STARE DECISIS IN THE SUPREME COURT OF CANADA

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The matter does not appear to me now as it appears to have appeared to me then.[1]

I.

In *Reference re Farm Products Marketing Act*[2] there appears in the judgment of Rand J. a passage couched in terms that are measured and undramatic but which should nevertheless sound as a clarion call to those contributors to this Review who in recent years have been pleading in eloquent concert for the development of an independent Canadian jurisprudence.[3] It appears to be the

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[1] *Andrew* v. *Styrap* (1872), 26 L.T. (N.S.) 704, at p. 706 per Bramwell B. during argument with reference to his judgment in *Ellis* v. *Kelly* (1860), 3 L.T. (N.S.) 331.

[2] (1957), 7 D.L.R. (2d) 257.

[3] Recent articles in this Review display a unanimity that is perhaps unusual in legal writers, as the following excerpts indicate:

"In my view, such a disassociation [from the doctrine of *stare decisis*] whether formally expressed or not, is imperative if the Court is to develop a personality of its own." Laskin, The Supreme Court of Canada (1951), 29 Can. Bar Rev. 1038, at p. 1075.

"In constitutional matters, the case for a restrained but undisguised liberty to depart from rigid *stare decisis* is strongest." Friedmann, Stare Decisis at Common Law and under the Civil Code of Quebec (1953), 31 Can. Bar Rev. 723 at p. 747.

"In non-constitutional cases, the greatest weakness of the present doctrine, as applied in England and Canada, lies in the rigid application of *stare decisis* to the decisions of the highest court of the country." *Ibid.*

"Baldwin and Lafontaine would hardly have been content with, 'the authorities in England have pronounced.' In this new era of judicial independence let us turn to others for guidance, and then make our own decisions as Canadians." Kennedy in (1955), 33 Can. Bar Rev. 340, at p. 345.

"More distressing [than the summary disposal by the Supreme Court *in Att.-Gen. of Nova Scotia* v. *Att.-Gen. of Canada*, [1950] 4 D.L.R. 673, of the constitutional doctrine of delegation], however, is the disposition revealed by the Supreme Court to follow, in its role as the final arbiter of Canadian constitutional questions, the restrictive pattern established by its predecessor, the Judicial Committee." Ballem in (1951), 29 Can. Bar Rev. 79.

view of these writers that such a jurisprudence will be incapable of growth or even proper formulation until the highest court in Canada ceases to follow automatically and without critical investigation the decisions of alien tribunals; in other words until the Supreme Court of Canada considers the decisions of the Privy Council and the House of Lords to be of persuasive rather than binding authority. The aim of this article is firstly to examine the present position of the *stare decisis* rule in the Supreme Court on the basis solely of the existing decisions, secondly to examine the attitude adopted by the Appellate Division of the Supreme Court of South Africa to the same problem as that now facing the Supreme Court of Canada, and finally to argue that the Supreme Court Amendment Act of 1949[4] has presented such a novel situation that the existing authorities examined in the first part are inadequate to deal with it, and to indicate the advantages and disadvantages of adopting the two possible solutions.

The best way of introducing the problem is to accord to the aforementioned words of Rand J. at least the honour of quotation in full. They are as follows:[5]

> The powers of this court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92, and in its general interpretative formulations, and that incident of judicial power must, now, in the same manner, and with the same authority, wherever deemed necessary, be exercised in revising or restating those formulations that have come down to us. This is a function inseparable from constitutional decision. It involves no departure from the basic principles of jurisdictional distribution; it is rather a refinement of interpretation in application to the particularized and evolving features and aspects of matters which the intensive and extensive expansion of the life of the country inevitably presents.

There appear to be two reasons invoked by Rand J. in justification of his proposition that the Supreme Court has now power to depart from previous constitutional decisions, the first that this is a necessary incident of constitutional interpretation and the second that the Supreme Court, having inherited the mantle of the Privy Council, is consequently possessed of the Privy Council's acknowledged[6] power to overrule its own previous decisions. This second reason is of the greater significance since its logic is not confined

[4] Stats. of Can., 1949, c. 37, s. 3.

[5] *Reference re Farm Products Marketing Act*, *supra*, footnote 2, at p. 271.

[6] See in particular *Tooth* v. *Power*, [1891] A.C. 284, at p. 292.

to fields of constitutional law. Indeed there appear to be more difficulties in applying it in the case of constitutional law than elsewhere for it is at first sight difficult to reconcile with the Privy Council's own view of its powers of departure as expressed in *Att.-Gen. of Ontario* v. *Canada Temperance Federation.*[7] In this case the Judicial Committee was called upon to declare a successor[8] to the original Canada Temperance Act[9] invalid. The original Act had been declared *intra vires* the Dominion Parliament by the Judicial Committee in *Russell* v. *The Queen,*[10] mainly on the basis of the Dominion's emergency power, and Viscount Simon, giving judgment in the *Canada Temperance Federation* case, refused either to overrule the *Russell* decision or to distinguish it on the ground that the emergency of national intemperance which apparently existed in 1882 to justify the original Act no longer existed in 1946 to justify a successor, admittedly not materially different. Concerning the question of overruling the *Russell* case he pointed out that "in tendering humble advice to His Majesty" he was "not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments," but continued:[11]

> In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered.

However, it is submitted that there is in reality no conflict between this view and that of Rand J. Viscount Simon's rule that statutes once declared valid should not later be declared invalid is of limited application in the field of constitutional interpretation, and it would certainly not operate to bind every subsequent court to accept either the determination of the relationships between sections 91 and 92 of the British North America Act or of the legislative powers that should be ascribed to the itemized heads in those sections that led to any statute being held *intra vires* a particular legislature. Moreover, it does not seem that Viscount Simon's rule is intended to apply invariably to every declaration that a statute has been validly passed, since its justification is the chaos that might result from a subsequent judicial repeal, and this justification would not apply to the majority of statutes which can

[7] [1946] 2 D.L.R. 1.
[8] Canada Temperance Act, R.S.C., 1927, c. 196.
[9] Canada Temperance Act, Stats. of Can., 1878, c. 16.
[10] (1882), 7 App. Cas. 829.
[11] *Att.-Gen. of Ontario* v. *Canada Temperance Federation, supra,* footnote 7 at p. 206.

certainly be repealed legislatively without undue disruption of the nation. The rule is thus not a denial of Rand J.'s plea for flexibility in constitutional interpretation but rather a warning against its over-drastic application.[12] None of these difficulties, however, arise in areas of the law other than the constitutional, and in these areas Rand J.'s plea for flexibility, though delivered in a constitutional context, appears to apply *a fortiori*.

II. *Existing Canadian Authorities*

Before further discussion of the most recent judicial pronouncement on *stare decisis* in the Supreme Court of Canada, it will be as well to examine its predecessors. The starting point for such an examination is inevitably *Stuart* v. *Bank of Montreal*.[13] In this case the plaintiff had transferred to the defendant bank virtually the whole of her property as security for her husband's debts to the bank, which still remained unsatisfied. She now sought to have this property restored to her on the basis of a rule which she alleged to be set forth in a decision of the Supreme Court handed down some five years earlier[14] that the relation of husband and wife is such that where a transfer of property whether by way of security or otherwise is given by one for the benefit of the other the law presumes that the transfer was obtained by the undue influence of the other unless it be shown that at the time of the transfer the transferring spouse had the benefit of independent advice. The application of this rule, salutary though it might be in general, to the actual situation before the court in *Stuart* v. *Bank of Montreal* was distinctly unrealistic in the light of the admirably frank evidence of the plaintiff wife. She had testified that:[15]

> . . . if her husband had said to her not to enter into the guarantee without asking someone else she would have refused to consult any person else, that she knew there was no sham about the guarantee and that she was becoming legally bound, that her husband did not make the slightest misrepresentation to her. . . .

However, her failure to consult an independent person whom she

[12] The problem presented by the *Canada Temperance Federation* case is in any event a little unrealistic, because it is well known that whatever the Privy Council's own views may have been with regard to its duty to follow its own previous decisions in constitutional matters it has in fact departed from its former reasoning on a number of occasions, although it has never expressly admitted as much. See in particular MacDonald, The Privy Council and the Canadian Constitution (1951), 29 Can. Bar Rev. 1021.

[13] (1909), 41 S.C.R. 516.

[14] *Cox* v. *Adams* (1905), 35 S.C.R. 393.

[15] *Stuart* v. *Bank of Montreal*, *supra*, footnote 13, at p. 522.

would have refused to consult, enabled her to establish that the legally binding obligation which she knew she was entering was in fact a nullity. This result is the more surprising when the facts, and indeed the judgments of *Cox* v. *Adams*, the case which the Supreme Court regarded as irrevocably laying down the proposition claimed by Mrs. Stuart, are investigated. In this case the guarantor-wife and her sister were clearly the victims of fraud on the part of the husband and the husband's creditor. In the words of Sedgewick J., who was one of the bare majority of three against two deciding *Cox* v. *Adams*:[16]

> I look upon the whole thing as a conspiracy between Walmsley and Cox to rob, for their mutual advantage, those weak and trustful ladies.

Throughout his judgment it is clear that he regarded the fraudulent conduct of the husband and the creditor as of great significance. That this aspect of the case also influenced another member of the majority is indicated by the following words of Girouard J.:[17]

> I have less hesitation in arriving at this conclusion that I am inclined, on the evidence, to think that both these ladies . . . were, in fact, badly pressed and grossly deceived as to the nature of the transaction. . . .

Nevertheless, the Supreme Court, discovering that the remaining member of the majority, Davies J., based his conclusion solely on the proposition that the presumption of undue influence in circumstances where a wife has guaranteed the debt of her husband is irrebuttable except upon evidence of the consultation of an independent advisor, and that both the other two majority judges concurred in this proposition,[18] concluded that they were bound to apply it in the case of a wife of as independent a turn of mind as Mrs. Stuart avowedly was.

When the opportunity to distinguish *Cox* v. *Adams* was so manifest the rules concerning the binding character of its own

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[16] (1905), 35 S.C.R. 393 at p. 396. [17] *Ibid.*, at p. 414.

[18] Girouard J. stated the rule propounded by Davies J. in terms equally absolute, but much of his supporting reasoning was directed to the fraud point. Thus dealing with the argument that acceptance of the rule would add serious perils to the banking business he said (at p. 400): ". . . but is it not mere irony to compare a regular banker to a common shaver or financial shark?" Sedgewick J.'s discussion is exclusively directed to the fraud point, his concurrence in the undue influence ratio being deduced from his opening sentence (at p. 394) "I entirely agree with the conclusions reached by Girouard J., but the same result might have been reached by a less elaborate process." This brief concurrence is of course the feature in *Cox* v. *Adams* which prevented it presenting the same dilemma to the Supreme Court as *Sachs* v. *Donges*, [1950] 2 S.A.L.R. 265, presented to the Appellate Division of the Supreme Court of South Africa in *Fellner* v. *Minister of the Interior*, [1954] 4 S.A.L.R. 523. *infra.*

previous decisions[19] laid down by the Supreme Court in *Stuart* v. *Bank of Montreal* undoubtedly partook of very great weight and may well explain the surprisingly small number of cases decided subsequently which do any more than simply restate these rules with approval. The doctrine is to be found in the judgments of Duff J., with whose remarks Fitzpatrick C.J. associated himself, and Anglin J., Davies J. simply stating that *Cox* v. *Adams* was binding without more, and Idington J. dissenting. Duff J. said:[20]

> Some question is raised, whether or not we are entitled to disregard a previous decision of this court laying down a substantive rule of law. This court is, of course, not a court of final resort in the sense in which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the Lord Justices, sitting in appeal, (from which courts there was an appeal as of right to the House of Lords) have felt themselves at liberty to depart from their own previous decisions. That is also the principle on which the Court of Appeal now acts. . . . Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decisions of this court. What exceptional circumstances would justify a departure from the general rule, we need not consider. . . .

This statement must be regarded as having been delivered in the light of *London Street Tramway Co.* v. *London County Council*[21] which lays down that the House of Lords is absolutely bound by its own previous decisions. Duff J. clearly regards this as a desir-

[19] The case also stands as a highly authoritative precedent for a related but entirely distinct problem in *stare decisis*, namely, once it has been determined whether the ratio of a particular case is binding, what, if anything, the ratio of that case consists of. In this area, the Supreme Court came to a conclusion which the House of Lords did not arrive at authoritatively for another forty years that in the words of Lord Simonds (*Jacobs* v. *London County Council*, [1950] A.C. 361, at p. 369) "there is no justification for treating as obiter dictum a reason given by a judge for his decision, because he has given another reason also." This language is strikingly similar to that used by Lord Macnaghten in *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, at p. 184, which is quoted as controlling in *Stuart* v. *Bank of Montreal* by both Duff J. and Anglin J.: "It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined." Nevertheless there were sufficient doubts about the correct view before Lord Simon's reaffirmation for Scott L.J. in *Haseldine* v. *Daw*, [1941] 2 K.B. 343, to be able to state that the determination of the status of the plaintiff in *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74 (the authority of which was in issue in the *Jacobs* case) was not binding on the Court of Appeal. The *Jacobs* case has been subject to very penetrating criticism: see Allen, Law in the Making (5th Ed. 1951) pp. 248 et seq. and Goodhart, The "I think" Doctrine of Precedent (1950), 66 L.Q. Rev. 374.

[20] *Stuart* v. *Bank of Montreal*, *supra*, footnote 13, at p. 535.

[21] [1898] A.C. 375.

able rule of conduct for ultimate tribunals but must be presumed to feel that in the case of intermediate tribunals the rule need not be absolute, but that departures may be made, though only in "exceptional circumstances". It is however, difficult to discover the rationale for this distinction. Of course, intermediate tribunals will have to depart from their own previous decisions when they have been overruled by a court having an appellate jurisdiction over them; but this can hardly have been such an "exceptional circumstance" as Duff J. was referring to. This apart, it would seem that if any distinction is to be made between the extent to which ultimate tribunals on the one hand and intermediate tribunals on the other ought to be bound by their own previous decisions it should operate the other way. Short of lobbying a legislature, an unsuccessful litigant in an ultimate tribunal is powerless against an unfavourable decision of that tribunal if the absolutely binding rule prevails. The adoption by an intermediate tribunal of the absolutely binding rule, however, merely places upon a litigant seeking to establish that the time is ripe for casting away an outmoded precedent the onus of taking an appeal to a court high enough to overrule it. This it is suggested is where the onus should lie. The rule laid down by Duff J., however, would appear to apply on his formulation without any exception whatever now that the Supreme Court has become an ultimate tribunal like the House of Lords.

The view of Anglin J. is very similar to that of Duff J. He adverts to the fact that the Supreme Court is technically an intermediate tribunal, whilst pointing out that in the vast majority of cases its decision is accepted as final, but appears to draw no conclusion from this fact. He then states that any inconsistent decisions of the Privy Council or the House of Lords should be followed in preference to previous decisions of the Supreme Court, and as regards conflicting decisions of the Court of Appeal he reserves judgment. His conclusion is that:[22]

> . . . in other cases, unless perhaps in very exceptional circumstances, a previous deliberate and definite decision of this court will be held binding, if it is clear that it was not the result of some mere slip or inadvertence.

This formulation is, verbally at least, more explicit concerning what exactly would constitute the "exceptional circumstances" mentioned by Duff J. as justifying departure. However, such categories as decisions that are not "deliberate and definite", and

[22] *Stuart* v. *Bank of Montreal, supra,* footnote 13 at p. 549.

decisions involving a "mere slip or inadvertence" appear to have no more truly meaningful content than a category of "exceptional circumstances" and the acid test of practical application indicates that in reality these exceptions need not have been stated. In no subsequent case[23] has the Supreme Court consciously, or rather expressly, overruled one of its previous decisions and in any event, the rule in *Stuart* v. *Bank of Montreal* would only admit the overruling of decisions of an undefined but undoubted oddity. Such an exception would be of little value to proponents of an independent Canadian jurisprudence, for it would clearly be impossible to nurture it on a diet of the bizarre and unusual.

It may be useful at this stage to consider the practical effects of the *stare decisis* rule upon the process of reasoning in *Stuart* v. *Bank of Montreal.* It may be supposed that the hypothetical intelligent layman would say that the true point for consideration was whether the rule laid down by Davies J., in *Cox* v. *Adams* should for reasons of public policy be applied even in situations where the rationale behind the rule did not require its application. There is, however, very little discussion of this point. On the other hand there is a great deal of discussion of the theory of *stare decisis* and of the technical authority that should be attached to the literally wide rule expressed by Davies J. The only justification appearing for adopting a strict formulation of *stare decisis* and of applying it to a rule set out in a very different context is the need for certainty in the law. Yet it would seem that however strict the formulation of the *stare decisis* rule prevailing at the time it would have been impossible to predict on the basis of the *Cox* v. *Adams* decision what would be the result of the *Stuart* v. *Bank of Montreal* situation before that case was decided, simply because *Cox* v. *Adams* was so readily distinguishable on the facts. In other words, the *stare decisis* rule discovered in *Stuart* v. *Bank of Montreal* to bind the Supreme Court could not even if enunciated and accepted earlier have led to any greater certainty in the law in the sense of ability to predict what the result of the *Stuart* case would be. It is surmised that the reason why the majority in the *Stuart* case chose to "follow *Cox* v. *Adams*" really was the fact that they felt that there were compelling reasons of policy for presuming undue influence even when there manifestly was none, yet the preoccupation with what particular *stare decisis* rule was controlling and the arid intellectual exercise of discovering what was the *ratio*

[23] That the writer can discover. And see Friedmann, *op. cit., supra,* footnote 3 at p. 730.

decidendi of *Cox* v. *Adams* led to virtually ignoring the real reason for the decision.

Subsequent consideration of the propositions of Duff and Anglin JJ. has centered mainly round the exception propounded by Anglin J. with regard to the duty to follow inconsistent decisions of the Privy Council, the House of Lords and the Court of Appeal, and in this latter area the forum of discussion has for the most part been not the Supreme Court itself but the provincial courts. In the Supreme Court most of the pronouncements on *stare decisis* have amounted to little more that reiteration of the propositions in *Stuart* v. *Bank of Montreal*, with no attempt to clarify any of the doubtful areas. Thus in *Gale* v. *Bureau*[24] Anglin J. remarked that the *Stuart* case had settled the point that the Supreme Court was bound by its own previous decisions and again in *Grant* v. *Scott*,[25] this time speaking for the whole court, he stated that an existing decision of the Supreme Court precluded further argument. The same judge also ruled in *Daoust* v. *Farland*[26] that the rule in the *Stuart* case applied with equal effect when the Supreme Court was deciding appeals from the province of Quebec, notwithstanding that the courts of that province did not regard the rule *stare decisis* with quite the reverence felt by common law courts.[27] More recently, in *Att.-Gen. of Canada* v. *Higbie*,[28] concerning the authority of an opinion given by the Supreme Court on a reference by the Governor General as provided for by section 55 of the Supreme Court Act,[29] it was said:[30]

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[24] (1911), 44 S.C.R. 305. [25] (1920), 59 S.C.R. 227.

[26] [1932] 2 D.L.R. 642.

[27] For discussions of this difference in the civil law attitude to *stare decisis* see Mignault, The Authority of Decided Cases (1925), 3 Can. Bar Rev. 1, and Friedmann, *op. cit.*, *supra*, footnote 3, *passim*.

[28] [1945] S.C.R. 385. [29] R.S.C., 1952, c. 259.

[30] *Att.-Gen. of Canada* v. *Higbie*, *supra*, footnote 28, at p. 403 per Rinfret C.J. Two questions that only arise once *stare decisis* has been accepted as an inflexible rule of judicial conduct have also been adverted to by the Supreme Court. The authority of a decision affirming the judgment of a lower court upon an equal division was considered in *Rider* v. *Snow* (1891), 20 S.C.R. 12, and again in *Minister of National Revenue* v. *Royal Trust Co.*, [1931] S.C.R. 485. The former case held that such a decision could not be considered as binding, an opinion with which the latter case agreed, though with the added qualification that it was "nevertheless entitled to great respect." The second question concerned the authority of a decision where the majority based their conclusions on different reasoning, and no single reason can be discovered that was concurred in by a majority of the court. Such a situation occurred in *McGreevy* v. *The Queen* (1890), 18 S.C.R. 371, and a majority of the court in *Ross* v. *The Queen* (1895), 25 S.C.R. 564, held themselves bound by the decision in the *McGreevy* case on similar facts whatever might be the correct reason for it. It is interesting to note that this conclusion is in direct variance with that reached by the House of Lords in *The Mostyn*, [1928] A.C.

> . . . although this was not a judgment in the true sense of the word . . . we should regard an opinion of that kind as binding upon this court.

Until Rand J.'s brave words the sole dissentient voice in the Supreme Court has been that of Rinfret C.J., in *In re Storgoff*.[31] In this case the court was called upon to consider the validity of a British Columbia statute under the authority of which the decision of a judge of the Supreme Court of British Columbia releasing Storgoff from a term of imprisonment imposed upon him by a magistrate for an offence under the Criminal Code, had been successfully appealed by the Attorney General of the province to the Court of Appeal of British Columbia. By section 91 of the British North America Act legislation on matters relating to the "Procedure in Criminal Matters" is within the exclusive legislative competence of the Dominion, and the question was accordingly whether the Attorney General could properly appeal the release ordered by the British Columbia Supreme Court judge under the authority of a provincial rather than a Dominion statute. The answer to this question clearly depended on whether the *habeas corpus* proceedings before this judge were matters of civil or of criminal procedure within the meaning of the British North America Act. The Supreme Court of Canada was invited to follow the decision of the House of Lords in *Amand* v. *Secretary of State for Home Affairs*[32] which had established that for the purposes of the English Judicature Act *habeas corpus* proceedings arising out of a criminal charge should be regarded as appertaining to criminal procedure. Although none of the majority judges expressly held themselves bound by the *Amand* case, they elected to follow it, and, the Attorney General's successful appeal to the Court of Appeal being *ultra vires*, Storgoff's re-release was ordered. The Chief Justice, however, came to the conclusion that legislation relating to *habeas corpus* proceedings was within the head "Property and Civil Rights" assigned to provincial legislatures by section 92 of the British North America Act whatever the circumstances of the incarceration complained of, and that the appeal to the British Columbia Court of Appeal was accordingly validly taken. Concerning the authority of the contrary House of Lords decision he had the following to say:[33]

> Moreover, the question now before our Court may not be discussed from the view-point of the English constitutional law. In this country

57, and by the Appellate Division of the Supreme Court of South Africa in *Fellner* v. *Minister of the Interior*, *supra*, footnote 18, discussed *infra*.

[31] [1945] S.C.R. 526.

[32] [1943] A.C. 147.

[33] *In re Storgoff*, *supra*, footnote 31, at p. 538.

> we have to apply the B.N.A. Act and the Criminal Code, two statutes which, of course, do not apply in England and do not call for interpretation or application in the English courts. In addition to that, the Supreme Court of Canada is now the court of last resort in criminal matters; and although, of course, former decisions of the Privy Council, or decisions of the House of Lords in criminal causes or matters, are entitled to the greatest weight, it can no longer be said, as was affirmed by Viscount Dunedin, delivering the judgment of their Lordships in *Robins* v. *National Trust Co. Ltd.*, [1927] A.C. 515 at p. 519, that the House of Lords, being 'the supreme tribunal to settle English law, . . . the Colonial Court, which is bound by English law, is bound to follow it.'

The first proposition here enunciated by Rinfret C.J. appears to be no more than the tautological one that English, and indeed any, decisions can only be authoritative if they decide the same point of law that has to be decided in the subsequent case. The second proposition, however, is of considerable significance. The assertion that the abolition of appeals to the Privy Council in criminal causes[34] was effective to remove the binding character of decisions of the Privy Council and the House of Lords for the purposes of the criminal law can be applied equally since 1949 in all fields of law, and accords exactly with Rand J.'s approach.

In view of the fact that Rinfret C.J. was a lone dissentient it is impossible to attach much weight to his words and it is unfortunate that none of the concurring judges addressed themselves to the question of the authority of the *Amand* case. It seems fair to assume that they did not regard that case as technically binding, since its reasoning was subjected to a prolonged examination whereas one of the main defects of the *stare decisis* rule is that the reasoning of decisions that are regarded as binding are not generally subjected to any critical investigation. However, there were clearly constitutional problems of far wider implication than the mere procedural nature of the writ *habeas corpus* involved, so it may well be that the majority judgments in *In re Storgoff* merely indicate that the *Amand* case was regarded as a decision on a similar but not identical point, by a tribunal whose decisions were still accepted as binding when precisely in point. Certainly the view of Rinfret C.J. runs counter to the general tenor of Supreme Court utterances.

For further deliminitations of the propositions of Duff and Anglin JJ. in *Stuart* v. *Bank of Montreal* as regards the authority of English decisions it is necessary to turn to the provincial courts;

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[34] Stats. of Can., 1932-33, c. 53, s. 17.

and though provincial courts are, of course, incompetent to legislate for the Supreme Court it seems not unreasonable to assume that in so far as any independence from English authorities is consistently asserted by them, the Supreme Court will assert no less. At least the absence of an appeal from such decisions argues a belief among litigants that the Supreme Court would be likely to approve them.

First, the Privy Council. In *Negro* v. *Pietro's Bread Co.*[35] the plaintiff had suffered emotional disturbance on discovering that part of the defendant's bread which he had eaten contained a fragment of glass and the Ontario Court of Appeal had to consider the troublesome case of *Victoria Railway Commissioners* v. *Coultas,*[36] decided by the Privy Council on appeal from Australia, where it was held that nervous shock, without any accompanying physical injuries would not ground a cause of action in negligence. This decision had received considerable adverse criticism, and as far as English courts were concerned had been authoritatively disapproved by the House of Lords in *Coyle* v. *Watson Ltd.*[37] In *Will* v. *Bank of Montreal*[38] a judge of the Supreme Court of Alberta had been presented with the same problem of the Privy Council and the House of Lords speaking with different tongues, in the context of the obligation of the customer of a bank to make out his cheques in a manner that rendered them reasonably secure against unauthorized alteration. The Privy Council in *Colonial Bank of Australasia* v. *Marshall*[39] had held that "the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation" whereas the House of Lords in *London Joint Stock Bank* v. *Macmillan*[40] had said, expressly disapproving the Privy Council decision, that leaving spaces was such a breach of the duty owed by a customer to his bank as entitled the bank to deduct from his account the additional amount paid on the cheque as a result of the forgery. Ford J.'s conclusion was that since the Privy Council had itself indicated in *Robins* v. *National Trust Co.*[41] that a colonial court[42] in a country where English law prevails was bound to follow the law as settled by the House of Lords, and since, in so settling the law the House of Lords had expressly dis-

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[35] [1933] 1 D.L.R. 490.
[36] (1888), 13 App. Cas. 222.
[37] [1915] A.C. 1.
[38] [1931] 3 D.L.R. 526.
[39] [1906] A.C. 559.
[40] [1918] A.C. 777.
[41] [1927] 2 D.L.R. 97.
[42] *Sic*, although it was a decision of the Ontario Court of Appeal that was in question.

approved the ruling of a tribunal equally competent to settle the law for Canada, it was his duty to apply the law as he found it rightly[43] settled, that is by the House of Lords. As Ford J. was careful to point out this conclusion was very different from simply refusing to follow a decision of the Privy Council. In *Negro* v. *Pietro's Bread Co.*, however, the Ontario Court of Appeal, whilst similarly preferring the House of Lords to the Privy Council did so on a ground that would not necessarily require a contrary decision of the House of Lords to justify departure, namely because,[44]

> the binding effect of the judgment of the Privy Council is limited to the Courts of the Colony from which the appeal is had.

The clear effect of this rationale is to remove a considerable quantity of Privy Council decisions from the area of the binding to the area of persuasive authority. The Supreme Court has never accepted this limitation, although in *Toronto Railway Co.* v. *Toms*[45] Davies J. had indicated that the Supreme Court might only "possibly feel itself bound" by the *Coultas* decision. Whether this doubt arose because the decision had been subjected to criticism in English courts, or because it was decided on appeal from another country, is not clear, but in any event it was no more than a doubt. Provincial courts, however, have not been so hesitant and there are at least two[46] further instances of refusals to follow the *Coultas* decision, whilst in a dissenting judgment in the British Columbia Court of Appeal[47] Martin J.A. went so far as to suggest that Privy Council decisions taken on appeal from other Canadian provinces might not be binding upon him. This latter view is extreme, but it is suggested that if provincial judges can limit the area of binding Privy Council decisions at least to Canadian appeals, the Supreme Court can confidently be expected to do no less.

As regards the authority of decisions of the House of Lords there has been equally little judicial comment in the Supreme Court since *Stuart* v. *Bank of Montreal* and an equally independent atti-

[43] The use of the word "rightly" must be regarded as either question-begging, concealing the subjective preference of the judge presented with the two conflicting decisions or alternatively as intended to indicate an invariable preference for a subsequent critical decision.

[44] *Negro* v. *Pietro's Bread Co.*, *supra*, footnote 35, at p. 496.

[45] (1911), 44 S.C.R. 268, at p. 274.

[46] *Austin* v. *Mascarin*, [1942] 2 D.L.R. 316 (Ont. C.A.), and *Purdy* v. *Woznesensky*, [1937] 2 W.W.R. 116 (Sask. C.A.). Neither of these cases states whether the reason for refusal was the conflicting English authorities or the fact that the case was appealed from Australia, and this, of course, is crucial.

[47] *Att.-Gen. of British Columbia* v. *Col.*, [1934] 3 D.L.R. 488.

tude taken by the provincial courts. In *Robins* v. *National Trust Co.*[48] Viscount Dunedin, speaking for the Judicial Committee in an appeal from the Ontario Court of Appeal, appears to include the Supreme Court of Canada in his rule that the House of Lords,[49]

> 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.

Again, Duff C.J. in *Bright* v. *Kerr*[50] declared that a statement of the law by Story adopted by the House of Lords in *Lloyd* v. *Grace, Smith & Co.*[51] as authoritative was thereby binding on the Supreme Court. However, as early as 1917 Martin J.A. sitting in the Court of Appeal of British Columbia[52] stated that the Supreme Court was at liberty to disregard the opinion of any court in the Empire including the House of Lords and refused to consider himself bound by one of its decisions. His colleagues, MacDonald C.J.A. and Galliher J.A. did not dissent from this view, but felt that the House of Lords decision was inapplicable. More recently in *Anderson* v. *Chasney*[53] two of the majority judges in the Manitoba Court of Appeal, Coyne and Adamson JJ.A. stated that decisions of the House of Lords were not binding upon them; and two judges of the same court, Coyne J.A. this time being joined by Dysart J.A. again stated flatly in *Kerr* v. *Kerr*[54] that English decisions did not bind Canadian courts. Instances of dicta asserting the two viewpoints can be multiplied and in the face of such a conflict of authority it is difficult to discern any definite rule. The one thing that can be said with certainty is that it is surprising that there has been no recent and authoritative statement in the Supreme Court to settle the confusion.

Similarly the question whether decisions of the English Court of Appeal bind the Supreme Court, which was left unresolved in *Stuart* v. *Bank of Montreal* is still unresolved on the basis solely of authoritative statements of the Supreme Court. However, it can be stated with more confidence that since in the eyes of the Privy Council,

> when an Appellate Court in a colony which is regulated by English law differs from an Appellate Court in England,[55] it is not right to assume that the Colonial Court is wrong.

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[48] [1927] 2 D.L.R. 97. The continuing silence of the Supreme Court has been vigorously criticized by Gilbert D. Kennedy in the comment cited *supra*, footnote 3.

[49] *Ibid.*, at p. 100. [50] [1939] 1 D.L.R. 173. [51] [1912] A.C. 716.

[52] *Pacific Lumber* v. *Imperial Timber* (1917), 31 D.L.R. 748.

[53] [1949] 2 W.W.R. 337. [54] (1952), 5 W.W.R. (N.S.) 385.

[55] The House of Lords is excluded from this expression by the next sentence quoted *supra*, footnote 49.

and since there are many instances of provincial courts themselves refusing to follow the English Court of Appeal, there can be little doubt that the Supreme Court is not so bound.

Disregarding the effect of the legislation constituting the Supreme Court as the final court for Canada, which appears to have been considered only by Rinfret C.J. and Rand J., the authorities on *stare decisis* in the Supreme Court point to the following conclusion:

(1) The court is bound by pre-1949 decisions of the Privy Council taken on appeal from Canada. Decisions of the Privy Council rendered in cases arising after that date will of necessity fall within the *Negro* v. *Pietro's Bread Co.* exception as being non-Canadian and therefore, assuming the view of the Ontario Court of Appeal to be equally acceptable to the Supreme Court, not binding.

(2) The court is bound by its own previous decisions, subject to the meaningless "exceptional circumstances" qualification.

(3) It is impossible to state whether or not the court is bound by the House of Lords.

(4) The court is not bound by the English Court of Appeal.

III. *The Position in South Africa*

It is instructive to contrast the approach of the Appellate Division of the Supreme Court of South Africa, where the problem of legislation similar to the Supreme Court Amendment Act of 1949 has been squarely presented and unequivocally answered, with the continued silence of the Supreme Court of Canada. Appeals to the Privy Council from the South African court were abolished by the South African Act 16 of 1950, so the parallel between its situation and that of the Supreme Court is both apt and remarkably contemporary. Before that date, the Appellate Division had applied the *stare decisis* rule to its own previous decisions according to a formulation which appeared to differ little, if at all, from that in *Stuart* v. *Bank of Montreal.* Thus in *Bloemfontein Town Council* v. *Richter*,[57] Stratford J.A. said:

> The ordinary rule is that this Court is bound by its own decisions, and unless a decision has been arrived at on some manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors. . . .

[56] See a discussion of recent authorities in two comments by Gilbert D. Kennedy, (1948), 26 Can. Bar Rev. 581 and (1949), 27 Can. Bar Rev. 187.

[57] [1938] A.D. 195 at p. 232.

The sole exception, that of a "palpable mistake", is verbally as circular as the "very exceptional circumstances" in *Stuart* v. *Bank of Montreal*, but there is the difference that in South Africa there was at least one actual overruling to give the phrase some content, for in the *King* v. *Faithfull & Gray*[58] the case of *Dexter* v. *The King*[59] was expressly disapproved on the ground that a vital point was not argued. With regard to the other problem areas of *stare decisis* the Appellate Division was clearly bound by decisions of the Privy Council,[60] and no attempt was made to limit those decisions to South African appeals, presumably because, the common law of South Africa being Roman-Dutch, no decisions of the Privy Council other than those on appeal from South Africa and the few from Ceylon could possibly be relevant. This same difference in the municipal laws also prevented any problem arising with regard to the authority of decisions of the House of Lords or the English Court of Appeal.

In *Harris* v. *Minister of Interior*[61] the Appellate Division came to the unanimous conclusion that its previous decision in *Ndlwana* v. *Hofmeyr*[62] was wrong and that the passing of the Statute of Westminster, 1931[63] by the Imperial Parliament had not repealed the requirement in the South Africa Act, 1909,[64] that legislation to remove voters from the electoral roll solely on the grounds of race or colour could only be passed on a two-thirds majority vote at a joint sitting of both houses of the Union Parliament. The Nationalist Government had passed its Separate Representation of Voters Act, 1951, without this special procedure, but notwithstanding the *Ndlwana* decision, the Appellate Division held the Act to be unconstitutional on the ground that its provisions for placing the coloured voters in Cape Province on a separate electoral roll could only be passed at a special joint sitting. In giving the judgment of the court, Centlivres C.J. reviewed the South African authorities on *stare decisis*, observed that in 1950 the Privy Council, which until recently was the final court of appeal for all the Dominions, had in two cases[65] departed from a decision

[58] [1907] T.S. 1077. [59] [1904] T.S. 243.

[60] This obvious rule appears to result from a principle other than *stare decisis*, since it depends not so much on the comity of courts or the desire for certainty in the law, which are the commonly expressed justifications for the *stare decisis* rule, but on the common sense fact that a court which disregards the opinion of another court having appellate jurisdiction over it is wasting its own time and its litigants' money.

[61] [1952] 2 S.A.L.R. 428. [62] [1937] A.D. 289.

[63] 22 & 23 Geo. 5, c. 4. [64] 9 Edw. 7, c. 9.

[65] *Bereng Griffith Lerotholi* v. *The King*, [1950] A.C. 11 and *Gideon Nkambule* v. *The King*, [1950] A.C. 379. These decisions were given in the

rendered only the previous year[66] on the ground that its attention had not then been drawn to several important authorities, and concluded without formulating any general rules,[67]

> that this Court is bound to consider any reasons that may be advanced to show that its previous decision in *Ndlwana's* case was wrong.

He then overruled *Ndlwana's* case on the ground that there was nothing in the judgment to indicate that the court had applied its mind to the question whether the Statute of Westminster had impliedly repealed the entrenched clauses[68] in the South African Act.

This justification for departure indicates no formal change in the rule laid down in the *Richter* case, but the effect of the actual application of this rule to the *Ndlwana* decision appears to indicate a substantial departure from the previous *stare decisis* doctrine, since much of the reasoning of Centlivres C.J. is directed to showing not so much that the *Ndlwana* court did not consider the point at all, but that it did not consider it sufficiently.[69] This approach opens far-reaching opportunities for overruling if an exacting standard of consideration of the point by the previous court is required in order to preclude departure, and the case must certainly have paved the way for the more radical decision of the Appellate Division in *John Bell & Co.* v. *Esselen.*[70]

In this case, one Tucker had fraudulently drawn a cheque on the plaintiff company in part payment of a house purchased by him on his own behalf from the defendant. The cheque was honoured, and the sole question was whether the plaintiff company could recover the amount of the cheque from the defendant drawee. The court was faced with a decision of the Privy Council[71] given on appeal from Ceylon which held that under Roman-Dutch law this question should be answered in the company's favour. Centlivres C.J. again giving the judgment of the whole court pointed out that in the Privy Council case there were no Roman-Dutch authorities cited in argument or considered in the judgment and

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context of criminal law and the Privy Council made it clear that where life or liberty were at stake it felt more disinclined to perpetuate error than in other areas of the law.

[66] *Tumahole Bereng* v. *The King*, [1949] A.C. 253.

[67] *Harris* v. *Minister of the Interior, supra*, footnote 61, at p. 454.

[68] That is, the clauses which required special procedures for the passage of legislation on certain topics.

[69] See for instance his remark, *ibid.*, at p. 471, that "it is clear that there was not placed before this Court on that occasion the mass of material which counsel on both sides placed before this Court in the present case."

[70] [1954] 1 S.A.L.R. 147.

[71] *John* v. *Dodwell & Co. Ltd.*, [1918] A.C. 563.

that the only purely Roman law authority was irrelevant and concluded that notwithstanding the opinion of the Privy Council there was no formula in Roman-Dutch law under which recovery could be allowed in these circumstances. Concerning the authority of such pre-1950 decisions of the Privy Council, he demonstrated that the Privy Council is itself not bound to follow its own previous decisions and concluded:[72]

> As this Court is now the final Court in respect of appeals from courts in the Union, it must naturally have the power, which the Privy Council had and which it does not now have in respect of these appeals of departing from an erroneous decision of the Privy Council.

The Privy Council decision was thereupon overruled.

This position of the Chief Justice was reiterated by him in a third case, *Fellner* v. *Minister of the Interior*[73] in the following words:

> At one time the Privy Council was our final court. It was not bound by its own decisions. . . . And now, the appellate Division being the final Court of Appeal in respect of appeals from Courts in the Union, has the power which the Privy Council had, of departing from an erroneous decision of the Privy Council.

In this latter case the Appellate Division had been called upon to consider its own previous decision in *Sachs* v. *Donges*[74] and since it came to the conclusion that there was no *ratio decidendi* discoverable in *Sachs* v. *Donges*, neither the authority of pre-1950 Privy Council cases nor of its own decisions was in issue. However, the conclusion reached in the *Esselen* case concerning the effect of the 1950 legislation on pre-1950 decisions of the Privy Council clearly forms part of the *ratio decidendi*, and indicates that if there is the same dissatisfaction felt in South Africa concerning Privy Council decisions as apparently exists in Canada at least with reference to constitutional interpretations, there resides full power in the Appellate Division to rectify the position.

One final point must be made with regard to these South African cases. It does not appear that the persuasiveness of their reasoning can fairly be disregarded in Canada either on the ground

[72] *John Bell & Co.* v. *Esselen, supra*, footnote 70, at p. 154.

[73] *Supra*, footnote 18, at p. 530.

[74] *Supra*, footnote 18. In this case the Appellate Division had decided in favour of the plaintiff by a majority of three to two, but no single reason leading to the court order was concurred in by more than two judges out of the majority of three. Thus each possible reason which the plaintiff in the *Fellner* case could point to as its *ratio decidendi* was in fact assented to by only a minority of the five judge tribunal. For a discussion of the conclusion of the *Fellner* court that in these circumstances there could not properly be said to be a *ratio decidendi* in *Sachs* v. *Donges*, see comment by Honoré (1955), 71 L. Q. Rev. 196.

that in Roman-Dutch law the *stare decisis* rule does not have the same status as in common-law jurisdictions, or on the ground that Canadian sentiment appears to be generally out of sympathy with the present South African political retreat from the British heritage. The first objection is answerable because whatever technical difference there may have been in the *stare decisis* rule before 1950 in Roman-Dutch law, the view that the abolition of appeals to a superior tribunal invests in the new ultimate court the powers of the old ultimate court is equally applicable whatever the status of the *stare decisis* rule in the lower court might have been. The second possible objection fails because there is no reason to suppose that the judges of the Appellate Division considered the existing political climate when deciding what authority should be attached to previous decisions of the Privy Council. The reasoning was strictly a matter of judicial interpretation. Even supposing that it were not, and accepting the unworthy suggestion that political considerations could sway the judgment of the Appellate Division, it seems more than a little incongruous to suppose that the Appellate Division should with one voice strike down legislation dear to the hearts of the Nationalist Government as in the *Harris* case and at the same time be influenced by a desire which appears to be confined to the same Nationalist party to disassociate South Africa from its ties with Great Britain, in reaching its conclusion that the abolition of appeals to the Privy Council had abrogated the binding authority of previous Privy Council decisions.

IV. *The Way Ahead*

Professor Laskin has pointed out that since 1949 there are three different attitudes which the Supreme Court can adopt with reference to the doctrine of *stare decisis*:[75]

> First, the Supreme Court has succeeded to the position formerly occupied by the Privy Council and, like the latter, is not bound by its previous decisions. . . . Secondly, the Supreme Court is now an ultimate court for Canada in the same sense as is the House of Lords for Great Britain, and hence like the latter it should continue to be bound by its decisions. . . . The third approach is to adopt a simple rule of adult behaviour and recognize that law must pay tribute to life; and that in constitutional litigation, especially, stare decisis cannot be accepted as an inflexible rule of conduct.

The first attitude is dismissed by Professor Laskin as ignoring the reason that prevented the Privy Council's formal adoption of *stare decisis*, which reason is apparently intimately connected with the

[75] Laskin, *op. cit., supra*, footnote 3, at p. 1073.

fact that the Privy Council is not technically a court but a board convened to tender humble advice to the British monarch. Why this advisory aspect of the Privy Council should make any difference is not entirely clear[76] but no attempt to take issue on this ground will be made, since so long as Professor Laskin's third, and preferred attitude is not limited to constitutional decisions, there is no difference in result between this and the first attitude. It does in fact seem that Centlivres C.J. in South Africa and Rand J. in Canada have used the first attitude to arrive at the third. The second attitude is criticized on the grounds that the House of Lords is secure in the knowledge that the Parliament of Great Britain can readily amend anachronistic rules as it thinks fit, whereas in the constitutional field at least in Canada neither Parliament nor the provincial legislatures can do anything about outdated views concerning the distribution of legislative powers. An additional criticism along the same lines which has already been adverted to and which is not limited to constitutional areas is that there is a lamentable inertia about law reform when unconnected with any acceptable political slogan and when an ultimate tribunal adopts a strict interpretation of *stare decisis* there is little a litigant baulked by ancestral stupidity can do except lobby an unsympathetic legislature; when an intermediate court adopts a strict interpretation, however, the unsuccessful litigant has merely to appeal to a court high enough to overrule, and it is entirely fair that the onus of conducting an appeal to a higher level should be imposed on him who maintains that the time has come to overhaul the existing rules. Consequently when an intermediate court is made an ultimate one, this type of argument demands that its attitude to *stare decisis* should become less, not more, rigid.

In effect, then, there is a simple choice between two alternatives

[76] It is commonly accepted that the absolutely binding doctrine of precedent has no deep seated roots in judicial tradition but is a comparatively recent adoption of English courts during the nineteenth century. See in particular Allen, *op. cit.*, *supra*, footnote 19, pp. 179 *et seq.* Accordingly there appears to be no possible historical reason why the doctrine should not also have been accepted by the Judicial Committee of the Privy Council which at the time of acceptance of the doctrine elsewhere had itself become indistinguishable in practice from a court. Apart from this historical point, any inferences that can be drawn from the fact that the Privy Council is even today not technically a court, but a board to advise Her Majesty, as aptly point to the conclusion that Her Majesty should not be subject to conflicting advice as to the opposite conclusion. The possibility for a rehearing (mentioned by Allen, *op. cit.*, p. 240) under the provisions of section 4 of the Judicial Committee Act, 1833, is a different matter since it would result in an alteration of the original court order and would not authorize a disagreement with the reasons given for a previous court order when a court order not commenced under section 4 is under consideration.

now facing the Supreme Court, and the existing authorities do not give any indication of which will be finally adopted. Either *stare decisis* is to continue unchanged, with possibly the doubts concerning the authority of decisions of the House of Lords clarified, or the 1949 abolition of appeals to the Privy Council is to be regarded as conferring upon the Supreme Court the Privy Council's power to depart from its own decisions. This latter alternative must, if it is to be efficacious, apply to remove the binding character of both pre-1949 decisions of the Privy Council and previous decisions of the Supreme Court itself. To allow departure from Privy Council decisions whilst retaining the rule that the decisions of the Supreme Court, which have so often been handed down in deference to and in interpretation of, the opinions of the Privy Council, are binding on the present court would be a singularly fruitless exercise.

The same cannot properly be said with reference to either pre-1949 or post-1949 decisions of the House of Lords because even before the abolition of appeals to the Privy Council there was at least considerable doubt whether House of Lords decisions technically bound the Supreme Court, and accordingly it is impossible to posit that pre-1949 decisions of the Supreme Court were handed down in deference to the opinions of that court. The two possible reasons for regarding decisions of the House of Lords as strictly binding before 1949 were first the one adverted to in *Robins* v. *National Trust Co.* that Canada is governed by the English common law and the House of Lords should be regarded as the sovereign interpreter of what the English common law is, and second that, since the Privy Council is in practice really the *alter ego* of the House of Lords, it would be unrealistic not to regard with equal deference the views of the members of the Privy Council expounded in their other capacity as Lords of Appeal in Ordinary in the House of Lords. Unless the first reason has been rendered obsolete by the Statute of Westminster, 1931, (and in light of the present day recognition that the judicial function is in reality frequently legislative, it may well have been) it is difficult to see how the abolition of appeals to a different tribunal can possibly affect its validity. The second reason, however, cannot apply to House of Lords decisions handed down after 1949, and so, assuming that

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[77] The South African *Esselen* decision was in fact limited to pre-1950 decisions of the Privy Council, but the *Harris* case indicates that the Appellate Division already had sufficient power to depart from its own previous decisions to prevent any such anomaly occurring.

House of Lords decisions did bind the Supreme Court before 1949 the question of the authority of pre-1949 House of Lords decisions must, if this latter reason be the true one, stand or fall with the authority of pre-1949 decisions of the Privy Council. However, whatever authority was attached to decisions of the House of Lords by the Supreme Court before 1949, and whatever the reason for attaching such authority might have been, it is not unreasonable to suppose that if the alternative chosen in respect of pre-1949 decisions of the Privy Council is that they are no longer binding, the same result will automatically follow in respect of all decisions of the House of Lords. If, on the other hand, pre-1949 decisions of the Privy Council continue to bind the Supreme Court, the question of the authority of House of Lords decisions, whether rendered before or after 1949, will remain for authoritative determination. Apart from the question of these existing authorities and rationalia on the subject, which have, it is submitted, like existing authorities on the binding character of decisions of the Privy Council, been cast into the limbo by the 1949 legislation, the considerations involved with regard simply to the desirability of following the one or the other of the two available solutions in the case of the House of Lords are not thought to be significantly different from the considerations in regard to the desirability of choosing one or other of the same two alternatives in the case of the Privy Council; and the arguments considered below in connection with pre-1949 decisions of the Privy Council apply equally in the case of both pre- and post-1949 decisions of the House of Lords. It is submitted, however, that the correct view is that even before 1949 the authority of decisions of the House of Lords was no more than persuasive, so that the arguments in favour of departing openly where necessary from pre-1949 decisions of the Privy Council are redundant when applied to the question of departure from decisions of the House of Lords if even before 1949 such decisions were of no more than persuasive authority.

There appear to be at least three contexts in which the advantages and disadvantages of the two alternatives can be canvassed; these three contexts may be designated the political, the metaphysical and the practical. The political approach contrasts on the one hand the desirability of retaining the accumulated wisdom of the British heritage, of which the decisions of the Privy Council form no insignificant part, with the desire that Canada should stand legally on her own feet and should test the doctrines of the mother country before accepting them as an integral part of her own jurisprudence.

There is now little that remains unsaid in this context,[78] but it may be remarked first that there is no great divergence between the two schools of thought[79] since the proponents of the new Canadian jurisprudence advocate not widespread discarding, but merely a thoughtful and respectful examination of the English authorities which would by no means lead to a loss of the benefit of the opinions expressed therein; and secondly that the framers of the Supreme Court Amendment Act of 1949 must have contemplated, and indeed intended, a substantial break from the automatic acceptance of English authorities, and to regard pre-1949 decisions of the Privy Council as being of no more than persuasive authority is simply to give effect to that legislative intent.

The second possible area of discussion, the metaphysical, is if anything even more exhausted than the first. In this context the traditional approach is to contrast the need for certainty in the law with the equally pressing need for the law to move with the times, and it seems to be assumed that the doctrine of *stare decisis* satisfies the former need at the expense of the latter. A moment of reflection, however, indicates that this assumption is naive in the extreme. It is well known that the art of distinguishing has become so developed that in the majority of cases a judge is only bound by a case if he chooses to be bound and that precedents of the highest authority can in course of time be distinguished out of existence. Indeed, Professor Radin has pointed out[80] that the only practical difference between distinguishing and overruling is that where the latter occurs, counsel are specifically instructed not to cite the overruled decision again. Furthermore, it is difficult to conduct a discussion in this second area on any other plane than a valueless contrast of such abstractions as certainty on the one hand and justice and flexibility on the other. When related to the actual operation of the *stare decisis* rule these abstractions have a habit of disappearing. The impossibility of predicting solely on the basis of *Cox* v. *Adams* what would have been the result of the situation in *Stuart* v. *Bank of Montreal*, no matter how absolute the terms in which the then accepted *stare decisis* rule was framed, has already been adverted to. Indeed, in spite of the commonly expressed justification for its existence it is doubtful whether the *stare decisis* rule has in general any significant contribution to

[78] See for example, the articles cited *supra*, footnote 3.

[79] One school is that which finds its expression for the most part in this Review; the other, it is surmised is the more generally accepted but seldom articulated opinion current among the bar and bench.

[80] Radin, The Trail of the Calf (1946), 32 Corn. L. Q. 137 at p. 143.

make towards certainty in the law in the sense of the ability to predict the result of the application of a legal proposition to a particular fact situation, rather than in the formulation of the legal proposition itself. Furthermore situations can be readily conceived where acceptance of *stare decisis* even militates against certainty in the formulation of legal propositions themselves whilst they are subject to the eroding process of being distinguished. In *Negro* v. *Pietro's Bread Co.* for example, the Ontario Court of Appeal, after rejecting the binding authority of the *Coultas* decision indicated that even if it were binding it could be distinguished on the grounds that when the plaintiff ate the bread containing the broken glass he had in fact suffered a slight cut. This insignificant injury would have sufficed to take the ensuing nervous shock outside the ambit of the *Coultas* rule that nervous shock without any accompanying physical injury gives no right of recovery in negligence. Had the court decided that *stare decisis* applied to the *Coultas* case and then adopted this method of distinguishing it the result would have been not more but less certainty in the law. In the result Ontario lawyers knew that it was unwise to rely on *Coultas.* Had *Coultas* been accepted but then distinguished the status of its rule would have remained even longer in doubt.

This illustration will also serve to indicate what is meant by the third, or practical approach to the problem. In this area what is considered is what the acceptance or rejection of the *stare decisis* rule will actually mean to counsel arguing and judges deciding cases. If this consideration be kept in mind it seems that no variation of the *stare decisis* rule will have any considerable effect either on certainty in the law or on the question whether Canadian judges will continue to follow English authorities. If they wish to follow English decisions they will; if they do not wish to follow them they will either disapprove them or distinguish them according to the prevailing formulation of the stare decisis rule in Canada.

Where the particular *stare decisis* rule adopted does make a really significant difference, it is suggested, is in the context of simplicity of presentation on the part of counsel and clarity in deciding on the part of judges. It is not often that statements of the frankness of that by Baron Bramwell quoted at the beginning of the article appear in contemporary judgments, mainly because the rule *stare decisis* forbids such candour, and it is submitted both that judgments would be more readily understood and that cases would be more sensibly decided if a less formally restrictive

rule of *stare decisis* were adopted. Unless the rule is stated in a formula which permits such a conclusion as was reached by Centlivres C.J. in the *Harris* case,

> that this Court is bound to consider any reasons that may be advanced to show that its previous decision in *Ndlwana's* case was wrong.

counsel faced with awkward precedents will have to inject confusions and irrelevancies in order to create an atmosphere receptive to distinguishing and the resulting decision will tend to be to that extent obscure.

A good illustration of obscurity caused by the necessity to distinguish rather than contradict is afforded by the decision of Manson J. in the Supreme Court of British Columbia, in the case of *General Securities Ltd.* v. *Brett's Ltd.*[81] Manson J. was faced with a decision of the British Columbia Court of Appeal[82] which had held quite unequivocally that where a car had been sold under a conditional sale agreement containing an express prohibition against the creation of liens by the purchaser, the vendor when repossessing on default of payments could take free of any liens incurred by the purchaser in defiance of the contractual prohibition. This rule was sufficient to decide the *General Securities* case but since it ran counter to the rule prevailing in many other jurisdictions and ignored the salutory doctrine of apparent authority, Manson J. clearly wished to avoid it. He was not allowed to say that the British Columbia Court of Appeal was wrong, so he proceeded to distinguish its decision with considerable ingenuity but on grounds that simply do not make sense. The result is that a considerable portion of his judgment is incomprehensible. This illustration is extreme and certainly no suggestion is made that lower courts should be at liberty to depart from decisions of their superiors, but it is clear that the unnecessary adoption of *stare decisis* where there is no superior-inferior relationship will force courts into the commission of needless obscurities.

The case of *Negro* v. *Pietro's Bread Co.* can again be used as an illustration of the second undesirable result of distinguishing rather than disapproving, that the process tends to militate against sensible decisions. The suggested method of distinguishing would have resulted in a quite nonsensical category. To tell a client that his wife could recover nothing in respect of a miscarriage caused by a narrow escape on the highway but that the result would be entirely different if her leg had been so much as brushed by a tire

[81] (1956), 19 W.W.R. 385.
[82] *Alliance Finance Co.* v. *Simons*, [1928] 3 W.W.R. 621.

would be to invite incredulity and ridicule. Yet this might well have been the result of a more traditional distinguishing.

One final point comes close to talking in metaphysical terms, but it is believed that there is some substance in it. It concerns the development of a Canadian jurisprudence. This is clearly the aspiration of many Canadian lawyers, and one important way in which this end can be achieved will be by the critical examination by the Supreme Court of all decisions handed down under the old Privy Council regime. This critical examination will be severely hindered if such decisions are technically binding.[83] Certainly they will be distinguishable, but it has been sought to demonstrate that the process of distinguishing is an illogical and deceptive method for the law to progress. It is in a sense a perpetuation of the infamous fictions of English property law in a new guise. There is no authority against construing the 1949 legislation as conferring upon the Supreme Court the power to depart frankly and for the correct reasons, where need be, from both pre-1949 decisions of the Privy Council and from its own previous decisions handed down in deference to the Privy Council's views, and it is felt that the interests of all persons connected with the law will best be served if this candid approach is adopted.

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[83] Only in a footnote dare the disrespectful suggestion be made (that is nevertheless qualified by the euphemism "with respect") that the adoption of a rule which accords somewhat less respect to the aura of precedent will tend to encourage judges of the Supreme Court in formulating principles in their own words and limit the present tendency to borrow extensively from the judgment of others.