CASE AND COMMENT

MARRIAGE—NULLITY—WILFUL REFUSAL TO CONSUMMATE—USE OF CONTRACEPTIVES.—Prior to the Matrimonial Causes Act, 1937, the English Supreme Court had jurisdiction, by virtue of the Matrimonial Causes Act, 1857, and amending statutes, to declare a marriage void ab initio upon such grounds as bigamy,[1] or to dissolve a marriage for adultery. But between those two jurisdictional limits there lay a middle ground, inherited from the Ecclesiastical Courts, to declare a marriage void upon certain grounds, upon which it was voidable at the option of either party to it. This middle ground was always considered in the Ecclesiastical Courts to be a ground of nullity or annulment, because those courts had no power to dissolve a marriage, the Matrimonial Causes Act, 1857, creating the earliest jurisdiction of any English court to dissolve a valid marriage. Where, however, there was ground upon which a marriage could be declared voidable the Ecclesiastical Courts had always assumed jurisdiction to annul that marriage if either party to it elected to raise the grounds of avoidance and petition for annulment.

Prior to the Matrimonial Causes Act, 1937, and indeed since that time, much controversy has raged in the courts and among writers on Conflict of Laws as to whether causes falling within this middle ground could be entertained only by the court of the matrimonial domicile of the parties, or whether as in cases of true nullity — where the marriage was void ab initio — residence within the jurisdiction was alone sufficient to found jurisdiction. It would serve no useful purpose here to explore the various phases of this controversy. Suffice it to say that in 1931 Bateson J. suggested that this middle ground was really a ground of dissolution of marriage rather than a true ground of nullity and that the sole jurisdiction in such cases was vested in the court of the matrimonial domicile, *i.e.*, the domicile of the husband, at the time of the commencement of the suit.[2] The controversy has continued since that time, and may continue until the House of Lords has finally decided it. But as recently as this year the Court of Appeal has upheld the judgment of Bateson J. in this

[1] There are in fact six grounds: (1) Bigamy, (2) Duress or mistake, (3) Insanity at the time of marriage, (4) Consanguinity, (5) Want of due form, and (6) Non-age (10 Hals., 2nd ed., pp. 639-40, para. 934).

[2] *Inverclyde* v. *Inverclyde*, [1931] P. 29, where Bateson J. felt that *Salvesen* (or *Von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641, required a reconsideration of the earlier authorities and a revision of the opinions expressed in many of them.

respect[3] and until the House of Lords decides otherwise the point may well be settled.

In causes in this middle ground, which it now appears, from the point of view of Conflict of Laws, must be regarded rather as actions for dissolution than actions of nullity, there were various grounds upon which the Ecclesiastical Courts would act and upon which the Supreme Court, as heir of the jurisdiction of the Ecclesiastical Courts, also exercised jurisdiction to declare a marriage void or more strictly speaking, in the light of the point touched upon above, would dissolve a marriage upon the election of either party to raise by suit the grounds of avoidance and claim the appropriate relief. In view of what will be said later this distinction appears important. One of these grounds of avoidance was impotence, and for the purpose of this note other grounds may be disregarded. Impotence may be shortly defined as the incapacity of either party to the marriage to have or permit complete intercourse with the other. The cases both in the Ecclesiastical Courts and, since 1857, in the Supreme Court show many refinements of what the courts considered to be complete intercourse, as well as when a presumption of impotence would arise, but in all the authorities on the point it is perfectly clear that it must be shown that the spouse alleged to be impotent was *incapax copulandi*, incapable of intercourse, and it was not sufficient to prove the spouse in question merely to be *incapax procreandi*, incapable of begetting or bearing children, in other words sterile, so long as complete intercourse was possible.[4]

Prior to 1937 non-consummation of a marriage was only a ground for avoidance if it could be shown to be due to an invincible repugnance to intercourse and not a mere wilful or capricious obstinacy. Naturally many fine distinctions between invincible repugnance and wilful or capricious obstinacy were drawn. But the cases show clearly that if invincible repugnance was proven, it was quite sufficient if that repugnance existed only as between the particular spouses, or as the cases put it *quoad hunc* or *hanc*.

It seems then safe to say that the Matrimonial Causes Act, 1937, was intended to solve many of the intricate difficulties of the law and the jurisprudence in this particular branch of dissolution of marriage when in section 7(1)(a) it enacted that wilful refusal to consummate a marriage should be a ground upon

[3] *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56, where a number of cases decided since *Inverclyde* v. *Inverclyde*, *supra*, are considered and some overruled.

[4] *D——e* v. *A——g* (1845), 1 Rob. Eccl. 279, at p. 296, seems to be the leading case on this point, as it also seems to be on the necessity for capacity for complete intercourse (at p. 298).

which a marriage should be voidable. It would appear that it was intended, by making wilful refusal to consummate a ground upon which a marriage was voidable, to eliminate the hair-splitting over the question of where wilful or capricious obstinacy ends and where invincible repugnance begins.

But apparently the section, while ending that controversy, engendered another. The question thus raised was the meaning of consummation. Looking at the matter in the light of the pre-1937 law, and the carefully drawn distinction between incapacity for intercourse and incapacity for procreation (or sterility), it would appear that, if the legislative intention in enacting section 7(1)(a) of the Matrimonial Causes Act, 1937, has been correctly deduced, consummation could only mean the physical completion of the marriage by complete intercourse. But perhaps that begs the question because the question still remains what is complete intercourse. But whether that is so or not, it must remain clear that the question of complete intercourse can only have relation to copulation and is not affected one way or the other by any question of sterility, whether natural, resulting from a surgical operation,[5] or arising from the use of contraceptive measures by either spouse.

This last point, the use of contraceptives, was first raised in 1945, in a case[6] where the wife petitioned on the ground that the husband refused to have intercourse without the use of contraceptives or of contraceptive measures. The decree was granted on the ground that intercourse with the use of contraceptives is not complete intercourse, or *vera copula.*

In order to have a complete understanding of the point involved an outline of the various methods of contraception cannot be avoided, because it becomes obvious, when the variety of those methods is enumerated, that if the use of contraceptives were to be a ground for claiming non-consummation, utter absurdity would result, or the question might depend upon the particular method used, and whether the husband or wife was the one responsible. Broadly speaking, contraceptive measures divide themselves into three classes: first, mechanical methods, the sheath used by the husband or the mechanical pessary used by the wife; secondly, chemical methods, the chemical suppository,

[5] *L.* v. *L.* (*otherwise D*) (1922), 38 T.L.R. 697, where a decree claimed on the ground of sterility of the wife by a pre-marital operation was refused; *J.* (*otherwise S*) v. *J.*, [1946] 2 All E.R. 760, where a decree claimed on the ground that the husband had been rendered sterile by a pre-marital operation, though capable of intercourse, was granted. *L.* v. *L.* was not cited in the Court of Appeal in *J.* v. *J.*

[6] *Cowen* v. *Cowen*, [1945] 2 All E.R. 197, [1946] P. 36.

or the douche; thirdly, *coitus interruptus*. It seems quite clear that only the use of the sheath by the husband, of the measures in the first class, and the third class of contraception, could prevent complete intercourse in the sense of *vera copula*, if the question is regarded in the light of the pre-1937 law, under which the only question was capacity to have intercourse without regard to whether procreation was the possible result of that intercourse. It must, therefore, also be obvious that the use of certain contraceptive measures would give a right to relief, whilst other would not, if the use of contraceptive measures were held to have any bearing on the question of what is consummation. Indeed, as will be pointed out, the refinement of this distinction can be carried even further than that.

Since the use of contraceptives is adopted solely for the purpose of preventing the possibility of procreation, it would seem fairly clear that, except perhaps in the case of *coitus interruptus*, such use has no more bearing upon the question of consummation than the sterility of either spouse had, prior to 1937, to the question of impotence. The only effect of contraceptive precautions is to create artificial sterility. Prior to 1937 persistent use of contraceptives by one spouse contrary to the desires of the other could not have been a ground for declaring the marriage void, because it could not by any stretch of the imagination be held to be impotence, the use involving demonstration of complete capacity.

The 1945 case just referred to was a peculiar one. The use of contraceptives was adopted by mutual consent because the place where the parties were living at the outset of their married life was one where child birth for an English woman was attended with great danger. But after the parties had returned to England the husband persisted in the use of contraceptives against the consent of the wife and this disagreement, which by that time had become a question as to whether there should be children of the marriage, wrecked the marriage and the wife petitioned for annulment. The Court of Appeal, while recognizing that the question of sterility thus artificially induced did not affect the matter one way or the other, granted the decree on the ground that, by persisting in the use of contraceptives, the husband had wilfully refused to consummate the marriage, because there had never been *vera copula*, complete intercourse as the Ecclesiastical Courts had understood it. It must be apparent, therefore, that the Court of Appeal practically applied the old ground of annulment for impotence and treated section 7(1)(a) of the 1937 statute

as simply dispensing with the necessity of proof of actual incapacity. It must also be apparent that this reasoning would lead to ultimate absurdity, since it would lead in every case into an inquiry as to the effectiveness of the contraceptive measures adopted.

But in 1947 an analogous case came before the Court of Appeal.[7] The facts were not dissimilar, but the non-consummation alleged arose from the wife's refusal to permit intercourse without the use of contraceptives and there was no initial period during which contraceptives were used by mutual consent. The marriage struggled along in spite of the fundamental divergence of opinion on whether there should be children of the marriage for some ten years before the parties finally separated. In this case the trial judge and the Court of Appeal both held that the husband had disentitled himself to relief on the ground that by continuing intercourse with the use of contraceptives the husband had acquiesced in the wife's refusal to consummate the marriage, as consummation had been defined in the earlier case.

Pausing there for a moment, it would seem difficult to hold that a spouse who had consented for a time to the use of contraceptives was in any better position than one who had never consented, and any possible distinction between the 1945 and 1947 cases seems quite impossible; in both, intercourse with the use of contraceptives had continued for a long period after refusal of intercourse without contraceptives against the consent of one spouse.

But in the later case the husband appealed to the House of Lords and the opportunity was thus given to settle the law. The House affirmed the refusal of the decree, but on the ground that intercourse with the use of contraceptives could be consummation.[8] Lord Jowitt, delivering the judgment in which the whole court concurred, held that there was no distinction between sterility created by premarital surgery and postnuptial artificially produced sterility. If the former did not prevent *vera copula*, complete intercourse, the latter could not prevent consummation. Prior to 1937 the inquiry had always been as to the ability to consummate at the time of marriage and whether, if there was a lack of ability, it was due to a cause that was reasonably capable of being cured. Under section 7(1)(a) of the 1937 statute the inquiry was as to a postnuptial condition. But the question of consummation was the same in both cases, and sterility had no bearing on it.

[7] *Baxter* v. *Baxter*, [1947] 1 All E.R. 387.
[8] *Baxter* v. *Baxter*, [1947] 2 All E.R. 886.

This it seems must be apparent, since the invincible repugnance upon which annulment was granted prior to 1937, especially where that invincible repugnance was *quoad hunc* or *quoad hanc*, is really no more a premarital condition than the wilful refusal of the 1937 statute. Both are induced by a state of mind that existed at the time of marriage. As has been pointed out, the sensible deduction of legislative intention in section 7(1)(a) of the 1937 statute is that the legislature intended to do away with the hair-splitting distinction between invincible repugnance and wilful and capricious obstinacy.

A discussion of this point would not be complete without pointing out that the House of Lords expressly left open the question of whether the use of the contraceptive measure known as *coitus interruptus* would constitute non-consummation. It may well be that in such a case there is that absence of *vera copula* which would entitle a wife to claim non-consummation.[9]

But with this exception it is now settled law that the use of contraceptive measures by either spouse against the consent of the other is not a refusal of consummation of the marriage and that sterility artificially induced by such methods after marriage is no more a ground of dissolution of the marriage than premarital sterility was a ground for declaring a marriage void prior to 1937.

R. M. Willes Chitty

Toronto

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Stare Decisis — Are Decisions of English Court of Appeal Binding on Canadian Trial Judges?— On the surface the case of *Canada Safeway Limited* v. *Harris*[1] appears to be a simple case of defamation of a particularly vicious type, for which the court, consisting of the Chief Justice sitting without a jury, awarded damages of $3000 together with an injunction "restraining the defendant from any further or future publication of the words complained of or any similar defamatory matter".[2] And the case contains a good discussion of the amount of those damages and the basis of assessment. But buried in one sentence[3] is the unqualified statement that the decision of the English Court of Appeal in *Rook* v. *Fairrie*[4] is binding upon the Canadian trial judge.

[9] But see *Rice* v. *Rice*, [1948] 1 All E.R. 188.
[1] [1948] 1 W.W.R. 337 (Man., Williams C.J. K.B.)
[2] *Ibid.*, at p. 354.
[3] *Ibid.*, at p. 353.
[4] [1941] 1 K.B. 507; 1 A.E.R. 297.

The problem arose out of the decision in *Rook* v. *Fairrie* that damages in a libel action where the assessment is made by a judge sitting alone may be less than those that would probably be awarded by a jury, in that the jury cannot express its feelings as to the viciousness or otherwise of the libel except by awarding heavy damages (*i.e.*, damages in excess of the actual pecuniary loss to the plaintiff), whereas a judge sitting alone is at liberty to express his feelings in words. In *Rook* v. *Fairrie* the trial judge, Atkinson J., did so express his feelings, and then awarded a sum which he said was less than what a jury might award because of his lordship's opportunity to express his views. An appeal by the plaintiff against the inadequacy of the damages was based partly on the argument that the trial judge had misdirected himself on this very point. Sir Wilfrid Greene M.R. rejected this argument very shortly by saying that he agreed that the situation, where a judge sits alone, is in important respects different from where he is sitting with a jury "because, although the same elements are always present, the method in which they ought in any individual case to be treated may well be different. Accordingly, I can find no misdirection there."[5] This does not say expressly that the trial judge's different "method" of treatment in the instant case was proper, but it perhaps has to be conceded that it implicitly does so. MacKinnon L. J. expressly approved of the idea. Du Parcq L. J. agreed with the Master of the Rolls.

In the Manitoba case, Williams C.J. K.B. was sitting without a jury. He notes the decision in *Rook* v. *Fairrie*, and the criticism of it in Mayne on Damages[6] and of its principle by Goddard L.J. in *obiter* in *Knupffer* v. *London Express*.[7] It would also appear from two comments on the *Rook* case at the time of its appearance that the writers agreed there should be no difference, although they put it differently — that the damages awarded by a jury should be reduced to those awarded by a judge.[8] We believe it is fair to say that Williams C.J. K.B. saw merit in the criticism. Yet he winds up the discussion without more than this sentence:

> While I think there is considerable substance in the views put forward in the note in *Mayne*, and I might, like Lord Goddard, have found it difficult to subscribe to the principle enunciated in *Rook* v. *Fairrie*, that decision is binding upon me.[9]

[5] [1941] 1 A.E.R. 297, at p. 299.
[6] 11th ed., 1946, at p. 500.
[7] [1943] K.B. 80, at p. 91 (C.A.); aff'd, [1944] A.C. 116.
[8] *Cf.* (1941), 57 L.Q.R. 159-60; (1941), 5 Mod. L.R. 144-5.
[9] [1948] 1 W.W.R. 337, at p. 353.

"That decision is binding upon me". Since when did a decision of the Court of Appeal in England become binding upon a Canadian judge?[10] It may be largely true that we have no jurisprudence of our own, that we follow whatever England does, but we can surely follow of our own volition, if we do it at all, and not because England's acts are binding upon us. It may be true that the High Court of Australia has reversed itself to bring its law into uniformity with that of the House of Lords on a particular point,[11] but this was done of its own volition and not because the decisions of even that "august" body were thought to be binding upon the Australian court.

GILBERT D. KENNEDY

Faculty of Law,
University of British Columbia

[10] In speaking as we do, we are merely deprecating the slavish adherence to a foreign court's decisions, and suggest that this deprecation is not solely based upon wishful thinking. We admit that Sir Montague E. Smith said in *Trimble* v. *Hill* (1879), 5 App. Cas. 342, at p. 344, speaking for the Judicial Committee:

> "Their Lordships think the Court in the colony [New Zealand] 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."

We admit also that Adamson J. in *Lowery* v. *Lamont*, [1927] 1 D.L.R. 669, at p. 674, has said: "In my opinion the English Court of Appeal is binding on this Court in the circumstances which exist here [interpretation of a Manitoba Statute in the same terms as the English Statute] and must be followed". We admit, too, that *Trimble* v. *Hill* has been used in Ontario in earlier days to justify certain decisions. But it is to be noted that (a) *Trimble* v. *Hill* applies, not merely on its facts, but also on its express wording (i) to interpretation of a "like enactment", and not generally to all decisions, and (ii) to "Colonial Courts", and (b) courts in British Columbia (*Pacific Lumber* v. *Imperial Timber* (1917), 31 D.L.R. 748, at p. 749 (C.A.)), Alberta (*Rodowith* v. *Parsons* (1914), 19 D.L.R. 8) and Manitoba (*Manitoba Bridge* v. *Minnedosa Power*, [1917] 1 W.W.R. 731, at p. 738), not to mention the Supreme Court of Canada (*London* v. *Holeproof Hosiery*, [1933] 3 D.L.R. 657), have held that *Trimble* v. *Hill* is a little too absolute for Canada. In fact, we prefer the British Columbia view (*supra*) that the case does not apply to the three great Dominions — Canada, Australia and South Africa — to the view put forward by Riddell J.A. in Ontario (*e.g.*, in *McMillan* v. *Wallace*, [1929] 3 D.L.R. 367, at p. 369) that provincial courts are "Colonial Courts" within the meaning of *Trimble* v. *Hill*! Must we submit without question to being "bound by" English Court of Appeal decisions as made from time to time unless and until our legislatures act? Surely the spirit of the executive and legislative victory of the Baldwin-Lafontaine ministry one hundred years ago can be applied to our judicial system? (We are not quibbling over any technical difference between "bound by" and "ought to follow": they reach the same slavish result. Nor are we overlooking the helpful remarks of Lord Dunedin in *Robbins* v. *National Trust*, [1927] A.C. 515, at p. 519, that where appellate courts in England and in the Empire differ, the latter are not necessarily wrong.)

[11] *Piro* v. *Foster* (1943), 68 C.L.R. 313.

TRADE UNIONS — ACTION IN DAMAGES AGAINST UNINCORPORATED AND UNREGISTERED UNION—INJUNCTION—MANDAMUS — ARTICLES 50 AND 992 OF THE QUEBEC CODE OF CIVIL PROCEDURE —It seems now to be definitely established in the Province of Quebec that workers who are expelled illegally from a union of which they are members may claim from the union at fault the amount of the resulting damages.

On February 25th, 1947, Mr. Justice Fortier of the Superior Court, sitting for the District of Montreal, awarded each of two Montreal longshoremen the sum of $272 in an action against the International Longshoremen's Association for damages arising out of their illegal expulsion from their local.[1] In the opinion of the court the illegality consisted in the fact that the Association rendered a decision on a complaint for conduct prejudicial to the union without hearing any evidence with respect to the charges made. In any event, the learned judge added, it had been established clearly before him that the plaintiffs had not committed the infringements of the regulations of the local with which they had been charged.

This decision followed closely both in time and spirit, though without specific reference to it, the judgment of the Supreme Court of Canada in *International Association of Longshoremen, Local 375* v. *Dussault et al.*, rendered on October 22nd, 1946.[2] In this latter case three members of the defendant union brought a joint action alleging that they had been illegally expelled from the Association of which they were members and that, as a result, it had been impossible for them to obtain work during the navigation season of 1939. The Superior Court dismissed their action, but the Court of King's Bench, Letourneau C. J. dissenting, allowed the appeal with costs. The appeal from this judgment was dismissed by the Supreme Court.

In both these cases an action in damages was maintained against a union which is neither incorporated as a body politic and corporate nor, apparently, registered under any special law. The union had been sued under its collective name.

Prior to 1938 it was settled law in Quebec that an unincorporated labour union could not be sued as such, since it did not constitute a legal entity. True, there was already in existence a federal statute, the Trade Unions Act, permitting the registration of trade unions with the Registrar General of Canada.[3] Under

[1] *Beland et al.* v. *Association Internationale des Debardeurs, Local 375*, [1947] C. S. 452.
[2] [1947] 1 D.L.R. 5.
[3] R.S.C., 1927, c. 202.

section 18 of this statute, trade unions which have been so registered may not sue or be sued as such, plead or be impleaded. However, their assets and property being entrusted to a board of trustees, the board

> . . . may bring or defend, or cause to be brought or defended, any action, suit, prosecution or complaint, in any court of competent jurisdiction, touching or concerning the property, right or claim to property of the trade union, and may, in all cases concerning the property, real or personal, of such trade union, sue and be sued, plead and be impleaded, in any such court, in their proper names, without other description than the title of their office.

it will be noted that, under the Trade Unions Act, the union is not itself a party to the proceedings, but only the trustees in their capacity as administrators of the union's property, and even then only in so far as the proceedings pertain to the "property, real or personal, of such trade union".

The decisive case on the subject prior to 1938 was *Society Brand Clothes Limited* v. *Amalgamated Clothing Workers of America et al.* Plaintiff appellant had taken proceedings against the defendant respondent, an "unincorporated association", and some of its members and officers, by way of injunction accompanying an action in damages. By the final judgment in the Superior Court the interlocutory injunction already granted was quashed and the action was dismissed as to all defendants. On appeal the Court of King's Bench reversed this decision in a majority judgment, in so far as it affected the individual defendants, but dismissed the appeal, in so far as the unincorporated union was concerned, this latter on the ground that the union could not validly be impleaded, not being a juridical body distinct from its members.[4] The majority of the court held that, even though the matter had not been raised in the pleadings nor by preliminary exception, but only at argument before the trial judge, there was an absolute nullity which could not be corrected by tacit consent, inasmuch as the defendant union was not a legal entity before the court: the objection could be raised at any time. The plaintiff appealed to the Supreme Court of Canada,[5] where Cannon J. said at page 323 (the italics in this and subsequent quotations are mine):

> . . . the only question before us is whether or not an unincorporated labour union may be considered in law *an entity distinct from its individual members, suable in the common name* and liable to damages recoverable out of the common fund; or, in other words, does legal theory conform

[4] (1930), 48 K.B. 14.
[5] [1931] S.C.R. 321.

to industrial reality and subject an unincorporated collectivity to responsibility for its tortious acts?

The defendant union had its head office or principal establishment in the State of New York, where, as was established by a New York lawyer testifying as an expert, the following statutory provision (which appears to be analogous to our Trade Unions Act) was in force:

> ACTION OR PROCEEDING AGAINST UNINCORPORATED ASSOCIATIONS
> An action or special proceeding may be maintained, *against the president or treasurer* of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership therein, either jointly or in common of their liability therefor, either jointly or severally. Any partnership, or other company persons, which has a president or treasurer, is deemed an association within the meaning of this section.

Notwithstanding this legislation, the five judges of the Supreme Court of Canada held that the union could not be validly impleaded under the then existing state of Quebec law. The statement of Cannon J. in this connection, at pages 327-328, is of high importance for an understanding of the subsequent provincial legislation to which reference will be made in a moment:

> We must accordingly reach the conclusion that, while, under the prevailing policy, our legislation gives to unincorporated labour organizations a large measure of protection, they have no legal existence; they are not endowed with any distinct personality; they have no corporate entity; they constitute merely collectivities of persons. The acts of such an association are only the acts of its members. Therefore, it cannot appear before the courts and its officers have no capacity to represent it before the tribunals of the Province of Quebec, where 'nul ne plaide au nom d'autrui' (Art. 81 C.C.P.). However cogent the reasons that may be urged in favour of authorizing and legalizing proceedings against unincorporated bodies, the Superior Court, and this Court, cannot, under article 50 C.C.P., do more than *order and control these bodies* 'in such manner and form as by law provided'. The province of Quebec has not yet legislated to give legal existence to or recourse against unincorporated bodies. . . . We must, accordingly, ignore the industrial reality and must refuse to regard an unincorporated labour union as, in law, *an entity distinct from its individual members.*

This gap in our legislation, to which Cannon J. thus drew attention, was filled in 1938 by the enactment of An Act to facilitate the exercise of certain rights,[6] the provisions of which subsequently became sections 28 and 29 of the present Special Procedure Act:[7]

[6] 2 Geo. VI, c. 96.
[7] R.S.Q., 1941, c. 242.

> 28. Every group of persons associated for the carrying out in common of any purpose or advantage of an industrial, commercial or professional nature in this Province, which does not possess therein a collective civil personality recognized by law and is not a partnership within the meaning of the Civil Code, is subjected to the provisions of section 29 of this Act.
>
> 29. The summoning of such group before the Courts of this Province, in any recourse provided by the laws of the Province, may be effected by summoning one of the officers thereof at the ordinary or recognized office of such group, or *by summoning such group collectively under the name* by which it designates itself or is commonly designated or known.
>
> The summoning by either method contemplated in the proceeding paragraph shall avail against all the members of such group and the judgments rendered in the cause may be executed against all the moveable or immoveable property of such group.

It was in virtue of this legislation that an unincorporated union was sued successfully in damages in the cases of *Dussault* and *Beland* to which reference has been made, decided respectively by the Supreme Court of Canada and the Superior Court of the Province of Quebec.

Both these cases were concerned only with an action in damages, but it now seems clear also that, in the Province of Quebec, so long as the association involved is found to possess a juridical personality, an injunction may be prayed for requiring it to cease any tortious act of a continuing nature, for example, an illegal strike. In this connection reference is made to the decision of the Court of King's Bench in *International Ladies Garment Workers Union* v. *Rother*, where the court affirmed a judgment of the Superior Court granting a permanent injunction against an unincorporated trade union.[8] Here the court took it for granted that the defendant union had waived its right to argue that it was not a juridical person by failing to raise the question either by preliminary exception or in its plea and by joining issue with the plaintiff, a point of view that coincides with that of the two dissenting judges of the Court of King's Bench in *Society Brand Clothes Limited* v. *Amalgamated Clothing Workers of America*.[9]

Notwithstanding this jurisprudence on the question of injunctions, the Superior Court in at least one unreported case has denied recourse by way of mandamus to a plaintiff who claimed that he had been illegally expelled from a union, which refused to reinstate him, and who sought an order from the court

[8] (1923), 34 K.B. 69. See also the cases referred to in Spector, Labour Injunction in Quebec (1942), 2 R. du B. 312.

[9] *Supra*, footnote 4.

directing that he be reinstated in all his rights and privileges as a member.[10] Mr. Justice Duranleau's two principal reasons for judgment were (translation):

> Considering that, in accordance with article 992 C.C.P., the special recourse by way of a writ of mandamus to order the fulfilment of a duty or of an act can be exercised only against corporations or public bodies, or their officers, or a public officer, or only in cases where the plaintiff is interested in requiring the performance of any act or duty of a public nature;
>
> Considering that the legislator, by enacting 2 Geo. VI, c. 96, An Act to facilitate the exercise of certain rights, whereby a means was provided for summoning before the courts certain groups of persons having no civil existence, never intended to allow a member of any such group to seek by way of mandamus to obtain the intervention of this court in the internal government of such group.

While it is not the primary purpose of this note to discuss in detail whether a writ of mandamus lies against an unincorporated trade union, it is submitted, with deference, that these two *considérants* were wrongly applied to the question in issue in the *Lachance* case. It seems a necessary inference from the previously quoted remarks of Cannon J. in the *Society Brand* case that where a legislature provides, as it did in effect in "An Act to facilitate the exercise of certain rights", that a group would become "suable in the common name" (to adopt the phraseology of Cannon J.), the following results necessarily follow for the purposes of *any* legal proceedings:

(a) the group is to be considered as having a "legal existence" and "corporate entity" and its acts are not "only the acts of its members";

(b) the group should be considered as "an entity distinct from its individual members";

(c) in examining its obligations, the courts should not "ignore the industrial reality";

(d) the Superior Court has jurisdiction to "order and control these bodies" under article 50 C.C.P.

It is true that, under the rules established by a constant jurisprudence, mandamus is deemed to be an extraordinary remedy and the rules relating to it are to be interpreted restrictively. But this merely means that mandamus lies only in the circumstances described in article 992 of the Quebec Code of Civil Procedure. There does not appear to be any judgment of a court of appellate jurisdiction holding that the word "cor-

[10] *Lachance* v. *La Fraternité des Wagonniers de Chemins de Fer d'Amérique*, S.C.M. 232096, February 26th, 1945.

poration" in article 992 *necessarily* means an artificial person created as such by statute or charter and excludes "corporations" in their etymological sense. Etymologically, the word "corporation" applies to any group formed in the interest and for the advancement of its members, as well as to incorporated companies and bodies politic.

Without labouring the point unduly, my contention is that in its natural meaning the term "corporation" in article 992 C.C.P. includes an unincorporated group or union, which the legislator has provided may be sued in a mode similar to that provided for suing the traditional legal entities. The change in the law brought about by "An Act to facilitate the exercise of certain rights" was intended mainly, in my opinion, to remove any possibility that in future an unincorporated union, notwithstanding all the privileges and rights it now possesses, could not be sued either in damages or to compel the execution of duties which it refused to carry out. It is only logical then that the word "corporation" in article 992 should be adapted to give effect to this intention of the legislature, so as to include (as a juridical person) any group now suable under the Special Procedure Act.

It is settled law that a particular word used by the legislature, even in a restrictive statute, should be interpreted progressively to take into account circumstances that have developed since the enactment of the statute in which it appears. A good example of the application of this principle was the case of *Deneault* v. *Monette*,[11] where the Court of King's Bench was concerned with the meaning of the word "vehicle" in paragraph 10a of article 598 C.C.P., concerning judicial execution, which reads:

> The debtor may select and withdraw from seizure . . . one horse, one summer vehicle, one winter vehicle and the harness, used by a carter or driver for earning his livelihood.

In this case Chief Justice Tellier said at page 112 (translation):

> It is most probable that the legislator, in enacting his law, only had in mind the kinds of vehicles then in use by carters and drivers. This, however, is of no importance. The terms of the act must be given their natural meaning. One cannot contend that the law must be amended each time a new type comes into use.

At page 113 Mr. Justice Bond said:

> Bonis judiciis est ampliare justitiam. The true maxim of our law is '. . . to *amplify its remedies*, and, without usurping jurisdiction, to apply its rules to the advancement of *substantial justice*'.

[11] (1933), 55 K.B. 111.

The modern trade union, so far as public order is concerned, has acquired a status as important as, or even more important than the ordinary company. In some cases it is recognized as the official representative even of employees who have not chosen to become members of it; under the Quebec Labour Relations Act[12] an association having as members 51% of a category of employees may be certified by the Labour Relations Board as the representative of all the employees included in the category for the purpose of negotiating and bargaining collectively with the employer. Many unions have signed collective agreements providing for the "closed shop" or, at least, for "union recognition and preference". In ways such as these unions have acquired the character of public bodies, entrusted with the welfare of great numbers of individuals. As such, any illegal and damaging act on their part becomes of interest to the community as a whole.

GUY FAVREAU

Montreal

* * *

WILLS MADE IN THE FORM DERIVED FROM THE LAWS OF ENGLAND — ESSENTIAL FORMALITIES — ARTICLES 851 AND 855 OF THE QUEBEC CIVIL CODE. — The recent judgment of the Court of King's Bench (Appeal Side) in *Dame Gingras* v. *Gingras*[1] raises the important question of when a court may properly depart from a clear and specific provision of the Quebec Civil Code. Article 851 C.C. prescribes the formalities necessary to the making of a valid will in the so-called form derived from the laws of England. Is a court ever justified in holding valid a will not made in strict accordance with those formalities?

The provisions of the Civil Code in issue in the *Gingras* case were article 851, in part, and article 855, in part. The first paragraph of article 851 provides:

> Wills made in the form derived from the laws of England, whether they affect moveable or immoveable property, must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.

[12] R.S.Q., 1941, c. 162A.
[1] [1947] K.B. 612, Marchand J. dissenting.

The first paragraph of article 855 reads as follows:

> The formalities to which wills are subjected by the provisions of the present section [which includes article 851] must be observed on pain of nullity, unless there is some particular exception on the subject.

The plaintiff alleged *inter alia*[2] that the formalities prescribed by article 851 had not been complied with, in that the two witnesses had not signed as such in the presence of each other, and asked that the will be declared null and void. This contention the Superior Court refused to accept and four of the five appeal judges agreed.

While there does not appear to have been any serious dispute over the facts, I adopt for present purposes the statement of them by the majority of the court of appeal. The testator, Jean-Xavier Gingras, kept a store in the City of Lachine near Montreal. For several days he had been drinking heavily, but on the day when the disputed will was made he was capable of executing a valid will. On that day he called to his room over the store a confidential clerk named Desjardins and dictated to him the terms of his will. But his hand was so shaky that he was unable to write his name legibly and instead he made his mark at the bottom, opposite the words written by Desjardins: "Moi Marcel Desjardins j'ai signé pour M. Jean-X. Gingras". Under this Desjardins signed as witness. Desjardins then told the testator that another witness was required and suggested a man called Quenneville who was in the store below. Desjardins left the room and brought Quenneville upstairs, the will was read in the presence of the testator, Desjardins and Quenneville, acknowledged by the testator, and Quenneville witnessed it immediately beneath Desjardins' signature. Desjardins did not sign again.

It was not suggested seriously by any of the judges who heard the appeal that this procedure complied technically with all the requirements of article 851, though it met most of them. The will was in writing and it was signed at the end with the mark of the testator. The fact that Quenneville was not present when the testator made his mark did not invalidate the will, since it is not necessary under the article that the testator should sign or make his mark in the presence of the witnesses. It appears that the majority of the court felt that the testator had sufficiently acknowledged his mark to the will in the presence of the

[2] The plaintiff alleged also that at the time the testator executed his will he was in a state of insanity which rendered him incapable of making a valid will. The action was dismissed on both grounds.

two witnesses together, though Marchand J. had some doubts as to this. There was no question as to the competency of the witnesses. Finally, they attested and signed in the presence of the testator and at his at least tacit request. Where admittedly the formalities were not fulfilled was that the two witnesses did not attest and sign in each other's presence, Desjardins having signed before Quenneville arrived on the scene. That this was, at least technically, a violation of the requirements seems obvious from the concluding words of article 851, "in presence of at least two competent witnesses together who attest and sign the will immediately, in presence of the testator and at his request".

In their formal judgment the Court of King's Bench gave as reasons for their dismissal of the plaintiff's appeal that, although the will was not perfect in its form, "the spirit of art. 851 C.C. was followed so closely that there can be no possibility of fraud". It is necessary, the judgment continued, to avoid a too technical interpretation of article 851 and it is not necessary that a non-authentic will should be absolutely perfect in its form. Again, while all possible safeguards should surround the execution of a will in the English form, so that the possibility of fraud cannot exist, when the possibility of fraud has disappeared the fact that one of the witnesses did not sign again when the second one signed in his presence should not cause a will to be set aside.

In the circumstances of this case it does certainly strain one's sense of fairness to argue that the will should have been set aside. As Mackinnon J. wrote in the course of his judgment, "it is a very technical interpretation to say that both witnesses must sign together", and it may well be, as he also wrote, that it is an interpretation that "a person in an ordinary walk of life should not be called on to have to make". I concede at once that it is difficult to see how in the circumstances there was the remotest possibility of fraud and that to have declared the will invalid would presumably have frustrated the testator's intentions. And yet the doubt recurs whether Marchand J. was not right when he said in his dissenting judgment that the only possible conclusion was to hold the will invalid. *Fiat justitia ruat coelum.*

In one respect the formal reasons for judgment in the *Gingras* case are difficult to follow. Article 851 was introduced in the Civil Code, said the court, after the following comments by the Codifiers:[3]

[3] Fifth Report of the Commissioners appointed to codify the laws of Lower Canada in civil matters (1865). The paragraphs that follow appear at pp. 171 and 177, respectively, of the Fifth Report.

> The form of wills, treated of in the second section, presents considerable complexity in consequence of the coexistence of the forms recognized and admitted by both laws, those namely of France and England. The Commissioners are fain to believe that by means of amendments which are few in number they have approximated the main features of these forms in such a manner as to offer upon the subject a distinctively Canadian law which does not essentially depart from either one or other of its sources.
>
> . . . . . .
>
> But the amendment 105*a* [paragraph 1 of which is identical with paragraph 1 of article 851] proposes to adapt those rules to the changes which recent legislation has introduced in England. This modification will be found to be more in harmony with the notions which have been acquired from habit and reading by persons of English extraction; it is moreover an approximation to our own law. Under the proposed change, two witnesses will suffice instead of three but they will require to be present and to sign at the same time, without however, its being necessary any more than formerly that the will should be signed in their presence by the testator or by another on his behalf.

After quoting these two paragraphs the court continues immediately by saying, "Considering that the codifiers apparently had in mind the necessity of avoiding that strict and rigid application by the courts in England of the requirements of 1 Vict. ch. 26, section 9 when they departed from its wording and stated that they were approximating its main features so that it would offer a distinctively Canadian law". This is one of the reasons advanced, in other words, for holding that in Quebec the witnesses to a will in the form derived from the laws of England need not sign in each other's presence.

With respect, I should myself have drawn precisely the opposite conclusion from these and other remarks of the Codifiers. The reasons for arriving at the opposite conclusion can be put quite simply. In their reports the Codifiers incorporated draft articles stating the law as they conceived it to be at the time and, in certain cases, alternative articles setting forth the law as they thought it ought to be. These draft articles are preceded by a running commentary of explanation; it is from this commentary that the two paragraphs just quoted are taken. The second of the two paragraphs quoted (that is, the one commencing "But the amendment 105*a* . . .") follows immediately in the commentary the following paragraph:

> Article 105 declares the rules applicable to wills made in the English form such as they existed in England in 1774, the period at which this form was introduced into Lower Canada. Such is still the actual law.

Article 105 as drafted by the Codifiers and given later in their Fifth Report reads:

> 105. Wills made in the form derived from the laws of England, in so far as they affect immoveables, must be in writing and be signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, and be afterwards attested and signed in his presence and at his request by three credible witnesses, subjects of Her Majesty, and competent to give evidence. Females are not excluded from being witnesses. *The witnesses need not all be present and sign at the same time.*
>
> Moveable property may be disposed of by will in the English form, by means of any writing of a nature to indicate the intentions of the testator.[4]

In other words the law in force in Quebec at the time of the Codifiers' Report did not in their opinion require that the witnesses should be present and sign at the same time. When they went on to say that their suggested amendment 105*a* proposed to adapt the rules contained in their article 105 (the existing law of Quebec) to the changes which recent legislation had introduced in England, they did not have in mind "the necessity of avoiding the strict and rigid application by the courts in England of the requirements of 1 Vict. ch. 26, section 9", as the court in the *Gingras* case suggested. On the contrary, the Codifiers had in mind to change the existing law of Quebec by *adopting* at least in this respect the provisions of 1 Vict. c. 26, s. 9 (An Act for the Amendment of the Laws with respect to Wills). This Imperial statute did not expressly provide that the witnesses should be present and sign at the same time,[5] but it would appear from contemporary English authorities cited by the Codifiers that it was so interpreted by the English courts. That the Codifiers intended in their amendment 105*a* to adopt what they understood to be the English rule that the witnesses should sign in each other's presence they themselves said in effect in the second paragraph quoted from their Report in the *Gingras* case: "Under the proposed change, two witnesses will suffice instead of three but they will require to be present and to sign at the same time . . .".

[4] The italics are mine. When in article 105 the Codifiers stated the existing law as requiring three witnesses, they had not taken into account a statute of the Province of Canada, 27-28 Vict., 1864, c. 42, which reduced the requirement from three to two witnesses. Accordingly, in their Supplementary Report, pp. 365 and 378, they amended article 105 to read "by two credible witnesses". Needless to say, this change in no way affects my argument.

[5] The governing words of 1 Vict., c. 26, s. 9, are " . . . and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the presence of the Testator, but no Form of Attestation shall be necessary".

While I am on the subject of the Codifiers' intention, it is relevant to add that with respect to the section containing amendment 105*a* they said : "It is hoped that none of the rules contained in this section will be deemed to be merely directory".[6]

There is comparatively little jurisprudence on article 851 C.C. and none at all, so far as I can discover, on the question whether the witnesses to a will in the form derived from the law of England must on pain of nullity sign in each other's presence. No judgment of any court prior to *Gingras* v. *Gingras* has held a will valid which admittedly was not executed in accordance with one of the formalities laid down in article 851. What the jurisprudence has been concerned with mainly is the correct *interpretation* of the article. Either the cases have held a will valid because, on a correct interpretation of the article, the formalities were considered to have been complied with, or they have held it invalid because the formalities were not fulfilled. Thus it has been held that the requirement that the will "must be in writing" does not necessarily mean that it must be written by the testatrix herself.[7] There is a sufficient acknowledgment by the testatrix of her signature if the will, to which her signature is appended, is shown her and she says she is satisfied with it, an acknowledgment of the whole document including an acknowledgment of the signature.[8] The witnesses need not sign in the same room as the testator in order to meet the requirement that they should attest and sign "in presence of the testator", provided that the testator could see them while they signed.[9] No particular form of attestation is required.[10] Where the article states that the witnesses sign in the presence of the testator and "at his request", the request may be by the testatrix herself or by someone on her behalf;[11] the request by the testator need not be express.[12] On the other hand, probate has been refused where the witnesses did not sign the will in the presence of the testatrix,[13] and where the mark and signature of the testator were added by his *curé* after his death.[14]

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[6] Fifth Report, p. 179.
[7] *Hannah* v. *Brereton* (1903), 23 C.S. 98.
[8] *Hannah* v. *Brereton, supra.*
[9] *Langlois* v. *Morin* (1918), 24 R.L. n.s. 362 (Court of Revision). See also, *Lefebvre* v. *Lacroix* (1920), 26 R.L. n.s. 93.
[10] *Hannah* v. *Brereton, supra; Wynn* v. *Wynn* (1922), 62 S.C.R. 74, *per* Mignault J; *Young* v. *Sutherland* (1934), 56 K.B. 309.
[11] *Hannah* v. *Brereton, supra.*
[12] *Wynn* v. *Wynn, supra,* particularly the judgment of Mignault J.
[13] *Ex parte Henderson* (1887), 10 L.N. 91; *Ex parte Brulé* (1935), 39 R.P. 183.
[14] *Ex parte Roy* (1937), 40 R.P. 311. See also *Dubé* v. *Dubé* (1935), 73 C.S. 553.

Three previous Quebec judgments were mentioned in the *Gingras* case: *St. George's Society of Montreal* v. *Nichols*, *Lefebvre* v. *Lacroix* and *Wynn* v. *Wynn*. *St. George's Society of Montreal* v. *Nichols* was a judgment of Tait J. in the Superior Court.[15] Here the purported will had been written out by the defendant, who was the testator's spiritual adviser and who would have benefited under its terms. The provisions of the will did not agree with the testator's previously expressed intentions and there was no evidence that it had ever been read by or to him. On the day the will was signed, the defendant called on the two witnesses, asked them to act as witnesses and took them to the testator's bedroom where he was lying ill. The testator himself never asked the witnesses to act. The will was not read by or to the witnesses and at least one of them said that he did not know the nature of the document to which he put his signature. Tait J. maintained the action and declared the will null and void on the ground that the testator had not acknowledged the document to the two witnesses as his will. On this point he said at page 287:

> Our own article [article 851], however, seems to me so clear that a mere acknowledgment of the signature is not sufficient, but that the testator must also acknowledge the document he has signed, and which is then produced, as being his will in presence of two witnesses, and that when so acknowledged the will must be signed immediately by the witnesses in his presence and at his request; that it seems useless to go outside it . . . . So that our own article, containing definite rules on the subject, which must be followed on pain of nullity, must be our guide.

Tait J.'s interpretation of article 851 on the question of acknowledgment may or may not be sound, but it is submitted that he was correct when he said that the article must be the guide. In disposing of the *St. George's Society* case, Mackinnon J. said in *Gingras* v. *Gingras* that it dealt with different facts, and this is true. But it is also true that the facts in the *Gingras* case differ from those in the two cases in which Mackinnon J. and the majority found some support for their conclusion.

Lefebvre v. *Lacroix* was a judgment of Mercier J. in the Superior Court.[16] The sole ground for dismissing the plaintiff's action was the finding that undue influence had not been exerted on the testatrix and that at the time the will was made she was in full enjoyment of her mental faculties. During the trial it developed that one or both of the witnesses had signed the will, not in the room where the testatrix was, but at the entrance, in

[15] (1894), 5 C.S. 273.
[16] (1920), 26 R.L. n.s. 93. See also *supra* where reference is made to this case.

such a position that they could be seen by her. This ground had not been alleged by the plaintiff in his pleadings, but Mercier J. made it clear that even if it had been the action could not have succeeded. It was in this connection that he used the phraseology quoted by Mackinnon J. in the *Gingras* case:

> Considérant, d'abondant, que les tribunaux doivent surtout, tout en respectant les formalités essentielles qui régissent la confection des testaments, s'efforcer de maintenir les volontés clairement exprimés des testateurs et que, être trop rigide dans certaines circonstances, serait en quelque sorte violenter ces volontés alors qu'elles doivent être respectées, la tendance des cours de justice d'Angleterre d'où nous vient le testament dérivé de la loi de ce pays, étant donner que possible effet à un tel testament, à moins d'inobservance flagrante des formalités essentielles qui le régissent.

It is submitted that this passage is of doubtful assistance in the instant case because:

(*a*) the views expressed in it were not necessary to the decision in the *Lefebvre* case and in any event the facts in that case differed materially from those in the *Gingras* case;

(b) in the opening lines of the passage Mercier J. conceded that the "formalités essentielles qui régissent la confection des testaments" must be respected, and the essential formalities were respected in the *Lefebvre* case whereas in the *Gingras* case they were not;

(c) when Mercier J. said that the courts should "s'efforcer de maintenir les volontés clairement exprimés des testateurs", he was enunciating a rule more properly applicable to the interpretation of wills than to the formalities necessary to the making of a valid will;

(d) he misconceived the tendency of the English courts when he said that it was to "donner que possible effet à un tel testament, à moins d'inobservance flagrante des formalités essentielles qui le régissent" and, in any event, it is the Civil Code which must govern not the tendency of the English courts, even though the will in question was "in the form derived from the laws of England".

Wynne v. *Wynne* is an important and interesting judgment of the Supreme Court of Canada.[17] The facts need not detain us, though again they differed substantially from those in the *Gingras* case. Apart from the alleged incapacity of the testator, the chief questions in dispute were whether under article 851 the testator had "acknowledged" his signature and whether the witnesses had

[17] (1922), 62 S.C.R. 74. See also *supra* where reference is made to this case.

signed "at his request". It was held that on the evidence the requirements of the article had been met. The following passage from the judgment of Idington J.[18] was quoted in the *Gingras* case in support of "the necessity of avoiding a too technical interpretation" of article 851:

> To hold such a will invalid for the technical reasons assigned by the learned judges of the Court of King's Bench, disregarding all the attendant circumstances, as evidence of an effectual compliance with the requirements of the law, would as Mr. Justice Martin suggests, render invalid many apparently good wills.

The truth is that no very useful purpose is served by citing authorities in cases involving article 851, except in the unlikely event that one can find a previous decision on all fours. No doubt passing comments could be discovered in the jurisprudence to support almost any view one wished to uphold. For example, the majority in the *Gingras* case referred to two judgments which they felt justified them in avoiding a too technical interpretation of the article, but it would be easy to quote authority to the effect that the article should be interpreted strictly.[19] A careful reading of the Quebec jurisprudence on this point leaves one with the suspicion that the courts have on occasion cited authority, not as evidence of what the law is, but to support a preconceived notion of what would be a fair decision in the circumstances of the case. Admirable as the desire to render essential justice may be, it is not the only or indeed the governing factor in cases under article 851.

So far as I am aware, *Gingras* v. *Gingras* is the first case that holds valid a will admittedly not made in accordance with all the formalities prescribed in article 851, and this in spite of article 855 which states that those formalities must be observed on pain of nullity. The time has long passed when students were taught that judges do not make law; the question now is within what bounds they may properly do so. In the course of his classic discussion of the question the late Justice Cardozo had this to say in a frequently quoted passage:

> Here, indeed, is the point of contact between the legislator's work and his [the judge's]. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot

[18] *Ibid.*, at p. 77.

[19] For instance, the cases mentioned, *supra*, in footnotes 13, 14 and 15. See also: Mignault, vol. 4, pp. 265, 266, 302 (footnote *c*).

> be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.[20]

What the gaps, the open spaces, the interstices are within which the judge may legislate is difficult of definition in the civil as well as the common law. But at least it can be said that there is no gap in Quebec law where the Civil Code is clear and specific. In an article elsewhere in this issue Lord Macmillan writes:

> Where a binding authority exists it must be followed, even if it leads in the judge's opinion to injustice, for, as Lord Bramwell said, 'it is much better that a wrong decision should be set right by legislation than that idle distinctions should be drawn . . . and the law thrown into confusion'.[21]

No doubt Lord Macmillan had the common law in mind when he wrote those lines, but the principle he states is also true of Quebec. The Civil Code is a binding authority.

It is submitted that a will in the form derived from the laws of England has not been executed in accordance with the formalities prescribed by article 851 if the witnesses did not sign it in each other's presence. Such a will is null and void under articles 851 and 855. When it comes before a court for consideration it must be declared invalid, whether or not the court feels that to do so would be to frustrate the testator's intention and whether or not there is a possiblity of fraud. It is not the supposed spirit of article 851 that governs, but its clear words. If this seems like a technical interpretation, it is because the law in this respect is technical. If it is too technical, it is for the legislature to change the law.

G.V.V.N.

[20] The Nature of the Judicial Process (1921), p. 112.
[21] At p. 499.