CASE AND COMMENT

CONTRACTS UNDER SEAL—ENFORCEABILITY—NECESSITY OF CONSIDERATION.—The effect of executing a promise under seal is merely to shift the burden of proof as to consideration. Without a seal, the promisee must prove consideration. With a seal, the promisee is entitled to say that the seal "imports" (that is, is *prima facie* evidence of) consideration. The burden of proof having been so shifted, the promisor may satisfy the burden and prove absence of consideration and thereby avoid liability. This is the proposition of law which is one of the *rationes decidendi* of *Chilliback* v. *Pawliuk*[1]—surely a proposition which will cause surprise to anyone conversant only with English law and unaware of the course of events in the United States in the last 150 years on the subject of the seal.

Although the decision would be ignored as a mere aberration by anyone with more than a passing familiarity with the common law, it is worthy of comment as an example of how even the simplest and most obvious kind of ambiguities can be the source of confusion and the beginning of a further field of bad or at least anomalous law. It is also an example of a well-understood fiction being turned into reality and therefore misapplied in the hands of one who does not appreciate its fictional character—the kind of activity of which the *locus classicus* is *Sinclair* v. *Brougham*.[2]

The first ambiguity involved in the decision, and the one which resulted in mistaking fiction for fact, is seen in the expression that the seal "imports" consideration. "It has been often said that a seal imports consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view."[3] Ames's assumption was not justified even in his own time and apparently is not today.

I. In order to understand the significance of the expression

[1] (1956) 1 D.L.R. (2d) 611 (Alta., Egbert J.).
[2] [1914] A.C. 398.
[3] Ames, Lectures on Legal History (1913) p. 104.

and how it has led to ambiguity, I must refer briefly to the historical development of which it formed a part. Well before our law developed any consensual contract it was possible to bind oneself by a writing under seal, resulting in a purely formal, unilateral contract. With the development of *assumpsit* the purely consensual contract dominated the field and absorbed the action of debt, debt thereafter being regarded merely as one kind of consideration sufficient to support an *assumpsit*. In an attempt to broaden *assumpsit* still further, or at least to rationalize the whole law of contract upon a single basis, it was sought to have the seal regarded as consideration or as mere evidence thereof.

The frequent statements in the reports[4] that the seal imported or implied consideration have been regarded as "merely another way of saying that deeds under seal had no place in the common-law scheme of consideration".[5] But the very reverse seems to be true. It looks rather as if there was a definite and conscious attempt to find deeds just such a place in that scheme, in the same way that Lord Haldane in *Sinclair* v. *Brougham* tried, unfortunately with success, to find a place for quasi-contract within the legitimate fold of contract,[6] thereby impressing it with all the failings of that lineage and killing the independent growth which was already well developed, and which might by now have flourished into a respectable doctrine of unjust enrichment. The simplifying of our law—the reducing of it so as to fit under the least number of rubrics—has an attraction for all ages. In 1711, when counsel with historical correctness put the law thus, "A bond does not want a consideration, but is perfect without it",[7] Parker C.J., for the court, rebuked him: "The law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in bonds and covenants". We also see in some cases[8] counsel or the court playing upon the words "consideration" and "deliberation", stating with some truth but much deception that the seal imports or implies a solemn deliberation or consideration of the legal consequences of the act.

These attempts, if such they were, to reduce the obligation aris-

---

[4] *Sharington* v. *Strotton* (1566), Plowden 298, at p. 309, *arguendo*; *Turner* v. *Binion* (1661), Hard. 200; *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181, at p. 193, are early examples.

[5] Plucknett, Concise History of the Common Law (4th ed.) p. 614. See also: Markby, Elements of Law (4th ed.) p. 310.

[6] [1914] A.C. 398, at p. 415.

[7] *Mitchell* v. *Reynolds*, *ante*, footnote 4, *loc. cit.*

[8] *E.g.*, *Sharington* v. *Strotton*, *ante*, footnote 4, *loc. cit.*

ing by seal to the status of an obligation arising from consideration were never successful in English law and it ever remained true to say, with Bracton, "per scripturam vero obligatur . . . sive pecunia numerata sit sive non".[9] Nevertheless the usage persisted and, plainly recognized as a fiction, and a purposeless one at that, the seal was frequently said to import or provide evidence of consideration. There is no indication that in England this historically inaccurate manner of expression misled any court or any writer. Contract required formality, either in the form of the older seal or in that of the more modern formal consideration.[10]

In the United States, where Blackstone's *Commentaries* occupied a place of primary authority, and where historical scholarship and materials were for a time lacking, the statement in Blackstone that "every bond from the solemnity of the instrument carries within it an internal evidence of good consideration"[11] came to be understood as containing the basis of the obligation arising by seal, and this fact colours the whole subsequent history of the seal in that country. The statement was taken to mean that the seal created a conclusive presumption of consideration,[12] and hence consideration was thought to be the only basis upon which you could justify contractual liability. We have, then, a change in the moral sense of the legal community towards contract, and with this change a realization that the contract under seal did not satisfy the test except by way of a conclusive presumption. This supposed injustice, an anachronism inherited from an unpopular ancestor, was sought to be remedied by the passing of statutes destroying this quality of the seal, commencing with one in New York as early as 1829. In view of the then accepted effect of a seal, these statutes took the form of saying that the seal was to be no longer conclusive evidence of consideration, but presumptive evidence only, some statutes going even further and destroying the presumption altogether. More than half the states followed suit, but some of them later realized that they had lost a very useful and commercially necessary type of contract, and so reinstated it, while a few others adopted the Uniform Written Obligations Act for the same reason.[13]

---

[9] Brac. 100b.

[10] See an interesting analysis along these lines in Fuller, Consideration and Form (1941), 41 Col. L. Rev. 799.

[11] 2 Bl. Comm. 446.

[12] See 17 Corpus Juris Secundum p. 423, n. 96: "The common-law rule that seal on instrument is conclusive evidence of consideration has been relaxed".

[13] See Lloyd, Consideration and the Seal in New York (1946), 46 Col.

Thus in England the attempt to look upon a seal as consideration had been a failure; that notion remained in the language of that country a mere fiction. In the United States the fiction was mistaken for truth, and the abortive efforts in England had thus, by a miscarriage, borne fruit across the Atlantic. But the truth was not only stranger than fiction; it was also more distasteful, and was therefore hastily remedied.

II. In some American jurisdictions the courts reached the conclusion, unaided by statute, that the seal was merely *prima facie* evidence of consideration,[14] and they did this by means of a double confusion. (1) In actions for specific performance, for declarations of resulting trust on voluntary conveyance, and to set aside voluntary conveyances in fraud of creditors—in short, in all actions where substantial rather than formal consideration is relevant—the question of the presumption of substantial consideration falls to be determined by the rules of pleading. Thus in the specific performance case the plaintiff must prove the necessary kind of consideration. In the case of resulting trust or fraudulent conveyance he would have to disprove it. So the existence of substantial consideration is presumed or not, depending upon the type of action brought. It has never been English law that in the case of a sealed instrument any different rule applies: the seal in such cases does not raise a presumption of substantial consideration. In most of the resulting trust cases and in many of the fraudulent conveyance cases the subject matter is a conveyance of land and this will normally have been by deed, but still the presumption of sufficient consideration arises in those cases because the plaintiff must prove his case, not because of the existence of the seal. By some misapplication of the Blackstonian statement as to a deed importing consideration (which, as written, had no possible application in the cases of substantial consideration but only in those of formal consideration) the American courts came to the conclusion that, though actual consideration could be looked to, the seal did have some part to play, and of course the most it could do was to raise a presumption of sufficient consideration. Hence, in this field of law, we end up with the proposition that the seal is *prima facie* evidence of substantial consideration,[15] and this pro-

L. Rev. 1, and Hays, Formal Contracts and Consideration (1941), 41 Col. L. Rev. 849.

[14] *Gates* v. *Herr* (1918), 172 P. 912; *Ruppert* v. *Franenkneckt* (1909), 146 Ill. App. 397; 2 Bl. Comm. (Lewis's U.S. ed.) 903, n. 38.

[15] 26 Corpus Juris Secundum pp. 601-602; *Dingle* v. *Major*, 101 S.E. 836: "A seal merely imports *prima facie* a consideration, where none is alleged or proved; but it is not conclusive of that issue, where the instrument is

position was frequently put in the form: a seal imports consideration. (2) It was inevitable that some judges, by now hopelessly bewildered, would transpose this last proposition, for which reputable authority now existed, back into the field from which it had been extracted, but with the new meaning of the word "imports".

The progress of errors, then, had taken the form of the following propositions: (a) in the field of common-law remedies in contract, a seal imports (that is, conclusively) consideration (that is, formal consideration); (b) in the field of specific performance, etc., a seal imports (that is, *prima facie*) consideration (that is, substantial consideration); (c) back now in the field of common-law remedies, a seal imports (that is, *prima facie*) consideration (that is, formal consideration).

That this has been the course followed is shown by the fact that the decisions laying down the final proposition, as well as *Corpus Juris*,[16] rely for that proposition on cases in the prior field. The potential ambiguity of the words "import" and "consideration" has, in the metamorphosis, been overlooked.

In Canada, the first of the three propositions just mentioned has never been accepted. The second makes its appearance in *O'Brien's Conveyancing Law and Forms*,[17] no doubt following American cases. The third appears, presumably for the first time,[18] in *Chilliback* v. *Pawliuk*, by reason of Egbert J. relying on the statement in *O'Brien*, but misconstruing it and importing it back into the totally different field of common-law remedies, in exactly the same manner some few American courts had done before him. And so the comedy of errors is repeating itself.

III. At the risk of making a history of confusions confusing in itself, reference should be made to a further ambiguity which has lent apparent weight to the conclusion of Egbert J. A contract

attacked for fraud or undue influence". See the complete confusion of these two fields of law in *Storm* v. *U.S.* (1876), 94 U.S. 76, at pp. 83-84, assisted by Taylor, Evidence (now 12th ed.) § 86.

[16] 13 Corpus Juris p. 315, n. 79, relying, *inter alia*, on *Axe* v. *Tolbert* (1914), 146 N.W. 418; *Ruppert* v. *Franenkneckt*, *ante*, footnote 14, relying on *MacFarlane* v. *Williams* (1883), 107 Ill. 33, and *Mills* v. *Larrance* (1900), 58 N.E. 219.

[17] (9th ed., 1955) p. 958: ". . . if it is under seal the actual consideration need not usually be mentioned, as the seal is said to 'import' consideration, or, in other words, that *prima facie* an actual consideration has passed; and evidence that no consideration actually passed must be given before a court would set aside, on the ground of absence of consideration, an instrument under seal".

[18] The same error had occurred before, also in Alberta, but not as part of the *ratio decidendi*. See Macdonald J.A. and C. J. Ford J.A. in *B.A. Oil Co.* v. *Ferguson*, [1951] 2 D.L.R. 37, at pp. 43, 45.

under seal, without consideration, will ground an action at common law for damages; it is in that sense "enforceable". The same contract would not ground a suit for specific performance in equity; it is in that sense "not enforceable". We can end up with the proposition that absence of consideration precludes any kind of action, legal or equitable, either by the natural confusion resulting from the use of "enforceable" to mean two entirely different things, or by the less defensible conclusion that obviously the common law and equity were in conflict on this matter and equity now prevails by reason of the "fusion" of law and equity in the Judicature Acts. In *O'Brien* we read, with Egbert J., that "although at common law a contract made under seal cannot be revoked, it is otherwise in equity—which now governs in most of the Provinces".[19] There is, of course, no conflict between common law and equity in the matter, and the passage in *O'Brien* is a complete blunder.

To sum up. I. It was sought to rationalize the effect of the seal in terms of consideration. This attempt failed in England but was, by mistake, successful in the United States. II. By a further error, some courts in the United States, and Egbert J. here, wrote that rationalization in terms of a rebuttable rather than a conclusive presumption. III. This result was supported by misapplying the "equity shall prevail" doctrine of the Judicature Acts.

By such confusions we could write out of our law the useful binding unilateral promise—surely a retrograde step at a time when on all sides the policy trend seems to be towards widening the area of the binding promise. A legal institution 800 years old is not necessarily without present-day value.

A. B. WESTON*

* * *

STATUTORY INTERPRETATION—CHILD NOT LEGITIMATED BY SUBSEQUENT MARRIAGE—ENGLISH COURT'S JURISDICTION TO MAKE ORDER FOR CUSTODY.—The decision of the House of Lords in *Galloway* v. *Galloway*[1] will prove of interest to players of the ever-popular legal parlour game known as Statutory Interpretation. In its narrower aspects the case is also a personal triumph for the liberal views of Denning L.J. in his attempts to achieve greater

[19] *Op. cit.*, p. 1228.

*A. B. Weston, LL.B., B.C.L. (Oxon.), Assistant Professor, Faculty of Law, University of Toronto.

[1] [1955] 3 W.L.R. 723 (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Tucker and Lord Cohen).

uniformity of treatment between legitimate and illegitimate children.

The facts of the case arose out of a regrettably common situation in our modern society.[2] The female appellant lived in adultery with a married man and gave birth to a child. Later the man's wife divorced him and he then married the appellant. Under the peculiar wording of the English Legitimacy Act, 1926,[3] this subsequent marriage did not legitimate the child. It should be noted at this point that the various provincial acts in the common-law provinces of Canada are worded differently so that, except in Newfoundland,[4] this situation in *Galloway* v. *Galloway* would not arise because, more sensibly than under the English act, the child would have been legitimated. Later the appellant, in an undefended suit, obtained a divorce on the ground of the husband's desertion and adultery. By way of additional relief she asked for an order giving her custody of the child and making provision for his maintenance. The judge who granted the decree of dissolution refused this application for an order of custody and maintenance on the ground that previous decisions had established that the court had no jurisdiction to make a custody order for the illegitimate children of parties to divorce proceedings.

The statutory power to make custody orders derives from section 35 of the Divorce and Matrimonial Causes Act, 1857, which subsequently became section 26 of the Matrimonial Causes Act, 1950, and reads as follows:

> In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education *of the children the marriage of whose parents is the subject of the proceedings.*[5]

Since other sections of the act dealing with children speak of "children of the marriage"[6] it was clear that something different was intended by the broader expression "children the marriage of whose parents is the subject of the proceedings"; otherwise, presumably, the same expression would have been used in section 26 as in the other sections. However, whilst their lordships in *Galloway* v. *Galloway* agreed that there was a difference between these two expressions, they disagreed (three to two) on what that difference was.

[2] The proponents of wider grounds for divorce may argue that our present divorce laws encourage such adulterous unions.
[3] 16 and 17 Geo. 5, c. 60.
[4] See Legitimacy Act, R.S.N., 1952, c. 164.
[5] Italics added.
[6] *Viz.*, ss. 33 & 45.

The majority (Lords Oaksey, Radcliffe and Tucker) construed the words in the wider sense so as to include any children resulting from the union of a man and woman whose marriage was before the court, whether those children had been born in wedlock or not, and whether they had been legitimated by the subsequent marriage or not. In short, they adopted the interpretation formulated by Denning L.J. in *M* v. *M*[7] and *Packer* v. *Packer*[8] and followed by Singleton L.J., who dissented in the *Galloway* case when it was before the Court of Appeal.[9] In brief, for the purposes of this section the test of parenthood had been substituted for that of legitimacy.

The dissenting minority (Viscount Simonds and Lord Cohen) chose the narrower interpretation, which had been adopted by Morris L.J. in *Packer* v. *Packer* and Jenkins and Hodson L.JJ. in the Court of Appeal's determination of the instant case. This was to the effect that the wording had to be wider in order to give the court jurisdiction in cases of nullity. If the court annuls a marriage, that is declares it never existed, then any children of that *de facto* union cannot be "children of the marriage", but they would be "children the marriage of whose parents is the subject of the proceedings". Hence the broader expression was designed to cover illegitimate children resulting from a "marriage" now annulled, but not all illegitimate children.

The point of construction raised in the *Galloway* case was, so far as the House of Lords was concerned, a matter of first impression. It is true that the point had been considered in a few recent cases of first instance, and by the Court of Appeal in *Packer* v. *Packer* where, because Denning and Hodson L.JJ. were equally divided, the decision of the trial judge had to stand. But this was the first time since the section was enacted nearly a century ago that this particular point of statutory construction of the section had been brought to the final appellate court of England.

In the absence of any binding authorities their lordships were compelled to employ general principles of statutory interpretation and it is in the comments made on some of those principles that Canadian lawyers will find the *Galloway* case of interest.

(i) *The presumption of legitimacy.* As a general rule, in the interpretation of deeds, wills and statutes, the word "child" or "children" is taken to mean legitimate offspring only. But this is

[7] [1946] P. 31. [8] [1954] P. 15.
[9] [1954] P. 312; [1954] 2 All E.R. 143.

only a presumption, which of course can be rebutted. The matter was put thus by Williams L.J. in *Woolwich* v. *Fulham*:[10]

> . . . that is only a prima facie meaning, and in the case of each statute a wider meaning may be given, which would include illegitimate children if the effect is more consonant with the object of the statute.

This statement of the rule, which has hitherto always been regarded as impeccable, caused some concern to Viscount Simonds in the *Galloway* case. He considered that it was not

> . . . an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreover, capable of leading and, I think, has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself.[11]

Lord Radcliffe criticized it on the ground that

> . . . it is a very vague one: but on the other hand it seems to me uncontroversial to say that the prima facie meaning will be displaced if the context in which the word 'child' appears evidently requires it to embrace a wider category than that of legitimate children.[12]

Lord Oaksey however adopted the passage *in toto*, even to the extent of following its precise language, when he said:

> In my opinion it is more consonant with the object of the Act of 1857 that jurisdiction over the custody and maintenance of illegitimate children as well as legitimate children should be conferred upon the Divorce Court in all proceedings referred to in the section.[13]

The essential question, however, was whether this undoubted presumption of legitimacy (or against illegitimacy) was rebutted by the particular circumstances of the section under review. Viscount Simonds thought very strongly that it was not. His lordship agreed that section 26 would cover certain illegitimate children but not all. He did not think it unjustifiable to limit the operation of the section to the smaller class of illegitimates resulting from annulled marriages. He stated:

> The section is dealing with a marriage of which children have been born; it does not look behind it. It is a natural and proper use of language to speak of the children of that union as children the marriage of whose parents is the subject of such suit even though the result of the suit is to annul the marriage. They are the children who are affected by the result of the suit, as other illegitimate children are not, and it is proper that the court having by its decree affected their status should be empowered to provide for them.[14]

---

[10] [1906] 2 K.B. 240; 22 T.L.R. 579.
[11] [1955] 3 W.L.R. 723, at p. 726.
[12] *Ibid.* at p. 733.
[13] *Ibid.* at p. 731.
[14] *Ibid.* at p. 729.

Lord Cohen reached the same conclusion after an intensive analysis of the origins of the section and its subsequent history. Section 35 of the 1857 act was the only one to refer to "children the marriage of whose parents is the subject of such suit . . ." and the phrase could only be explained, in his opinion, as appeared from the judgment of Cotton and Fry L. JJ. in *Langworthy* v. *Langworthy*[15] by the fact that the section included decrees of nullity of marriage:

> I find it impossible to hold that by the change of expression in section 35 the legislature did more than enable the court in the case of suits of nullity to make similar provision for children born between the date of the ceremony of the marriage which was the subject-matter of the suit and the date of the decree to that which the court could make for legitimate children in suits for dissolution of marriage or judicial separation.[16]

The majority of their lordships considered that, having once reached the conclusion that the wording of the section was intended to include some illegitimate children, it was impossible to further qualify it so as to exclude other illegitimates. This view was expressed very clearly by Lord Radcliffe who said:

> . . . if the rule as to the prima-facie meaning of 'children' is displaced in this subsection, it is displaced for good, and . . . it cannot be allowed to come back, as it were, for a second bite by confining the illegitimate children contemplated to those born after an ostensible but void ceremony of marriage. . . . I do not think that it is a right application of the rule of construction to read the word as extending to illegitimate children, but only to as few of them as possible.[17]

(ii) *Established practice or usage.* The very novelty of the point of construction raised in *Galloway* v. *Galloway* gave rise to the argument that it must be regarded as established law that the section excluded illegitimate children, other than those born of a marriage since annulled. The argument found favour with Jenkins L.J., when the case was before the Court of Appeal, who described it as the "received interpretation of section 26(1) and its predecessors over as long a period",[18] and with Viscount Simonds in the House of Lords who said:[19]

> . . . I concede that your Lordships are at liberty to give to these words a meaning which in their hundred years of life they have not yet borne. Yet it may be right to pause before you do so. . . . The reported cases in which the contention might have been raised are numerous: . . . I

[15] (1886), 11 P.D. 85; 2 T.L.R. 373.
[16] [1955] 3 W.L.R. 741. [17] *Ibid.* at p. 733.
[18] [1954] P. 312, at p. 333; [1954] 2 All E.R. 143, at p. 155.
[19] [1955] 3 W.L.R. 741, at p. 729.

> cannot even conjecture the number of unreported cases. Yet to generations of lawyers on the Bench and at the Bar, learned in this branch of the law, it did not occur that the words had the meaning now attributed to them, a fact the more strange if, indeed, it is a meaning more consonant with the policy of an Act with which nobody could be more familiar than they.

Lord Radcliffe, however, was not prepared to deduce authority from a lack of authority. Since there was no previous decision of the House of Lords on this matter he thought it was a "large claim" to say "that there has been an authoritative judicial interpretation over a period from which your Lordships ought not now to depart". Moreover, he observed, in this case it was not sought to deny a jurisdiction hitherto asserted, but to assert a jurisdiction not hitherto exercised.[20]

Lord Tucker, one of the majority, did state that if there had been a considerable body of authority, although not binding on the House, which had been acted upon for many years, and which must be assumed to have been in the mind of Parliament on the occasions when section 35 of the act of 1857 had been amended or re-enacted, he would have felt obliged to adopt the narrower construction.[21]

(iii) *Meaning of the words at the time the statute was passed. Maxwell on the Interpretation of Statutes*[22] states:

> The words of a statute will, generally, be understood in the sense which they bore when it was passed. . . . In a Consolidation Act it will be found that the language bears the meaning attached to it in the original enactment.

In the *Galloway* case the House of Lords was concerned with the interpretation of a statutory provision, originally enacted in 1857, then part of the Judicature (Consolidation) Act, 1925, and finally a part of the Matrimonial Causes Act, 1950, a further measure of consolidation. The argument was advanced that the provision should be interpreted as it would have been interpreted in 1857, and that any concern with what might be called the "policy of the act" must be limited to the ascertainable policy of the act of 1857. Viscount Simonds said that the answer to the question whether the word "children", in the phrase "the children the marriage of whose parents is the subject of the proceedings", included illegitimate children could not be different from the one that would have been given in 1857:[23]

---

[20] *Ibid.* at p. 734.
[21] *Ibid.* at p. 739.
[22] (10 ed., 1953) pp. 59-60.
[23] *Loc. cit.* at p. 726.

> The question is . . . to be decided by an examination of the relevant words in the context of the statute in which they are found and the then prevailing general law.[23]

Lord Tucker, in rejecting this approach, which he aptly described as looking at the section "through 1857 spectacles", did so on two grounds. Firstly, he was not convinced that Parliament in 1857 was totally unconcerned with illegitimate children since the act did in fact make provision for them. Secondly, even assuming that the Parliament of 1857 did have little regard for illegitimate children, this was not

> a sufficient ground for not construing the section strictly in accordance with its language. Purely as a matter of construction it would seem to me that Parliament, having deliberately chosen a form of words which can only have one meaning with reference to one class of proceeding, and having used the same words with reference to two other classes in a section which is prefaced with the words 'in any proceedings', these words must necessarily bear the same meaning throughout. I agree with the view expressed by Denning L.J. in *Packer* v. *Packer*,[24] that any other construction requires the section to be rewritten, and that by the language adopted the test of parenthood has been substituted for legitimacy.[25]

(iv) *The policy of the statute.* One of the most difficult problems in the field of statutory interpretation is whether the interpreter should arrive at his interpretation regardless of the consequences, or approach his task in a less impartial manner and thereby, in cases of doubt, adopt that construction which the legislature might reasonably have been expected to adopt had its attention been drawn to the obscurity. This choice is in itself one of the greatest difficulty. But the task is even more difficult when it is fairly evident that the particular circumstances under review were never within the contemplation of Parliament at the time the act was passed. Should the judge "fill in the gap" or merely point to its existence and presume that appropriate legislation will be forthcoming. The latter course represents the traditional approach and was the one adopted by Morris L.J. in *Packer* v. *Packer* and the minority of their lordships in *Galloway* v. *Galloway*. Viscount Simonds in the *Galloway* case saw danger in taking as a guiding rule that the meaning should be given to words which is "more consonant with the policy of the statute". He suggested that in the instant case that rule "has led the court to find the policy of the Act in its own predilections of a later age than in the provisions of the Act itself",[26] and that the view of the majority was "based not

[24] [1954] P. 15.
[25] *Loc. cit.* at p. 738.
[26] *Ibid.* at p. 726.

on any policy which is to be found in the statute as a whole but upon a conviction that the Legislature ought to have provided for illegitimate children . . . ".[27] The traditional answer to this heresy is, of course, that,

> if what I think was justly called . . . a revolutionary change is to be made in the law it should be made by the Legislature by such plain words as in modern times it has been accustomed to use when it has intended to confer advantages or impose obligations in respect of children whether legitimate or illegitimate.[28]

To this forthright argument the majority in the *Galloway* case had no real answer. Only Lord Tucker came near to acknowledging that the majority, to use Viscount Simonds' apt phrase, was concerned with "its own predilections of a later age". Though adopting what was clearly a liberal construction of the section, Lord Tucker called it a strict construction and justified its adoption on the ground that it enabled "the court to do that which justice clearly requires in the interests of an infant child. . . ".[29]

The singular conclusion to be drawn from a reading of *Galloway* v. *Galloway* is, surely, that "rules" of statutory interpretation, to adopt Montesquieu's observation of the British constitution, "n'existent pas".

ERIC C. E. TODD*

* * *

CONFLICT OF LAWS —WILLS —EXTRINSIC VALIDITY IN QUEBEC OF HOLOGRAPH WILL EXECUTED ELSEWHERE —CHARACTER OF RULE *LOCUS REGIT ACTUM*. —The question whether a holograph will,[1] which complies with the requirements as to form of the law of the testator's domicile or, if he is disposing of immoveables, of the law of their situation, is to be regarded as valid in Quebec, although it does not conform with the law of the place where it was executed, has been raised again in this province by a recent decision of the Superior Court, *Bellefleur* v. *Lavallée*.[2]

Article 7 of the Quebec Civil Code provides that:

---

[27] *Ibid.* at p. 727.
[28] *Ibid.* at p. 730.
[29] *Ibid.* at p. 739.

*Assistant Professor of Law, University of British Columbia.

[1] A holograph will is a will completely written and signed by the testator (article 850 C.C.). For other forms of wills see article 842 of the Quebec Civil Code.

[2] [1955] R.L. 1 (Brossard J.). Conversely, is a will complying only with the requirements as to form of the place where it was executed to be regarded as valid in other places? Of course the intrinsic validity of a will remains subject to the proper law governing the succession.

> Acts and deeds made and passed out of Lower Canada, are valid, if made according to the forms required by the law of the country where they were passed or made.

Does this article mean that a Quebecer travelling abroad must always make his will in the form required by the *lex loci actus*, or may he choose among the forms of the *lex loci actus*, the *lex domicilii* and the *lex rei sitae*? This has been a moot question in the civil law for the last seven centuries and even now uncertainty exists in Quebec. Article 7 is not clear. It is difficult to determine whether, in Quebec, the rule expressed by the famous maxim *locus regit actum* is to be regarded as imperative or permissive. The Codifiers are not particularly helpful. All they say is that:[3]

> These Articles [7-8] are not to be found in the Code Napoleon; however the Commissioners have thought it right to adopt them owing to the importance of the rule which they enounce, and the frequent use that is made of them; conforming in this respect to the example of the authors of the Code of Louisiana and of those of several others.
>
> At any rate they contain no innovation; they are conformable to our present jurisprudence.

And the authorities upon which they relied are far from conclusive.[4] In order to determine the character of article 7, it is necessary first to examine its historical background and then to analyze it in the framework of the code as a whole.

In France until the 16th century a will was valid only if it was made in accordance with the forms of the Roman law, or with those of the law of the testator's domicile,[5] or, if immoveables were involved, with those of the law of the place where the immoveables were situated. Long before the 16th century, however, the authors in France and Italy began to concern themselves with the extrinsic validity of a will made according to a *coutume* different from the one prevailing in the place where the testator was domiciled or where his immoveables were.[6] Could a foreigner, they began to inquire, make a valid will by complying only with the forms provided for by the local custom? During the 14th century Bartolus in Italy argued that such a will should be valid regardless of domicile or the nature of the property affected.[7] This view, ex-

---

[3] Second Report of the Commissioners appointed to codify the Laws of Lower Canada in Civil Matters, Vols. I-III (1865), pp. 145-146.

[4] de Lorimier, La Bibliothèque du Code Civil de la Province de Québec (1871), Vol. I, pp. 141 *et seq.*

[5] Formalities were held to be part of the personal status of the testator.

[6] The nullity of a will made contrary to the *lex loci actus* was never asserted by the Italian jurists.

[7] De Summa Trinitate (1555), In leg. Cunctos populos, No. 23: "Non obstat quod dicitur, quod est temeraria; quia imo utilis et bona et favor-

pressed in the phrase *locus regit actum*, prevailed almost immediately in Italy and, two centuries later, in France.[8]

When the early authors discussed the rule *locus regit actum* they apparently had in mind only wills made in authentic form. The arguments they advanced for the rule were based mainly on convenience and necessity. Take, for example, the case of a person away from his domicile and in danger of death who wishes to make a will and suppose, to simplify the illustration, that he is possessed of no immoveables. Normally he would consult a local public officer, but neither the testator nor the public officer might be familiar with the provisions of the *lex domicilii* on the form of wills. Even if they were, how could a local public officer authenticate a will unless he observed the formalities required by the law from which he derived his authority?[9] Probably the only will he could authenticate was one made in accordance with the local law. And, if the will were null where made, it could not have any effect elsewhere, even if it followed the form required by the *lex domicilii*. Thus when a foreign testator resorted to a local public officer, the rule *locus regit actum* was necessarily imperative. Similar considerations applied where the testator's estate consisted of immoveables in another jurisdiction or jurisdictions, except here of course the concern was with the *lex* or *leges rei sitae* not the *lex domicilii* and the difficulty arose whether the testator sought to make his will at his domicile or in any jurisdiction other than the situation of the immoveables. To force a testator in all cases to follow the forms of the *lex domicilii* or the *lex rei sitae* would have been highly impracticable or impossible and also, it was argued, would have been incompatible with the freedom of disposing by will.[10]

The argument for making the rule *locus regit actum* imperative in the case of authentic wills did not apply to holograph wills. In

---

abilis, facta tam ratione testantis, sicut jura statuunt in militantibus, quam etiam ratione eorum quibus reliquitur sicut jura faciunt inter liberos, etiam ratione testium ne a suis negotiis avocentur".

[8] In general see: Lainé, Introduction au droit international privé (1892), II, pp. 328-428; De la forme du testament privé en droit international privé, [1907] Revue de Droit International Privé et de Droit Penal International 833 (hereinafter cited as "Revue"); Surville, La règle "locus regit actum" et le testament (1906), 33 Journal du Droit International Privé 961 (hereinafter cited as "Journal"); Johnson, Maxims of the Civil Law (1929) pp. 33 *et seq.*; Gonzalo e Parra A., La regla "Locus regit actum" y la forma de los testamentos (1955), Ch. VIII, p. 227.

[9] Usually a notary. Note that in certain circumstances a Quebec notary may receive a deed outside the province (article 1208 C.C.).

[10] Rodenburgh, De jure quod oritur ex statutorum vel consuetudinum diversitate, Tit. 2, Cap. 3, Nos. 1 *et seq.*

the case of a holograph will there was no reason to require the testator to follow the law of the place where the will was executed, since he did not have to resort to a local public officer. It might have been thought that the logical consequence would have been to restrict the maker of a holograph will to his domiciliary law or, if immoveables were involved, to the *lex rei sitae*. But in fact the authors, accustomed to the arguments favouring *locus regit actum* for authentic wills, were prepared to admit it as an exception for holograph wills on grounds of convenience. Generally the authors considered that the rule *locus regit actum* should not be imperative since it was intended only to supplement the traditional rules.

The distinction between authentic and holograph wills was clearly drawn during the 17th century by John Voet,[11] Rodenburgh[12] and Schotanus,[13] who favoured making the rule *locus regit actum* permissive for holograph wills. Loisel, Charondas, Basnage and Dumoulin,[14] though frequently cited in this connection, did not analyze the character of the rule and Froland,[15] though raising the problem, did not distinguish between authentic and holograph wills. Furgole[16] favoured making the rule imperative for both authentic and holograph wills. Pothier[17] set forth the two possibilities but expressed no personal opinion, although he conceded that the imperative character of the rule was recognized by the courts. Boullenois[18] was uncertain which view should prevail. Ricard[19] and Bouhier,[20] after analyzing the whole problem both from a historical and logical point of view, came to the conclusion that the rule should be permissive for holograph wills.

Unfortunately, in 1721, the *Parlement de Paris* in the celebrated

[11] Comm. ad Pand. (ed. 1778), Lib. I, appendices to tit. 3 and 4; de Statutis, Nos. 10 and 13.

[12] *Ante* footnote 10.

[13] Disput. Jurisprud., No. 20: "Solemnitates actus pertinent non tam ad eum locum ubi quid agitur quam ad domicilii locum".

[14] Dumoulin, Consilium, Liv. III, no. 9, and Conclusiones de statutis et consuetudinibus localibus, Opera, liv. III, p. 557; Loisel, Institutes coutumières (ed. 1783), liv. 2, tit. 4, règles 3 and 4; Charondas, Memorables Observations, au mot Coutume; Basnage, Oeuvres (4th ed.), t. 2, Des testaments, p. 185.

[15] Memoire sur les statuts (1729) p. 136.

[16] Testaments (1777), I, Ch. II, s. II, no. 22.

[17] Traité des donations testamentaires, Ch. I, art. 2, s. 1, no. 9 (ed. Bugnet, 1861), VIII, p. 228.

[18] Personnalité et realité des lois (1766), I, Tit. 2, Ch. 3, Observ. 21, pp. 427 *et seq.*, and II, Tit. 2, Ch. 3, Observ. 34, pp. 73 *et seq.*; Démission des biens (1727), Quest. 6, pp. 140-141; Dissertation (1732) pp. 5-7 (cited by de Lorimier, *op. cit.*, Vol. I, p. 145).

[19] Traité du don mutuel (ed. 1754), Ch. VII, nos. 306-307. But see Traité des donations (ed. 1754), Part I, Ch. 5, s. 7.

[20] Obs. sur Coutumes de Bourgogne (1742), Ch. 23, nos. 81 *et seq.*, p. 665, and Ch. 28, nos. 20 *et seq.*, p. 765.

case of *de Pommereu*[21] failed to recognize the well established distinction between authentic and holograph wills and, varying the usual argument, held that convenience required that the rule *locus regit actum* be imperative in all cases. Although legal writers and practitioners reacted violently against the decision, which in their opinion erroneously interpreted the old law,[22] it was confirmed by later cases.[23] Thus a doctrine which came into the law by way of exception became the rule and regard was no longer had to the *lex domicilii* or *lex rei sitae*. As Lainé pointed out:[24]

> L'habitude se forma, dans le droit coutumier d'exprimer cette règle en termes brefs, concis, absolus, qui se condenserent encore à la longue en la maxime *locus regit actum* d'un ton imperatif. Alors, la forme l'emporta sur le fond; on perdit de vue l'origine de la règle, les besoins qui l'avaient fait naître et qu'elle était simplement destinée à satisfaire, et l'on finit par l'entendre à contre sens.

Criticism of these decisions continued. It was felt that the doctrine of the *Parlement de Paris* was not binding, since it did not apply a particular provision of any custom or ordinance of the kingdom.[25] This argument was expressed by Merlin in 1806:[26]

> Tout se reduit à savoir, si la regle *locus regit actum* est fondée sur quelque loi ou si elle n'a pour appui que les opinions plus ou moins uniformes d'auteurs et jurisprudence plus ou moins constante d'arrêts. Car, si aucune loi ne l'a consacrée, il est evident que la Cour d'appel de Liege a pu la méconnaître impunément et que le jugement de cette Cour ne peut être annulé pour avoir préféré aux auteurs et aux arrêts qui la sanctionnent les auteurs et les arrêts qui la combattent.

---

[21] 15 Janvier 1721, 7 Journal des Audiences, p. 515. Here a will had been made in the holograph form by a testator, whose domicile was in Paris, while temporarily in Douai where that form was not recognized. Cf. Merlin, Rep. Testament, Vol. 17 (5th ed., 1828), s. II § IV, art. II, pp. 534 *et seq.*

[22] Boullenois, Personnalité et realité des lois (1766), I, Tit. 2, Ch. 3, Observ. 21 at p. 433.

[23] Parlement de Paris, 14 juillet 1722, 7 Journal des Audiences 689; 15 juillet 1777, Merlin, Rep. Testament, Vol. 17 (5th ed., 1828), s. II § IV, art. II, p. 538.

[24] Introduction au droit international privé (1892), II, p. 397; La redaction du Code Civil et le sens de ses dispositions en matière de droit international privé, [1905] Revue 443, at p. 475.

[25] The rule *locus regit actum* was analyzed in connection with article 289 of the Custom of Paris (N.C.). However this article, which deals with holograph and authentic wills, does not adopt either view. It only states: "Pour réputer un testament solennel, est requis qu'il soit écrit et signé du testateur, ou . . ." (Ferrière, Corps et compilations de tous les commentateurs anciens et modernes sur la Coutume de Paris (2nd ed.), Vol. IV (1714), pp. 74 *et seq.*, glose première). See also article 126 of the Ordinance of 1629, which was registered by "lit de justice" and thus was not considered as having the force of law within the jurisdiction of the *Parlement de Paris*, and article 19 of the Ordinance of 1735.

[26] Decision of 28 Ventose An XIII, Merlin, Rep. Testament, Vol. 17 (5th ed., 1828), s. II § III, Art. VIII, p. 520.

Thus, at the time of the enactment of the Napoleonic Code in 1804, the law was far from being settled, although the *Parlement de Paris*, and some other courts, had continued to follow the *Pommereu* decision.

The draft of the Napoleonic Code, presented for discussion by the French government in 1800, contained an article (no. 6) similar in substance to article 7 of the Quebec Civil Code, which provided that:[27]

> La forme des actes est réglée par les lois du lieu dans lequel ils sont faits ou passés.

The draft also provided for several applications of this general rule, which later on became articles 47, 170 and 999, while the general rule disappeared. In the opinion of the drafters the principles embodied in the maxim *locus regit actum* were[28]

> . . . des règles générales de jurisprudence . . . qu'il est dangereux de vouloir convertir en articles de lois parcequ'elles sont sujettes à de frequentes exceptions parcequ'elles deviendraient fertiles en applications fausses, en consequences funestes.

The French legislators were not prepared to do way with the rule, and yet did not want to codify it for fear that its sweeping generality would be interpreted as making compliance with it imperative, whereas their intent was merely that it should be permissive.[29] Thus, they adopted a compromise and, in article 999, stated:

> Un français qui se trouvera en pays étranger, pourra faire ses dispositions testamentaires par acte sous signature privée, ainsi qu'il est prescrit en l'article 970, ou par acte authentique, avec les formes usitées dans le lieu ou cet acte sera passé.

This provision ensured the permissive character of the rule and was interpreted by the courts as allowing a Frenchman abroad to execute his will either according to the local form or according to French law. As the Napoleonic Code did not specifically deal with the case of foreigners making their wills in France, the French courts were uncertain whether to apply article 999 to them or not. For some time they held that foreigners, temporarily in France, had to comply with the forms of French law exclusively, thereby giving an imperative character to the rule *locus regit actum*. In 1909, however, the *Cour de Cassation* held that the rule was per-

---

[27] Fenet, Receuil complet des travaux préparatoires du Code Civil, II, p. 6.

[28] *Ibid.*, VI, p. 241.

[29] Naquet, La règle "locus regit actum" est elle imperative ou facultative? (1904), 31 Journal 39; Bilciuresco, La forme des actes juridiques en droit international privé p. 35.

missive and that a foreigner in France had the choice of making his will either according to the law of his nationality or the law of France.[30] This decision, which removed any distinction between foreigners and Frenchmen, has been followed ever since.[31]

The Louisiana Civil Code, which is also relied upon by the Quebec Commissioners, incorporates the rule *locus regit actum* in its article 10, which provides in part that:

> The form of and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed. . . .

This article, corresponding with article 6 of the French draft of 1800, differs substantially from article 7 of the Quebec Civil Code, as the language of article 10, taken by itself, is clearly imperative. In order to meet the doubts expressed by the French drafters, the Louisiana codifiers limited the generality of article 10 by special provisions designed to ensure the permissive character of the rule in the case of holograph wills. For instance, article 1588 of the Louisiana code states:

> The olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form and may be made anywhere even out of the State.

It follows from this provision that a person temporarily absent from the state may make his will abroad in the Louisiana form. This would be the only form of which he could avail himself,[32] if article 1597 of the code did not provide that:

> . . . testaments made in foreign countries, or the States and other Territories of the Union, shall take effect in this State, if they be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made.

The two articles, 1588 and 1597, read together show the essentially permissive character of the rule *locus regit actum* in Louisiana as regards holograph wills. The testator may resort either to the form of the *lex loci actus* or to the form of his domicile. Since the Que-

[30] *Gesling* v. *Viditz* (several decisions were rendered in this case, namely, Seine, 21 dec. 1894 (1895), 22 Journal 387; Seine, 28 juin 1895 (1895), 22 Journal 847; Paris, 2 dec. 1898 (1899), 26 Journal 585; Cass. Req. 1900, not reported; Cass. Civ., 29 juillet 1901 (1901), 28 Journal 971; Orléans, 24 février 1904 (1904), 31 Journal 680; Cass. Req., 12 juillet 1905 (1905) 32 Journal 1045; Cass. Civ., 20 juillet 1909 (1909), 36 Journal 1097, Sirey 1915, I, 165).

[31] Amiens, 11 dec. 1912 (1913), 40 Journal 947; Alger, 26 mai 1919 (1920), 47 Journal 241; Seine, 23 février 1921 (1923), 50 Journal 946.

[32] Article 1595 of the Louisiana Civil Code; compare Quebec article 855 C.C.

bec Commissioners have worded their article 7 differently, by using the word "if", this article should be construed as permissive. At most its terms are affirmative or declaratory, but certainly not imperative. In Quebec there was no need, therefore, to insert special provisions to affirm the permissive character of the rule in the case of wills, as was done in France and Louisiana.

It is possible to conclude this historical analysis by stating that, but for certain decisions of French *parlements*, the preponderance of authority supported the view that the rule *locus regit actum* was permissive as regards holograph wills. Such decisions as there have been in Quebec support this view.

As early as 1894 the Supreme Court of Canada, in *Ross* v. *Ross*,[33] considered the problem. In this case, a testator domiciled in the province of Quebec made in 1865, while temporarily in the state of New York, a holograph will. This form of will was not recognized in New York and it was contended that, since the rule *locus regit actum* was imperative in Quebec, the will was invalid for not complying, as to form, with the law of New York. The Court of Queen's Bench (Appeal Side)[34] relied upon the decisions of the *Parlement de Paris*, on the ground that the Custom of Paris prevailed in Quebec when the will was made, and the five judges unanimously came to the conclusion that the rule *locus regit actum* was imperative.[35] It was admitted, however, that the opinion most generally accepted favoured the permissive character of the rule. On appeal to the Supreme Court, the three common-law judges examined the history of the rule and found that in old France its character was not firmly established as a rule of settled law. Taking into consideration not only the history of the rule in France but also developments in the province of Quebec since the cession, the majority concluded that it was essentially permissive. The Chief Justice stated:[36]

> First, I am of the opinion that the rule *locus regit actum* was not before the enactment of the Code (nor since under the Code itself, Art. 7) imperative, but permissive only. The jurisprudence is, it is true, con-

---

[33] 25 S.C.R. 307 (Strong C.J., Sedgewick, King, Fournier and Taschereau JJ.).

[34] (1893), 2 Q.B. 413 (the judgment of the court was rendered by Lacoste C.J.). For the judgment of the Superior Court see (1892), 2 S.C. 115 and 8.

[35] Although the Custom of Paris applied to Quebec, there is no reason why the decisions of the *Parlement de Paris* should be binding in this province, especially after the creation of the *Conseil Souverain* in 1663. The *Pommereu* decision was rendered long after 1663. See also *ante* footnote 25.

[36] At p. 328.

> tradictory, but Pothier treats it as an unsettled point, and such great authorities as Boullenois, Ricard, Massé, Mailher de Chassar, Wharton, Story, Westlake, and I may say all modern writers whose opinions are entitled to weight are in favour of *locus regit actum* being regarded as permissive only. To hold it to be imperative would be harsh and unreasonable, entirely at variance with the policy of the law of Lower Canada since the Quebec Act, 1774, which favours the exercise of the testamentary power instead of discouraging it, as was the policy of the old law of France, and most arbitrary in making the sufficient execution of a will depend upon the locality of a testator who, whilst *in transitu* makes his will according to the forms of his own domicile. Viewed as permissive only the rule *locus regit actum* is, on the other hand, most beneficent and reasonable since it enables a testator who wishes to make an authentic will to avail himself of the notaries and public officers of a foreign country through which he may be passing at a time when he would not be able to avail himself of the instrumentality of the notaries and public officers of his domicile. I therefore conclude that the will was good because made in strict accordance with the law relating to holograph wills prevailing in the province of Quebec, in which province the testator was domiciled, both at the time of the will and at the time of his death.

The minority, the two judges from Quebec, thought with the court of appeal that the rule was imperative. Although seven judges trained in the civil law, five in the court of appeal and two in the Supreme Court, had favoured the views expressed by the *Parlement de Paris*, Quebec legal circles hailed the decision of the Supreme Court as a major step in the development of the law in this field. Lafleur stated that:[37]

> . . . there can be no two opinions as to the desirability on grounds of justice and expediency, of considering the rule *locus regit actum* as permissive or facultative.

Other authors, such as Langelier,[38] Sirois,[39] Lavallée[40] and Trudel,[41] have also approved of the Supreme Court's opinion.

More than fifty years elapsed[42] before the point was considered again in a reported case, in 1955 by the Superior Court in *Bellefleur* v. *Lavallée*.[43] In this decision, Brossard J. followed the

---

[37] The Conflict of Laws (1898) p. 136. Mr. Lafleur as counsel for the appellants had defended the imperative character of the rule before the Supreme Court (1894), 25 S.C.R. at p. 314.

[38] Cours de droit civil, Vol. I (1905), pp. 81-83.

[39] Loi applicable en matière de formalités testamentaires (1907-8), 10 R. du N. 90; De la forme des testaments (1907) pp. 366, 369.

[40] Le règlement des successions (1925-26), 28 R. du N. 371.

[41] Traité de droit civil du Québec (1942), Vol. I, p. 55.

[42] Lafleur had hoped that the Privy Council would resolve the conflict, which placed the court of appeal in opposition to the Supreme Court, *op. cit.*, p. 136.

[43] [1955] R.L. 1.

Supreme Court in a carefully reasoned opinion, in which article 7 was considered in the light of other provisions of the Civil Code. The facts of the case are simple. In 1951, a school teacher, then and at the time of her death domiciled in the province of Quebec, executed a holograph will while temporarily resident in British Columbia, which does not recognize the holograph form. Again the sole issue for the court was whether the rule *locus regit actum* is imperative or permissive. In reaching the conclusion that it is permissive, the Superior Court, unlike the Supreme Court in the *Ross* case, had to consider the construction of article 7. The court referred to the conflicting views of the authorities, but rightfully felt that, since the enactment of the Civil Code, there were additional reasons for holding that the rule is merely permissive.

Brossard J. began with a literal analysis of article 7, which, in his opinion, is merely "affirmatif ou déclaratoire". Consequently, article 7 does not compel Quebec courts to apply the foreign law exclusively. It is impossible, the court thought, to conclude that when the Codifiers stated that acts made out of Lower Canada are valid if in accordance with the form required by the law of the country where they were passed they intended to prevent a testator domiciled in Quebec, but travelling abroad, from resorting to the law of his domicile. In order to make the rule imperative, in other words, the Codifiers would have had to use other phraseology, say something like that of article 10 of the Louisiana Civil Code or article 6 of the French draft of 1800. Since they did not, the presumption is that they intended article 7 to be permissive. At most the language of the article is ambiguous; it is certainly not imperative. Failing to find unequivocal support for the permissive character of the rule *locus regit actum* in the language of article 7, the court decided to examine the article in the light of other provisions of the code.

The court first examined the Quebec procedural rules governing proof of a foreign law and found that only where the foreign law is pleaded and proved may a court apply it. In the absence of such proof, the foreign law is deemed to be similar to Quebec law. Thus, in the opinion of Brossard J., since the *lex loci actus* can be applied only at the option of the parties to the action or one of them, the application of the *lex loci actus* is permissive. If the application of the foreign law were imperative, a court would be bound to apply it on its own motion. Brossard J. concluded that the foreign law may be invoked to validate a will made abroad which would be invalid according to the law of Quebec, but can-

not be invoked to invalidate a will complying with the formalities of the domicile. The argument is ingenious, but in this writer's opinion should be rejected, the conclusions arrived at by the court not necessarily following from the premises. Furthermore, it is always dangerous to resort to procedural rules in construing substantive provisions, particularly so in the present case where the court's argument ignores the origin of the rule on proof of foreign law in the forum and the reasons for it.

Brossard J. then drew support from the permissive character of article 8 of the Quebec code, which enables the parties to a deed to select the law which will be applied in construing it. Reasoning by analogy, the court concluded that it would be illogical to allow the parties to choose the substantive law to govern their deeds, and not to allow them to choose the law governing the form of those deeds. In short, how can article 8 be permissive and article 7 imperative? This argument carries greater conviction, although in the case of wills the analogy seems strained on a strict reading of article 8. The article speaks only of "deeds", a word which is ordinarily taken as referring to contracts. Quebec courts and authors have extended the provisions of article 8 to wills, however,[44] and the court's reasoning can be justified on that ground.

Next the court considered article 7 in combination with article 135, which provides in part that:

> A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid if solemnized according to the formalities of the place where it is performed. . . .

This article has been construed by the Privy Council as being imperative since, in their opinion, it expresses the doctrine of international law.[45] If the Codifiers had considered article 7 imperative, they would not have repeated the rule in article 135. It follows that both articles should not be given the same effect, although prima facie their wording is substantially analogous. In other words, it is not because article 135 is expressed in imperative terms (in fact, as in the case of article 7, its language is merely affirmative) that the *lex loci actus*, in the case of marriage, must apply, but because the article sets out a universal rule. The Codifiers must have had a special purpose in mind when they drafted article 135, which otherwise would have constituted a repetition of article 7. The point is well taken. Article 7 must be read with other articles of the code if each is to be given its full effect.

[44] Johnson, The Conflict of Laws, Vol. III (1937), pp. 59 *et seq.*; *Ross* v. *Ross* (1893), 2 Q.B. 413, at p. 419.

[45] *Berthiaume* v. *Dastous*, [1928] K.B. 391, [1930] A.C. 79.

The last argument advanced to support the court's conclusion is also convincing.[46] In 1902 the following provision was added to article 857 of the code:

> When any person who has had and has ceased to have his domicile in the Province of Quebec, dies outside the said province, having made, outside the said province, a will which is valid under our laws, and such person leaves property in the Province of Quebec, such will may be proved in this province in any district in which he may have left property, as if it had been made, and such person had had his domicile therein.

It results that a holograph will made abroad by a person who has been domiciled in Quebec, which disposes of property in the province, is valid in Quebec, once verified, until set aside if it is valid under Quebec law. If the legislature did not think it necessary to enlarge this provision to enable a person domiciled in Quebec to make his will abroad according to the form required by the law of his domicile, it is not because it has been more generous to former domiciliaries than to Quebecers, but because persons domiciled in Quebec are already covered by article 7. There would have been no need for duplication.

On the whole the decision of the Superior Court in the *Bellefleur* case is sound. Although all the arguments in favour of the permissive character of article 7 are not equally convincing, their combined effect will be hard to overcome. The great merit of the decision is its construction of the article in the light of other provisions of the Civil Code, a method essential in the interpretation of a code.[47] Brossard J. has broken new ground and his decision constitutes a constructive attempt to sustain on historical and logical arguments a rule which is essentially equitable. The decision is also in accord with the spirit of private international law, the ultimate aim of which is to facilitate international relations.

Assuming for the moment that the rule *locus regit actum* is permissive, is it necessary to take into consideration the nature of

---

[46] It had already been mentioned by Lavallée, *ante* footnote 40.

[47] This case, which is now pending before the court of appeal, was noted briefly by Me Turgeon, Locus regit actum (1955), 58 R. du N. 124. As Merlin pointed out (Rep. Testament, Vol. 17 (5th ed., 1828), s. II § III, art. VIII, p. 505), it can also be argued that since holograph wills need contain no indication as to date or place of execution, " . . . il est assez naturel d'en conclure que ce n'est pas la loi du lieu ou l'on écrit, ou l'on signe une pareille disposition, que l'on tient le droit de tester dans cette forme, puisqu'autrement il serait impossible de constater si, en lestant dans cette forme, on a fait une chose permise ou defendue par la toi du lieu ou l'on a testé. Cf. Quebec Civil Code, articles 850 and 854; the Custom of Paris, art. 289; Ferrière, *op. cit.*, Glose première, no. 8, p. 78.

the property disposed of by holograph will so as to modify the generality of the rule? In other words, should the *lex rei sitae* govern the formal validity of holograph wills disposing of immoveables even to the exclusion of the *lex loci actus*? There seems to be no reason why a will dealing with immoveables, in whatever form, should be declared invalid merely because it does not comply with the form of the *lex rei sitae*. Once valid by the *lex loci actus*, a will should be recognized in Quebec, even if the testator has not followed the form of the *lex rei sitae*, which may of course be Quebec law.

This view prevailed at an early date in most European countries. Thus, John Voet[48] stated that, although normally the *lex rei sitae* should apply, "the usage of recognizing the observance of the form required by the law of the place where an act occurred as sufficient for its validity has prevailed, so that an act executed in this mode is effective with respect to moveables and immoveables, even though they be situated in territories whose laws require very different and much greater solemnities". It is the view adopted in France. In Quebec, a similar attitude was taken in the two cases already discussed, which held that a testator may dispose of all his property, located in Quebec, without distinguishing between moveables and immoveables, so long as he follows the forms of the *lex loci actus*. This conclusion was reached in spite of the provisions of article 6 of the Quebec Civil Code, which states that the laws of this province govern immoveable property situated within its limits, whereas moveable property is governed by the law of the domicile of its owner. To extend article 6 to cover form would render article 7 nugatory. As Johnson points out, article 6 is not concerned with the formal validity of wills, but mostly with matters relating to the sovereignty over land or substantive matters.[49] Thus, where a will complies with the form of the *lex loci actus*, it will be valid in Quebec, whether it concerns moveables, wherever situated, or immoveables situated in Quebec.[50]

This is the better view, as article 7 does not distinguish between moveables and immoveables. On the other hand, where the form of the *lex loci actus* has not been followed, a distinction must be

---

[48] Cf. *ante* footnote 11.

[49] *Op. cit.*, Vol. III, pp. 2 *et seq.* Cf. also *Ross* v. *Ross* (1894), 25 S.C.R. 307, at pp. 329 and 337.

[50] Compare *Re M'Candless* (1848), 3 La. Ann. 579. Such wills may have to be registered in accordance with articles 2098 and 2144 of the Quebec Civil Code; compare Louisiana Civil Code, article 1688. Quebec courts are not concerned with immoveables situated outside the province.

made between moveables and immoveables.[51] In *Ross* v. *Ross*,[52] which involved moveables and immoveables situated in Quebec and elsewhere, the holograph will was held to be valid as to moveables, wherever situated, because the will was executed according to the law of the testator's domicile, and good as to immoveables only in the province of Quebec, because executed according to the law of their situation. Since, in Quebec, it is possible to dispose by holograph will of both moveables and immoveables, the will was valid according to both the *lex rei sitae* and the *lex domicilii*. It is thus not necessary for Quebecers travelling abroad and owning moveable and immoveable property in Quebec to make two wills, or to make one will and authenticate it in different ways.[53]

Where the immoveables are outside the province, Quebec courts have consistently refused to deal with them, considering themselves without jurisdiction. They have held that the question of the validity or invalidity of wills relating to immoveables outside the province is exclusively for the *forum rei sitae*.[54] For instance, Quebec courts will refuse to determine the extrinsic validity of a will relating to immoveables situated in Ontario, whether such a will is valid by the *lex rei sitae* or the *lex loci actus*. Some may argue that the Quebec courts should modify their attitude, assume jurisdiction and apply the same principles as in the case of immoveables in Quebec. Yet the existing rule seems wiser, especially in view of the fact that in common-law jurisdictions the *lex rei sitae* must exclusively govern the validity of instruments disposing of immoveables.[55]

To sum up, it is possible to conclude that a testator domiciled in Quebec may execute a will involving moveables by complying either with the form of the *lex loci actus* or the *lex domicilii*. Where immoveables situated in Quebec are disposed of by will, he has a

[51] Quebec law applies whenever the question involved relates to the distinction or nature of the property: article 6 C.C.

[52] (1894), 25 S.C.R. 307, at p. 329. *Bellefleur* v. *Lavallée*, [1955] R.L. 1, only involved moveables situated in the provinces of Quebec and British Columbia.

[53] Note that this distinction follows the provisions of article 6 C.C.

[54] *Ross* v. *Ross* (1894), 25 S.C.R. 307, at p. 327.

[55] Dicey's Conflict of Laws (6th ed., 1949), rule 127. But in many jurisdictions this rule has been modified by statute: Dicey, *ibid.*, rule 127, exception 3. Cf. also, Falconbridge, Conflict of Laws (2nd ed., 1954), Ch. 22, s. 2 (3), Formal Validity of Will, p. 532, and Ch. 23, Lord Kingsdown's Act, pp. 524 *et seq.* For a comparative study see Lorenzen, The Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws (1911), 20 Yale L.J. 427. Since most often the characterization adopted by Quebec courts of the property involved in the succession would be different from that adopted by the *forum rei sitae*, the judgment would be ineffective outside Quebec.

choice between the form of either the *lex loci actus* or the *lex rei sitae*. If immoveables situated outside the province are involved, Quebec courts will refuse to consider that portion of the will which deals with them.[56]

Should these principles on the application of the rule *locus regit actum* to wills disposing of moveables and immoveables be extended by analogy to wills made by persons while temporarily in the province of Quebec? Obviously, in so far as immoveables in Quebec are concerned, the choice will be between only the *lex loci actus* and the *lex rei sitae*, which are the same in this particular case, and there will be no problem. The Quebec form will be the only one available. In the case of immoveables outside Quebec, the formal validity of the will would normally depend upon the law of the *situs*: the *lex rei sitae* would determine whether a will made according to the *lex loci actus* is valid. But Quebec courts will not concern themselves with this problem. In the case of moveables situated in Quebec and elsewhere, the testator should be allowed, under article 7 as construed by the courts, to make a will complying with either the law of the domicile or that of the place of execution. It seems, however, that he must follow Quebec law exclusively if the moveables are situated in the province,[57] although this opinion appears to be based on the ground that the rule *locus regit actum* is imperative.[58] It is certainly sensible to recognize the permissive character of article 7 in the case of a person temporarily present in Quebec, especially if no property located here is involved. Indeed, why should the province of Quebec, in which the testator is not domiciled and in which he leaves no property, be concerned whether he uses the local form or the form of his domicile? The imperative character of the rule *locus regit actum* where the testator is not domiciled in the province is without foundation.

In the writer's opinion to hold article 7 imperative would discourage the free exercise of the testamentary power which is a basic principle of Quebec law. If it is desirable to relieve testators of the necessity of executing several wills, or of executing their wills in the forms prescribed by several laws, by enabling them to resort to the *lex loci actus*, which it is, it does not follow that they should be prevented from resorting if they wish to the law of their domicile or that of the situation of their immoveables. Since the

[56] *Ross* v. *Ross* (1894), 25 S.C.R. 307, at p. 327.
[57] Johnson, *op. cit.*, Vol. III, p. 10.
[58] *Ross* v. *Ross* (1893), 2 Q.B. 413, at p. 418.

recognition of the rule *locus regit actum* is a concession to a Quebecer resident abroad to enable him to execute his will in a form familiar to local legal advisers, it should not, it seems to the writer, be regarded as imperative. The rule was adopted to facilitate the execution of wills and should certainly not be used to restrict the testator's freedom of action. The Quebec rules of private international law should be drawn so as to accord with principles of justice and reason, and not be built on abstract principles which might work to the detriment of Quebecers and foreigners alike.

The solution adopted by the Canadian courts in the two cases discussed can be justified not only on historical, textual and practical grounds, but also upon a ground of principle, vague perhaps, but nonetheless compelling. The form of wills should not be linked with the capacity of the testator, otherwise, as Professor Niboyet has pointed out,[59]

> . . . tout le compartiment des formes, en vertu d'une fuite du droit, risquerait de se vider complètement et sans raison à la suite d'une veritable hemorragie hypertrophique du statut personnel.

A holograph will is the most secret type of will. More than any other type it expresses the personality of the testator. Wherever he goes the testator should be able to make use of the law relating to his person in order to give expression to his personality. In other words, since the testator is the creator of his will, he should be free to choose from the law of his domicile, the *lex loci actus* and the *lex rei sitae* the form which suits him best. Therefore it should be possible for him to supplement the rule *locus regit actum* by the rule *auctor regit actum*. The maker's option is inherent in the law applicable to his status, not his capacity, and for this reason he should be able to choose the law of his domicile if he wishes.[60]

---

[59] Traité de droit international privé français, Vol. V (1948), La Territorialité, no. 1455, p. 223.

[60] The exclusive application of the law relating to the intrinsic validity and construction of the will has been advocated by Savigny (Private International Law, Guthrie's transl., s. 381), while other writers favour an option between that law and the *lex loci actus*. See the references given by Batiffol in, Traité élémentaire de droit international privé (1949), no. 580, p. 581. It may also be argued that a will invalid by the *lex domicilii*, the *lex rei sitae* or the *lex loci actus* should be recognized if it complies with the form of the forum. These solutions could not be adopted by the Quebec courts, since the Civil Code (articles 7-8) distinguishes between form and substance. In the case of form, the reference made by article 7 to the law of the place where the act is executed should be considered as a substantive one in order to avoid difficult problems of *renvoi* such as arose in the *Ross* case (see the opinion of Taschereau J. (1894), 25 S.C.R. 307, at pp. 351 *et seq.* Cf. also Falconbridge, Renvoi and Succession to Moveables (1930), 46 L. Q. Rev. 465, and (1931), 47 *ibid.* 271; and Schrei-

This analysis should have removed any doubt about the advisability of holding the rule *locus regit actum* to be permissive. Since, however, the effect of article 7 continues to be questioned, it might be desirable for the legislature to amend articles 7 and 135 so as to make clear beyond possibility of error that the former is permissive and the latter imperative. Such a reform would be in harmony with other provisions of the Quebec Civil Code. Amending the articles themselves would be better than adding separate articles qualifying the general rule in the case of holograph wills as was done in France and Louisiana.

In France, the *Commission de Réforme du Code Civil* has abandoned the rule *locus regit actum* as a general principle and, in article 91 of its draft on private international law, has stated that the law governing the validity of the transaction in general shall control.[61] This article was adopted on the principle that a requisite of form prescribed for the existence of a legal act is an element entering into its validity, which logically should be governed by the law determining the validity of the act in other respects. In 1955, however, the *Comité Français de Droit International Privé*, meeting in Paris, on the strong representation of Professor Batiffol unanimously recommended that the old rule *locus regit actum* be maintained as a general principle, with the parties having an option to select another law.[62] In the case of holograph wills, everyone seems agreed that the old rule found in article 999 of the Code Napoléon should be retained and its application extended to cover persons only temporarily in France. Article 92 of the draft reads as follows:[63]

> Un français peut faire un testament olographe en pays étranger soit selon les formes prescrites par la loi française, soit selon les formes des testaments privés admises dans le pays étranger. L'étranger qui teste en France a le choix entre les formes usitées dans son pays pour les testaments privés et celles qui sont admises en France pour les testaments olographes.

Such a reform would seem to be too drastic for Quebec. To repeat, it would probably be better merely to modify the wording of

---

ber, The Doctrine of Renvoi in Anglo-American Law (1917-18), 31 Harv. L. Rev. 523, at p. 561.

[61] La Codification du droit international privé (1956) pp. 28, 165 and 216.

[62] *Ibid.*, p. 294.

[63] *Ibid.*, p. 28. In Canada see sections 34 and 35 of the Uniform Wills Act, 1953 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, pp. 49-51, and Falconbridge, *op. cit.*, Ch. 23, pp. 541 *et seq.* Compare, Hague Convention, 1904, article 3, Actes de la IV Conférence de La Haye (1904).

articles 7 and 135. Even if no amendment is made, it seems that, unless the Supreme Court of Canada reverses its former position, article 7 of the Quebec Civil Code is permissive and *Bellefleur* v. *Lavallée* was correctly decided.

J. G. CASTEL*

* * *

CONSTITUTIONAL LAW—THE TRADE AND COMMERCE POWER—SLEEPING GIANT OR EMPTY FAÇADE?—One of the more ironic facts of life in constitutional law is that the least effective head of jurisdiction under section 91 of the British North America Act is the one which is expressed in the widest terms and with the broadest scope of all the enumerated heads under that section. The head that has so ignominiously fallen short of its bright promise is the trade and commerce power, heads 2, which ostensibly granted to the federal Parliament the right to make laws in relation to "The Regulation of Trade and Commerce".

The courts were not slow to appreciate that this head of jurisdiction, unless limited by interpretation, could become an insatiable monster ingesting vast areas of legislative jurisdiction which might otherwise accrue to the provinces.[1] Before the turn of the century, the Privy Council began its long programme of attrition, relying on the principle of statutory interpretation that words and phrases must be read in the light of their context, a principle which led their lordships to a realization that only regulations relating to general trade and commerce were in the mind of the legislature at the time the British North America Act was passed. It might be mentioned that the Privy Council ignored an even more fundamental rule of statutory interpretation, the Plain-meaning Rule, which is to the effect that if the meaning of words and phrases is clear and free from ambiguity that meaning is to be given them. The Privy Council had no difficulty in deciphering the plain meaning of the phrase, "The Regulation of Trade and Commerce", but, dismayed by the implications of such an interpretation, adopted the context rule to limit the scope of the head to the now famous three categories: (1) political arrangements in

*Assistant Professor of Law, McGill University.

[1] See *Citizen's Insurance Co. of Canada* v. *Parsons* (1881-82), 7 App. Cas. 96, at p. 112: "The words 'regulation of trade and commerce', in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute laws for regulating particular trades".

regard to trade—requiring the sanction of parliament (external trade); (2) regulation of trade in matters of inter-provincial concern; (3) possibly the general regulation of trade affecting the whole Dominion.

It is generally conceded that some limitation on the trade and commerce power was required and that the area marked out by these three classes may indeed represent the proper ambit of the power, although the exact status and range of the third class has never been satisfactorily defined.[2] In addition to marking out the limits of the trade and commerce power, the *Parsons* case imposed a negative restriction which has had a profound effect on the vitality of this head of jurisdiction: "the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province".[3] This statement, later enshrined by Viscount Haldane as a fundamental canon of constitutional law, has proved to be the major obstacle to the establishment of the trade and commerce power as a normally effective head of Dominion jurisdiction.

The *Parsons* case imposed necessary limits on the trade and commerce power; it remained for the Privy Council, acting through Viscount Haldane, to deliver a blow from which there has been no recovery. The new restriction, first enunciated in the *Board of Commerce* case,[4] was made appallingly explicit in the *Snider* case: "It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces".[5]

The state of affairs after the *Snider* case was that the trade and commerce power, alone among all the enumerated heads of section 91, could not operate as a primary source of competence for federal legislation, it could only function as a supplement to some other independent head of jurisdiction possessed by the Dominion. The trade and commerce power was now a sort of poor relation to the other enumerated heads, a situation so at variance with the concept of the British North America Act that it immediately led to judicial protest and disavowal. In the *Combines* case the Privy

---

[2] MacDonald, The Constitution in a Changing World (1948), 26 Can. Bar Rev. 21, at p. 37.
[3] *Ante*, footnote 1, at p. 113.
[4] [1922] 1 A.C. 191.
[5] [1925] A.C. 396, at p. 410.

Council took the opportunity to condemn explicitly such a restricted interpretation of the power:

> Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce Case* under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter.[6]

The continued failure of the trade and commerce power to win judicial acceptance as a primary source of Dominion legislative competence indicates that the limitation imposed by Viscount Haldane, despite its repudiation, continues to exert an inhibiting effect. With one insignificant exception,[7] no major Dominion legislation has been found intra vires on the sole ground that it was legislation in relation to trade and commerce. It is true that the trade and commerce power has been used as a makeweight argument in support of some Dominion legislation, and it has also enjoyed a very successful career as an obstacle to provincial legislation, but its ineffectiveness in justifying federal legislation must, in view of the scope of its language and the prominence of its position, remain as an astounding testimonial to the completeness of the evisceration performed by Viscount Haldane.

The trade and commerce power has come close to receiving judicial blessing on a number of occasions where the legislation in question clearly dealt with external or extra-provincial trade, but, heretofore, recognition has been snatched away by the difficulty of finding language which, while including the external and inter-provincial trade aspects, clearly eliminated the purely intra-provincial aspect.[8] The difficulty is more than one of pure semantics, as the facts of commercial life make a complete and clear-cut division between the intra- and extra-provincial aspects of a particular trade almost impossible to achieve. This difficulty, both

---

[6] *Proprietary Articles Trade Association* v. *A.-G. for Canada*, [1931] A.C. 310, at p. 326.

[7] *A.-G. for Ontario and A.-G. for Canada*, [1937] A.C. 405, where Dominion legislation establishing a national trade mark was held intra vires on the ground that it was legislation in relation to trade and commerce.

[8] *R.* v. *Manitoba Grain Co.* (1922), 66 D.L.R. 406, 37 Can. C. C. 346; *The King* v. *Eastern Terminal Elevator Co.*, [1925] 3 D. L. R. 1, S.C.R. 434; *A.-G. B.C.* v. *A.-G. Can.*, [1937] 1 D.L.R. 691, A.C. 377.

semantic and practical, may have been overcome in a recent Manitoba decision on the validity of the Canadian Wheat Board Act[9] and, consequently, the vitality of the trade and commerce power may be brought under review on its own merits and clear of any question-begging entanglements with obviously provincial spheres of legislation.

The structure of *Murphy* v. *Canadian Pacific Railway*[10] (subject to one reservation) permits the court no way of escaping the issue of the potency remaining in the trade and commerce power. While the case has not as yet gone beyond the trial court, it may be said that, if it reaches the Supreme Court of Canada, the resulting decision could determine the fate of section 91(2) for all time.

The legislation under attack in *Murphy* v. *C.P.R.* was the Canadian Wheat Board Act, the cornerstone of the Dominion's policy on western agriculture. The act established a scheme for regulating the marketing in "inter-provincial and export trade" of grain from the Prairies. Section 32 of the act prohibits anyone, except the board set up by the act, from exporting or importing grain from or into Canada, transporting it from one province into another, or selling or buying it inter-provincially. The board will buy all grain offered to it by producers so long as the producers are within their quotas as determined by the board, and deliver the grain to the board at an elevator or in railway cars. The board then sells the grain in the Canadian and world markets, distributing the proceeds of sale to the producers in accordance with the quantity and quality delivered by each of them. Additional control over the marketing of grain is given to the board by provisions which prohibit any delivery to an elevator (widely defined in the act to include all the normal storage facilities for grain awaiting transportation or processing) unless the delivery is by a person authorized under the act and in possession of a permit-book issued by the board. The act further prohibits the loading of any grain into a railway car unless permitted by the board or unless it is grain already validly delivered to an elevator in compliance with the act; thus the railways may only transport grain which has passed into the control of the board.

Although the act specifically states that it is designed to regulate only the "inter-provincial and export trade", the prohibitory sections on the reception of grain by elevators and the trans-

[9] R.S.C., 1952, c. 44.
[10] [1956] 1 D.L.R. (2d) 197; 17 W.W.R. 593 (Maybank J.).

portation of it by railways have a profound effect on transactions which take place entirely within one province. An owner of grain, although he may dispose of his grain entirely within the province in which it was grown, no longer has unimpeded use of the elevators and railways for storage and transportation. This is a very substantial interference with "a particular business or trade . . . in a single province" and would normally be fatal to the validity of the entire act. As it happens, however, the Dominion Parliament had previously declared both railways and grain elevators to be works for the general advantage of Canada, which, as the trial judge pointed out, removes them from provincial jurisdiction under the combined effect of section 92(10)(c) and the concluding paragraph of section 91 and places them under federal jurisdiction. Accordingly, Maybank J. holds that the sections in the Canadian Wheat Board Act imposing the restrictions on the railways and elevators are valid Dominion legislation and the fact that they may affect an intra-provincial trade is of no consequence. It would certainly seem that a restriction on what an elevator may receive for storage and a railway may receive for transportation is truly legislation "in relation to" railways and elevators; yet it is at this point that there may be a weakness in the chain of reasoning. An appellate court could find that the prohibitory sections are not, in "pith and substance", legislation dealing with railways and elevators, but are, in fact, legislation aimed at interfering with the trade in grain within a province — a finding which would bring the act within the restriction laid down in *Parson*'s case and so destroy it. This is the reservation I have previously referred to that may permit the higher courts to avoid once more the issue of the capacity of the trade and commerce power as has so often occurred in the past.

Assuming, however, that Maybank J.'s categorization of the prohibitions as valid legislation "in relation to" railways and elevators is upheld, the case should force a definite judicial pronouncement on the status of the trade and commerce power. In his words, "the sections of the *Wheat Board Act* which relate to interprovincial and export trade are valid in my opinion under the terms of the *B.N.A. Act*, S. 91(2) or not at all".[11] If there is any justification for Dominion legislation, in normal times, which establishes a board, prohibits anyone but the board from exporting grain from or importing it into Canada or from dealing with it interprovincially, grants the board the right to impose quotas on each

[11] D.L.R. at p. 219; W.W.R. at p. 614.

producer's grain to be marketed outside the province of origin, and vests the board with monopolistic powers in the interprovincial and export trade of grain, it can only be under the Dominion's power to legislate in relation to the regulation of trade and commerce. There can also be no doubt that the act involves a very substantial interference with civil rights in the province as, apart from its embargo on the use of elevator and railways, it absolutely prohibits an owner of grain from marketing outside the province, which alone would be the kiss of death under Haldane's definition.

In the case under consideration, the learned judge examined the act and found that not only did its language repeatedly express its application to only inter-provincial and export trade (the courts are not prone to attach much weight to those pious legislative declarations of rectitude, which all too often in the past have masked other purposes) but that the act was, in fact, so confined. At this stage of the judgment, the student of constitutional law, accustomed to the usual judicial attitude toward the trade and commerce power, would expect the introduction of some ground for holding that the legislation could not be upheld on the basis of section 91(2). But Maybank J., having categorized the Canadian Wheat Board Act as legislation in relation to trade and commerce, without more ado upheld its constitutionality on the ground of the trade and commerce power and, moreover, granted to that head of jurisdiction the same right of "incidentally affecting" a provincial legislative field as is enjoyed by the other Dominion powers under section 91:

> As respects the infringement by the *Canadian Wheat Board Act* upon the rights of property and upon civil rights, I think there can be no doubt that there is infringement. . . . The owning of property carries with it, surely, the right to alienate it; and it is every man's civil right to use and dispose of something which is his in any way that he sees fit, subject, of course, to the individual and collective rights of other people in the body politic. But does interference, *mere interference*, by a statute of the Parliament of Canada, with property and civil rights within the Province, *necessarily* invalidate that statute? I think not . . .[12]

There is nothing wrong with this portion of the judgment; indeed, it is eminently right. But one may be forgiven some astonishment at finding the trade and commerce power so casually treated as an equal with the other sources of federal jurisdiction and not as a hollow shell with no independent vitality. We may wait a long time for another set of facts which so squarely raises

[12] D.L.R. at p. 210; W.W.R. at p. 605 (italics in original).

the issue of the power and it is to be hoped that the trial judge's categorization as legislation in relation to railways and elevators of the injunctions against their use is upheld by the higher courts, thus making it possible to have a pronouncement on the present status of this power as an independent head of jurisdiction.

JOHN B. BALLEM*

The Presentment of the Grand Jury

There is great difference, gentlemen, between a morose and over-sanctified spirit which excludes all kind of diversion, and a profligate disposition which hurries us into the most vicious excesses of this kind. 'The common law', says Mr. Pulton in his excellent treatise *de Pace*, fol. 25b, 'allows many recreations, which be not with intent to break or disturb the peace, or to offer violence, force, or hurt to the person of any; but either to try activity, or to increase society, amity, and neighbourly friendship'. He there enumerates many sorts of innocent diversions of the rural kind, and which for the most part belong to the lower sort of people. For the upper part of mankind, and in this town, there are many lawful amusements, abundantly sufficient for the recreation of any temperate and sober mind. But, gentlemen, so immoderate are the desires of many, so hungry is their appetite for pleasure, that they may be said to have a fury after it; and diversion is no longer the recreation or amusement, but the whole business, of their lives. They are not content with three theatres, they must have a fourth; where the exhibitions are not only contrary to law, but contrary to good manners, and where the stage is reduced back again to that degree of licentiousness which was too enormous for the corrupt state of Athens to tolerate; and which, as the Roman poet, rather, I think, in the spirit of a censor than a satirist, tells us, those Athenians, who were not themselves abused, took care to abolish, from their concern for the public.

Gentlemen, our newspapers, from the top of the page to the bottom, the corners of our streets up to the very eaves of our houses, present us with nothing but a view of masquerades, balls, and assemblies of various kinds, fairs, wells, gardens, etc., tending to promote idleness, extravagance, and immorality among all sorts of people.

This fury after licentious and luxurious pleasures is grown to so enormous a height, that it may be called the characteristic of the present age. And it is an evil, gentlemen, of which it is neither easy nor pleasant to foresee all the consequences. Many of them, however, are obvious; and these are so dreadful, that they will, I doubt not, induce you to use your best endeavours to check the farther increase of this growing mischief; for the rod of the law, gentlemen, must restrain those within the bounds of decency and sobriety who are deaf to the voice of reason, and superior to the fear of shame. (Henry Fielding, A Charge Delivered to the Grand Jury at the Sessions of the Peace held for the City and Liberty of Westminster, on Thursday the 29th of June, 1749)

---

*John B. Ballem, M.A., LL.B. (Dal.), LL.M. (Harvard); member of the Nova Scotia, Ontario and Alberta bars.