and particularly in the consideration of earlier decisions. Today many are not so enamoured of the perpetuation of error or of inappropriateness to current times of old decisions, and favour their review in proper cases by final courts of appeal.
Also the obligation of the judge to the law itself rather than to the decisions upon it is properly given prominence.

In 1922 the same distinguished Justice said this:

“Technically, I am aware, a decision of the House of Lords does not bind this Court. But there are certain matters I cannot but remember. One is that a decision of the House of Lords is binding on that House and cannot be departed from except by fresh legislation. Then I have to consider that, if the same learned Lords were, when sitting in the Privy Council, to give precisely the same decision for the majority reasons, I should have to regard those reasons as controlling whatever it decided. Next, I look upon the observations of the Privy Council in Trimble v. Hill (1879) 5 App. Cas., 342 at p. 344 as a clear suggestion involving, at all events, that a relevant decision of the House of Lords should be accepted by an Australian Court as decisive. And this for a reason given further on in that judgment (1879) 5 App. Cas., at p. 345 namely, that ‘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’. Having regard to these considerations, I only desire to say that upon the best reading I can give to Blott’s Case (1921) 2 A.C., 171 I do not feel judicially at liberty to act unhesitatingly on Knowles’s Case (1916) 22 C.L.R., 212 and Fisher’s Case (1917) 23 C.L.R., 337, as I should otherwise have acted.” (Webb v. Federal Commissioner of Taxation (1922) 30 C.L.R. 450 at p. 469.)

Thus, whilst asserting a right to decide for himself if need be, the Justice was clearly reiterating his willingness to consider uniformity of decision within the sphere of the common law both desirable and in many cases a compelling occasion for conformity to a decision with which there was not wholehearted agreement. Also, there was present a like notion to that expressed by the Judges of the Court of Appeal in New Zealand in the passage I have quoted, the idea of considering as part of the reason for not following a decision of the Privy Council in conflict with a decision of the House of Lords whether or not it was likely that the Privy Council would review its own decision if opportunity offered and then accept the view of the House of Lords. In strict theory this attitude is hardly supportable and more recently has not been adopted by the High Court. It should be left by the inferior court to the superior to effect the change. I shall later refer to Jacob v. Utah Construction & Engineering Pty. Ltd. (1966) 116 C.L.R. 200 on this aspect of precedent. There are perhaps exceptions to such a strict application of theory. The New Zealand case and the above-mentioned case in the High Court perhaps afford examples. Our system of law allows no initiative in an appellate court to bring forward a decision of an inferior court, without the parties having made an appeal. Thus a decision below may stand a long time before it is overturned by the superior court. Such a situation tends to encourage a departure from the strict theory of precedent comparable to the course
described in the cases to which I have referred. A power in the inferior court to send the point of law to the superior court for decision and a wide and restrained use of such a power by the inferior court would clearly obviate the need to make such a departure.

But three years later, when dealing with a case involving a question of ratification, Sir Isaac Isaacs said in relation to the decision of the English Court of Appeal in *Bolton Partners v. Lambert* (1889) 41 Ch. D. 295:

"... In the circumstances I have first to consider how far I am bound to yield an unquestioning acceptance to that decision. The reasons suggested for that course are (1) the observations of the Privy Council in *Trimble v. Hill* (1879) 5 App. Cas. 342, at p. 344 and (2) the time the decision has stood in England unreversed. I am unable to see in either reason anything to weaken my ordinary constitutional duty to declare the law as I believe it to be, subject, of course, to the contrary opinion of this Court and then the Privy Council, and also, I will add, for reasons I have stated in *Webb v. Federal Commissioner of Taxation* (1922) 30 C.L.R. 450, at pp. 469, 470, the House of Lords.

In some cases the suggestion in *Trimble v. Hill* (1879) 5 App. Cas. 342, at p. 344 must naturally have great weight; but this is not one of them. Having regard to the status of this Court and its functions in relation to the Australian Courts referred to in the suggestion in *Trimble v. Hill*, as well as the features of the particular question now involved, I have no hesitation in believing it to be my judicial duty to form and declare my own opinion on the point. Moreover, in passing, I would add that, while fully conscious, as already stated in *Webb’s Case*, of the importance of securing uniformity of interpretation in the Empire, that purpose must not be pressed too far. Forty-five years have passed since *Trimble v. Hill*, and the relative status of the highest Dominion Courts as well as of the Dominions themselves is not the same. Inter-Imperial trade and general communications have become more complex. Logically, on the ground of uniformity, there is as much reason for following a decision of the Supreme Court of Canada or of New Zealand, of the Irish Free State or in some cases of South Africa—all of which like our own are under the corrective power of the Privy Council, as for singling out the one Appellate Court of England subject to appeal to the House of Lords. Each case must, in my opinion, be dealt with on its own merits, and in that process every decision of an English Court, original or appellate, is sure to receive our traditional and unfeigned respect. But, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed.” (*Davison v. Vickery’s Motors Ltd. (In Liquidation)* (1925) 37 C.L.R. 1 at p. 13.)

Here, the movement is towards self-expression and again the Justice favours the paramountcy of correctness rather than of precedent, particularly where comity rather than strict theory suggests compliance with it. Here too it cannot only be surmised that nascent nationalism was having its influence on
the judicial acceptance of English precedent: it is expressed in the learned Justice's references to the separateness of the identity of the new dominions. Also the claims of uniformity of development of the common law in the area of what later became the British Commonwealth of Nations is observed and some emphasis placed upon it.

Thus, the position was reached that courts of the States may be bound to follow the English Court of Appeal until the High Court has itself decided the point. Once the High Court has decided, however, and not followed the Court of Appeal, the State Court in turn must follow the High Court and not the English Court of Appeal.

In the following year, however, 1926, the Court in a case by the name of Sexton v. Horton (1926) 38 C.L.R. 240 seemed to pause in its movement towards expression of its own independent views. The question in this case was whether an equitable estate in fee simple required for its creation the use of technical words of limitation, as for such an estate at common law, namely, the use of the word "heirs" as a word of limitation. The High Court in 1917 had decided that such technical words were unnecessary to create an equitable fee simple in land and that the question whether or not such an estate had been effectively created could be resolved by discovery from the instrument in question of the intention of the donor, or the settlor as the case may be. The Supreme Court of New South Wales in Sexton v. Horton had properly regarded itself as bound by that decision of the High Court and, finding the necessary intention, had declared the creation of an equitable fee simple without there being technical words of limitation. But in 1921 the English Court of Appeal had decided to the contrary. Accordingly, the question arose on the appeal in Sexton v. Horton from the Supreme Court's declaration, whether or not the High Court should follow the Court of Appeal. The Court decided to reverse the Court's own decision and to follow the Court of Appeal.

It was said:

"In this Court we are not bound by the decisions of the Court of Appeal, but uniformity of decision upon the law of property in force both in England and in Australia is paramount. It is a sufficient reason for reconsidering Hunt v. Korn (1917) 24 C.L.R. 1 (the 1917 decision of the High Court) that the Court of Appeal has acted upon a different rule of law.

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. Bostock's Case (1921) 2 Ch. 469 accords, if we may say so, with the stronger body of authority in England; and the examination of the cases by, and the reasoning of, the learned Lords Justices satisfy us that the decision in Hunt v. Korn
(1917) 24 C.L.R. 1 was based upon an erroneous view of the law, induced, no doubt, by some English decisions that have now been overruled" (1926) 38 C.L.R. 240 at p. 244).

Of course, in this case, although uniformity of decision was expressed to be paramount, the Court seemed to find other reasons for preferring the decision of the Court of Appeal. But those reasons themselves involved acceptance of the view of the Court of Appeal.

In somewhat the same vein, was the reversal by the Court of one of its decisions relating to divorce. In 1937 the Court had decided that where a husband who has been deserted by his wife commits adultery before the expiration of the statutory period of desertion which would entitle him to a decree of divorce on the ground of desertion, the period of desertion so far expired is terminated even though the adultery is unknown to the wife. In 1939 the English Court of Appeal decided that:

“If a spouse commits adultery after he or she has been deserted, the desertion is not necessarily terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is left in doubt whether the respondent knew of the adultery or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge the burden of proof. The question is to be determined according to the circumstances of each case.” (Earnshaw v. Earnshaw (1939) 2 All E.R. 698 at p. 699.)

The High Court in the case before it decided to forgo its own view and in the interests of uniformity to adopt the rule laid down by the Court of Appeal. One Justice said:

“Technically this court is bound by the judgments of the Privy Council, but, as heretofore, we shall pay the highest respect to decisions of the English Appeal Court and to those of the Supreme Courts of the other Dominions and to the judgments of the Supreme Court of the United States of America on points of law common to the respective countries. In quest of uniformity the court may reconsider previous decisions, but with great reluctance in the case of old authorities on the strength of which many transactions may have been adjusted and rights determined (Concrete Constructions Pty. Ltd. v. Barnes (1938) 61 C.L.R. 209, at p. 226; Westminster City Council v. Southern Railway [1936] A.C. 511, at p. 564). The House of Lords alone does not depart from its rulings, and they remain, unless altered by legislation, the reason being that the House of Lords is a legislative body (Beamish v. Beamish (1861) 9 H.L.C. 274, at pp. 338, 339; London Tramways Co. Ltd. v. London County Council [1898] A.C. 375). I have elsewhere stated that ‘in Australia the six States forming the Commonwealth are governed by common law, modified by statute, which although enacted by six parliaments showed remarkably little divergence. One of the tasks of
this court is to preserve uniformity of determination. It may be that in performing the task the court does not achieve the uniformity that was desirable and what uniformity is achieved may be uniformity of error. However in that event it is at least uniformity. As one of the two justices who decided Crown Solicitor (S.A.) v. Gilbert (1937) 59 C.L.R. 322 considers, for the reasons expressed in his judgment, that he is willing to give up his own view, I shall not stand in the way. And in order not to produce divergent rules of construction we shall follow the rule adopted by the Court of Appeal in Earnshaw v. Earnshaw [1939] 2 All E.R. at p. 699.” (Waghorn v. Waghorn (1942) 65 C.L.R. 289 at p. 292.)

The sound of the sentence that “what uniformity is achieved may be a uniformity of error” will no doubt have caught your ear. In 1942, that seemed acceptable; I doubt if it would pass muster today. Dixon J., who later, as Sir Owen Dixon, became a most distinguished Chief Justice of the Court, said this:

“The question how far this court should defer to the decisions of the Court of Appeal is one to which an unqualified answer can hardly be given. But I think that if this court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the court’s applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense. The fact that we still believe in the correctness of our own decision, as I do in the present case, is not in itself an adequate ground for refusing to follow this course. If the point decided amounts to no more than a particular application of a principle about which there is no difference of opinion, no harm can come from our adhering to our decision. In the application of the law to the facts, divergences between English opinion and Australian opinion may be expected and it is a matter of little concern. But where a general proposition is involved the court should be careful to avoid introducing into Australian law a principle inconsistent with that which has been accepted in England. The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations. In this court some trouble has been taken to preserve consistency of decision, not only with English courts, but also with those of Canada and New Zealand. English courts cannot be expected to receive the decisions of the Dominions with the traditional respect which the courts of the Dominions pay to the decisions of the English courts, but it is disappointing to find that, upon the particular question with which we are concerned, the Court of Appeal did not take an opportunity of considering the judgment delivered by this court in Crown Solicitor (S.A.) v. Gilbert. At the same time the fact that the Court of Appeal made such short work of the question is strong ground for believing that in
England it will be treated as closed and the conclusion will be accepted without reconsideration or further examination. This is not the first time that the court has been faced with the difficulty of adjusting its decisions with those subsequently given in England. In Brown v. Holloway (1909) 10 C.L.R. 89, this court found the reasoning of Fletcher Moulton L.J. in Cuenod v. Leslie (1909) 1 K.B. 880 so satisfactory that it rejected the decisions in Seroka v. Kattenburg (1886) 17 Q.B.D. 177 and Earle v. Kingscote (1900) 2 Ch. 585, and decided that a husband was no longer liable for his wife's torts. Unfortunately, however, in Edwards v. Porter (1925) A.C. 1 the House of Lords rejected the reasoning of Fletcher Moulton L.J. and adhered to the decision in Seroka v. Kattenburg. In Hall v. Wilkins (1933) 33 S.R. (N.S.W.) 220 the Supreme Court of New South Wales considered that it should follow the decision in Brown v. Holloway rather than that in Edwards v. Porter, and from this decision the High Court refused special leave to appeal (1933) 49 C.L.R. 661. It is difficult to understand why the court should have allowed this state of conflict in authority to continue, but a very small amount was involved in the case, and the refusal of special leave to appeal does not mean that the High Court was not prepared to reconsider Brown v. Holloway (1909) 10 C.L.R. 89." (Waghorn v. Waghorn (1942) 65 C.L.R. 289 at p. 297.)

I was counsel, a very young counsel, in Hall v. Wilkins (1933) 49 C.L.R. 661, when I hopefully sought special leave to appeal. I say hopefully because I thought conformably to its past performances the High Court might reconsider the matter and that the principle at stake was sufficiently important to warrant that consideration although only a small sum of money was directly involved. But, as you realise, my hopes were dashed. I remember being asked by one of the Justices whether I was more interested in a leading case than in that of my client!

These passages are illustrative of the very real endeavours made to maintain the uniformity of the common law within the British Commonwealth so far as the High Court could do so. I would wish you to keep this in mind for in the end the Privy Council gave a decision to which I shall later refer and which it might be thought ultimately denied the virtue of maintaining that uniformity.

Waghorn v. Waghorn (supra) was decided by the High Court in 1942. In the following year the Court had to consider whether it would follow a decision of the House of Lords in preference to one of its own. By name, the case was Piro v. W. Foster & Co. Ltd. (1943) 68 C.L.R. 313. It concerned a provision of a Factories and Shops Act relating to the fencing of dangerous machinery enacted by one of the States of Australia. It was almost in the same terms as an English statute on the same subject. In 1926 the High Court had decided that the employers' obligation in respect of the fencing of dangerous machinery under the statute was absolute and that the work-
man's negligence contributing to his injury by the unfenced machine was not a defence to an action by the workman for breach of the statutory duty to fence or to guard the dangerous machine. However, in 1940 in Caswell v. Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152 the House of Lords decided to the contrary. Sir John Latham, Chief Justice of the High Court, in his reasons for judgment in Piro v. Foster & Co. Ltd., said:

"This Court is not technically bound by a decision of the House of Lords, but there are in my opinion convincing reasons which lead to the conclusion that this Court and other courts in Australia should as a general rule follow decisions of the House of Lords. The House of Lords is the final authority for declaring English law, and where a case involves only principles of English law which admittedly are part of the law of Australia, and there are no relevant differentiating local circumstances, the House of Lords should be regarded as finally declaring that law: See Robins v. National Trust Co. Ltd. [1927] A.C. 515, at p. 519. As was said in Trimble v. Hill (1879) 5 App. Cas. 342, at p. 345 (a decision of the Judicial Committee of the Privy Council): '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.' In Webb v. Federal Commissioner of Taxation (1922) 30 C.L.R. 450, at p. 469, Isaacs J. referred to the passage from Trimble v. Hill as a 'clear suggestion' that a relevant decision of the House of Lords should be accepted by an Australian court as decisive: See also Davison v. Vickery's Motors Ltd. (1925) 37 C.L.R. 1, at p. 13. In Waghorn v. Waghorn (1942) 65 C.L.R. 289 this Court referred to the desirability of uniformity of decision with the English courts. In my opinion it should now be formally decided that it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court, and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle." (p. 320)

Another Justice said:

"I agree that, in the absence of any ruling of this Court, the learned Chief Justice of the Supreme Court of New South Wales in Houston v. Stone (1943) 43 S.R. (N.S.W.) 118, at p. 123 was right in considering that he was bound by a decision of the High Court as the ultimate court of appeal for Australia subject to an appeal to the Privy Council. But for the future, in order to prevent circuity of action, it is advisable for us to direct that Australian courts should follow all rulings of the House of Lords and of course the Privy Council in preference to those of this Court." (p. 326)

This decision was remarkable, not so much for the readiness of the Court to follow the House of Lords but for its direction to the State Courts to follow such decisions rather than its own decisions. This, as it seems to me, was really an abdication of its own responsibility as a Court of Appeal within each
State system—the House of Lords quite clearly not being within any one of such systems. It was one thing for the Court to decide for itself in the cause of uniformity of decision in matters of general principle that it would accept and adopt as its own the rules declared by the House of Lords. It was quite another to give to the State courts a direction to consider for themselves firstly whether inconsistency exists between a decision of the High Court and a decision of the House of Lords itself and in the event that the State Court decides that there is inconsistency, secondly, that the State Court should follow the decision of the House of Lords in preference to that of the High Court. However, as we shall see as we proceed, this view did not ultimately prevail.

In 1948 a question arose in the High Court as to the standard of proof of adultery required in a matrimonial cause. The High Court had earlier, in the year 1938 to be precise, decided that adultery in such a suit, need not be established beyond reasonable doubt as guilt must be in a criminal trial, but that it was sufficient to prove it on a clear balance of probabilities. Meantime, however, the Court of Appeal had decided in 1948 that adultery must be established according to the criminal onus of proof. The Court on this occasion refused to follow the English Court of Appeal and endorsed its own earlier view of the matter. Mr. Justice Dixon in judgment said this:

“For myself, I have in the past regarded it as better that this Court should conform to English decisions which we think have settled the general law in that jurisdiction than that we should be insistent on adhering to reasoning which we believe to be right but which will create diversity in the development of legal principle. Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle. But there is great difficulty in being sure of what has been finally settled in England. For example, the reasoning of the majority of their Lordships in the Scots Appeal of Marshall (or Wilkinson) v. Wilkinson [1943] 2 All E.R. 175, decided since Waghorn v. Waghorn (1942) 65 C.L.R. 289, somewhat reduces the certainty we there expressed that the law had been definitively settled in accordance with the decision of Herod v. Herod [1939] P. 11 and Earnshaw v. Earnshaw [1939] 2 All E.R. 698. Again In re Arden; Short v. Camm (1935) Ch. 326 lessens the certainty that final guidance is given by In re Bostock's Settlement; Norrish v. Bostock [1921] 2 Ch. 469, in deference to which Hunt v. Korn (1917) 24 C.L.R. 1 was overruled in Sexton v. Horton (1926) 38 C.L.R. 240. Further, the observation may be made that in the divorce jurisdiction cases have of late been decided in England that are very hard to reconcile with the settled doctrine of all Australian States, particularly in relation to desertion; doctrine settled by judicial work spread over a period of not much less than half a century before 1937, when the English legislation of that year
brought forward a stream of difficulties, the greater number of which had been faced and solved long before in Australia. The observation it is true has not very much significance with reference to the question before us. For it happens that, before Briginshaw v. Briginshaw (1938) 60 C.L.R. 336, some authority did exist in Australia for the view taken in Ginesi v. Ginesi [1948] P. 179.

On this occasion I am prepared to concur with the opinion that we ought to adhere to our own decision and not abandon it in favour of that of the Court of Appeal in Ginesi v. Ginesi. Briginshaw v. Briginshaw is a well-considered decision based on as complete an examination and survey of the subject as we could make. So much cannot be said of Ginesi v. Ginesi. Of late years English courts have from time to time dealt in almost an unconsidered fashion with the standard of persuasion in reference to issues in civil proceedings involving crime, fraud or moral turpitude, that is, without going back to earlier case law inconsistent with assertions that have been casually made. Needless to say the assertions have been made without a study of the learning collected in Wigmore on Evidence: cf. Helton v. Allen (1940) 63 C.L.R. 691, at p. 713. A ‘full-dress’ examination of the question would, I am sure, lead to some revision of the statements made in Ginesi v. Ginesi. Further, it is after all a matter of practice and procedure and not of substantive law, part of the law adjective.” (Wright v. Wright (1948) 77 C.L.R. 191 at p. 210.)

These words of this most distinguished judge are particularly to be noted. His various reasons for not allowing uniformity to be the paramount consideration are each of consequence. But, over all the particular reasons there hangs, though perhaps but obscurely, a pall of dissatisfaction with the course of English decisions generally. Later, this Justice, when Chief Justice of the Court, much more openly criticised a decision of the House of Lords and was instrumental in a predominant degree in hastening the ultimate position which the Court has reached in relation to English authority, other than that derived from the decisions of the Privy Council.

In 1953 an appeal in a matter involving stamp duty imposed by the legislation of a State was unsuccessfully carried to the Privy Council from a decision of the High Court. The subject matter of the case is of no present interest. But it is worth quoting from their Lordships’ decision a passage which at the one moment reflects what is perhaps their Lordships’ inadequate appreciation of how far the movement away from mere acceptance of English authority had gone in Australia at that time and, at the same time, indicates how far the Privy Council of that time still found value in uniformity of decision within the British Commonwealth where the common law attitudes to statutory construction still prevailed. Their Lordships said this:

“‘Their Lordships note that it is the practice of the Australian courts in questions of law and equity common to both countries to follow the decisions of the Court of Appeal in England where the decisions of
the Court of England appear to have settled the law. Their Lordships think that this practice is to the advantage of both systems of law since it will enable the courts of either country to refer to the decisions of the other country for guidance in any field of law or equity common to both countries.” (Commissioner of Stamp Duties (N.S.W.) v. Pearse (1953) 89 C.L.R. 51 at p. 62.)

The reason assigned by their Lordships for the advantage claimed for similarity of decision seems strange to Australian eyes because of the noteworthy inattention of the English Courts to the decisions of Australian Courts until very recent times, a matter remarked upon by Mr. Justice Dixon in the passage which I have already quoted from Waghorn v. Waghorn. But the hopes which may have underlain these judicial expressions of their Lordships were not in any event to be realised.

In 1961 the House of Lords decided the appeal in the case known as Director of Public Prosecutions v. Smith, or now more familiarly as Smith’s Case [1961] A.C. 290. You will remember the facts. The accused was told by a constable to bring to a halt the car he was driving on a public street: but the accused, instead, accelerated. The constable grasped and clung to the side of the car which was deliberately driven by the accused upon an erratic course in an attempt to shake the constable off the car. In time the attempt succeeded. The constable dropped from the car. He fell to the roadway where another car ran over him, causing him fatal injuries. The accused was convicted of capital murder. On appeal, the House of Lords sustained the conviction on the footing that though there was no actual intent to kill, the required malice aforethought could be found by the jury to exist if grievous bodily harm was thought by them to be the natural and probable result of the accused’s unlawful and voluntary act, in driving his car in the manner described with the constable clinging to the car.

The following year the High Court heard an appeal in which the question was whether in a murder trial there was any evidence of provocation to warrant a verdict of manslaughter. Chief Justice Dixon in a dissenting judgment which later found approval in the Privy Council thought that there was evidence of provocation sufficient to be put to the jury and that the conviction for murder could not stand. Having so expressed himself he proceeded:

“In Stapleton v. The Queen (1952) 86 C.L.R. 358 we said: ‘The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous’ (1952) 86 C.L.R., at p. 365. That was some years before the decision in Director of Public Prosecutions v. Smith [1961] A.C. 290, which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. 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 [1961] A.C.
290 I think that we cannot adhere to that view or policy. There are
propositions laid down in the judgment which I believe to be miscon-
ceived and wrong. They are fundamental and they are propositions
which I could never bring myself to accept. I shall not discuss the
case. There has been enough discussion and, perhaps I may add, expla-
nation, to make it unnecessary to go over the ground once more.
I do not think this present case really involves any of the so-called pre-
sumptions but I do think that the summing-up drew the topic into
the matter even if somewhat unnecessarily and therefore if I left it on
one side some misunderstanding might arise. I wish there to be no
misunderstanding on the subject. I shall not depart from the law on
the matter as we had long since laid it down in this Court and I think
Smith’s Case should not be used as authority in Australia at all.”
(Parker v. The Queen (1962–1963) 111 C.L.R. 610 at p. 632.)

The strength of the Chief Justice’s conviction as to the unsoundness of
the decision of the House of Lords is evident from the change in his attitude
towards English precedent which this passage manifests. The earlier quota-
tions I have made, some from the earlier judgments of that Chief Justice,
make this change the more dramatic. He had been amongst those willing in
the interests of uniformity of decision to follow not merely the House of
Lords but also the Court of Appeal even when not wholly convinced of the
correctness of the decision followed. But in terms, the directions with which
the passage concludes were limited to the case of Director of Public Prosecu-
tions v. Smith. However, as we shall see the Chief Justice’s remarks con-
tained sufficient generality to spark off a wider change in Australia “in our
relation to the judicial authority as precedents of decisions in England”. His
Honour, now in his retirement, has had the satisfaction of seeing the reversal
of this decision of the House of Lords by Act of Parliament; see the Criminal

The next step in the development which I have been describing for you is
a case dealing with the measure of damages for injuries in a road accident
where a plaintiff was rendered permanently unconscious by his injuries and
thus of the fact that his expectation of life had been grievously shortened.
The subject matter had received judicial attention in a number of English
cases. The Court did not follow them, striking out for itself in the decision it
gave on the question of precedent. One Justice said:

“The position of this Court in relation to decisions of the House of
Lords does not seem to me to need clarification. The Court is not, in a
strict sense, bound by such decisions, but it has always recognized
and must necessarily recognize their peculiarly high persuasive value.
Moreover the reasoning of any judgment delivered in their Lordships’
House, whether dissenting or concurring, commands and must always
command our most respectful attention. The Court is, of course, bound
by directly apposite decisions of the Privy Council. Other courts in Australia are bound by such decisions of the Privy Council, and, subject to that, are bound by decisions of this Court. I should perhaps add, though it has become obvious enough in recent years, that nothing in the judgments in *Piro v. W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313 can have the effect of a general charter to Australian courts to act upon an assumption that this Court will treat itself as if technically bound by decisions of the House of Lords, or should be treated as having in any degree diminished the binding force of decisions of this Court.” (*Skelton v. Collins* (1965–1966) 115 C.L.R. 94 at p. 104.)

Three Justices concurred in the following passage in the reasons for judgment of one of the Justices:

“But before deciding which line I should adopt, I think it desirable to set out what I believe to be the approach which we, in the High Court, should now make when we are required to consider whether we should follow a decision of the House of Lords. In *Piro v. W. Foster & Co. Ltd.* Latham C.J., after referring to the desirability that there should be uniformity of decision on matters of legal principle and expressing the opinion that to achieve that end this Court and other courts in Australia should as a general rule follow decisions of the House of Lords, went on to say that ‘it will be a wise general rule of practice that in cases of clear conflict between a decision of the House of Lords and of the High Court, this Court, and other courts in Australia, should follow a decision of the House of Lords upon matters of general legal principle’ (1943) 68 C.L.R., at p. 320. To much the same effect were the remarks of other members of the Court. In pursuance of this rule of practice the High Court has on occasions overruled or refused to follow its own earlier decisions when they were thought to have been in conflict with the law as later laid down in English courts. For example, in *Waghorn v. Waghorn* (1942) 65 C.L.R. 289, the Court for this reason refused to follow its earlier decision in *Crown Solicitor (S.A.) v. Gilbert* (1937) 59 C.L.R. 322, and in *Piro’s Case* (1943) 68 C.L.R. 313 it overruled its earlier decision in *Bourke v. Butterfield & Lewis Ltd.* (1926) 38 C.L.R. 354. But the decision of the House of Lords in *Director of Public Prosecutions v. Smith* [1961] A.C. 290 forced a reconsideration of the earlier policy based on *Piro’s Case*. In *Parker’s Case* (1963) 111 C.L.R. 610 Dixon C.J. expressed the opinion, with which every member of the Court agreed, that that policy should no longer be followed and went on to say that no court in Australia should follow *Smith’s Case*. This statement is not to be taken to have meant that judgments of the House of Lords are not to be treated by this and every other court in Australia with all the respect that is rightly due to decisions of the ultimate appellate tribunal in England. But it does mean that if the High Court comes to the firm conclusion that a decision of the House of Lords is wrong it should act in accordance with its own views. And I think it also follows from *Parker’s Case* that we should depart from the statement in *Piro’s Case* that, where there is a clear conflict between
a decision of the House of Lords and of the High Court upon a matter of general legal principle, other courts in Australia should follow the decision of the House of Lords in preference to the High Court. In Houston v. Stone (1943) 43 S.R. (N.S.W.) 118 Jordan C.J. [a very distinguished Chief Justice of New South Wales] said: 'In my opinion, however, it is the duty of this Court to treat itself as bound by a decision of the High Court unless it is clearly in conflict with some later decision of the High Court itself, or of the Privy Council, which is directly in point. The High Court is the ultimate Court of Appeal for Australia, subject only to the possibility of an appeal to the Judicial Committee of the Privy Council. That Court may or may not be disposed to defer to a decision of the House of Lords in preference to an inconsistent decision previously given by itself; but unless and until it is ruled that the Supreme Court of a State is at liberty to act as arbiter between these tribunals and to follow the House of Lords in preference to the High Court, or that it is its duty in every case to prefer the former, I think that only the High Court itself or the Privy Council can determine that a decision of the High Court should no longer be treated as authoritative. This was the principle upon which this Court acted in Hall v. Wilkins (1933) 33 S.R. (N.S.W.) 220. In my opinion, it makes no difference that the House of Lords may have expressly referred to the decision of the High Court which is sought to be called in question and refused to guide itself by it' (1943) 43 S.R. (N.S.W.), at p. 123.

This passage, in my opinion, defines the course that should now be followed. Where, however, there is no decision of the High Court on a question that arises in some other Australian court and a decision of the House of Lords is directly in point, the court which is called upon to decide the question will no doubt follow the decision.” ((1965–1966) 115 C.L.R. 94 at p. 137.)

One of these Justices added:

“And we, in this Court, need not, in exercising our functions as an appellate tribunal, be deterred by expressions of opinion in their Lordships’ House in old cases or new cases. Nevertheless I believe that we must not only give respectful attention to whatever is said there, but that the decision of the majority of their Lordships on questions of common law will ordinarily be followed in this Court, leaving it to the Australian legislatures to correct the result if they think fit. But all judgments of the House of Lords are not equally persuasive and all statements in all speeches of their Lordships are not equally acceptable. 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.” (p. 135)

One sees here a continuing hankering after uniformity of decision in matters of general principle with perhaps no clear cut view of the court as a whole.
None the less the attitudes of the Justices who have expressed themselves do show some distinct movement from the stand taken in *Piro v. W. Foster & Co. Ltd.*, the case about the fencing of dangerous machinery to which I referred earlier. Quite clearly the Court by this time has moved to the position of examining for itself the decisions of the English Courts, even those of the House of Lords: and examining them to decide for itself what is the correct view of the relevant law. Perhaps the degree of conviction of the correctness of its own view may determine the point at which the Court is willing in the interests of uniformity to defer to the English view.

Allow me to digress from the main stream for one moment to touch upon another point of precedent. You will recall that the decisions of the High Court are binding on all the courts of the States and all the courts of the Commonwealth. Now, following the course of decision so far taken, a decision of the House of Lords may not be preferred by a State or federal court to a decision of the High Court. In the description of federal courts for this purpose, I include the courts of the Territories of the Commonwealth, those within the continent of Australia and those beyond it, those of the External Territories. What of obiter dicta or reasoning of the Privy Council inconsistent with a decision of the High Court? Two cases in this connection are worth mentioning.

In a case by the name of *Rejifik v. McElroy* (1965) 112 C.L.R. 517 an appeal was brought from a decision of the Supreme Court of a State which involved the standard of proof of fraud in a civil action. The High Court in more than one case had said that fraud in a civil suit need only be established on the probabilities. But Lord Atkin on several occasions when sitting in the Privy Council in appeals from courts other than the courts of Australia had said by way of obiter dicta that fraud in such a case must be established beyond any reasonable doubt. One such instance was *Narayanan Chettyar v. Official Assignee of the High Court, Rangoon* (1941) 39 Allahabad L.J. 683. The Queensland Supreme Court had preferred the dictum of the Privy Council to the decisions of the High Court and decided in more than one case that fraud in a civil action in Queensland must be established beyond any reasonable doubt. The High Court, however, in the appeal from one of such decisions, once again affirmed that the standard of proof required of fraud in a civil action was not the criminal but the civil standard. In giving judgment, it made it clear that the State Court was bound by the High Court's decision and was not entitled to displace it by a dictum as distinct from a Privy Council decision precisely in point. The Court said:

"The Supreme Court of Queensland, in our opinion, quite clearly was bound at the time of the decision of *King v. Crowe* (1942) St.R. Qd. 288 (an earlier Queensland decision) and thereafter to follow the decision of this Court in *Helton v. Allen* (1940) 63 C.L.R. 691 (a decision of the High Court) and was in error in not doing so. That case (i.e. *King v. Crowe*) and the cases antecedent and subsequent to it..."
(i.e. decisions of the Queensland Supreme Court) which decided that the criminal standard of proof had to be satisfied in civil proceedings as to facts which amounted to a crime should to that extent be overruled." (p. 521)

Of course, this holding of the High Court is binding on all the courts of Australia, not merely upon those of Queensland from which the particular appeal was brought.

Within a year the matter was carried somewhat farther. A State Supreme Court in giving judgment had reasoned that a decision of the High Court precisely in point to the matter in hand and itself definitive of that matter was inconsistent with the reasoning of the Privy Council in a subsequent case. The State Court did not follow the decision of the High Court. The subject matter was the statutory validity of a regulation relating to lifts and scaffolding. The High Court in an appeal from the decision of the State Supreme Court reversing that Court said in judgment that:

"Unless this case (i.e. the High Court's earlier decision) was overruled by the Privy Council, it was binding upon the Court of Appeal of the Supreme Court of New South Wales and that Court ought not to have held that reg. 73(2) was invalid. 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;..." (Jacob v. Utah Construction and Engineering Pty. Ltd. (1966) 116 C.L.R. 200 (at p. 207).)

It would now seem that Australian courts must follow a decision of the High Court and do so even if a decision not definitive of the subject matter or reasoning of the Privy Council might appear inconsistent with that decision of the High Court. The question of consistency or inconsistency will not be one for the State Court. That Court will not be able to prefer a decision of the House of Lords to one of the High Court. They will prefer a decision of the Privy Council to a decision of the House of Lords. The High Court, bound only by the decisions of the Privy Council, can review and in a proper case will review its own previous decision and will not necessarily accept a decision of the House of Lords, or of the Court of Appeal, of the propriety of which it is not convinced.

In so far as the litigant must await the decision of the High Court where decisions which might or might not be inconsistent are said to exist, there may be a degree of inconvenience in the somewhat emphatic rule laid down by the High Court in the cases to which I have referred. Expense or delay
in litigation at times gives one litigant a significant advantage over the other. Consequently these are features to be avoided where possible. But, on the other hand, there is a clear advantage in having the High Court itself decide such a question as the consistency or otherwise of its decisions with those of the Privy Council. Cases may of course arise where because of the terms of the decision of the Privy Council the matter is clearly beyond question. But such cases must of necessity be rare and the generality of the High Court’s rule is not really affected by them.

To resume the main stream, it can be seen that the High Court has established itself as the source of authority in precedent in Australia for the courts of the States wherever it has decided the matter. Where there is no decision by the High Court, the State courts must decide according to such decisions as exist whether Australian or English or for that matter of any court in a common law jurisdiction. But, having regard to the latter attitude of the High Court towards English decisions as precedent, it might seem that the State courts do well to scrutinize the tendencies to be found in the judgments of the High Court and to make that decision which is the more likely to find acceptance in the High Court. After all, although appeals may be taken to the Privy Council in matters of non-federal law, most cases end in the High Court. Thus, the highest probability is that any appeal which is brought against the State Court decision will be taken to the High Court. I have already indicated the possibilities of conflict, which also need to be borne in mind.

The most recent steps in the development of the relationship of Australian courts to English decisions have been taken in a case concerning the measure of damages in defamation. The appeal in the case was decided in the High Court in 1966. The question was as to the occasions when exemplary or punitive damages can properly be awarded in an action for defamation. The trial judge had directed the jury who tried the facts that if they found that the publication of the libel by the defendant (a daily newspaper with a large circulation) was made out of ill will to the plaintiff and as part of a campaign against the plaintiff (who was a member of the national Parliament) they could award exemplary or punitive damages. Decisions of the High Court prior to 1964 had dealt with this topic and had settled the law so far as Australian courts were concerned in the sense of the trial judge’s direction. However, in *Rookes v. Barnard* [1964] A.C. 1129 a decision had been given by the House of Lords which most materially restricted the categories of cases in which exemplary or punitive damages might be given. The resultant area was considerably less than that which was allowed by the decisions of the High Court. The unsuccessful defendant in the defamation action brought an appeal to the High Court.

The Court followed its own decisions and refused to follow the decision of the House of Lords in relation to the awarding of punitive or exemplary damages. However, for reasons particular to the case, the High Court set
aside the verdict of the jury awarding the plaintiff a very large sum for damages and ordered a new trial of the action. The Privy Council gave the defendant, the successful appellant in the High Court, special leave to appeal, apparently to enable a decision to be made as to the proper direction to be given in the new trial which had yet to take place as to the measure of damages in the circumstances of the case.

Thus, in the appeal which resulted, the Judicial Committee had the opportunity to differ from the House of Lords, or to differ from the High Court. Though formally the House of Lords would not have been bound by the decision of the Privy Council, a decision in either sense would have contributed considerably towards uniformity of principle in the common law as operative both in the United Kingdom and in the countries of the British Commonwealth. However, the Privy Council affirmed the judgment of the High Court and its view of the proper direction to be given to a jury in a defamation action with respect to exemplary or punitive damages.

In concluding their judgment, their Lordships said this:

"The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in Rookes v. Barnard compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court was wrong in being unconvinced that a changed approach in Australia was desirable." (Australian Consolidated Press Ltd. v. Uren (1967) 41 A.L.J.R. 66 at p. 74.)

Whilst it might be said that the question before the High Court was whether it would depart from its own prior decision, it might respectfully be doubted whether that was the question before their Lordships of the Privy Council. It might well be thought that the question before them was really what was the proper direction to be given according to the common law upon the topic of the occasions for the award of punitive or exemplary damages. Thus, by stating the question before the High Court rather than the question before the Board, it seems that the need to decide which was the right view of the law, that of Rookes v. Barnard or that of the High Court in the case under appeal, might appear to have been avoided. But one is entitled to consider if it really was. By agreeing that the prior decisions of the High Court in a sense opposite to that of Rookes v. Barnard were not developed by any faulty processes of reasoning or founded on misconception, their Lordships, whatever the form of their expressions, can scarcely be doing less than affirming the view of the common law enunciated by the High Court.
Of course, if the expressions used by their Lordships were all taken literally their Lordships were merely deciding that the High Court was right in not being convinced that it should change the Court's former decision and substitute therefor a decision in a contrary sense conformable to the decision of the House of Lords. But, as I have said, that can scarcely be acceptable as a reading of the judgment. Did they not really make the High Court's decision their own? Yet the fact that their Lordships did not expressly approve the substance of the High Court's decision and reject the view of the House of Lords is more than significant. Taking the form of the reasons for judgment and emphasising the references to policy in relation to a particular country one cannot avoid the conclusion that their Lordships were indeed denying the virtue of uniformity of decision in such an important matter of general principle as was involved in the case before them. It could be said that there has emerged with a clarity not earlier perceived a common law of England and a common law of Australia.

Thus, after the long years of endeavour on the part of the colonial courts, and latterly of the courts of the States, and indeed, of the High Court itself to attain or at least to contribute towards uniformity of decision in matters of general principle in the common law, at least as between the United Kingdom and Australia, it seems to me that the commentator can scarcely be blamed for concluding that the Privy Council itself has given what may yet prove the final quietus to this endeavour. Of course, it may be that there is no virtue now in maintaining such uniformity or it may be that there is no commercial necessity for doing so or it may be that due to differing social development in the different parts of the British Commonwealth it is no longer possible with justice in each place to maintain uniformity of decision, even in matters of fundamental principle. But, for my own part, I cannot call to mind any purely Australian circumstance which would call for differential treatment as to the award of exemplary damages in defamation.

A remarkable feature of this case is that after the grant of special leave and some twelve months before the judgment in the appeal itself was given by their Lordships of the Privy Council, the Lord Chancellor had made his historic announcement that thereafter the law Lords would not regard themselves as bound by the prior decisions of the House of Lords. Thus, at the time the Privy Council heard the appeal in the libel case, the common law in England was not finally settled and unalterable by judicial decision. One is entitled in a lecture such as this to speculate as to what might have happened if their Lordships of the Privy Council had expressly adopted the views of the High Court.

You will recall that I mentioned earlier that it had been assumed in colonial days that a decision of the Privy Council in an appeal from any colonial court was binding on the court of each and every colony. It is not without interest that both the Privy Council and the Supreme Court of New South Wales within recent times had occasion to remark on this matter. In 1951
the Privy Council heard the appeal *Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakhshuwen* [1952] A.C. 1. Their Lordships decided that a decision of the Privy Council in a matter of Moslem Law in an appeal from India was binding on the courts of East Africa in relation to that law.

In 1968, a Judge in Equity in the Supreme Court of New South Wales in a suit before him followed a decision of the Privy Council given in an appeal from New Zealand. In judgment, the Judge said that the Privy Council decision (which was precisely in point in relation to the matter the Judge had in hand) was "absolutely binding upon this Court" (the Supreme Court) "just as if it were a decision of the High Court". (*Mayer v. Coe* (1968) 2 N.S.W.R. 747 at p. 752.) The Judge was explaining that the fact that the judgment of the Privy Council was not in an appeal from the Supreme Court of New South Wales or from any Australian court did not render it any the less binding. (See also *Morris v. The English, Scottish and Australian Bank Ltd.* (1957) 97 C.L.R. 624.) Thus, although the language of the Privy Council which I have quoted from *Australian Consolidated Press Ltd. v. Uren* might seem to give encouragement to a contrary view, the opinion that the Australian courts are bound by a decision of the Privy Council no matter from what jurisdictional unit the matter has come before the Privy Council would seem to be well established.

Earlier I reminded you of the Lord Chancellor’s pronouncement as to the future practice of the House of Lords with respect to its former decisions. The High Court is in the same situation where no precise decision of the Privy Council exists. It is free to decide according to law as it understands it and to review its own decisions. It will readily be appreciated that the wide range of matters which can be brought before the High Court must naturally afford a considerable opportunity for careful re-examination of precedents and for departure from them when circumstances warrant that exceptional course. If uniformity of development of the common law within the British Commonwealth is not a paramount consideration, the law may be developed appropriately to the social and economic development of the Australian nation. Thus far it seems the movement in acceptance of precedent which I have attempted to relate to you has gone. But, as with other institutions derived from British origins, diversity does not necessarily connote lack of cohesion. Consequently, though its applications may vary within the British Commonwealth, the endeavour nonetheless will be to interpret and apply the common law. In statutory construction, the approach to discover meaning will be the approach of a common law court. These basic and abiding elements may produce a uniformity more meaningful than mere identity in particular solutions. However, time alone can provide the proof of this speculation. Meantime it would seem that adherence to precedents which have developed in a different juristic unit has given way to independent examination and self-expression on the part of a new nation.
These, however, are but a few facets of what I hope has been for you an interesting subject. Time will not permit of further exploration. I can only hope I have clearly drawn for you a picture of a development in the use of precedent which federation made possible and which has not merely complemented the growth of a national sentiment but to a substantial degree has contributed to it.