THE AUTHORITY OF ENGLISH DECISIONS.

BY THE HONOURABLE MR. JUSTICE HODGINS.

I wish to consider this subject under three heads:

(1) The intrinsic worth of English decisions.
(2) Has their undoubted acceptance in Ontario weakened or suppressed the otherwise natural evolution of Canadian legal thought?
(3) The actual authority of the decisions of English Courts in Ontario and the wisdom of continuing or changing that authority.

The last is, perhaps, just now, the most interesting and practical of the three.

In dealing with the first head, one may well begin by quoting the noteworthy admission of Bentham, the ablest as he was the bitterest, of the opponents of judge-made law, and according to Lord Birkenhead a most acrid controversialist. He sums up thus:

"Traverse the whole Continent of Europe—ransack all the libraries belonging to the jurisprudential systems of the several political states—add the contents all together—you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English Reports of adjudged cases."

In the Dictionary of National Biography, it is said that every law book and every statute bear witness to Bentham's influence.

It is interesting to consider the function of a Judge and how the decisions which excited the admiration of Bentham have been formulated.

"The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily, is not to act sua sponte, but is to
determine cases which are presented to him. To use the phrase of the English Ecclesiastical Courts, the office of the judge must be promoted by some one."

The function of a jury, says John Chipman Gray, LL.D., in "The Nature and Sources of the Law," is not mainly to declare the Law, but to maintain the peace by deciding controversies. Suppose a question comes up which has never been decided—and such questions are more frequent than persons not lawyers generally suppose—the judge must decide the case somehow; he will properly wish to decide it not on whim, but on principle, and he lays down some rule, which meets with acceptance in the Courts, and future cases are decided in the same way. That rule is the Law, and yet the rights and duties of the parties were not known and were not knowable by them."

Mr. Justice Holmes of the U. S. Supreme Court, has remarked, sardonically, that "the law has sometimes been said to be the rules which the Courts will follow."

A more classical view may be found in the judgment of Sir Samuel Evans, late President of the Admiralty Division, in the "Odessa."

"The decisions of a Court of law should proceed upon defined principles. Those principles have to be applied to ever varying sets of facts. But the Court has the function and duty not merely of deciding individual cases, but of determining them from principles which shall be a guide to others as to what their position and rights are in the eye of the law."

I think we can agree that, speaking generally, judges as a class have brought to their tasks a high standard of conscientiousness. As has been well said;

"the knowledge that a decision will have direct consequences, often of the most serious character, to actual human beings, is a tremendous sanction

1 British and Colonial Prize Cases, 163.
for rendering right judgment. It is true that a feeling of the consequences sometimes unduly deflects the decision of a Court; but in a vastly greater number of cases it furnishes a motive for just judgment which the most right-minded man must feel. There is no such direct and impressive presence before the legal writer; the careless statement, the hasty conclusion, the unverified authority, are apt to sit too lightly on the consciences of the writers of text-books."

One of the distinctive characteristics of English law is the fact that while on the Continent of Europe the decisions of Courts have, apart from their intrinsic merit, no binding force on other Courts, even on those from which an appeal lies to the Court rendering the decision, yet in England and in the United States, the decision of a Court is given great weight apart from its intrinsic merits, and all Courts of co-ordinate jurisdiction are expected to follow it, while that is the absolute duty of all inferior Courts. In Ontario a statute was deemed necessary to impress this duty upon some of the Judiciary.

The only English Court which is absolutely bound by its own prior decision is the highest, the House of Lords. No such doctrine governs, however, the Judicial Committee of the Privy Council.

Blackstone makes an interesting statement, which has been much canvassed, that the Common Law consists of general customs and that a decision of a Court makes what was before uncertain and indifferent a permanent rule, which subsequent judges must follow.

The criticism directed at this dictum may be best illustrated by the famous case of Pells v. Brown, decided in 1620 by the Court of King's Bench. It arose out of the seizing of three cows by the defendant, who justified for damage feasant in his freehold. The case was twice argued at the bar and afterwards at the Bench. The question was in effect whether the defendant had a freehold. It appeared that land was

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Devised to Thomas Brown and his heirs, but if he died without issue in the lifetime of his brother William, the land was to go to William and his heirs; that is, Thomas took an estate in fee simple, with an executory devise, as it is called, over to William, in case Thomas should die in the lifetime of William without issue. Thomas parted with the land by a conveyance known as a common recovery, and the question was whether Edward Pells, who claimed the land under this conveyance, held it subject to the executory devise to William or free from it, or, in other words, whether an executory devise after a fee simple is destructible by the holder of the fee.

The Court, by three judges to one, decided that the executory devise continued, that Pells took the land subject to it, that Thomas could not destroy it; and so the law has been held ever since. Therefore, in England and America, future contingent interests can be validly created by will.

The criticism is this: Before the decision in Pells v. Brown so far was there from being a general opinion in the community that executory devises were indestructible, there was no such opinion even among the Judges. One Judge of the four, who comprised the Court, dissented, and the decision was far from meeting a favourable reception among the judicial brethren. In Scatterwood v. Edge, Powell, J., said that the notion that an executory devise was not barred by a recovery "went down with the judges like chopped hay"; and Treby, C.J., said, "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again it would never prevail"; and stronger statements were made by Larch, as counsel in Gay v. Gay. But the point having been decided by the Court in favour of executory devises, the law has stood so ever since.

How, it is asked, in the face of all this, is it possible to say that the judges in Pells v. Brown only declared law which custom had previously created, or that the
fair expectation of the community was that a doctrine should have in its favour three judges out of four, instead of one out of four? It is possible to make such a statement, but what support has it in real facts? If law was ever made by any one, Montague, C.J., Chamberlain and Houghton, JJ., made law.

It is hard to over-estimate the importance of the law which these three men made. Millions upon millions, probably billions upon billions, of property have gone to persons to whom they would not have gone, if two of the judges of the majority had agreed with their dissenting brother Doderidge.

There is some truth in this criticism. It is probable that the part which custom has in truth played as a source of law has been much exaggerated. There is every reason to suppose that hundred of rules in the substantive law originated in the Courts, and that the bulk of the community had nothing to do with them. How can we believe that the rule in Shelley's case, for instance, had its origin in popular custom? Indeed, of many rules, such as the Rule against Perpetuities, we know their origin and development and that they were creatures of the judges. Jessel, M.R., in 1879, said:

"It must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time... altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence."

*13 C. D. at p. 710.*
Primogeniture is cited by Sir Frederick Pollock as another instance of judicial creation. But it may be fairly asserted that the Judges throughout fairly represented the effective desires and forces of society at large and were chiefly instrumental in giving them restrained and effective form and shape.

It has been well said that the English people have not been governed by the same law since Lord Mansfield’s time that they were before. His decisions have made that to be law which was not law before, and the law of England since his time is different from what it would have been, had he been a man of a different cast of mind. To quote from Lord Birkenhead in his recent volumes “Points of View”:

“The amazing genius of the English for improvisation was never put to better use than when, during the 18th century, the doctrine of equity grew under the hand of Hardwicke, and the great instrument of the Common Law was shaped and perfected by Mansfield, or when a little later the principles of prize and admiralty were laid down by Stowell.”

In accounting for the unquestionable authority of English legal decisions, I would give the chief place to the fact that English law has been evolved in and during the development of the nation, and forms an inseparable part and parcel of its struggles for the freedom of the individual and of his civil and religious rights. These struggles included, in the first place, an earlier contest for the supremacy of the King’s Courts over all others, such as the Ecclesiastical and Mercantile Courts, the Manor Courts, the Sheriff’s Courts, the Hundreds Court, and similar jurisdictions. It was succeeded by that strife between the King and the Courts for their own independence which was safely and clearly won, and the fundamental rule of political liberty, that the law must be supreme, was established and maintained.

“Coke’s . . . vigorous personality, his minute knowledge of the legal materials, the ascendancy
which his professional standing gave him, and his power and determination to wield it to make a judicially administered law of England in which courts could stand between the individual subject and the Crown and the Crown's agents, by interpretation and logical development of medieval English materials, actually made law as perhaps it was never made to so great an extent by one man before or since." (Roscoe Pound).

From these strivings emerged a triumvirate of great price namely the freedom of the individual from feudal service, bringing with it the great enlargement of the original powers of municipal bodies, the freedom of alienation and the freedom of the press, which came later.

Various branches of the law were gradually brought into more systematic form by the pressure of trade and commerce, as, for example, Maritime law, the Law Merchant and International Law, while the internal forces of the nation developed and reformed Ecclesiastical Law, and reduced and modified the harsh operation of Criminal Law. It is a remarkable thing that the various departments of law which I have first mentioned were systematized and modernized, and adopted to the needs of the population long before there were any great reforms in the Criminal Law, which remained in many directions in a barbarous state of neglect. Its administration long continued to be entirely unjust to the offender in maintaining the common law rule denying him counsel in cases of felony, though with some exceptions in practice, until the year 1836 (6 & 7 Wm. IV., c. 14).

Reasons subsidiary, perhaps arising out of the considerations I have mentioned, may be found in two things, one the personnel of the Bench and Bar, and the other the compactness of the system which they have to administer. In regard to the first of these, we do well to remember that the education of the members of our profession in England is a very broad one, and not merely a purely legal education. It is based on
their University system, not quite as we understand such a system, but as developed in England through length of time and intercourse with the best minds of many other nations during the past centuries. The result is that members of the Bar come to their work as thoroughly educated men in departments of learning which enable them to make the best of, and to see what is worthiest in their jurisprudence. The legal part of their education is, perhaps, not so rigidly professional as ours, but it has proved to be thorough, if judged by its results. There is something in it unknown here, a legal clinic. By this I mean the following of the judges on circuit by barristers just called to the bar, where, with no real business to do, they watch their seniors conducting cases, learn how to do it themselves, and hear the words of wisdom that fall from the Bench in deciding points which arise from time to time in the cases themselves.

When we combine with all other forces the underlying basis of sterling English character, much of the weight and excellence of the decisions emanating from the Bench become easy of comprehension.

Judge Parry has recently named what he calls the seven lamps of advocacy. These are, honesty, courage, industry, wit, eloquence, judgment and fellowship and they are well exemplified in the history of the English Bar.

There is also much help from the second element, viz., the compactness of the system. English Common Law in its widest sense has been administered in England by the legal profession since before the time of legal memory and equity for some centuries. This has been and still is done in a small area, and though divided up among members of the profession who specialize in Equity, in Commercial Law, in Mercantile Law, in Maritime Law, in Ecclesiastical Law, and so forth, it is all co-ordinated in a wonderfully self-contained centre. Only one set of authorized Law Reports is published, and the administration of the
law is carried on practically in a theatre where are focussed all the surroundings that are important in the administration of justice, including an able and critical press, and an equally alert body of professional opinion. Super-excellent text books by eminent writers, many of them judges of the Superior Courts, are evidence of the industry and training of the profession, while that unique monument of concentrated ability, Halsbury's Laws of England, is in itself a marvel.

It is from these elements, I think, that one may safely draw the conclusion that there is no system of law which has produced decisions of such a high character, which have set so lofty a standard, and have been at the same time practical and progressive.

It is a curious and interesting fact that in 1808, arising out of the excited political feelings at the time, the Legislatures of Kentucky, Pennsylvania and New Jersey passed Acts excluding the reading or considering of any cases in the Kingdom of Great Britain adjudged since the 4th July, 1776. This gradually became disregarded, and in 1852 the rule was reduced to a prohibition against English cases being regarded as binding authorities, but allowing them to be read and given such weight as the Judges thought proper to give them.

An American Professor of Jurisprudence has explained the way in which they were restored to their proper place:

"Story, by a creative use of comparative law, was able so to expound English commercial law and English equity as to make them appear a body of universal principles, sanctioned by experience and received by the reason of mankind, and to make straight the way for their reception. Here also it might be said that the comparative law invoked was something of a fiction, analogous to natural law. An ideal of what the law should be, drawn from examination of the English law in the light of the commercial law of continental Europe and of Eng-
lish equity in the light of the treatises of the civilians, was used to give shape to English doctrines and rules with reference to American wants so as to make them worthy of reception."

There is one consideration which it behooves us to treat with some seriousness, particularly when we find that at the last Christmas examinations in our Law School there were 102 students who were progressing successfully towards call to the Bar. We have contented ourselves with but one department, and that the strictly professional one, of the culture which has produced these results in England. Should we not look forward to the time when a University degree in Arts shall be the foundation of a Barrister's work and training? And shall we not expect to find either in the University or in our own Law School departments outside the work-a-day training for the Bar, which will equip our profession with a knowledge of those departments of jurisprudence in which it is essential that we should be qualified, having regard to our new role as a nation among other states?

A writer in our new and excellent Canadian Bar Review, Dr. R. W. Lee, Rhodes Professor of Roman Dutch Law in the University of Oxford, has just drawn our attention to one aspect of this subject. Speaking of Roman Law he says that the student will learn from it more than from any source, the rudiments of legal science. And he adds this practical illustration of the need for its study:—

"This is an age in which young lawyers can aspire to the highest positions in public life. Some of them will in the fullness of time be statesmen and diplomats. They will have relations with statesmen and diplomats of other nations whose mentality is different from their own, and different notably in this particular, that it is a Roman Law mentality. Without the necessary intellectual equipment (which the study of Roman Law can give) they cannot expect to cut more than a poor figure before Commissions of
Arbitration and International Courts of Justice.
Need I speak of the League of Nations, which will apply to any controverted question calling for a juridical interpretation not the Common Law of England and the United States but the Common Law of Europe, i.e., Roman Law? Consider for a moment the implications of a "Mandate" under the League which may contain surprises for our home bred lawyers, who have not had occasion to study the relations of mandator and mandatarius."

The Second Department of my subject is whether the acceptance in Ontario of the intrinsic authority of English decisions has weakened or suppressed the otherwise natural evolution of Canadian legal thought. Owing to the fact that since 1791 when the Constitutional Act came into force, English Law has prevailed in what is now Ontario, the Civil Law of old France, which was in force from the passing of the Quebec Act in 1774, in all about eight years, had hardly time to take root. Consequently, as modified by statutes of old Canada, and of this Province and affected by local judicial determination, the same law has been administered in this Province as in England for over a century and a quarter. The result is what might be expected, and we have a body of law largely modelled on English precedent, and decisions which have usually followed those pronounced in similar questions in England. There are, however, in the early development of law in Upper Canada and Ontario, very strong evidences of independence of thought and a recognition of new conditions, in the judgments delivered in our Courts. I may mention a few, as interesting examples of some of the questions which cropped up early to be dealt with:

(1) Attorney-General v. Grasett, 1856, 5 Gr. 412.
cal events which happened between the years 1826 and 1836 or by the lapse of 50 years during which the power was not exercised.

(2) The extradition of John Anderson, a fugitive slave charged with murder, as to whose surrender under the Ashburton Treaty the Courts of Queen’s Bench and Common Pleas differed, while the English Court of Queen’s Bench created a sensation by granting a writ of Habeas Corpus, which happily was never executed here.

(3) The case of The Queen v. Sharp, involving the Provincial Criminal Jurisdiction over the Great Lakes.

(4) The important case of Norwich v. Attorney-General, deciding that a municipality guaranteeing Railway Bonds was not released by a subsequent statute which released certain stock-holders and created new companies to build the railway on a different line.


Dealing with more modern times, let me suggest some illustrations which show, I think, that the authority of English decisions has not prevented development along our own lines. While the English Courts, including the House of Lords, are still struggling with whether or not an accident has happened through, and in the course of a workman’s employment or within the scope of his duty, we have had for years the Workmen’s Compensation Act, which has removed that from our Courts, and has produced system in this department of law, far in advance of that prevailing in England. Another instance is to be found in the Codification of the Criminal Law, which has apparently avoided the difficulties which generally attach to such

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* 1869, 5 P. R. 135.
* 1865, 2 E. & A. 541.
* 1880, 28 Gr. 114.
an attempt and has proved a great boon in its administration. This is due to Canadian enterprise and ability and has never yet been accomplished in England, which has only progressed in that direction as far as to deal in separate Acts with the offences of Perjury, Forgery and Larceny. It is pointed out by a former Lord Chancellor that in the last edition of Russell on Crimes, 173 pages are devoted to the discussion of the law of homicide, and 27 pages to the law of conspiracy to commit or attempt murder, and to the law on the attempt to commit murder.

Bigham, J. (afterwards Lord Mersey), goes rather far when, speaking of codification, he says in Edelman v. Schuler: 10

“It is also to be remembered that the law merchant is not fixed or stereotyped: it has not been arrested in its growth by being moulded into a Code.”

This paralysis has not yet become apparent in Canada.

The Revised Statutes of Canada and of Ontario represent a distinct advance upon anything done in England in that direction since 1878. Our Judicature Act is to be contrasted with the situation in the mother country where the statutory provisions regulating the Supreme Court of Judicature are scattered over some 47 volumes of the Statute Book.

In Constitutional Law, while the interpretation of the British North America Act has been largely determined by English jurists, and I think, much to our ultimate advantage, it cannot be denied that an enormous number of most interesting, intricate and important questions, in that and other fields of law, have been argued in the Privy Council by Canadian Counsel with marked originality and success. It was left, too, to an eminent Canadian Judge to place the law in regard to what is now known as ultimate negligence upon a reasonable footing, which has since been

10 (1902) 2 K. B. 144.
approved by some of the most learned Law Lords in England. The conditions in Western Canada have, as well, brought about a series of important decisions relating to contracts in which a lien on or title to the article sold is retained, and these form a large body of very important law, which is but slightly developed in England. Then, again, with regard to the sale of land, conditions in the West have resulted in the rights with respect to specific performance and the forfeiture of either the deposit or part of the purchase money paid being more closely considered than had hitherto been the case owing to the different methods of sale and conveyance in vogue in England. The Devolution of Estates Act and its kindred statutes marked an advance on English jurisprudence which has recently, in great measure, been followed in that colossal Act known as the Law of Property Act, 1922, which has surmounted difficulties in that department of law unmet with in our simpler system. I should also mention with the strongest commendation the excellent textbooks, of which there had been such a great lack in Ontario for many years, but which are now being supplied with great credit by their authors. I give a list of these at the end of this paper, and am astonished at its length and range.

Taking a survey of the condition of Ontario, and in fact Canadian, law in this regard, I cannot see any evidences of unreasonable subservience to English decisions or lack of initiative, but rather a thoughtful adoption of them so far as they apply to our conditions, coupled with such variations or amplifications as are necessary, owing to local circumstances or to our habits of thought or bent of mind.

The next and last Department is: "What is the Actual Authority of English Decision in the Courts of Ontario and the Wisdom of Continuing or Changing it?" The only tribunal in England, whose decisions are legally binding upon Canadian Courts, is the Judicial Committee of the Privy Council. At an early
date, however, after Confederation, that body made a suggestion which I quote (Trimble v. Hill,\textsuperscript{11} a case from New South Wales). Sir Montague Smith there said:—

"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, but they might have yielded to the high authority of the Court of Appeal which decided the case of Diggle v. Higgs, as the English Court which decided Batty v. Marriott would have felt bound to do if a similar case had again come before it."

This suggestion has met in some quarters with a cold response.

In McDonald v. Elliott,\textsuperscript{12} Rose, J., referring to this case, said:—

"If I felt bound to consider whether Sutton v. Sutton, 22 Ch. D. 511, should bind me, there are some questions of interest which I would wish to hear fully argued before arriving at a decision, but I find that Mr. Justice Proudfoot in Macdonald v. Macdonald, 11 O.R. 187, at p. 190, declined to follow Sutton v. Sutton, and followed Allan v. McTavish, 2 A.R. 278, as the decision of the highest appellate tribunal of this Province." . . . "I think I ought to follow the course taken by Mr. Justice Proudfoot and especially so when I am disposing of a case in the Chancery Division, of which he is a member."

\textsuperscript{11} (1879) 5 A. C. 342.
\textsuperscript{12} (1886) 12 O. R. 98.
In Macdonald v. Macdonald,\textsuperscript{19} to which Mr. Justice Rose referred, Proudfoot, V.C., said:—

"The ease of Allan v. McTavish also answers the other ground of appeal, that not more than ten years' arrears should be given. It is true that the Court of Appeal in England has taken a different view of the effect of the reduction of limitation, and held that it applied to the covenant as well as to the land: Sutton v. Sutton, 22 Ch. D. 511. But Allan v. McTavish is the decision of the highest appellate tribunal in the province, to which an appeal lies from me. The Court of Appeal in England is not the Court of ultimate appeal for the Province. And therefore whatever my own view might be I feel constrained to decide according to the opinion of our Court of Appeal."

Previous to Trimble v. Hill, there are expressions by some judges which indicate a feeling that we should look abroad except where the decisions there were not harmonious. In Hawkins v. Patterson,\textsuperscript{14} Adam Wilson, J., said that we should, in matters of practice, adopt the rule which will be the most convenient and suitable to ourselves if there be a difference in the English Courts on the point argued. In 1865 in the case of Scott v. Reckie,\textsuperscript{15} the Court of Common Pleas decided to follow a case in the U. C. Q. B. in preference to English decisions

"until the questions there raised are settled in a more satisfactory manner by the Court of Appeal either in England or in this country."

In the same year the Court of Queen's Bench here followed a decision of Wood, V.C., being the latest and most complete on a complicated point in company law, where there had been a great divergence of view among English Judges.

\textsuperscript{19} 1886, 11 O. R. 187.
\textsuperscript{14} (1863) 3 P. R. 254.
\textsuperscript{15} 15 U. C. 200.
In 1868, in *Moore v. Bank of British North America*, the Court of Chancery expressed a view consonant with that of the Court of Common Pleas, to which I have referred, which Court in 1878, in *Coulson v. O'Connell*, re-affirmed it.

In the years following Mr. Justice Rose’s decision, there are conflicting expressions from the Bench. In the case of *Woodruff v. McLellan*, Burton, J.A., says:

“If the dictum attributed to Sir Montague Smith in the case of *Trimble v. Hill*, 5 App. Cas. 342, in the Privy Council, means only that where in a colony an enactment, precisely similar to an Act passed by the Imperial Parliament, has received a construction by the Court of Appeal in England, that construction should be adopted and acted upon by the Courts of the colony until a contrary determination has been arrived at by the House of Lords, I do not think that any exception could be reasonably taken to it; but if it is intended to express the view that an Appellate Court in a colony is bound under any circumstances to follow a decision of the English Court of Appeal, I must respectfully but decidedly dissent from that view. The very greatest respect is due and should be paid to the decisions of that tribunal, but in performing the functions entrusted to us as an Appellate Court, we are bound, in my opinion, to exercise the right to act upon our own judgment, governing ourselves by the same rule as the Judicial Committee profess to act upon, viz., ‘not to depart from the decision arrived at by the Court of Appeal unless entertaining a clear opinion that the decision arrived at is wrong.

“Looking at the eminence of the Judges at present constituting the Court of Appeal in England, the occasions in which any Colonial Court would feel justified in disregarding a judgment of that tribunal, must be very rare; but in cases where a clear opinion of its incorrectness is entertained, the suitor is entitled to the independent judgment of the Colonial Court.”

15 Grant, 308.
29 U. C.C.P. 341.
(1887) 14 A. R. 242.
I append to this paper a reference to the cases in which these discordant opinions were pronounced, as it is unnecessary to give them in detail here.

I may, however, mention here that the following Judges were in favour of following the advice tendered in Trimble v. Hill:


Armour, C.J., Falconbridge, J., Street, J., Anglin, J., Riddell, J., in the Ontario High Court of Justice.

Cameron, J.A. (Manitoba).

Hunter, C.J. (British Columbia).

Harvey, C.J. (Alberta).

McPhillips, J.A. (British Columbia).

On the other side are found:

Meredith, now C.J.O., Moss, C.J.O., Macmahon, J., Teetzel, J., Garrow, J.A., Maclaren, J.A., Hodgins, J.A.

Martin, J.A. (British Columbia).

Dennistoun, J.A., (Manitoba).

I may, however, note that Falconbridge and Street, JJ., as well as Osler, J.A., afterwards followed a decision of the Ontario Court of Appeal in preference to that of the English Court of Appeal, while Maclaren, J.A., in a later case adopts and follows the rule in Trimble v. Hill.

The trend of the later decisions is, however, adverse to following the rule except, perhaps, where the Imperial and Canadian Statutes in question are identical.

The Ontario Court of Appeal has twice, in effect, pronounced against the rule. Moss, C.J.O. and Osler, J.A., in 1908, and Moss, C.J.O., Garrow and Maclaren, JJ.A., in 1911, and the present C.J.O., when presiding in a Divisional Court in 1905, has expressed himself in the same way.
Anglin, J., in 1904, points to the Ontario Judicature Act, R. S. O. c. 51, s. 81), as preventing an Ontario Judge from following an English decision where the Ontario Court of Appeal has decided to the contrary, and in the Supreme Court case of *Stuart v. Bank of Montreal*,\(^9\) indicates that in the event of an irreconcilable conflict upon a question of law between a decision in the Supreme Court of Canada and a subsequent decision of the English Court of Appeal, the duty of the Supreme Court would require most careful consideration.

An interesting question arises where there exists a limitation of appeals to the Privy Council by the Dominion Parliament or by any Provincial Legislature. This limitation is within the jurisdiction of these bodies, but cannot, of course, affect, or destroy, the Royal prerogative. There are instances of explicit abridgement of the right of the subject to appeal, as of right, direct to the Privy Council, in the Australian Commonwealth Act, in the Supreme Court of Canada Act and in the Ontario Statute, R. S. O. 1914, c. 54.

Some interesting considerations have arisen under these enactments. The Commonwealth Act imposed a further restriction, and forbade an appeal on any question, however arising, which was a matter of Federal jurisdiction and related to the constitutional powers of the Commonwealth and States or of State and State inter se.

The Judiciary Act of 1903, of the Commonwealth Parliament invested the Courts of the States with a Federal jurisdiction in certain cases, and enacted that in these cases the only appeal should be to the High Court of Australia.

The limitation thus imposed on the right of appeal to the King in Council has come before the Judicial Committee for consideration, and it has been held that the Commonwealth could not make a matter one of Federal jurisdiction, which was within the jurisdic-

\(^9\) 41 S. C. R. 516.
tion of the State Courts when the Commonwealth Act was passed. In other words, what was a matter of independent State jurisdiction, such as the imposition of taxation by a State Legislature on those who were within its authority, could not be treated as a question of the powers of Commonwealth and States or State and State inter se; it was not therefore a subject of Federal jurisdiction, and no legislation of the Commonwealth Parliament could make it so.20

Thus again, the Act of a colonial Legislature by which the decision of a Colonial Court in matters of insolvency was made final was held not to preclude the exercise of the prerogative in allowing an appeal as a matter of grace.21

The Ontario Statute permits appeals to go direct from the Court of Appeal in Ontario to the Privy Council, if over $4,000 is involved, or where there is involved any annual or other rent, duty or fee or any like demand of a general or public nature affecting public rights. As the Judicial Committee has, by virtue of the Royal prerogative, power to grant leave to appeal, our statute is quite valuable as in effect limiting cases which may be heard by the Privy Council, because in all others the expense of applying being great, the necessity to obtain leave acts as a very effectual bar.

The result of its operation has been that, while cases involving a large sum can go without leave, those under the named amount require a special application in England and a preliminary consideration of their case here before they can go beyond the Provincial Court. It has the additional and great advantage of enabling a Judge in Ontario to refuse to allow a stay of execution in trivial or vexatious cases, and also to impose terms of security for costs and also for the debt upon those who do go, an extremely valuable safeguard and one which ought to exist in Ontario instead of in England. A further valuable provision

20 Webb v. Outram (1907), A. C. 81.
is that the Court in Ontario can stay the execution of judgment except in cases where the judgment may be executed without detriment to the parties.

There has been a certain amount of agitation for repeal of this Statute, and I would like to point out the obvious fact that its abrogation will only remove from the salutary control of the Ontario Courts a sound and beneficial jurisdiction both as to trivial cases and as to those which are permitted to be appealed.

The Privy Council, in dealing with the granting of leave, have laid down, as to Canadian appeals, a most reasonable and conciliatory rule which is set out in the case of Clergue v. Murray,\(^{2}\) in these words:—

"Where a suitor, having his choice, whether to appeal to the Supreme Court of Canada or to His Majesty in Council elects the former remedy, it is not the practice to give him special leave except in a very strong case, i.e., unless a question of law is raised of sufficient importance to justify it." This is again repeated in C.P.R. v. Blain (1904), A.C. 453, and in Ewing v. Dominion Bank, ib. 807.

There are some further matters which do not appear to have been fully considered when it is suggested that the appeal to the Privy Council from Ontario Courts should be abolished. The first is that the Judicial Committee of the Privy Council is a Court which is not forced on Canada. It exists for the whole Empire, and those who desire to take advantage of it must, unless the local authority here gives them leave, apply in England for permission to go there, and the other side has the right to be heard in objection. The Court is maintained, at the expense of the English Crown, not for the benefit of the English, but for the benefit of the Dominions, and Crown possessions overseas, and is in no sense imposed upon Canada or Canadians. It is there for any party engaged in litigation to resort to, if he thinks the justice of his case demands it, and he cannot do this without

\(^{2}\) (1903) A. C. 521.
the other party being able to protest. If both parties agree, no one is hurt. If they disagree, then why penalize the party who desires to go, in favour of his opponent? No one knows on which side the merits of the case really lie until it is finally decided. Another important consideration is that if we deem the value of English judgments to be such that by their intrinsic weight they do and will affect the minds of the members of the Bench and Bar here, why should we object to allow the litigants to seek after and get an actual decision upon their own case from a Court whose opinions in other matters are welcomed and quoted as authorities in this country? We cannot disregard the fact that the Supreme Court of Canada is at present so constituted that two systems of law, the Common Law and the Civil Law, are represented in it, and that it is not possible to obtain a quorum without at least one representative of the contrasted systems of law sitting in a case where the point of decision may have to be decided by a law different from his. Then again, owing to the requirements of the statute every Judge of the Supreme Court must assent or dissent in writing, or give his views, so that diverse opinions are continually being permitted which perhaps under a different rule would not be so obvious. In the Privy Council there is only one decision, that of the majority, in all cases even where there is not absolute unanimity. Anson points out that the Privy Council advises the Crown, and in so doing is not bound to record a dissentient opinion, and that it is not merely a matter of policy, but is due to one of the "Orders to be observed, in Assemblies of Council" made in 1627 never altered or repealed, and affirmed by Order-in-Council in 1878. It runs thus:—

"In voting of any cause the lowest Councillor in place is to begin and speak first, and so it is to be carried by most voices, because every Councillor hath equal vote there; and when the business is carried according to most voices, no publication is afterwards to be made by any man how the particular voices and opinions went."
I am not one of those who regard as helpful the assertion that every British subject has the right to carry his dispute to the foot of the Throne. The important element is not the individual right, but rather the jurisdiction under which the Judicial Committee does hear appeals from every spot in the Empire where dwells any British subject. The great boast that under the British flag complete freedom obtains and justice flourishes can only be truly made if each Dominion and Crown possession administers law based upon those vital principles which have made British law famous. And the sole touchstone that I know of by which this can be demonstrated and tested is an ultimate Court to which every national and every constituent State or Possession can go. It is a commonplace to say that each of these must be ruled by its own laws, and that any such ultimate Court must be bound by them. But for their proper interpretation and enforcement there is no better safeguard than the consciousness that there is a jurisdiction whose legal principles are applicable equally to all disputes because they are fundamental and that the tribunal administering them is made up of those who are recognized as at least the equal of the Jurists of any nation. This is the real value of the Judicial Committee to the Empire in that it forms a standard to which all its various members are bound to conform and that it enables us to affirm that throughout the whole British Empire the same ideals of justice and the same conceptions of right and wrong prevail. Lord Shaw of Dunfermline in his address last year before the Canadian Bar Association has outlined this link of Empire in a fine passage:

"The law, the true and enduring *jus civile*, which is the great umpire, interpreter, helper, is not English law, nor Canadian law, nor Scotch law, nor Australian law, but it is those principles of jurisprudence which inform and bind together the whole mass of co-operating provinces and states under concepts which underlie all variety of local and jur-
istic expression, and which are the guarantee of civilization. Law, according to this modern idea, has evolved more freely in the British Empire than in any other sphere. The chances of its life are far more enduring, because it is commended by reason itself, than any system however mighty which is imposed by force.’’

The question of how far the reasoning upon which the Judicial Committee proceed, as distinguished from the formal report containing the actual judgment, is binding upon our Courts is an interesting one. A learned writer thus explains the procedure followed in practice:

“A judgment of the Judicial Committee is a statement at length of the reasons which determine them in ‘humbly advising the King to give effect to their decision. These reasons are not stated in the report to the King; this merely sets forth their conclusion and the method proposed for giving effect to it. When the report has been submitted to the King, and approved by him at a meeting of the Privy Council, an Order of Council is made reciting the report, and adopting it as the judgment of the King in Council.”

I should be inclined to think that to this question the answer should be that given in Kreglinger v. New Patagonia Meat Co., by Lord Haldane, L.C.:

“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. But when a previous case has not laid down any new principle but has merely

23 1 Canadian Bar Review. p. 117.
24 (1914) A. C. 23 at p. 39.
decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. 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. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

The report, when it becomes a judgment, is res judicata in regard to the questions litigated, having regard to the grounds stated in the reasons for the advice which is tendered, and as such is binding upon the parties. But if the rule were that only the actual and bald conclusion stated in the formal report should bind our Courts the statement of Lord Haldane would be reduced to an absurdity, and we would be departing from the practice universally followed as set out therein. To confine the authority of the decision to what is expressed in the report would also be to deprive ourselves of the substantial benefit enjoyed by every Court from an examination of the reasoning employed in the opinions, in order to appreciate their application to like or cognate questions as they arise. This self denying method has no advantages that I can discern and would unquestionably defeat itself in practice.

I may mention, in closing, an interesting illustration of carrying to extremes the idea of limiting by Provincial legislation the right of appeal. It occurs in Crown Grain Company, Limited v. Day,25 a Manitoba case where Lord Robertson said:—

"The appellants maintain that the implied condition of the powers of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circum-

25 1908, A. C. 504.
scribed by provincial legislation dealing with those subject matters of litigation which, like that of contracts, are committed to the Provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purpose of the Court of Appeal.”

APPENDIX A.

CANADIAN TEXT BOOKS.

(1) Law of Banking and of Bills and Notes by the Honourable Mr. Justice Maclaren.
(2) Law of Mortgages and of Bills of Exchange by John D. Falconbridge, K.C.
(3) Mayers on Admiralty Law.
(4) Biggar, Mr. Justice Robson and Sir Wm. Meredith, C.J.O., on Municipal Law.
(5) Holmested on Practice.
(6) Clement and Lefroy on Canadian Constitutional Law.
(7) Taschereau, Treemear, Snow and Crankshaw on the Criminal Code.
(8) Mr. Justice Russell and Barron on Bills of Sale and Chattel Mortgages.
(9) Armour on Real Property Law.
(10) E. R. Cameron, Laverty and Sims on Insurance Law.
(12) Kingsford and Williams on Landlord and Tenant.
(13) Duncan on Bankruptcy.
(14) Macpherson & Clark on Mining.
(15) Macmurchy and Jacobs on Railway Law.
(16) King on Libel.
And those old classics,
(17) Leith’s Blackstone and Taylor’s Equity.
APPENDIX B.


June 16, 1887—Paridis v. The Queen, 1 Ex. Ct. R. 191: Taschereau, J., sitting alone on appeal from an award, says:

"It is settled law, upon the authority of Trimble v. Hill, 5 App. Cas. 342, in the Privy Council, and City Bank v. Barrow, 5 App. Cas. 664, in the House of Lords, that where a colonial legislature has re-enacted an Imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony."


April 20, 1893—Mason v. Johnson, 20 A. R. 412. Osler, J.A., indicates that had the statute not been changed, it might have been necessary to follow the rule in Trimble v. Hill, notwithstanding Boice v. O’Loane.


Nov. 26, 1900—Butler v. McMicken, 32 O. R. 422: Street and Falconbridge, JJ., followed the decisions of the Ontario Court of Appeal, Boice v. O’Loane, in preference to that of the English Court of Appeal.


Nov. 10, 1904—City of Toronto v. Toronto Railway Co., 9 O. L. R. 333: Anglin, J., said he might have followed the rule in Trimble v. Hill were it not for the Ontario Statute ((1897), R. S. O., c. 51, s. 81), which made it his duty to follow the decision of the Ontario Court of Appeal unless the Privy Council had decided to the contrary.

In McVity v. Trenorth (1905), 9 O. L. R. 105, the Court of Appeal in Ontario, consisting of three judges, Osler, Maclennan, and Maclaren, J.J.A., followed an English case of Thornton v. France (1897), 2 Q. B. 143, in preference to Cameron v. Walker, 19 O. R. 212, saying, per Osler, J.A., at p. 108:
"In Thornton v. France, 2 Q. B. 143, it was held that the section of the Imperial Real Property Limitation Act, which corresponds with sec. 22 of our Act, R. S. O. 197, ch. 133, does not confer a new right of entry on a mortgagee when at the date of the mortgage a person is in possession in whose favour the statute has already begun to run against the mortgagor . . . So far, therefore, as Cameron v. Walker, 19 O. R. 212, decides to the contrary of this it must be taken to be overruled, in accordance with the rule laid down for our guidance by the Judicial Committee in Trimble v. Hill (1897), 5 App. Cas. 342. It may be that cases will arise in which we should not consider ourselves bound to follow that rule, but the language of the Acts being the same and the question being one relating to real property, the present case would seem to be one for its application if the circumstances call for it, as I think they do.

Nov. 10, 1905—Slater v. Laboree, 10 O. L. R. 648: Meredith, C.J., MacMahon and Teetzel, J., followed a decision of the Supreme Court of Canada in preference to decisions of the House of Lords and other English Courts.

April 24, 1907—In re S., 14 O. L. R. 536: Riddell, J., held himself bound by the rule laid down in Trimble v. Hill.

April 5, 1909—Stuart v. Bank of Montreal, 41 S. C. R. 516:

"Anglin, J.: "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, the duty of this court would require most careful consideration. (See Jacobs v. Beaver, 17 Ont. 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.”

Oct. 19, 1908—Jacobs v. Beaver, 17 O. L. R. 496:
Moss, C.J.O. and Osler, J.A., agreed that: “A decision of the highest Court of this Province while it remains unreversed by a tribunal having appellate jurisdiction over it, ought not to be set aside or ignored, simply because other Courts, not possessing appellate jurisdiction over it and themselves subject to reversal by higher Courts, have subsequently expressed views that may appear to be not in harmony with the decision.”

Oct. 22, 1910—Crowe v. Graham, 22 O. L. R. 145: Riddell, J., held rule in Trimble v. Hill was:

“a canon by which all Colonial Courts must govern themselves.”

Oct. 24, 1911—Hutt v. Hutt, 24 O. L. R. Moss, C.J.O., with whom Garrow and Maclaren, J.J.A., agreed, said it was the duty of the Court to follow a decision of the Ontario Court of Appeal, notwithstanding anything suggested in Trimble v. Hill.
March 17, 1913—Gold Medal Furniture Co. v. Stephenson, 10 D. L. R. 1. Cameron, J.A. (Manitoba), agreed that the rule as stated in Trimble v. Hill should be followed.

Nov. 7, 1916—Pacific Lumber Co. v. Imperial Timber Co., 31 D. L. R. 748:

Martin, J.A., says: “The Supreme Court of Canada primarily settled the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and save as aforesaid, in its determination of that law the said
Court may, if it sees fit, disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom. It is our duty, therefore, where the facts are the same as they are here, to avoid all unprofitable discussion, and simply respectfully give effect to the decision of our immediate appellate tribunal by dismissing this appeal. The observations of their Lordships of the Judicial Committee of the Privy Council in Trimble v. Hill (1879), 5 App. Cas. 342, on the duty of colonial Courts of Appeal in general and the Supreme Court of New Zealand in particular have no application to the three great Dominions, Canada, Australia and South Africa, which are composed of a federation of self-governing colonies with a federal Supreme Court. There is only one colony (New Zealand) officially established in 1840 and styled a Dominion since September 26, 1907, and no corresponding Court which is on the same plane in these respects as our oldest colony, Newfoundland, being greater only in the amount of population, but almost 60,000 miles smaller in area.”


Jan. 9, 1919—Re Albin and C. P. R., 45 O. L. R. 1. Riddell, J., speaks of the rule as “authoritative.”

Oct. 25, 1919—Rex v. Gartshore, 49 D. L. R. 276:

Hunter, C.J. (Br. Col.): “The decisions of the Privy Council and English Court of Appeal are binding on the British Columbia Court of Appeal and on the Judges of the Supreme Court, and it is the duty of the Supreme Court Judges to follow and apply the decisions of these highest Courts of Judicature in preference to those of the British Columbia Court of Appeal where they are in conflict.”

Dec. 19, 1919. Re Cherniak and College of Physicians, 46 O. L. R. 434; Maclaren, J.A., adopts and follows the rule in Trimble v. Hill. Meredith, C.J.Q., did not think necessary to deal with the point. Hodgins, J.A.:

“I regret that upon this point I am not in accord with my brother Maclaren. Trimble v. Hill, 5 App. Cas. 342, to
which he refers, contains only a dictum, as Burton, J.A., calls it, or an expression of opinion, worthy of course of respectful attention, that the Courts in Canada should govern themselves by the judgment of the Court of Appeal in England in its construction of a statute where a like enactment has been passed by the local legislature."


March 23, 1922—*Re Bell*, 67 D. L. R. 66: Dennistown, J.A. (Man.), follows the Canadian Supreme Court authority in preference to English cases.

Nov. 30, 1922—Mowat, J., approves the rule, which he said is "yet the law, although the decision was murmured at, if not girded at, by the Court of Appeal for Ontario in *Jacobs v. Beaver*, 1909, 17 O. L. R. 496."