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*Mar. 16, 17.
*April 5.

JANE JACQUES STUART (PLAINTIFF) ..... APPELLANT;

AND

THE BANK OF MONTREAL AND JOHN STUART (DEFENDANTS) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Husband and wife—Contract—Separate estate—Security for husband's debt—Independent advice—Stare decisis.

The confidential relations between husband and wife are such that where the latter conveys or encumbers her separate property for her husband's benefit she is entitled to the protection of independent advice; without that her action does not bind her. *Cox* v. *Adams* (35 Can. S.C.R. 393) followed, Idington J. dissenting.

Only in very exceptional circumstances should the Supreme Court refuse to follow its own decisions.

Judgment of the Court of Appeal (17 Ont. L.R. 436) reversed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming, by an equal division of opinion, the judgment at the trial which dismissed the plaintiff's action.

The action was brought by appellant for rescission of conveyances and other documents which she executed to secure the bank for a large liability of her husband, the respondent, John Stuart. Mr. Justice Mabee, in giving judgment at the trial, states the facts as follows:

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 17 Ont. L.R. 436.

"Mr. John Stuart, the plaintiff's husband, had for many years prior to 1896 occupied a very prominent position in financial and mercantile matters in Hamilton. He was the head of a large wholesale house, the president of the Bank of Hamilton and connected with other corporations.

"Prior to 1896 he had made large investments in the Maritime Sulphite Fibre Co. owning a pulp and paper mill at Chatham, N.B. He was the president of the company, his only living son was the general manager. Almost the whole of his available resources were invested in that company. The defendants were carrying the account and more money was urgently required if there was to be any likelihood of the company being made a success. On Feb. 6th, 1896, Mr. Stuart in a letter to the defendant says: "He (Mr. Lee, a fellow director) however knows that the $50,000 mentioned in the guarantee will not be sufficient to carry us through. * * * I shall find a surety to take his place. I explained to him, as to you, the pressing necessity for relief in money matters in Chatham during the next few days * * * Mr. Lee will either sign the guarantee in a day or two, or agree with me for a substitute; in the latter case my wife will join me in the guarantee and I now submit her name to you for that purpose, as I told you her means are ample enough to secure payment for a much larger sum than we contemplate requiring now or in the future. Pending the carrying out of these arrangements I trust you will authorize your Chatham branch to pay the company's cheques for funds required as follows: (Then follows a statement amounting to $7,500.) I would prefer as you will readily believe not to ask this favour lest it should meet the fate of similar previous ones,

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but it is based upon the proposals above recited and I trust you will have no doubt that my promise to complete one or other during the coming week will be kept."

"On February 7th the general manager of the bank wrote saying the bank would advance $4,250 of the $7,500 asked and stating the balance could stand until the guarantee was completed and the following is a postscript: 'I think it only reasonable to ask, that if you offer Mrs. Stuart's guarantee, you should provide us with a statement of her means and ability to make it good.'

"The information was furnished shewing Mrs. Stuart to be possessed in her own right of real estate, stocks and mortgages to the value of about $250,000.

"On February 24th, 1896, Mr. Stuart completed the proposed transaction, or rather the guarantee being that date was completed shortly afterwards, and the plaintiff signed a document guaranteeing advances to the Sulphite Co. up to $100,000.

"On February 14th, 1896, she assigned in trust for the bank mortgages amounting to about $27,000 and on 11th April, 1898, she gave another guarantee to the bank for the Sulphite Co. advances up to $125,000. This latter was inclusive of the $100,000 guarantee, so her total liability was not to exceed $125,000.

"Advances were made by the bank upon these guarantees and in 1903 the company went into liquidation and on October 2nd, 1903, the plaintiff and her husband gave the bank a mortgage upon all the real estate owned by them. On July 20th, 1904, a lengthy agreement was entered into between the bank and the plaintiff and her husband, the result of which was that the plaintiff gave up to the bank all her estate, both real

and personal, in settlement of her guarantee. The plaintiff's husband at this time was liable to the bank upon a note $196,052 and a guarantee of $50,000 and he was discharged from this debt by the bank. Many stocks that the plaintiff owned, but which stood in the name of the husband, were pledged by him for advances from other banks, and the equity of redemption only in these was turned over by the settlement of July. There was nothing in the transaction to shew the defendants that these stocks belonged to the plaintiff and I have every reason to believe the officers of the bank treated upon the basis of these stocks belonging to the husband.

"On Jan. 6th, 1903, Mr. John Stuart resigned his position of director and president of the Bank of Hamilton and received from them an agreement to pay him the sum of $5,000 per year as long as he lives, the payments to be made monthly in advance. Of course by releasing him from the indebtedness to the bank in consideration of both the husband and wife agreeing to make the transfers provided for in the settlement of July 20th the defendants put it out of their power to proceed for the recovery of the $5,000 per year payable by the Bank of Hamilton. Mr. Stuart said he had understood that was not available for creditors, but it is quite apparent that the defendants could have obtained judgment against Mr. Stuart and obtained a receiving order and swept away from him the monthly payments from the Bank of Hamilton. Many deeds were executed as provided for by the settlement of July, 1904. The properties turned over to the bank, stocks sold, some of the real estate, if not all, it was said in argument had been sold and the position of the defendants entirely changed.

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"In 1903, during the liquidation of the Sulphite Co., the defendants were in litigation with the liquidators and on October 6th, 1903, Mrs. Stuart joined in an agreement authorizing the settlement of that litigation upon the strength of which the defendants made compromises and otherwise changed their position and made a cash payment to the liquidator of $15,000.

"On February 24th, 1896, five shareholders and their representatives transferred to the plaintiff 134 preference and 100 ordinary shares (in all $23,400) "in consideration of Mrs. Jane J. Stuart giving a guarantee to the Bank of Montreal for advances made and to be made to the company to the extent of $100,000." Mrs. Stuart signed acceptances of the transfer of these shares upon the books of the company and from time to time gave proxies for them to be voted upon. In a letter written by Mr. Stuart to Mr. Bruce (who was a shareholder and guarantor to the bank) of February 12th, 1896, he says: 'The question at once presents itself what inducement can we offer to any one to assume the responsibilty of guaranteeing the necessary advances ($100,000 referred to in the letter) and how can the matter be arranged. * * * I believe I can procure the guarantor required by the bank for the new advances, on the security of a lien on material to the bank, and the postponement by Mr. Lee and myself of our claims for cash advances, together with a reasonable bonus in the way of stock which may under existing circumstances be considered of only nominal value. It is, of course, most vital to me to save this property in which my all is invested, and it is of no small consequence to all concerned, for all have not merely an interest in the value that is expected to be given to the stock, but also, perhaps, a more serious

responsibility contingent on the unpaid debt due to the Bank of Montreal.'

"Of course Mrs. Stuart was the guarantor referred to in the letter and in addition to the stock bonus which was given to her the postponement of the debt for cash advances was also executed by Messrs. Stuart and Lee. On February 26th, or thereabouts, and when the $100,000 guarantee was given by the plaintiff the advances already made and for which the plaintiff was becoming liable were about $20,000, but whether this sum included the $7,500 which Mr. Stuart was asking in his letter of February 6th, 1896, the bank to advance upon the strength of the guarantee being given does not clearly appear, but it is altogether likely it does include that sum as on February 20th the debt upon this head was only some $11,000. In any event the guarantee was not given for an entire past due liability to the bank; at least the sum of $80,000 was advanced upon the strength of the first guarantee and an additional sum of $25,000 upon the second guarantee being given.

"Mrs. Stuart is a lady of intelligence and refinement. She was the sole executrix and devisee under her father's will and obtained in land and securities about $250,000 from that source upon his death in 1886. Her husband had had the entire management of her estate and in 1896 it stood at something like $240,000.

"Prior to becoming liable to the defendants in February, 1896, she had indorsed for her husband a note discounted and then held by the Bank of Hamilton for $125,000; that note was afterwards paid out of the proceeds of her securities, which with the transfers made by her to the defendants in 1904, entirely wiped out her fortune.

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"She says she had no experience in business matters, that she signed at her husband's wish, that she knew something of his business matters, and thought he had independent means, that she knew of his connection with the Sulphite Co. long before 1896, and that she also knew Messrs. Lee, Bruce, Brown and Leys were connected with it, that her son had been connected with it for many years and was the manager and that she and her husband were both hoping the company would offer to him an opportunity for a successful business career. She also says she knew there was nothing her husband was more engrossed in than the success of the company and that she knew he had a large amount invested in it, that upon that account and her son being manager she was also interested in its success. She says she consulted no one about the wisdom of her entering upon the guarantee, that she would have scorned to consult any one about the transaction and regarded it solely as a matter between herself and her husband, that she knew the bank would advance a large amount of money to the company that her husband and son were interested in upon the strength of the guarantee and that she intended the bank to act upon the guarantee and advance the money; that she was in no way under the control or influence of her husband, but exercised her own free will, and that she was sanguine about the success of the company if the bank would advance the money. She says that if her husband had said to her not to enter into the guarantee without asking some one else she would have refused to consult any person else, that she knew there was no sham about the guarantee and that she was becoming legally bound, that her husband did not make the slightest misrepresentation to her

and she repudiates the suggestion that she was in any way deceived or misled. Then when giving the second guarantee she says she knew the company wanted more money and that that was the reason she was asked to give the additional guarantee. She did not remember getting stock in the company, but at once frankly recognized her signature in the company's books and to the proxies, although she had also forgotten about the latter. Then, speaking of the settlement made in 1904 when she gave up everything, she says she knew all the facts connected with the matter and had learned nothing additional to what she knew at that time; she knew of the arrangement the Bank of Hamilton had made to pay her husband an annuity of $5,000 per year and that the bank was releasing him from all liability. She knew she was conveying everything to the bank, that they could not keep up Inglewood (the Hamilton residence which also belonged to her) on $5,000 a year and that she intended the bank to get it.

"Mr. Stuart says that no misrepresentations of any kind were made to induce her to sign any of the documents and that he told her "she was to get shares in the Fibre Co. as a sort of acknowledgment of her goodness in doing this."

The learned judge held that as the transaction was *bonâ fide* and there was no fraud on deception *Cox* v. *Adams*(1) did not apply his interpretation of the decision in that case being that there was not a majority of the court in favour of the principle that a married woman is entitled to the protection of independent advice. He therefore dismissed the action and on

(1) 35 Can. S.C.R. 393.

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appeal from his judgment the Court of Appeal was equally divided and it was sustained. The plaintiff then appealed to the Supreme Court of Canada.

Hellmuth K.C. and *W. J. Elliott* for the appellant. *Cox* v. *Adams*(1) is a binding authority for the proposition that the relation between husband and wife, as regards the necessity for independent advice, is the same as that between father and child or guardian and ward.

And this is clearly the law in England as exemplified by *Bank of Africa* v. *Cohen*(2), decided in 1908. See also *Bischoff's Trustee* v. *Frank*(3).

Shepley K.C. for the respondents. All the cases in which a married woman has succeeded in setting aside a transaction into which she had entered are those in which there was fraud or deception. This was so in *Cox* v. *Adams*(1), and the majority of the court in that case did not proceed on the view that the wife was in the protected class.

In *Turnbull* v. *Duval*(4) also the decision was based on the ground of pressure, and concealment of material facts by the husband and the question of independent advice had not to be determined. The same can be said of all the cases relied on by the appellants.

THE CHIEF JUSTICE.—I agree that this appeal should be allowed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—The only question argued before us on this appeal was whether conveyances or securities

(1) 35 Can. S.C.R. 393.
(2) 25 Times L.R. 285.
(3) 89 L.T. 188.
(4) [1902] A.C. 429.

given by a married woman of or upon her separate property to or for the benefit of her husband can be upheld as against her in the absence of independent advice before executing the documents, the beneficial assignee having knowledge at the time of her marital relationship. Or, put it in another way, whether under English authorities the wife stands towards her husband within those confidential relationships which, in cases where conveyances or securities are made or given by one to or for the benefit of the other, the law, on grounds of public policy, requires shall have the protection of independent advice in order to be upheld.

In the case of *Cox* v. *Adams*(1) this court had to consider the question very fully. A majority of the court, of which I was one, was, after full consideration of the authorities, of the opinion that the wife was within those confidential relationships and gave judgment accordingly. Mr. Justice Sedgewick, while expressly concurring in the opinions delivered by Mr. Justice Girouard and myself, held also that the securities in question in that case were avoided as against the wife by fraud, and, because of this, an attempt has been made in the courts below to distinguish *Cox* v. *Adams*(1) from the case now before us, where no fraud is charged. But that additional ground adopted by Mr. Justice Sedgewick for the conclusion he reached cannot, in my judgment, weaken the authority of that case or make it less binding upon us than it, otherwise, would be. The learned justice fully agreed with the ground on which Mr. Justice Girouard and I, myself, rested our judgments, that the wife was within those confidential relationships.

(1) 35 Can. S.C.R. 393.

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Davies J.

As I am of the opinion that the decision of this court in *Cox* v. *Adams*(1) is binding on us, I would allow this appeal with costs and dispose of the case in the manner proposed by Chief Justice Moss in the Court of Appeal.

IDINGTON J. (dissenting).—It is contended that the appellant, being a married woman living with her husband to the knowledge of the respondent when she signed, without independent advice, documents guaranteeing the respondent for advances made by it to a corporation in which her husband was deeply interested, could not thereby bind her separate estate, though the facts surrounding and leading to these contracts are such that, if she had before signing, gone through the form of hearing some such independent advice and had discarded it, the contracts would have bound her and her estate.

I observed the difficulty her counsel had in defining this new doctrine as presumption of law or of fact and the qualification, in the latter case at all events, that might be some sort of consolation to some of those in Ontario concerned in some of the thousands of contracts entered into in that province, without observing the form demanded on the faith of the law not imposing such conditions.

It is attempted to rest the appeal on the case of *Cox* v. *Adams*(1).

I admit there are expressions in some of the opinion judgments in that case, reversing by a bare majority the unanimous judgment of the Court of Appeal for Ontario, going a long way, but I submit these opinions

(1) 35 Can. S.C.R. 393.

were not necessary in the view taken of the facts by two of that majority to the determination of the case, and, in short, do not form the *ratio decidendi* of their judgments.

It is one thing, in dealing with a case of fraud or undue influence, to remark upon the absence of independent advice, and quite another to hold that alone sufficient because of presumption arising therefrom.

Unless there be in a case the concurrent opinion of at least the majority of a court as to the application of a principle of law on a point to be decided which, of necessity, has led to the determination of the suitors' rights found dependent thereon, its decision binds no one in a later case.

I might well adopt and apply the language used in relation to a more extended view of the nature of authority by Sir William Markby, in his book on "Elements of Law," par. 99:

> The nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by elimination of all the qualifying circumstances, is a very peculiar and difficult one. The opinion of the judge, apart from the decision, though not exactly disregarded, is considered as extra-judicial, and its *authority* may be got rid of, by any suggestion which can separate it from the actual result. Unless, therefore, a proposition of law is absolutely necessary to a decision, however emphatically it may have been stated, it passes from the province of *auctoritas* into that of mere *literatura*. Curiously enough it is not the opinion of the judge, but the result to the suitor, which makes the law.

I might also refer to the remark of the late Sir George Jessel M.R., in *Re Hallett's Estate*(1), at p. 712, that

> the only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him.

(1) 13 Ch. D. 696.

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Another illustration of the nature of authority derived from decided cases is that of *The "Vera Cruz"* (1), in which, on appeal, the court held a previous decision arrived at in appeal by an equal division had not the effect of constituting such decision authority in a later case in appeal.

Let us see what those of the learned judges who composed the majority deciding *Cox* v. *Adams*(2) did say.

Mr. Justice Sedgewick says, at page 396:

> After many days not only of expostulation and entreaty, but also upon the most atrocious misrepresentation of his financial position and his prospects of ultimate success from property which he then falsely asserted that he owned, they both were induced to sign the notes which are the instruments sued on in this case.
>
> I look upon the whole thing as a conspiracy between Walmsley and Cox to rob, for their mutual advantage, those weak and trustful ladies. * * *

And at page 397 speaks of it as

> a deliberate attempt on the part of both to defraud them.

And he expressly says, in light thereof, that

> the equitable principles regarding undue influence need not be resorted to.

And at page 398 Mr. Justice Girouard says:

> If that advice had been taken, is it probable that the gross misrepresentations and fraud perpetrated by the principal debtor would not have been discovered by the solicitor inquiring either from Walmsley or elsewhere, as was done later on? etc., etc.

And, at page 414, he says:

> I have less hesitation in arriving at this conclusion that I am inclined, on the evidence, to think that both these ladies, as in *Turnbull* v. *Duval*(3); *Bridgman* v. *Green*(4); *Huguenin* v. *Baseley*(5), and *Smith* v. *Kay*(6), were, in fact, badly pressed and grossly deceived as to the nature of the transaction, and that Walmsley became an active party to the fraud by the promise of $1,000, which it is hardly pos-

(1) 9 P.D. 96.
(2) 35 Can. S.C.R. 393.
(3) (1902) A.C. 429.
(4) 2 Ves. Sr. 627.
(5) 14 Ves. 273.
(6) 7 H.L. Cas. 750.

sible, under the circumstances, not to consider as a reward to Cox for betraying the persons who were entitled to his protection.

If these learned judges intended to lay down the proposition it is now contended they did as the *ratio decidendi* of the case, I would not have expected this examination of the evidence for there was never any pretence of these ladies having taken independent advice.

Hence, I cannot feel assured from reading his judgment that the late Mr. Justice Sedgewick deliberately intended to concur in the view of his colleague Mr. Justice Davies as to the law when considered in relation to the wife as governing his decision.

In short, in the view taken of the facts both by him and Mr. Justice Girouard, there was no need to rely upon any such proposition of law so far as the wife was concerned. Comprehensive undiscriminating phrases of agreement sometimes mislead. Nor do I think when such widespread consequences depend upon the decision which could only be weighed by those since concerned in its interpretation by reference to the report of the case we should look elsewhere for assurances of its meaning; especially when we find three out of five judges able to distinguish it from this case.

And I find Mr. Justice Sedgewick avowedly did not consider it necessary to come to any such conclusion of law, and, hence, proceeded on the facts as he viewed them to reach the result by the application of legal principles in no way affected by the proposition now in question.

If we are not bound by the decision of this court in *Cox* v. *Adams* (1), to hold otherwise, as I think we are

(1) 35 Can. S.C.R. 393.

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not, there can, in light of the findings of the learned trial judge, be nothing clearer. I think, then, that this appeal is not maintainable.

To illustrate and apprehend the true position of the law of Ontario on the subject, let us observe its growth and remember that, at common law, the marriage gave certain limited and certain more extended, but conditional, rights to the husband in and over his wife's real estate and to possess her chattels real and to possess absolutely her specific personal chattels and, as to her choses in action, to reduce them into his possession.

I am not called upon here to go into the details of this brief outline of the husband's right or of the qualifications thereof nor to observe the distinct rights she might have arising from settled estates or other property held for her separate use. All I am concerned with is to recall the condition of things before the changes made in the law by modern legislation in the province whose law is now in question in order that we can understand how little it was possible under such a state of things to have arisen therein for the application to the dealings between husband and wife of the exact principles of law governing the relation between parent and child or similar relations.

In such cases the child's property was his or her own and the weak were protected against the strong by the application of well-known principles to preserve to the child or other weak person his or her rights of or in property.

But when the husband requesting the wife to part with such property as Mrs. Stuart gave up here was only asking, apparently, what the law had so recently

given to him, what field was there for such a principle to operate upon?

When the enfranchisement of married women began and their power over their separate real estate was recognized, the husband's common law rights therein were, for a time, also recognized. She could not convey her real estate without him. And she was so protected by law that she could not convey it, even with him, save upon condition of a separate examination and judicial certificate that she was found, as a result thereof, to be acting free from the restraint of her husband.

I need not dwell upon the details of this legislation or how, bit by bit, the husband's rights and her protection, in this mode or by such means, were at last obliterated.

The lesson to be drawn from this history is that, when the legislature was conferring thus upon the wife a dominion over her real estate and also her personal property it was, tentatively as it were, for a long time expressly protecting her against her husband as regards her real estate, but never applied that protection or seems to have dreamt of applying similar protection for the wife as to her personal property; much less to her power of contracting, which I am about to advert to.

In all this growth of legislation, the wife was gradually acquiring dominion over that which had, speaking broadly, been theretofore the husband's property or possible property. The enfranchisement had gone a long way and was something entirely inconsistent in principle with putting restraint upon the married woman.

Those, I submit with respect, arguing for the main-

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tenance of safeguards seem to me to have entirely misapprehended the starting point of the married woman's emancipation, the condition of things in which that took place, and the process that has gone on which finally, for the present, ends in 60 Vict. ch. 22, now set forth in R.S.O. [1897], ch. 163, and section 4 thereof, as to the meaning of the contracting power, as if a *feme sole,* previously conferred and appearing in section 3 of the last named chapter 163; both being now in question.

If the legislature in this long course of legislation and judicial discussion, I had almost said struggle, extending over nearly forty years, had ever intended in taking from the husband that which once was his, to prohibit him from merely requesting and receiving assistance unless through the channel of some independent advice, I think it would have said so.

When protection as against her husband's influence so long guarded against in regard to her real estate until the injury and absolute futility of it was recognized and removed by the legislature, why should we partially re-establish it? Why, especially when the principle had never been adopted by courts in relation to the dealings of husband and wife?

We have been referred to many authorities quite beside what the history of this legislation tells was intended and this enactment expressly provides.

What right have we to cut down the express power so given? Moreover, it is not in the case of a contract with the husband we are asked to do so, but in a contract with others knowing only the married relation existed and husband's partial interest. In this case his proportion of interest is large, but in many other cases it might well be his interest would be merely

fractional with that of others, or of and with others, including the wife herself. Where can such a principle end?

It is not as if the legislation had invaded the common law rights of married women or some protecting right they had enjoyed at common law or protection by virtue of a long, well understood course of jurisprudence which required a wife, before contracting, to have and take the privilege of independent advice in order to enjoy the rights which this legislation has provided and suffer the burthens consequent thereon.

The relationship exists which will induce the courts to scrutinize closely the conduct of either party upon being charged with exercising undue influence.

But, notwithstanding expressions used in *Cox* v. *Adams* (1) and other cases, I submit with confidence no court has yet held that, from that relationship alone, there arises, upon mere request for either party to do or abstain from doing something which may enure to the other's benefit, any kind of presumption of undue influence. The court will, doubtless, require that the nature of the instrument signed be understood. This one seems to have been explained by a trustworthy solicitor, who, though solicitor for the bank, was not disqualified from doing that much, went no further and refrained from giving advice either way.

The act of signing such an instrument involved risk. So does every case of going surety and it would be much more sensible to prohibit married women, or for that part, unmarried women also, from ever going surety, than imposing an idle and possibly mischievous form. The legislative tendencies, how-

(1) 35 Can. S.C.R. 393.

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ever, are entirely and perhaps wisely directed in an opposite direction.

The facts having been found as they were by the learned trial judge, and such findings not being quarrelled with by the Court of Appeal, and, taking the view I do of the legal result of *Cox* v. *Adams*(1), I think that the appeal should be dismissed with costs.

DUFF J.—In the determination of this appeal we are, I think, concluded by *Cox* v. *Adams*(1). In that case, at page 415, Davies J. says:

> I rest my decision upon the principle that both the wife and daughter, at the time they signed the notes sued on, stood towards E. S. Cox in the position of parties having confidential relationship with him; that the law, on grounds of public policy, presumes that the transaction was the effect of influence induced by these relations, and that the burthen lay upon Walmsley, the indorsee of the notes and the beneficial plaintiff in the action, who took them with notice and full knowledge of the relationship, of shewing that the makers had independent advice.

The principle thus enunciated formed the basis of the judgment of Girouard J.; and, notwithstanding the acute critical examination to which the observation of Sedgewick J. has been subjected, I cannot bring myself to doubt that, upon the same ground, that learned judge also proceeded. It is true that the judgment of Sedgewick J. and, perhaps, also that of Girouard J., rested upon another ground as well; but "it is," said Lord Macnaghten, in *New South Wales Taxation Commissioners* v. *Palmer*(2), at page 184:

> impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum because there is another ground upon which, standing alone, the case might have been determined.

(1) 35 Can. S.C.R. 393. (2) [1907] A.C. 179.

Some question is raised, whether or not we are entitled to disregard a previous decision of this court laying down a substantive rule of law. This court is, of course, not a court of final resort in the sense in which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the Court of Exchequer Chamber or the 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* (1); 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; because there was, in the circumstances in which *Cox* v. *Adams*(2) was decided, nothing in the least degree exceptional. Mr. Shepley, with his usual candour, admitted frankly, what indeed is indisputable, that under the rule laid down in the passage quoted above from the judgment of Davies J. the appellant must succeed.

I would allow the appeal with costs; the action should be disposed of in the manner proposed by Moss C.J.O.

(1) [1895] 1 Ch. 51.

(2) 35 Can. S.C.R. 393.

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Anglin J.

ANGLIN J.—The appellant seeks to be relieved from liability upon a guarantee given by her to the Bank of Montreal.

The evidence establishes the following material facts.

The bank did not, in any sense, seek to have the plaintiff brought into its transactions with her husband. Its manager, however, knew that it was his wife whom John Stuart procured to become his guarantor and that Mrs. Stuart assumed liability in reality for the benefit of and as surety for her husband and without any personal gain or advantage to herself. She knew that the purpose of the guarantee was to render her, to the extent of her separate estate, personally liable for a large sum of money which the bank proposed to advance to the sulphite company, in which her husband was interested, and she intended that the bank should act upon her guarantee and advance the money. She was in nowise under the control of or influenced by her husband in the transaction, but exercised her own free will. She says that if her husband had suggested her taking independent advice she would have refused to consult any other person; and she repudiates the idea of any misrepresentation or deceit. She was not misled in any way and fully understood the nature of the transaction. On the other hand, notwithstanding Mr. Shepley's contention to the contrary, the only possible conclusion upon the evidence is that she had not, in fact, independent advice. The circumstances do not support the plea of laches urged by the respondent. The question, therefore, is squarely presented for decision, whether the mere fact that she acted without independent advice, notwithstanding the absence of fraud and un-

due influence and of any misunderstanding on her part, enables the appellant successfully to repudiate her liability to the bank.

This question, which the Judicial Committee, in *Turnbull* v. *Duval*(1), at page 434, treated as not settled and expressly left open, was, it is contended by the appellant, definitely decided in her favour by this court in *Cox* v. *Adams*(2) in 1904. If it was, and if this court is bound to follow its own previous decision, this appeal must succeed. The respondent contests both propositions.

I entertain no doubt whatever that the judges who composed the majority of this court in *Cox* v. *Adams* (2), intended to formulate, and did, in fact, formulate, as the basis of their judgments, the propositions that the relation of husband and wife is one of those confidential relations in which, on grounds of public safety, the law presumes that an obligation, contracted by the person assumed to repose confidence for the benefit of the person in whom confidence is assumed to be reposed, has been procured by the undue influence of the latter and that he, or any person claiming the benefit of the transaction with notice of the relationship, can rebut that presumption only by proving that the obligor had, in fact, independent advice.

Davies J., at page 415, in the report of *Cox* v. *Adams*(2), expressly states that he rests his decision upon this ground, and he adds that

> apart from this beneficial and salutary rule of public policy, the facts would not, in themselves, be sufficient to justify interference with the judgment of the Court of Appeal.

He thus excludes the idea that the fraud and misrepresentation of the husband and his agency for the

(1) [1902] A.C. 429. (2) 35 Can. S.C.R. 393.

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creditor, which Sedgewick J. expressly found (pp. 396-7), and which Girouard J. was also inclined to think established (p. 414), at all influenced or affected his judgment.

Girouard J., after quoting the passage of Lord Lindley's judgment in *Turnbull* v. *Duval*(1) in which he leaves open the question whether or not, if impeached upon the sole ground of lack of independent advice, the security given by Mrs. Duval should be set aside, adds:

> In the present case, the point of law must, I conceive, be determined. (p. 412.)

Again he says:

> I cannot see that a material distinction can be made between the case of the mother and that of the daughter. * * * I have come to the conclusion that the rule which governs the case of Miss Cox applies also to that of Mrs. Cox.

These passages leave no doubt as to the *ratio* of Mr. Justice Girouard's judgment.

Sedgewick J. commences his opinion by stating:

> I entirely agree with the conclusion at which my brother Girouard has arrived in his very able and exhaustive judgment.

And he concludes by stating that as to

> the equitable principles regarding undue influence * * * I can usefully add nothing to what my brother Girouard and my brother Davies have said.

In the course of his opinion he expresses very strongly his own view that the fraudulent and deceitful—he calls it criminal—conduct of the husband must invalidate the security in the hands of the creditor and that it is, therefore, unnecessary to resort to the proposition of law upon which Girouard J. rested his

(1) [1902] A.C. 429.

opinion. But I entertain no doubt that he intended to express, and did in fact express, as a distinct ground of his decision, his concurrence in the conclusions of Girouard and Davies JJ. that the equitable doctrine invoked by them was applicable to the case of Mrs. Cox.

In *New South Wales Taxation Commissioners* v. *Palmer*(1), Lord Macnaghten, delivering the judgment of the Privy Council, says, at page 184:

> It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

In *Membery* v. *The Great Western Railway Co.*(2), at page 187, Lord Bramwell said:

> Of course it is in a sense not necessary that I should express an opinion on this as the ground I have first mentioned, in my opinion, disposes of the case. But if, instead of mentioning that ground first, I had mentioned the one I am now dealing with, it would, on the same reasoning, be unnecessary to mention that. What I am saying is not obiter, not a needless expression of opinion on a matter not relevant to the decision. There are two answers to the plaintiff; and I decide against him on both; on one as much as on the other.

Reference may also be made to the remarks of Rose J. in *Landreville* v. *Gouin*(3), at page 464.

Being satisfied that all three judges who composed the majority in *Cox* v. *Adams*(4) (and only their opinions need be considered in determining what was the principle of the decision: *Suffell* v. *Bank of England* (5), at page 560) concurred in assigning as a ground of judgment the applicability of the rule above stated to the relation of husband and wife, we must regard

(1) [1907] A.C. 179.
(2) 14 App. Cas. 179.
(3) 6 O.R. 455.
(4) 35 Can. S.C.R. 393.
(5) 9 Q.B.D. 555.

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this conclusion not as a mere dictum, but as the *ratio decidendi* of the case, and, therefore, binding, unless members of this court are at liberty to reconsider and review its former deliberate and explicit decision upon a question of law, merely because they would, if the matter were *res integra,* reach a different conclusion.

Cox v. *Adams*(1) was decided in the year 1904. The rule against interference with a decision which has stood unchallenged and has been acted upon in transactions of daily life throughout the country for many years, especially if titles to property depend upon it. has no application in this instance. On the other hand, *Cox* v. *Adams*(1) has not itself been questioned nor has the principle upon which it proceeded been controverted in this court, or in any tribunal of co-ordinate or quasi-co-ordinate jurisdiction, since it was decided.

The case of *Chaplin & Co.* v. *Brammall,* in the English Court of Appeal(2), proceeded upon the fact that the true nature of the guarantee given by the wife was not understood by her when she signed it, and is, therefore, distinguishable from the present case. The proposition involved here was not passed upon by the court. This is the only case at all similar to the present which has received consideration from a court of appeal, either in England or in this country since *Cox* v. *Adams*(1) was decided.

Bischoff's Trustee v. *Frank*(3), though decided before *Cox* v. *Adams*(1), does not appear to have been adverted to by counsel or by the court. But, in that case also, Mr. Justice Wright found that the defendant, whom he held not liable, did not sufficiently

(1) 35 Can. S.C.R. 393. (2) [1908] 1 K.B. 233.
(3) 89 L.T. 188.

understand the nature of the guarantee which she had signed.

In *Howes* v. *Bishop and Wife*(1) Mr. Justice Jelf stated a proposition quite inconsistent with the decision in *Cox* v. *Adams*(2); and in *Bank of Africa* v. *Cohen*(3), Mr. Justice Eve said that he would not be prepared to hold that in England the mere absence of independent advice would operate to avoid a contract of the wife for the benefit of the husband.

If the matter were *res integra* in this court, I should certainly treat the opinions of Wright, Jelf and Eve JJ. and those of Leach M.R. in *Field* v. *Sowle*(4), of Hardwicke L.C. in *Grigby* v. *Cox*(5), of Parker V.C. in *Nedby* v. *Nedby*(6), and of Cozens-Hardy J. in *Barron* v. *Willis*(7), as entitled to the very greatest consideration; but the opinion of any judge of first instance, however eminent, cannot be permitted to weigh in this court against a previous deliberate and definite decision by itself.

How far should we, in these circumstances, hold ourselves bound by the comparatively recent decision in *Cox* v. *Adams*(2)?

There are instances in which judges of this court have considered themselves free to decline to follow its earlier decisions with which they did not agree. In the *Burrard Election Case*(8), Gwynne J. (dissenting) expressed his opinion that the Supreme Court is competent to overrule a judgment of the court differently constituted, if it clearly appears to be erroneous.

(1) 25 Times L.R. 171.
(2) 35 Can. S.C.R. 393.
(3) 25 Times L.R. 285.
(4) 4 Russ. 112.
(5) 1 Ves. Sr. 517.
(6) 5 DeG. & S. 377.
(7) [1899] 2 Ch. 578.
(8) 31 Can. S.C.R. 459.

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In *Stephens* v. *McArthur*(1), at page 460, Patterson J. (dissenting) said

> it is indisputable that, as a matter of principle, the reasons given by the court for its judgment in any case may properly be reconsidered, and, if found to be erroneous, corrected, when a similar question arises in another case;

and he indicated that the Supreme Court of Canada should, in this matter, be governed rather by the rules which prevail in intermediate appellate tribunals—such as the English Court of Appeal—than by those which now govern such a final appellate tribunal as the House of Lords.

In the *Stanstead Election Case*(2) this court refused to hold itself bound by a previous judgment dismissing an appeal upon an equal division: *Megantic Election Case*(3); but there is no case in which the court has refused to follow a previous judgment in which a majority concurred. The nearest approach to such a position is that taken by Strong C.J. in *The Queen* v. *Grenier*(4), where he says, at page 53:

> Since the case of *Robertson* v. *The Grand Trunk Railway Co.*(5), it would seem that *Vogel's Case* (6) can scarcely be considered as a binding authority and, at all events, I should not hesitate to reconsider it if a similar question arose.

In *The Grand Trunk Railway Co.* v. *Miller*(7) Taschereau C.J. followed the decision in *The Queen* v. *Grenier*(4), though, if unfettered by authority, he would probably have decided otherwise. Girouard J. also followed it, adding that he was of opinion that it was correctly decided. Davies J. accepted the Grenier decision as binding, as did also Killam J.,

> without intending to indicate any opinion upon the question involved.

(1) 19 Can. S.C.R. 446.
(2) 20 Can. S.C.R. 12.
(3) 8 Can. S.C.R. 169.
(4) 30 Can. S.C.R. 42.
(5) 24 Can. S.C.R. 611.
(6) 11 Can. S.C.R. 612.
(7) 34 Can. S.C.R. 45.

In the Privy Council(1), at page 195, in reversing the judgment of the Supreme Court of Canada, Lord Davey significantly said:

> Their lordships are not sure that * * * they are differing from the real opinion of the learned judges of the Supreme Court.

I have not found any other case in this court in which a previous decision of the court, although tacitly, if not expressly, disapproved of, has nevertheless been followed.

The instances are innumerable in which the court has accepted its own previous decisions as authority without questioning their accuracy. In *Salvas* v. *Vassal*(2), at page 89, Girouard J. said:

> Il n'entre pas dans les attributions de cette cour de reviser ses propres décisions.

In several judgments since *The Grand Trunk Railway Co.* v. *Miller*(3), there occur individual expressions of opinion that the court is bound by its own previous decisions. In *Hébert* v. *La Banque Nationale*(4), Idington J. says:

> The case of *The Merchants Bank* v. *Lucas*(5) binds this court.

In *Leroux* v. *The Parish of Ste. Justine*(6) the court, considering that the case *Toussignant* v. *County of Nicolet*(7) was binding, quashed the appeal. In *Canada Carriage Co.* v. *Lea*(8), Davies J. held the *Town of Aurora* v. *Village of Markham*(9) "applicable and conclusive." In no case since the *Grand Trunk Railway Co.* v. *Miller*(3) has any member of this

(1) *Miller* v. *Grand Trunk Railway Co.*, [1906] A.C. 187.
(2) 27 Can. S.C.R. 68.
(3) 34 Can. S.C.R. 45.
(4) 40 Can. S.C.R. 458, at p. 479.
(5) 18 Can. S.C.R. 704.
(6) 37 Can. S.C.R. 321.
(7) 32 Can. S.C.R. 353.
(8) 37 Can. S.C.R. 672.
(9) 32 Can. S.C.R. 457.

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court, so far as I can find, expressed the view that the court is at liberty to decline to follow its previous decisions in matters of law.

For a summary of the history of *stare decisis* in England, and some of the authorities upon its application in English courts, reference may be made to the first book of Pollock's Jurisprudence (2 ed.), at pages 312 *et seq.*, and to Beal's Legal Interpretation (2 ed.) pages 20 *et seq.*

Lord Eldon, Lord Lyndhurst and Lord St. Leonards are distinguished law lords who thought that judgments of the House of Lords did not absolutely bind the House itself. Lord Campbell always held the opposite opinion to which Lord Wensleydale, Lord Cranworth and Lord Chelmsford assented.

Since the decision in *Beamish* v. *Beamish*(1) the House of Lords has consistently acted upon the latter view. Instances are to be found in *Mersey Docks Trustees* v. *Gibbs*(2), at page 125; *Houldsworth* v. *City of Glasgow Bank*(3), and *Darley Main Colliery Co.* v. *Mitchell*(4), at page 134. Finally, in *London Street Tramways Co.* v. *London County Council*(5), it was expressly held by Lord Halsbury L.C., the other members of the House, Lords Macnaghten, Morris and James of Hereford, concurring, that

> a decision of this House upon a question of law is conclusive and nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House. (P. 381.)

On this sole ground the appeal was dismissed. It may be taken, therefore, as definitely settled that the House of Lords is bound by its own decisions.

(1) 9 H.L. Cas. 274.
(2) L.R. 1 H.L. 93.
(3) 5 App. Cas. 317.
(4) 11 App. Cas. 127.
(5) [1898] A.C. 375.

The Judicial Committee of the Privy Council apparently claims greater freedom in dealing with its former decisions. This is illustrated in a passage from the judgment of Cairns L.C. in *Ridsdale* v. *Clifton*(1), at p. 306, quoted with approval by Halsbury L.C., in *Read* v. *Bishop of Lincoln*(2), at p. 654. See also *Tooth* v. *Power*(3), at p. 292. But the Judicial Committee is not a court of law in the strict sense. Its decision is the advice of a Board to the Sovereign.

Coming to the English Court of Appeal—an intermediate tribunal—we find cases in which that court has felt itself at liberty to decline to follow the decisions of courts of co-ordinate authority: *Mills* v. *Jennings*(4), at p. 648; and *In re Dewhirst's Trusts*(5), are instances. While the court still considered itself free to decline to follow judgments of courts of equal rank, the view was expressed that

> it would not be right to overrule the decision of a court of co-ordinate jurisdiction unless we are clearly satisfied that it was wrong. (*Per* James L.J. in *Wake* v. *Varah*(6), at page 357.)

Several other similar statements might be quoted. But in more recent years the Court of Appeal has held itself bound by its own previous decisions, as well as by those of English courts of equal rank. In *Palmer* v. *Johnson*(7), at p. 355, Brett M.R. said:

> A court of law is not justified, according to the comity of our courts, in overruling the decision of another court of co-ordinate jurisdiction.

In *Nugent* v. *Smith*(8) Cockburn C.J. stated, at p. 433:

(1) 2 P.D. 276.
(2) [1892] A.C. 644.
(3) [1891] A.C. 284.
(4) 13 Ch.D. 639.
(5) 33 Ch.D. 416.
(6) 2 Ch.D. 348.
(7) 13 Q.B.D. 351.
(8) 1 C.P.D. 423.

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We (the Court of Appeal) are, of course, bound by the decision of the Court of Exchequer Chamber, in the case referred to, as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal.

In *London County Council* v. *Schewzik*(1), Ridley J. considered himself bound by *Hull* v. *London County Council*(2), the decision of a court of co-ordinate jurisdiction, although, if applicable, he thought it wrongly decided. Joyce J. took a similar view in *Lyon & Co.* v. *London City and Midland Bank*(3), at p. 138. In *Merry* v. *Nickalls*(4), James L.J. said:

> To say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is that the decision of a superior court is binding on an inferior court and on a court of co-ordinate jurisdiction so far as it is a statement of the law which the court is bound to accept.

In *Pledge* v. *Carr*(5), at page 52, Lord Herschell L.C. said:

> We cannot overrule *Vint* v. *Padget*(6), for that was a decision of a court co-ordinate in jurisdiction with ourselves.

and the appeal was dismissed solely on this ground. In *Lavy* v. *London County Council*(7) Lindley L.J., at page 581, said:

> The case of *London County Council* v. *Cross*(8), is a decision which I not only think is correct, but it is a decision of the Court of Appeal which we should be bound to follow whether we think it right or not.

In *Dibden* v. *Skirrow*(9), at page 45, Cozens-Hardy M.R. said:

> I consider that the later decision (*Hopkins* v. *Great Northern* Railway Co.(10)) binds us.

(1) [1905] 2 K.B. 695.
(2) [1901] 1 K.B. 580.
(3) [1903] 2 K.B. 135.
(4) 7 Ch. App. 733, at p. 751.
(5) [1895] 1 Ch. 51.
(6) 2 DeG. & J. 611.
(7) [1895] 2 Q.B. 577.
(8) 61 L.J.M.C. 160.
(9) [1908] 1 Ch. 41.
(10) 2 Q.B.D. 224.

Fletcher-Moulton L.J. said:

I base my decision on the ground that we are bound by that decision.

Farwell L.J. said:

In my view, the case is governed by the decision of the Court of Appeal in *Hopkins* v. *Great Northern Railway Co.* (1), which, of course, binds us.

In *Re North-Western Rubber Co. and Hüttenbach & Co.* (2) Vaughan-Williams L.J., referring to *Hutcheson & Co.* v. *Eaton & Son* (3), said:

We are bound to follow that decision.

Buckley L.J., although he would have come to a contrary conclusion if at liberty to apply his own judgment to the facts, felt constrained to agree with the other members of the court on the authority of *Hutcheson & Co.* v. *Eaton & Son* (3), a decision of Brett M.R., and Bowen L.J., from which Fry L.J. dissented. While preferring the view of Fry L.J., he thought he ought loyally to apply the opinion of the majority of the court. Other recent instances may be found in the following cases: *In re Coles and Ravenshear* (4); *In re Russian Petroleum and Liquid Fuel Co.* (5); *Fear* v. *Morgan* (6); *In re Stucley* (7); *Fitzroy* v. *Cave* (8); *Williams* v. *Hunt* (9), and *In re Ambler; Woodhead* v. *Ambler* (10).

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* (11), it

(1) 2 Q.B.D. 224.
(2) [1908] 2 K.B. 907.
(3) 13 Q.B.D. 861.
(4) [1907] 1 K.B. 1.
(5) [1907] 2 Ch. 540.
(6) [1906] 2 Ch. 406.
(7) [1906] 1 Ch. 67.
(8) [1905] 2 K.B. 364.
(9) [1905] 1 K.B. 512.
(10) [1905] 1 Ch. 697.
(11) [1895] 1 Ch. 51.

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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. "Judicia posteriora sunt in lege fortiora," 8 Co. 97—"Judiciis posterioribus fides est abhibenda," 13 Co. 14.

A later and more deliberate decision should be followed in preference to one which is earlier,

Caledonia Railway Co. v. *Walker's Trustees*(1), at page 302, *per* Lord Blackburn.

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

(1) 7 App. Cas. 259.

English Court of Appeal—should such a case arise—in view of what was said by the Privy Council in *Trimble* v. *Hill*(1), the duty of this court would require most careful consideration. (See *Jacobs* v. *Beaver*(2).) 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: *Bozson* v. *Altrincham Urban District Council*(3). The decision of this court in the *Stanstead Election Case*(4), which is in accord with the views expressed in such cases as *Smith* v. *Lambeth Assessment Committee*(5), at page 328, and *The "Vera Cruz" No.* 2(6), at page 98, may be deemed conclusive authority that judgments of dismissal which have proceeded upon an equal division of opinion are not to be regarded as decisions of this court, but merely as decisions of the court whose judgment has been thus affirmed. See, however, *Lumsden* v. *Temiskaming and Northern Railway Commission*(7), at pages 473, 474.

Though, as stated by Brett M.R. in *The "Vera Cruz" No.* 2(6), 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

(1) 5 App. Cas. 342.
(2) 17 Ont. L.R. 496.
(3) [1903] 1 K.B. 547.
(4) 20 Can. S.C.R. 12.
(5) 10 Q.B.D. 327.
(6) 9 P.D. 96.
(7) 15 Ont. L.R. 469.

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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):

> Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before.

The case at bar is, no doubt, an important case. It may be in one sense "not an ordinary case." It may be that the application to it of the principle of the decision in *Cox* v. *Adams*(2) will do some injustice to the present respondents. But, to quote the Earl of Halsbury, in *London Street Tramways Co.* v. *London County Council*(3), at page 380,

> what is an occasional interference with what is, perhaps, abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions.

I have discussed the authorities at length because, in Ontario, this case is regarded as very important and it has been a subject of much speculation how far this court would deem itself bound to follow *Cox* v. *Adams* (2).

Solely because I am convinced that the present case falls within the principle of the decision in *Cox* v. *Adams*(2), and because I consider that that decision binds this court, I would allow the appeal of the plaintiff with costs here and below and would direct that judgment be entered as indicated by the learned Chief Justice of Ontario.

(1) 1 Str. 83.

(2) 35 Can. S.C.R. 393.

(3) [1898] A.C. 375.

Appeal allowed with costs.

Solicitors for the appellant: *Elliott & Hume.*

Solicitor for the respondent Bank of Montreal: *Alexander Bruce.*

Solicitors for the respondent Stuart: *C. & H. D. Gamble & Brown.*