Case and Comment

INTERNATIONAL LAW — UNIMPLEMENTED TREATIES — THEIR EFFECT ON MUNICIPAL LAW—PUBLIC POLICY.—It is a well-established rule of Anglo-Canadian law that the provisions of a treaty, though binding upon the state under international law, do not become part of the law of the land unless they are implemented by legislation. A treaty that has not been implemented by legislation cannot be a source of legal obligations affecting private rights. Lamont J. stated this principle clearly in the *Arrow River* case:[1]

> Without the sanction of Parliament, the Crown cannot alter the existing law by entering into a contract with a foreign power. . . . Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject.

Does this principle mean that the provisions of an unimplemented treaty can never have any effect upon rights and duties of citizens under existing municipal law? It is clear that they can never affect them directly since under our law, as we have just seen, the provisions of a treaty are not self-executing and cannot by themselves modify the municipal law. Is it possible, however, that they may have an *indirect* effect upon their rights and duties?

The Ontario case, *Re Drummond Wren*,[2] gave support to a theory that a treaty, even though not implemented, can have some considerable, if indirect, effect upon municipal law. The facts of the case were as follows. Drummond Wren had purchased certain lands and at the time of the purchase had assumed and agreed to exact from his assignees the following restrictive covenant: "Land not to be sold to Jews, or to persons of objectionable nationality". Later he made an application to the Ontario High Court to have this covenant declared invalid. Under section 60 of the Conveyancing and Law of Property Act (R.S.O., 1937, c. 152), judges

[1] *Arrow River and Tributaries Slide and Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495, at p. 510; [1945] 2 D.L.R. 250, at p. 260. See also *Walker* v. *Baird*, [1892] A.C. 491.

[2] [1945] 4 D.L.R. 674; [1945] O.R. 778.

were given wide discretion to modify or discharge any covenant running with or capable of being legally annexed to land. Counsel for Drummond Wren sought the discharge and removal of the covenant on the four grounds that (i) it was void as being against public policy; (ii) it was invalid as a restraint on alienation; (iii) it was void for uncertainty; and (iv) it contravened the provisions of the Racial Discrimination Act (1944 (Ont.), c. 51). No one opposed the application on behalf of those who were interested in the land or in the adjacent lands subject to the same or a similar restrictive covenant, even though notice of the application had been served on them. Mackay J. held that the covenant was void because it was contrary to public policy; it was a restraint on alienation, and it was uncertain.

My interest, for the purpose of this note, is focussed on the part of the judgment dealing with the argument that the covenant was void as being against public policy. In particular, the method used by Mackay J. is of great interest. In setting out on the uncertain task of determining public policy, he prepared the reader for the use of a novel technique by quoting two statements. The first was from Mr. Justice Cardozo's *The Growth of Law:*

> Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth.

The second was from Mr. Justice Holmes' *The Common Law:*

> The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, what is expedient for the community concerned.

With these colourful bits of jurisprudential comment to support him, Mackay J. asserted that "the courts may look at various dominion and provincial Acts and public law as an aid in determining principles relative to public policy"; and he proceeded not only to look at various Acts of Canadian legislatures, but also to embark on a survey of the Charter of the United Nations and the Atlantic Charter, the Racial Discrimination Act of Ontario, the Insurance Act, the Community Halls Act, speeches of Mr. Roosevelt, of Mr. Churchill and of General De Gaulle, resolutions passed at the World Trade Union Congress, the resolution against discrimination adopted unanimously by the Latin American nations and the United States in Mexico City in March 1945 and, finally, article 123 of the Constitution of the U.S.S.R. This survey sat-

isfied Mackay J. that the restrictive covenant was "offensive to the public policy of this jurisdiction", and therefore void.

Now the decision in *Re Drummond Wren* was important in the eyes of an international lawyer because, if a court in ascertaining public policy can consider not only judicial decisions and legislative enactments but also the provisions of treaties, then clearly a treaty, whether implemented or not, may have an effect on the content of municipal law (limited, of course, to cases in which public policy is relevant). Mackay J. was greatly influenced by the provisions of the Charter of the United Nations on human rights and fundamental freedoms, and, as a result, the rights and duties of persons under contract were seriously affected. It should be made clear, however, that his decision was not based on the ground that the provisions of the Charter of the United Nations applied to individuals in Canada, and were binding upon the Ontario courts.[3] He did not in fact apply the provisions of the Charter; he did not turn to them as a source of legal obligation affecting private rights. He merely applied our rules of public policy. The only effect that the provisions of the Charter had was an indirect effect through their influence on the content of our public policy. The judgment in *Re Drummond Wren* did not in any way alter the principle stated earlier that a treaty cannot be a source of legal obligation affecting private rights unless it is made part of our law by legislation. Its significance lay not in any change of the old principle but in the fact that the willingness of Mackay J. to look at the provisions of treaties to aid him in determining public policy seemed to contain the promise of an increasing supremacy of international law over municipal law.

It is no wonder, then, that international lawyers welcomed *Re Drummond Wren*. It is justly celebrated, and several public references have been made to it by eminent scholars. For example, in 1948 Professor Paul Sayre wrote:[4]

> I have always felt *Re Drummond Wren* to be a landmark case in the legal order of the entire world, and one that should always be held in honor.

Professor Lauterpacht mentions it four times in his recent book, *International Law and Human Rights*,[5] and a reviewer of the book in the Cambridge Law Journal[6] thought that it was an attractive decision, but "it is difficult to see how an English court could follow the High Court of Ontario . . . and hold, on the basis of the

[3] Professor Paul Sayre seems to think that *Re Drummond Wren* was decided on that ground. See his article in (1948), 34 Ia. L. Rev. 1, at p. 8.
[4] *Ibid.*, at p. 2.
[5] At pp. 150, 152, 156, 411.
[6] (1951), 11 Camb. L.J. 120, at p. 122.

Charter, that a covenant in a lease restrictive of user by a religious or racial minority is void". For some strange reason, however, it seems to have escaped the attention of many that the validity and usefulness of *Re Drummond Wren* has been greatly impaired by a subsequent decision of the Court of Appeal of Ontario, *Re Noble and Wolf*.[7] Indeed, only a technical application of the doctrine of *stare decisis* could keep one from stating that the parts of the judgment of Mackay J. in *Re Drummond Wren* on public policy have been completely overruled by *Re Noble and Wolf*.

One Noble purchased a summer resort property in 1933. The conveyance of the property to him contained a restrictive covenant, one of the clauses of which was as follows:

> The lands and premises . . . shall never be sold, assigned, transferred, leased, rented or . . . alienated to, and shall never be occupied or used . . . by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention . . . to restrict the ownership, use, occupation and enjoyment . . . to persons of the white or Caucasian race not excluded by this clause.

This covenant was to remain in force only until August 1st, 1962. Noble agreed to sell the property to Wolf. As Wolf might be considered a Jew, he required a release from the restrictions imposed in the clause of the restrictive covenant just quoted and an order declaring that it was void. Noble replied that the clause was invalid because the decision rendered in *Re Drummond Wren* applied to the facts. Wolf, however, was not satisfied and insisted upon an order being obtained. Noble then brought a motion under the Vendors and Purchasers Act (R.S.O., 1937, c. 168) for an order declaring that Wolf's objection had been fully answered and was not a valid objection to his title. The issue, therefore, was this: Was it a sufficient answer to this racial restrictive covenant that since the decision in *Re Drummond Wren* such covenants are void? Counsel for Noble argued that the clause was void because (i) it was contrary to public policy, (ii) it was uncertain, and (iii) it was a restraint on alienation. Naturally, he relied on *Re Drummond Wren* and argued that that case was rightly decided. Both the Ontario High Court and Court of Appeal emphatically rejected these arguments. They held that the restrictive covenant was sufficiently certain and that it was a valid partial restraint on alienation. On the question of public policy, which for present purposes is the important part of the case, Schroeder J. in the High Court and all five judges of the Court of Appeal held that the covenant

[7] [1948] 4 D.L.R. 123; [1948] O.R. 579; [1949] 4 D.L.R. 375; [1949] O.R. 503; [1951] 1 D.L.R. 321; [1951] S.C.R. 64.

was not void as being against public policy. In essence, they said that to hold that a racial restrictive covenant is contrary to public policy and therefore void, as Mackay J. had done, would be to create a new head of public policy; that judges no longer can create new heads of public policy since it is now the task of the legislature to keep the law in harmony with public policy.

These judgments in *Re Noble and Wolf* are a complete rejection of the technique used by Mackay J. to determine what public policy is. Reference to treaties as an indication of public policy is ruled out. The following statements are good examples of the judges' views. Schroeder J. said:[8]

> To hold on the basis of Canadian treaty obligations and on the basis of the provincial legislation and regulations and other public documents, referred to in the judgment of Mackay J., that there is a public policy in Ontario which prohibits the use of and renders void any covenant such as the one under review, seems to me to involve an arbitrary extension of the rules which say that a given contract is void as being opposed to public policy.

Hogg J. expressed the same opinion in clearer terms:[9]

> It was argued that the doctrine of public policy should be extended to embrace the present case because of the principles expressed and adopted by the General Assembly of the United Nations and the international bodies and charters mentioned by Mackay J. in *Re Drummond Wren*; also because of opinions expressed in certain judgments in the Supreme Court of the United States. As was said in the carefully considered judgment of Schroeder J., the obligations set out in the United Nations Charter do not seem to have been made a part of the law of this country or of this Province by any legislative enactment of either the Dominion Parliament or the Ontario Legislature. Nor can the statement made by Lord Thankerton in the *Fender* case [p. 25] be disregarded, that 'there can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country'. This expression of the law, in my view, applies as well to the principles and obligations set forth in international covenants or charters, such as the United Nations Charter, until such time as they should be made a part of the law of the land.

And Henderson J. A. said that "the judgment in *Re Drummond Wren* is wrong in law and should not be followed".[10]

Re Noble and Wolf was appealed to the Supreme Court of Canada and the decisions of both lower courts that the covenant was valid were reversed.[11] It must be noted, however, that the judges of the Supreme Court made no reference to the argument that the covenant was contrary to public policy. Their decisions

[8] [1948] 4 D.L.R. 123, at pp. 138-139; [1948] O.R. 579, at p. 596-7.
[9] [1949] 4 D.L.R. 375, at p. 399; [1949] O.R. 503, at p. 532-3.
[10] [1949] 4 D.L.R. 375, at p. 390; [1949] O.R. 503, at p. 523.
[11] [1951] 1 D.L.R. 321; [1951] S.C.R. 64.

rest upon the ground that this covenant was an invalid restraint upon alienation, that it was void for uncertainty, and that the covenant had no reference to the use or abstention from use of the land (that is, it did not touch or concern the land and so the doctrine of *Tulk* v. *Moxhay* was not applicable).

The international lawyers who considered *Re Drummond Wren* to be "an extraordinary and heroic achievement" may have been overemphasizing the significance of that case in international law. But quite apart from its importance to international lawyers, it was of general interest to all lawyers because of the bold manner in which Mackay J. sought out public policy without regard to previous judicial opinion on the subject. It was refreshing to find a judge trying to recapture some of the spirit that enabled the greatest of his judicial forebears to systematize the common law and yet leave it the elasticity necessary to keep it in harmony with changing social needs. On the other hand, in *Re Noble and Wolf* the judges of the Ontario courts took a cautious approach and refused to take notice of any change in the public policy of Canada or Ontario. One feels some regret that the judges of the Supreme Court of Canada did not see fit to express an opinion upon the public policy issue. There is little doubt that, as matters now stand, lawyers in Ontario will consider the lone decision of Mackay J. in *Re Drummond Wren*, in so far as it relates to public policy, as being thoroughly discredited by the opinions of the six judges[12] who considered the public policy issue in *Re Noble and Wolf*.

C. B. BOURNE*

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WORKMEN'S COMPENSATION—WHETHER ACCIDENT AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT.— In a recent case, *In re the Workmen's Compensation Act*,[1] the Appeal Division of the Supreme Court of New Brunswick has handed down an important decision in a border-line case that considerably extends the meaning of the phrase "in the course of employment". An appeal to the Supreme Court of Canada is now pending.

Marilyn Ann Noell, a young university student twenty years of age, was employed by the Canadian Pacific Railway as a wait-

[12] Schroeder J. of the High Court; and Robertson C. J. O., Henderson, Hope, Hogg and Aylesworth J. J. A.

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[1] (1951), 28 M.P.R. 270.

ress in their Algonquin Hotel at St. Andrews, N.B. Her contract for service, dated May 4th, 1949, called for continuous services on the premises until September 10th, 1949, at a wage of $35.00 a month. In addition, sleeping accommodation and meals were provided for her on the premises and she was entitled to certain recreational facilities on the hotel grounds, namely, the use of the tennis courts, the privilege of the golf links at a reduced fee of $5.00 for the season, and swimming privileges on a private beach owned by the hotel at Katy's Cove. She commenced work on June 9th, 1949.

At breakfast time on June 23rd, Miss Noell was told that she need not report back for work until five o'clock for the supper meal. About twelve o'clock noon she decided to go in swimming at Katy's Cove. She had gone swimming there some fifteen times before, each time diving into about five feet of water from a jetty or float which extended some 100 feet into the cove. On the evening previous to June 23rd, the gates at the mouth of the Cove had been opened to empty it, and when she dived into the jetty, the depth of the water being one foot and a half, she struck the bottom, sustaining, according to a medical report, serious injuries of a permanent nature.

The New Brunswick Workmen's Compensation Board disallowed her claim for benefits on the grounds that what she was doing at the time of the accident was not for the purpose of the employer's business and was not part of her regular work. This decision was overruled by the Supreme Court of New Brunswick, Harrison and Hughes JJ., Bridges J. dissenting.

Harrison J. based the majority decision on *Knight* v. *Howard Wall, Ltd.*,[2] where an employee was injured by a dart while he was eating his midday meal in a canteen provided on the employer's premises for the convenience of the work-people by arrangement with an independent contractor. Employees were allowed the use of the canteen, but were under no obligation to use it. It was held that the accident arose out of and in the course of the employment. The reasoning of the Court of Appeal, *per* Slesser L.J., was as follows:

> Once it is established that it is part of the course of the employment — that is to say, that it is a term of his contract that he should be there — the accident which arises at that point, if the place is one where there is a specific danger, is one which, I think, arises out of the employment.

In the *Noell* case, Harrison J. applied this locus concept by finding that recreation *on the hotel premises* in off-duty hours was a natural incident of Miss Noell's employment, being part of her

[2] [1938] 4 All E.R. 667.

compensation, and that "the place where the accident occurred" is the important element in determining liability (p. 284).

Bridges J., in dissenting, refused to apply the test of locus to the exclusion of other determinants of liability. He stated that Miss Noell was at Katy's Cove "in consequence of her employment" (p. 295) but not in the course of her employment. The real test to be applied was whether she was doing what she was doing as a duty to her employer at the time of the accident. Bridges J. failed to see any "legal nexus" between waiting on tables at the Algonquin Hotel and swimming at Katy's Cove, one-half mile distant, during a period of some six hours when the employee was at liberty to do what she liked and to go where she pleased (p. 300).

The decision in the *Noell* case, if it is not reversed by the Supreme Court of Canada, will have a double-barrelled effect on workmen's compensation law. Firstly, it extends the principle of cases like *Knight* v. *Howard Wall, Ltd.*, which says that an accident occurring during a noon hour while the employee is taking his meal on his employer's premises is compensable. Accidents occurring on the employer's premises during the noon hour break, those occurring to a domestic while washing her hair during a free period in her employer's house[3] and what occurred when Miss Noell was told that she could go about her own business all seem to have a common denominator. This common denominator is provided by the test of locus. This test of locus, or the employer's ownership or non-ownership of the place where the accident occurred, is, according to the English cases, only one factor to be taken into consideration.[4] The real test is whether or not an otherwise continuous employment had been broken before the accident. Therefore, if the *Noell* case is good law, the second effect of the decision is that predominance is given to the test of locus, since Mr. Justice Harrison found in favour of Miss Noell because the accident occurred at a place of recreation provided by the employer on its premises.[5]

[3] *Codling* v. *Ridley* (1933), 26 B.W.C.C. 3.

[4] See Lord Parmour in *Davidson* v. *McRobb*, [1918] A.C. 304, at p. 355.

[5] Section 7 of the Workmen's Compensation Act (N.B. Stats., 1932, c. 36, as amended by c. 51 of 1938 and c. 43 of 1948) provides in part:

"When personal injury or death is caused to a workman by accident arising out of and in the course of his employment in any industry within the scope of this Part, compensation shall be paid to such workman or his dependents, as the case may be, as hereinafter provided, unless such accident was, in the opinion of the Board, intentionally caused by such workman, or was wholly or principally due to intoxication or serious and wilful misconduct on the part of the workman and did not result in the death of the workman.

"(a) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the em-

The decision of the N.B. Supreme Court could have far-reaching consequences in an age when corporate entities hold large tracts of land and spread their undertakings over long distances. For example, it would tend to show that a railway employee injured while travelling on a free pass on the railroad is entitled to receive workmen's compensation. It is true that the *Noell* case does not go this far but, in going farther than any of the previously decided cases, it is a step in this direction.

J. CARLISLE HANSON*

* * *

SUPREME COURT — TECHNIQUE OF DISPOSING OF APPEAL — WILLS — VALIDITY OF ENGLISH WILL — REVOCATION BY HOLOGRAPH LATER WILL — VERBAL PROOF OF MISSING WILL — MINOTAUR IN LABYRINTH.— The legal problems raised by *Langlais* v. *Langlais et al.* are of difficulty and importance, but the recent judgment of the Supreme Court of Canada does little to settle them.[1] A few years ago Lord Macmillan wrote in an English case that "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England".[2] Criticized for the sweeping generality of this remark, he later sought to explain what he had intended, and he then made no attempt to deny that it is the part of a judge to assist in clarifying the law and clearing up apparent discrepancies.[3] If a court's only duty is to settle disputes between litigants no commentator can have much criticism of the Supreme Court for giving the property in the *Langlais* case to the daughter rather than the sister, but if a court, particularly an appeal court, has a duty also to the law, there is rather more to be said.

The only facts that are relevant for the moment can be set down briefly. J. A. F. Langlais, an elderly man living at Beauport near Quebec City, made a will on April 22nd, 1947, in "the form derived from the laws of England". By this will he left his property, approaching $100,000, to his sister, the appellant to the Supreme Court. A week later, on April 29th, he made a holo-

ployment, and when the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment."

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[1]The judgments of the Superior Court and the Court of King's Bench (Appeal Side) have not been, and the Supreme Court's judgment has yet to be, reported.

[2] *Read* v. *J. Lyons and Co. Ltd.*, [1947] A.C. 156, at p. 175.

[3] Macmillan, The Writing of Judgments (1948), 26 Can. Bar Rev. 491, at pp. 496-497.

graph will revoking the English previous will and naming his daughter, the present respondent, his universal legatee. He died at Beauport in November 1948 and the sister secured probate of the English will. Sometime later the daughter started these proceedinzg to have the English will set aside and herself declared heiress at law. In the Superior Court the trial judge, Gibsone J., holding that the English will had been valid when made and had not been effectively revoked by the holograph will, dismissed the daughter's action. This judgment was reversed unanimously by the Court of King's Bench (Appeal Side), which, without passing on the question of revocation, declared that the English will was invalid when it was made and the daughter sole heiress at law. The Supreme Court (Rinfret C. J., Kerwin, Rand, Kellock, Cartwright and Fauteux JJ., Taschereau J. dissenting) have now confirmed the King's Bench, though not necessarily on the same grounds. All seven judges give written reasons, some of them of considerable length.

The purpose of the present comment is not to suggest that this or that individual judge was right or wrong in the view he took of this or that point of law. The case is one of great complexity and the legal questions it raises will be argued for a long time. I have some ideas about these — all lawyers will have — but my primary concern here is with the overall effect of the seven separate sets of reasons on an important branch of Quebec law, the law of wills. The fact that only one of the seven judges dissented on the final disposition to be made of the case as between the litigants gives a quite misleading picture of the differences among the judges on particular points of law. Certainty is commonly alleged to be one of the aims of law and I propose to try to thread my way through the labyrinth which is the ninety-five typewritten foolscap pages comprising the seven sets of reasons and, by some analysis of them, attempt to estimate the extent to which the Supreme Court *as such* has made in this case a contribution to certainty. Although *stare decisis* in any formal sense may not be part of Quebec law, the courts of the province usually attempt to respect the decisions of courts higher in the hierarchy than themselves,[4] but they must know what they are being asked to follow.

Some of the judges of the Supreme Court may have been moved by human sympathy in their disposal of the case. Fauteux J., in a refreshingly candid discussion of the facts, shows clearly

[4] Cf. the concluding remarks of Rinfret C.J. in *Woods Manufacturing Co. Ltd.* v. *The King*, [1951] S.C.R. 504, at p. 515.

that his feelings are with the daughter-respondent rather than the sister-appellant, and his conclusions on this phase of the case, the invalidity of the first will, are approved with varying formulas by Rinfret C. J., Kerwin and Cartwright JJ. The respondent, says Fauteux J., is the testator's only surviving child and his legal heir. She has little or no means, while his sister is already well-to-do. The sister has shown a "hostilité complète et irréductible" for the daughter, her niece. There is no doubt of the sister's willingness, even eagerness, to get her hands on the property, the first will was undoubtedly prepared at her instigation, and so on. Here is one major premise that does not remain undisclosed.

There are two main routes (and a choice of side paths on each route) by which the desired conclusion can be reached. The first is to find, by one means or other, that the English will, under which the sister was named universal legatee, was invalid when it was made. The second route, alternative to the first, is to hold that, though the English will was valid, it was effectively revoked by the holograph will. Should a judge elect to travel by the first route, he need consider the second will only to decide whether the daughter takes as legal heiress or as universal legatee, a point to which I shall want to refer again. On the other hand, should he elect to go by the second route, he is not compelled to consider the first will, because the daughter inherits irrespective of its initial validity.

However much the civil and common law approaches to the judicial process may differ, the *Langlais* case certainly gives no support to the idea that the racial or legal background of a judge of the Supreme Court helps you to prophesy what answer he will give to a particular legal question. On no phase of the case are the English-speaking common-law judges aligned against their French-speaking civilian confrères. Of the six majority judges, four, Rinfret C. J. and Kerwin, Cartwright and Fauteux JJ., go by the first route to their conclusion, the route of invalidity of the first will, and four, Rinfret C. J. and Rand, Kellock and Cartwright JJ., take the second route, that the holograph will has effectively revoked the English will. In other words, two judges, Rinfret C. J. and Cartwright J., think that the daughter ought to win either way. Not dissimilar divisions appear when we turn to what might be called the negative side of the reasons for judgment, the support received by the dissenting judge, Taschereau J., who, finding for the sister, holds that the first will was valid and that it had not been effectively revoked by the

second. Two judges, Taschereau and Kellock JJ., say that the first will was valid and one, Rand J., thinks it unnecessary to pass on the question; three, Kerwin, Taschereau and Fauteux JJ., hold there was no effective revocation.

The question of the validity of the English first will at the time it was made turns largely on an appreciation of the facts. It might be declared invalid on any one of three grounds: (1) that the formalities prescribed by article 851 of the Quebec Civil Code for the making of a will in the form derived from the laws of England were not fulfilled; (2) that at the time he made the will the testator was not "of sound intellect" within the meaning of article 831; and (3), not unrelated to (2), that he thought mistakenly he was signing a document other than a will. None of the six judges who deal with this phase of the case appears to think that there is anything in the argument that the formalities were not followed or that the testator was shown to be of unsound mind. The chief protagonists on either side of the dispute over error are Fauteux J., of the majority, and Taschereau J., dissenting, both of whom enter upon a detailed examination of the evidence. Fauteux J., with whom on this phase of the inquiry Rinfret C. J. and Kerwin and Cartwright JJ. agree, says that the will was invalid because the testator did not realize what he was signing and consequently it did not receive "l'adhésion libre d'une volonté éclairée". At the risk of confounding an already confusing case, I venture to say that Taschereau J. (Kellock J. agreeing) is more convincing in his argument *for* the validity of the English will.

The really difficult legal problems sprout along the second route, that the English will, even though valid when made, was effectively revoked by the holograph second will. That a second will was made, and that it contained clauses revoking previous wills and instituting the daughter as universal legatee, was not questioned before the Supreme Court, but this second will was not produced at the trial and, what is even more embarrassing (legally speaking), no explanation could be given of its disappearance. In these circumstances may verbal proof of the holograph will be made? Involved in this problem is the further problem whether a will for these purposes is divisible or indivisible: in other words, may verbal proof be made of it merely as a revoking instrument, or must it be proved as both a revoking and disposing will or not at all? Does a revoking clause in a will take effect immediately it is made, or is it in abeyance until the testator's death: does the revocation of a will that con-

tains the revocation of a previous will revive the previous will automatically, or is additional proof of the intention to revive it necessary? Are there circumstances in which the revocation of the second will, or indeed any will, may be presumed? Questions such as these are fundamental to the whole law of wills in Quebec.

As the reader is conducted into that part of the labyrinth bordering on this second route, his steps may be eased, comparatively speaking, by reproducing the more significant articles of the Quebec Civil Code that are referred to by the judges of the Supreme Court in the *Langlais* case. There is, first, article 756:

> 756. A will is an act of gift in contemplation of death by means of which the testator, without the intervention of the person benefited, makes a free disposal of the whole or of a part of his property, to take effect only after his death with power at all times to revoke it. Any acceptance of it purporting to be made in his lifetime is of no effect.

Next is article 860, which appears in section III of Chapter Third, headed "Of the Probate and Proof of Wills", and which concerns the proof of a lost or destroyed will:

> 860. When the minute or the original of a will has been lost or destroyed by a fortuitous event, after the death of the testator, or has been withheld without collusion, by an adversary or by a third party, the will may be proved in the manner provided in such case for other acts and writings in the title Of Obligations.
>
> If the will have been destroyed or lost before the death of the testator, without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death.
>
> If the testator knew of the destruction or loss of the will and did not provide for such destruction or loss, he is held to have revoked it, unless he subsequently manifests his intention of maintaining its provisions.

The reference to the title Of Obligations is to article 1233 (6):

> 1233. Proof may be made by testimony:
>
> 6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced; . . .

The chief provisions on revocation will be found in articles 892 and following, of which the relevant ones for purposes of the present comment are:

> 892. Wills and legacies cannot be revoked by the testator except:
>
> 1. By means of a subsequent will revoking them either expressly or by the nature of its dispositions;
>
> 2. By means of a notarial or other written act, by which a change of intention is expressly stated;
>
> 3. By means of the destruction, tearing or erasure of the holograph will, or of that made in the form derived from the laws of England, deliberately effected by him or by his order, with the intention of revoking

it; and in some cases by reason of the destruction or loss of the will by a fortuitous event becoming known to him, as explained in the third section of the present chapter; . . .

895. A revocation contained in a subsequent will retains its full effect, although such will should remain inoperative by the reason of the incapacity of the legatee or of his refusal to accept.

A revocation contained in a will which is void by reason of informality, is also void.

896. In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether, upon the revocation of a will which revokes another will, the former will revives.

It is delusion to begin with the assumption that these articles can give any clear and ready answer to the question whether there was an effective revocation of the English by the holograph will. The fact is that the precise situation in *Langlais*, where the second, revoking will has disappeared and the circumstances of the disappearance cannot be explained, is not expressly dealt with by the Quebec Code. Admit that, and some progress has been made, for a satisfactory answer is not to be found only by the technical manipulation of texts, however ingenious. If this question is approached as an exercise in statutory interpretation, in any narrow sense, either the facts will have to be pinched and pulled to fit the mould of the Code, or the Code will have to be forced to the mould of the facts. The proper civil-law approach, and therefore the approach of judicial statesmanship, is to consider the articles of the Code on wills as a *system* and to evolve the answer that seems to be required by that system. The Code should be treated as a code, not a "statute", and this means that the judge, in the exercise of the considerable latitude of decision he has in this case, may have to consider the state of the law in Lower Canada before the codification, the reports of the Codifiers, and French and English law. Against this background, as well as the existing articles of the Code, any tentative answer he comes to must be tested again and again, because, for good or bad, the civil law strives for rationality.[5]

Where the Code is clear a judge has no choice of course but to apply it, but where it is silent or uncertain, considerations of the *ought* instead of the *is* will inevitably enter his mind. The facts of a particular case apart, if a holograph will that revokes a previous will and names a new universal legatee disappears in unexplained circumstances, should it be the policy of the law that the person named in the first will takes, or the person named in the second will, or the legal heir at the expense of both of them?

[5] Which is not to say that it treats law as if it were a quasi-mathematical formula.

The answer to this broad question turns on others as, for example, whether the probabilities are that the testator in the hypothetical case intended to revoke the second will and, if he did, whether he intended the first will to revive or his property to go *ab intestate.* If the judge thinks that there should be a general policy of law, or if he thinks that the circumstances of the case before him give some indication of the testator's intention, his decision, whether for example the way for secondary proof of the missing will should be eased, will presumably be affected.

May secondary proof be made so as to establish legally that the holograph will revoked the English will? Article 860, of which there is no counterpart in the Code Napoléon, is badly drafted, but this much at least is clear, that it is intended to cover the cases where proof by testimony may be made of a non-produced but still subsisting will; it does not expressly provide for testimonial proof of a will that has itself been revoked, or is held to have been revoked, and it has nothing whatever to say about the will that is missing in unexplained circumstances so that no one knows whether it is subsisting or not. The four judges who hold that testimony was admissible, Rinfret C. J. and Rand, Kellock and Cartwright JJ., approach in varying ways the difficulties arising from the fact that the disappearance of the holograph will is unexplained.[6]

The Chief Justice points out that two of the methods of revoking a will provided by article 892 are a subsequent will revoking it either expressly or by the nature of its dispositions, and a written act by which a change of intention is expressly stated. Whether the holograph second will is treated as a subsisting will, he says, or as a written act, proof may be made by testimony of its contents, either under article 860 or under the general provision for the proof of missing writings, article 1233(6).

This reasoning raises several difficulties. First, is it for the party offering testimony under article 1233(6) to establish that the writing was "lost by unforeseen accident", in the sense that he must show precisely how it was lost? If so, the article is of no help to the Chief Justice, where, as here, no one knows what has become of the writing. The Chief Justice and Kellock J. answer this question in the negative; Rand and Cartwright JJ. express no opinion; Kerwin, Taschereau and Fauteux JJ., the three who

[6] To simplify description I have grouped Rand and Cartwright JJ. together, which is to say that their approaches are similar, though they are by no means identical. In my own mind, in preparaing this paper, I similarly grouped Rinfret C.J. and Kellock J. together, but perhaps the latter should be classified with the other two, or apart.

hold that verbal proof of the holograph will may not be made at all, answer it in the affirmative. In the result, though by one method or another four judges to three would have permitted verbal proof, the vote is three to two against a legal interpretation essential to one of the methods.

Secondly, and not unrelated, must the party offering testimony under article 860 show, by precise proof of what happened to the will, that it was "lost or destroyed by a fortuitous event", "fortuitous event" being defined in article 17(24) as an event "which is unforeseen, and caused by superior force which it was impossible to resist"?[7] The same alignment of judges might be expected here as on the analogous question under article 1233(6), and in fact the Chief Justice and Kellock J. both say that the phrase "by a fortuitous event" in article 860 applies to the word "destroyed" but not to "lost", the very idea of "lost" implying a disappearance that cannot be explained. Rand and Cartwright JJ. again express no definite opinion and Kerwin (rather less definitely this time perhaps), Taschereau and Fauteux JJ. answer again in the affirmative, so that we have the same curious result as before.

If I may venture a personal expression of opinion here, it is that the Chief Justice, though mistaken, for reasons to be discussed later, when he bases his argument for allowing verbal proof on the combined effect of the two articles, is correct in the view he takes of "unforeseen accident" in 1233(6) and "fortuitous event" in 860. Accidents and events are "unforeseen" and "fortuitous", not absolutely, but with respect to persons, and what is "unforeseen" or "fortuitous" for one person may not be for another. "Unforeseen" in article 1233(6) means unforeseen by the creditor, or at least by the person who wishes to use the writing; "fortuitous" in article 860 means fortuitous as regards the testator. It has always seemed to me that it may often be possible to make satisfactory proof of the "unforeseen" nature of an accident or the "fortuitous" nature of an event, in this sense of the words, without the necessity of proving the precise accident or event.

The third obstacle is the statement often heard that a will is not divisible. May a will, the disposing part of which cannot be proved and therefore cannot take effect, nonetheless be proved to have effectively revoked a prior will? Taschereau J., with Fauteux J. agreeing, denies it categorically. The testator, says Mr. Justice

[7] If precise proof must be made under articles 1233(6) and 860 the burden would seem to be heavier under 860 than under 1233(6). This is a discrepancy of drafting which I do not think amounts to much in practice, and certainly does not under the view I take of the articles.

Taschereau, has not made two separate provisions, a new will and a revocation, which can be considered separately; a will that cannot be proved is, like the will void for informality provided for by the second paragraph of article 895, inexistent, and the revocation contained in one as in the other is void.

A distinction, it seems to me, must be made. Unlike the will void for informality, a will, the disposing part of which cannot be proved because it has been revoked, is not inexistent. There is always the possibility, for example, that it will revive under article 896, when the will that revoked it is itself revoked. Taking the articles on wills as a system, I suggest that the proper analogy is not with the second paragraph of article 895 but with the first. A will, then, is not to be divided in the sense that if initially void as a will it may still be proved to have revoked a previous will, but it is divisible in the sense that, though subsequently revoked itself, it may still be proved to have revoked a previous will.

A more serious difficulty for the argument based on the combined effect of articles 860 and 1233(6) is the suggestion, related to the question of the divisibility of wills, that the revocation of a will by a subsequent will takes effect immediately the will containing it is made, *eo instanti*. If it does, I should rather think that the Chief Justice's reasoning fails. To get over the fact that no one knows whether the holograph second will was itself revoked or not, he argues that if it is treated as a will revoking a previous will under article 892(1), verbal proof of it is authorized by article 860; and if it is treated as a written act revoking a will under 892(2) verbal proof is authorized by article 1233(6). But if a revocation takes place *eo instanti*, it is a will under 892(1) and not a written act under 892(2) with which we are concerned in the *Langlais* case, whether or not there has been a subsequent revocation.

Without discussing the matter, Rand, Kellock and Cartwright JJ. say expressly that revocation takes place at once. Taschereau J. gives extensive reasons for coming to the opposite conclusion. The argument that a revocation in a will takes effect immediately runs counter, he writes, to article 756, which says that a will can have effect only after the testator's death. During the lifetime of its maker it is a "simple projet"; only death transforms the "projet" into a "disposition". This applies to all the provisions of the will and hence it results that a revocation clause in a will that is revoked by its maker can have no more effect than the will itself.[8] It is I venture to say a mistaken argument.

For one thing, article 756 does not say that no part of a will takes effect until after the testator's death; what it refers to is the *disposal provision* of a will, ". . . makes a free disposal of the whole or of a part of his property, to take effect only after his death with power at all times to revoke it". For another, his argument would render article 896 almost meaningless.

Rand and Cartwright JJ. apparently realize the logical difficulty that *eo instanti* puts in the way of the argument based on articles 860 and 1233(6) and seek to avoid it by reasoning from the combined effect of 860 and 896. If I understand Mr. Justice Rand's argument correctly it is that article 860 has application where the loss or destruction of the will occurs in circumstances from which the intention to revoke it cannot be presumed; where the presumption of revocation arises article 896 comes into play. If the purpose of 896 is not to be defeated, the article implies that the revocation by the destroyed will of a previous will may be proved by parole evidence. The effect of articles 860 and 896 taken together, he says, is that if on the death of a testator a testamentary document shown to have previously existed cannot be found, the actual circumstances causing the undiscoverability lie necessarily within one or other of them. If the circumstances of the *Langlais* case are within 860, the entire contents of the holograph will may be proved by parole evidence for all testamentary purposes, and if they are within 896 the fact that the lost instrument revokes the previous will may be proved. Thus proof of the fact of revocation of the previous will arises under both articles, and since the case necessarily falls within one or other of them, that fact at least may be established by parole evidence.

What the other judges think of this reasoning they do not expressly say, with the exception of Mr. Justice Cartwright, but Taschereau and Fauteux JJ. would have to reject it if they are to be consistent — for one thing it assumes the divisibility of wills, which they deny. It is probably another minority view, and if it is we have a conclusion favoured by a majority — the admissibility of verbal proof — where neither of the two arguments advanced to justify the conclusion can muster a majority.

Mr. Justice Rand's argument is an ingenious one, but it seems to me to suffer from at least one fatal flaw, which to a degree the one based on articles 860 and 1233(6) shares with it. The problem,

[8] This statement seems the equivalent of the trial judge's holding, which was expressly disavowed by Rinfret C.J. and Cartwright J., that where a will revoking another will is destroyed by the testator with the intention of revoking it the first will revives.

whether verbal proof is permitted of a will missing for unexplained reasons, will not be solved by an application of pure logic. The syllogism — the circumstances fall either within article *A* or within article *B*, both article *A* and article *B* permit verbal proof: therefore verbal proof is permitted in the circumstances — is quite inappropriate here.

Article 860 appears in a section of the Code entitled "Of the Probate and Proof of Wills", 896 in the section "Of the Revocation and Lapse of Wills and Legacies", and 1233 in a section "Of Testimony" in the title "Of Obligations". Article 860 is the only article in the Code providing expressly for the verbal proof of missing wills and, as has been repeated, the article provides for it only in circumstances from which a revocation of the will sought to be proved cannot be assumed. Article 896 does not *provide* for verbal proof of a missing will that has been revoked and, though Rand and Cartwright JJ. seem to be correct when they say that it *implies* the possibility of verbal proof, alone it is insufficient authority. Though less obviously perhaps, similar considerations apply to article 1233(6), which is intended to apply, not to wills, but to obligations, a contract for example. Again, the article may be used as an argument by analogy for permitting verbal proof of missing revoked wills, but by itself it is not decisive enough to form one leg of a syllogism.

We are approaching, though, a possible solution of the problem of verbal, or secondary, proof of missing wills in Quebec. The linchpin of the *Langlais* case, legally speaking, is the uncertainty whether the missing holograph will, which is alleged to have revoked the English will, was itself revoked or not. If the holograph will was unrevoked, or is to be treated as unrevoked, verbal proof of its contents must be made under article 860 or not at all. If it was revoked, or is to be treated as revoked, the Code is in my contention silent, and the judge, who under article 11 cannot refuse to adjudicate under pretext of the silence of the law, must use all the tools available to him and reach a conclusion. There are arguments both ways, but on balance the sounder view seems to be that verbal proof may be offered to show that a missing will, which has been revoked or is to be taken as revoked, has itself revoked a previous will.

More difficult is the case of the will missing in unexplained circumstances, where there is nothing to justify a conclusion that it is either unrevoked or revoked. If a genuine example of such a case ever occurs, my conclusion would be that verbal proof could not be offered either to establish the missing will as a whole

or as merely revoking. This conclusion may sound strange to those who are accustomed to either/or arguments based on articles 860 and 1233(6) and on articles 860 and 896, but there is a distinction between the missing will that is known to be either unrevoked or revoked and the missing will whose status is unknown. It would be a fallacy to argue that because verbal proof is possible under 860 of a missing will that has not been revoked (case *A*), and because verbal proof is possible by judicial interpretation of a missing will that *has* been revoked (case *B*), verbal proof ought to be possible of a will whose status is unknown (case *C*), all wills being either unrevoked or revoked. It is a fallacy because in case *A* the property goes to the legatee mentioned in the will and in case *B* it goes ordinarily to the heir at law, and it *may* be thought preferable to uncertainty as between them that in case *C* verbal proof should not be admitted at all—a conclusion that should be tested against the hypothetical situation where the missing will names as universal legatee a person other than the heir at law and revokes a previous will naming a third person. Some support for my conclusion is found in the considerations that verbal proof is admitted only as an exception, the general rule being proof by writing or the oath of the adverse party, and that the onus lies in every case on the person propounding a will. In short, if verbal proof of a missing will is to be made, the will must *either* be brought within article 860 *or* be excluded from it.

Haunting the *Langlais* case from the beginning has been this uncertainty over the status of the holograph will. Where the English will is held to have been initially valid but to have been revoked by the holograph will, the daughter inherits either as heiress at law, if for any reason consideration is not to be given the disposal provision of the holograph will, or as universal legatee, if effect is to be given it. The same sort of question arises where proof has been offered of the holograph will and the English will is later held to have been invalid at the time it was made. Whether the daughter takes as heiress at law or as universal legatee makes no great practical difference to her, but the difference in law is pointed up by asking the reader to imagine that the holograph will names as universal legatee, not the daughter, or the aunt, but a third person.

Of the majority judges, Kerwin, Cartwright and Fauteux JJ. succeed in avoiding the dilemma. Kerwin and Fauteux JJ. hold that the English will is invalid and verbal proof of the holograph will, either as a disposing or revoking instrument, may not be

made, with the logical result that the daughter takes as heiress at law. Cartwright J. escapes the dilemma in another but not less effective way. Thinking apparently of the presumption in English law that, in the absence of proof to the contrary, a will, which on the death of the testator cannot be found and which when last heard of was in his possession, has been destroyed by him with the intention of revoking it, he treats the holograph will as revoked. Certainly if a presumption like the English one is possible in Quebec, it can be made out in the *Langlais* case. After Langlais wrote the holograph will, he left it for safekeeping with a friend, who kept it for over a year, until the testator asked for it back so that he could make some changes. Nothing has been seen or heard of it since, and five months later the testator was dead. Thus Cartwright J., having held that the English will is initially invalid, that verbal proof of the revocation by the holograph of the English will may be made, and that the holograph will as a disposing instrument is presumed to be revoked, is consistent in finding for the daughter as heiress at law.

May such a presumption be made in Quebec? The trial judge seems to have assumed revocation of the holograph will in the *Langlais* case, though he went on, no doubt incorrectly, to assume that the revocation had had the effect of reviving the English will. Cartwright J. of course is prepared to presume revocation, but the Chief Justice and Taschereau J. deny that there can be any such presumption, and Kellock J. feels he is not called upon to decide. What the other four judges of the Supreme Court think about it we are not told.

Rinfret C. J., Rand and Kellock JJ., having avoided a decision on the precise status of the holograph will, run into difficulties more or less serious with their conclusions.[9] The Chief Justice, who holds that the holograph revoked the English will but that anyway the English will was invalid, concludes that "pour toutes fins pratiques" the daughter must be held to take as heiress at law. Rand J., who holds that, irrespective of the validity of the English will, proper proof of its revocation by the holograph will has been made, concludes that the daughter takes as legal heiress, but provisionally, since proper proof of the holograph will as a testamentary disposition may still be possible. Kellock J., holding that the English will was valid and that pro-

[9] In fairness it should be said that these difficulties stem in some degree from the plaintiff's declaration, which, after alleging the revocation of the English by the holograph will and the initial invalidity of the English will, concludes by asking that the English will be declared void and the daughter sole legal heir.

per proof of its revocation by the holograph will has been made, concludes that "In the existing state of the record, there is no evidence upon which the court could find that this will remained an effective instrument and was not revoked".

In *Sorrell* v. *Smith*,[10] the lower courts made a touching appeal for guidance, which Lord Dunedin in the House of Lords summarized as, "Reverse our judgment an it please you, but at least say something clear to help in the future".[11] I trust I may be forgiven for echoing the appeal here. No more important case on the Quebec law of wills can have gone to the Supreme Court and in none for some reason are the results so confusing. Perhaps the court, remembering the maxim that hard cases make bad law, felt that this was not the most suitable case in which to be categorical upon complicated legal issues. Perhaps, again, it thought of itself here, not as a final court of appeal, but as a way station to the Privy Council, which it should assist by a detailed exposition of possible points of view. The truer explanation is probably that the individual reasons for judgment were prepared without adequate preliminary conference among the judges, with the result that, among so many possible combinations of reasons, no two judges happened upon the same formula.[12]

The trial judge, five judges of the Court of King's Bench and seven judges of the Supreme Court of Canada have already expressed themselves in *Langlais* v. *Langlais*, and yet another opinion can do no harm. It is this:

(1) the English will was initially a valid will;

(2) there is evidence from which revocation of the holograph will may be taken;

(3) in these circumstances verbal proof of the fact that the holograph will revoked the English will may be made;

(4) the English will was effectively revoked and the daughter takes as heiress at law.

If, however, the status of the holograph will is uncertain, in the sense that it cannot be taken to be either unrevoked or revoked, verbal proof of its contents may not be made and the sister takes as universal legatee under the English will.

G.V.V.N.

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[10] [1923] 2 Ch. 32, reversed by [1924] 1 Ch. 506; the decision of the Court of Appeal was affirmed by [1925] A.C. 700.

[11] Referred to by Lord Macmillan, The Writing of Judgments (1948), 26 Can. Bar Rev. 491, at p. 497.

[12] This matter has been referred to before in this Review. See Brewin (1951), 29 Can. Bar Rev. 193, at p. 202.