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THE DOCTRINE OF STARE DECISIS*

The authority of judicial decisions is alike an old and distinctive doctrine in English law. In the common law it has been traced as far back as the fourteenth century, and was well established by the beginning of the seventeenth century. In equity, charged as it was with the duty of moderating the hardships of the common law, precedent had not so much weight during its early development. Yet, in 1670, when Vaughan, C. J., said, "I wonder to hear of citing of precedents in matter of equity," Bridgman, Lord Keeper, replied, "Certainly, precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us, and beside the authority of those who made them is much to be regarded." By the beginning of the nineteenth century, the courts of equity were governed in their decisions by fixed principles, and while they had power to enlarge their jurisdiction by applying these principles to new combinations of facts, since the Judicature Act the binding force of precedents is much the same as in the common law.

To trace the origin and development of this doctrine would require much time and investigation. It is the outstanding one in English law as compared with other systems, such as those of the Continent and Scotland. The reason for the doctrine was that the common law was an unwritten law, while the civil law was a written one. The English law was found in the decisions of the courts, not in any written code. The judges were the living oracles, who declared the law, and their decisions became the best evidence of the law. These were preserved in reports, and this doctrine, and the method of law reporting, are part of the one system of law.

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The doctrine may be generally stated as follows: decided cases which lay down a rule of law are authoritative and must be followed. To this general statement there are some qualifications.

Sir Frederick Pollock has stated the rule thus:—

"The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority, nor on that court itself, will be followed in the absence of strong reasons to the contrary. The decisions of a court of appeal are binding on all courts of co-ordinate rank with the court below, and generally, according to English practice, on the appellate court itself." *First Book of Jurisprudence*, 6th Ed. 34.

In *Vera Cruz,*² Brett, M.R. said:

"It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a court of co-ordinate jurisdiction, but there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank. It does so simply from what may be called the comity among judges. There is no common law or statutory rule to oblige a court to bow to its own decisions; it does so again on the grounds of judicial comity."

He then pointed out that when a court is equally divided, this comity does not exist except in the case of the ultimate court of appeal.

It is the principle only of a decision which governs. Viscount Haldane, L.C., in *Kreglinger v. New Patagonia,*³ said:—

"In questions of this kind the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect, the previous decisions of a court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a code. To look for anything except the principle established or recognized by previous decisions is really to weaken and not to strengthen the importance of precedent."

This doctrine of English law, whether as part of the common law or as a rule of the courts, became part of the law of Canada and of its Provinces and Territories, except the Province of Quebec. The times and circumstances of its introduction are of much historical interest, and in some instances of considerable uncertainty. It is not within the scope of this paper to attempt

² 1884, L.R. 9 P.D. 96, at p. 98.
to treat such subjects, but rather to examine the present status of the doctrine.

A brief examination of its present place in the English Courts is desirable.

The House of Lords is the final court in England, and its decisions are absolutely binding upon the House itself, and all other courts, and in questions of the common law and equity upon the Judicial Committee of the Privy Council, and possibly also upon all Canadian Courts. After some uncertainty covering a lengthy period this first point was determined authoritatively by London Tramways Company v. London County Council. The headnote reads: "A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament." In his speech the Earl of Halsbury, L.C. referred to Lord Campbell's statement that—

"A decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision."

and continued:—

"That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided."

And again,—

"It is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an 'extraordinary case,' an 'unusual case,' a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, 'interest rei publicae' that there should be 'finis litium' at some time, and there could be no 'finis litium' if it were possible to suggest in each case that it might be reargued, because it is 'not an ordinary case,' whatever that may mean.
Under these circumstances I am of opinion that we ought not to allow this question to be reargued.

My Lords, I only wish to say one word in answer to a very ingenious argument which the learned counsel set before your Lordships. It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a case of a mistake of fact."

“But what relation has that proposition to the question whether the same question of law can be reargued on the ground that it was not argued or not sufficiently argued, or that the decision of the law upon the argument was wrong? It has no application at all.

Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House."

Lords Macnaghten, Morris and James of Hereford, the other members of the House sitting, concurred in this.

The rule is here based upon the current of authority, and upon the disaster of uncertainty, and the necessity of certainty. An exception is allowed when a decision has been pronounced by a mistake of fact, e.g. the omission to notice a statute, or the acting upon one which had been repealed. Some questions immediately arise. The overlooking of a decision of the House or of the Court of Appeal or of any Court would also be a mistake of fact. Does this involve a complete examination of the law upon the subject, and of the cases cited to the House before one can accept the decision as final? The fact that there was no argument, or an insufficient one, or an error in law, does not bring a decision within the exception. Is a judgment inter partes to be set aside because of a mistake of fact on the part of the Court? Further, does this exception apply to all courts, or only to the House of Lords?

In the Kreglinger case, Lord Haldane, after referring to an earlier decision of the House, said:

"It is binding on your Lordships in any case in which the transaction is really of the same kind, although it does not follow that all the dicta in the judgments of those of your Lordships' House which were in a majority should be taken as of binding authority."

With this statement the Earl of Halsbury, Lords Atkinson and Mersey, agreed.

7 Supra, p. 42.
In *Usher's Wiltshire Brewery v. Bruce*⁸, Earl Loreburn, after referring to *Lion Brewery Company's* case, L.R. 1911 A. C. 150, continued:

"I did not myself agree with that decision, and your Lordships' House was equally divided. It is none the less binding, and our duty is loyally to carry it into effect . . . . I am always averse to reasoning by analogy from the facts of one case to the facts of another case; but I cannot see that the decision in the *Lion Brewery Co's.* case rests upon anything short of what I have stated. Upon the facts as found it is impossible to distinguish the rule laid down there. If it is to be changed the Legislature must 'change it; we cannot.'"

In *Commissioners of Inland Revenue v. Walker*⁹, this principle was again laid down. In none of these later cases is the exception of Lord Halsbury mentioned, but in accordance with the principle of that decision it no doubt still stands.

The Court of Appeal's decisions, until reversed by the House of Lords, are binding upon all inferior Courts, and, as it will appear, upon the Appeal Court itself. The leading Canadian case upon this doctrine is *Stuart v. Bank of Montreal*¹⁰. Duff, J., at 535, said:

"Only in very exceptional circumstances would the Court of Exchequer Chamber or the Lords 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 one of their own previous decisions. That is also the principle upon which the Court of Appeal now acts: *Pledge v. Carr* (1895) 1 Ch. 51; and the Court of Appeal, in any province where the basis of the law is the common law of England, would act upon the same view. 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." Anglin, J., after a full review of the subject and authorities, concluded thus, at 547:—"It is fairly well established, therefore, that the English Court of Appeal now holds itself bound by its own previous decisions in matters of law. Since the express decision of that court in *Pledge v. Carr* (1895) 1 Ch. 51, it is quite improbable that any of its members will in the future hold the view that the court is at liberty, even for grave reasons, to disregard such decisions.

In the House of Lords, in the English Court of Appeal and in this court the recent judgments have all been in the direction of holding previous decisions of these respective courts to be binding on themselves.

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¹⁰ (1909), 41 S.C.R. 519.
Among the cases cited were two in which the Court of Appeal had overruled earlier decisions of courts of co-ordinate authority, namely:—Mills v. Jennings\(^{11}\), and Re Dewhirst's Trusts\(^{12}\).

In Kelly v. Kellond\(^{13}\), Lord Esher, M.R., claimed the right of the full Court of Appeal to overrule earlier decisions of the same Court composed of a smaller number, saying:

"This Court is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this Court is entitled, sitting as a full Court, to decide whether we will follow or not the decision arrived at by the smaller number."

In Ex parte Stanford\(^{14}\), the appeal was first heard by a court of three judges, and thereafter they asked to have the construction of a statute reargued before the full court of six judges, and the final decision was considered at variance with an earlier decision. The question of the Court's power to so decide was not discussed, but it assumed the power.

In Wynne-Finch v. Chayter\(^{15}\), the court of six judges refused to follow an earlier decision of the same court of two judges, one of whom doubted its correctness and was a judge in the second court.

These appear to be the only cases on record where the Court of Appeal has overruled decisions of the same court, and in both the full court sat and the earlier decisions were by a smaller court.

In Re Olympia Oil & Cake Co. v. Produce Brokers Co.,\(^{16}\) Buckley, L.J. said:—

"I am unable to adduce any reason to show that the decision which I am about to pronounce is right; on the contrary, if I were free to follow my own opinion, my own powers of reasoning, such as they are, I should say that it is wrong. But I am bound by authority, which of course it is my duty to follow, and following authority, I feel bound to pronounce the judgment which I am about to deliver." Phillimore, J. at 750 said: "With reluctance—I might almost say with sorrow—I concur in the view that the appeal must be dismissed."

An appeal was carried to the House of Lords\(^{17}\), and that House reversed the decision. Nowhere in the speeches was it suggested that the Court of Appeal could do other than it did, but on the

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\(^{11}\) L.R. 13 C.D. 639.
\(^{12}\) L.R. 33 C.D. 416.
\(^{13}\) L.R. 20 Q.B.D., 569, at p. 572.
\(^{14}\) L.R. (1886) 17 Q.B. 259.
\(^{15}\) [1908] 2 Ch. 475.
\(^{16}\) 112 L.T. 744.
\(^{17}\) [1916] 1 A.C. 314.
contrary, its course was approved. Earl Loreburn, at 320, said:

“If in this case we allow the appeal it is to be understood that we are not differing from the opinions expressed by the Lord Justices. The Court of Appeal felt itself bound by previous decisions of co-ordinate authority though it disapproved of them, while this House is not bound.”

Lord Sumner, at 331, said the Court of Appeal was bound by the earlier decisions, and at 332 continued:

“On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordships' House those objections should prevail.”

In Newsholme Bros. v. Road Transport and General Insurance Company18, the Court of Appeal of three members was asked to reconsider an earlier judgment of the Court.

Scrutton, L.J. said at p. 375:

“The decision of the Court of Appeal on fact is not binding on any other Court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is I think, binding on the Court of Appeal in any case raising substantially similar facts.”

Greer, L.J., agreed with the other members in dismissing the appeal, and added at p. 384:

“I have not thought it necessary to say anything on the difficult and very interesting question as to how far this Court is bound by its previous decisions; but I should like to point out this fact, that it has, at least on two occasions, sitting as a full Court, differed from a previous decision by the same Court; and it seems to me that if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised.”

This while no doubt logical is obiter, and hypothetical and cannot be regarded as the considered opinion of the learned judge, that the Court may reverse itself.

Russell, L.J., the third member sitting, did not prepare any independent judgment.

Later, in Baker v. Longhurst19, the question was whether a judge could enter judgment for the defendant on the ground that contributory negligence was conclusively proven. Greer, L.J., as one of three members of the Court of Appeal, said:

18 [1929] 2 K.B. 356.
19 [1933] 2 K.B. 461.
"It is now settled beyond question . . . . That was finally determined, at any rate so far as this Court is concerned, in the case . . . of Sharpe v. Southern Ry."\textsuperscript{20}

That was also a decision of the Court of Appeal composed of three members, and this later opinion of Greer, L.J., destroys the suggestion he made in the Newsholme case.

From this review it follows that the Court of Appeal, in the opinion alike of the House of Lords and of itself, is now bound to follow its own earlier decisions. The cases of Evans v. Rival Granite Quarries\textsuperscript{21}, and Elliott v. Duchess Mill\textsuperscript{22}, should also be mentioned.

A divisional court in England will follow an earlier decision of a co-ordinate Court: Foster v. Great Western Railway\textsuperscript{23}.

It is usual for the superior courts of original jurisdiction to follow the decisions of courts of co-ordinate jurisdiction until they are overruled, although instances can be given where judges have refused to do so, and it has generally been regarded that a judge was not bound by the decision of another judge at nisi prius: Forster v. Baker\textsuperscript{24}.

While the decisions of the Judicial Committee of the Privy Council are treated with the highest respect, they are not now binding upon any English court, nor upon the Committee itself. Occasionally the House of Lords has differed from the view adopted by the Judicial Committee upon a point of law.

In Ridsdale v. Clifton\textsuperscript{25} (an appeal from the Arches Court of Canterbury) Lord Cairns, L.C., in delivering the opinion of the Committee said:

"Their Lordships have had to consider, in the first place, how far, in a case such as the present, a previous decision of this tribunal between other parties, and an order of the Sovereign in Council founded thereon, should be held to be conclusive in all similar cases subsequently coming before them. If the case of Hebbert v. Purchas (L.R. 3 P.C. 605), is to be taken as absolutely conclusive of every other case with the same or similar facts, there can be no doubt that the decision of the learned judge on the first three heads, being in accordance with that of Hebbert v. Purchas was correct.

The present case, however, raises the question of finality not inter partes, but as against strangers.

In the case of decisions of final Courts of Appeal on questions of law affecting civil rights, especially rights of property, there are strong

\textsuperscript{20} [1925] 2 K.B. 311.  
\textsuperscript{21} [1910] 2 K.B. 979, and 998.  
\textsuperscript{22} [1927] 1 K.B. 182 at p. 206.  
\textsuperscript{23} [1904] 2 K.B. 306.  
\textsuperscript{24} [1910] 2 K.B. 636, at p. 638.  
\textsuperscript{25} 1877, 2 P.D. 276.
reasons for holding the decisions, as a general rule, to be final as to third parties.

The law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the compositions of the law, and the dealings of mankind are based upon a reliance on such decisions.

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly ought not to be reopened without the very greatest hesitation."

After reviewing the circumstances, he continued:

"These considerations have led their Lordships to the conclusion that, although very great weight ought to be given to the decision in Hebbert v. Purchas, yet they ought in the present case to hold themselves at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from those reasons, to decide upon their own view of the law."

In Tooth v. Power, an appeal from the Supreme Court of New South Wales, Lord Watson, after referring to Ridsdale v. Clifton, quoted with approval this language of Earl Cairns.

In Read v. Bishop of Lincoln, an appeal from the Court of the Archbishop of Canterbury, Lord Halsbury, Lord Chancellor, after referring to the arguments that some of the points in the appeal had been conclusively determined by the Board, and that no further argument was permissible, continued:

"In the present case their Lordships cannot but adopt the view expressed in Ridsdale v. Clifton as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law."

The Judicial Committee itself has not based this freedom on the ground that it is not a court but an advisory committee to His Majesty, but this has been offered as the explanation of the different principles adopted by the House of Lords and the Judicial Committee: Anglin, J., in Stuart v. Bank of Montreal, supra, and in his paper on "Some differences between the law of Quebec and the law as administered in the other Provinces of Canada." While the form of the decision of the Judicial Committee is that of a report to His Majesty, and not a judgment such report is followed by a King’s Order which does in fact

28 Supra, p. 655.
29 1 Canadian Bar Review (1923) p. 33.
become a judgment of the court, from which the appeal is taken. This difference is one of form rather than of substance, and further, all courts administer justice in the King's name.

The Judicial Committee is our ultimate Court of Appeal, and its decisions are binding upon all Canadian Courts. There is the possible exception of the case where its decision has been dissented from by the House of Lords on a question of common law or equity, or the interpretation of an English Statute enacted in the same terms in Canada. Such a case came before Ford, J. of the Alberta Supreme Court in Will v. Bank of Montreal30,

He adopted the law as laid down by the House of Lords upon the authority of Robins v. National Trust Co.31

This decision was not appealed, and the point may later arise32.

In some Courts there appears a tendency to limit the application of the decisions of the Judicial Committee. In Trimble v. Hill33, an appeal from New South Wales upon the interpretation of a Colonial Statute similar to an English one, Sir Montague E. Smith said34:

"It is not disputed by the two Judges forming the majority in the Court below that this decision was directly in point, but their own opinions not agreeing with it, they declined to follow its authority. Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. The Judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of Hogan v. Curtis, (6 S.C.R. 292), but they might well have yielded to the high authority of the Court of Appeal which decided the case of Diggle v. Higgs, (2 Ex. D. 422), as the English Court which decided Batty v. Marriott, (5 C.B. 819) would have felt bound to do if a similar case had again come before it.

Their Lordships would not have felt themselves justified in advising Her Majesty to depart from the decision in Diggle v. Higgs

30 1931, 2 W.W.R. 364.
32 After the reading of this paper, Hon. Horace Harvey, Chief Justice of Alberta, kindly brought to the attention of the writer the fact that this point had been considered by the Appellate Division in that Province. Reference is now made to Jeremy & Jeremy v. Fontaine, 1931 26 A.L.R. 499, and also to In Re Succession Duty Act, Col. v. Attorney-General of B.C., 1934, 2 W.W.R. 481, and to Rex v. Gleafield 1933, 3 W.W.R. 465.
33 L.R. 5 A.C. 342.
34 Supra, at p. 344.
unless they entertained a clear opinion that the construction it has
given to the priviso in question was wrong, and had not settled the
law; since in their view it is of the utmost importance that in all parts
of the empire where English law prevails, the interpretation of that
law by the Courts should be as nearly as possible the same. Their
Lordships, however, do not dissent from, nor do they desire to express
any doubt as to the correctness of that decision, which, it may be
assumed, has settled the vexed question of the construction of a not
very intelligible enactment."

The Judicial Committee was there considering a statute,
and naturally the words refer to the statute, but the rule
indicated surely applies with as much force to the laying down
of a principle of common law or equity by the Court of Appeal.

In McMillan v. Wallace35, the Ontario Appellate Division
strictly limited this decision to the interpretation of statutes.

Again, in Negro v. Pietro Bread Co.36 the Appeal Court,
through Middleton, J. A., after referring to Victorian Railway
Commissioners v. Coultas37, an appeal from Australia, proceeded,
at 117:

"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 series of decisions in 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"38.

And at 119:

"These considerations lead me to the conclusion that it is open to
us to refuse to follow the decision of the Australian case which stands
alone and which is so adversely criticized and which is out of harmony
with the whole tread of the English cases. I am aware that I am very
bold in reaching this conclusion."

In Lobb v. Rockwood Rural Credits Society39, the Manitoba
Court of Appeal considered a decision of the Judicial Committee
from Trinidad, saying, at p. 503:—"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."
The Court pointed out that the English Court of Appeal had
treated the relevant passage in the judgment of the Judicial
Committee as a dictum and a slip, and continued at p. 504:—
"This Court under these circumstances is not bound by authority

35 1929, 64 O.L.R. 4.
36 1933, O.R. 112.
37 13 A.C. 222.
38 5 A.C. 342.
39 35 M.R. 499.
in the *Tennant v. Howatson* (1888) 13 App. Cases 489, 57 L.J.P.C. 110, case, and is free to follow the House of Lords which has affirmed what has long been the law laid down in this province.”

The decisions of our Supreme Court of Canada until reversed are also binding on all Canadian Courts. Whether this Court was bound by its own decisions was a question of considerable difference of opinion, but in *Stuart v. Bank of Montreal*40, it was laid down that it was so bound. Davies, J., said at p. 526:

“I am of the opinion that the decision of this court in *Cox v. Adams*, 35 S.C.R. 393, is binding on us.”

Duff, J., said at pp. 534, 535:

“We are, I think, concluded by *Cox v. Adams.*” “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.”

Anglin, J., said at p. 548:

“The Supreme Court of Canada occupies a somewhat peculiar position. From it no appeal lies as of right. By special leave an appeal may be had to the Judicial Committee. In the great majority of the cases which it hears it is a final appellate tribunal; in other cases, it occupies the position of an intermediate appellate court. But, whether it be regarded as final or intermediate, in view of the current of recent decisions to which reference has been made, the attitude of this court towards its previous decisions upon questions of law should, in my opinion, be the same. 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 Privy Council in *Trimble v. Hill*, supra, the duty of this court would require most careful consideration. (See *Jacobs v. Beaver*, 17 O.L.R. 496). But we should not, in my opinion, hesitate now to determine that, 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: *Bozzon v. Altrincham Urban District Council*, (1903) 1 K.B. 547. . . . .

Though, as stated by Brett M.R. in *The 'Vera Cruz' No. 2*, it is (except in Ontario, as to which see *R.S.O. (1897)*, ch. 51, sec. 81) no doubt true that ‘there is no common law or statutory rule to oblige a court of law to bow to its own decision—it does so on the ground of judicial

comity—it is of supreme importance that people may know with certainty what the law is, and this end can only be attained by a loyal adherence to the doctrine of stare decisis. I see no good reason why this doctrine should not be applied, and many very cogent reasons why it should prevail in this court. As tersely put by Pratt, J. in Rex v. Inhabitantes de Haughton 1 Str. 83, 'Little respect will be paid to our judgment if we overthrow that one day which we have resolved the day before.'

The decision in this case was affirmed by the Judicial Committee, but the report has nothing bearing upon this question. Duff, J. and Anglin, J., stated that the rule was subject to departure in exceptional circumstances, but they did not indicate what such might be, and they have not since arisen. The Court has now for twenty-five years adhered to this rule: Gale v. Bureau, Grant v. Scott, Barre v. The King.

The Exchequer Court of Canada usually follows the decisions of co-ordinate courts, and also its own decisions; Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co.

But it does not always do this. In three cases three different Judges, over a period of twenty-five years, held that the rule of evidence res ipsa loquitur did not apply in actions against the Crown under the Statute: Dubé v. The Queen, Western Co. v. The King, Montreal Trust v. The King. In Sincennes-McNaughton v. The King, Maclean, J. did not follow them, holding that the rule did so apply.

Our Provincial Courts, under the B.N.A. Act, are constituted by the respective Provincial Legislatures. There is no statute or law requiring the Courts of one Province to follow the conclusions of another. While they are continually cited, they are not binding, even those of the Appellate Court of one Province upon the trial courts of another. Many instances can be cited where an appellate court or single judge has refused to follow the decisions in other Provinces.

Looking next at the Courts of the various Provinces, generally, the Provincial Court of Appeal and the lower courts follow their earlier respective decisions, but there are instances where this rule has been departed from.

41 [1911] A.C. 120.
42 1911, 44 S.C.R. 305.
45 18 Ex. C.R. 241.
46 2 Ex. C.R. 381.
47 12 Ex. C.R. 289.
48 1923, Ex. C.R. Ex. 189.
49 1926, 2 D.L.R. 633.
In Nova Scotia, in *McIsaac v. Broad Cove Coal Co.*, the full court was asked to overrule a decision on account of a subsequent decision in Ireland contrary thereto. Ritchie, J. said: "I do not think it advisable to alter the practice established by the court," and the majority of the judges concurred in this opinion.

In *Rex v. Barrett*, the court of four was evenly divided on the question, Graham, J. saying at 151:

"*Stare decisis* is a fairly good working rule, particularly when there is a court of appeal at Ottawa, very easy of access in nearly every kind of case, although perhaps not in this one." And at 152: "There was no mistake in the principles laid down by the majority in adopting that view; no error in overlooking statutory provisions was pointed out."

In this Province there does not appear to be any case in which the final court or trial court refused to follow its own earlier decision.

In Prince Edward Island the courts of co-ordinate jurisdiction usually follow earlier decisions, and there is no reported case in which the subject of this paper was discussed, nor in which the court expressly declined to follow its earlier decision.

In New Brunswick, in *The Queen v. Commissioners of Sewers of the Germantown Lake District*, a court, composed of Ritchie, C. J., Weldon, J. and Allen, J., the latter dissenting on the point, reversed a former decision of the same court composed of three judges. Ritchie, C. J., speaking for himself and Weldon, J., said at p. 354:

"It is no doubt generally most convenient and desirable to adhere strictly to the decisions of the court once pronounced, leaving further discussion and reversal, if found wrong, to a higher tribunal, and this observation would be entitled to more weight if such Appellate Court was practically accessible to the great body of suitors in this Province. But we can discover no arbitrary and inflexible rule requiring this in all cases. If there are two conflicting decisions we should be bound to elect, or if any previous authority more, in our opinion, in accordance with the law had been accidentally overlooked, or if the decision ignores, or is in our opinion inconsistent with, the right application of a clear and well-established and important principle, we think the case should give way to the principle, and this is no novel view, for we find constantly throughout the books cases explained, questioned, doubted, disapproved and overruled or not acted on, by others than Court of Appellate Jurisdiction, and therefore, though we think a decision once deliberately declared, should not be lightly disregarded or disturbed

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50 1898, 31 N.S.R. 108.
51 1903, 36 N.S.R. 135.
52 1869, 12 N.B.R. 341.
unless by Court of Appeal, except for cogent reason and upon a clear manifestation of error, there are occasions when we should be wrong to shut our ears or refuse our judgment, and this, we think is one of those exceptional cases."

In Black v. Brown, a court of five judges unanimously overruled a decision of the same court constituted of five judges. Barker, J., speaking for the Court, stated at pp. 633, 637:

"We are unanimously of the opinion that that case Sullivan v. Murphy, (27 N.B.R. 172) ought not to be considered as a binding authority, at all events so far as actions in the City Court of Saint John are concerned. . . . . . No doubt, as was said in The Queen v. Commissioners of Germantown Lake there should always exist cogent reasons for inducing this court to disregard its own decision deliberately announced. We cannot, however, refrain from thinking that the decision in Sullivan v. Murphy would have been more nearly in accord with our present views, if the considerations which have been presented to us had been present to the minds of those who took part in that decision."

For the last forty years no such cogent reasons have arisen to require the highest court in this Province to depart from its earlier decisions.

The doctrine has not the same effect in the Province of Quebec, and it is outside the sphere of this paper. Reference may be made to the article by Hon. Mr. Justice Mignault on "The Authority of Decided Cases," in Canadian Bar Review, vol. 3, p. 1. The Quebec courts follow the decisions of the Privy Council and of the Supreme Court of Canada in their interpretations of Dominion Statutes and of the Code, and if an observer may be allowed an opinion, the tendency is for the courts of Quebec and of Continental countries to adopt the English rule.

In Ontario for a period there was a marked difference of opinion as to the binding force of the decision of one Divisional Court upon another, and the subject was settled by the Legislature intervening: 1895, cap. 12, s. 79; cap. 13, s. 9. This legislation, so far as my study goes, was unique in English-speaking countries. It was carried forward to The Judicature Act, R.S.O. 1927, cap. 88, s. 31, and read as follows:

"31.—(1) The decision of a Divisional Court on a question of law or practice unless overruled or otherwise impugned by a higher court shall be binding on all Divisional Courts and on all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision.

53 1894, 32 N.B.R. 631.
(2) It shall not be competent for any judge of the High Court Division in any case before him to disregard or depart from a prior known decision of any other judge of co-ordinate authority on any question of law or practice without his concurrence.

(3) If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a Divisional Court.

(4) Where a case is so referred, it shall be set down for hearing, and notice of hearing shall be given in like manner as in the case of an appeal to a Divisional Court.

Numerous cases arose as to the effect and meaning of the statute. Where an appeal came before a Divisional Court of last resort, such Court has frequently held that the statute did not apply, and that the Court was required to consider the question for itself: Canadian Bank of Commerce v. Perram, Mercier v. Campbell, Farrell v. Gallagher, Different views are found in Toronto Auer Light Co. v. Colling, Crowe v. Graham, In 1931, by cap. 24, s. 5, sub-sections (1) and (2) of this statute were repealed, and (3) and (4) were renumbered (1) and (2). So that, except as to this procedure, the Ontario Courts are in much the same position as those of the other Provinces based on English law. There is no reported case where the question of whether the Court of Appeal should now follow its own earlier decisions has arisen since such repeal.

In Manitoba, while there is no fixed rule that a single judge should follow an earlier decision of the same court, it is usual to do so, but here cases can be cited where that has not been done.

In Re Fenton, Galt, J. said at p. 37.

"The practice in Manitoba is that when a question has been decided by one of the judges, this decision is accepted and followed by any other single judge except under very exceptional circumstances," And he followed an earlier decision although he apparently did not approve of it.

The Court en banc, or its successor, the Court of Appeal, has generally been considered bound by its earlier decisions.

In Bullock v. Hansen, the Court of Appeal, all the members sitting, refused to follow Contant v. Piggott, a decision of the

54 31 O.R. 116.
55 14 O.L.R. 639.
56 23 O.L.R. 130.
57 31 O.R. 27.
58 22 O.L.R. 145 at p. 147.
59 1926, 2 W.W.R. 34.
60 1928, 37 M.R. 450.
61 1918, 5 W.W.R. 946; 15 D.L.R. 358.
same Court, also composed of five members, one of the five being the same, and in effect overthrew it. The Court in doing so did not give any written reasons. The question was as to the interpretation of a Provincial statute.

In *Rex v. Thomson*, the Court of Appeal of five judges, in interpreting The Dominion Lord’s Day Act, unanimously reversed a decision of the same court of two years before, one member of the Court being different. Upon this point, Fullerton, J. A., at 278, said:

"My first impression was that we were bound by our earlier decision but I find that other Courts, when convinced of the error of their previous decisions, have refused to follow them. In *Newsholme Bros. v. Road Transport and Gen. Insur. Co.* (1929) 2 K.B. 356, 98 L.J.K.B. 751, Greer, L. J. at p. 384, points out that the Court of Appeal in England has, at least on two occasions, differed from a previous decision of the same Court. In *Black v. Brown*, (1894) 32 N.B.R. 631, the Supreme Court of New Brunswick refused to follow its previous interpretation of a section of a statute. *Rex v. Hartfeil* (1920) 3 W.W.R. 1051, 16 Alta.L.R. 19, 35 C.C.C. 110, was a case turning upon the construction of a statute. There the Supreme Court of Alberta overruled its previous decision. Convinced as I am that the construction placed upon the section of the statute in question here by this Court in *Cote v. Friesen* 31 M.R. 334, (1921) 3 W.W.R. 436, is erroneous and that the construction placed upon it by the Saskatchewan Court of Appeal is the correct one, I think it is our right, as well as our duty, to say so and to give effect in the case at bar to what we now believe to be the correct interpretation of the section."

Dennistoun, J. A., after referring to the subsequent Saskatchewan case, and the argument upon it, said at p. 281:

"If this view had been presented to the Court in *Cote v. Friesen* the result, in my humble opinion, would have been different. . . . . .

The doctrine of *stare decisis* does not compel a court to perpetuate error.

I have frequently said that the Courts of Appeal of the provinces should endeavor to reconcile their views whenever possible for obvious reasons, and when satisfied of error to frankly acknowledge it."

He also referred to the *Newsholme* and *Hartfeil* cases, and continued at 283:

"When this Court expressed the opinion that the word 'law' in the Act must mean common law, for there was no other law to which the word would apply, it was wrong on a point of fact, which being pointed out in a subsequent case gives good ground for refusing to repeat the error indefinitely: *London Tramways Co. v. London County Council* (1898) A.C. 375, 67 L.J.Q.B. 559."
Considerable may be said in favour of the Provincial Courts agreeing in their interpretation of a Dominion Statute, but it is submitted that this should be considered in giving the first decision. In the *Newsholme* case, as pointed out above, Greer, L. J., mentioned that the Court of Appeal in England had twice, and that when the full court sat, reversed earlier decisions of a smaller court, but that circumstance did not exist in the Manitoba case, and whatever force his words had in 1929, they have none now. That Court has not done so for thirty years. Dennistoun, J. A., relied upon a mistake of fact which Lord Halsbury had treated as an exception to the rule in the House of Lords. But the mistake of fact here, if any, was also a mistake of law. The court reversed its earlier decision because a new argument had been adduced and this is not within the language of Lord Halsbury.

In Saskatchewan the single judge does not necessarily follow the earlier judge: *Rural Municipality of Bratt's Lake v. Hudson's Bay Company,* 63 *Ross v. Fiset,* 64 The Court of Appeal has followed its own decisions relating to property and civil rights unless reversed by a higher court, indicating that different considerations apply in criminal matters: *Murdoch v. Minneapolis Threshing Machine Co.* 65

In Alberta, as already indicated, the Appellate Division has declined to follow earlier decisions of the same court, for example, *Rex v. Hartfeil,* 66 Here, the Court was constituted by five judges, and three reversed the unanimous decision of the court constituted of three judges. Harvey, C. J., upheld the necessity of the court adhering to its earlier decisions. Stuart, J., found support for his view in the facts that the question was one of jurisdiction of an inferior court, and that the earlier court was constituted of three judges. Walsh J. agreed with Stuart, J., and Ives, J. agreed, but did not discuss the principle of stare decisis.

Reference may also be made to *Dowsett v. Edmunds,* 67 and *Rex v. Sélock.* 68

It is doubtful whether the Appellate Division would depart from an earlier decision on the common law or a provincial statute, or one by the full court of five judges on any subject.

63 11 S.L.R. 357.
64 20 S.L.R. 553.
68 1931, 2 W.W.R. 745.
In British Columbia, in *Rex v. Gartshore*, a criminal case, the Court of Appeal was met with an earlier decision of its own. Macdonald, C.J.A., said at 179:

"While we do not sit for the purpose of reviewing previous decisions, yet I do not understand it to be a hard and fast rule of the court that we will under no circumstances give counsel at least an opportunity to state the grounds on which he had found his submission that a previous decision of the court or of the full court should not be followed. We have on one or two occasions overruled decisions of the full court. In *Re Tiderington* (1912) 17 B.C. 81; *In Re Rabim* ib. 276, in which the court, consisting of Irving, Martin and Galliher, J.J.A., and myself, overruled the decision of the Full Court, in *Ikezova v. C.P.R.* (1907) 12 B.C. 454, Irving, J.A. dissenting."

He held that "it was only under very exceptional circumstances" that counsel should be allowed to question previous decisions of the same court. Martin, J.A. strongly upheld the contrary view, and McPhillips, J.A. agreed with him, while Galliher and Eberts, J.J.A. agreed with the Chief Justice.

Reference may also be made to *McPhalen v. City of Vancouver*, *Sale v. East Kootenay Power Co.*

An instance of a single judge refusing to follow an earlier decision of another judge is found in *Sheppard v. Sheppard*.

Reference has already been made to the relation of our Supreme Court and of our Provincial Appeal Courts to the English Court of Appeal. To examine the subject fully would extend this paper beyond reasonable limits. *Stuart v. Bank of Montreal*, supra, *Lowery v. Lamont*, and *Negro v. Pietro*, supra, may be referred to. There are also other courts and jurisdictions to explore in respect of this doctrine; for example, the Board of Railway Commissioners for Canada, and our various Provincial, Municipal, and Public Utility Boards.

There may be discovered a tendency in some of our courts to depart from the principle of *stare decisis*. Several reasons may be suggested for this; the developing feeling of independence among all classes in our population, which also affects the courts; the hurry of our age, which prevents careful examination by judges and counsel of the law and decisions; the view that the duty of the courts is to administer justice, and on this ground may refuse to follow precedents. This is being urged in England.

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69 27 B.C.R. 175.
70 15 B.C.R. 367.
71 1931, 3 W.W.R. 112.
72 13 B.C.R. 486.
73 1927, 1 W.W.R. 95.
as a reason why the rule should be modified. The editor of The Canadian Bar Review, 1934, volume 12, 262, quoted these words of Hamilton, L.J., in Bayliss v. London (Bishop), L.R. 1913, 1 Ch. 140:

"Whatever may have been the case one hundred and forty-six years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."

He then wrote:

"One confesses to a sense of repugnance on reading such an amoral pronouncement by a twentieth century judge. That is the sort of thing which justifies the criticism of intelligent laymen that English law as expounded by the Bench today is divorced from its ancient character as a minor field of ethics, and takes on the role of a menace to efforts at advancement in right social living."

The principles of the two maxims "Stare decisis et non quieta movere," and "Fiat justitia, ruat coelum," cannot in respect to our courts be placed in opposition, and in an aggressive struggle resulting in the destruction of one or the other. Each has its field of operation. There rests upon all not only the duty "to do justly and to love mercy," but also "to walk humbly" and obediently. The obligation to reform the law and to obey the law is one and indivisible.

The growth of English law has been in a large measure dependent on the development of precedent. To abandon it now will destroy the system, and create confusion and chaos. Changes can be made in the constitutional way, and in that field the reforming lawyer may play his part. In England the difficulty of obtaining parliamentary action to alter old principles of law considered to be unjust or inequitable under present conditions is urged as a reason for departing from this rule. Whatever may be the case in England, that reason does not hold in Canada. Our provincial jurisdiction covers the larger part of the field of litigation, and each of our nine legislatures meets annually, or more frequently, and is composed of a large number of members, often representing few electors. Changes in the law where it is obnoxious are not so difficult to obtain. In fact, the complaint is that our legislatures are changing the law too frequently, and that the Bench and Bar cannot keep pace with them.

In such a paper, and before such an audience, one may be allowed not only to state the law as he finds it, but to make some suggestions. Much may be said in favor of permitting a
court of first instance to change its ruling on a point of law when convinced of error. The necessity of quick decision, the absence of authorities, the pressure of work with litigants, witnesses and counsel waiting, the lack of full argument, all may be urged. But in our appellate tribunal, assisted by experienced counsel, and often by a factum, equipped with adequate libraries, and without the same kind of pressure, one desires to find that when the court has once considered a point of law and reached its conclusion, it would adhere to it in future cases. To insure respect for the courts this is essential, as also to maintain the certainty, stability and uniformity so necessary in the realm of law. The House of Lords, the English Court of Appeal, the Divisional Court and the Court of Criminal Appeals, and our Supreme Court each follows its own decisions. Might not all our Provincial Appeal Courts adopt the same rule with advantage? In Stuart v. Bank of Montreal, supra, Duff, J. said they would, but as already indicated, some of them have not. If any earlier decision of the same court or of a court of coordinate jurisdiction should be found to be unsound, might not the court so state, and recommend an appeal or legislation, but follow the decision and leave the overruling to a higher authority as the English Court of Appeal does?

Further, is it too much to hope for the day when the decisions of a Provincial Court of Appeal will be followed by the courts, not only of such Province, but by those of other Provinces, both of appeal and of first instance? No doubt such courts are independently organized by the provincial authority, but our judges are appointed by the Federal authority, and presumably are of similar ability, learning, training and experience. The education and training of the profession, and the requirements for admission to the bar in the various Provinces, are now,—thanks largely to the work of this Association—much the same. Especially in the field of Federal law and Federal statutes, such a comity would greatly assist in developing our national unity, and sound law. Our Bankruptcy Act provides that the Courts in Bankruptcy shall be auxiliary to each other, and in applying the statute such courts have sought uniformity. This principle might be extended and enlarged by Dominion legislation to cover such subjects as the criminal law, bills of exchange, banking, shipping and railway law.