CASE AND COMMENT.

WILLS — PARTIAL REVOCATION — DEPENDENT RELATIVE REVOCATION.—A testator makes a will, the dispositive part of which consists of two clauses: one, leaving half the estate to A, the other, leaving to B the remaining half. On the testator's death, the will is found with the clause concerning A completely cut out, and, due to the method of cutting, the will was completely severed into two pieces. Neither of the two remaining pieces had been re-executed or re-attested. What action a court of probate should take under such circumstances was the problem recently presented to the Ontario Court of Appeal in *Re Anderson*.[1]

As a matter of common sense, it seems to the writer reasonably clear, in the absence of evidence to the contrary, that the testator undoubtedly intended to revoke the provision in favour of A, and to leave operative the clause in favour of B. If the intention had been to nullify the entire will, the natural courses open would have been either a complete destruction of the will, or at least a tearing or cutting of the will in its entirety. It seems strange that a man would revoke an entire will by deleting a clause in favour of one beneficiary only. Of the various views taken by the four judges hearing the case, including the trial judge, this appears to have been the only view definitely rejected, and that with practically no comment. As the facts appear so obvious, the rejection of this view must depend either on an insuperable obstacle contained in the *Wills Act*, or in the body of judicial legislation which has grown up around that Act. The writer does not believe there was any such obstacle, and therefore suggests that the case, as reported, cannot be supported.

The majority judgment of the Court of Appeal, written by Grant, J.A.,[2] suggests four alternative conclusions open on the facts as

[1] [1933] O.W.N. 67; [1933] O.R. 131.

[2] If the practice adopted by the Court of Appeal in this case, apparently without objection from counsel, be taken as establishing a precedent, an extremely important decision has been made without either argument or judicial notice. The judgment purports to be that of a majority of three. The majority is stated as consisting of Grant, J.A., and Latchford, C.J., and it was their view which prevailed in allowing the appeal from the Surrogate Court Judge. Fisher, J.A., dissented. As a matter of fact, the reasons for judgment of the majority appear to have been written by Grant, J.A., Latchford, C.J., concurring without further reasons. As judgment of the Court was delivered on January 19th, 1933, and as Grant, J.A., was not living at that date, he having died on January 1st, 1933, it would appear that under the circumstances a majority judgment was a physical impossibility. Section 9 of the Ontario *Judicature Act*, R.S.O., 1927, c. 88, which allows a majority

stated. While "partial revocation" (the solution which, as suggested, not only appears the simplest, but accords best with the facts) is mentioned, it is nowhere discussed in the reasons for judgment.[3] It is possible, however, that partial revocation was indirectly considered and deemed unworthy of further notice by reason of the answer given to the first proposition discussed. That proposition was to the effect that the mutilation of the will was to be deemed an alteration, leaving the papers as found constituting the will. Grant, J.A., dismissed this in one sentence, saying that the requirements of the *Wills Act*, necessitating the attestation of alterations, was not followed. On this point the dissenting judge seems to have taken the same view.

It is submitted that this attitude is erroneous, in so far as it ignores completely the possibility of partial revocation, and secondly, fails to distinguish between revocation and alteration. If it be sound, such an attitude effectually destroys even the possibility of a partial revocation by physical acts of "burning, tearing or otherwise destroying," because, in every such case, the will must of necessity operate in a manner altered from that as originally executed. There are, however, numerous decisions, none of which are, unfortunately, referred to in the decision, allowing the remainder of wills which have been mutilated by the excision of bequests or clauses to be probated in the form in which they were found. In none of these is there any mention of the necessity of re-execution.[4] As the *Wills Act* expressly provides for revocation of a "will, or any part thereof,"[5] the whole problem is thus reduced to a question of ascertaining *quo animo* the burning or tearing was done. This was put most clearly in an early case,[6] quoted with approval and followed by Lord Penzance in *In the Goods of Woodward*.[7] Admitting that

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to deliver judgment in the case of the death of one member of an appellate court, does not seem to cover this case. Had judgment been given at the conclusion of the argument, with reasons only deferred, no quarrel could have been taken with the course pursued in this case. As, however, a judge always has the opportunity of revising or changing his decision down to the actual giving of judgment at least, it is submitted that *Re Anderson* is not a judgment of the Ontario Court of Appeal in any sense of the word.

[3] Anyone familiar with the extreme care with which the judgments of the late Mr. Justice Grant were worked out, must find this surprising. The fact that these reasons were not handed down as his "judgment" until almost three weeks after his death, may suggest an explanation.

[4] *In the Goods of Lambert* (1841), 1 N. of C. 131; *In the Goods of Cooke* (1847), 5 N. of C. 390; *Christmas* v. *Whinyates* (1863), 3 Sw. & Tr. 81; *In the Goods of Woodward* (1871), L.R. 2 P. & D. 206; *In the Goods of Maley* (1887), 12 P.D. 134; *In the Goods of Leach* (1890), 63 L.T. 111. See also 38 L.R.A. (N.S.) 797.

[5] R.S.O., 1927, c. 149, s. 22 (Imperial Act, 1837, s. 20).

[6] *Clarke* v. *Scripps* (1852), 2 Rob. Ecc. 563.

[7] *Supra.*

a partial revocation was permissible by burning or tearing, the question, according to that case, was to determine whether the intention was to revoke the will entirely or in part. Such intention might be proved by declarations of the testator, or might "be inferred from the nature and extent of the act done by a testator. . . . From the face of the paper itself it may be inferred, either that he did intend to destroy it altogether or did not." Thus, if the main substance of the will is destroyed, so that what remains is unintelligible without what was there previously, there is little doubt that a complete revocation was contemplated.[8] So, also, where something essential to the will in its entirety, such as the testator's signature, is removed.[9] In the present case, however, the inference seems reasonably clear, that by virtue of the method adopted, a partial revocation only was intended.[10]

The point raised by the Ontario Court, that to admit to probate the will in its changed form would be to give effect to alterations unattested in accordance with the *Wills Act,* is one that has been little discussed in the cases. The answer probably depends on a realization of the exact import of revocation and alteration. The difference between the two was stated by Mellish, J., in *Swinton* v. *Bailey.*[11] In that case a testator had devised his real estate to A, "her heirs and assigns forever." He subsequently obliterated the words in quotation marks. In discussing the problem raised as to whether giving effect to what remained would be admitting to probate an unattested alteration, Mellish, L.J., stated: "The difference between revocation and alteration seems to me to be this: if what is done simply takes away what was given before or a part of what was given before, then it is revocation, but if it gives something in addition, or gives something else, then it is more than revocation and cannot be done by mere obliteration."[12] Applying this test to

[8] *Williams* v. *Jones* (1849), 7 N. of C. 106; *Treloar* v. *Lean* (1889), 14 P.D. 49; *Leonard* v. *Leonard,* [1902] P. 243.

[9] See, however, *Christmas* v. *Whinyates, supra,* where the testator, by cutting out one clause of a will, also cut off his own signature. Standing alone, the Court indicated such a removal of a signature would work a complete revocation, but in this case, from the manner of the cutting, the Court found in favour of a partial revocation, and probated the balance of the will.

[10] *In the Goods of Lambert, supra,* and *In the Goods of Cooke, supra,* seem to be practically identical with the present case. In both, clauses had been cut out with the effect of completely severing the two parts of the will. The fact that, in both, the testator had gummed the severed pieces together with a wafer, seems not material.

[11] (1876), 45 L.J. Ex. 427; on appeal, 4 App. Cas. 70.

[12] In the House of Lords, Lord Penzance seems to have regarded it as immaterial that part of a will which is struck out may have the effect of increasing benefits passing by the will. Similar problems arise in connection with the jurisdiction of probate courts to strike words out of a will on the ground of mistake. The English Courts have not refrained from excluding qualifying words, even though the effect may be to pass considerably more prop-

Re Anderson, it seems quite apparent that no question of alteration was raised. No new disposition was made; nothing was altered; part was merely taken away.

The Ontario Court seems to have taken the standpoint that whenever a will is found in a mutilated condition, a presumption of law invariably arises to effect a complete revocation, in the absence of clear evidence to the contrary. Enough has been said to indicate that this is not true. The strongest point in favour of this argument in the present case, lay in the fact that the will was completely severed into two pieces. Admitting, however, that had the clause been capable of excision without this result—which seems highly improbable—an English Court has recently refused to say there is any presumption of *animus revocandi* when the will is found in two pieces, both of which are legible.[13] While this case is not referred to in the judgment in the Ontario case, it seems to cover the situation, because, granting the intention to revoke the one clause, all that remains is perfectly visible and legible. On this view, it seems that the rest of the will should have been admitted to probate.

One further observation remains. The entire Court, having decided that the will could not operate in its mutilated state, found itself confronted with the doctrine of dependent relative revocation. The vagaries and inconsistencies of this doctrine have been admirably treated by Professor Warren of the Harvard Law School,[14] and to deal with the subject adequately, would necessitate too lengthy a discussion. In a short and popular form, the doctrine may be stated as follows: Where the court finds that a testator revoked his will or part of his will as part of a larger act of substituting another testamentary provision, and such substitution for any reason fails to take effect, the court will declare the original revocation ineffective, since it was dependent or conditional on the new provisions taking effect. Taken in this mechanical way, strange results often follow. Thus, the dissenting judge in *Re Anderson*, finding the testator revoked because he intended to substitute the will as mutilated, and finding, as we have indicated, that such mutilated will could not be given testamentary effect, held that the revocation entirely failed,

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erty than the will as originally executed covered. See, for example, *Morrell* v. *Morrell* (1882), 7 P.D. 68, where the Court, by striking out "40," which qualified a gift of shares, in effect passed an additional 360 shares to a beneficiary. Would the Ontario Court have balked at this as an alteration? Such a case raises serious difficulties, and Lord Blackburn in *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, 198, has indicated that courts should not reject words, where "the rejection of words alters the sense of those which remain." The entire problem is discussed in Gray: *Striking Words out of a Will*, (1912), 26 Harv. L. Rev. 212.

[13] *In re Cowling, Jinkin* v. *Cowling*, [1924] P. 113.

[14] *Dependent Relative Revocation*, (1920), 33 Harv. L. Rev. 337.

and that the will as it was originally executed should be admitted to probate. In other words, the testator, having carefully manifested, in accordance with the *Wills Act*, his intention of cutting A out of his will, would, under this view, have had him forced back into the will by the court. Truly a strange doctrine!

The true view would seem to be that expressed by Professor Warren.[15] Namely, that courts, under the guise of dependent relative revocation, are relieving against a mistake. The testator may have revoked under a mistake of fact or law, it is true, but in such case, no relief should be given by going back to the original will, unless it is plain that by so doing the testator's intention will be better effectuated than by leaving the will revoked.[16] This is the view taken by Grant, J.A., who stated, in effect, that unless the evidence was clear and satisfactory as to what the testator would have done had he been apprised of his error, the revocation should stand.[17]

The result of the case is curious. Two judges held there was an intestacy, which view ultimately prevailed. Two judges wished to probate the will as it stood originally. Nobody, apparently, showed any desire to give effect to the testator's intention, even though such intention was to be found in an instrument executed according to the formalities prescribed by the *Wills Act*.

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NEGLIGENCE — NERVOUS SHOCK — DAMAGES — PRIVY COUNCIL — BINDING EFFECT OF DECISION—CANADIAN COURTS.—The judgment of the Ontario Court of Appeal in *Negro* v. *Pietro's Bread Co. Ltd.*,[1] as delivered by Middleton, J.A., is extremely interesting from more than one standpoint. In this case the Court upheld an award of damages to a plaintiff who became very excited and shocked nervously because he found some pieces of broken glass in his mouth while eating bread purchased from the defendant. He suffered no direct physical injury other than a slight scratch calling for no medical treatment, but nevertheless sued the defendant for five thousand

[15] *Op. cit.*

[16] *Goods of Horsford* (1874), L.R. 3 P. & D. 211, furnishes an interesting illustration of a court unconsciously applying the mistake doctrine to one obliterated section of the will, and mechanically applying the "part of a larger act" doctrine to another. As the Court gives no explanation of the mental processes involved, the case is confusing without some appreciation of the method of stating the problem suggested by Warren.

[17] See also *In the Estate of Zimmer* (1924), 40 T.L.R. 502.

[1] [1933] O.R. 112; [1933] 1 D.L.R. 490.

dollars damages for nervous shock. The learned County Court judge before whom the case was tried awarded the plaintiff two hundred dollars damages for shock and the defendant appealed, seeking to bring the case within the principle of that notorious stumbling-block in the law of negligence, the decision of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*.[2]

It is hardly necessary to recall that this celebrated case held that sudden terror, unaccompanied by any actual physical injury but occasioned by nervous or mental shock, gives rise to no cause of action; that it has been severely criticized, both from a legal and medical standpoint, and that the Courts of England, Ireland and Scotland have flatly refused to treat it as an authority. The writer must, therefore, apologize for his temerity in suggesting that, while conceding the impossibility of defending this decision from the standpoint of pure jurisprudence or physiology, the pragmatical reasons for the same still have weight. These reasons are well illustrated by the case, the subject of this annotation. The common experience of mankind probably tells us that, if the average citizen had been rewarded with damages aggregating four to six weeks' income every time he had found a foreign substance in his food and decided to make a ridiculous fuss about it, he probably would be in a position to weather the current economic depression without any difficulty. Yet the Court thought the award of damages made "very modest."

If, then, our courts are going to admit claims of this sort, it may be respectfully suggested that they be scrutinized with care, even to the point of scepticism and at the very least that they adopt the sturdy point of view with which alleged nuisances are viewed in the leading case of *Walter* v. *Selfe*.[3] There it is said a nuisance must be "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to the elegant or dainty models and habits of living, but according to the plain and sober and simple notions among the English people."

The above comment however can be treated as a digression, for the most interesting phase of the case under discussion is the ingenious effort made by the Court to escape from the consequences of the *Coultas* decision. Lawyers trained in the common law and therefore fervent disciples of the rule of *stare decisis* nevertheless have to concede that the efforts of courts, where the legislature has failed them, to avoid past questionable precedents, are usually more interesting than edifying. The usual procedure adopted, of course, is

[2] (1888), 13 App. Cas. 222.
[3] (1851), 20 L.J. Ch. 433.

what Ford, J., of Alberta, has called the "judicial subterfuge of being astute to distinguish." Some of the efforts of this character put forth by our tribunals of final resort lead one to question whether a frank avowal of a past mistake, such as the Supreme Court of the United States has on rare occasion permitted itself, would not be on the whole a more satisfactory policy.

In the case under discussion the Court, through that extremely eminent judge Middleton, J.A., have taken what he himself terms the "bold" course of cutting the Gordian knot by stating that because of recent decisions it is not bound to follow the *Coultas* case, even though a decision of the Privy Council. It is of course to be pointed out that this attitude of the Court is *obiter* as the plaintiff had sustained some physical injury even if utterly trivial. Nevertheless, a statement by a Canadian Court of Appeal that it is not bound to follow a decision of the Privy Council contains such elements of apparent novelty that the grounds for such statement deserve careful scrutiny.

Up to the present case whatever regard has been had to decisions of the Privy Council in the English Courts or the House of Lords, except for one case to be hereinafter referred to, decisions of the Privy Council from any jurisdiction involving English law have been treated by all Canadian courts as of binding authority. As Middleton, J.A., points out, the Ontario Court of Appeal in *Henderson* v. *Canada Atlantic Ry. Co.*,[4] and in *Toms* v. *Toronto Railway Co.*,[5] and the Supreme Court of Canada in the latter case,[6] expressed themselves as bound to follow the *Coultas* case in any similar set of facts despite their expressed disapproval of the decision.

In *Stuart* v. *Bank of Montreal*[7] Anglin, J., made an exhaustive investigation of the principle of *stare decisis* in England and Canada and laid down definitely the principles which he concluded should govern the Supreme Court of Canada in respect of decided cases. He said: "Of course, if the Privy Council should determine that the law is not what this court has declared it to be, the view of this court must be deemed to be overruled. A decision of the House of Lords should, likewise, be respected and followed though inconsistent with a previous judgment of this court. In the event of an irreconcilable conflict upon a question of law between a decision of this court and a subsequent decision of the English Court of Appeal—should such a case arise—in view of what was said by the

[4] (1898), 25 O.A.R. 437.
[5] (1910), 22 O.L.R. 204.
[6] Reported at 44 Can. S.C.R. 268.
[7] (1909), 41 Can. S.C.R. 516 at p. 548.

Privy Council in *Trimble* v. *Hill*,[8] the duty of this court would require most careful consideration."

In 1924 in two cases in Western Canada the *Coultas* case came up for consideration. It is to be noted that these decisions are substantially later than the cases disapproving of it with the exception of *Hambrook* v. *Stokes*.[9] In *McNally* v. *Regina*[10] the Court of Appeal of Saskatchewan was able to distinguish the *Coultas* case but Lamont, J.A., said, "So long as the *Coultas* case remains unreversed, Canadian Courts are in my opinion obliged to follow it," and Martin, J.A., was of like opinion. In *Penman* v. *Winnipeg Electric Ry. Co.*[11] *Mathers*, C.J.K.B., expressly followed the *Coultas* case, saying, "It is a decision of our highest Court of Appeal and has, in Canada, generally been regarded—as indeed our Courts are bound to regard it—as a binding authority in all cases indistinguishable in their facts."

In the case of *Re Lobb* v. *Nixon*[12] the Manitoba Court of Appeal had pressed on them a Privy Council decision from Trinidad. It was able to show that the alleged authority was *obiter* and therefore not binding upon the Court, but Dennistoun, J.A., who delivered the judgment of the Court, in discussing the matter, said, "That judgment, if the point were actually decided, would be binding upon this Court, rather than a judgment of the House of Lords to the contrary." In the case of *Robins* v. *National Trust Co. Ltd.*[13] the Privy Council, per Viscount Dunedin, stated: "When an Appellate Court in a colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law and that being settled the Colonial Court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled, so far as the Colonial Court is concerned, by a judgment of this Board."

Immediately after the *Robins* case, however, a note of independence was sounded in Western Canada, for in *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*[14] Martin, J.A., of the British Columbia Court of Appeal, declared: "I shall proceed to deal with the case at bar upon the assumption that the law as stated by the House of Lords does not conflict with that laid down by our national

[8] (1879), 5 App. Cas. 342.
[9] [1925] 1 K.B. 141.
[10] [1924] 2 D.L.R. 1211.
[11] [1925] 1 D.L.R. 497.
[12] [1926] 2 D.L.R. 819.
[13] [1927] A.C. 515.
[14] [1929] 1 D.L.R. 77 at p. 82.

Supreme Court, but if it does then I shall follow the law as declared by our said national Court because it is not bound by or subject to the decisions of the House of Lords unless and until the Parliament of Canada shall so declare that Parliament being now, as a result of the Imperial Conference of 1926, the only authority which has jurisdiction to make such a binding declaration upon the Courts of this nation, and though its Courts continue to be bound by the decisions of the Privy Council (so long as Canada thinks it best to continue that tribunal as the final Court of Appeal of our country, but no longer) yet no decision of the Privy Council has been cited to us as altering the views of our national Court on this question." Finally as late as last year in *Re Johnson*[15] Riddell, J.A., pointed out that a recent decision of the Privy Council had altered the settled practice in Ontario for years in the subject-matter there under discussion. He continued: "Unless or until the Judicial Committee change the opinion—and, of course, it is not bound by its own previous decisions—or new legislation is passed, we are bound to accept this as the law of the Province of Ontario."

Now of course in theory the pronouncement of Viscount Dunedin in the *Robins* case leaves nothing to be desired. The House of Lords finally settles English law and its decisions bind all courts in the Empire administering English law, and the Judicial Committee of the Privy Council, a tribunal of practically equal eminence administering the same English law and being the direct and final Court of Appeal for the Empire, must equally control the decisions of the subordinate courts of the Empire. But, sad to relate, on more than one occasion the decisions of these two final courts of appeal have clashed and what then becomes of the rule in the *Robins* case?

That able Western judge, Ford, J., of Alberta, was apparently the first to be placed in this dilemma in the case of *Will* v. *Bank of Montreal.*[16] Here he had to choose between the authority of the Privy Council decision in *Colonial Bank of Australasia* v. *Marshall*[17] (a decision much criticised after its delivery) and a later decision of the House of Lords in *London Joint Stock Bank* v. *Macmillan,*[18] which expressly disapproved of the *Marshall* case. Ford, J., finally and with obvious hesitation, came to the conclusion that it was his duty to follow the later decision—in this case that of the House of Lords—rather than the earlier and somewhat discredited decision of the Privy Council. The learned judge, after referring to the *Robins* case, said:

[15] [1932] O.R. 385 at p. 389.
[16] [1931] 3 D.L.R. 526.
[17] [1906] A.C. 568.
[18] [1918] A.C. 777.

In my humble opinion the logical result of what Lord Dunedin says is that the "Colonial Court," in which term, I take it, he includes the Courts of the self-governing Dominions because he was there dealing with an appeal from Ontario, have as their primary duty to find out how the law has been "settled" and then to apply it as so settled. If the House of Lords as "the supreme tribunal to settle English law" has settled it in a way differing from that other tribunal by whom "equally . . . the point of difference may be settled," the House of Lords in doing so pointing out in express terms in what respect the other has erred, I, for my part, feel it my duty to apply the law as I find it rightly settled. In doing so I am not in any way refusing to be bound by the judgment of the Privy Council. There is a great difference between a subordinate Court saying that the Privy Council is wrong and refusing to follow its decisions and in following the law as laid down by the House of Lords because that Court has said that the Privy Council has taken a wrong view of English law. The Privy Council indeed is not bound by its previous decisions[19] while as pointed out by the present Chief Justice of Canada in *Stuart* v. *Bank of Montreal*[20] the House of Lords is bound by its previous decisions on a point of law. As put by Mr. Steer, K.C., in his argument before me, "if the Privy Council is bound upon principles which it has itself laid down to follow the *Macmillan* case, it is in the interests of the efficient administration of justice that subordinate Courts should be free to do what the Court of last resort, applying its own principles must do if the question is raised before it.

As we have seen, the Court of Appeal for Ontario has independently come to the same conclusion in the face of the same problem. The only additional case that Middleton, J.A., refers to is the case of *Fanton* v. *Denville*,[21] where the English Court of Appeal refused to follow an Ontario Privy Council appeal because, as Greer, L.J., said: "This case seems to me inconsistent with the whole trend of English decisions, and being a decision on the law of Canada (*sic.*) is not an authority which we are bound to follow." This decision, the learned judge feels, "indicates that the binding effect of the judgment of the Privy Council is limited to the Courts of the Colony from which the appeal is had."

With the utmost respect, it is difficult to see why the case referred to warrants such a sweeping conclusion. Even if the language of Greer, L.J., is capable of any such interpretation, it is plainly obiter for clearly the English Court of Appeal has never been bound by Privy Council decisions, no matter how much weight it may have attached to them. And surely English common law is, in theory at least, the same wherever administered, especially when finally interpreted by the same tribunal. It is inconceivable that the Privy Council would decide an Ontario case in one way and a New South

[19] *Read* v. *Bishop of Lincoln*, [1892] A.C. 644 at p. 655; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409.
[20] (1909), 41 Can. S.C.R. 516 at p. 544.
[21] [1932] 2 K.B. 309 at p. 332.

Wales case, or closer still, a Manitoba case, in another. If we are to escape the consequences of a Privy Council decision, it surely must be on broader grounds than this.

The quandary presented by differing decisions of the two final courts of appeal in the Empire is a real one. The constant affirmation of all our Courts (up to now) that they are bound by the decisions of their own final appellate court in the face of all other decisions, is at least logical. The dictum of the *Robins* case that the authority of the two tribunals is "equal" casts no light upon the problem and is, it is submitted, of no assistance. Technically, of course, there is no relation between our courts and the House of Lords, practically there is every reason why our courts should strive to conform to its decisions and maintain the unity of the jurisprudence of the Empire. Nevertheless, it is submitted that where conflict is irreconcilable our subordinate tribunals should follow, even with distaste, their own final court of appeal and hope for legislative intervention.

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PRIVY COUNCIL — DECISIONS — BINDING EFFECT — CANADIAN COURTS.—The growth and expansion of the common law depend in large measure, implicitly or professedly, upon the technique of *stare decisis*. The relegation of the doctrine of binding precedents to a place subordinate to the economic, social or factual interpretation of law presents a false picture of the administration of justice in Canada and England. He who reads the current law reports of these countries is bound to be impressed by the number of cases in which the judge regretfully decides the issue before him in a certain manner because, as he points out, he is bound by the decision of a higher tribunal. While we may not share the Benthamite optimism with respect to the possibility of certainty and predictability of the principles of substantive law, it is not too much to expect—in fact, it would seem to be necessary—that the rules relating to the mechanics of the development of our law from precedent to precedent should be precise, exact and definite. If they are not, the very keystone of the science of English law is lacking. It is not possible, however, to state precisely, exactly or definitely whether judgments of the Court of Appeal in England, of the House of Lords, or of the Judicial Committee of the Privy Council bind Canadian courts. The conclusion of Middleton, J.A., of the Ontario Court of Appeal, in the recent case of *Negro* v. *Pietro's Bread Co.*,

Ltd.[1] to the effect that a judgment of the Judicial Committee of the Privy Council, in an appeal from a court in Australia, is not binding on Canadian courts makes confusion more confounded.

The question before the Ontario Court was whether the decision of the Judicial Committee of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*[2] was binding upon it. After pointing out that that decision was out of harmony with subsequent decisions of the English Court of Appeal and an Irish Court, Middleton, J.A., stated:

> Are we bound to follow the decision of the Privy Council in the Australian Appeal or are we at liberty to disregard this decision and follow the decisions of the English and Irish Courts? The Privy Council has itself emphasized the duty of Colonial Courts to follow the high authority of the English Court of Appeal in *Trimble* v. *Hill*.[3] The Court of Appeal has very recently indicated that while a Privy Council decision which purports to be based upon the English Common Law should be very seriously considered, it is only binding on the Courts of the Colony or Dominion from which the appeal is taken and in no way controls the English Court. I refer to the case of *Fenton* v. *Denville*,[4] where the decision of the Privy Council in the case of *Toronto Power Co.* v. *Paskwan*[5] was discussed. The views of the judges of the Court of Appeal are fairly summarized by what is said by Greer, L.J. He says this case "seems to me inconsistent with the whole trend of English decisions, and, being a decision of the law of Canada, is not an authority which we are bound to follow.

To the conclusion reached, not very vigorously it must be admitted, by the learned judge,[6] several objections may be raised. In the first place, the authority of *Trimble* v. *Hill* has been seriously, albeit validly, discredited[7] in its application to Canadian Courts. Furthermore, Sir Montague E. Smith, speaking for the Judicial Committee in *Trimble* v. *Hill*, referred expressly to a "judgment of the Court of Appeal" which must be followed by Colonial Courts. By no stretch of the imagination or exercise of native ingenuity may it be argued, reasonably, that the English Court of Appeal in *Fanton* v. *Denville* did decide that Privy Council decisions bind only the courts of the colony or dominion from whence the appeal in the particular case comes. The Court of Appeal actually decided that it was not bound to follow a judgment of the Privy Council. That in itself was not a novel or startling holding. The remark of Greer,

[1] [1933] O.R. 112; [1933] 1 D.L.R. 490.
[2] (1888), 13 App. Cas. 222.
[3] (1879), 5 App. Cas. 342.
[4] [1932] 2 K.B. 309.
[5] [1915] A.C. 734; 22 D.L.R. 340.
[6] Middleton, J.A., in the *Negro* case confessed, "I am aware that I am very bold in reaching this conclusion."
[7] See article: Hodgins, (1925), 3 C.B. Rev. 1; article: Williams, (1926), 4 C.B. Rev. 289; article: Shannon, (1931), 9 C.B. Rev. 578.

L.J., that the decision of the Privy Council in an appeal from Canada —the case of *Toronto Power Co.* v. *Paskwan*—was "a decision on the law of Canada" can hardly be dignified by the name of *obiter dictum*. If it were possible to conjecture a case where the English Court of Appeal would be called upon to decide upon the limits of the doctrine of *stare decisis* in relation to Canadian Courts, it would be preposterous to believe that the doctrine of *Trimble* v. *Hill*, promulgated by the Privy Council, could be used in a circuitous fashion to delimit the binding effect of the decisions of the Privy Council itself on colonial or dominion courts. Canadians have had excessive difficulty in ascertaining from opinions of provincial courts, of the Supreme Court of Canada and of the Judicial Committee what precedents are binding on their courts. Members of the profession, if the holding of Middleton, J.A., is correct, must now read also the reports of cases decided in the English Court of Appeal in order to determine if the august judges of that Court have "indicated" opinions on this vexed problem. By parity of reasoning, members of the House of Lords which binds the English Court of Appeal may likewise express themselves and bind Canadian courts as to the effect of decisions of the Judicial Committee. Finally, the premise of Middleton, J.A., imports another patchwork consequence. The decision of the Privy Council in an appeal directly from the Supreme Court of Nova Scotia *en banc* will bind only the Courts of Nova Scotia while the Courts of New Brunswick and the other provinces of Canada may properly disregard it.

The determination of the hierarchy of courts in our legal system will be more than comparable in vexation to the solution of the popular jig-saw puzzle for there is no assurance that the various decisions and "indications" will fit into a harmonious unity.

S. E. S.