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PRECEDENT IN SOUTH AUSTRALIA: THE HIERARCHIC AND THE HEURISTIC

1. Statics, Dynamics and Stare Decisis

For common law judicial processes, Hans Kelsen's famous contrast[1] of "static" and "dynamic" modes of norm-derivation is paradoxical. "Dynamic" inquiries ask whether the norms given as starting-points are *authoritative:* whether their creation drew on validly-conferred lawmaking *power.* "Static" inquiries seek reasoned elaboration of the norms' interpretive *content.*

A first source of paradox is Kelsen's insistence that positive legal orders are *essentially* "dynamic", with "static" inquiries as mere incidents or accidents adulterating "the idea of a pure positive law".[2] At least in a common law system, the actual balance is the reverse. Both "static" and "dynamic" techniques play their parts; but for common lawyers the "static" development of interpretive content has the primary and dominant role.[3]

The choice of labels, too, is counter-intuitive for common lawyers.[4] It tends to imply that "dynamic" judgment, pursuing change through creative freedom, is to be sought through "dynamic" inquiries into whether precedent courts had the legal power to "bind"; whereas if we want the law to stand pat, we should focus on "static" inquiries. Common law experience suggests otherwise. To focus on issues of "binding" precedent —or even, as we shall see, to frame in the *language* of "binding" precedent an issue whose substance is broader and larger—is to stunt and stultify opportunities for judicial development. Is is not in "dynamic" concern with authority, but in "static" explication and unfolding of legal materials, that common law dynamism" is found. If this is so even in the House of Lords,[5] which always *can* nowadays declare itself free from binding authority, it is true *a fortiori* in lower and intermediate courts, which often *cannot* so declare.

This leads to a final paradox. Discussion of common law judgment encourages crude and bold contrasts between two kinds of judge:[6] the

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1. Kelsen, *General Theory of Law and State* (transl. Wedberg, 1945; 20th Century Legal Philosophy Series, vol. 1), 112-114, 122-123, 399-404.
2. *Id.*, 401. *Cf.* Kelsen, *Pure Theory of Law* (transl. Knight, 1967), 70-71, 195-198, 230-232. It is clear that "static" and "dynamic" modes are only ideal types, not mutually exclusive characteristics of actual normative systems; interpretations taking Kelsen to see positive law as *exclusively* "dynamic" thus need modification. See, *e.g.*, Stone, *Legal System and Lawyers' Reasonings* (1964) 110 (hereinafter cited as "Stone, *Legal System*").
3. This emphasis on techniques which Kelsen (in a continental setting) links primarily with "natural law" may reflect the historical surrogate role by which, in England, "common law" did the functional, symbolic, ideological and inspirational work done elsewhere by "natural law"; or it may reflect a later English tradition of casuistry and invention reacting *against* the fetters of precedent.
4. *Cf.* on similar cross-purposes Blackshield, "Quantitative Analysis: The High Court of Australia, 1965-1969", (1972) 3 *Lawasia* 1, 64, n.221.
5. See Stone, "Judicial Precedent and Common Law Growth", in Vuylsteke, ed., *Law and Society: Culture Learning through the Law* (East-West Center, Honolulu, Hawaii, 1977), 143, 144-145. And see Blackshield, *The Abolition of Privy Council Appeals* (Adelaide Law Review Research Paper No. 1, 1978), 68, repeated in Blackshield, "Viresne ex Virone Virent an Virus?", (1978) 2 *U.N.S.W.L.J.* 277, 302, 303 (hereinafter cited respectively as "Blackshield, *Abolition*" and "Blackshield, 'Viresne . . . an Virus?' ").
6. See Blackshield, "Five Types of Judicial Decision",(1974) 12 *Osgoode Hall L.J.* 539, 542-545; Pound, "Mechanical Jurisprudence", (1908) 8 *Columbia L. Rev.* 605.

boldly creative pioneer like Lord Mansfield who *uses* the legal material to fashion substantive justice, and the "slave of the precedents" who sets out, with Manseld's successor Lord Kenyon, to discover what our predecessors have done, and . . . servilely tread in their footsteps".[7] Clearly, such a contrast leaves no room for the subtleties, idiosyncrasies and painful personal compromises of individual judges. But collegiate benches may also display *collective* values and attitudes which bridge (and thus blur) the dichotomy. If an intermediate court can find scope for bold and creative action in Kelsenite "static" techniques, but little or no such scope where the precedent framework calls for Kelsenite "dynamic" techniques, then the court as a whole may lean towards the creative Mansfield tradition in its "static" encounters with reason, while simultaneously leaning towards the "servile" Kenyon tradition in its "dynamic" encounters with power. It will then combine submissiveness towards the hierarchical aspects of precedent, with boldly imaginative exploitation of its heuristic aspects.

The pervasive presence of this combination in the Supreme Court of South Australia under the Chief Justiceship of John Jefferson Bray can be explained away neither by stressing the play of variations among individual judges,[8] nor by attributing dominant influence to the ambivalent attitudes of Bray C.J. himself. Nevertheless, the complex and articulate position of the Chief Justice was both a benchmark by which his colleagues' reactions could be measured, and a summing up and synthesis, in personified form, of the countervailing trends in the Court. On the one hand, Bray C.J. came to the Court with a reputation as a courageous reformer dedicated to forceful implementation of liberal values, and left it with that reputation greatly and deservedly enhanced. On the other hand, he was ever conscious of the need to subordinate his own beliefs to the "necessary restrictions" which surround the judicial office. When sworn in as Chief Justice[9] he acknowledged some room for judicial "adaptation" in the light of the needs of a "democratic and egalitarian community" in a changing age; and argued that while the "enduring principles of justice and fair dealing . . . are not subject to alteration with . . . the passing of the years", yet the "application of those principles must vary with the habits and customs and beliefs" of the particular time and place. But he argued also that the law represents

> "stability and permanence in the community . . . The primary task of adaptation is for the legislature, not for the Courts. The judge is the minister and not the master of the law . . . 'To seek to be wiser than the laws is the very thing which is by good laws forbidden'."

The result was summed up by Hogarth J. on the Chief Justice's retirement.[10] Despite a "burning desire" for justice, Bray C.J. had "never flinched from his duty" when faced with "intractable" laws whose "strict application" had "inexorably" unpalatable results. "He did not put himself above the law."

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7. *Bauerman* v. *Radenius* (1798) 7 T.R. 663, 668, 101 E.R. 1186, 1189.
8. Such variations correlate broadly with differences in age. Judges born before 1910 (Travers, Chamberlain and Hogarth JJ.) were typically *more* conservative on precedent issues; those born after 1920 (Jacobs and White JJ.) were less so. All other members of the Court were born, like Bray C.J. himself, in the intervening decade, and displayed much his own mixture of conformism and creativity.
9. 10 March, 1967: see [1967] S.A.S.R. viii.
10. 7 October, 1978: see (1978) 19 S.A.S.R. v-vi.

Bray C.J. himself added wryly that he had always, "or nearly always", bowed to the weight of authority; and though he never bowed with quite the servility of a Kenyon, this was a dominant theme in his work. As a poet he was wont to kick against the pricks of "conformity",[11] as a judge he often saw no option but to conform. As a poet, while ruefully acknowledging the universal exaction of tribute by "conformity the king", he added that the tribute might at least be paid "in local currency";[12] but the tribute which he thought that South Australian law must pay was often in imperial coin. His judgments in cases like *Drage* v. *Drage*[13] and *Bagshaw* v. *Taylor*[14] seemed to accord to precedent a conservative force transcending the boundaries of geography, culture and statute. In spite of obvious counter-instances,[15] the Chief Justice's leadership pointed typically to judicial restraint.

Lord Denning's exuberant example, therefore, was one of which Bray C. J., by his own conviction and temperament, was unlikely to be enamoured. A State Supreme Court has much in common with the English Court of Appeal: both are "final" courts of appeal for many practical purposes, but neither is "final" in the sense that no further appeal can lie. In this situation Bray C. J. (unlike Lord Denning) was clearly at pains to avoid confrontation with the higher "tier", and especially to avoid the strains for litigants and for judges that flow from decisions *inviting* appeal. Again, the effect of this anxiety on his own judicial responses was a conservative one.

His response to Lord Denning's adventures ranged from reservations[16] to active resistance; from a rueful remark that Lord Denning might bear the ultimate blame for the baffling distinction between "nullities" and merely "voidable" decisions,[17] to a flat rejection of Lord Denning's suggestion in *Letang* v. *Cooper*[18] that developments in negligence liability had swallowed up the old law of trespass. To Bray C.J. this was unacceptable "judicial legislation", even if the issue had not been concluded for Australia by the High Court.[19] He quoted Lord Loreburn in *The Amerika*:[20] "When a rule has become inveterate from the earliest time . . . it would be legislation pure and simple were we to disturb it." He acknowledged judicial "disagreement" as to "the respective claims of authority and progressive innovation"; but insisted that no court could "legislate" to "deprive plaintiffs of a remedy which they have enjoyed for over a century and a half". On the other hand, when the English Court of Appeal held in *Donnelly v. Joyce*[21] that damages for personal injuries could include

11. Notably in "The Chariot of Plato" (Bray, *Poems* (1962), 9): "A scabby wall-eyed camel called Conformity/Blasts both the steeds with staggers and deformity."
12. *Id.*, 23.
13. [1969] S.A.S.R. 484. But see *Majdak* v. *Majdak* [1971] S.A.S.R. 225, 230.
14. (1978) 18 S.A.S.R. 564; see text at notes 236-254 *infra*.
15. *E.g.*, *R.* v. *Brown & Morley* [1968] S.A.S.R. 467; see notes 178-182 *infra*.
16. See, *e.g.*, *R. J. Mabarrack Pty. Ltd.* v. *King* (1971) 1 S.A.S.R. 313, 320-321, and *cf.* Hogarth J. in *Linke* v. *Howard* [1967] S.A.S.R. 83, 87-88, and Sangster J. in *Bartemucci* v. *Ash* (1974) 10 S.A.S.R. 241, 248, as to *Lea* v. *Sheard* [1956] 1 Q.B. 192.
17. *Hinton* v. *Lower (No. 2)* (1971) 1 S.A.S.R. 512, 521; see notes 109-210 *infra*.
18. [1865] 1 Q.B. 232, 239.
19. *Venning* v. *Chin* (1974) 10 S.A.S.R. 299, 307. See text at notes 279-283 *infra*. His disapproval extended also to *Fowler* v. *Lanning* [1959] 1 Q.B. 426, 439.
20. *Admiralty Commissioners* v. *S.S. Amerika* [1917] A.C. 38, 41.
21. [1974] Q.B. 454, as followed in *Beck* v. *Farrelly* (1975) 13 S.A.S.R. 17, 18, 21. See text at notes 337-345 *infra*. Lord Denning did not sit in *Donnelly* v. *Joyce* but took the same view a day earlier in *Cunningham* v. *Harrison* [1973] Q.B. 942.

losses and expenses of which the plaintiff had in fact been relieved by gratuitous aid from third parties, Bray C.J. led the Full Court in adopting this new rule "in accord with popular conceptions of justice", and thus in assuming power "to define the law on this point for this State" until Parliament or a higher court intervened.

Yet even when he assumed the mantle of a judicial innovator, he did so with hesitation. Neither temperament, nor sensitivity to the role of intermediate courts, nor deliberate eschewal of the Denning approach, could wholly explain his resistance. Part of the answer was, of course, that his mastery of techniques of distinguishing, synthesising, and reinterpreting cases enabled him often to infuse the law with his own "enduring principles of justice and fair dealing" *without* ostentatious "innovation". Part of it lay (as we shall see) in the tactical exigencies of coaxing or cudgelling inferior courts into accepting Supreme Court guidance in criminal matters. But part of it lay in his Honour's commitment to the "classical" liberalism which (as I have argued elsewhere)[22] treats courts as "a vital safeguard of freedom" only so long as judges keep to "a scrupulously non-activist role".

Thus it was fitting that for Bray C.J. the hardest (and perhaps most instructive) test of attitudes to *stare decisis* was the series of obscenity and indecency cases testing "the Hicklin test".[23] Initially he felt "bound by this piece of nineteenth century philosophy". His "duty" was to "accept its implications loyally, whether or not in a non-judicial capacity I might think its sociology based on unproved *a priori* assumptions and its reasoning circular".[24] But gradually, through dialectical interplay with Zelling J., he was able to bring the law into line with his own pluralistic views.

In *Romeyko* v. *Samuels* [25] Zelling J. at first took the Chief Justice's position quoted above: he too felt "bound by authority to hold the opposite of what my common sense tells me to be the fact". Yet he also felt able to hold that the complaint against Romeyko was bad for duplicity[26] and as an "omnibus count"; and that given Romeyko's own linguistic intuitions, and by *current* "community standards",[27] the use of vulgarities was not "indecent" or "obscene" beyond a reasonable doubt. On somewhat different grounds, the Full Court affirmed this decision on appeal. Emboldened by the example of Zelling J. (or perhaps disarmed by his allusions to Catullus and Seneca),[28] Bray C.J. felt able not only to exploit the leeways in *Crowe* v. *Graham*,[29] but to distinguish that case as concerned with a different statute; to add the South Australian rider[30] that community standards must be offended "to a substantial degree", to hint that such standards might have "changed significantly in the three years since *Crowe* v. *Graham*"; and to give his own humanely eloquent view of "community standards".[31] Bright and Sangster JJ. concurred. Yet all this was only obiter with many

22. Blackshield, "Judges and the Court System", in Evans (ed.), *Labor and the Constitution, 1972-1975* (1977), 105, 106.
23. *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 373.
24. *Simmons* v. *Samuels* (1969) 1 S.A.S.R. 397, 400.
25. (1972) 2 S.A.S.R. 529, 536.
26. *Id.*, 535-538 (duplicity).
27. *Id.*, 542-545 (community standards).
28. *Id.*, 543, 544.
29. (1968) 121 C.L.R. 375. See (1972) 2 S.A.S.R. 529, 560-561.
30. Based on *Norley* v. *Malthouse* [1924] S.A.S.R. 268; see (1972) 2 S.A.S.R. 529, 560.
31. *Id.*, 565, and generally 563-567.

reservations. Though Bray C.J. agreed "broadly speaking" with the "general reasoning" of Zelling J., he was "not sure" that it reflected "the contemporary legal situation". It was "probably unwise" to go beyond the immediate needs of the case.[32]

The tactical prudence of this restraint may be judged by *Dalton* v. *Bartlett*,[33] where a Special Magistrate, before the Full Court decision in *Romeyko*, rebelled against what Zelling J. had said in that case—taking courage from the English Court of Appeal's rebellion in *Broome* v. *Cassell & Co. Ltd.*[34]The reaction of Bray C.J. echoed that of the House of Lords,[35] right down to its "studied moderation". He quoted Lord Hailsham's demand for "loyalty" for "each lower tier", adding an explicit translation "into South Australian terms". He went on to make his own view of indecency "unmistakably plain"; and Hogarth J. (not a party to *Romeyko*) now announced similar views. Yet these remarks were still only obiter,[36] and the absence of binding pronouncements pointed up the tactical problem. How far should a reformist Court *impose* ideas upon a sometimes recalcitrant magistracy by use of hierarchical power; and how far should it rather rely on persuasive gradualism? It was clear that Bray C.J. preferred the latter approach .

Yet *Romeyko* and its sequel had committed him to progressive reform; and by the time of *Popow* v. *Samuels*,[37] the House of Lords had taken a hand. In *Director of Public Prosecutions* v. *Whyte*[38] their Lordships went back to "the Hicklin test", making a "tendency to deprave and corrupt" essential to the offence. The attempt of Windeyer J. in *Crowe* v. *Graham* to shift from this test to greater emphasis on "community standards" was considered, but rejected; the United Kingdom's Obscene Publications Act, 1959, said Lord Wilberforce, had reinstated the Hicklin "tendency" as the essential test. For Bray C.J. this opened the way to using the Hicklin test not as a "circular" nineteenth century relic but as a bar to convictions: conviction was now sustainable only where material violated *both* "community standards" *and* "the Hicklin test". *Whyte* had dismissed *Crowe* v. *Graham* by contrasting the English and New South Wales statutes (one treating the Hicklin tendency as "the essence", the other as "an alternative element . . . only"). But "our Act . . . stands in between", and stands "nearer to the English position".[39]

In this adventure Bray C.J. was alone. Walters J. followed *Crowe* v. *Graham;* Zelling J. found the same alternatives in South Australia as in New South Wales. But in *Trelford* v. *Samuels*[40] Bray C.J. added a pregnant footnote. The majority view in *Popow* v. *Samuels* must be treated as binding (at least "in my judicial capacity"). But the differing reasons for it opened up a new leeway, available for future exploitation "by an appellate court".

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32. *Id.*, 562. The point was obiter because Romeyko had in any case won his appeal on the "duplicity" point. *Id.*, 564 (Bray C.J.), 571-572 (Sangster J.).
33. (1972) 3 S.A.S.R. 549.
34. [1971] 2 Q.B. 354.
35. [1972] A.C. 1027, 1054. See (1972) 3 S.A.S.R. 549, 554.
36. Those of Bray C.J. are at 555, those of Hogarth J. at 556-557. They are obiter because the conviction was in any case set aside for prejudice arising from the prosecution's failure to furnish particulars. And see Hogarth J. at 556.
37. (1973) 4 S.A.S.R. 594.
38. [1972] A.C. 849, 861.
39. (1973) 4 S.A.S.R. 594, 602.
40. (1974) 7 S.A.S.R. 587, 589-590.

Yet these creative initiatives involved no challenge to precedent. Rather, the boldest step involved an ingenious use of precedent to "follow" the House of Lords. It thus falls into place as part of the characteristic and ongoing process of adaptation, in South Australia, of principles and precedents from all common law jurisdiction. To that process we now turn.

2. *The Seamless Web*

Under Dr. Bray as Chief Justice the use of precedent was both learned and eclectic. The typical goal was to illumine by "all the precedents from every source" the historical evolution, or seminal principles, giving place and purpose to precept—sometimes only by a nod to the *English and Empire Digest* or a judicial survey elsewhere,[41] but mostly by independent review. Judges relied heavily on counsel's research; but added their own inputs as well.[42] Citations drew mainly on Australasia and England;[43] but also on Canada,[44] India[45] and South Africa.[46] American cases, too, had a place:

> "They do not, of course, bind us, nor are they persuasive authority in the [strict] sense . . . But they emanate from tribunals which . . . pay homage to the same common law as we, follow procedures of trial that are similar to our own, encounter [similar] problems of admissibility and use of evidence . . ., and are presided over by judges of experience, skill and learning. It is . . . natural that we

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41. In analyzing "duplicity" in *Romeyko* v. *Samuels* (1972) 2 S.A.S.R. 529, Bray C.J. at 553 drew on the *Digest;* Sangster J. at 567-568 (and Zelling J. at 538) on work of the High Court of Guyana in *Doobay* v. *Inspector of Police* (1968) 11 W.I.R. 187.
42. There were of course several transfers of research prowess from bar to bench.
43. Or Scotland: *Consalvo* v. *Standard Quarries (S.A.) Pty. Ltd.* [1968] S.A.S.R. 179.
44. See, *e.g.*, Bray C.J. (dissenting in *R.* v. *Brown & Morley* [1968] S.A.S.R. 467, 495 (Quebec versus British Columbia); the use in *R.* v. *Hallett* [1969] S.A.S.R. 141, 150, 156, of *Bradley* v. *R.* [1956] S.C.R. 723, (1956) 6 D.L.R. (2d.) 385 (Supreme Court of Canada); the contrasting uses in *R. v. Wright* [1969] S.A.S.R. 256, 266, 276-277 (as to cross-examination on the *voir dire),* of the ambiguous division in the Supreme Court of Canada in *De Clerq* v. *R.* [1968] S.C.R. 902, (1968) 70 D.L.R. (2d) 530 (Bray C.J. seeing a 5:4 division and Zelling J. a 6:3 division, since both claimed support from Cartwright C.J., who held that cross-examination *could* but *should not* be allowed); Zelling J. in *Michell* v. *Minister of Works* (1974) 8 S.A.S.R. 7, 30-31 (Supreme Court and Provincial decisions). And see *Venning* v. *Chin* (1974) 10 S.A.S.R. 299, *supra* n.19. For Bray C.J., *id.*, 312, the rejection of *Fowler* v. *Lanning* [1959] 1 Q.B. 426 by Windeyer J. in *McHale* v. *Watson* (1964) 111 C.L.R. 384, was bolstered if need be by "weighty support" from the Supreme Court of Canada in *Cook* v. *Lewis* [1951] S.C.R. 832, [1951] 1 D.L.B. 1; while at 318-319 he followed Hogarth J. at first instance (*Venning* v. *Chin* (1974) 8 S.A.S.R. 397, 411) in considering (but distinguishing on statutory grounds) the Ontario single-judge decision in *Hollebone* v. *Barnard* [1954] 2 D.L.R. 278. And see Bray C.J. in *R. v. Goodall* (1975) 11 S.A.S.R. 94, 100 (using dicta in *R.* v. *Electrical Contractors Association of Ontario & Dent* (1961) 27 D.L.R. (2d) 193, 200, to cancel out dicta in *R.* v. *McDonnell* [1966] 1 Q.B. 233, 245); Zelling J. in *Hayman v. Forbes* (1975) 11 S.A.S.R. 225, 235 (as to *R.* v. *Uvery* [1968] 1 D.L.R. (3d) 29); the use by Wells J. in *R.* v. *Pfitzner* (1976) 16 S.A.S.R. 171, 188, of a *dissent* by Dickson J. (backed by Laskin C.J.) in *Vezeau* v. *R.* [1977] 2 S.C.R. 277, 285, (1976) 66 D.L.R. (3d) 418; and resort on all sides in *Bagshaw* v. *Taylor* (1978) 18 S.A.S.R. 564, 569, 574, 585-587, to chaotically divergent views in *Fleming* v. *Atkinson* [1959] S.C.R. 513, (1959) 18 D.L.R. (2d) 81 (Supreme Court of Canada) of whether *Searle* v. *Wallbank* [1947] A.C. 341 should be followed in Ontario. See text at notes 236-254 *infra.*
45. See Zelling J. in *Popow* v. *Samuels* (1973) 4 S.A.S.R. 594, 618 and again in *Mayer* v. *Marchant* (1973) 5 S.A.S.R. 567, 587 as to "strict liability" offences.
46. See Bray C.J. in *R.* v. *Ireland (No. 1)* [1970] S.A.S.R. 423.

should give careful consideration to their decisions, to their reasons for judgment, and to the principles they formulate and accept."[47]

British cases, too, were mostly only "persuasive"; what mattered was their helpfulness in clarifying the reasoning job in hand. Sometimes cases were reviewed *ambulando et seriatim*, or "a great deal of ingenuity" went on "trowelling deductive mortar between the joints";[48] usually a more ambitious reworking was undertaken. Decisions and dicta, dissents and majority judgments, analogical example[49] and prescriptive guidance—all were grist to the mill. One common technique was to reconstruct legal history from the cases; another was to distil a mass of history and precept into systematic tabulation or quasi-codification of principle.[50] In both respects Wells J. set monumental standards; but other examples abound.[51]

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47. *In re Van Beelen* (1974) 9 S.A.S.R. 163, 216 (Bray C.J.). The Court there followed the *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 8 E.R. 1034. See text at notes 226-228 *infra*. That case, and later House of Lords and Privy Council rulings, were "insuperable obstacles" to American-based attack on the hearsay rule. Even so, at 216-231 the Court reviewed cases from California, Illinois, Kansas, Kentucky, Michigan, New York, Texas, Vermont and Virginia as well as from the U.S. Supreme Court.The review was exhaustive and sympathetic, though not without criticism ("artificial"; "arguable"; "we acknowledge the authority of the decision in the American courts, but we are not persuaded that it is sound"; "difficult to gauge" from a partial report; "difficult to follow"). A recurring complaint (*e.g.*, at 228) concerned the American habit of "mentioning the *Sussex Peerage Case* only to discard it, without examining the reasons given for the decision, or the substantial grounds of policy" for a different view. But at 233-237 the principles laid down in *Hale* v. *U.S.*, 25 F. 2d 430 (1928), and in cases from Idaho and Ohio, were accepted as "plainly right". And *cf.* Zelling J. in *Michell* v. *Minister* of Works (1974) 8 S.A.S.R. 7, 30, as to *U.S.* v. *Wilbur*, 283 U.S. 414 (1931). Perhaps the most resourceful argument was that noted by Zelling J. (with a view to possible "definitive ruling" in a higher court) in *Para Motors Pty. Ltd.* v. *Cocks* (1974) 9 S.A.S.R. 44, 52, using cases from Arizona and Hawaii to pit a novel form of equitable estoppel against the Statute of Frauds. *R.* v. *Ireland (No. 2)* [1971] S.A.S.R. 6, 15, took its test of admissibility at a criminal trial of informal experiments and demonstrations from a judgment in Oklahoma (Edwards J. in *Shepherd* v. *State*, 51 Okl. Cr. 209, 300 Pac. 421 (1931)). American cases were almost too obvious an answer to the claim in *Gilbertson* v. *S.A.* (1976) 15 S.A.S.R. 66, that apportionment of electoral boundaries was not a judicial power: Zelling J., who had asked that the U.S. cases be cited, was disappointed that they turned on constitutional provisions with "no analogues in South Australia." *Id.*, 115; *cf.* Bray C.J. at 88.

48. See Becker, "Current Sacred-Secular Theory and its Development", in Becker and Boskoff (eds.), *Modern Sociological Theory in Continuity and Change* (1957), 154, discussed in Blackshield, *loc. cit.*, *supra* n.6, 551.

49. See *e.g.*, *In re Van Beelen* (1974) 9 S.A.S.R. 163, 181, 184-185.

50. See *id.*, 182.

51. For Wells J. (in addition to examples given elsewhere) see his massive survey in *R.* v. *O'Loughlin*; *Ex parte Ralphs* (1971) 1 S.A.S.R. 219, 238-282, of the history and guiding principles of defences in the nature of *autrefois convict*; his distillation, in *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* (1972) 7 S.A.S.R. 268, 284, of fifteen "principles" emerging from the mass of case law on covenants in restraint of trade; and his survey of the evolution of mandamus in *Michell* v. *Minister of Works* (1974) 8 S.A.S.R. 7, 26-31. For other examples see Bray C.J. in *French* v. *Ianella* [1967] S.A.S.R. 226, 236-240 (rival English lines of authority on the word "wilfully") and in *Venning* v. *Chin* (1974) 10 S.A.S.R. 299, 317-321 (old defences to trespass as bearing upon the effect of contributory negligence under modern apportionment statutes); Walters J. in *Tiver* v. *Tiver* [1969] S.A.S.R. 40, 47-51 (an elaborate interweaving of English and interstate dicta and decisions on interrogatories); Bright J. in *Hayes* v. *Commissioner of Succession Duties* [1970] S.A.S.R. 479, 487-490 (a remarkable collection of cases on *travaux préparatories)*; Sangster J. in *R.* v. *Elliott* (1974) 8 S.A.S.R. 329, 349,366 (a carefully tabulated history of proceedings by information or complaint and of problems of duplicity in relation thereto, followed by a collection of cases on the use of certiorari); and the histories of prostitution (equally lively, but opposed in legal result) given by Bray C.J. and Zelling J. in *Bosch* v. *Samuels* (1972) 3 S.A.S.R. 37.

The Court could marshal lines of authority but also dismantle them;[52] or play off analogies against each other, and even favour "persuasive" authorities over "binding" ones.[53] "If the matter were *res integra*" was a recurrent cry; but deft use of cases sometimes showed that a matter *was "res integra"*, or at least in sufficient doubt for South Australia to form its own view. A good example was *R.* v. *Brown*,[54] where the Court held (*before* the decision in *Director of Public Prosecutions* v. *Morgan*,[55] but on similar Australian[56] and English authority) that honest (though unreasonable) belief in the victim's consent is a good defence to rape. Or the Court could pluck from a flux of inconsistent counter-authority a single decisive case to be used to crystallize or settle an issue. *R.* v. *Tomlin*[57] could not "bind" in Australia, and its implication that proof of a "general deficiency" could support a charge of fraudulent conversion was only *obiter*. But Bray C.J. was willing to use it to "settle" a point on which older cases were "fairly evenly balanced".[58]

Sometimes the Court cut through "a wilderness of single instances"[59] to basic principles; sometimes it *reduced* the cases to "single instances". ("A case is only authority for what it actually decides.")[60] One judgment might use both techniques. Arguing in dissent that duress can be a defence to murder, Bray C.J. said initially that "the best approach" is to see what principles flow from the cases, and "in the light of those principles" (if "they do not afford an authoritative answer") to use "general reasoning". Yet when he went on to review the cases he repeatedly pared them down, by pruning back dicta or stressing facts, to what was "actually decided".[61]

Continuity and consistency were not ends in themselves; the judges clearly recognized that wider social trends must be weighed.[62] Perhaps the most ringing assertion of the creative opportunities in a precedent system came from Wells J. in *R.* v. *Potisk*.[63] Potisk, in a currency exchange, was overpaid by a bank teller's mistake. Perhaps he knew of the error at once; perhaps not till two days later. Was he in either event guilty of larceny? Bray C.J. and Mitchell J. thought he was not; Wells J. thought he was. *R.* v. *Middleton*[64] and *R.* v. *Ashwell*[65] supported his view. But Wells J. relied on neither, cutting through the decisions to a broad synthetic restatement:

> "The cases . . . do not stand, or have effect, singly, but take their place, as manifestations of a hypostatic principle, amongst a large

52. See *e.g.*, *Para Motors Pty. Ltd.* v. *Cocks* (1974) 9 S.A.S.R. 44, 47-49.
53. See Jacobs J. in *Amid Pty. Ltd.* v. *Beck & Jonas Pty. Ltd.* (1974) 11 S.A.S.R. 16, using English and N.S.W. analogies against competing High Court analogies.
54. (1975) 10 S.A.S.R. 139.
55. [1976] A.C. 182. *Brown* was decided in South Australia on 24 January, 1975; *Morgan* was first argued in the House of Lords four days later.
56. Notably the series of N.S.W. cases building up to *R.* v. *Sperotto* (1970) 71 S.R. (N.S.W) 334, and the series of Victorian cases including the aptly-named *R* v. *Hornbuckle* [1954] V.L.R. 281 (as to the effects of drunkenness on rape).
57. [1954] 2 Q.B. 274.
58. *R.* v. *Goodall* 1975 11 S.A.S.R. 94, 97. The policy factors were explicit.
59. Tennyson, *Aylmer's Field*, 1. 437.
60. *Quinn* v. *Leathem* [1901] A.C. 495, 506 (Lord Halsbury).
61. *R.* v. *Brown & Morley* [1968] S.A.S.R. 467, 492. The pruning extended to cases tending both *for* and *against* his own view.
62. See, *e.g.*, *Chignola* v. *Chignola* (1974) 9 S.A.S.R. 479, 492 (Sangster J.).
63. (1973) 6 S.A.S.R. 389.
64. (1873) L.R. 2 C.C.R. 38 (suggesting that mistake vitiates consent to taking).
65. (1885) 16 Q.B.D. 190 (suggesting no "taking" until Potisk realised the error).

> body of received doctrines and precepts by which they are supplemented, and in the light of which they ought to be understood."

He prefaced this by an even bolder claim. The problems involved had "beset the common law almost since its inception"; but "the time has come for a Court to act boldly to overcome them". He echoed Viscount Simonds in *Shaw* v. *Director of Public Prosecutions*:[66] if the common law could not meet the challenge "we should no longer . . . do her reverence". But "the traditions, the spirit and the resources of the common law" were "equal to the task".[67] Neither Bray C.J. nor Mitchell J. could come at this;[68] but Bray C.J., too, embarked upon a creative judicial adventure. Wells J. sought to reconcile law with "community" reactions to "plain dishonesty"; Bray C.J. sought to reconcile it with the "common sense" of an "intelligent layman", who "would unhesitatingly say" that Potisk "took" the money (with consent) when it was given to him. "Legal fictions and hair-splitting" were sometimes "hallowed by authority"; but they should be avoided if possible.[69] To this end Bray C.J. spun an intricate maze of arguments to show that neither *Ashwell*[70] nor *Middleton*[71] was "binding". Diametrically opposed both in technique and in result, both judges had nonetheless shown the creativity of the common law.

In *Minigall* v. *McCammon*[72] a similar issue evoked a similar contrast. The finder of a wallet was held not guilty of larceny upon the original finding, but guilty two days later when he opened the wallet and kept the contents. Wells J. based the result on exposition of general principles; Bray C.J. based it on *R.* v. *Riley*,[73] and did his best to reconcile it with *R.* v. *Glyde*[74] and *Bridges* v. *Hawkesworth*.[75] His historical survey from the Year Books onward made the leeways and anomalies explicit; but he thought each of the three main cases too deeply embedded in authority to be overruled. In particular, while admiring "the force . . . on general principles" of the solution offered by Wells J., he thought it would entail a decision to overrule "or at least not to follow" *Bridges* v. *Hawkesworth*. "That case has been much battered but it has recently been followed [in England] . . . I am not prepared in these proceedings to hold that it is wrong."[76]

At such moments alertness for "trouble cases" in the legal fabric—for rucks and anomalies to be ironed out at some later time—was tempered by sensitivity to the role of an intermediate court: to the felt imprudence (if not impropriety) of anticipating more authoritative answers elsewhere. It was tempered, too, by the broader prudence of deciding no more thtan is needed: of not foreclosing future problems by venturing into the overbroad

66. [1962] A.C. 220, 269—perhaps an unfortunate authority.
67. (1973) 6 S.A.S.R. 389, 404-405. He argued that on criminal matters "the common law is not . . . found only in the cases that find their way into the reports"; "accretions to" and "consolidation of" criminal law come also from "continuous work of single judges at *nisi prius* . . . whose rulings and directions (though unreported) gradually build up a jurisprudence of the courts that, throughout vast tracts of our system of criminal law, has an interstitial operation".
68. See Mitchell J. (*id.*, 404); Bray C.J. (*id.*, 392-393).
69. *Id.*, 394, 403-404; compare Wells J. at 404.
70. On which see *id.*, 395-398.
71. On which see *id.*, 399-404. He admitted that this was "a harder nut to crack".
72. [1970] S.A.S.R. 82—a precursor of *Potisk*.
73. (1853) Dears. 149, 169 E.R. 674 (delayed appropriation by a finder is larceny).
74. (1868) L.R. 1 C.C.R. 139 (appropriation not larceny if finding not tortious).
75. (1851) 21 L.J. (Q.B.) 75 (initial finding in the public realm is not tortious).
76. [1970] S.A.S.R. 82, 84-90, esp. 88.

or the merely peripheral. The corollary is that when an issue does arise for decision, it must not be too lightly dismissed as preempted by earlier cases. *In re De Vedas, Deceased*[77] illustrated both ideas. On the one hand Wells J. paused to ask—but not to answer—whether the anomalous cases on gifts for animals and tombs needed reconsideration after *Inland Revenue Commissioners* v. *Broadway Cottages Trust.*[78] On the other hand, a gift in perpetuity to "the Adelaide Hebrew Congregation" led him neither to reject, nor blindly to follow, the cases treating gifts to churches as charitable trusts. The functions of the Adelaide Congregation were not *quite* those of the churches; and "while I must abide by relevant principles laid down for my guidance", the "church" analogy could not automatically be applied. He was "tempted to do so: all my intuitive faculties urge me to adopt . . . such a straightforward . . . solution". But his duty was "to probe deeper". The case was *res integra*; he would not risk "begging the question". The result epitomized the Court's use of precedent: a wide canvassing of all relevant cases, binding or not; a clear recognition despite those cases of freedom and duty to decide the instant case on its merits; and an effort, in doing so, to subordinate "intuitive faculties" to principles found in the cases.

In *Aidinis* v. *Hotchin*[79] Wells J. took his measure of damages for repudiation of contract from a New Zealand decision of Salmond J. at first instance; as to interest on damages, he drew on a recent decision of the English Court of Appeal. Both decisions[80] helped him; neither bound him. In *Samuels* v. *Johnson*[81] Bray C. J. explored contrasting views in the English and Irish Courts of Appeal (and an intermediate "middle view" in the House of Lords) as to how far default judgment creates an estoppel. He followed none of these views directly, preferring an *interpretation* of the House of Lords view by Roper J., as a single judge in New South Wales.[82] None of the views considered was binding; nor did Bray C.J. choose among them by ranking degrees of "persuasiveness", except in the lay sense of the word. Even in *Australian Telecommunications Union* v. *Krieg*,[83] based on Privy Council and House of Lords dicta as to the meaning of "probable", Bray C.J. gave no special weight to these, but brought them into hotchpot along with a wide range of other examples and guidelines, regardless of binding force.

In this sense, the use of precedent is indispensable in common law courts.[84] If not a "seamless web" or "brooding omnipresence in the sky",[85] the common law is at least a reservoir of reason, unfolding over time and space in Heraclitean unity and Heraclitean flux.[86] In *Skelton* v. *Collins*[87] Windeyer J. saw the common law heritage of "method" and "spirit" as leaving ample room for divergence from the common stream, and for

77. [1971] S.A.S.R. 169, 173, 183.
78. [1955] Ch. 20, 36.
79. [1971] S.A.S.R. 446, 457, 461.
80. *Ruddenklau* v. *Charlesworth* [1925] N.Z.L.R. 161; *Jefford* v. *Gee* [1970] 2 Q.B. 130.
81. [1971] S.A.S.R. 273, 283.
82. *Hume* v. *Munro* (1942) 42 S.R. (N.S.W.) 218, 230.
83. (1975) 14 S.A.S.R. 303, 309-313.
84. *Cf.* Stone, *Legal System, op. cit. (supra* n.2), 282.
85. The former metaphor (applied initially to history, not law) is from Pollock and Maitland, *A History of English Law* (2 ed., 1898), 1; the latter from the dissent of Holmes J. in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 222 (1917).
86. For a better metaphor see Virgil, *Aeneid* vi. 726-727: *"Spiritus intus alit,totamque infusa per artus/Mens agitat molem et magno se corpore miscet."*
87. (1966) 115 C.L.R. 94, 135.

disagreements and dialectics within and across jurisdictional limits. Such disagreement does not negate, but is itself a vehicle for, the collaborative contribution by *all* inheritors of the common law to the shared midwifery by which it "works itself pure". Only by constant attention to developments elsewhere can any cadre of judges make its own contribution to this task. Yet this use of precedent is not only independent of whether decisions are "binding", but may even be distorted by the intrusion of such questions. As Julius Stone observes, when precedent "ceases to be used [comparatively] to illustrate a probable just result", and is "taken as an ultimate formulation, independent of its former context, to be transposed as a premise for deductions to the present context, it ceases to be a rational means towards judgment."[88]

Sometimes intermediate courts faced with directly binding decisions may be unable to avoid this distortion; though even then close attention to the meaning of a precedent *in its context* may often give a way out. But if precedents are not directly binding, there is neither room nor excuse for decision based on the *supposed* compulsion of *supposedly* binding authority. Even if the language of "bindingness" is used for comity, or by reflex habits of speech, the result may be a distortion. To *distinguish* cases not formally "binding" is another matter; to say, for instance, that a decision depends on a statute with no local parallel may be a very useful way to clarify the precedent meaning.[89] Even the corollary sometimes implied,[90] that if statutes are equivalent exogenous decisions *should* be followed, is harmless in itself. The trouble is the further implication that exogenous decisions on *exactly equivalent* statutes can somehow acquire binding force.

Yet such implications have often coloured South Australian dicta,[91] and occasionally decisions. In *Thomas* v. *Thomas*[92] Walters J. put the onus on a *petitioner* for restitution of conjugal rights to prove absence of just cause for the respondent's refusal to return. Although the onus was *formerly* on the respondent, he thought the order of the statutory words in s.60 of the Matrimonial Causes Act, 1959, compelled a different view. He therefore refused to follow a contrasting decision of Moller J. in New Zealand.[93] The issue was a paradigm "category of meaningless reference",[94] with an added wry twist: the form of words used in Australia in 1959 was in fact substantially similar to that used in New Zealand in 1963, and Moller J. in the New Zealand case had expressly addressed himself to both.

Puzzling overtones of the language of binding precedent did not flow only from statutory distinctions. Faced with apparent conflict between a New South Wales decision (followed in South Australia) and a later English single-judge decision (followed in Western Australia), Bright J. thought he should follow the latter, because to do so would be to "follow the current of authority".[95] Another odd example involved amendment of pleadings.

88. Stone, *Legal System, op. cit.* (*supra* n.2), 287-288.
89. In *R.* v. *Van Beelen* (1973) 4 S.A.S.R. 353, 385, the Court was willing to *infer* a statutory distinction. And see *In re Van Beelen* (1974) 9 S.A.S.R. 163, 182; *Ovenden* v. *Palyaris Construction Pty. Ltd.* (1974) 11 S.A.S.R. 41.
90. See *In re Van Beelen* (1974) 9 S.A.S.R. 163, 190-192.
91. See, *e.g.*, *Bosch* v. *Samuels* (1972) 3 S.A.S.R. 37, 45, 48.
92. [1970] S.A.S.R. 36.
93. *Parker* v. *Parker* [1967] N.Z.L.R. 309.
94. Stone, *Legal System, op. cit.* (*supra* n.2), 241-246.
95. *Hamlyn* v. *Hann* [1967] S.A.S.R. 387, 391.

Can special indorsement be changed to general indorsement? General indorsement to special indorsement? An inappropriate special indorsement to an appropriate one? Clearly these are separate issues; but Bray C.J., on the *first* of these issues, thought himself "bound to follow the English decisions" on the *third*.[96] *In the Estate of Queain, Deceased*[97] raised complex issues of policy and statute as to the effect of adoption on pre-adoption wills and post-adoption codicils; but except in the judgment of Travers J. these issues failed to emerge amidst preoccupation with the question of whether to follow a New Zealand decision offering "the only direct authority on the present question".[98] In *Kuchel* v. *Conley*[99] the handling of precedent was quite impeccable; but the High Court reversed the decision[100] because the whole enterprise of analysis in terms of precedent had diverted attention from the real issues. These related not to precise taxonomy of the nature and provenance of a grandparent's duty of care, but to the substantive questions of fact on which liability for negligence must nowadays depend.

3. Co-ordination and Comity

Most "coordinate" courts do not "bind" each other in a legal sense. If they serve separate legal orders (like the courts of an Australian State and a Canadian Province), no issue of mutual binding arises. Even if they serve the *same* legal order (like the old Courts of Exchequer, Common Pleas and King's Bench) there is probably no mutual "binding"; mutual "following" arises from comity. Pollock C.B. in *Taylor* v. *Burgess*[101] claimed "binding" force in such cases—but only if both courts fed into the same avenue of appeal. If mutual "binding" were the rule within the *same* legal order, and mere persuasive "comity" in *separate* legal orders, these might be opposite ends of a scale. Courts with symbolic ties or common interests *weaker* than coexistence in the same legal order, but *stronger* than mere shared common law heritage, would fall in between; their power to "bind" each other could be analogized either way. But if even the strongest end of the scale falls short of any power to "bind", the scale in effect collapses. In any event, to base mutual binding on "coordination" is to argue that coequal courts should give each other's decisions the *same* force as each gives to its own. If a court's own rule is only to follow its own decisions *unless they are wrong*, "coordination" can yield no more onerous rule as to sister courts.

It is clear, then, that no court "coordinate" with South Australia's Supreme Court can "bind" it. For the English Court of Appal, "coordinate" intermediate status is reinforced by symbolic ties; for other Australian State Supreme Courts, by community of interest. But neither factor demands

96. *Lucas* v. *Linke* [1969] S.A.S.R. 454, 455-456. The puzzles are manifold. How could he be "bound" by the English decisions? How could he be "bound" at all on a matter of practice and judicial discretion? If he was bound by English decisions, why not by Irish decisions like *Palmer* v. *Palmer* [1923] 2 I.R. 154 to the contrary effect? How could he be "bound" by cases to which he conceded "special features"? How could he be bound on the *first* issue above by cases on the *third*, especially when he took pains to separate the first from the second? One can only conclude that the word "bound" does not here mean what it says.
97. [1967] S.A.S.R. 124.
98. *Id.*, 132 (Chamberlain J.); *cf. id.*, 138 (Hogarth J.).
99. (1971) 1 S.A.S.R. 73.
100. *Hahn* v. *Conley* (1971) 126 C.L.R. 276. See esp. Windeyer J., *id.*, 294-295.
101. (1859) 5 H. & N. 1, 5, 157 E.R. 1076.

more than comity. As to the English Court of Appeal, the *Taylor* v. *Burgess* test of the *same* appellate supervision rules out any idea of "binding".[102]

All this was clear in South Australia prior to *Bagshaw* v. *Taylor*.[103] But in that case, High Court dicta in *Public Transport Commission (N.S.W.)* v. *J. Murray-More (N.S.W.) Pty. Ltd.*[104] (in respect of the English Court of Appeal decision in *Cory & Son Ltd.* v. *France, Fenwick & Co. Ltd.*)[105] almost persuaded Bray C.J. and Mitchell J. not only that House of Lords decisions bound the State Supreme Courts, but that English Court of Appeal decisions effectively did so too. In *Murray-More* the New South Wales Court of Appeal had rejected *Cory* as "clearly wrong"; the High Court thought it was "well decided" and should therefore have been followed. But Barwick C.J. added obiter that single Supreme Court judges "should as a general rule" follow the English Court of Appeal, and that larger Supreme Court benches too were "well advised" to do so. His language was not absolute; and elsewhere he seemed to imply that rejection of *Cory* would have been proper if that case had been wrong. In the end Bray C.J. so understood him.[106] But neither he nor Mitchell J. discussed the dictum of Gibbs J., that the New South Wales judges "should have treated" *Cory* "as an authority binding upon them".[107]

Whether Gibbs J. would adhere to this dictum is doubtful. It cannot stand with his argument in *Viro* v. *R.*[108] that precedents can only "bind" in the same hierarchical system. Nor can it stand with the practice settled for High Court and State Courts alike by *Cowell* v. *Rosehill Racecourse Co. Ltd.*,[109] which not only declared the High Court's own freedom not to follow the Court of Appeal, but upheld a refusal by the Supreme Court of New South Wales to do so, and approved of that Court's earlier (and similar) decision in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.*[110] Arguments that the Court of Appeal should be followed to ensure uniformity in "Empire courts" cannot survive the *Cowell* majority's firm rejection of the dissent on that basis by Evatt J.[111] Arguments that, as a matter of collective Australian strategy, the States should await High Court leadership in such matters,[112] cannot survive *Cowell's* clear endorsement

102. The contrary argument rests on claims that House of Lords and Privy Council are each the *alter ego* of the other: see Brett, "High Court—Conflict with Decisions of Court of Appeal", (1955) 29 *A.L.J.* 121, 122. But House of Lords and Privy Council have never been bound by each other; and where each ultimate tribunal is free to depart from the other, a court subordinate to either must be "bound" only by *its own* court of last resort. See Blackshield, *Abolition, op. cit., (supra* n.5), 82, n.23, repeated in Blackshield, "Viresne . . . an Virus?", *loc. cit., (supra* n.5), 283, n.37.
103. (1978) 18 S.A.S.R. 564. See text at nn. 236-254 *infra*.
104. (1975) 142 C.L.R. 336, 341-342 (Barwick C.J.), 349 (Gibbs J.).
105. [1911] 1 K.B. 114; *cf. Price* v. *Commissioner of Highways* [1968] S.A.S.R. 329.
106. (1978) 18 S.A.S.R. 564, 578; *cf.* Mitchell J. at 584.
107. (1975) 132 C.L.R. 336, 349. He went on to contrast the N.S.W. position with his own position in the High Court: "This Court, however, is not bound by decisions of the Court of Appeal and I [am] accordingly . . . unfettered by authority".
108. (1978) 18 A.L.R. 257, 282.
109. (1937) 56 C.L.R. 605, rejecting *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.
110. (1935) 35 S.R. (N.S.W.) 281.
111. (1937) 56 C.L.R. 605, 642-643.
112. Something like this is presumably intended by the *Murray-More* dicta. But this would be a plausible strategy only if State courts could always be sure that their decisions would be taken to the High Court on appeal. Recent changes in statute and practice have not only decreased the likelihood of this, but have institutionalized a policy of discouraging such appeals. The best way for a State court to implement this policy is to give the decisions that *it* believes to be right, even if this does involve departure from the Court of Appeal.

of the alternative strategy there used, by which the issue was both raised for the High Court, and constructively mapped out for it, by successive New South Wales decisions.[113]

Certainly, prior to *Bagshaw* v. *Taylor*, there was no suggestion in South Australia that the Court of Appeal could "bind". Indeed, the *Amoco* case[114] had shown that South Australia, too, could clear a helpful path for the High Court by *not* following the Court of Appeal. A service station was acquired subject to an existing restraint of trade. Did acceptance of the restraint as a *fait accompli* prevent later challenge to its reasonableness? The only cases quite in point[115] were *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.*[116] (in the House of Lords), and *Cleveland Petroleum Co. Ltd.* v. *Dartstone Ltd.*[117] (in the Court of Appeal). Dicta in *Esso* had suggested that acquisition subject to existing restraints gave no ground for complaint; and the *Cleveland* case had spun these dicta into a unanimous decision. Yet there, as in the South Australian case, the evidence showed that the corporate entity let into possession on existing restraints arose by incorporation of the natural persons formerly running the same business on the same site. How could it be said that the company was *newly* let into possession in a relevant sense? *Cleveland* avoided this problem by refusal to lift the corporate veil. Wells J., at first instance in *Amoco*, was thus in a dilemma. The *result* in the *Cleveland* case suited "the common sense of the basic commercial situation"; but it was "surprising" that the Court of Appeal had used "such a highly technical ground" in an area "where technicalities are supposedly anathema". He "reluctantly concludd that it would need a higher authority than this Court" to say *Cleveland* was right.[118]

Bray C.J. was equally hesitant in the Full Court. The English cases posed questions not yet allowing "authoritative answers"; he did not expect the Court's decision to have "more than a temporary authority", and wished "to express myself no more widely than is necessary". But he thought *Esso* and *Cleveland* were indistinguishable. *Amoco*, like *Cleveland*, involved lease and sublease on incorporation; but in *Cleveland* "the company had never been free to trade on the land" until the sublease, while in *Amoco*, *before* lease and sublease, the company was entitled to registration as transferee of the land, and thus already had a "freedom to trade on the land as owner". Thus (however it should be interpreted) *Cleveland* was "not an authority binding me to hold" that a simultaneous lease and sublease gave an existing *owner* "freedom for the first time to trade on the land".[119] As for "temporary authority", his fear was belied by later events; the High Court adopted the same distinction, and likewise found no need to determine whether *Cleveland* was right.[120] Bray C.J. in his judgment had in fact made Australian law.

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113. (1937) 56 C.L.R. 605, 622-624, 626, 640, 655-656.
114. *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* (1972) 7 S.A.S.R. 268. See also text at note 212 *infra*.
115. Dicta in *Buckley* v. *Tutty* (1971) 125 C.L.R. 353, 375 implied a negative answer.
116. [1968] A.C. 269.
117. [1969] 1 W.L.R. 116.
118. (1972) 7 S.A.S.R. at 309; see generally *id.*, 306-310.
119. *Id.*, 331, 333-335. Walters J. agreed at 356; but see Hogarth J., at 350-353.
120. *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* (1973) 133 C.L.R. 288, 292-293, 303-305, 312-315 (Menzies, Walsh and Gibbs JJ.). In another phase of the case the Privy Council dismissed an appeal, again expressly endorsing the reasoning of Bray C.J. and Walters J.: *Amoco Australia Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* [1975] A.C. 561, 577, 580.

When the English Court of Appeal[121] spun failure to wear a seatbelt into "a novel species of contributory negligence", Bray C.J. saw problems created "both by precedent and by principle", and chose to "reserve consideration" till the matter arose directly.[122] When it did arise, Hogarth J. rejected the English view.[123] When a trade union organizer attacking non-union labour was sued for tortious interference with contracts,[124] Wells J. simply assumed that the recent House of Lords and Court of Appeal decisions were relevant sources; whether they were mandatory sources never arose.

With English criminal cases the Court had an even freer hand,[125] in part because of their relative weakness as precedents even in England.[126] *Considine* v. *Kirkpatrick*[127] was a typical puzzle. In a teenage "punch-up" a youth removed his brass-studded belt to use it as a weapon. Chamberlain and Zelling JJ. held that, once he took the belt off, he could properly be charged with carrying an offensive weapon. Bray C.J. dissented, following *R.* v. *Jura,*[128] which construed such a charge as aimed at one who "goes out with" a weapon. Despite later conflicting cases,[129] he said, *Jura* had not been overruled "by any court having authority to do so". His brethren got rid of *Jura* by distinguishing the English statute; yet Zelling J. followed *R.* v. *Petrie,*[130] where a razor kept in a car was a weapon because it was "carried with the intention so to use it". As in other cases, the dissent of Bray C.J. was vindicated by later English developments.[131] The question remains why the Court had to wrestle with the English cases at all. If the statutory distinction disposed of *Jura,* why not of them all?[132]

For cases from other Australian States, statutory distinctions were common;[133] diversity in the practical working of statutes also sufficed.[134] Conversely, the absence of any relevant statutory differences was often an affirmative reason to follow an interstate decision.[135] Even the State Constitutions were sufficiently comparable to allow cross-fertilization.[136]

121. *O'Connell* v. *Jackson* [1972] 1 Q.B. 270.
122. *Rust* v. *Needham* (1974) 9 S.A.S.R. 510, 523.
123. *Hancock* v. *Commercial Union Assurance Co. of Australia Ltd.* (1975) 10 S.A.S.R. 185; and see *Grantham* v. *S.A.* (1975) 12 S.A.S.R. 74, 85.
124. *Woolley* v. *Dunford* (1972) 3 S.A.S.R. 243, 266-270, 290-293.
125. See, *e.g.,* Bray C.J. in *Moore* v. *Fingleton* (1972) 3 S.A.S.R. 165, 169, ("very scanty reports"); Zelling J. in *Harris* v. *Samuels* (1973) 5 S.A.S.R. 439, 465.
126. The English Court of Criminal Appeal (now the Criminal Division of the Court of Appeal) had never adopted the rules laid down by the civil Court of Appeal in *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718; see Cross, *Precedent in English Law* (3 ed., 1977), 116-119. Thus it is not technically self-binding.
127. [1971] S.A.S.R. 73.
128. [1954] 1 Q.B. 503, 506 (Court of Criminal Appeal; airgun at shooting gallery).
129. *Woodward* v. *Koessler* [1958] 1 W.L.R. 1255; *R.* v. *Powell* [1963] *Crim. L.R.* 511.
130. [1961] 1 W.L.R. 358.
131. *R.* v. *Dayle* [*1974*] 1 W.L.R. 181, substantially preferring *Jura* to *Woodward.* And see *Ohlson* v. *Hylton* [1975] 1 W.L.R. 724; *Bates* v. *Bulman* [1979] 1 W.L.R. 1190.
132. The distinction was clearest for Chamberlain J.: the English provision speaks of one who "has with him" an offensive weapon, the S.A. provision of one who "carries" an offensive weapon. The point is a fine one, possibly bolstered by *Jura's* reliance (repeated in *Dayle)* on the long title of the English Act. See [1971] S.A.S.R. 71, 82.
133. See, *e.g., In re Kay, Deceased* [1969] S.A.S.R. 1, 5-6; *Australian Eagle Insurance Co. Ltd.* v. *Federation Insurance Co. Ltd.* (1976) 15 S.A.S.R. 282, 288-289; *R.* v. *Wright* [1969] S.A.S.R. 376, 262, 278 (see notes 478-479 *infra).*
134. See *Arkaba Holdings Ltd.* v. *Commissioner of Highways* [1970] S.A.S.R. 94, 102.
135. In *R.* v. *City of West Torrens; Ex parte Kentucky Fried Chicken Pty. Ltd.* [1969] S.A.S.R. 545, 560 (after citing eleven different cases on minor issues) Bray C.J. held that council approval once given and notified could not be rescinded following N.S.W. cases and treating N.S.W. and S.A. legislation as comparable.
136. See *Gilbertson* v. *S.A.* (1976) 15 S.A.S.R. 66, 85 (Bray C.J.), 109-110 (Zelling J.).

There were, of course, elaborate gestures to comity with other State Courts.[137] In *R.* v. *Rigney*,[138] Bray C.J. preferred a Victorian decision (as consonant "with justice and with common sense") to dicta in the House of Lords. And even when Sangster J. was not "completely satisfied" by a Victorian Supreme Court decision, he noted "the persuasive weight of [its] authority", and left his doubts unresolved.[139] Yet such gestures of comity only emphasized that the cases relied on did not formally bind. And *comity* with sister States would always be overridden by *duty* to the High Court.[140]

Special problems arise when different State courts, invested with federal jurisdiction, must apply the same federal law. Formerly the issue arose primarily from the Matrimonial Causes Act, 1959;[141] later legislation extends it to increasingly diverse areas.[142] Even here, one State Supreme Court can in theory expect no more than "comity" from another;[143] and even the mutual comity applicable *between single judges* or *between full benches* may not apply when a full bench in one State weighs the views of a single judge in another.[144] But what if these roles are reversed? Can a single judge (or *a fortiori* a magistrate) attempt his own appraisal of decisions from another State? Or (at least in case of interstate conflict) must he wait for guidance from his own Supreme Court, adhering to its views till it says otherwise? In *R.* v. *Jackson*[145] the Full Court chose the latter view.

The case concerned the sentencing principles applicable to marijuana offences under the Commonwealth Customs Act, 1901-1971. South Australian decisions tended to play down the gravity of such offences; cases in other States tended to imply a sterner view. In *R.* v. *Jackson* the sentencing judge was openly swayed by the latter cases, by which indeed he said he was "bound". The issue was clouded by the ambiguity of this word "bound"; by ambiguity as to whether he had in fact departed from the South Australian decisions; and by the fact that in any event the extent to which sentences affect one another is not strictly a problem of precedent. In the end the appeal against sentence failed. But the Court ruled "firmly" that a trial judge "is not technically 'bound' by the decision of the appellate court of another State, whether that Court is exercising State or Federal jurisdiction", but only by "superior courts in the same hierarchy". Conflicts of superior courts in different hierarchies "should be left to be resolved by those courts, or by a higher appellate court". If, as to marijuana, actual *rationes decidendi* in Victoria and South Australia conflicted, the judge was bound by the latter, "even though the Victorian Court, was exercising Federal jurisdiction". Yet the federal element did make *some* difference. The judge's remarks could be read as "merely expressing loyal adherence to

137. Or with other Australian courts outside normal hierarchies. See *e.g.*, *R.* v. *Hoskin* (1974) 9 S.A.S.R. 531, 540, as to the Courts-Martial Appeal Tribunal.
138. (1975) 12 S.A.S.R. 30, 38-39; see text nn.260-269 *infra*. And see Bray C.J. in *Carslake* v. *Guardian Assurance Co.* (1977) 15 S.A.S.R. 378, 382.
139. *South Australian Barytes Ltd.* v. *Wood* (1976) S.A.S.R. 527, 555. *Cf.* Bray C.J. at 536-537; and generally on this case and its sequel see *infra* n.187.
140. See Zelling J. in *Smith* v. *Badenoch* [1970] S.A.S.R. 9, 14-15; Hogarth J. in *Preston* v. *Mercantile Mutual Insurance Co. Ltd.* [1971] S.A.S.R. 221, 223 and in *Aakster* v. *H. A. Chalmers Pty. Ltd.* (1972) 3 S.A.S.R. 519, 528-529.
141. See *e.g. Landau* v. *Landau* [1970] S.A.S.R. 288, 293 (Bray C.J.) and *Deszery* v. *Deszery* [1971] S.A.S.R. 267, 271 (Walters J.).
142. Including those given a "downwards shift" by the series of Acts surrounding the Judiciary (Amendment) Act, 1976; see, *e.g.*, text at nn. 170-174 *infra*.
143. Compare *Amid Pty. Ltd.* v. *Beck & Jonas Pty. Ltd.* (1974) 11 S.A.S.R. 16, 30-31; *In re Long; Ex parte Fraser Confirming Pty. Ltd.* (1975) 12 S.A.S.R. 130, 135.
144. See *West* v. *West* (1972) 5 S.A.S.R. 479 (Hogarth J.).
145. (1972) 3 S.A.S.R. 81, 90-91, 93.

the general level of penalties" and "approach" of "appeal courts in other States exercising the same Federal jurisdiction"; and this would be only a proper response to the task of "participating in the enforcement of legislation intended to have a uniform operation throughout the Commonwealth".

Of course, when drug offences arise not under Commonwealth but under State law, the claims of interstate comity have even less force.[146] In an area of distinctive State statute law, no interstate decision can possibly be "binding"; since few issues today are untouched by statute, *some* relevant differentiating statutory provision can almost always be found.

In areas ruled only by common law a case might be made for extending to sister-State judgments the *same* degree of weight as the instant court accords to its own. Australia has never adopted the American theory that each State has its own common law;[147] instead, we assume that the colonists brought with them *one* common law. As separate colonies and States emerged, it was not "disintegrated into six separate codes of law", but became "an identical law applicable to six separate political entities".[148] Appellate supervision in the High Court has ensured its continued unity; and has also satisfied the *Taylor* v. *Burgess* test of subordination to the same appellate tribunal. Yet federalism preserves the six State legal systems as separate entities: the wine is the same, but not the bottles. "Hierarchical" tests of precedent must in the end apply separately to each Australian State.

"Full faith and credit" to "the judicial proceedings of every State" cannot help.[149] The operation of s. 118 of the Constitution on interstate judgments is largely confined to their impact on litigants: the result has "credit" as *res judicata*, not the reasoning under *stare decisis*.[150] Even if this were not the case, s. 118 could make interstate judgments authoritative as evidence only of matters which they can by their nature evidence: a Tasmanian Full Court decision might merit "full faith and credit" as a statement of the law of Tasmania, but hardly as a statement of the law of South Australia. The real test is a practical one. If sister-State views do *not* conflict with those of the instant court, they will be followed out of "comity". If they do so conflict, to make them "bind" would be absurd.

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146. The same issue of sentencing as in *R.* v. *Jackson* (especially contrasting *R.* v. *Beresford* (1972) 1 S.A.S.R. 446 with *R.* v. *Peel* (1971) 1 N.S.W.L.R. 247) arose again in *Dimitriou* v. *Samuels* (1975) 10 S.A.S.R. 331, but under the S.A. legislation. The magistrate, after comparing N.S.W. and S.A. approaches, refrained from imposing a prison sentence but instead imposed a fine "so great as to amount in practice to a sentence of imprisonment". Bray C.J., sitting alone on appeal, substantially reduced the fine: *Beresford*, as a Full Court "considered judgment", was "binding on the learned Special Magistrate and is binding on me and, indeed, on every Court in the State". *Cf.* text at nn. 33-36 *supra*.
147. See Holmes J. (dissenting) in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) and in *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533-534, 535 (1928), as adopted and approved by Brandeis J. in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938).
148. *R. v. Kidman* (1915) 425, 436 (Griffiths C.J.). And see Castles, *An Introduction to Australian Legal History* (1971), 142.
149. *In re E. & B. Chemicals & Wool Treatment Pty. Ltd.* [1939] S.A.S.R. 441, 443 (where Napier J. invoked s.118 of the Constitution to assert that a Victorian judgment "is not—in any relevant sense—a foreign judgment") came well before *Harris* v. *Harris* [1947] V.L.R. 44; but mostly S.A. judges have been no more eager to fathom the mysteries of "full faith and credit" than those elsewhere. Bray C.J., in *Nominal Defendant v. Bagot's Executor & Trustee Co. Ltd.* [1971] S.A.S.R. 346, wrestled valiantly with the rules of private international law, reinforced by Roman law; but at 366 found "no need" to resort to s. 118.
150. Even though the main objective of s. 118 is "full faith and credit" *for laws*.

4. The Privy Council

Appeals from High Court to Privy Council ended on 8th July, 1975;[151] the consequences were spelled out in *Viro* v. *R.*[152] on 11th April, 1978. On 23rd March, 1978, three weeks earlier, the South Australian Supreme Court gave leave in a case of "general and public importance"[153] to appeal to the Privy Council, refusing to say that the appeal should go to the High Court. "It is [not] for us to prescribe to the appellant which of the alternatives open to him he should pursue." After *Viro*,[154] the New South Wales Court of Appeal was to draw from the new hierarchical ordering just such a prescription; the decision of March, 1978, was presumably a last transitional gasp of Supreme Court willingness to grant *leave* to appeal to the Privy Council. Only appeals "as of right" now remain.

On the merits, the South Australian Full Court had boldly prefigured *Viro* even *before* the 1975 Act. The issue was one of conflict between the High Court decision in *R.* v. *Howe*,[155] and the Privy Council decision (on appeal from Jamaica) in *Palmer* v. *R.*,[156] as to the effect of a finding in a murder trial of "excessive self-defence". In *Viro* (by the barest whisker) the High Court preferred its own view in *Howe*, thus reversing the decision of the New South Wales Court of Criminal Appeal, which (on 15th July, 1976) had felt bound to follow *Palmer*. The Victorian Court of Criminal Appeal in *R.* v. *Arena* (remarkably unreported) had felt similarly bound as late as 7th February, 1977. But in *R.* v. *Olasiuk*,[157] as early as 17th September, 1973, without the benefit of any guidance *Viro* might offer, and even without the foothold of the 1975 legislation, South Australia made the opposite choice.

Again, in rejecting the English view of when an order is "final" for purposes of appeal, Bray C.J. looked to the High Court for the view "established in Australia",[158] adding almost in passing that the Privy Council took the same view. Walters J. bypassed the Privy Council altogether.[159] But here there was no conflict of High Court and Privy Council; where there was conflict, responses were not always as tidy as in

151. Privy Council (Appeals from the High Court) Act, 1975—subject of course to a continued possibility of appeal in certain transitional "pipeline" cases.
152. (1978) A.L.R. 257.
153. *Armor Coatings (Marketing) Pty. Ltd.* v. *General Credits (Finance) Pty. Ltd.* (1976) 17 S.A.S.R. 259, 286-287 (Bray C.J.). Mitchell and Walters JJ. agreed.
154. *National Employers' Mutual General Association Ltd.* v. *Waind (No. 2)* [1978] 1 N.S.W.L.R. 466. If the rules of precedent are rules of practice which cannot themselves be the subject of precedent, then the *Waind* case (reported under the catchword "practice") cannot bind in S.A., even if we assume (as we should not) that interstate cases affecting federal matters can *sometimes* bind. But there are strong policy reasons to follow it. See Blackshield, *Abolition, op. cit.* (*supra* n. 5), 1, 61-63, 76-78, repeated in Blackshield, "Viresne . . . an Virus?" *loc. cit.* (*supra* n.5), 278, 296-298, 311-313. *Waind* deals only with appeals "by leave" under Rule 2 (b) of the various Orders-in-Council; *Southern Centre of Philosophy* v. *S.A.* (unreported: High Court, 22 November, 1979) affirms a continued right of appeal "as of right" under Rule 2 (a), with no reference to *Waind*.
155. (1958) 100 C.L.R. 448.
156. [1971] A.C. 814; reiterated (for Hong Kong) in *Edwards* v. *R.* [1973] A.C. 648.
157. (1973) 6 S.A.S.R. 255, 258.
158. The phrase is that of Gibbs J. in *Licul* v. *Corney* (1976) 8 A.L.R. 437, 446.
159. *Carslake* v. *Guardian Assurance Co.* (1977) 15 S.A.S.R. 378, 379, 385. The outcome neatly illustrates the operation of precedent: though Bray C.J. and Walters J. agreed on a test of "finality" ("Does the judgment or order . . . finally dispose of the rights of the parties?") Bray C.J. held that the order appealed from was "final" (and proceeded to hear the appeal as if brought as of right), while Walters J. held that it was not "final" (and proceeded to hear the appeal as if by leave). Zelling J. expressed no opinion.

Olasiuk. In *R.* v. *Ireland (No. 1)*[160] the Full Court reviewed the trial judge's discretion as to admissibility of irregularly secured evidence. Bray C.J. and Zelling J. said he should have declined to exercise "discretion to admit"; Walters J. that he should have declined to exercise "discretion to exclude". Behind the case lay the Privy Council ruling in *Kuruma* v. *R.*[161] ("if the evidence is relevant it is admissible") and in *King* v. *R.*[162] For Walters J. *Kuruma* merited only a prefatory string citation; he relied on *R.* v. *Sadler*[163] (for his basic contrast of discretions "to admit" and "to exclude"), and on *King* (as showing that the relevant criteria are "not susceptible of close definition", since the categories of "oppressiveness" to an accused are never closed—thus confirming by indeterminacy the suspicion[164] that his basic contrast was a meaningless one). Zelling J. argued that the cases cited in *Kuruma* "do not entirely bear out" the result; and quoted a remark of Dixon C.J. in *Wendo* v. *R.*[165] that *Kuruma* had not put the issue "to rest". As for *King,* he said, their Lordships went wrong by treating *The People (Attorney-General)* v. *O'Brien*[166] as "turning purely on" the Constitution of Eire. Not only was this "not correct", but *O'Brien* was in fact the best statement of the principles[167] on which Zelling J. finally relied. Bray C.J. joined Zelling J. in result, but not in his "illuminating and forceful reasons". For him the matter was "foreclosed" by *Kuruma* and *King.*[168] Dixon C.J. may have qualified *Kuruma* in *Wendo* v. *R.,* but Taylor and Owen JJ. had accepted it "without qualification". Nor could he use the safety-valve in *Kuruma* as to evidence analogous to a confession, for here there was no such analogy. But there was a further safety-valve as to police procedures which left the accused no real opportunity for consent; and on this he felt able to rely.

In February, 1977, faced by signs of incipient tension between High Court and Privy Council, Bray C.J. again chose the Privy Council. The case arose from the "downwards shift" of jurisdiction effected by the Income Tax Amendment (Jurisdiction of Courts) Act, 1976, and confronted him at once[169] with the notorious puzzles arising from s. 260 of the Income Tax Assessment Act, 1936-1976. In the *Newton, Mobil* and *Mangin* cases[170] the Privy Council had steadily drained power from s. 260 till all it could catch

160. [1970] S.A.S.R. 416.
161. [1955] A.C. 197.
162. [1969] 1 A.C. 304, 318-319, endorsing *R.* v. *Murphy* [1965] N.I. 138.
163. [1970] 1 W.L.R. 416 (English Court of Appeal). See [1970] S.A.S.R. 416, 433-436.
164. See n.93 *supra.* The suspicion was heightened when, on appeal *(R.* v. *Ireland* (1970) 126 C.L.R. 321, 335), the High Court agreed *taxonomically* with Walters J. ("a discretion to reject the evidence"), but *operationally* with Zelling J. ("the competing public requirements" must be "weighed", and the procedurally irregular photographs and medical evidence should have been excluded).
165. (1963) 109 C.L.R. 559, 562. See [1970] S.A.S.R. 416, 444.
166. [1965] I.R. 142, 161.
167. Including a statement of the impropriety of going beyond "the case now before us" to "attempt to lay down rules to govern future hypothetical cases"; of a broad exclusionary discretion "based on a balancing of public interests"; of the independent discretion of appellate courts to make their own balancing; and of the pious hope that a series of future decisions, "based on the facts of individual cases, may in time give rise to more precise rules". See [1970] S.A.S.R. 416, 445-448 per Zelling J.
168. [1970] S.A.S.R. 416, 421.
169. *Jones* v. *Commissioner of Taxation* (1977) 15 S.A.S.R. 462, *cf. Bayly* v. *Commissioner of Taxation* (1977) 15 S.A.S.R. 446.
170. *Newton* v. *Federal Commissioner of Taxation* [1958] A.C. 450, 466; *Mobil Oil Australia Ltd.* v. *Federal Commissioner of Taxation* [1966] A.C. 275, 292-293; *Mangin* v. *Inland Revenue Commissioner (N.Z.)* [1971] A.C. 739.

was a scheme with tax avoidance as its "sole" or "principal" purpose.[171] In *Hollyock* v. *Federal Commissioner of Taxation*,[172] Gibbs J. (sitting alone) was moved to protest: it should be enough if tax avoidance was one purpose among others. In Tasmania, *Hollyock* emboldened Nettlefold J. not to follow *Mangin*,[173] and Bray C.J. might not have done so had not *Europa (No. 2)*[174] intervened. The Privy Council (including Barwick C.J.) there reasserted its earlier views, with what Bray C.J. saw as "perhaps some slight shift of meaning" extending s. 260 to schemes with tax avoidance as "their main purpose or one of their main purposes". Given this apparent attempt to accommodate the views of Gibbs J., Bray C.J. thought he must "follow the Privy Council formulation".

In re King, Deceased[175] led Wells J. to a Solomonic apportionment of reasoning (and the deceased's estate) between High Court and Privy Council. *Parkroyal Corporation Pty. Ld.* v. *Pope*[176] followed the Privy Council decision in *Blue Metals Industries Ltd.* v. *Dilley*[177] that a group of companies is not "a company"; yet managed to reject (in favour of greater literalism) its interpretive basis in overall statutory context, "substance and tenor". Bray C.J. managed this by holding that the New South Wales statute applied in *Dilley* gave "greater" room for the "broader" Privy Council approach than the South Australian legislation; Zelling J. managed it by subordinating their Lordships' advice to the High Court reasoning in the same litigation.

Even when Privy Council views did not have to be juggled with those of the High Court, they had no absolute sway. For some appeal points in *R.* v. *Brown and Morley*[178] it was "sufficient to say" that they had failed in the Privy Council a decade before;[179] and Bright and Mitchell JJ. relied on the Privy Council also for the theory that duress is no defence to murder. But Bray C.J. argued that neither of the cases relied on[180] had *clearly* so

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171. *Id.*, 751, adopting the language of Turner J. in the N.Z. Court of Appeal.
172. (1971) 124 C.L.R. 647, 657.
173. *Peacock* v. *Federal Commissioner of Taxation* (1976) 11 A.L.R. 545, 556.
174. *Europa Oil (N.S.) Ltd.* v. *Inland Revenue Commissioner (N.Z.) (No. 2)* [1976] 1 W.L.R. 464; *Ashton* v. *Inland Revenue Commissioner (N.Z.)* [1975] 1 W.L.R. 1615.
175. [1971] S.A.S.R. 147, involving interests arising under the wills of the testatrix's father, sister, brother-in-law and niece as well as of the testatrix, she being the niece's sole next-of-kin and administratrix of her estate. Wells J. held that the testratrix's residuary interest in the earlier and as yet unadministered estates did *not* pass under her will, since this interest had not yet crystallized into "finally and unconditionally ascertained rights in relation to certain specified items of property". Thus far he followed *Commission of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694 (Privy Council). But he also held that, as to two properties left to the niece by her own father's will, and also remaining (when the testatrix died) in the niece's undistributed estate, a specific disposition of those properties in the testatrix's will *was* effective. On this he followed *Smith* v. *Layh* (1953) 90 C.L.R. 102 (High Court) though its language and conceptual assumptions were extensively criticized by the Privy Council in *Livingston* (at 708-713).
176. [1969] S.A.S.R. 376, holding that ten companies trading together cannot apply jointly for a publican's licence. See Bray C.J. at 377-378, Zelling J. at 383.
177. [1970] A.C. 827, similarly refusing to read the word "company" in the plural.
178. [1968] S.A.S.R. 467, 477, 478. See n.15 *supra*.
179. *A.-G. for South Australia* v. *Brown* (no relation) [1960] A.C. 432.
180. *Sephakela* v. *R.* [1954] *Crim. L.R.* 723, *The Times*, 14 July, 1954; *Rossides* v. *R.* [1957] *Crim. L.R.* 813, *The Times*, 3 October, 1957. The reports in *The Times* are reprinted in full in the majority judgment in *Brown & Morley*, at 486-489. Bright and Mitchell JJ. conceded that "too much weight must not be placed on an extempore report"; Bray C.J. allowed no weight at all. In *Rossides* their Lordships refused special leave to appeal and gave no reasons for doing so. It is probably impossible to infer *any* proposition of law; but even if one could

decided; and that if the theory was not "compelled by authority", it should be rejected. His dissent was later vindicated in the House of Lords.[181]

The two Privy Council cases in question had come from Basutoland and Cyprus: if precedent binds only in its own hierarchy, their effect in South Australia might now be queried on that basis alone.[182] Bray C.J. made no such point, and in *R.* v. *Hallett*[183] treated another Privy Council case from Basutoland as "no doubt binding on this Court". But after 1975 there were perhaps signs of change. Why, for example, in *R.* v. *Boyce*,[184] did he feel such freedom to criticize and confine their Lordships' decision in *Director of Public Prosecutions* v. *Brooks*?[185] One possible source of freedom lay in the prefatory observation: "That was an appeal from Jamaica."[186] Again in *South Australian Barytes Ltd.* v. *Wood*,[187] he stressed that a Privy Council decision "given in an appeal *from this Court*" is "certainly binding on us".

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180. *Cont.*
extract from "material facts" plus result a *ratio decidendi* to the effect that *an actual killer* could not plead duress, Bray C.J. argued (at 497) that this would be "no authority" as to "lesser acts of participation". (In *Brown & Morley* the appellant had coughed to conceal the sound of the murderer's approach). As to *Sephakela*, Glanville Williams, *Criminal Law: The General Part* (1961), 753 takes a cautious view: their Lordships "assumed that duress was a defence to a charge of ritual murder in Basutoland", but had no need "to decide the point finally". Bray C.J. at 496 was similarly cautious: the case said "nothing to prevent us from holding that . . . duress can be a defence to [murder] . . . Indeed, it may well be that it compels us so to hold." But at 495, "with unfeigned respect" for Bright and Mitchell JJ., he claimed *Sephakela* as "an authority for the converse [of their] proposition"; and at 499 he relied not only on "general reasoning" and decisional trends, but on *Sephakela's* "express authority".

181. *Director of Public Prosecutions* v. *Lynch* [1975] A.C. 653; see text at n.269 *infra*. Lord Edmund-Davies at 715 (and *semble* Lord Morris at 676) accepted that *Sephakela* was no bar to the result, but denied that it was "express authority"; Lord Wilberforce at 683 came close to endorsing the latter and bolder claim.

182. See Blackshield, *Abolition, op. cit. (supra* n.5), 48-53 and notes at 79-86, repeated in Blackshield, "Viresne . . . an Virus?", *loc. cit. (supra* n.5), 280-287. The point would apply especially to *Sephakela* (where the law their Lordships had to apply was South African Roman-Dutch law).

183. [1969] S.A.S.R. 141, 156-157, accepting the authority of *Meli* v. *R.* [1954] 1 W.L.R. 228. In *Meli* as in *Sephakela*, Roman-Dutch law applied; but their Lordships stipulated that it did not relevantly differ from the law of England.

184. (1976) 15 S.A.S.R. 40.

185. [1974] A.C. 862.

186. (1976) 15 S.A.S.R. 40, 45. *Brooks* had imputed "possession" of drugs to a man found in the driver's seat of a van. The drugs (ganja) were stowed in the back of the van, neither visible nor accessible from the driver's seat. Bray C.J., *id.*, 46, made two main points. First, *Brooks* had wrongly assimilated questions as to the accused's "knowledge that he had the thing in question", to questions as to his "knowledge that the thing he had was ganja". The two states of knowledge were not synonymous; nor could one be inferred from the other. Second, *Brooks* was only "an authority for its own facts", not for any general rule that physical custody of a thing whose nature is known is "possession". This limitation to the facts is one possible source of Supreme Court freedom to qualify *Brooks:* literally it would confine the *ratio decidendi* to cases about vans full of ganja. S.A. legislation making knowledge a specific element in the crime is a second possible source, allowing *Brooks* to be set aside as based on a different state. The fact that the appeal was from Jamaica is a third.

187. (1976) 12 S.A.S.R. 527, 532, as to *Bank of S.A.* v. *Abrahams* (1875) L.R. 6 P.C. 265. As it happened, Sangster and King JJ. felt able *not* to follow that case. King J. stressed that its actual *decision* (that a company had no power to mortgage uncalled capital) was coupled with an express rider that "apt and proper words" in the memorandum and articles might give such a power; here (he said) there were such words. *Id.*, 556. Sangster J., without ever citing *Abrahams*, went back to its roots in *Stanley's* case (1864) 4 De G. J. & S. 407, 46 E.R. 976 (Court of Appeal in Chancery), to argue that this was superseded by later cases such as *In re Phoenix Bessemer Steel Co.* (1875) 44 L.J. Ch. 683 (Jessel M.R.). But what

At the least, Privy Council decisions for other jurisdictions cannot bind if relevant differentiating local circumstances[188] exist. They exist (in law) if a decision reflects a statute with no exact local parallel; and (in fact) if legal realities vary with the factors that Montesquieu blended into *l'esprit des lois.*[189] But to use non-Australian provenance of appeals as itself a differentiation would go well beyond this. In the end it seems unlikely that Bray C.J. was toying with this step. Had he been doing so, he would surely have taken it in relation to *Durayappah* v. *Fernando.*[190]

In *R.* v. *Town of Glenelg; Ex parte Pier House Pty. Ltd.*[191] there had been a contract for sale of land. The purchaser was to use the premises as a private hospital, and the contract was subject to council approval. When that approval was refused, the *purchaser* withdrew from the sale; the *vendor* sought certiorari, arguing that the council had violated natural justice.

As to whether the council had a duty to act judicially, one view—that this duty inheres in any determination affecting rights—was applied to the very same statute in *Hay* v. *City of Adelaide.*[192] The other view—that duty to act judicially is a separate superadded requirement—was taken by the Privy Council in *Nakkuda Ali* v. *Jayaratne.*[193] In the House of Lords *Ridge* v. *Baldwin*[194] cast doubts on *Nakkuda Ali*; in the Privy Council *Durayappah* in turn cast doubts on the doubts, conceding only that "outside the well-known classes of cases" there was "no general rule".[195] The High Court majority in *Testro Bros. Pty. Ltd.* v. *Tait*[196] seemed to apply *Nakkuda Ali;* but Kitto J. in dissent read the cases as requiring natural justice at least where determination of rights requires "judgment" based on "inquiry".

In *R.* v. *Glenelg,* the Supreme Court picked its way around, rather than through, this minefield. Bray C.J. declined to "participate in these battles

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187. *Cont.*
those cases had done was to distinguish the Privy Council view (not of course binding in England) on the "apt and proper words" point; so that this was only an oblique form of the argument of King J. So far Bray C.J. was inclined to agree; but in this case his brethren had first to find "apt and proper words" giving power to charge uncalled *capital,* and then to slur from this to a power to charge uncalled *premiums.* This Bray C.J. was unable to do. *In re South Australian Barytes Ltd. (No. 2)* (1977) 19 S.A.S.R. 91, 101, challenged Mitchell J. to find a *ratio decidendi* in all this, and specifically to follow the view of Bray C.J. But she did not. If the view of Sangster and King JJ. formed part of the ratio ("as in my view it does"), she was "bound" to follow it; if not, she would follow it anyway to avoid a "chaotic result".

188. Formerly the High Court criterion for departure from the House of Lords: see *Piro* v. *W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313, 320. For the Privy Council see now *Viro* v. *R.* (1978) 18 A.L.R. 257, 295 (Mason J.): Blackshield, *Abolition, op. cit. (supra* n.5), 85-86, n.40, repeated in Blackshield, "Viresne . . . an Virus?" *loc. cit. (supra* n.5), 286-287, n.53.

189. *"Le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les moeurs, les manières".* See Montesquieu, *L'Esprit des Lois* (1748) Bk. XIX, Ch. 4. Montesquieu's own pet factor of "climate" was used by Zelling J. in *Smith* v. *Badenoch* [1970] S.A.S.R. 9, 13-14.

190. [1967] 2 A.C. 337 (on appeal from Ceylon).

191. [1968] S.A.S.R. 246.

192. [1935] S.A.S.R. 234, itself following *James* v. *Pope* [1931] S.A.S.R. 441.

193. [1951] A.C. 66 (on appeal from Ceylon).

194. [1964] A.C. 40, 79.

195. [1967] 2 A.C. 337, 349.

196. (1963) 109 C.L.R. 353. Since only Kitto J., in dissent, attempted a sustained analysis of the cases, the precise effect was unclear. The majority certainly endorsed *R.* v. *Coppel; Ex parte Viney Industries Pty. Ltd.* [1962] V.R. 630; but the deference in that case to *Nakkuda Ali* was itself rather ambiguous.

of the giants";[197] *non nostrum inter vos tantas componere lites.*[198] *Nakkuda Ali* was distinguishable as focused on "purely administrative" grant and revocation of licence; the instant case (like the Court's own prior decision in *Hay's* case, which drew the same distinction) involved "probhibition against the exercise of a common law right". "A previous decision of this Court" was "directly in point"; a distinguishable Privy Council case was "all that can be urged against it". His duty was to follow *Hay's* case. Mitchell J. reached the same result by relying on the reasoning of Kitto J. in *Testro* v. *Tait.*[199] She, too, thereby tacitly distinguished *Nakkuda Ali.*

The second main issue in *R.* v. *Glenelg* was whether the *vendor* could seek certiorari in respect of denial of natural justice to the *purchaser.* The vendor had lost its contract, and was saddled with a council decision impliedly limiting future use of its land. Would correction by certiorari, if granted, sufficiently benefit the vendor to make it "a party aggrieved"? Both Mitchell and Travers JJ. focused on this question, though giving opposite answers to its essentially predictive concern. They purported thus to be working within the framework of *Durayappah*: the council refusal was not a "nullity" (in which case the vendor could clearly have impugned it), but was only "voidable", and thus impugnable "only at the instance of the party affected", "only at the instance of the person against whom the order was made". But to slur (as Mitchell J did) from these very insistent words to their Lordships' more casual reference to "the party aggrieved", from "*the* party aggrieved" to "*a* party aggrieved", and from this to the comfortable criteria of *R.* v. *Surrey Justices.*[200] was rather adroit sleight-of-hand.

Bray C.J. found another escape.[201] The drastic constraints on certiorari arose from sweeping all natural justice cases into the "voidable" basket. Could not some of them go back into the "nullity" basket? Dicta in 1872[202] gave the answer: removal from office for a "frivolous or futile cause" was "probably" a nullity. Lord Evershed (dissenting) had quoted the passage in *Ridge* v. *Baldwin*; *Durayappah* had proceeded by expounding *Ridge* v. *Baldwin,* including Lord Evershed's speech. By working backwards through this rather tenuous genealogy, Bray C.J. was able to build into *Durayappah* itself the idea that a breach of natural justice reducible to "frivolous or futile" grounds leads not merely to a "voidable" order but to a "nullity". Add to this an equally resourceful interpretation of the facts to show that this case involved "frivolous or futile" grounds; and certiorari could go.

Problems of natural justice leading only to "voidability" obviously cannot be aired in collateral proceedings. In *Hinton* v. *Lower (No. 2),*[203] a road

197. [1968] S.A.S.R. 246, 256. (But he added that if a direct choice arose the Court would be "bound to follow the Privy Council" rather than the House of Lords).
198. Virgil, *Eclogues,* IV, 108. *Cf. Brewarrana* v. *Commissioner of Highways* (1973) 4 S.A.S.R. 476, 486 (Bray C.J.), as to Lord Wright's interpretation in *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison* [1933] A.C. 449, 461, of older House of Lords dicta: "It is not for me to comment on the satisfactoriness of this decision." Zelling J. in *Murphy* v. *McCarthy* (1974) 9 S.A.S.R. 424, 426-427, was similarly chary of the effects of *The Wagon Mound (No. 1* [1961] A.C. 388.
199. [1968] S.A.S.R. 246, 256 (Bray C.J.), 271-272 (Mitchell J.).
200. (1870) L.R. 5 Q.B. 466.
201. [1968] S.A.S.R. 246, 253-255.
202. *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636, 647. See [1967] 2 A.C. 337, 354.
203. (1971) 1 S.A.S.R. 512. Earlier, in *R.* v. *Johns; Ex parte Public Service Association of S.A. Inc.* [1971] S.A.S.R. 206, 210, Bray C.J. had seized upon dicta of Barwick C.J. in *Banks* v. *Transport Regulations Board* (1968) 119 C.L.R. 222, and

haulier queried the fixing of his truck's road capacity. Certiorari *may* have been a viable remedy;[204] but the Full Court agreed that collateral attack, on appeal from conviction under the Road Maintenance (Contribution) Act, 1963-1968, was not. No doubt this sat oddly with the House of Lords' results in *Director of Public Prosecutions* v. *Head*;[205] but Wells J. managed to limit the *ratio decidendi* of *Head* to an *ad hoc* reliance on legislative intention.[206] Bray C.J. was more direct. *Head* and *Durayappah* conflicted; and "for us the Privy Council must prevail over the House of Lords".[207]

For Bray C.J., *Hinton* thus rested squarely on his earlier reading of *Durayappah*. But for Wells J. *R.* v. *Glenelg* had not foreclosed the matter. "The structure of the contest in that case",[208] and the varied views of its judges, "logically left it open for this Court to consider at large" the historical development of certiorari, the "jurisprudential niceties" which history had obscured or brushed aside, and the place within the emerging pattern for the ungovernable conflicts of *Ridge* v. *Baldwin*, *Durayappah* and *Head*. If those conflicts "could readily be reconciled" within "principles both logically satisfying and historically unassailable", the Court's task "would not be so formidable as it now appears". As it was their Lordships' decisions and dicta created "as many difficulties as they were designed to solve".[209] For Bray C.J.,[210] these difficulties were insuperable. Though paying "tribute" to Wells J. in his quest of rational principle, he did so

> "with considerable caution . . . The authorities are in such a state of flux and confusion that it is hardly likely that this Court will be able to construct an enduring causeway through the flood. The task of imposing order on this chaos must . . . be reserved for the High Court, the Privy Council and the House of Lords . . . [One cannot] disentangle any general principle which will not be opposed to some decision which is binding on us or would be if it stood alone."

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203. *Cont.*
Lord Reid in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, as showing that, despite *Durayappah*, "the old principle still applies that expressions like 'want of jurisdiction' . . . [cover] breach of natural justice", and hence "that decisions of appropriate tribunals in breach of natural justice are void and not merely voidable". But in *Hinton* v. *Lower*, at 521-522, he reluctantly had to conclude that such dicta were not directed "to any such question", nor indeed to the contrast of void and voidable decisions at all.
204. Wells J. thought not; Bray C.J. and Mitchell J. expressly left the point open.
205. [1959] A.C. 83. Head, appealing against a conviction of carnal knowledge of a mentally defective female inmate of an institution, was allowed to challenge successfully the administrative order committing her to institutional care.
206. (1971) 1 S.A.S.R. 512, 548. Another possible ratio of *Head* is that *Durayappah* does not apply to criminal proceedings for an *indictable* offence.
207. *Id.*, 523.
208. (1971) 1 S.A.S.R. 512, 550-551. To be precise, he thought that the reasoning of all judges in the *Glenelg* case had focused on the issue of standing in a way which was not really dependent on (and hence could not bindingly impose) any particular view of the void/voidable distinction. In particular, while acknowledging the interplay of the two issues in the reasons of Bray C.J., he thought he detected in that interplay a "category of circular reference" which deprived those reasons of any logically binding force. See Stone, *Legal System, op. cit. (supra* n.2), 258-263.
209. (1971) 1 S.A.S.R. 512, 530-531.
210. *Id.*, 520-521. At 552 Wells J. replied that even though only the higher courts could "provide solutions that will endure", that still left it open to Supreme Courts to go as far as they could towards an extraction of rational principles. Indeed, the state of the authorities left them "with no [other] alternative".

5. The House of Lords

Announcing a decision to follow *Morris* v. *Harris*,[211] Wells J. noted its "doubters and dissentients", but added that "if there is today any dispute as to whether this Court is bound by decisions of the House of Lords", he thought *this* case "incontrovertible". What is puzzling here is not his decision, but the oddly grudging terms (in March, 1976!) of his concession that House of Lords cases might not "bind" in South Australia. What is yet more puzzling is that this concession must be seen as a major step forward.

Sometimes the true position was clear. When Wells J. gave the lease and sublease in the *Amoco Case*[212] normal effect "according to their tenor", he stressed that his use of *Regent Oil Co. Ltd.* v. *Strick*[213] was only an analogy, and had its "perils". In *Mitchell* v. *Minister of Works*,[214] Bright J. left it open whether *Padfield* v. *Minister of Works*[215] should be followed out of "duty or comity". And *R.* v. *Congressi*[216] said only that a House of of Lords case had "very high authority". Sometimes the assiduous interweaving of all available sources saw House of Lords cases so commingled with others as to gain an illusion of binding force by assimilation or transference: by merger in cognate High Court cases,[217] or apparent covalence with the Privy Council.[218] Sometimes the mode of acceptance was tentative or indecisive, or too cryptic for any guess at its theoretical basis. *Kemp* v. *Piper*[219] rejected a decision of Chamberlain J. as probably at odds with *Chaplin* v. *Boys*,[220] though noting its compatibility with the views of Lords Hodson and Wilberforce. When Jacobs J. refused to order contribution to worker's compensation as between successive employers,[221] he doubted the legal effect of a "declaration of liability" against the first employer. Given House of Lords approval of such declarations, it was "not for me" to reject it; he was "faced with [it], for what it is worth". But he went on to reject the claim to contribution, and drew on other House of Lords cases [222] to do so. In *R.* v. *O'Loughlin*[223] the overlap of issue estoppel and *autrefois convict* required close attention to *Connelly* v. *Director of Public Prosecutions*,[224] a case (said Wells J.) of "outstanding importance for common law countries" as the "most comprehensive" analysis in a British court. Both he and Bray C.J. asserted a judicial discretion (apart from any formal plea) to avoid double jeopardy as abuse of process. Wells J. felt "constrained" to this view; whether by *Connelly* or by his own careful history is unclear. He saw "differences of emphasis" but "no

211. [1927] A.C. 252; for the comments of Wells J. see *In re Kilkenny Engineering Pty. Ltd.* (1976) 13 S.A.S.R. 258, 266.
212. (1972) 7 S.A.S.R. 268, 306; see generally *id.*, 303-306.
213. [1966] A.C. 295.
214. (1974) 8 S.A.S.R. 7, 26. Even Zelling J., who followed *Padfield* though preferring Lord Morris' dissent, did not treat it as technically binding: *id.*, 31-32.
215. [1968] A.C. 997.
216. (1974) 9 S.A.S.R. 257, 263.
217. See *McKernan* v. *Afford* (1973) 9 S.A.S.R. 11, 17 (Sangster J.).
218. See *R.* v. *Heidt* (1976) 14 S.A.S.R. 574, 580-583 (Bray C.J.), 586-588 (Walters J.).
219. [1971] S.A.S.R. 25, 30 (Bray C.J.), 38 (Hogarth J.).
220. [1971] A.C. 356, here outweighing *Li Lian Tan* v. *Durham* [1966] S.A.S.R. 143.
221. *Floreani Bros. Pty. Ltd.* v. *Woolscourers (S.A.) Pty. Ltd.* (1975) 11 S.A.S.R. 441, responding to *King* v. *Port of London Authority* [1920] A.C. 1.
222. *Stirling* v. *Forrester* (1821) 3 Bligh 575, 4 E.R. 712; *Ruabon Steamship Co. Ltd.* v. *London Assurance* [1900] A.C. 6. See (1975) 11 S.A.S.R. 441, 449.
223. (1971) 1 S.A.S.R. 219. See text at nn. 459, 465 *infra*.
224. [1964] A.C. 1254.

basic conflicts" in the various speeches; Bray C.J. saw conflicts, but chose the above as "the preferable view".[225]

Cases before 1836 may in theory have come into South Australian law as "binding"; cases soon after 1836 may be *almost* authoritative voices of the common law as "received". Those not crumbled into oblivion have unique venerability. The *Sussex Peerage Case*,[226] "which has stood for 130 years", was endorsed by *In re Van Beelen*[227] "as authoritative and clearly binding": its exception to the hearsay rule had always had "practical unanimity".[228]

The word "practical" is ambiguous here. In procedure and evidence, adherence to precedent overlaps with mere adherence to practice. In the area of overlap precedent guidance may become so flexible and indeterminate that binding force means little: cases are cited for rhetorical power, not logical proof. Expounding the duty to cross-examine, Wells J. found rich guidance in an obscure House of Lords case;[229] but added an emollient layer of forensic "jurisprudence and practice". Counsel need not abide "to the letter" by their Lordships' "general rule"; provided its "spirit" prevailed their "techniques and . . . discretions must stand unimpaired". The protean limits on appellate reopening of damages are noted below; what of appellate reopening of apportionment between tortfeasors? Bray C.J. held that House of Lords cases forbade it "save in very exceptional circumstances";[230] his brethren noted his "analysis", but intervened all the same. Press reports that their Lordships had repeated their view then prompted Bray C.J. to do likewise:[231] Zelling J. joined him in non-interference, but not Jacobs J. He agreed that one can interfere only in "rare and exceptional cases". But that left "the haunting question, what is a 'rare and exceptional case'?"

If Jacobs J. was here *distinguishing* a House of Lords decision, that was itself exceptional. *Liversidge* v. *Anderson*,[232] trailing old clouds of controversy, could be held not to govern "such a humble subject as damage to postal installations";[233] but even this humble distinction was backed by Privy Council support.[234] In newer controversies South Australia mostly sided with the House of Lords. *British Transport Commission* v. *Gourley*[235] was dutifully followed; and (in *Bagshaw v. Taylor*)[236] *Searle* v. *Wallbank*[237] led Bray C.J. to his most startling claim that House of Lords cases "bind".

225. (1971) 1 S.A.S.R. 219, 273-282 (Wells J.), 228-229 (Bray C.J.).
226. (1844) 11 Cl. F. 85, 8 E.R. 1034. See n.47 *supra*.
227. (1974) 9 S.A.S.R. 163, 220.
228. *Id.*, 219 *Cf. id.*, 232, noting that recent cases in the House of Lords and the Privy Council made it clear that English and Australian courts "are not encouraged to review" *Sussex Peerage*. The claim that it is "binding" may only be shorthand for these more specific and more contemporaneous claims; or it may mean only that *Sussex Peerage* has merged into wider currents of common law development.
229. *Browne* v. *Dunn* (1894) 6 The Reports 67; so used by Wells J. in *Reid* v. *Kerry* (1974) 9 S.A.S.R. 367, 373.
230. *Pollard* v. *Ensor* [1969] S.A.S.R. 57, 61, relying on *The Macgregor* [1943] A.C. 197 and *The Boy Andrew* [1948] A.C. 140, and arguing that *Pennington* v. *Norris* (1956) 96 C.L.R. 10, 16, had adopted them into Australian law.
231. *Grantham* v. *S.A.* (1975) 12 S.A.S.R. 74, 87-88 (Bray C.J.), 92 (Zelling J.), 97 (Jacobs J.). The new case was *The Konigin Juliana* [1975] Ll. R. 111.
232. [1942] A.C. 206.
233. Bray C.J. (sitting alone) in *Australian Telecommunications Commission* v. *Krieg Enterprises Pty. Ltd.* (1975) 14 S.A.S.R. 303, 309.
234. *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 76-77.
235. [1956] A.C. 185; see the cases in n.274 *infra*. *Sager* v. *Morten & Morrison* (1973). 5 S.A.S.R. 143, 177-178, is a rare instance of its being distinguished.
236. (1978) 18 S.A.S.R. 564. See text at nn. 14 and 103-107 *supra*.
237. [1947] A.C. 341. See Nichols, "Common Law Liability for Straying Stock—An Inter-State Divergence", (1978) 52 *A.L.J.* 485; Watterson, "Recent Australian

Before *Bagshaw* v. *Taylor* judges in four of the other five States had departed from *Searle* v. *Wallbank;* but only Campbell J. in Tasmania[238] and Samuels J.A. in New South Wales[239] had said explicitly that House of Lords decisions cannot "bind". The three Queensland judges in *Stevens* v. *Nudd*[240] had presumably agreed; so perhaps in a technical sense had Mahoney J.A. in New South Wales.[241] But Hutley J.A. in that State[242] and all three Western Australian judges in *Thomson* v. *Nix*[243] had averred or assumed that House of Lords cases do in principle bind. And in *Brisbane* v.*Cross*[244] a Full Court in Victoria followed *Searle* v. *Wallbank* on grounds giving new ammunition to both sides. Young C.J. held that State courts must "unquestionably" follow the House of Lords; but sandwiched this between a concession that "technically" it cannot bind them, and concessions (quoting Windeyer J. in *Skelton* v. *Collins*)[245] to "the creative element in the work of courts" and the need to reconcile a "common heritage" with "development of differing doctrines". McInerney J. explored local laws and practices as to fencing since colonial times, and amply proved "relevant differentiating local circumstances"; but then seemed to say he had done no such thing. The explanation is crucial.

Young C.J., in demanding obedience to the House of Lords, had made an exception for any decision "not part of the law of Victoria".[246] This may be merely circular: a House of Lords decision is part of the law of the Australian States unless it is not. But it may mean that such a decision will not be followed (1) if it has common law sources which (at the date of reception) were "unsuitable" to colonial needs, and thus never received; or (2) if it is distinguishable (at the date of our own response) by "relevant

237. *Cont.*
Developments in the Rule in *Searle* v. *Wallbank*", (1979) A.C.L.D. DT1. The High Court's espousal of *Searle* v. *Wallbank* in *State Government Insurance Commission* v. *Trigwell* (1979) 26 A.L.R. 67, mainly for reasons given by Bray C.J. is of decidedly double-edged import as to the pathfinding role of State Courts.

238. *Jones* v. *McIntyre* [1973] Tas. L.R. 1.

239. *Kelly* v. *Sweeney* [1975] 2 N.S.W.L.R. 720, 730-733, 735-736.

240. [1978] Qd. R. 96 (decided 16 December, 1977, on the last day of argument in *Bagshaw* v. *Taylor*). Andrews and Campbell JJ. accepted the views of Hutley and Samuels JJ.A. in *Kelly* v. *Sweeney*—indicating their willingness to live with either, but preferring "the surgical approach" of the latter. *Id.*, 102-104. Douglas J. (at 97) disarmingly begged the question: *Searle* v. *Wallbank* should not be "considered", since the facts disclosed "a simple case of negligence"!

241. [1975] 2 N.S.W.L.R. 720, 738-740: while a House of Lords case *could* be rejected, this should as a matter of sound Australian practice be left to the High Court.

242. Id., 724, 726-729. He did not follow *Searle* v. *Wallbank*, but only because he confined it to a *ratio decidendi* which clearly did not extend to modern freeway conditions and was probably limited to the simple rustic conditions "on country roads and in market towns". See Lord du Parcq in *Searle* v. *Wallbank* [1947] A.C. 341, 361.

243. [1976] W.A.R. 141. They did not follow *Searle* v. *Wallbank* because of "relevant differentiating local conditions": *i.e.*, distinctive Australian traditions and social expectations with regard to fencing. See n.189 *supra.*

244. [1978] V.R. 49, 51-53 (Young C.J.), 57-61 (McInerney J.). Sangster J., to whom *Bagshaw* v. *Taylor* first came on appeal, thought that this gave "less than full weight to the concept of the common law—not as dead but as living"; and that the interstate chaos had left "no authority binding" as to the position in S.A. He thus felt free to reject *Searle* v. *Wallbank*. See (1978) 18 S.A.S.R. 564, 569.

245. (1966) 115 C.L.R. 94, 134-135.

246. [1978] V.R. 49, 51, 53. Despite inconclusive comments on *Thomson* v. *Nix* in *State Government Insurance Commission* v. *Trigwell* (1979) 26 A.L.R. 67, 73, 80, the conflation and reductionism here traced to *Brisbane* v. *Cross* and *Bagshaw* v. *Taylor* taint *Trigwell* as well. At least *Trigwell* does not suggest that *Searle* v. Wallbank is "binding"; but see Mason J. at 76 ("greater freedom" for the High Court).

differentiating local circumstances".[247] What happened was that a formula receptive to both tests served first to conflate the two, and then, by this conflation, to reduce the second to the first. One test seeks antiquarian study of conditions at the date of reception; one seeks contemporary study of conditions *now*. On one test a House of Lords case *will* apply unless we can show affirmatively [248] that its roots were "unsuitable"; on the other it *will not* (or need not) apply if comparative English and local contexts show any relevant difference. *Thomson* v. *Nix* correctly used the second test to show that *Searle* v. *Wallbank* did not apply in Western Australia; *Brisbane* v. *Cross* correctly used the first test to show that it applied in Victoria.

In *Bagshaw* v. *Taylor* Bray C.J. used only the first test: "unsuitability" at the date of reception. It "may seem curious" to cast "a rule laid down in 1947" back to 1836; but their Lordships had only "declared what the common law had always been". The *seeds* of *Searle* v. *Wallbank* were received into South Australia; and given a "conclusion that the rule was applicable in South Australia in 1836", the question "almost answers itself". Despite recent High Court initiatives, "I do not think that we can or should assume a similar liberty". He quoted the "convincing" judgment of Young C.J. with approval, including his view that a House of Lords case "is not technically binding". But he went on to differ from this. Young C.J. had invoked the dicta of Barwick C.J. in *Murray-More*,[249] and had argued that the enjoinder of loyalty to the Court of Appeal applied *a fortiori* to the House of Lords. Bray C.J. gave the *Murray-More* dicta *less* weight as to the Court of Appeal, but *more* weight as to the House of Lords. The court could properly depart from Court of Appeal cases "if it thinks that they are wrong, but I do not think the same is true of decisions of the House of Lords". The relevant enjoinder for him was still that of the Privy Council in *Robins* v. *National Trust*,[250] that no "Colonial Court" could differ from the House of Lords.[251]

His view is no longer tenable. *Robins* and *Trimble* v. *Hill*[252] assume a colonial and imperial background. Without it those cases are politically

247. Indeed, it may also mean that a decision will not be followed (3) if (at some intermediate date) there has grown up in Australia a distinctive legal development of settled rules and practices, into which a new House of Lords pronouncement cannot readily be absorbed; or (4) if Australian judges, on their own view of common law principles, think that the House of Lords is "wrong." Young C.J. evidently did not intend his formula to cover (4); but why should it not do so? He also did not seem advertent to (3), though it was crucial to the position of Hutley J.A. in *Kelly* v. *Sweeney*. See [1975] 2 N.S.W.L.R. 720, 725-726, with special reference to the divergent views of exemplary damages in *Rookes* v. *Barnard* [1964] A.C. 1129 and *Uren* v. *John Fairfax & Sons Ltd.* (1966) 117 C.L.R. 118.

248. "Unsuitability" is not made out by showing a lack of good policy reasons for adopting the rule, nor even by showing good policy reasons for *not* adopting it. Nor will inappropriateness or incongruity suffice. The rule will be applied unless it is shown that (logically or physically) it *cannot* be applied. See *Delohery* v. *Permanent Trustee Co. of N.S.W.* (1904) 1 C.L.R. 283, 310-311.

249. [1978] V.R. 49, 51-52. See text at nn. 104-107 *supra*.

250. [1927] A.C. 515, 519.

251. (1978) 18 S.A.S.R. 564, 574, 577-578. Mitchell J. at 587 set all this in the context of the explicit statement of Barwick C.J. in *Favelle Mort Ltd.* v. *Murray* (1976) 8 A.L.R. 649, 658, that "outside the area of binding precedent, there is an area where comity or respect for the high standing of a court outside that juristic unit dictates that the views of such a court in general be accepted", unless there are "sufficient reasons" for departing from a clearly "erroneous" case—and that "respect" for the House of Lords is a prime example of this.

252. [1879] 5 App. Cas. 342. See Castles, *op. cit.* (n.148 *supra*), 140. And see Samuels J.A. in *Kelly* v. *Sweeney* [1975] 2 N.S.W.L.R. 720, 735, citing *Trimble* v. *Hill* and *Robins* v. *National Trust* but adding succinctly: "All that is now changed."

unreal and legally unsound. If the Privy Council is to be our guide, they must be seen as overruled by *Australian Consolidated Press Ltd.* v. *Uren.*[253] That case dealt mainly with High Court liberation; but its changes did not stop at that Court. What it approved despite *Rookes* v. *Barnard*[254] was "the law as it has been settled in Australia": a law evolved by decisions and practices in the Australian *States. Rookes* v. *Barnard* used the language of reform, *Searle* v. *Wallbank* that of antiquarianism. But neither is binding save insofar as it soundly develops common law principles. If State Courts could develop those principles differently from the House of Lords as to exemplary damages, they could equally do so as to animals on the highway.

In criminal law, too, Bray C.J. urged loyalty to the House of Lords even if it seemed to be wrong. In *R.* v. *Collingridge*[255] he took *Haughton* v. *Smith*[256] "as binding on us and I make it my starting point"; Bright and Zelling JJ. made it neither a starting point nor a last word.[257] Concern with fair trial of multiple charges inevitably collided with precedent. An information may join two counts if they are "part of a series of offences"; but can two be a "series"? Zelling J. said not, differing from the English Court of Appeal;[258] and so far his brethren agreed. But the House of Lords had upheld the Court of Appeal. Bray C.J. thought that "we should follow the decision of the House of Lords", and Wells J. put it more strongly: "I agree with the Chief Justice that we are bound by the House of Lords."[259]

But only decisions are binding, not dicta. Faced in *R.* v. *Rigney*[260] by two House of Lords denials of a "blanket rule" against mutual bootstrap corroboration by witnesses in a criminal trial, Bray C.J. thought "we must accept that ruling" but added that it had rejected *only* the "blanket rule", leaving intact the rule against mutual corroboration by *accomplices.* Faced also in *Rigney* by their Lordships' narrow reading of "accomplice" in *Davies* v. *Director of Public Prosecutions,*[261] he preferred a broader view; but the issue was "concluded by the authority" of *Davies,* which "binds this Court". Yet its dicta did not. The jury warning against reliance on uncorroborated accomplice evidence was there said to apply "only to witnesses for the prosecution", but Bray C.J. now applied it to evidence by a co-accused in his defence. On this point *Davies* was not "a compelling authority": on "close examination" their Lordships intended "no authoritative pronouncement", but were "expressly reserving" the point. He

253. [1969] 1 A.C. 590. There are of course three possible *rationes* of *Uren.* One is that the law of damages *had already* been settled in Australia, so that the Privy Council was sanctioning divergences *prior to,* but not *subsequent to,* a House of Lord pronouncement. In *Kelly* v. *Sweeney* Hutley J.A. apparently read the case in this sense: see n.247 *supra.* A second is that divergence is sanctioned in any "sphere of the law where its policy calls for decision and where . . . policy in a particular country is fashioned . . . largely by judicial opinion": [1969] 1 A.C. 590, 644. This implies nothing either way as to relative temporal priorities. A third is that while common development is desirable for "those parts of the Commonwealth (or indeed of the English speaking world)" with a common legal foundation, "development may gain its impetus from any one and not from one only of those parts". *Id.,* 641.
254. [1964] A.C. 1129.
255. (1976) 16 S.A.S.R. 117, 118-119.
256. [1975] A.C. 476; *cf. Director of Public Prosecutions* v. *Nock* [1978] A.C. 979.
257. (1976) 16 S.A.S.R. 117, 128, 130 *per* Bright J.; *id.,* 140 *per* Zelling J.
258. *R.* v. *Anderson* (1973) 5 S.A.S.R. 256, 273-275, rejecting *R.* v. *Kray* [1970] 1 Q.B. 125—and similarly rejecting *R.* v. *Johansen* [1917] V.L.R. 584.
259. *Id.* 265 *per* Bray C.J. and 276 *per* Wells J.
260. (1975) 12 S.A.S.R. 30, 36.
261. [1954] A.C. 378.

therefore followed the Victorian Full Court, which in *R.* v. *Teitler*[262] had similarly departed from *Davies*.

He could not "quite see the relevance" of one ground of departure in *Teitler:* that the matter was one of "practice". *Davies* had said that the jury warning, "although a rule of practice, now has the force of a rule of law";[263] Bray C.J. added that a rule of practice sanctioned (if disobeyed) by "the risk of a successful appeal" was "only semantically distinguishable from a rule of law".[264] If it mattered, South Australian practice seemed more like the English than the Victorian. The puzzles here are profound. But the point in *Teitler* is not that the Victorian and English practice *differ*, but that each jurisdiction must evolve *its own*. Whatever ties of precedent may link jurisdictions as to law can therefore not operate as to practice, which in any event is inherently not amenable to control by precedent techniques. Indeed, Hogarth J. in *R.* v. *Rigney* pointed to one reason for this. Like Jacobs J. he held that *Davies'* narrow sense of "accomplice" made rules about evidence by a co-accused inapplicable in *Rigney;* he therefore had no need to respond to *Teitler* either way. But he preferred *not* to follow it, for he "would deprecate any further development of the law along the lines of hard and fast rules". If the law "has already crystallized, so be it"; if not, trial judges should have a "duty" to exercise a "discretion".[265]

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262. [1959] V.R. 321.

263. [1954] A.C. 378, 399 (Lord Simonds). At 395-398 his Lordship stressed the "customary" origins of the "practice" of warning juries against conviction without corroboration; the earlier emphasis on "the discretionary nature of any directions given by the judge"; and the clear consensus in "the whole current of the decisions" until this century that the rule was "at most a salutary and usual practice, to be followed or not, at the judge's discretion". *Id.*, 396. But he then contrasted one line of modern decisions continuing "the older . . . 'discretionary' view", with another line of cases supporting "the 'peremptory' school of thought". Bridging the two were assertions that the warning was "a practice which deserves all the reverence of law" (*R.* v. *Farler* (1837) 8 Car. & P. 106, 107, 173 E.R. 418, 419) and that "this rule of practice has become virtually equivalent to a rule of law" (*R.* v. *Baskerville* [1916] 2 K.B. 658, 663). In the end he thought cases like *Baskerville*, "laying down the stricter rule, have the preponderant weight of authority on their side, and should be adopted".

264. (1975) 12 S.A.S.R. 30, 38; *cf.* Hogarth J., *id.*, 54, citing similar criticism of *R.* v. *Teitler* by Forsyth, Note (1960) *2 Melb. U.L.R.* 418, 420. "The difference between a rule of practice and a rule of law", says Forsyth, can be tested only by "the effect of non-compliance . . . If the infringement automatically invalidates the decision, it seems impossible to maintain that the rule is not one of law". But suppose the High Court were to lay down for Australia that the rule as to warnings is a mere "discretionary" rule of "practice". That would still leave it open to State Supreme Courts, while accepting the High Court precedent, nevertheless to adopt a "practice" of automatic invalidation in cases of non-compliance. (This is only so say that a "practice" may be either a uniform or a variable one). In imposing and policing such a uniform practice for its trial judges, the Full Court would not be relying on its hierarchical power to formulate "precedent", but on its inherent and supervisory power to formulate "practice". None of this could operate at the level of "law" or precedent", since at that level the Full Court would remain bound by the High Court ruling that the matter was discretionary only. Thus "automatic invalidation" will not do as a test, since this might follow either under "precedent" or under "practice".

265. (1975) 12 S.A.S.R. 30, 53-54. The notion of a "duty" to exercise a "discretion" sheds further light on precedent and practice. The *existence* of the duty can be ordained by precedent; what happens in its *exercise* cannot. It is in this sense that "precedent" is referred to below as a meta-language for "practice". To the same effect, Hogarth J. relied on *R.* v. *Stannard* [1965] 2 Q.B. 1, 14, where Winn J. noted, but did not enforce, the rule relating to evidence by a co-accused—on the ground that "the rule, if it be a rule, . . . is no more than a rule of practice", and "certainly is not a rule of law".

A third side of *Rigney* adds to the puzzle. One man was charged with buggery, and two "accomplices" with indecent assault, after one event. Was it proper to use a single indictment? Bray C.J., though disliking joinder of counts, led the Court in finding no legal objection. The English Court of Criminal Appeal had found none in *R.* v. *Assim;*[266] and this (he said) had "received the imprimatur of the House of Lords".[267] Yet only Lord Morris had given any imprimatur to *Assim;* and that only for a dictum that joinder is a matter of "practice", within a court's "inherent power both to formulate its own rules and to vary them" to fit "experience" and "justice".[268] To follow *this* enjoinder would have led Bray C.J. to the opposite result.

The unique prestige of the House of Lords has often encouraged its members to overt judicial lawmaking based frankly on "policy", which offers invaluable challenge and leadership to all British countries. But stimulus can be reciprocal. Hogarth J. has pointed proudly to their Lordships' use, in *Director of Public Prosecutions* v. *Lynch,*[269] of a dissent by Bray C.J.; and cases of South Australian views being vindicated but *not* cited[270] also suggest room for cross-fertilization. As reciprocal citation increases, so will the role of Australian State judges in common law pioneering. Their first step must be recognition that the House of Lords does not bind them.

6. The High Court of Australia

The myth that House of Lords cases "bind" taints even relations with the High Court. In theory, if House of Lords and High Court conflict South Australia follows the latter; if both have spoken without actual conflict, South Australia takes its cue as to the House of Lords from the High Court. For the English Court of Appeal such theories work well enough;[271] but for the House of Lords a policy of awaiting *clear* High Court guidance cuts both ways. After *O'Brien* v. *McKean*[272] had undermined *British Transport Commission* v. *Gourley,*[273] South Australia not only clung to *Gourley* but added the converse or corollary rule in *Taylor* v. *O'Connor:*[274]

266. [1966] 2 Q.B. 249.
267. (1975) 12 S.A.S.R. 30, 46.
268. [1966] 2 Q.B. 249, 258; see [1973] A.C. 584, 592.
269. [1975] A.C. 653, referring to *R.* v. *Brown & Morley* [1968] S.A.S.R. 467. See n.181 *supra.* Hogarth J. was speaking on the occasion of the Chief Justice's retirement; see n.10 *supra.* He singled out the views of Lord Morris, but might also have noted those of Lord Wilberforce at 682-683. By contrast Lord Kilbrandon (who dissented in *Lynch*) expressed *his* agreement (at 701-702) with Bright and Mitchell JJ.; and Lord Simon of Glaisdale (at 695) sarcastically dismissed the "dissenting judgment of Bray C.J." Lord Edmund-Davies, at 714-715, took a middle view, quoting Bray C.J. at length in order to "concur", but arguing that his use of *Sephakela* v. *R.* was "misplaced". See nn. 180-181 *supra.*
270. *R.* v. *Brown* (1975) 10 S.A.S.R. 139 was too close in time to be used in *Director of Public Prosecutions* v. *Morgan* [1976] A.C. 182, but strikingly prefigured it. See nn. 55-56 *supra.* And *cf. Ulowski* v. *Miller* [1968] S.A.S.R. 277, 282 with *Birkett James* [1978] A.C. 297, 324.
271. See *Orchard* v. *Orchard* (1972) 3 S.A.S.R. 89, 96. In *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289, the High Court had followed *Earnshaw* v. *Earnshaw* [1939] 2 All E.R. 698 in preference to its own previous view in *Crown Solicitor (S.A.)* v. *Gilbert* (1937) 59 C.L.R. 322. But in the wake of *Skelton* v. *Collins* (1966) 115 C.L.R. 94, it was argued in *Orchard* that the striving for uniformity reflected in *Waghorn* had now been discarded, and that the Supreme Court should return to *Gilbert.* Bray C.J. found this "completely untenable": "We are bound by the decisions of the High Court, including any decision of that Court that a previous decision by it is not to be followed. If *Waghorn's* case is to be dethroned and *Gilbert's* case restored, it is for the High Court to do it, not for us."
272. (1969) 118 C.L.R. 540.
273. [1956] A.C. 185.
274. [1971] A.C. 115.

not clad in High Court approval, and decided only after *O'Brien* had sown doubts. High Court and House of Lords were "not yet" in conflict; "our duty is to accept the view of the House of Lords until the High Court tells us not to".[275] If direct conflict arose, responses ran to ambivalence and (if possible) evasion.[276]

Often the path of duty was clear. Zelling J. thought an older South Australian case tending towards strict liability for escape of fire "cannot stand" with later High Court cases, "which must be treated as the source of the law so far as this Court is concerned".[277] Despite the "acerbity" of a 3:2 High Court division, Bright J. followed the majority.[278] For Bray C.J., *Letang* v. *Cooper*[279] "cannot stand" with *Williams* v. *Milotin*.[280] "The High Court has decided to the contrary"; that decision "binds us". It was "immaterial" that he agreed. *Fowler* v. *Lanning*,[281] requiring plaintiffs to prove intention or negligence in *all* trespass cases, was similarly excluded by the single-judge decision of Windeyer J. in *McHale* v. *Watson*;[282] but for highway cases such a rule must reluctantly be accepted. English dicta to that effect could be distinguished; but not those in the High Court.[283]

Reluctant acceptance is the real test of a precedent system. In *R.* v. *Reynhoudt*[284] a 3:2 High Court majority held that a charge of assaulting police did *not* require knowledge that the victim was a policeman. Applying this to "resisting" police, Wells J. invoked a "historical background" of "precedent after precedent". Bray C.J. wistfully eyed his own view of *mens*

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275. *Sunderland* v. *Macco-Palmer* (1972) 3 S.A.S.R. 314, 322 (Bray C.J.). See also *Hamlyn* v. *Hann* [1967] S.A.S.R. 387, 401, 402, 407; *Bitolas* v. *Tsakonakas* (1972) 2 S.A.S.R. 416, 418; *McCoy* v. *Johnson* (1972) 3 S.A.S.R. 187, 188; and *Hayman* v. *Forbes* (1975) 13 S.A.S.R. 225, 228, treating *Petroleum & Chemical Corporation (Australia) Ltd.* v. *Morris* (1973) 1 A.L.R. 269, 271, as still not supplying the awaited guidance. Presumably *Atlas Tires Ltd.* v. *Briers* (1978) 21 A.L.R. 129 has now done so, despite continuing doubt as to the High Court's final view.

276. See *R.* v. *Garrett* (1977) 15 S.A.S.R. 501, on "issue estoppel", then apparently secured by *Mraz* v. *R. (No. 2)* (1956) 96 C.L.R. 62 for Australian criminal law, but rejected by *Director of Public Prosecutions* v. *Humphrys* [1977] A.C. 1 for English criminal law. See now *Garrett* v. *R.* (1977) 18 A.L.R. 237; *R.* v. *Storey* (1978) 22 A.L.R. 47. Zelling J. in *Garrett* (at 523) made no attempt to resolve the conflict between *Humphrys* and *Mraz*; for him "issue estoppel" was irrelevant anyhow. Walters J. (at 516-518) based its irrelevance on dicta in *Humphrys*; he was "bound to accept" the "authority" of *Mraz*, but had "the temerity" to find a "positive attractiveness" in *Humphrys*. Bray C.J. (at 507-508) felt "bound" by *Mraz* to hold "that there is such a thing [as issue estoppel] in Australia"; but in light of *Humphrys* felt real doubt as to what it can now "mean in Australia". It was not "an appropriate occasion, nor probably is this an appropriate Court" for "exegetical analysis" of *Mraz*. He continued to apply "what I shall continue to call issue estoppel" by assuming that "at the very least" it means "what the Privy Council . . . said" in *Sambasivam* v. *Public Prosecutor* [1950] A.C. 458.

277. *Smith* v. *Badenoch* [1970] S.A.S.R. 9, 12, following *Wise Bros. Pty. Ltd.* v. *Commissioner for Railways (N.S.W.)* (1948) 75 C.L.R. 59 rather than *Young* v. *Tilley* [1913] S.A.S.R. 87.

278. *Hayes* v. *Commissioner of Succession Duties* [1970] S.A.S.R. 479, 485, on *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co.* (1915) 21 C.L.R. 69.

279. [1965] 1 Q.B. 232, as discussed in *Venning* v. *Chin* (1974) 10 S.A.S.R. 299, 308.

280. (1957) 97 C.L.R. 465, 474. See text at nn. 18-19 *supra*.

281. [1959] 1 Q.B. 426.

282. (1964) 111 C.L.R. 394. Although this was only a single-judge view, the larger High Court bench on appeal had "certainly expressed no dissent from the remarks of Windeyer J. about the onus of proof". See (1974) 10 S.A.S.R. 299, 312.

283. *Id.*, 315, referring to *Nickells* v. *Melbourne Corporation* (1938) 59 C.L.R. 219, 225-226; *Williams* v. *Milotin* (1957) 97 C.L.R. 465, 474. Yet, as Hogarth J. had pointed out at first instance, the relevant observations in these cases were only obiter; there was "no case where the question is decided as part of the *ratio decidendi*". *Venning* v. *Chin* (1974) 8 S.A.S.R. 397, 410.

284. (1962) 107 C.L.R. 381, as applied in *Leonard* v. *Morris* (1975) 10 S.A.S.R. 528.

rea in *R.* v. *Brown*,[285] voiced "regret" that the *Reynhoudt* dissents did not prevail; and noted that Taylor J. in the majority had also done this. But the case was "conclusive". Wish as one might, "the law has taken another course" and "we are bound by it".[286] Charges of police brutality in *R.* v. *Pfitzner*[287] not only put the accused at risk of cross-examination on prior convictions but (for Wells and Sangster JJ.) ensured that the trial judge's discretion in the matter must go against him. On the first point Bray C.J. agreed that he was bound by the 3:2 High Court decision in *Curwood* v. *R.*[288] ("which I may be permitted to regret"); but he then seized on *Curwood* as showing also that the discretion must almost always favour the accused.

If statutory amendments in 1963 were spurred by a Western Australian case, then it might override an older South Australian decision; but for Bright J. it could not override High Court approval thereof.[289] Zelling J. doubted that a widow's damages for bereavement *should* be reduced by revived capacity to marry, but felt "bound by the authority of the High Court" to reduce them.[290] Wells J. [291] followed a High Court majority though clearly preferring the dissent. Dissent in the High Court did not matter; nor the size of the majority (nor of the bench); nor the lack of any hierarchical nexus with South Australia.[292] Single-judge decisions were binding.[293]

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285. (1975) 10 S.A.S.R. 139. See text at nn. 54-56 *supra*.
286. (1975) 10 S.A.S.R., 539-542 (Wells J.), 529-530 (Bray C. J.) The latter had similar regrets in *R.* v. *Collins* (1976) 12 S.A.S.R. 501, 508, as to *R.* v. *Lee* (1950) 82 C.L.R. 133 and *Wendo* v. *R.* (1963) 109 C.L.R 559, which put a heavy onus on the accused to show why voluntary admissions to police should not be admitted in evidence. King J., at 516-517, followed *Lee* and *Wendo* routinely.
287. (1976) 15 S.A.S.R. 171, 198 (Wells J.), 213-214 (Sangster J.), 180 (Bray C.J.).
288. (1944) 69 C.L.R. 561—treating allegations of police brutality as imputations attracting the discretion, but not allegations of police dishonesty, since this is logically entailed in denial of the charge. Bray C.J. thought this a "curious contrast". "It is safer for the police to procure a confession by violence than to invent a non-existent confession", and this was neither "desirable" nor "creditable to the law". But *dis aliter visum*.
289. *Hayes* v. *Commissioner of Succession Duties* [1970] S.A.S.R. 479, 496, rejecting *French* v. *Commissioner of Probate Duties (W.A.)* [1961] W.A.R. 196 (Hale J.) in favour of continued adherence to *Elder's Trustee & Executor Co. Ltd.* v. *Commissioner of Succession Duty (S.A.)* ("*Barr Smith's* case") [1945] S.A.S.R. 34, on the ground that the latter had been approved in *Elder's Trustee & Executor Co. Ltd.* v. *Federal Commissioner of Taxation* ("*Morphett's* case") (1967) 118 C.L.R. 331. There are wheels within wheels here. *Barr Smith* had depended on following the earlier High Court decision in *Rosenthal* v. *Rosenthal* (1910) 11 C.L.R. 87; *Morphett* had approved and reaffirmed *Rosenthal* as well as *Barr Smith*. But the reason why Hale J. in the W.A. case did *not* follow *Rosenthal* or *Barr Smith* was that he thought they had been disapproved by the High Court—the former (at least as to overwide language) in *Commissioner of Probate Duties (Vic.)* v. *Mitchell* (1960) 105 C.L.R. 126, 149, the latter (at least by implication) in *Commissioner of Stamp Duties (N.S.W.)* v. *Bradhurst* (1950) 81 C.L.R. 199 and *Commissioner of Stamp Duties (N.S.W.)* v. *Sprague* (1960) 101 C.L.R. 184. The spectacle of State Supreme Court judges scrabbling after oblique indications of Olympian approval or disapproval is rarely an edifying one; see n.303 *infra*.
290. *Public Trustee* v. *Paniens* (1971) 1 S.A.S.R. 297, 300, following the High Court decision in *Carroll* v. *Purcell* (1961) 107 C.L.R. 73, 79.
291. *In re De Vedas, Deceased* [1971] S.A.S.R. 169, 175, following *Congregational Union of N.S.W.* v. *Thistlethwayte* (1952) 87 C.L.R. 375 (Kitto J. dissenting).
292. See, *e.g.*, *R.* v. *Rowland* [1971] S.A.S.R. 392, 394-395, following *Hayes* v. *R.* (1967) 116 C.L.R. 459.
293. *E.g.*, the decision of Taylor J. in *Wilson* v. *McLeay* (1961) 106 C.L.R. 523 was accepted as "binding" by Hogarth J. in *Preston* v. *Mercantile Mutual Insurance Co. Ltd.* [1971] S.A.S.R. 221, 223; and again by Sangster J. (despite his own leaning to a different view) in *Gillespie* v. *Steer* (1973) 6 S.A.S.R. 200, 205.

Conformity to High Court dicta was also sought. When the Court held that estate agents' commission is payable on completion, not on exchange of contracts, Bray C.J. found precedents both ways, but chose the former view in part because the High Court had done so.[294] What Hogarth J. saw as part of a High Court *ratio decidendi*, Bray C.J. saw as obiter; but both agreed that it should be followed.[295] The High Court assertion in *Wendo* v. *R.*,[296] that use of verbal admissions to police requires the prosecution to prove their voluntariness, was "in the strict sense" merely obiter; but it was (said Bray C.J.) "deliberate and considered", and "ought to be followed". Zelling J. agreed: "It is impossible for us to be beyond the decision".

Even when High Court dicta were both indirect and inscrutable, there were earnest efforts to decipher their meaning. The debate between Wallace P. in New South Wales (who thought a court should not approve a corporate scheme or arrangement smacking of tax avoidance), and Bray C.J. in South Australia (who saw no need "to be more revenue-minded than . . . the revenue law") was obscured by whether one State should follow the other; by wehther either should follow English cases on the Variation of Trusts Act, 1958; and above all by whether Wallace P. or Bray C.J. had more faithfully interpreted *obiter dicta* (of no direct relevance) of Isaacs J. in 1912.[297]

Albert Del Fabbro Pty. Ltd. v. *Wilckens & Burnside Pty. Ltd.*[298] saw yet more laborious efforts (with even less to work on) to fathom High Court innuendoes. A sub-contractor may have a statutory lien over moneys payable to his contractor by a client. Does it take effect on creation; on registration; on notice to the client; or at some stage (and if so which) in the actual progress of work? For Queensland, the High Court had held that the crucial step "at the latest" is notice to the client;[299] and (to show that such liens are effective) it cited a string of Australasian cases including the South Australian *Miller's Lime* case.[300] Did *Miller's Lime* thus receive High Court approval? And if so, for what? The *Miller's Lime* majority saw registration as crucial; how was this compatible with the High Court view that what matters ("at the latest") is notice? Richards J., dissenting in *Miller's Lime*, held to his own view in *Pitt Ltd.* v. *Town of Glenelg*[301] that the lien attaches once work is done; this case too appeared without comment in the High Court string of citations. Finally Chamberlain J. found tacit *approval* of *Miller's Lime;* Zelling J. found tacit *overruling* of

294. *R. J. Mabarrack Pty. Ltd.* v. *King* (1971) 1 S.A.S.R. 313, 319, following dicta in *Anderson* v. *Densley* (1953) 90 C.L.R. 460, 467.
295. *Smith Patrick Stevedoring Pty. Ltd.* v. *Pearson* (1976) 13 S.A.S.R. 478, 480, 485 —responding to *Mermingis* v. *Perry Engineering Co. Ltd.* (1964) 112 C.L.R. 468.
296. (1963) 109 C.L.R. 559, 562, 572, followed in *R.* v. *Stafford* (1976) 13 S.A.S.R. 392, 393; and see Bray C.J. in *R.* v. *Matheson* [1969] S.A.S.R. 53, 56.
297. See respectively Wallace P. in *Bridges* v. *Hershon* [1968] 3 N.S.W.R. 47; Bray C.J. in *In re A. & C. Constructions Pty. Ltd.* [1970] S.A.S.R. 565, 567; and Isaacs J. in *Isles* v. *Daily Mail Newspaper Ltd.* (1912) 14 C.L.R. 193, 204, 205.
298. [1971] S.A.S.R. 121.
299. In *Stapleton* v. *F. T. S. O'Donnell, Griffin & Co. (Queensland) Pty. Ltd.* (1961) 108 C.L.R. 106, 114.
300. *Miller's Lime Ltd.* v. *Royal Agricultural & Horticultural Society of S.A.* [1936] S.A.S.R. 306.
301. [1927] S.A.S.R. 501.

it;[302] and Bray C.J., like Bright J. at first instance, bypassed the whole morass.[303]

Even High Court dissents were combed for clues; Bray C.J. reconciled older single-judge cases on resumption of land by adopting "a general principle" from the *dissent* of Williams J. in *Grace Bros. Ltd.* v. *Commonwealth.*[304] Judges strove to satisfy not only High Court majority views but dissenting views as well. In *Australian Workers' Union* v. *Bowen (No. 2)*[305] the majority held that a union officer basing expulsions on his own allegations had violated natural justice; the dissenters argued that *actual* bias must be shown, and that union rules envisaging his double role had excluded natural justice. Applying this,[306] Mitchell J. followed the majority, but took care also to find *actual* bias and nothing in the rules to oust natural justice. *Kemp* v. *Piper,*[307] juggling *Koop* v. *Bebb*[308] with both main views of *Chaplin* v. *Boys,*[309] debated whether the separate judgment of McTiernan J. in *Koop* v. *Bebb* could not also be followed. In *Brownfield* v. *Earle,*[310] a High Court of four unanimous in *result* divided 2:2 as to *reasons.* Since neither ground had a majority, neither could bind as a *ratio decidendi.*[311] Bray C.J. saw no problem. Two judges had taken the "class gift" view; the others had said nothing inconsistent with it, and it should be adopted.

"Firm and definite" statement of a "settled" High Court view must be followed; when the High Court used "less decided terms", one could pick

302. Chamberlain J., ([1971] S.A.S.R. 121, 132-133) argued that the High Court had said of its whole list of cases that "it would require cogent arguments to induce us to reject their authority"; and that while their Honours "were of course not concerned" with the instant point, "at least they gave no indication of detecting" any fallacy in *Miller's Lime.* (But of course they gave no such indication as to *Pitt Ltd.* v. *Glenelg* either). Zelling J. *id.*, 137-138 ignored the string of citations; for him, the substantive High Court discussion made it "clear" that *Miller's Lime* "cannot stand". As "inconsistent" with the High Court view, it "must no longer be regarded as an authority".

303. The statutory formalities had been undertaken by the sub-contractor only *after* the contractor had gone into receivership, and hence *after* a bank mortgage by way of floating charge had "crystallized". Chamberlain and Zelling JJ. assumed that the sub-contractor could claim priority as against the bank only if the lien had become effective *before* the receivership; hence the concern with chronology. For Bray C.J. the form of floating charge which the bank had used (and hence the receivership) had done nothing to affect the legal *identity* of the contractor: the relationship between client, contractor and sub-contractor was thus the same *before and after* appointment of the receiver, and the lien was effective whenever "perfected" (*id.*, 126-127). He linked this with his own resolve (*id.*, 128) to give effect to the "absolute" nature of workmen's liens as a "statutory right"; with emphasis (*id.*, 125) that although the sub-contractor was a corporate entity, an adverse outcome would affect individual workmen too; and with obiter doubts (*id.*, 129-130) of what was in any event (he said) only obiter in *Miller's Lime.* In this context his sidestepping of the precedent tangle was clearly appropriate. To say that Supreme Court judges are bound by the High Court does not condemn them, whenever one of their own decisions is mentioned in the High Court, to strain anxiously after tenuous clues to approval or disfavour.

304. (1946) 72 C.L.R. 269, 301; followed in *Arkaba Holdings Ltd.* v. *Commissioner of Highways* [1970] S.A.S.R. 94, 99.

305. (1948) 77 C.L.R. 601.

306. *Fagan* v. *National Coursing Association of S.A. Inc.* (1975) 11 S.A.S.R. 451, 457 (holding that a greyhound racing steward who brought allegations before a tribunal and then initially assumed chairmanship of its proceedings had violated natural justice and so vitiated the resulting penalties).

307. [1971] S.A.S.R. 25.

308. (1951) 84 C.L.R. 629. The argument was that the reasoning of McTiernan J., though yielding the same result as the "majority" in that case, would yield a different result in *Kemp* v. *Piper.*

309. [1971] A.C. 356.

310. (1914) 17 C.L.R. 615; cited in *In re Mitchell, Deceased* (1971) 2 S.A.S.R. 312.

311. See Cross, *Precedent in English Law* (2 ed., 1968), 98 (omitted in the 1977 ed.).

and choose among dicta. So saying, in *Kain & Shelton Pty. Ltd.* v. *McDonald*,[312] Bray C.J. led the Court in following *Brown* v. *Green*[313] for its actual decision (refusing to import *mens rea* into a statutory offence), while keeping open all the issues of principle that the High Court had there seemed to foreclose. He began by disclaiming any desire to "photograph" definitively the state of "the legal kaleidoscope". To reconcile the cases, let alone dicta, was "impossible"; he was "anxious to say no more than is necessary". Yet he went on to assert, as "the present law of Australia", a presumption of *mens rea* as "an essential ingredient in every offence". *Brown* v. *Green* had denied this presumption for areas of "economic and social regulation"; but Fullagar J., a party to that case, had later[314] taken a milder view—as had Barwick C.J. and Windeyer J. in *Ianella* v. *French*,[315] and the Privy Council in *Lim Chin Aik* v. *R.*[316] Besides reaffirming this presumption, Bray C.J. gave new life to the Australian *Proudman* v. *Dayman*[317] defence and the South Australian *Norcock* v. *Bowey*[318] defence (the latter by invoking *Maher* v. *Musson*[319] in the High Court). After all this to "follow" *Brown* v. *Green* was clearly to give the result to one side and the reasoning to the other.

Mayer v. *Marchant*[320] made *rationes decidendi* of these *obiter dicta.* The majority upheld a *Norcock* v. *Bowey* defence of "unauthorized act of a stranger"; Hogarth J. agreed in principle, but found no unauthorized act. Bray C.J. traced this defence back to dicta of Griffith C.J.[321] Zelling J. explored the role of *Maher* v. *Musson:* depending on the facts, he thought it assimilable sometimes to *Norcock* v. *Bowey,* sometimes to *Proudman* v. *Dayman.* Bray C.J. accepted this possibility but added another: that *Maher* v. *Musson* had established yet another independent defence.[322] A *Proudman*

312. (1971) 1 S.A.S.R. 39, 40-41.
313. (1951) 84 C.L.R. 285.
314. By acknowledging that some presumption existed, though still treating it as "at best a very weak presumption". See *Bergin* v. *Stack* (1953) 88 C.L.R. 248.
315. (1968) 119 C.L.R. 84. The fact that they were in dissent was "not germane to the present question". Their dissent endorsed that of Bray C.J. himself in *French* v. *Ianella* [1967] S.A.S.R. 266: see text at nn. 381-387 *infra.*
316. [1963] A.C. 160, 174.
317. (1941) 67 C.L.R. 536 (honest and reasonable mistake of fact). As to this, he argued that *Duncan* v. *Ellis* (1916) 21 C.L.R. 379 (treating exclusion of *mens rea* as excluding a defence of mistake as well) was superseded by later cases.
318. [1966] S.A.S.R. 250 (offence due to circumstances wholly beyond the defendant's control, at least where these involve the "unauthorized act of a stranger").
319. (1934) 52 C.L.R. 100. He thought that the High Court had here given its imprimatur to a defence virtually indistinguishable from that in *Norcock* v. *Bowey.*
320. (1973) 5 S.A.S.R. 567.
321. *Hardgrave* v. *R.* (1906) 4 C.L.R. 232, 237: see (1973) 5 S.A.S.R. 567, 574.
322. *Id.,* 590 (Zelling J.), 574 (Bray C.J.). On the latter view strict liability can be avoided (1) by the presumption of *mens rea;* (2) by unauthorized act of a stranger *(Norcock* v. *Bowey);* (3) by honest and reasonable mistake *(Proudman* v. *Dayman);* or (4) by honest and reasonable ignorance *(Maher* v. *Musson). Maher* v. *Musson* is thus a paradigm example of what Stone, *Legal System, op. cit. (supra* n.2), 246, 248, calls a "category of concealed multiple reference", merging into multiple "categories of competing reference" (1) as S.A. judges continue to unpack the original multiplicity of meanings, and (2) as the crucial passage in the judgment of Evatt and McTiernan JJ. ((1934) 52 C.L.R. 100, 109) is compared and contrasted with two different passages (at 104, 105) in the judgment of Dixon J. One clearly foreshadows what is now the *Proudman* v. *Dayman* defence; the other seems to envisage a defence of "ignorance". To ask whether the relevant "mistake" or "ignorance" may be of fact, or of mixed fact and law, or of law (as the passage at 105 may imply) is of course to uncover a further nest of concealed multiple references, tending to meaningless reference. The point is that all these interlocking and nested possibilities add cumulatively to the leeways for judicial choice.

v. *Dayman* defence failed on the facts, but with even richer play upon precedent. In *Sweet v. Parsley*[323] the House of Lords had "discovered" *Proudman* v. *Dayman*. How is a State Supreme Court to react when the House of Lords construes the High Court? As Lord Pearce read *Proudman* v. *Dayman*, a defendant pleading honest and reasonable mistake must prove it on a balance of probabilities; as Lord Diplock read it he need only raise a reasonable doubt. The latter was closer to what *Proudman* v. *Dayman* had said, the former to common ideas of what it *meant*. *Woolmington* v. *Director of Public Prosecutions*,[324] with its "golden thread" of prosecution onus, supported Lord Diplock; *Maher* v. *Musson*, putting the onus on the accused, supported Lord Pearce. Perhaps in *Proudman* v. *Dayman* Dixon J. meant to adjust *Maher* v. *Musson* to *Woolmington*: but if so why not say so? Other jurisdictions[325] had followed Lord Diplock—but as between South Australia and the High Court what bearing had that?

For Hogarth J., duty to the High Court prevailed. "In the ordinary course" he would "unhesitatingly follow" the one explicit High Court ruling in *Maher* v. *Musson;* and neither *Woolmington* nor *Sweet* v. *Parsley* swayed him from that course. Lord Diplock's view, and its adoption in the New Zealand Court of Appeal, had "the highest persuasive authority", but were "in conflict" with *Maher* v. *Musson* and also perhaps with what Dixon J. had said in *Proudman* v. *Dayman*. "Until the matter is reconsidered in the High Court, I think it proper to follow *Maher* v. *Musson*." But in this he was alone. For Bray C.J. general acceptance of *Woolmington*, by which "pre-existing ideas" were "greatly modified" or even "abandoned", had displaced *Maher* v. *Musson*. To say so was not *avowedly* to modify High Court views by recourse to the House or Lords, for in *Proudman* v. *Dayman* Dixon J. must be read as "acknowledging" *Woolmington*. Thus, despite their opposite results, both Bray C.J. and Hogarth J. had *formally* followed the High Court. Only Zelling J. felt able to treat *Sweet* v. *Parsley* and its New Zealand and Victorian progeny as "direct authorities" which "correctly state the law" since *Woolmington;* and to deal with the onus of proof without citing High Court cases at all.

As in a chess game, High Court decisions and dicta had progressively been moved into place for optimum tactical pursuit of programmatic goals.[326] The salvaging of some dicta of Bray C.J. in *Liddy* v. *Cobiac*[327] from burial beneath successive reversals was even more adroit. Under s. 47 of the Road Traffic Act, 1961-1974, magistrates may *limit* disqualification from driving for a "trifling" first offence of driving under the influence, but may not otherwise reduce or mitigate penalty "notwithstanding any other Act". Bray C.J. had held that this did not exclude other "merciful" powers under s. 4 of the Offenders Probation Act, 1913-1971. A Full Court majority reversed this view; the High Court restored it. But Bray C.J. had also said

323. [1970] A.C. 132, 158 (Lord Pearce), 164 (Lord Diplock). *In Kain & Shelton* (at 41) Bray C.J. had used a concession by Lord Reid *(id.,* 149) to support a "strict liability" result; but this was disingenuous. Lord Reid's main concern (as for all who spoke) was to reassert a strong presumption *against* strict liability.
324. [1935] A.C. 462.
325. See *Kidd* v. *Reeves* [1972] V.R. 563; *R.* v. *Strawbridge* [1970] N.Z.L.R. 909.
326. (1973) 5 S.A.S.R. 567, 579 (Hogarth J.), 571 (Bray C.J.), 587-588 (Zelling J.). And see *R.* v. *Brown* (1975) 10 S.A.S.R. 139, 147-148, where Bray C.J. (speaking obiter) took pains not "to give any extra authority" to *Kain & Shelton* or *Mayer* v. *Marchant*, but ventured the "present impression" that "the law is settled on this topic in this State in the sense declared by Zelling J. and by myself".
327. [1969] S.A.S.R. 6, 10-12.

that in using their powers "courts should heed" the Road Traffic Act provision as a "declaration of policy", and limit leniency to "rart and exceptional cases". For him this was not such a case. The High Court opted lor leniency. Its *order* restored that of Bray C.J. but this implied no judgment of his "policy" of limited relief; as to that the High Court was silent. Windeyer J. perhaps made two relevant comments, but they pointed opposite ways.[328]

In *Kowald* v. *Hoile (No. 1)*[329] Bright J. resorted to syllogism. The extenuating facts in *Liddy* v. *Cobiac* were not "rare and exceptional"; yet the High Court accepted *those* facts as a basis for relief. It follows that relief is not limited to "exceptional" cases. But the dictum of Bray C.J. still had value "as a warning to magistrates". Zelling J. endorsed this result in *Kowald* v. *Hoile (No. 2),*[330] but clouded the issue by unearthing yet another line in the judgment of Windeyer J., which might after all support Bray C.J. Mitchell J. added a final twist in *Giersch* v. *Pennicott.*[331] she endorsed *Kowald* v. *Hoile (Nos. 1 and 2),* but *began* by quoting the new-found dictum of Windeyer J., and *ended* by seizing on the throwaway line of Bright J. that the earlier dictum could be "read as a warning". This now became "an appropriate warning" which "should be heeded by magistrates".

In *Samuels* v. *Reader's Digest Association Pty. Ltd.,*[332] a High Court majority held that a prosecution under the Trading Stamps Act, 1924-1935, was not unconstitutional, and remitted it to a magistrate. The company was convicted and appealed to Bright J. Intricate High Court characterizations of the charges and of trading stamps were both a boon and an embarrassment. Bright J. worked through them as best he could, "gratefully accept[ing]" the terminology of Kitto J." but differing "with great hesitation" from him and Barwick C.J. as to "proper characterization of the token" and its "relation to the mystery prize".[333] Bray C.J. was similarly hesitant in a collateral case.[334] He attempted to distinguish the facts; to reconcile his own views with those of Barwick C.J. and Kitto J.; and finally to treat their views as obiter in any event, as nothing "turned upon" them in the High Court.[335] As to whether tokens and "cheques" could be trading stamps though "given to particular persons as *personae designatae*", and whether the prosecution had to prove "specific appropriation in New South

328. *Cobiac* v. *Liddy* (1969) 119 C.L.R. 257. At 269 Windeyer J. referred to "special circumstances", at 275 to magistrates having an (apparently normal) discretion. The relationship between the various orders was complex. On the merits as Bray C.J. saw them the magistrate *should not* have dismissed the complaint but *should* have proceeded to conviction and penalty. But Bray C.J. felt unable to impose any penalty on appeal, since the limited nature of the appeal would not allow him to do overall justice. He therefore dismissed the complainant's appeal on the ground that it would not be "fair" to correct the magistrate's demonstrable error. The High Court did so on the ground that the magistrate had not demonstrably erred: "there was material" on which he could act as he did. *Id.*, 265.
329. (1975) 12 S.A.S.R. 101, 103-105.
330. (1976) 14 SA.S.R. 314. The newly-significant dictum of Windeyer J. (*id.*, 320) was in (1969) 119 C.L.R. 257, 277: "I do not see that anyone who drives when drunk can . . . expect leniency unless perhaps he be a man of seventy-three, of good character, looking after an aged sister and about to lose his driving licence."
331. (1977) 15 S.A.S.R. 300, 305-306.
332. (1969) 120 C.L.R. 1.
333. *Reader's Digest Association Pty. Ltd.* v. *Samuels* (1972) 4 S.A.S.R. 19, 27, 29.
334. *Samuels* v. *Reader's Digest Services Pty. Ltd.* (1972) 4 S.A.S.R. 213, 225-226.
335. By contrast, both in this case and in the earlier decision of Bright J., direct reliance was placed on *Home Benefits Pty. Ltd.* v. *Crafter* (1939) 61 C.L.R. 701.

Wales of any magazines to be sent to South Australia", only Kitto and Taylor JJ. had spoken. On the one issue Bray C.J. followed Kitto J., on the other Taylor J. Neither offered more than individual dicta; but he chose between them "with diffidence".[336]

Yet when *Beck* v. *Farrelly*[337] allowed damages for losses and expenses that the plaintiff *would* have incurred but for housekeeping and shopkeeping assistance from his brothers and sister, High Court dicta were eased aside. Those in *Blundell* v. *Musgrave*[338] were in dissent; and Dixon C.J. left *some* room for a plaintiff's "moral and social obligation" to repay a Samaritan, while even Fullagar J. noted trends in the English Court of Appeal towards an alternative rationale. Later Court of Appeal decisions, mainly *Donnelly* v. *Joyce*,[339] had gone much further; and later High Court cases also showed some signs of change.[340] The Full Court thus felt able to follow the Court of Appeal. For Bray C.J., the High Court dicta left one "free" to do so if it seemed "right". Mitchell J. glossed *Jacob* v. *Utah Construction & Engineering Pty. Ltd.*[341] If Court of Appeal decisions clashed with a High Court case "precisely in point", the latter must be followed; if not, one could follow the former. None of the High Court cases was "precisely in point." They were either consistent with *Donnelly* v. *Joyce*;[342] or had passed over the issue *sub silentio*;[343] or (like *Graham* v. *Baker*)[344] had focused on what Fullagar J. treated in *Blundell* v. *Musgrave* as the converse issue of "subvention": whether gratuitous payments can *reduce* a plaintiff's damages.[345] In short, though the *authority* of High Court cases was clear, their meaning might be tempered in practice by the use of cases from *every* major source. Wells J. summed it up neatly in *R.* v. *O'Loughlin*.[346] Relevant High Court cases should be seen as useful clarifications of principle, which "clearly constitute authority binding on us" for propositions precisely laid down; but not as a definitive attempt to "cover the field", nor even as

336. See (1972) 4 S.A.S.R. 213, 222 (*"personae designatae"*), 224 ("specific appropriation"): referring to (1969) 120 C.L.R. 1, 25, 26 (Kitto J.), 34 (Taylor J.).
337. (1975) 13 S.A.S.R. 17. See text at n.21 *supra*.
338. (1956) 96 C.L.R. 73, 80 (Dixon C.J.), 92-93 (Kitto J.).
339. [1974] Q.B. 454, followed in *Davies v. Tenby Borough Council* [1974] 2 Ll. R. 469 and in *Taylor v. Bristol Omnibus Ltd.* [1975] 1 W.L.R. 1054. And see also *Cunningham* v. *Harrison* [1973] 1 Q.B. 942; *Hay* v. *Hughes* [1975] Q.B. 790.
340. Taylor J. (sitting alone) in *Wilson* v. *McLeay* (1961) 106 C.L.R. 523 (rejecting the claim to a specific head of special damages, but permitting inclusion of an unquantified allowance in a general award); Menzies, Mason and Jacobs JJ. in *Ferguson* v. *E. A. Watts Pty. Ltd.* (unreported, but noted in (1974) 4 A.L.R. xxix and in (1974) 48 A.L.J.R. 402). *Cf.* Sangster J. in *Fuller* v. *Gare* (1975) 12 S.A.S.R. 242, following *Wilson* v. *McLeay* and *Donnelly* v. *Joyce*.
341. (1966) 116 C.L.R. 200, 207 (Barwick C.J.).
342. See n.340 *supra*.
343. As in the case (notorious on other grounds: see the text at n.364 *infra*) of *Arthur Robinson (Grafton) Pty. Ltd.* v. *Carter* (1970) 122 C.L.R. 649, 662.
344. (1961) 106 C.L.R. 340. See also *National Insurance Co of N.Z. Ltd.* v. *Espagne* (1961) 105 C.L.R. 569, 597; and *Paff* v. *Speed* (1961) 105 C.L.R. 549, 567.
345. Mitchell J. appeared to accept this distinction; but in the analysis summarized above ((1975) 13 S.A.S.R. 17, 29-30) she never expressly referred to his dicta in *Blundell* v. *Musgrave* at all. Bray C.J., at 22-23, was critical of the distinction; and both he and Mitchell J. were troubled by how their decision as to claims *for* gratuitous services might affect the cases on set-off *against* them. But Bray C.J. was willing to defer the issue to another day. *Donnelly* v. *Joyce* would "have to live with" *Graham* v. *Baker*, "which is binding on us"; but "the precise mechanics of the symbiosis can be left to some future Court". Logical coherence had never been an "overriding value" of the common law; and although it should be striven for "when that can be done consistently with authority and with justice", it did not require rejection of *Donnelly* v. *Joyce*. *Id.*, 23-24.
346. (1971)1 S.A.S.R. 219, 252-254,257-258; and *cf.* Bray C.J. at 226-227 (as to cases on double jeopardy, issue estoppel, and *autrefois convict*).

resolving "real difficulties" in the "practical application" of what was decided. By contrast, where the High Court had developed its own sufficiently rich or distinctive body of case law, that development *might* "cover the field".[347]

"Binding" authority thus elicits much the same kind of constructive dialogue as the merely persuasive. In *R.* v. *Hoskin*[348] a man took a gun to confront his wife at the city store where she worked: it went off, injuring four people. Did this attract the principles of causation and intention used by the High Court for inadvertent discharge of a gun in *Ryan* v. *R.*?[349] And what were those principles? While noting *Ryan* as "relevant", the Court made it only a springboard for independent discussion. It was more than a springboard in *R.* v. *Van Beelen:*[350] along with English cases like *Director of Public Prosecutions* v. *Beard,*[351] it was used to modify the High Court's view of felony-murder in *Ross* v. *R.,*[352] since it was "almost certain" that "courts nowadays would not apply . . . literally" the language or conceptual rigour of *Ross. Ross* was in 1922, *Beard* two years earlier; but inferences of legal evolution transcend mere chronology. Again, Bray C.J. and perhaps Mitchell J.[353] felt free to use dicta in *McHale* v. *Watson*[354] to show that its "binding" *ratio decidendi* was more complex than it seemed. High Court dicta could even be respectfully corrected; and not just editorially.[355]

As always, there are special problems when rules of law overlap with or dissolve into sound institutional procedure, "practice" or common sense. In *R.* v. *Brown*[356] the Court held firmly that the jury direction on insanity given in *R.* v. *Stapleton*[357] "forms portion of the law of Australia" as "an authoritative exposition of the common law". They even used the supposedly decisive test for separating "law" from "practice": that "in an appropriate

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347. *E.g.*, the discussion of *res ipsa loquitur* in *Public Trustee* v. *Western Hauliers* Ltd. (1971) 1 S.A.S.R. 27, was substantially confined to High Court cases.
348. (1974) 9 S.A.S.R. 531, 537.
349. (1967) 121 C.L.R. 205.
350. (1973) 4 S.A.S.R. 353, 400-404.
351. [1920] A.C. 479. See also *R.* v. *Betts & Ridley* (1930) 22 Cr. App. R. 148; *R.* v. *Stone* [1937] 3 All E.R. 920; and *R.* v. *Ryan & Walker* [1966] V.R. 553.
352. (1922) 30 C.L.R. 246, 252.
353. For Bray C.J. see *Andrews* v. *Armitt (No. 2)* (1971) 2 S.A.S.R. 273, 282; for Mitchell J. see her unreported judgment in *Westmoreland* v. *Schultz* (now briefly noted as a postscript to *Andrews*, at 286), as interpreted by Sangster A.J. at first instance in *Andrews* (at 279).
354. (1966) 115 C.L.R. 199.
355. For an editorial correction see *R.* v. *Goode* [1970] S.A.S.R. 69, 74, inserting a missing negative in the judgment of Dixon J. in *R.* v. *Vella* [1938] Q.S.R. 289. The brief *oratio obliqua* report in (1938) 12 A.L.J. 102 sheds no light on this or the other puzzles of the Queensland report. For more substantial correction see *R.* v. *Goodall* (1975) 11 S.A.S.R. 94, as to whether a company director can be charged with "aiding and abetting" his company in fraudulent conversion when the acts of the director and those of the company are the very same acts. The precedents for such a charge included an unreported decision of Bright J. in 1974. But dicta on various crimes and torts suggested that courts would pierce the corporate veil—including dicta of Starke J. in *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 32, and of Dixon J. in *Mallan* v. *Lee* (1949) 89 C.L.R. 198, 216. Bray C.J. not only overrode these dicta by invoking the logic of juristic personality, but corrected Dixon J. (who had spoken of a company's "vicarious liability" for acts of its managing director) by quoting the well-known dictum of Lord Reid in *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153, 170, that the liability is not vicarious but direct. Thus corrected, the dictum of Dixon J. weighs more strongly *against* the view of Bray C.J.; but still only as a dictum.
356. [1968] S.A.S.R. 467, 473.
357. (1952) 86 C.L.R. 358, 367.

case"[358] neglect of the direction will lead to a "successful appeal". Here evolution moved upwards from "practice" into precedent and so into law; but when precedent was unhelpful a deliberate plunge into "practice" could be the best tactical response. In *R.* v. *Ireland (No. 1)*[359] police interrogation had gone on after a suspect said he was "tired" and did not "wish to answer". Bray C.J. and Zelling J. treated subsequent questions and answers as wrongly admitted in evidence, preferring the Court's own ruling in *R.* v. *Evans*[360] to the High Court view in *Basto* v. *R.*[361] Bray C.J. saw no more in *Basto* than appellate refusal to reopen successive exercises of discretion in the courts below; he thought *Evans* had laid down a different "practice for this State which ought to be followed". Walters J., dissenting, followed *Basto*; but even he tacked on to it the earlier High Court dictum that "each case must, of course, depend on its own circumstances".[362]

The greatest temptation in this twilight zone of precedent and practice is to load the system of precedent with more work than it can bear. In making or reviewing awards of damages all members of the Court made sustained and self-conscious efforts to comply with the High Court's warnings, in cases like *Planet Fisheries Pty. Ltd.* v. *La Rosa*,[363] against "seek[ing] out" in the pattern of High Court decisions or damages awards elsewhere "a norm or standard" by comparison with which to fix damages in any one case; and yet also tried to give due weight to a "general awareness" and "general experience" of "current general ideas of fairness and moderation", as High Court dicta allow. At the same time (often in the same case), they strove to act upon High Court insistence, in cases like *Arthur Robinson (Grafton) Pty. Ltd.* v. *Carter*,[364] that the quantum of damages must be

358. Of course this crucial qualification rather blurs the decisiveness of the test—especially as they went on to say that the direction is in fact "not necessary in all cases", finding "clear" High Court authority for this point too in *Willgoss* v. *R.* (1960) 105 C.L.R. 295, 301, and in the refusal (noted (1964) 112 C.L.R. 676) of special leave to appeal from *R.* v. *Vallance* [1964] S.A.S.R. 361.
359. [1970] SA.S.R. 416, 428 (Bray C.J.), 452 (Zelling J.).
360. [1962] S.A.S.R. 303, 306-307; also *Lenthall* v. *Curran* [1933] S.A.S.R. 248, 261.
361. (1954) 91 C.L.R. 628, 638-639.
362. *R.* v. *Lee* (1950) 82 C.L.R. 133, 160. See [1970] S.A.S.R. 416, 437 (Walters J.). As it turned out, the High Court on appeal upheld the *result* reached by Bray C.J. and Zelling J., but sought to clarify the relation between S.A. "practice" under *R.* v. *Evans*, and Australia-wide judicial "discretion" under *Basto* v. *R.* The "practice" enjoined by *Evans*, said Barwick C.J., is "a rule of practice for the conduct of police officers": and as such he endorsed it. But a breach of the "practice" gave rise to no more than "a judicial discretion to exclude"; and nothing in *Basto* v. *R.* was inconsistent with this. See *R.* v. *Ireland* (1970) 126 C.L.R. 321, 331-333; and *cf.* text at nn. 160-164 *supra*.
363. (1968) 119 C.L.R. 118, 124-125. For another kind of overload see *R.* v. *Goode* [1970] S.A.S.R. 69, 76-77 (as to the need to warn juries against too ready a reliance on identification evidence). The Court did three things. First, like *R.* v. *Boardman* [1969] V.R. 151, it gave weight to the *dissenting* view of Evatt and McTiernan JJ. in *Craig* v. *R.* (1933) 49 C.L.R. 429, 448-450, since those two judges were later in the majority in *Davies & Cody* v. *R.* (1937) 57 C.L.R. 170, where the majority view was not incompatible with that in *Craig*. Second, the Court watered down the language of *R.* v. *Boardman* (which demands a warning even where the identification is supported by other factual evidence) by the use of *R.* v. *Vella* (see citations in n. 355 *supra*), where the High Court held that other supporting evidence dispensed with the need for a warning. But, third, the Court followed *Boardman* in holding that other supporting evidence "does not necessarily" dispense with the need for a warning. These tortuous efforts to combine comity with sister States with conformity to the High Court reflect the patience and determination required by a precedent system, and also its opportunities for refinement, compromise, and independent moulding of policy. But they also suggest serious dangers of overload—especially on an issue which must really depend on individualized discretionary appraisal in each case.
364. (1968 122 C.L.R. 649, 655-657.

assessed "ultimately and authoritatively" by an independent "judgment of those comprising the appellate tribunal", while also heeding a simultaneous warning against "intervention" unless the mind is "convinced of the unreasonable quality of the verdict"; and also to comply with a further warning in *Arthur Robinson* against quantifying heads of damage "in isolation" and comparing their sum with the verdict (since the verdict must rather be "a single sum" in fair and moderate proportion to the plaintiff's individual plight), while still exploiting the "utility of segregating some of the items which would necessarily have to have been considered in arriving at the ultimate figure", as the High Court dicta allowed.[365] In no area was the will to conform to precedent more earnest; in no area were precedent guidelines less helpful.

In the end even High Court decisions could always be distinguished. Under the *res gestae* rules, Bray C.J. contrasted the "clear separation in time and circumstance" between the two scuffles in *R.* v. *Heidt*[366] with the "continuous and confused orgy" in *O'Leary* v. *R.*[367] to hold that despite the admissibility of evidence in *O'Leary* no similar result followed in *Heidt*. In *Power* v. *Huffa*[368] a participant in a demonstration for aboriginal rights had defied a request to cease "loitering"; she claimed that in a telephone call to the Minister for Aboriginal Affairs she was given (or believed she was given) ministerial "orders or instructions" to remain, and was thus not "loitering". Mere mistaken belief would not help; in *Samuels* v. *Stokes*[369] Gibbs J. had predicated "loitering" on an "objective" test of "observable facts", not on "inquiry into the person's state of mind", and no one really disagreed. But what if Mrs Power *did* have ministerial backing? *Samuels* v. *Stokes* had held that one may "loiter" whether for a lawful purpose or not: "loitering" is only a descriptive synonym for "tarrying", "hanging about". But Zelling J. insisted on taking this *secundum subjectam materiam:* "lawful reason" for presence, as in *Samuels* v. *Stokes,* falls well short of "lawful

365. For efforts to cope with these and other conflicting guidelines arising from *Planet Fisheries, Arthur Robinson* or the multiplication of leeways arising from a juxtaposition of both, see *Forsberg* v. *Maslin* [1968] S.A.S.R. 432, 435 (Bray C.J. accepting *Arthur Robinson* as binding, and thus rejecting an earlier W.A. decision); *Pollard* v. *Ensor* [1969] S.A.S.R. 57, 58; *Hirsch* v. *Bennett* [1969] S.A.S.R. 493, esp. 498 (where Travers and Walters JJ. added further to the leeways by playing off both *Planet Fisheries* and *Arthur Robinson* against the Privy Council guidelines in *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] 1 W.L.R. 1382, despite the caution against such a playoff by Bray C.J. at 494); *Joyce v. Pioneer Tourist Coaches Pty. Ltd.* [1969] S.A.S.R. 501, 502 (*Planet Fisheries,* subject to its own internal leeways, treated as "binding", and *Arthur Robinson* as "compelling" interference); *Sluiter* v. *Keimeier* [1969] S.A.S.R. 506, 512; *Belleli* v. *McSkimming* [1970] S.A.S.R. 313, 322, 325-326, 331, 333; *Sager* v. *Morten & Morrison* (1973) 5 S.A.S.R. 143, 149, 170; *Fleet* v. *Henley Joinery Pty. Ltd.* (1973) 5 S.A.S.R. 506, 510-511 (qualifying *Planet Fisheries* by use of an unreported N.S.W. decision); *Mann* v. *Ellbourne* (1973) 8 S.A.S.R. 298, 301, 302, 307; *Rust* v. *Needham* (1974) 9 S.A.S.R. 510, 526 (where Bray C.J. derived his yardstick of a suitable sum not only from the High Court assessment in *Ferguson* v. *E. A. Watts Pty. Ltd.,* n.340 *supra,* but also from that of Barwick C.J. in *Arthur Robinson* itself!) and also *id.,* 527-528 (an especially plaintive summation by Wells J.); *Van Velzen* v. *Wagener* (1975) 10 S.A.S.R. 549, 551, 553 (following *Hirsch* v. *Bennett, supra,* "despite" the *Planet Fisheries* guidelines); *Irving* v. *Pilliczyk* (1975) 12 S.A.S.R. 11, 17 (actuarial calculations discussed despite "due regard" to *Arthur Robinson's* caution against them); *Zannoni* v. *Loft* (1975) 13 S.A.S.R. 208, 218 (Walters J. "obliged to heed" the *Arthur Robinson* warning against actuarial figures, but nevertheless going on to consider what would happen "if" they were used); *Hayman* v. *Forbes* (1975) 13 S.A.S.R. 225, 229.

366. (1976) 14 S.A.S.R. 574, 580 ("like two successive scenes of a play").

367. (1946) 73 C.L.R. 566.

368. (1976) 14 S.A.S.R. 337, now followed in *Morse* v. *Ashton* (1978) 18 S.A.S.R. 221.

369. (1973) 130 C.L.R. 490.

justification". Bray C.J. contrasted mere "lawful purpose" with "some duty or obligation, legal, contractual, moral or social, to be there". Given an "objective" test, and the hypothetical nature of the preliminary questions of law referred to the Court, no "exhaustive" analysis of relevant duties was needed; but at the least duty derived from a federal statute must suffice.[370] Jacobs J., also stressing the "objective" test, saw no need at this stage to join in such adventures at all; he thought that for a working policeman the simple *Samuels* v. *Stokes* approach might be the only practical one. But even he felt a need for *some* qualification, since if *Samuels* v. *Stokes* applied literally even a policeman on duty might be "loitering".

More simply, a High Court case could always be distinguished on its facts;[371] or as based on an interstate statute with no local parallel. Yet ironically, the clearest use of statutory distinctions was for High Court exegesis of South Australian statutes since superseded.[372] Elsewhere, the tendency was to follow the High Court despite such distinctions. *Peacock* v. *R.*[373] was adopted despite its admitted basis in Victoria's Evidence Act, 1890, and despite "reservations" as to its impact in "a system of criminal law *and practice*" with no "identical" statute. New South Wales workers' compensation provisions were "not in identical terms with ours", but High Court exegesis of them yielded "binding authority" for a general proposition" that the workman has the onus of proving reduced earning capacity.[374] Cases on the New South Wales extended definition of 'injury" were not comparable; but a case not dependent on that definition would be taken into account.[375] Commonwealth constitutional law was obviously not translatable to a State constitutional setting;[376] nor could High Court practice in constitutional cases be transposed.[377] But High Court doctrines of Australian federal constitutional law were still a fruitful source of analogy.[378]

370. Since in any event this would override the S.A. Police Offences Act, 1953-1972, by virtue of s. 109 of the Constitution. See Zelling J. (1976) 14 S.A.S.R. 337, 353-354, Bray C.J., *id.*, 342-343, Jacobs J., *id.*, 357. Zelling J., *id.*, 355, sought also to keep open the prospect of a *Proudman* v. *Dayman* defence: see nn. 317, 322 *supra*. To believe mistakenly that the Minister had given his approval would be a mistake of fact; to believe that he had authority to do so would be a mistake of law. Conjunction of these beliefs would be a single mistake, one of "mixed fact and law" within *Proudman* v. *Dayman*. But see Bray C.J., *id.*, 345-346, Jacobs J., *id.*, 356-357. Despite the latter's attempt to reconcile the two views, Zelling J. should be regarded as dissenting on this point.
371. See, *e.g.*, Sangster J. in *McKernan* v. *Afford* (1973) 9 S.A.S.R. 11, 15, distinguishing *De Oleveira* v. *Moore* (1967) 41 A.L.J.R. 25 Other examples abound.
372. See Mitchell J. in *Rowell* v. *Rowell* (1974) 9 S.A.S.R. 82, 83-84; and see Walters J. in *Ovenden* v. *Palyaris Construction Pty. Ltd.* (1974) 11 S.A.S.R. 41, 56; on appeal see Bray C.J. in *Ovenden v. Palyaris Construction Pty. Ltd.* (1975) 11 S.A.S.R. 65, 71, 75.
373. (1911) 13 C.L.R. 619, as followed in *R.* v. *Jansen* [1970] S.A.S.R. 531, 538.
374. Bray C.J in *Percic* v. *Broken Hill Pty. Co. Ltd.* (1973) 6 S.A.S.R. 1, 3 on *J. & H. Timbers Pty Ltd* v. *Nelson* (1972) 126 C.L.R. 625, 637-639, 649-651.
375. *General Motors-Holden's Pty. Ltd.* v. *Raptis* [1971] S.A.S.R. 108, 112-113 (Bray C.J.), responding in particular to *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Hankinson* (1967) 117 C.L.R. 19. *Cf.* Mitchell J., *id.*, 116.
376. Thus the central issue in *Gilbertson* v. *S.A.* (1976) 15 S.A.S.R. 66—whether the Supreme Court could validly be invested with both judicial and non-judicial powers—was decided without reference to the *Boilermakers' Case* [1957] A.C. 288, except to stipulate (at 84) that it had "nothing to do with the present case". No doubt Bray C.J. in the same breath spoke approvingly of the *dissent* of Higgins J. in *In re Judiciary & Navigation Acts* (1921) 29 C.L.R. 257; but that (unlike *Boilermakers?)* was "a matter of general reasoning and logic".
377. Thus the High Court habit of allowing State and Commonwealth Attorneys-General to intervene in constitutional matters was seen as not transferable to ordinary civil litigation in the Supreme Court. See Jacobs J. in *Amid Pty. Ltd.* v. *Beck & Jonas Pty. Ltd.* (1974) 11 S.A.S.R. 16, 27-28.
378. For a bold attempt to transfer the High Court's "cover the field" test to s. 47 of the Road Traffic Act, 1961, 1974, see *Liddy* v. *Cobiac* [1969] S.A.S.R. 6, 26.

But High Court decisions bind in legal principle, not verbal magic. Interpreting the word "hospital" in a statute, Wells J. did not follow High Court exegesis of that word in a will, for the Court was not "purporting to lay down the universal meaning of the word".[379] And when a statutory right of recovery by the New South Wales nominal defendant had to be categorized, Bray C.J. refused to call it "delictual" merely because the High Court had so labelled obligations to *indemnify* the nominal defendant.[380] High Court decisions are always binding. The question is: Binding for what?

7. Stare Suis Decisis

The same problem—"Binding for what?"—dogs the Full Court's own prior decisions. Only for these did the Bray Court overtly face the thorny task of finding a *ratio decidenda* notably in *French* v. *Ianella.*[381] Rent control by the Landlord and Tenant (Control of Rents) Act, 1942-1961 ended in 1962. Wrongly believing that other statutory controls had also ended, the defendant landlord fixed rents above the statutory maximum. Was honest mistake a defence? The offence was to overcharge "wilfully". In *Davies* v. *O'Sullivan (No. 2),*[382] Napier C.J. read that word as requiring "something in the nature of *mens rea*", but applying if rent was levied "intentionally" with no honest exculpatory belief *of fact.* If this was his *ratio decidendi* the landlord in *French* v. *Ianella* was guilty: his mistake was of law, not fact. But the landlady in *Davies* v. *O'Sullivan* had legal doubts, and chose not to resolve them. As to this Napier C.J. first repeated that she had no honest belief in exculpatory *facts*; but then said that the prosecution need only show "that she knew what she was doing, and that it might be illegal, but decided to do it whether or no". Did this limit the ratio to cases of "not wanting to know", leaving the effect of affirmative *belief* in legality open? Did it even mean that a prosecutor must prove a state of mind *short of* such affirmative belief? Mayo J., concurring, took Napier C.J. to limit exculpation to errors *of fact*;[383] but when Napier C.J. sat alone in *Fenwick* v. *Boucaut*[384] (where the landlords had no inkling of illegality) he said that *Davies* left the point open. (He then held that legal ignorance is *not* an excuse; but this single-judge decision could not bind the Full Court.)

The result, as Hogarth J. acutely showed, was a textbook example of choice between the two main theories of the *ratio decidendi.*[385] Travers J.

379. *Helping Hand Centre Inc.* v. *City of Adelaide* (1971) 1 S.A.S.R. 470, 477-478, declining on this ground to follow *In re Padbury* (1909) 7 C.L.R. 680.
380. *Nominal Defendant* v. *Bagot's Executor & Trustee Co. Ltd.* [1971] S.A.S.R. 346, 365, as to *Genders* v. *Government Insurance Office of N.S.W.* (1959) 102 C.L.R. 363.
381. [1967] S.A.S.R. 226. Other examples are *In re South Australian Barytes Ltd. (No. 2),* n.187 *supra,* and *R.* v. *White,* discussed at nn. 388-398 *infra.*
382. [1949] S.A.S.R. 208, 210.
383. Id., 211; he himself had doubts on the point, but was "not prepared to differ".
384. [1951] S.A.S.R. 290, 293-294.
385. [1967] S.A.S.R. 226, 250. The "classical view" seeks "the principle of law propounded by the judge"; see Montrose, "*Ratio Decidendi* and the House of Lords", (1957) *20 Modern L.R.* 124. On this view the earlier statements of Napier C.J. (limiting exculpation to mistake of fact) would be the ratio of *Davies,* and Ianella would be guilty. The "material facts" view relates "the facts treated by the judge as material" to "his decision as based on them": see Goodhart, "Determining the *Ratio Decidendi* of a Case", (1931) 40 *Yale L.J.* 161, reprinted in Goodhart, *Essays in Jurisprudence* (1931), 1, 25-26. On this view the ratio of *Davies* would extend only to cases where the landlord had at least suspected illegality. For other citations, and a fuller critique of both these theories, see Stone, "The *Ratio* of the *Ratio Decidendi*", (1959) 22 Modern L.R. 597.

chose the "classical" view: the majority "statement of the law" which was a "necessary element in reaching the decision" in *Davies*. (He did not understand the "somewhat curious" passage in *Fenwick*). Hogarth J. too chose the "classical " view: "I think that Napier C.J. intended to expound the law in the first passage . . . and merely to apply it to the facts . . . in the second passage". The passage in *Fenwick* could be explained (he said) by over-nice adherence to the "material facts" test. Only Bray C.J. chose that test.[386] Hogarth J. added that even if the limitation to errors of fact were not the *ratio decidendi* of *Davies*, it was the majority *opinion*, and thus "strongly persuasive". So, too, was *Fenwick*, where it *was* the ratio, if of only one judge. Travers J. went further. Taking Full Court cases as binding unless "manifestly wrong", he saw "no basis for qualifying or in any way departing from" *Davies*. Even if "doubtful" it was "far short" of "manifestly wrong". Magistrates had acted on it "in innumerable cases". It should not be "disturbed". *Fenwick* must stand in its own right: it too was a "landmark" for magistrates, and he would "hesitate very long" to query "a considered judgment of Napier C.J." Again Bray C.J. dissented: however it be in property or commercial law, the "impolicy" of innovation cut no ice for him in criminal or quasi-criminal law. That some have been "wrongly convicted in the past" is no reason for others to be "wrongly convicted in the future".[387]

The boldest attempt by Bray C.J. at a wider power of self-overruling was in *R.* v. *White*.[388] Did five convictions on 16 March, 1957, and three on 6 April, 1969, amount to conviction "on at least three occasions" to make White a habitual criminal? English cases (followed in Queensland) saw each batch of convictions as one "occasion"; New Zealand cases (followed in New South Wales) made each conviction a separate "occasion". White invoked the former. *R.* v. *Ciemcioch*[389] had noted a similar argument as "mentioned" but "quite properly . . . not pressed". This was an inadequate "decision" on inadequate argument. But the Court had expressed *some* opinion, which was "necessary to the decision": if it were wrong Ciemcioch should have won his appeal. *Ciemcioch* was thus *prima facie* a "decision", whatever its weight.

For Hogarth J. the New Zealand cases were convincing. *Ciemcioch* had "necessarily accepted" them, and alluded *sufficiently* to them (though not to the English cases) to negate decision *sub silentio* or *per incuriam*. The English cases, though on a provision comparable to that in South Australia, had sought to harmonize its use of "occasions" with other statutory usages *not* so comparable (and the Queensland case[390] had overlooked this).*Either* view had capricious results, but the *Ciemcioch* view at least gave judges a chance to control the caprice. Above all, the Court should overrule itself only on the grounds "referred to so often by judges of other States": that is, if "satisfied" that a past case is "clearly wrong". Even English cases directly in point should not "automatically" induce the Court to forego its previous view. If they showed that the Court had been "clearly wrong" they should be followed; if they only gave rise to "real doubt", the Court

386. [1967] S.A.S.R. 226, 245-247 (Travers J.), 249-250 (Hogarth J.), 235 (Bray C.J.).
387. *Id.*, 250-251 (Hogarth J.), 246-247 (Travers J.), 236 (Bray C.J.).
388. [1967] S.A.S.R. 184.
389. [1963] S.A.S.R. 64, 66.
390. *R.* v. *Keitley* [1965] Qd. R. 190.

should adhere to its own view and leave the High Court to resolve the conflict.[391]

Mitchell J. shared these last views, but denied that *Ciemcioch* was a "decision". With the point thus "fit to be reconsidered", she followed the English view. So did Bray C.J., but with much more room for manoeuvre on the precedent issue. Focusing on conflict of a South Australian decision with a "coordinate" decision elsewhere,[392] he held that such conflict freed the Court to decide either way, or indeed "to consider the matter *de novo*". This accorded with High Court responses to the English Court of Appeal;[393] and also with the latter's own "practice" under *Young* v. *Bristol Aeroplane Co. Ltd.*[394] of reviewing a prior decision if it conflicts with another such decision *or one of a "coordinate" court.* "Coordination" might be either temporal or spatial: the one linking the Court of Appeal with predecessors in English curial history, the other with courts of "equivalent status" in other Commonwealth jurisdictions. Whether or not the Court of Appeal would treat Australian State Supreme Courts as "equivalent", they might so regard the Court of Appeal. It would follow in logic (or in "courtesy") Thus, even if Hogarth J. were right to distinguish the English cases, the that they should so regard each other: if A = B and B = C, then A = C. Thus, even if Hogarth J. were right to distinguish the English cases, the Queensland case alone would "free [us] to consider the matter *de novo*". All this would be so even if *Ciemcioch* were a real "decision"; *a fortiori* when it was not.[395]

The case merits closer study. Overruling may have two phases, which Julius Stone calls "upper" and "lower" purgatories.[396] The first asks if a precedent *can* be overruled, the second if it *should* be. *Stare decisis* thus gets two bites at the cherry: first as an argument that self-overruling is impossible, then as a fallback argument that while possible it is unwise or imprudent. Insofar as the *Young* rules allow overruling of a case expressly or impliedly rejected by a higher court, the two tiers collapse: the upper purgatory result is decisive for the lower purgatory as well. But for the other "trigger situations" in *Young* (conflict of prior or coordinate cases, and decision *per incuriam)* an upper purgatory finding that such a situation

391. [1967] S.A.S.R. 184, 202. *Cf.* Mitchell J., *id.*, 203, Bray C.J., *id.*, 189-192.
392. He stressed that if there were no such conflict, or if it had already been considered by the precedent court, "the normal rule of precedent will continue to operate": *id.*, 191. Without trying to formulate this "normal rule", he added that if *Ciemcioch* had expressly rejected the English authorities, "there would have been no more to be said": *id.*, 189. He also noted approvingly the English view that precedent has less force in criminal matters (*R.* v. *Taylor* [1950] 2 K.B. 368) and that its binding force is not affected by the number of judges in the precedent court (*Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, 725).
393. At one time an Australian court would have followed a Court of Appeal decision in preference to its own. The force thus ascribed to such a decision must now be watered down, but it must at least still create a freedom "to reconsider the matter": the Court of Appeal can hardly have *less* weight in the States than in the High Court. *Id.*, 190.
394. [1944] K.B. 718.
395. [1967] S.A.S.R. 184, 191-192. On this last point Bray C.J. and Mitchell J. were to be vindicated, if not by the High Court (see *R.* v. *White* (1968) 122 C.L.R. 467), then at least by the headnote-writer in the Commonwealth Law Reports, who wrote that what the High Court had restored was a "dictum" in *R.* v. *Ciemcioch.*
396. Stone, "The Lords at the Crossroads—When to 'Depart' and How!" (1972) 46 *A.L.J.* 487, 488; *cf.* his analysis in three phases with two sub-phases in Stone, "On the Liberation of Appellate Judges: How Not to Do It!", (1972) 35 *Modern L.R.* 449, 471-473. His account of the issues assigned to the two purgatorial levels sometimes varies; the present adaptation necessarily varies again.

is present is not decisive of, but only a preliminary gateway to, the lower purgatory issue of whether to overrule. Moreover, for these situations the upper purgatory issue is quite independent of whether the impugned decision is "wrong". If two cases conflict, at least one must *logically* be wrong; but a power to overrule arises from conflict, not error. And decision *per incuriam* may not be wrong at all. Under the *Young* rules, the question whether an impugned decision was "wrong" is solely a lower purgatory question.

Australian State courts have mostly dispensed with the *Young* rules, and cut through to whether cases are "wrong". If this means that a case is overruled *whenever* it is "wrong", our two tiers collapse: overruling turns upon a single test of "wrongness". If it means that a "wrong" decision *may* be overruled, but may be upheld if stability or certainty so require, there are two tiers. But "wrongness" is exclusively an upper purgatory question: the lower purgatory is reserved for policies of *stare decisis*. "Wrongness" remains a single test. Yet another version makes the purgatories analogous to a two-tiered criminal justice system. In the upper purgatory one must show a *prima facie* case, by adducing *some* significant grounds for believing the impugned decision to be "wrong". In the lower purgatory one must show that these grounds are so strong as to compel overruling. The criterion of "wrongness" is *more* demanding in the lower purgatory than in the upper.

But the prevalent South Australian version differs again. It uses a *prima facie* upper purgatory test of wrongness as a gateway to full review; but it makes the test so onerous that no full review can arise. It demands not merely a presumptive possibility of wrongness, meriting fuller inquiry; but a finding that wrongness is clear *ex facie*, with no need for inquiry. If the stringent upper purgatory test is not satisfied, no lower purgatory testing of *actual* wrongness is allowed; if it *is* satisfied, no such testing has any point. On this limited model of "wrongness", a resort by Bray C.J. to the *seemingly* more limited *Young* rules was in fact a welcome escape.[397]

Other cases went further in demanding *manifest* "wrongness". *Jenerce Pty. Ltd.* v. *Pope*[398] invited review of *Parkroyal Corporation Pty. Ltd.* v. *Pope*.[399] Mitchell J. argued that since none of the exceptions to the *Young* rules applied, the relevant test was that of Walsh J. (as he then was) in the New South Wales Court of Appeal: unless a case is "manifestly wrong" it should be followed without "independent examination of its correctness".[400] Wells J .more explicitly made this a fourth exception to South Australia's analogue of the *Young* rules; [401] and perhaps his demand to be "satisfied" left more room for inquiry than demands for "wrongness" *ex facie*. Yet the levels of "satisfaction" sought by Wells and Mitchell JJ. almost coincided. Wells J. would have had "difficulties" with *Parkroyal* were it *res integra*. But even assuming that attacks on it should "in principle and logic" succeed, he would uphold it, since there were grounds for

397. As to "coordinate" courts, *cf.* his terminology in *Bagshaw* v. *Taylor* (1978) 18 S.A.S.R. 564, 574 ("the appellate courts of former colonial territories").
398. (1971) 1 S.A.S.R. 204.
399. [1969] S.A.S.R. 376. See n.176 *supra*.
400. (1971) 1 S.A.S.R. 204, 214, following Walsh J.A. in *Bennett & Wood Ltd.* v. *Orange City Council* (1967) 67 S.R. (N.S.W.) 426, 432.
401. As some members of the English Court of Appeal now seek to do: *e.g.* in *Davis* v. *Johnson* [1978] 2 W.L.R. 182. In both instances, of course, the exception if taken seriously would swallow up the rule.

arguing that it was right: "at all events, not plainly wrong".[402] As Stone sees House of Lords practice, it is an elaborate *separation* of the purgatories that causes anomalies; with Wells J. it is their *conflation*. Either a court can overrule a wrong decision or not. If it can, then to say that criticisms should "in principle and logic" succeed (or even to see "difficulties" in "sustaining all that was said") must in the upper purgatory show a *possible* use of the power. In the lower purgatory the facts that a case is "not plainly wrong" or that arguments exist both ways may weigh against overruling; but to use them to deny that the power *exists* is a denial of judicial responsibility. Bray C.J. saw no need in *Jenerce* to debate these issues. He ,too, followed *Parkroyal;* but thought that one *need* not do so. The crux of *Parkroyal* was conceded by counsel; thus there was no "decision" to bind a later court.[403]

R. v. *Elliott*[404] was more complex. In 1924 in *Tucker* v. *Noblet*[405] a Full Court had held that joinder of charges in one complaint attracted ss. 182-183 of the Justices Act, 1921. Joinder is not a ground for objection; but if the defendant "has been prejudiced the magistrate may dismiss the complaint." Any eventual conviction must be on one charge only. Napier J. added a rider of "inherent power" to dismiss if the evidence gave rise to "duplicity or uncertainty". The point was that a magistrate *could* resolve the matter at the outset, but *need* not do so until all the evidence was in. But in *Johnson* v. *Miller*[406] a magistrate held a complaint bad for duplicity and the Full Court allowed an appeal. Two judges found no defect in the complaint; for Murray C.J. it was defective but should have been dealt with at the *end* of the hearing.[407] *Tucker* v. *Noblet* was not cited. The High Court restored the magistrate's view: for Dixon J., the case fell "almost exactly" within *Tucker* v. *Noblet*—at least within the rider by Napier J., from whom Evatt J. also drew "support". This is not the language of overruling. Yet in *R.* v. *Elliott* it was argued that since the High Court view had affected *other* decisions, *Tucker* v. *Noblet* was no longer law. English cases like *Rodgers* v. *Richards*[408] (given High Court endorsement in *Hedberg* v. *Woodhall*)[409] merged the relevant powers with that of amendment, open at any time; *Tucker* v. *Noblet* had followed these. But later English cases had rejected this view, requiring the defect to be cured at the outset or the complaint dismissed.[410] Decisions interstate had therefore treated *Rodgers* and even *Hedberg* as no longer correctly stating the law;[411] thus rejecting both the *Tucker* v. *Noblet* result, and the precedents on which it was built.

The Court in *R.* v. *Elliott* distinguished these cases—Sangster J. on statutory grounds,[412] Bray C.J. by playing "jurisdiction to enter on the hearing initially" against "jurisdiction to continue with the hearing" if

402. *Id.*, 217.
403. *Id.*, 207.
404. (1974) 8 S.A.S.R. 329. Six separate charges of false pretences in corporate finance were joined in a single complaint. The magistrate did not require the complainant to make an election, and convicted on all six charges.
405. [1924] S.A.S.R. 326, 333-334.
406. (1937) 59 C.L.R. 467, 488, 489, 498; reversing *Miller* v. *Johnson* [1937] S.A.S.R. 323, and followed by Bray C.J. in *Lafitte* v. *Samuels* (1972) 2 S.A.S.R. 1, 8-9.
407. Since s.182 postulates that the defendant "has been prejudiced".
408. [1892] 1 Q.B. 555, interpreting the Summary Jurisdiction Act, 1848.
409. (1913) 15 C.L.R. 531, 535-536.
410. *Edwards* v. *Jones* [1947] K.B. 659; followed in *Brangwynne* v. *Evans* [1962] 1 W.L.R. 267 and especially in *Hargreaves* v. *Alderson* [1964] 2 Q.B. 159.
411. *Byrne* v. *Baker* [1964] V.R. 443; *Ex parte Graham* [1969] 1 N.S.W.R. 231, 242.
412. *All* the cases involved some variant of ss. 182-183 of the S.A. Act. But mostly (as in S.A. before 1943) the proviso to s.182 did not appear: the exclusion of "objections" to defective informations (s.182) was followed immediately by the power to "amend" the defects (s.183). It was easy to run the two together, as

duplicity appears. For South Australia the new cases either left jurisdiction unaffected, or affected only jurisdiction of the latter kind.[413] "In the abstract" he agreed with criticisms of *Rodgers* v. *Richards*; but if it and *Hedberg* v. *Woodhall* were not *clearly* overruled in *Johnson* v. *Miller* (as they were not), then *Hedberg* might still make *Rodgers* binding in Australia. As to *Tucker* v. *Noblet*, a Full Court decision was binding unless "overruled or modified by later [binding] authority", or unless "clearly wrong".[414]

In *Raynal* v. *Samuels*[415] Hogarth A.C.J., Walters and Jacobs JJ. took *R.* v. *White* as definitive of the power of self-overruling, thus supplanting the view of Napier C.J. in *Hewitt* v. *O'Sullivan*[416] that there was neither a "duty" nor a "right" to reopen Full Court decisions. Such "absolute words" (said *Raynal)* needed "some qualification". The Court could reconsider "if, but only if, it is satisfied" that a prior decision "was clearly wrong".[417]

Yet this liberation of the verbal formulae in *Hewitt* v. *O'Sullivan* led in fact to the very same refusal to reopen the very same set of cases. In *Homes* v. *Thorpe*[418] Angas Parsons J. had held that "belief" was stronger than "suspicion", so that a charge under s. 71 of the Police Act, 1916, of possessing goods "reasonably suspected" to be stolen must be dismissed when the goods were "believed" to be stolen *because the thief had confessed.* In *Henderson* v. *Surfield*[419] a Full Court including Angas Parsons J. approved this case, applying it *a fortiori* when "suspicion" consisted of direct eye-witness evidence ("I saw you take the wheat from the truck"); but held back from saying that *proof* of larceny *must* exclude the use of s. 71. *Lenthall* v. *Newman*[420] affirmed *Homes,* and took *Henderson* as "binding"; but held that the true dichotomy was not "suspicion" and "belief", but "suspecting that the property was stolen and "knowing when *and from whom* it was stolen". According to *Lenthall,* the vital fact in *Homes* v. *Thorpe* (not mentioned in the report) was that the accused had admitted stealing the goods *from his employer.* Thus both *Homes* and *Henderson* fell within the second limb of the new dichotomy, allowing the Court to say that *Lenthall* (where a shoplifter confessed to stealing, *but not from which shop)* fell within the first limb, and was properly dealt with under s. 71. Along with this painfully narrow ratio (which reconciled *Lenthall* with the earlier cases) went a wider one: that "suspicion" means "anything short of knowledge". *Hewitt* v. *O'Sullivan* (though treating *Lenthall* as binding) applied this wider ratio to a man who confessed when and from whom he stole a radio—thus flouting the narrower ratio on which *Lenthall* depended, making overall reconciliation impossible.

412. *Cont.*
Rodgers v. *Richards* did. For Sangster J., it was the continued *absence* of the proviso in England that explained attempts to find other "means" of reducing the . . . adverse effect on the defendant"; given the proviso, one could be "content" to apply the law according to its terms. See (1974) 8 S.A.S.R. 329, 353, 359.
413. *Id.*, 337-339.
414. *Id.*, 335-336, 339. What he meant by "clearly wrong" (and whether an "abstract" agreement with criticism sufficed) would depend on his view of *Jenerce* v. *Pope.*
415. (1974) 9 S.A.S.R. 264. 272, reversing (1974) 8 S.A.S.R. 273 (Bright J.).
416. [1947] SA.S.R. 384, 395.
417. (1974) 9 S.A.S.R. 264, 273.
418. [1925] S.A.S.R. 286, taking the contrast of "suspicion" and "belief" from *Smith* v. *Boucher* (1734) 7 *Mod.* 173, 87 E.R. 1171. There "suspicion" was seen as inadequate where "belief" would suffice; Angas Parsons J. made the converse point that where the evidence sufficed to justify a jury trial on the stronger charge of larceny, s.71 should not be used for easy convictions by summary trial.
419. [1927] S.A.S.R. 192.
420. [1932] S.A.S.R. 126, 132.

Only Bright J., who first heard *Raynall* v. *Samuels,* explored all this fully. Though bound by *Lenthall* and *Hewitt,* he managed to hold the "suspicion" charge inapt by projecting police cognizance "beyond mere suspicion" to a "certainty" counting as "knowledge". On appeal his view was reversed. *Homes* v. *Thorpe* was irreconcilable with later cases; its *actual* ratio opposing "suspicion" to "belief" was "discredited"; the salvaging ratio*imputed* to it by *Lenthall* must be that even to receive *and believe* a confession may stop short of "knowledge".[421] In their placement of "belief" on the weaker side of the dichotomy of "suspicion" and "knowledge", *Lenthall* and *Hewitt* were reaffirmed. Whether the dichotomy is sound, whether "knowledge" automatically negates "suspicion", and whether there can *ever* be "knowledge" short of and prior to courtroom proof, were left to another day.[422]

Yet at least the verbal formulae of overruling were eased; and other cases moves towarss a simple test of "wrongness". Asked to reject *Arriola* v.*Harris*[423] (under which one may "pretend to tell fortunes" despite honest belief in prophetic powers) the Full Court assumed *almost* unqualified power to do so if *Arriola* were "wrong" (though denying that it was). Sangster J. in *R.* v. *Gronert*[424] tied the Supreme Court rule on self-overruling to the High Court rule;[425] and since he based both rules on the criterion "clearly wrong", it may be that this test can now be read as flexibly as in the High Court. *R.* v. *Hallett*[426] saw a prior case as binding "unless the Full Court for some reason sees fit to depart from it". When *Hallett* was upheld, this became: "[unless] inconsistent with subsequent decisions of higher courts, or unless we, for exceptional reasons, think fit to reconsider it"[427] But in *R.* v. *Little*[428] Bray C.J., while *not* overruling, again set a simple test of "wrongness". On the other hand, the ease with which *R.* v. *Tideman*[429] modified *R.* v. *Beresford*[430] (or with which *R.* v. *Leak*[431]

421. (1974) 9 S.A.S.R. 264, 268.
422. *Id.,* 272.
423. [1943] S.A.S.R. 175, considered in *Hartridge* v. *Samuels* (1976) 14 S.A.S.R. 209. See Bray C.J., *id.,* 210, 212 ("binding . . unless, unusually and exceptionally, we are satisfied that they are wrong and that we ought to depart from them"; bound "unless we are satisfied that it is wrong"); Jacobs J., *id.,* 213 (not "persuaded" that the decision "is wrong"); King J., *id.,* 214 ("binding unless we are convinced that it is wrongly decided and ought not to be followed"). For Bray C.J. and King J. the double test—"wrong" *and* "ought not to be followed"—presumably reflects the "upper and lower purgatories" discussed at n.396 *supra.*
424. (1975) 13 S.A.S.R. 189, 198, considering *R.* v. *Stephens* (1975) 13 S.A.S.R. 145.
425. He took the former from *R.* v. *White* [1967] S.A.S.R. 184, *Jenerce Pty. Ltd.* v. *Pope* (1971) 1 S.A.S.R. 204, and *Raynal* v. *Samuels* (1974) 9 S.A.S.R. 264; the latter from the formulations by Isaacs and Higgins JJ. in the *Engine-Drivers'* case (1913) 17 C.L.R. 261, 274-279, 288, and by the Privy Council in *Geelong Harbor Trust Commissioners* v. *Gibbs Bright & Co.* [1974] A.C. 810, 818. His use of the latter quite clearly implies that his intention was to adapt the High Court rules to use at Supreme Court level.
426. [1969] S.A.S.R. 141, 150, considering *R.* v. *Bristow* [1960] S.A.S.R. 210.
427. *R.* v. *O'Sullivan & Mackie* (1975) 13 S.A.S.R. 68, 70 (Bray C.J.).
428. (1976) 14 S.A.S.R. 556, 561-562, affirming *R.* v. *Turner* (1975) 12 S.A.S.R. 373.
429. (1976) 14 S.A.S.R. 130, 134-135 (Bray C.J.), 136 (Jacobs J.).
430. (1972) 2 S.A.S.R 446, stipulating that before imposing sentence in drug cases (with special reference to marijuana) the courts should have evidence as to the nature and effects of the drug involved. *Tideman* conceded that after four more years of "regrettably frequent" experience with marijuana cases, the nature and effects of that drug were now well known to the courts—so that unless either side "wishes to tender more specific evidence", it could now be dispsensed with.
431. [1969] S.A.S.R. 172, where the Court was adamant on the need for clear warnings to juries of the danger of acting on uncorroborated evidence in criminal cases.

modulated into *R.* v. *Jansen)*[432] may only reflect a focus on "practice" rather than on "law".

The shift to a simple "wrongness" test may leave less need to borrow from the *Young* rules; but a *per incuriam* device remains useful, as Zelling J. [433] and Hogarth J.[434] showed. Yet neither use of the *Young* devices nor a shift to "wrongness" can detract from the regularity with which older cases were followed—especially if *stare decisis* merged into *res judicata.*[435]

The history of *Ireland* was eloquent. After *R.* v. *Ireland (No. 1)*[436] Crown advisers calculated that though the Full Court majority had ordered a new trial, there was no majority for any one of the thirty-two grounds of appeal which might base such an order. An appeal to the High Court on this novel ground failed,[437] but left puzzles of whether the Full Court decision had any possiblt *ratio decidendi.* Since the case dealt mainly with evidentiary discretions, any *rationes* that *did* emerge could mean little, even for Ireland's own retrial. As Barwick C.J. said, they went only to "the trial which has been held"; decisions in the second trial must turn on "the state of the evidence" in *that* trial, not on appellate responses to the first.[438] Yet in *R.* v. *Ireland (No. 2)*[439] the prior appeals were cited as precedents. In the first appeal, a chart used in evidence was held admissible by Bray C.J. and WaltersJ.; but not by Zelling J., since it was not based on proven expertise. Barwick C.J. agreed.[440] At the second trial, the chart was admitted; a unanimous Full Court approved. Clearly Barwick C.J. did not mean his tentative remarks to "bind"; nor could they bind on such an issue. Yet the Court worked by "distinguishing" rather than "not following": *rejecting* a claim that the same factual situation arose at both trials, and *accepting* that the second trial had yielded "ample evidence" of relevant expertise.

Discretion to renew an unserved writ seems too dependent on practice and individualization for precedent to be of much use; but in *Battersby* v. *Anglo-American Oil Co. Ltd.*[441] the English Court of Appeal found an almost unbroken line of "authority" against renewing a writ if it would "deprive" a defendant of an accrued limitation. The one case out of line, *Holman* v. *George Elliott & Co. Ltd.*,[442] was "not followed". In *Krawszyk*

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432. [1970] S.A.S.R. 531, 536, following *Leak* but (in a case of incestuous assault) setting appreciably lower standards as to the degree of explanation required.
433. In *Romeyko* v. *Samuels* (1971) 2 S.A.S.R. 529, 539, condemning "omnibus counts" despite the imprimatur given to them by Napier C.J. in *O'Sullivan* v. *De Young* [1949] S.A.S.R. 159, 169, on the basis that two English decisions relied on by Napier C.J. were in fact authorities for the very opposite of what he supposed.
434. In *Hanley* v. *Steel* (1973) 5 S.A.S.R. 242, 248, drawing a vital procedural distinction between the powers of disqualification from driving under ss. 168 and 170 of the Road Traffic Act, 1961: though in *Coleman* v. *Mayne* [1966] S.A.S.R. 404, Napier C.J. (for the Full Court) had coupled the two sections together, in a way which perhaps assumed that they were interchangeable. To the extent that this earlier assumption might conflict with *Hanley* v. *Steel,* Hogarth J. thought that in *Coleman* v. *Mayne* "the Court must be taken to have acted *per incuriam*".
435. See Mitchell J. in *Fagan* v. *National Coursing Association of S.A. Inc. (No. 2)* (1974) 11 S.A.S.R. 451, 453; *Hinton* v. *Lower (No. 2)* (1971) 1 S.A.S.R. 512, 550, *per* Wells J.
436. [1970] S.A.S.R. 416. See text at nn. 359-362 *supra,* 477 *infra.*
437. *R.* v. *Ireland* (1970) 126 C.L.R. 321, 329, 331.
438. *Id.,* 335.
439. [1971] S.A.S.R. 6, 10-14 (Bray C.J., Hogarth and Wells JJ.).
440. (1970) 126 C.L.R. 321, 336; see [1971] S.A.S.R. 6, 10, 12.
441. [1945] 1 K.B. 23, 32.
442. [1944] K.B. 591.

v. *Graham*[443] a South Australian Full Court led by Napier C.J. followed not *Battersby* but *Holman*, arguing that *Battersby* had overruled it unnecessarily since the two were wholly compatible. *Battersby* went on "false premises" and "completely missed the point" of *Holman:* "The Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be . . . putting an end to the discretion".[444] *Holman* observed this principle; *Battersby* did not. In *Ulowski* v. *Miller*[445] *Krawszyk* was extended to dismissal of actions for want of prosecution; Bray C.J. restated the point. Broadly relevant factors could be noted;[446] beyond that the discretion must work "as seems best in the interests of justice", unimpeded by "absolute or inflexible rules". Two different Full Courts had thus seen precedent as misplaced in the area; yet *Victa Ltd.* v. *Johnson*[447] challenged *Krawszyk* on orthodox precedent grounds. Three weeks before *Krawszyk* had been argued in Adelaide, and seven weeks before the decision, *Battersby* had been reaffirmed (and *Holman* not even cited) by the English Court of Appeal.[448] Since then, English cases had steadily followed *Battersby.*[449] But this argument proved too much: while *formally* following *Battersby*, the English cases had in fact returned to the flexible discretions of *Holman.* Accordingly *Victa* not only refused to reopen *Krawszyk*, but used the later English cases to bolster it.

One could of course depart from previous dicta;[450] nor did deference to past decisions enfold those of Boothby J.[451] But sorting out decisions from dicta, and both from "enduring principles", was not so easy. Dicta in *Lehmann* v. *Forsyth*[452] suggested that liquor price controls under s. 189 of the Licensing Act, 1967-1976, might be a "complete code" on prices, ousting any control by the Licensing Court. Later the Court so held.[453] Bray C.J. and Sangster J. saw the earlier dicta as quite inconclusive; but Hogarth J. (alone inclined to disagree) felt "bound" to adopt the "complete code" view because "the broad principles enunciated" had covered the instant facts.

Odd suggestions that even Full Court *obiter dicta* might bind single judges[454] perhaps involved only the usual hesitancy (scaled down to single-judge perspective) to meddle in "battles of the giants". It was clear that a single judge faced with a conflict of Full Court decisions would refer it to the Full Court;[455] and though Bray C.J. could say obiter that claims to

443. [1966] S.A.S.R. 73, 75-76.
444. Id., 75-77, 79-80. The quotation is from Kay L.J. in *Jenkins* v. *Bushby* [1891] 1 Ch. 484, 495.
445. [1968] S.A.S.R. 227, 280-281
446. The length of delay; the reason for it; prejudice to the defendant if the case went on; hardship to the plaintiff if it did not; and the defendant's conduct.
447. (1975) 10 S.A.S.R. 496.
448. *Baker* v. *Bowketts Cakes Ltd.* [1966] 1 W.L.R. 861.
449. *Jones* v. *Jones* [1970] 2 Q.B. 576 (C.A.); *Bugden* v. *Ministry of Defence* [1972] 1 W.L.R. 27 (C.A.); *Re Chittenden, Deceased* [1970] 1 W.L.R. 1618 (Ungoed-Thomas J.); *Easy* v. *Universal Anchorage Co. Ltd.* [1974] 1 W.L.R. 899 (writ renewed).
450. See Bray C.J. in *Carslake* v. *Guardian Assurance Co.* (1977) 15 S.A.S.R. 378, 383 (as to *Knott* v. *Royal Exchange Assurance of London* [1955] S.A.S.R. 33).
451. See *Gilbertson* v. *S.A.* (1976) 15 S.A.S.R. 66, 81.
452. (1974) 9 S.A.S.R. 359.
453. In *Young* v. *Farrah & Nicholas Enterprises Pty. Ltd.* (1976) 13 S.A.S.R. 444, 448-451 (Bray C.J.), 458 (Sangster J.), 454 (Hogarth J.).
454. See, *e.g.*, Jacobs J. in *Floreani Bros. Pty. Ltd.* v. *Woolscourers (S.A.) Pty. Ltd.* (1975) 11 S.A.S.R. 441, 448; *cf.* King J. in *Australian Eagle Insurance Co. Ltd.* v. *Federation Insurance Ltd.* (1976) 15 S.A.S.R. 282, 286.
455. See Zelling J. in *H.* v. *C.* (1976) 15 S.A.S.R. 251.

damages for lost earning capacity put the onus of proving residual earning capacity on the defendant,[456] he thought it "wiser" for even the Full Court to refrain from "definite pronouncement" till the matter arose directly.[457] Yet once a single judge gave an opinion, even the Full Court would usually follow it.[458] And in *R.* v. *O'Loughlin; Ex parte Ralphs*[459] the line between "persuasive" and "binding" authority seemed to be crossed. In defining an appealable "order" under the Justices Act, 1921, the Court followed a decision of Poole J. in 1923.[460] Wells J. thought it "too late to question the validity of this decision which has stood, and been acted on, for well-nigh fifty years". Bray C.J. surely meant no more, but what he *said* was: "We are bound by *Stuart* v. *Allchurch* and the subsequent course of practice". The idea that "practice" can bind adds new perils to its relation with precedent; the idea that a single judge can bind a Full Court is simply wrong.

Nor can single judges "bind" one another, though Bray C.J. sometimes implied otherwise.[461] A judge unhappy with another's opinion may choose to invite appeal[462] (and if a higher court intervenes then *cadit quaestio*),[463] but he can also correct or modify his own or another's ideas. In *Timms* v. *Van Diemen*[464] Bray C.J. (sitting alone) suggested that joinder or overlap of charges attracted s.50 of the Acts Interpretation Act, 1915. In *R.* v. *O'Loughlin; Ex parte Ralphs*[465] he thought he had spoken "too widely", but that common law principles might do the same job. He explored these principles in *Romeyko* v. *Samuels*[466] with only a nod to *Van Diemen*; in *Lafitte* v. *Samuels*[467] he announced that *Romeyko* had superseded his earlier dicta. Elsewhere he took another tack. In *Hull* v. *Nuske*[468] *one* encounter with *two* policemen led to charges of "assaulting" and "resisting" them. Walters J. held that reference to *two* policemen was not duplicity, and also that conviction on one charge did not bar conviction on the other. There was only one policeman in *Hallion* v. *Samuels*,[469] but again the incident was treated both as "assaulting" and as "resisting" .For Bray C.J., conviction on one charge *did* bar conviction on the other. But although his reasoning clearly rejected that of Walters J., he framed it as a correction *of the headnote.*

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456. *Forsberg* v. *Maslin* [1968] S.A.S.R. 432, 434; *Bremert* v. *Clark* (1971) 8 S.A.S.R. 294, 296; *Van Velzen* v. *Wagener* (1975) 10 S.A.S.R. 549, 550.
457. *Beck* v. *Farrelly* (1975) 13 S.A.S.R. 17, 19. *Cf.* Mitchell J., *id.*, 25.
458. See, *e.g*, *Elliott* v. *Harris (No. 2)* (1976) 13 S.A.S.R. 516, 518-519; *cf. In re Van Beelen* (1974) 9 S.A.S.R. 163, 207-211.
459. (1971) 1 S.A.S.R. 219, 289 (Wells J.), 220 (Bray C.J.), *Cf.* n.223 *supra.*
460. *Stuart* v. *Allchurch* [1923] SA.S.R. 333.
461. *E.g.*, in *Drage* v. *Drage* [1969] S.A.S.R. 484, 487. Of course long acceptance of a single-judge decision may be adduced as a reason why it *ought* not to be disturbed: see *Brewarrana* v. *Commissioner of Highways* (1973) 4 S.A.S.R. 476, 483 (Bray C.J.), 490 (Walters J.), 501 (Wells J.).
462. See Zelling J. in *Morris* v. *Roufos* (1975) 11 S.A.S.R. 3, 4-5.
463. See, *e.g.*, Wells J. in *Perre Bros.* v. *Citrus Organization Committee of S.A.* (1975) 10 S.A.S.R. 555, refusing to follow the decision of Travers J. in *Kalliontzis* v. *Citrus Industry Organization Committee of S.A.* [1966] S.A.S.R. 294, 300-301, because it could not stand in the light of *Banks* v. *Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222. Of course, High Court decisions and dicta continue to supervene: *quaere* now whether the High Court majority dicta in *Perre* v. *Pollitt* (1976) 135 C.L.R. 139, 151-152, 154, may not support Travers J.
464. [1968] S.A.S.R. 379, 382.
465. (1971) 1 S.A.S.R. 219, 210-221.
466. (1972) 2 S.A.S.R. 529, 553-554. See also text at nn. 25-32 *supra.*
467. (1972) 3 S.A.S.R. 1, 5. And see text at nn. 26, 266-267, 404-414, 433 *supra.*
468. (1974) 8 S.A.S.R. 587, 593 (duplicity), 599-600 *(autrefois convict).*
469. (1978) 17 S.A.S.R. 558, 563-564.

But when Mitchell J. modified an earlier judge's "general rule" that bail is not granted pending appeal,[470] no real precedent issue arose. She cited "changed attitudes to bail", adding that "nowadays it is the practice in South Australia to grant bail during trial". This was an invocation of practice, and a vivid example of practice modifying itself; it was no more.

8. Precedent, Primacy and Practice

The borderland of "precedent" and "practice" harbours quicksands in which orderly analytical administration of justice may be enmired. A State Supreme Court's use of precedent draws it ineluctably into such quicksands. Whether submitting to supervision by higher appellate tribunals, or maintaining supervision over trial judges and magistrates, the Court *must* rely on a hierarchical system of precedent. Yet in both respects the activities most needing supervision are *not* those of ratiocination about rules of law, to which a system of precedent is at least in theory attuned. Instead they are behavioural processes weaving mere patterns of habitude on "the normative force of the factual";[471] or discretionary processes of individualized concretization of indeterminate standards.[472] In short, a Supreme Court is most dependent on precedent for giving and receiving guidance in the very areas which precedent is least equipped to handle. The problem is deepened by uncertainty over whether a rule is one of "practice" (and not amenable to governance by precedent), or of "law" (which is so amenable); and by the random evolution whereby "practice" grows into "law", or "law" degenerates into "practice", or the two converge, merge and divide. The resulting dilemmas for Supreme Court compliance with higher appellate guidelines are noted above.[473] In efforts to secure compliance by magistrates and trial judges with the Court's own guidelines, the problem was even more acute.

It was not only pornography that led Bray C.J. to echo the "studied moderation" of Lord Hailsham in *Cassell & Co. Ltd.* v. *Broome*.[474] Marijuana was even touchier. When a sentencing judge presumed to "explain" the Full Court's "error" in reducing sentence in *R.* v. *Stephens*,[475] Bray C.J. again cited Lord Hailsham. "I forbear in the exercise of judicial restraint from commenting on the expressions which the learned Judge saw fit to

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470. *Welden* v. *R.* (1977) 15 S.A.S.R. 320, 321, as to *R.* v. *Ryan* [1930] S.A.S.R. 215.
471. See Jellinek, *Das Recht des modernen Staates* (1900), 304-306.
472. See Pound, "The Administrative Application of Legal Standards", (1919) 44 *Rep. Am. Bar Assn.* 445, 456-458; Pound, Introduction to National Consumers' League (ed.), *The Supreme Court and Minimum Wage Legislation* (1925), xi, xviii-xix; Pound, "Hierarchy of Sources and Forms in Different Systems of Law" (1933) 7 *Tulane L.R.* 475, 485-486; Pound, "What is Law?", (1940) 47 *W. Va. L.Q.* 1, 7, 9.
473. See text at nn 363-365 *supra;* and on other manifestations of the problem *cf.* text at nn. 228-229, 262-268, 356-362, 441-449 *supra,* and passages collected in n.477 *infra.* And see Stone, "1966 And All That! Loosing the Chains of Precedent", (1969) 69 *Columbia L.R.* 1162, 1162-68 and Blackshield, "'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent", (Australian Society of Legal Philosophy, 5 April, 1973) 2-15: with which *cf.* Bray C.J. in *Timms* v. *Van Diemen* [1968] S.A.S.R. 379, 382, on the discussion of precedent and practice in *Connelly* v. *Director of Public Prosecutions* [1964] A.C. 1254. *Cf.* the apparent recent conflict in England, in Commonwealth extradition proceedings, between *R.* v. *Governor of Pentonville Prison; Ex parte Kirby* [1979] 1 W.L.R. 541 (Note), and *R.* v. *Governor of Gloucester Prison; Ex parte Miller* [1979] 1 W.L.R. 537. And see the conflicting indications drawn by *R.* v. *Goode* [1970] S.A.S.R. 69, 73-74, from dicta in *Davies & Cody* v. *R.* (1937) 57 C.L.R. 170. The main issue in *Goode* (see n.363 *supra)* further illustrates the point.
474. [1972] A.C. 1027, 1054. See text at nn. 33-36 *supra.*
475. (1975) 13 S.A.S.R. 145, discussed in *R.* v. *Gronert* (1975) 13 S.A.S.R. 189, 191.

employ . . . It is not usual for lower courts to declare that higher courts have fallen into error." Even so, the trial judge may well have seen his rebellion as worthwhile. Sangster J. was able to hold that his criticisms, though "not open" to him, were "correct", so that the Court "should now declare the law to be, and always to have been, in substance as stated (albeit with the impropriety already referred to) by the learned trial judge". He held that the appeal from sentence should be dismissed. Bray C.J. and King J. agreed in result; and although they still defended *Stephens*, this was very much a rearguard action. Bray C.J. now said that *Stephens* had never purported to

> "lay down any principle of law. There is no rule of law prescribing any particular methods [by] which an appellate court must [assess] . . . whether a sentence . . . is out of line with current sentences and it would . . . be unfortunate if this were ever attempted . . . What the Court did . . . was a perfectly intelligible and valid basis of comparison . . . It was the correct one and I adhere to it. It does not follow that it will necessarily be applied in other cases . . . I repeat that there is no rule of law about these matters."[476]

The same no-man's-land between "law" and "practice" was the battle-ground for all the tangled issues in *R.* v. *Ireland*;[477] but above all as to the summing-up by Chamberlain J. at the first trial. Bray C.J. and Zelling J. found certain specific misdirections of fact; and Bray C.J. added these to his grounds for a new trial. Beyond this neither could go. Zelling J. would have *liked* to treat a strongly one-sided summing-up as "such a distortion of the trial process" as to merit appellate intervention. But "the cases are otherwise": fairness and impartiality are not enforceable by law.

R. v. *Wright*[478] saw another impasse. After inquiry on the *voir dire* Bray C.J. (presiding at the trial) ruled against admissibility of a confession; but on the *voir dire* the accused had again admitted his guilt. When the jury returned, the Crown sought to give evidence of this. Discharging the jury, Bray C.J. referred the point to the Full Court, which agreed that it was a matter of discretion. Bray C.J. followed the House of Lords: "It is of the essence of the discretion that it should not be fettered by rigid rules as to its application, notwithstanding the risk of variation in practice due to the idiosyncrasies of individual judges."[479] But he held that as a matter of discretion the evidence should *not* be admitted; Chamberlain J. held that it *should* be. Only Zelling J. thought it undesirable in such a "borderline" case to say what the judge at the new trial should do. Not only did the two attempts at guidance cancel each other out; it was surely paradoxical to attempt such guidance at all. That the guidance was pitched at the level of "principles" does not help. If any agreed "principles" had emerged, would they have "bound" the judge at the new trial or not? If so, would they bind as precedent; as *res judicata*; or what? And how would they be consonant

476. *Id.*, 199 (Sangster J.), 201 (King J.), 192, 193 (Bray C.J.).
477. See *R.* v. *Ireland (No. 1)* [1970] S.A.S.R. 416; *R.* v. *Ireland (No. 2)* [1971] S.A.S.R. 6; and see text at nn. 160-168, 436-440 *supra*. As to the summing up see [1970] S.A.S.R. 416, 430-433 (Bray C.J.), 453-454 (Zelling J.). Though Zelling J. felt constrained by "the cases", he cited only *R.* v. *Pope* (1910) 4 Cr. App. R. 123; yet that case had stressed a duty to "see that the balance is held evenly between the prosecution and the defence".
478. [1969] S.A.S.R. 256.
479. *Id.*, 264, following *Selvey* v. *Director of Public Prosecutions* [1970] A.C. 304, 341-342, 346, 352, 360. *Cf.* Chamberlain J., *id.*, 271, Zelling J., *id.*, 278.

with the judge's unfettered and even idiosyncratic discretion? If they were binding, what would be their origin, nature and weight?

When Supreme Court judges assess *each other's* discretionary choices, constraints of mutual respect and collegiate harmony compound the problems. In appellate supervision of magistrates the Court took a firmer stand; but the theoretical puzzles remain. When a magistrate opined that suspended sentence "is really no punishment at all", Bray C.J. retorted[480] that the Full Court had "frequently expounded" its merits; that it "behoves courts of summary jurisdiction to take heed of our pronouncements"; and that "this error sets the sentence at large for us". (But in fact it was not varied). In other areas the Court undertook a virtual continuing program of special education for magistrates, using precedent as the medium of instruction. One such campaign began in *Cooling* v. *Steel*,[481] when Wells J. outlined procedures by which magistrates could ensure that unrepresented defendants who pleaded guilty were aware of their rights and were not "overawed". It was (he said) "imperative" to follow these "practices"; and though the instant facts were unclear, it was "safest and fairest" to quash the sentence. In *Salter* v. *Seebohm*[482] Walters J. sought to reiterate "and stress" the point; in *Lamont* v. *Bryant*[483] Bright J. said that "the rules laid down" by Wells J. "ought to be observed", and that if they were not, appellate scrutiny would show "even more than ordinary care". In *Wyngaarden* v. *Samuels*,[484] Bray C.J. agreed. By 1975 the point had been made on at least four other occasions;[485] and when Zelling J. in *Smith* v. *Murfitt*[486] found yet another example of noncompliance, he not only ordered costs against the prosecution but warned that noncompliance was a "gross dereliction" of duty, and that "sooner or later it may become necessary to order costs personally against Justices of the Peace who will not apply the law when this Court directs them to do so". For Bray C.J. this was too much. In *Barila* v. *Huffa*,[487] while again affirming *Cooling* v. *Steel*, he not only set limits on its scope (it did *not* require a warning as to the effect of prior convictions), but was "not prepared" to hold that a shortfall in the desirable cautions "will necessarily lead to the intervention of this Court". In *R.* v. *Hanias*,[488] Mitchell J. referred to *Cooling* v. *Steel* as having "become a guide to the practice to be adopted by courts of summary jurisdiction"; but whether she spoke *de consuetudine lata* or *de consuetudine ferenda* is not clear. In any event she spoke of "practice", not (as Zelling had done) of "the law".

Even more striking was the drive to halt discrimination as to costs. In *Timms* v. *Van Diemen*[489] Bray C.J. noted the "practice" whereby conviction led "more or less automatically" to costs against the defendant, but costs against the police in case of acquittal were given only if the prosecution was thought "unreasonable". This practice offended "even-handed justice". It

480. *Elliott* v. *Harris (No. 2)* (1976) 13 S.A.S.R. 242, 247; his brethren agreed.
481. (1971) 2 S.A.S.R. 249.
482. (1972) 4 S.A.S.R. 192, 195-196.
483. (1972) 4 S.A.S.R. 333, 335.
484. (1973) 4 S.A.S.R. 420, 421.
485. Bray C.J. in *Hanley* v. *Steel* (1973) 5 S.A.S.R. 242, 247; Mitchell in *Mowbray* v. *Fingleton* (1973) 6 S.A.S.R. 159, 160; and Walters J. in *Kessling* v. *Commane* (1975) 10 S.A.S.R. 284, 286, and in *Tarca* v. *Price* (1975) 10 S.A.S.R. 604, 616.
486. (1975) 11 S.A.SR 1, 2
487. (1978) 18 S.A.S.R. 226, 230.
488. (1976) 14 S.A.S.R. 137, 150.
489. [1968] S.A.S.R. 379, 386.

had "no warrant in the statute"; nor in precedent;[490] nor in New South Wales endorsement[491] of a similar practice, for this should not be followed. But "the practice exists". He would not "disturb it without reference to the Full Court"; he would only "express my emphatic dissent, and my belief that the point remains open in an appropriate Court". *Hamdorf* v. *Riddle*[492] took the hint; the Full Court duly gave the *coup de grâce*. The practice was "fairly deeply rooted"; but no South Australian precedent "compels us to adhere to it". It "is wrong in principle and ought to be abandoned". The maxim that "the practice of the court is the law of the court" was no bar to disapproval of a practice "never formally approved". To quote Lord Robertson there had been some "practice" but no "reasoned vindication"; and "now that the matter is probed, the thing is on principle indefensible".[493]

But this decision had scotched the snake, not killed it. Four years later Wells J. tried to spell out for magistrates just what was required:

> "I have considerable sympathy for courts of summary jurisdiction who are expected to apply in practice precepts so broadly framed. It is one thing to state, as works of authority . . . do, 'Wide as the discretion is, it must be exercised judicially according to reason and justice, and not according to subjective feelings of approval, disapproval, sympathy or benevolence'. It is quite another thing to find in these words clear and definite guidance as to what to look for. [Little] assistance . . . can be derived from reported instances in which the discretion has been exercised . . . ; a few stand out as affording some direct help, but most go simply to enlarge the wilderness of single instances. We may, however, take hope from Mr. Justice Cardozo's affirmation of faith in the judicial process . . . 'There before us is the brew . . . *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion."[494]

Yet the real effect of this preamble was to show the impossibility of the task undertaken. Out of a montage of quotations from English precedents, Wells J. distilled six basic "principles". But in part these merely stressed the width of the discretion and the futility of restricting it by rules, or burdens of proof, or formal joinder of issues; beyond this, they said little more than that costs should follow the event except for "good cause", and that "unmeritorious conduct" might bear upon "good cause". The attempt was worthwhile as an elaborate signal to magistrates that *Hamdorf* v. *Riddle* should be taken seriously; and the result on the instant facts offered useful exemplarship.[495] Yet to stress exemplarship would return us to the "wilderness of single instances" which Wells J. hoped to transcend.

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490. Since *Lenthall* v. *Wilson* [1933] S.A.S.R. 31 had held only that where costs are awarded to the prosecution they should include counsel's fees; and that (if the complainant is a policeman) they should not be restricted by the fact that he would not *personally* bear the expense in any event. On this point it was correctly applied by Chamberlain J. in *Whitbread* v. *Velliaris* [1969] S.A.S.R. 291.
491. *Ex parte Jones* (1906) 6 S.R. (N.S.W.) 313, 316; he cited countervailing dicta in *Anstee* v. *Jennings* [1935] V.L.R. 144 and in *Mallan* v. *Berry* [1964] S.A.S.R. 8.
492. [1971] S.A.S.R. 398, 400-401 (Bray C.J., Hogarth J. and Sangster A.J.).
493. *Watt* v. *Watt* [1905] A.C. 115, 123.
494. *Schaftenaar* v. *Samuels* (1975) 11 S.A.S.R. 266, 267. The quotation is from Cardozo, *The Nature of the Judicial Process* (1921), 10-11.
495. The magistrate had withheld costs from the successful defendant on two grounds. One was the failure of either side to prove its case: this, said Wells J., was "wrong in law". The other was "the defendant's refusal to yield his fingerprints";

The problems with precedent in such areas are cumulative. *First,* on such matters precedent is only a meta-language: it establishes that an area of judicial discretion exists, and broadly identifies the job to be done; but cannot govern substance or technique or results in the area so defined. In Kelsen's terms, it can offer "dynamic" (power-conferring) norms, but not "static" (content-regulating) norms. *Second,* insofar as precedents do seek to regulate content, the "binding" guidelines laid down must merge inextricably in actual operation with the non-binding cluster of traditional and habitual modes of evaluating and behaving, labelled "practice". *Third,* even the "binding" guidelines injected into this mix must inevitably embody only "categories of indeterminate reference", whose content (such as it is) can at best "not usually lead compellingly to any one decision in a concrete case", but "allows a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range".[496] The efforts of Wells J. to clarify *Hamdorf* v. *Riddle,* for instance, turned on such terms as "reason and justice"; "good cause"; "unmeritorious conduct"; "unjustifiably or needlessly"; undue length"; "unnecessary litigation"; "unreasonable conduct"; "cannot act arbitrarily"; "satisfied that the defendant, by wilful *or other* wrongful conduct . . . has *so markedly* contributed . . . that it would be *fair*". *Fourth,* whatever guidance might come through cumulative exemplarship must be nullified by the need to insist (in the words of H. M. Hart and A. M. Sacks)[497] that there is a "continuing discretion", not "discretion on a one-way ratchet". In the latter, according to Julius Stone's summation,[498] "there are rules involving application of standards, such standards referring not to facts alone, but to a complex of facts and the valuation of them"; and although the rules "initially provide only vague guidance for their application", there is a "legislative intention that they be developed through reasoned elaboration by the designated tribunal into more precise guides". For "continuing discretion" there is no such legislative intention: rather the intention is that the tribunal "continue to exercise choice on each occasion, *without* more precise guides emerging from reasoned elaboration". Clearly the discretion as to costs is a "continuing discretion", however we might wish it otherwise. Yet, *fifth,* as Stone's discussion also makes clear, the reality in practice (and even in "legislative intention") may be that the distinction between the above two kinds of discretion is never clearly made, or breaks down—so that the different uncertainties of the two approaches become cumulative on each other, together with the added uncertainty of movement between the two.

The result is that, in much of a Supreme Court's supervisory work in relation to the workaday branches of the State's judicial system, reliance on the techniques of precedent is likely to lead to "shipwreck"[499] from the viewpoint both of theoretical justification and of practical efficacy. To say this is not to counsel despair: "It is not for thee to finish the task; neither

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495. *Cont.*
this, said Wells J., was properly taken into account, along with the defendant's generally "arrogant and provocative" conduct. The final order was therefore that the complainant should pay half the defendant's costs.
496. Stone, *Legal System, op. cit. (supra* n.2), 264.
497. *The Legal Process* ("tentative edition", 1958), 161-162, 168-179.
498. Stone, *Social Dimensions of Law and Justice* (1966), 673-674.
499. See Jaspers, *Von der Wahrheit* (1947), 521, 871-872, 893; Jaspers, 3 *Philosophie* (1932), 220-234; Thyssen, "The Concept of 'Foundering' in Jaspers' Philosophy", in Schilpp (ed.), *The Philosophy of Karl Jaspers* (1957), 297, 312-342.

art thou free to desist from it."[500] But what does follow is that in the end reliance on the techniques of precedent can be only a small part of larger and more enduring strategies of patience, persuasion and wisdom.

500. Stone, *Legal Controls of International Conflict* (1954), x1 and Stone, *Aggression and World Order* (1958), 183; quoting Rabbi Tarphon, *Tractate Aboth* (c. 100).