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Article abstract

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THE INTERPRETATION OF THE CIVIL CODE OF SAINT LUCIA

by V.F. FLOISSAC*

ABSTRACT

The author makes a presentation of the sources of the St. Lucia Civil Code. He then studies some mainly selected rules of interpretation taken from the Privy Council's decisions in cases where this Court has had to interprete Statute Law or a Code, like the Québec one. The author mentions also the difficulties of interpretation created by the introduction of English Law in the St. Lucia Code.

RÉSUMÉ

L'auteur présente les sources qui ont été à l'origine du Code civil de Sainte-Lucie. Il étudie par la suite un certain nombre de règles d'interprétation tirées des décisions du Conseil privé lorsque ce tribunal a été appelé à interpréter soit du droit statutaire ou un Code, comme celui du Québec. Il aborde aussi les difficultés d'interprétation créées par l'introduction dans le Code de Sainte-Lucie du droit anglais.

It was suggested that the paper on the interpretation of the Civil Code of St. Lucia should be prepared by a Saint Lucian legal practitioner. For reasons best known to Dr. N.J.O. Liverpool. I was asked to attempt that paper. This I have agreed to do in awareness of the dearth of literature and direct judicial authorities on this aspect of our Civil Code, but comforted by the prospect of finding precedent and guidance from Québec as we have done in the past.

Before submitting any special rules of interpretation of our Civil Code, perhaps I should indicate some of the problems which beset that code and make its interpretation difficult.

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THE STATUTORY FACTOR

Firstly, our Civil Code is a statutory code. Delivering the opinion of the Privy Council in *Quebec Railway, Light Heat & Power Co Ltd* v. *Vandry,* [1920] A.C. at p. 671 Lord Sumner said:

> "Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind"

The same is true of our Civil Code. It is the creature of the Civil Code Ordinance 1876 which was proclaimed on the 8th October 1877 and which provided for the adoption of our Civil Code "when it shall have been approved by Her Majesty". It was so approved and came into force in St. Lucia on the 20th October 1879. Since then, some of its original 2486 Articles have either been repealed or amended.

The emphasis which the Judicial Committee of the Privy Council (our final Appellate Court) has placed on the statutory character of a Code involves our Civil Code in the controversy as to whether a code should be interpreted as an ordinary statute.

THE HYBRID FACTOR

The second factor which complicates our Civil Code is its hybrid character. Our Civil Code is a fascinating blend of Québec, French, English and indigenous law. The preamble to the Civil Code Ordinance 1876 which created our Civil Code stated as follows:

> "WHEREAS uncertainty, causing serious inconvenience to the public, has for a long time existed with respect to the Law relating to many civil matters, and it is expedient that such uncertainty should be removed; and it is also expedient that the Civil Law should be consolidated and amended; and whereas a Code of Civil Law has for the above purposes been prepared by George William Des Veoux, Administrator of the Government of St. Lucia, and James Armstrong, Chief Justice of St. Lucia, the said Code being framed upon the principles of the Ancient Law of the Island, with such modifications as are conformable to the condition of modern society, or are required by existing local circumstances, and it is expedient that this Code should be adopted as the Law for the future:—
>
> BE IT ENACTED....."

The preamble did not identify the source of "the principles of the Ancient Law of the Island." We have had to look elsewhere for that source. We find it in *Du Boulay* v. *Du Boulay,* (1869-70) Moore's P.C. Cases 31 (a St. Lucian case decided before the enactment of our Civil Code). The issue in that case was whether a family had such property in their patronymic name as to entitle them to bring a civil action in St. Lucia for a declaration that the name

exclusively belonged to them. In seeking to prohibit the defendant from using their patronymic name, the plaintiffs relied on a French Ordinance which had never been registered in St. Lucia. The Chief Justice of the Royal Court of St. Lucia pronounced judgment in favour of the plaintiffs. That judgment was reversed by the majority of the Court of Appeal of the Windward Islands whose judgment was upheld by the Privy Council. In delivering the judgment of the Court of Appeal, the Hon. H.J. Woodcock said (at pp. 36 and 37):

> "Without hesitation, I say, that Ordonnance is not in force in St. Lucia. No Ordonnance in France was deemed to be in force in her Colonies unless registered there, or extended to the Colonies by the Order of the parent State. The Coutume de Paris was the law of the French Colonies, but why? because the 33rd Article of the arrêt of the *Conseil d'État du Roi,* of May, 1664, establishing the West India Company, expressly declares its obligatory effect in the West India Colonies, as it had been established in French Colonies in the East. The Coutume de Paris is still continued as the law of St. Lucia. It does not appear that the Ordonnance of the 11th of April, 1803, was extended by its terms, or by any other Edict of the French Government, to its Colonies, and it has not been registered in St. Lucia."

According to Appendix B at page 1063 of Vol. II of the Revised Ordinances of St. Lucia 1916, the *Coutume de Paris* was extended to St. Lucia on the 5th November 1681. It would therefore appear that "the Ancient Law of the Island" referred to in the preamble to our Civil Code Ordinance 1876 comprised the *Coutume de Paris* and such of the French Ordinances as were registered in St. Lucia or specifically extended to the island by Orders or Edicts of the French Government before the 22nd June 1803 when St. Lucia finally became a British possession.

The said preamble also omitted to mention that Chief Justice Armstrong was a Québec lawyer and that our Civil Code was patterned after the *Civil Code of Lower Canada* which I will hereinafter refer to as the Old Québec Code which had come into force in Québec on the 1st August 1866. This was admitted by no other than Sir George William Des Vœux himself in his memoir which may shortly be entitled "My Colonial Service etc." There, at pages 209 to 211 he wrote:

> "During my absence Mr. Armstrong, a barrister of Lower (French) Canada, had been appointed Chief Justice, and had arrived in the island. His attention had at once been attracted to the unsatisfactory state of the law, the ordinary uncertainty of which was increased by vagueness of knowledge as to what law was actually in force. The Coutume de Paris was perhaps still valid, in so far as it had not been altered. But many modifications had been made by Louis XVI., under pressure from the flowing tide of republicanism, and others were introduced after the Revolution, all of which must be supposed to have been in force at the period of the cession to England, though owing partly to hazy knowledge of them, and partly perhaps to anti-republican sentiment, they were little if at all recognised. When it is added that there had been many decisions on the part of the Court of

> Appeal of the Windward Islands, which was composed of English judges uninstructed in the Civil Law, and sometimes, as I was told, expressing open contempt for it as being French, it may easily be understood that, even apart from the doings of the late Chief Justice, legal matters were in a state of almost hopeless chaos. To restore some nearer approach to certainty, Mr. Armstrong proposed to me to introduce the English versions of the Civil Code and the Code of Civil Procedure of Lower Canada, with only some slight alterations.
>
> Though I had formerly passed a comprehensive examination in Civil Law, I had never before seen the Lower Canada codes. On reading them, in order to form a judgment upon their suitability for the intended purpose, I quickly found the French version to be a very able compilation founded for the most part on the Code Napoléon, and as regards the commercial portion, upon English law [....]."

Whatever the historical reasons may be, our Civil Code acquired a heterogeneity even more complex than the Old Québec Code on which it was modelled. It was created with articles most of which were either identical with or equivalent to articles of the Old Québec Code. Thus, from the outset, it was a mixture of ancient French law and Anglo Québec law. But it did not profess to retain in its entirety "the Ancient Law of the Island". On the contrary, it purported to amend that law. Our original article 2485 (which corresponded with article 2613 of the Old Québec Code and which has since disappeared) provided that:

> "The laws in force at the time of the coming into force of this code are abrogated in all cases:
>
> In which there is a provision herein having that effect expressly or by implication;
>
> In which such laws are contrary to or inconsistent with any provision herein contained;
>
> In which express provision is herein made upon the particular matter to which such laws relate;
>
> Except always that as regards transactions, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such transactions, matters and things remain in force and apply to them, and this code applies to them only as far as it coincides with such provisions."

Since the promulgation of our Civil Code, several principles of English, Québec and original law have been injected into it. To day, our Civil Code stands out as one of the few veritably unique Civil Codes in the world.

QUÉBEC CODAL LAW

From the Old Québec Code, our Civil Code inherited articles which contain old French law which was epitomised in the *Coutume de Paris* but was not repeated in the Code Napoléon. Illustrations of such law are to be

found in our articles 861 to 872 which relate to substitutions and in our articles 751(2) and 756 which permit the revocation of gifts inter vivos y means of resolutive conditions. Our articles 861 to 872 are either identical in terms with or equivalent to articles 925 to 936 of the Old Québec Code and our articles 751(2) and 756 are facsimiles of articles 811(2) and 816 of the Old Québec Code. We learnt of the derivation of these articles from the Québec case of *Herse* v. *Dufaux,* (1872-3) Moore's P.C. Cases 281. That case afforded an opportunity to compare the provisions of the *Coutume de Paris* with the provisions of the Code Napoléon in regard to the creation of substitutions by resolutive conditions. Delivering the judgment of the Privy Council in that case, Sir James Colville said at pages 312 and 313:

> "It is obvious that the law thus declared, however closely it may correspond with the ancient law of France as contained in the Coutume de Paris, differs materially from the law as it exists under the Code Napoléon. The latter prohibits substitutions altogether, and avoids the instrument which attempts to create one, but retains the principle of the irrevocability of a gift by an act inter vivos, subject only to a «droit de retour», which it thus limits and defines:— «Le donateur pourra stipuler le droit de retour des objets donnés, soit pour le cas du prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendans. Ce droit ne pourra être stipulé qu'au profit du donateur seul.» (See Code Civil, Articles 951, 895, 896.) Nothing is said in these Articles of any resolutive condition other than this limited «droit de retour.»

From the Old Québec Code, our Civil Code derived articles which were copied from the Code Napoléon. This is exemplified by our articles 394 to 436 which relate to usufruct. Those articles are either identical with or equivalent to articles 443 to 486 of the Old Québec Code. We were advised of the origin of those articles in the judgment of the Privy Council in the Québec case of *Lavendure* v. *Du Tremblay,* [1937] A.C. 666. Delivering the opinion of the Board, Lord Maugham said (at p. 677):

> "It may be remarked that the articles of the Code Napoléon relating to usufruct, copied in substance word for word in the Civil Code of Québec, were first decreed in the year 1804, and that some of them were taken directly from the Institutes of Justinian (Lib. II, Tit. IV)."

From the Old Québec Code, our Civil Code inherited articles which express old French law which was not embodied either in the *Coutume de Paris* or Code Napoléon. An example of such law is to be found in our articles 1588 and 1589 which are derived from articles 1688 and 1689 of the Québec Code. Those articles impose on architects and builders joint and several liability for loss occasioned by defects in construction. We are grateful to the Québec cases of *Brown* v. *Laurie* and *Wardle* v. *Bethune* (1871-72) VIII Moore's P.C. Cases 223 where the origin and rationale of that liability are fully discussed.

From the Old Québec Code, our Civil Code borrowed articles which reflected English commercial law. Most of these articles have since been superseded by our Commercial Code which portrays the English law relating to traders,, partnerships, limited partnerships, companies, mercantile agencies, sale of goods, bills of exchange, insurance, bankruptcy and patent, designs and trade marks.

THE IMPORTATION OF ENGLISH LAW

From the date of its birth in 1879 up to the year 1957, our Civil Code was no more English than the Québec Code. It is true that our Civil Code had been amended several times during those 60 years, but the amendments could hardly be said to have affected its basic character.

By the Laws of St. Lucia (Reform and Revision) Ordinance N° 21 of 1954, Mr. Allen Montgomery Lewis (now Sir Allen Lewis — Governor General of St. Lucia and former Chief Justice of the West Indies Associated States Supreme Court) was "appointed Commissioner for the purpose of enquiring into and making recommendations for the reform of the Code and of preparing the New Edition."

Sir Allen was empowered under s. 4(3) of the 1954 Ordinance: "To assimilate the Code to the Law of England where they differ, in the light of the present needs of the Colony and to prepare draft measures suitable for enactment by the Legislative Council to give effect thereto." The products of Sir Allen's *opus magnus* included the Civil Code (Amendment) Ordinance N° 34 of 1956 which came into force on the 30th June 1957.

The 1956 Ordinance imported English law into our Civil Code to an extent unsurpassed by all such importations under previous amendments to that Code.

In some cases, the importation was unheralded. An example of such silent importation is to be found in our article 988 which governs the right of action of dependents based on negligence causing death. Our article 988 was originally an imitation of article 1056 of the Old Québec Code which was interpreted by the Privy Council for the first time in *Robinson* v. *Canadian Pacific Railway Co,* [1892] A.C. 481. The 1956 Ordinance transmuted our article 988 into a provision equivalent to a consolidation of the provisions of the English Fatal Accidents Act 1846 (commonly known as Lord Campbell's Act), the English Fatal Accidents Act 1864 and the Law Reform (Miscellaneous Provisions) Act 1934 — all of which have since been either amended or repealed and replaced in the United Kingdom by the English Fatal Acci-

dents Act 1976. Our article 988 is therefore now conditional upon the survival and indefensibility of the deceased's right of action.

In other cases, the importation of English law has been express. Thus the English law relating to (1) the effect of separation agreements (2) the meanings of "adultery", "cruelty" and "desertion" (3) tutorship (4) trusts (5) contracts, quasi-contracts and torts (6) evidence (7) agency and (8) "things in action" were all imported into our Civil Code by articles 145(2), 160A, 216, 916A, 917A, 1137, 1608A and 1479(3) respectively.

As a result of these and other new articles which were introduced by the 1956 Ordinance, many important branches of our civil law were assimilated to English law.

CONTINUING DEPENDENCE ON THE QUÉBEC CODE

But the 1956 Ordinance did not completely anglicise our Civil Code. Several articles which we inherited from the Old Québec Code were left intact. Moreover, some of our articles were modernised in conformity with the 1956 edition of the Old Québec Code. This is particularly noticeable in the case of our articles 439 to 578 which relate to devolution of successions and seizin of heirs, the qualities requisite to inherit and the different orders of succession and nearly all of which were recopied from the amended articles 596 to 635 of the Old Québec Code.

Most of the articles of our Civil Code are still either identical with or equivalent to articles of the Old Québec Code. In fact, the Old Québec Code continues to be the source of vital aspects of our law of property in its widest sense. Most of our articles relating to the different kinds of property, ownership, usufruct, use and habitation, servitudes, emphyteusis, successions, gifts inter vivos and by will, sale, exchange, lease and hire, loan, deposit, life rents, transaction, gaming contracts and bets, suretyship, pledge, privileges and hypothecs, registration of real rights and prescription echo the laws summarised in the Old Québec Code.

INDIGENOUS LAW

Finally, there are some articles of our Civil Code which express neither Québec nor French nor English law. The law enunciated in those articles may conveniently be described as indigenous law — a few examples of which should be cited.

Our article 1(22) provides that "The word 'holograph' is predicated of a will which is wholly written in the handwriting of the testator." This def-

inition lends to the formalities of our holograph will a stringency which has not yet been adopted in Québec.

The 1956 Ordinance created a unique system of community of property. It restricted such community to legal community. It specified the properties which constitute the separate property of the spouses and deemed all other properties to be community property. It attached a proviso to article 1180 which enables spouses who were married outside of St. Lucia, after their return home, to make a declaration in notarial form to the effect that they were married in separation of property. It denied husbands the right to administer their wives' separate property. It abolished conventional community, legal and conventional dower, the clause of realisation, the clause of mobilisation, the clause of separation of debts, the wife's right of taking back free and clear what she brought into the community, preciput, the clauses by which unequal shares in the community are assigned to the consorts and community by general title.

Québec having recently discarded the concept of "community of property" and replaced it by the concept of "partnership of acquest," the laws of Québec and St. Lucia with respect to matrimonial property are now fundamentally dissimilar.

Many other examples of differences between our Code and the Old Québec Code may be cited.

The multiformity of our Civil Code therefore remains a factor which no interpreter of that Code can always justifiably ignore.

THE ENGLISH ADMINISTRATIVE FACTOR

The third factor which has tended to confuse the interpretation of our Civil Code is the English administrative factor — the fact that the Bench and Bar have always been composed of lawyers tutored under the English common law system. The temptation to resort to English law for solutions to all the problems of our civil law has always been irresistible. That temptation was judicially acknowledged even before the coming into force of our Civil Code on the 20th October 1879. Delivering the judgment of the Privy Council on the 15th March 1869 in *Du Boulay* v. *Du Boulay*, Lord Chelmsford admitted:

> "When a judge is called upon to decide a question depending upon Foreign Law, there is always some danger of his being influenced by notions derived from that Law which he is in the daily habit of administering"

More than a century later, the danger persists. All our judges have been jurists trained at the English Inns of Court. Our Court (the Eastern Caribbean

Supreme Court) is a regional Court which serves several islands, the civil law of all of which (with the exception of St. Lucia) is fundamentally English.

Our barristers (whose duty it is to assist our Courts in the interpretation of our Civil Code) have themselves been trained either at the English Inns of Court or more recently at the West Indies School of Law. All of us have little or no knowledge of French law. No book on French law and no French judgments will be found in our Law Library. Even if there were such books or judgments, they would be of no value to us without a qualified interpreter. The truth is that even if we purported to write or speak in the French language, we would be better understood in Martinique, Haiti or Mauritius than in France or Québec.

We no longer subscribe to Law Reports of Québec judgments. We are therefore denied the benefit of the Québec judicial opinions which illuminate those articles of our Code which are imitations of Québec articles.

MISCELLANEOUS FACTORS

In fact, the adversities of our Civil Code are infinite. The Code serves a small population comprising approximately 124,000 inhabitants without the benefit of legal aid in civil matters. Few of them can afford litigation. Of these, fewer still can afford an appeal against an adverse judgment. As for final appeals to the Privy Council in civil matters, they are reportedly less than 10 in number spread over the last century. Of these, none has resulted in a judgment which pronounces any special rule of interpretation as such.

The West Indies Reports record some of the judgments delivered by our Courts in 1958 and thereafter. But the judgments delivered before 1958 lie in oblivion in issues of the St. Lucia Gazette hidden in the recesses of the Registry and unknown places. Neither the pre-1958 judgments which I have been able to trace in the short space of time available to me for the preparation of this paper nor the post-1958 judgments propound any special rule of interpretation as such. For these reasons, the views expressed in this paper are based principally on decisions and opinions of the Privy Council which still functions as our Court of last resort.

SELECTED RULES OF INTERPRETATION

In those circumstances, what then are the principal rules of interpretation by which our Civil Code may be said to be governed?

Since our Civil Code is a statutory code, presumably all or most of the general rules of interpretation apply to it. This paper is however not an attempt

to discuss all those rules of interpretation. Its object is merely to select for consideration three rules which have been applied to codifying statutes such as ours and a special rule of interpretation which is contained in our Civil Code itself.

The rules selected may conveniently be called:
(1) the Vagliano Rule,
(2) the Vagliano exception,
(3) the judicial precedent rule, and
(4) the rules relating to the importation of English law.

(1) The Vagliano Rule

The cardinal rule of interpretation of our Civil Code must be the Vagliano Rule — the rule which was expounded in *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107 (Vagliano's Case). The Vagliano Rule is based on the presumption that a Code such as ours is intended to be an adequate and accurate summary of the law which it expresses. According to the Vagliano Rule, unless there is a valid and cogent reason for going beyond a Code, it should be interpreted internally or by reference to the language contained therein, without additions thereto of subtractions therefrom, without enquiring into the previous state of the law or otherwise resorting to external aids to its construction.

In Vagliano's Case, the House of Lords was required to interpret section 7(3) of the Bills of Exchange Act 1882 (a codifying statute). Section 7(3) provided that: "Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." One of the issues in that case was whether, on the authority of cases decided before the passing of the Act, the Court was at liberty to import into the subsection a condition or qualification to the effect that the subsection applied only when the acceptor was aware that the payee was a fictitious or non-existing person.

Dealing with that point, Lord Halsbury L.C. said (at p. 129):

> "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed."

The Earl of Selborne said (at pp. 129 & 130):

> "I cannot, however, agree with the opinion, that in the cases which do fall within the 3rd sub-section of sect. 7 knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessry. Such a qualifica-

tion of the express words of the statute cannot properly, in my judgment, be implied from the earlier authorities which treated knowledge as necessary. Those authorities were no doubt within the view of the legislature, and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction."

Lord Herschell said (at pp. 144 & 145):

"My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity wiht this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence [....].

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment."

Lord Macnaghten said (at pp. 160 & 161):

"Before the Act of 1882, the law seems to have been, as laid down by Lord Ellenborough in *Bennett* v. *Farnell* that a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer nor to bearer, unless it can be shewn that the circumstance of the payee being as fictitious person was known to the acceptor. The Act of 1882, sect. 7, sub-sect. 3, enacts that, (Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.) As a statement of law before the Act that would have been incomplete and inaccurate. The omission as the qualification required to make it complete and accurate as the law then stood seems to shew that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange — a change in accordance, I think, with the tendency of modern views and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice."

The Vagliano Rule was further explained in *Despartie* v. *Tremblay* (1921) 1 A.C. 702 where Lord Moulton said (at p. 709):

> "The essence of a code, whether it relates only to a particular subject or is of a more general character, is that it is a new departure. The codifiers have no doubt the task of examining the various authorities on each point in order to come to a right conclusion from the conflicting decisions as to what is the law upon the subject and their duty is to embody the result in the corresponding clause of the code they are framing. But when they have done this and the code has become a statute, the question whether they were right or wrong in their conclusion becomes immaterial. From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed. The language used by Lord Herschell in the case of the *Bank of England* v. *Vagliano Bros.* has always been accepted as expressing the object of codification."

The Vagliano Rule was applied to the Old Québec Code in *Robinson* v. *Canadian Pacific Railway Co,* [1892] A.C. 481. In that case, the Privy Council was called upon to interpret the first paragraph of article 1056 which provides that: "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death." Here again, one of the issues was whether on the authority of the law which existed anterior to the Old Québec Code, the Court was at liberty to import into article 1056 a condition or qualification to the effect that the article applied only when the deceased's right of action in respect of the injury which resulted in his death was maintainable during his lifetime. Delivering the opinion of the Privy Council, Lord Watson said (at page 487):

> "The language used by Lord Herschell in *Bank of England* v. *Vagliano Brothers,* with reference to the *Bills of Exchange Act,* 1882 (45 & 46) Vict. c. 61), has equal application to the Code of Lower Canada: (The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.) Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.
>
> In so far as they bear upon the present question, the terms of sect. 1056 appear to their Lordships to differ substantially from the provisions of Lord Campbell's Act and of the provincial statute of 1859. The Code ignores the representative of the injured person, and gives a direct right of action to his widow and relations — a change calculated to suggest that these parties are to have an inde-

> pendent, and not a representative right. A difference of much greater importance is to be found in the fact that the Code distinctly specifies certain conditions affecting the right of action competent to the deceased, which are also to operate as a bar against any suit at the instance of his widow and his ascendant or descendant relations after his death. These conditions are not expressed in either of the statutes referred to; and, according to a well-known canon of construction, it must be taken that they were inserted in the Code for the purpose of making it clear that no conditions affecting the personal claim of the deceased, other than those specified, are to stand in the way of the statutory right conferred upon his widow and relatives.''

The Vagliano Rule was also applied to the Old Québec Code in *Bank of Toronto* v. *St. Lawrence Fire Insurance Company,* [1903] A.C. 59. In that case, the Privy Council was required to interpret article 1571 of the Old Québec Code which was identical in terms with our article 1479 before our article was repealed and replaced by the 1956 Ordinance. Article 1571 (which relates to sales of debts and rights of action) provides that: ''The buyer has no possession available against third persons until signification of the act of sale has been made, and a copy of it delivered to the debtor [....].'' One of the issues in the case was whether on the authority of the *Coutume de Paris* and modern French law, the ''signification of the act of sale'' had to be by notarial act. Delivering the judgment of the Board, Lord Macnaughten said (at page 66):

> ''It appears to their Lordships that the question must depend simply upon the provisions of the Civil Code, without introducing or importing any requirements which, though necessary under the custom of Paris or under modern French law, are not found in the Code as it stands [....].
>
> There is nothing in the Civil Code to show that the intervention of a notary is required. It is certainly not prescribed in terms, nor is there in their Lordships opinion any room for implication in this matter.''

Although the Privy Council has repeatedly reaffirmed the Vagliano Rule in reference to the Old Québec Code, the Vagliano Rule has not escaped criticism in Québec. But whatever justification there may be for resisting the Vagliano Rule in its application to the Old Québec Code, our peculiar circumstances compel us to look at the rule through different spectacles.

Where the Vagliano Rule is an inappropriate or inadequate means of construing an article of our Civil Code, it is usually possible to construe that article by invoking other rules of interpretation, by recourse to judicial precedent (if any) or by the application of judicial common sense. But any rule of interpretation which requires our Courts to construe that article by determining what law prevailed in 1879 when our Civil Code came into force can only have the effect of reintroducing the ''uncertainty causing serious inconvenience to the public'' which our Civil Code was originally designed to

eliminate. The Vagliano Rule is therefore a most convenient and acceptable rule of interpretation in relation to our Civil Code.

(2) THE VAGLIANO EXCEPTION

The converse of the Vagliano Rule is what may conveniently be called the Vagliano exception. That exceptional rule comes into play whenever there are special grounds for departing from the Vagliano Rule. Those special grounds include ambiguity, manifest absurdity, manifest injustice and the fact that the word or phrase required to be construed has previously acquired a technical meaning.

In Vagliano's Case, Lord Herschell conceded (at p. 145):

> "I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

Lord Herschell continued (at p. 147):

> "My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle."

In Vandry's Case, Lord Summer said (at pp. 672 and 673):

> "Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide."

In *McMullen* v. *Wadsworth,* [1889] 14 A.C. 631 (which was decided before Vagliano's case), the Vagliano exception was anticipated and applied to determine the meaning of the word "domicil" appearing in article 63 of the Old Québec Code which, incidentally, was never adopted by our Code. Article 63 provided that: "The marriage is solemnised at the place of the

domicil of one or other of the parties. If solemnised elsewhere, the person officiating is obliged to verify and ascertain the identify of the parties. For the purposes of marriage, domicil is established by a residence of six months in the same place.'' Applying the Vagliano exception on the ground of absurdity, the Privy Council interpreted the word ''domicil'' to mean ''residence'' and did so inspite of article 79 of the Old Québec Code which is equivalent to our article 48 and which provides that ''The domicile of a person, for all civil purposes, is at the place where he has his principal establishment'' Delivering the Board's judgment, Sir Barnes Peacock said (at p. 636):

> ''Their Lordships are of opinion that the word ''domicil'' in art. 63 was used in the sense of residence, and did not refer to international domicil. They are of opinion that a person having resided temporarily six months in Québec would be entitled to have his marriage solemnized in that city, although he might be internationally domiciled elsewhere, and might refuse to change that domicil. It would be monstrous to suppose that an Englishman, Frenchman, or American travelling in Lower Canada, and retaining his domicil in his own country, could not be married in Québec after a temporary residence there for six months without abandoning his international domicil in his own country, and altering his status and civil rights.''

In *Stock* v. *Frank Jones (Tipton) Ltd,* [1978] 1 A.E.R. 948, Lord Scarman said (at p. 955):

> ''If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words 'have been inadvertently used', it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated: per MacKinnon LJ in *Sutherland Publishing Co Ltd* v. *Caxton Publishing Co. Ltd (N° 2).* This is an acceptable exception to the general rule that plain language excludes a consideration of 'anomalies', i.e. mischievous or absurd consequences. If a study of the statute as a whole leads inexorably to the conclusion that Parliament has erred in its choice of words, e.g. used 'and' when 'or' was clearly intended, the courts can, and must, eliminate the error by interpretation. But mere 'manifest absurdity' is not enough: it must be an error (of commission or omission) which in its context defeats the intention of the Act.''

There are a few articles of our Civil Code which cry for interpretation under the Vagliano exception. One such article is article 836 which reads: ''Every testamentary disposition lapses if the person in whose favour it is made, or his children, do not survive the testator''. But for the words ''or his children'', our article 836 would have been identical in terms with article 900 of the Old Québec Code. If our article 836 were to be interpreted ''without addition thereto or substraction therefrom'', it means that a legacy in favour of a legatee (who is not a child of the testator and who survives the testator) lapses if the legatee's children predecease the testator. If that inter-

pretation is correct, our article 836 expresses law which is not consonant with English, French or Québec law. In those circumstances, by what rule should our article 836 be governed — the Vagliano rule or the Vagliano exception?

(3) THE JUDICIAL PRECEDENT RULE

Another rule which is not strictly a rule of interpretation, but which may be so regarded is the judicial precedent rule. According to that rule, where an article of our Code is identical in terms with, equivalent to, evidently derived from or even similar to an English statutory provision or a Québec codal provision and that provision has received a hitherto unchallenged English or Québec judicial interpretation as the case may be, that judicial interpretation should normally be applied to our article.

In *Trimble* v. *Hill,* [1879-80] A.C. 342, the Privy Council was called upon to interpret section 8 of Colonial Act of Canada which annulled and rendered unenforceable all contracts by way of gaming or wagering which were not caught by the proviso to that section. The section was identical with section 18 of the Imperial Colonial Act which had already been interpreted by the English Court of Appeal in the case of *Diggle* v. *Higgs,* 2 Ex. D. 422. Delivering the judgment of the Privy Council in colonial language, Sir Montague E. Smith said:

> "Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. The Judges of the Supreme Court, who differed from the Chief Justice, were evidently reluctant to depart from their own previous decision in a case of *Hogan* v. *Curtis* but they might well have yielded to the high authority of the Court of Appeal which decided the case of *Diggle* v. *Higgs* as the English Court which decided *Batty* v. *Marriott* would have felt bound to do if a similar case had again come before it.
>
> Their Lordship would not have felt themselves justified in advising Her Majesty to depart from the decision in *Diggle* v. *Higgs* unless they entertained a clear opinion that the construction it has given to the proviso in question was wrong, and had not settled the law; since in their view it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."

In *Forget* v. *Ostigny,* [1895] A.C. 318, the Lord Chancellor said at page 325:

> "The decisions in the English Courts are of course not authorities upon the construction of the article of the Canadian Code. But the words of the English

> statute relating to gambling contracts (8 & 9 Vict. c. 109) do not differ substantially from those found in the Code. That statute renders null and void all contracts by way of gaming and wagering. The English authorities may, therefore, well be referred to as throwing light on the question what constitutes a gaming contract."

Again in *Mahumaralage Edward Coorey* v. *The Queen,* [1953] A.C. 407 delivering the opinion of the Privy Council (hearing an appeal from a judgment of the Court of Criminal Appeal of Ceylon), Lord Porter said at page 419:

> "In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this Board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English courts — see *Trimble* v. *Hill.* It is true that in that case the decision referred to was given by the Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in their Lordships' view English courts should themselves conform to the same rule where there has been a longestablished decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed."

At one time, the judicial precedent rule enshrined in the above dicta was the most popular method of interpreting our Civil Code. Where an article of our Code was derived from the Québec Code and expressed Québec or French law which was manifestly dissimilar to English law, that article would be interpreted by reference to available Québec decisions. Where the article was derived from an English statute or expressed English law or its equivalent, the article would invariably be interpreted by reference to English decisions. But as a result of the gradual anglicisation of our Code and the introduction of the New Québec Code with its substantial deviations from the Old Québec Code and as a result of other factors already alluded to, the utility of Québec judicial decisions is rapidly diminishing.

(4) THE RULES RELATING TO THE IMPORTATION OF ENGLISH LAW

The articles of our Civil Code which expressly import English law not only create rules of interpretation but themselves require to be interpreted.

Article 145(2) (which relates to separation agreements) reads:—

> "Where the parties have mutually agreed to live separate and apart from each other, such agreement has the same effect as it has by the law of England."

Article 160A reads:

"The expressions "adultery", "cruelty" and "desertion" shall have the same meanings as are assigned to them by the law of England in matters relating to matrimonial causes.

Provided, however, that it shall not be necessary to prove, in an action on the ground of desertion that the desertion has continued for any specified period of time."

Article 216 (which relates to tutorship) reads:—

"Save as is otherwise provided in this Code or in any other law which now is or may hereinafter be in force in the Colony the law of England for the time being relating to the custody of infants, guardianship and the appointment of guardians, and the rights, powers and duties of guardians, shall mutatis mutandis apply to the custody of minors tutorship and the appointment of tutors, and the rights, powers and duties of tutors."

Article 916A (which relates to trusts) reads:—

"(1) [....].

(2) Implied, constructive and resulting trusts shall arise under the law of the Colony in the same circumstances as they arise under the law of England

(3) Subject to the provisions of this Code or of any other statute the law of England for the time being in force governing the rights, powers and duties of trustees and beneficiaries under a trust shall extend to and apply in the Colony.

(4) Whenever by the law of England a beneficiary of a trust is entitled to a right in equity a beneficiary shall be entitled to a like right under this Code.

(5) [....]."

Article 917A (which relates to contracts, quasi-contracts and torts) reads:—

"(1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to this Colony, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris"

Provided, however, as follows:—

(a) the English doctrine of consideration shall not apply to contrats governed by the law of the Colony and the term "consideration" shall have the meaning herein assigned to it;

(b) the term "consideration" when used with respect to contracts shall continue as heretofore to mean the cause or reason of entering into a contract or of incurring an obligation; and consideration may be either onerous or gratuitous;

(c) third persons shall continue to have and exercise such rights with respect to contracts as they heretofore had and enjoyed under article 962 or any other statute.

(2) Paragraph (1) of this article shall not be construed as affecting the provisions of the Ninth Chapter of this Book [which relate to Proof of Obligations], or as affecting the provisions of the Fifth to Sixteenth Books of this Part or of any other statute relating to specific contracts save in so far as the general rules relating to contracts are applicable to such contracts.

(3) [....]."

Article 1137 (which relates to evidence) reads:—

"Any question relating to evidence, which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by the law of England."

Article 1608A (which relates to agency) reads:—

"Subject to the provisions of this Code or of any other statute the law of England for the time being relating to the contract of agency shall extend to and apply in the Colony, and articles 1601 to 1661 shall as far as practicable be construed accordingly."

The first question which arises under these articles is whether they import the English common law. That question has been answered (inter alia) by *Mendes* v. *Philbert,* (1971) 16 W.I.R. 255 which was decided by our Court of Appeal acting on the assumption that the common law doctrine of "scienter" was imported into our civil law by our article 917A.

The second question which arises under these articles is whether they import English statute law and if so whether the importation is ambulatory. In answering that question, it may be advisable to be guided by the decision in *Bashir* v. *Comr of Lands,* [1960] 1 A.E.R. 117. There, the Privy Council was required to consider the scope of the last paragraph of section 83 of the Kenya Crown Lands Ordinance which stated that: "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity." Delivering the opinion of the Board in that case, Lord Jenkins said:

"In their Lordships' opinion, the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when s. 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and, prima facie, a Kenya Ordinance could hardly be taken, in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content."

Having regard to the opinion expressed in *Bashir's Case,* it would appear that the language of all the articles under consideration is adequate to engen-

der an importation of the relevant English statutes which were in force on the 30th June 1957 when these articles themselves came into force.

The question whether these articles all have ambulatory effect is not so easy to answer. The words "the law of England for the time being" appearing in our articles 216, 916A(3), 917A(1) and 1608A evidently lend an ambulatory character to those particular articles. In the unreported cases of *Cools* v. *St. Lucia Agriculturists Association* (suit No. 175 of 1970), Mr. Justice Peterkin (now Chief Justice of our Eastern Caribbean Supreme Court) had no hesitation in treating our article 917A as being ambulatory and capable of embracing the English *Occupiers' Liability Act 1957* which came into force on the 1st January 1958. After citing that article, the learned judge said:

> "It becomes necessary then to turn to the relevant Law of England for the time being relating to torts. It is to be found in the Occupiers' Liability Act 1957 and the cases decided thereunder [....]. In the instant case, the defendants as occupiers of the warehouse owed that duty to the plaintiff. They are in my opinion to be held blameworthy on the facts found[...]."

The answer to the question whether articles 145(2), 160A and 1137 are ambulatory is best left to our Courts after hearing the expatiations of counsel on the nuances of the words used in those articles.

The fourth question which arises under these articles is the one invited by our article 917A(3). That article provides that: "Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail". If the express provisions of this Code include their natural and ordinary meanings judicially determined strictly in accordance with the Vagliano Rule, our article 917A(3) and other articles of our Code may find themselves uncomfortably juxtaposed.

One such article is our article 986. That article (which was copied verbatim from article 1054 of the Old Québec Code) makes "every person capable of discerning right from wrong" vicariously responsible for damage caused by persons under his control and by things under his care. The sixth paragraph of that article then provides that: responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which caused the damage". The corresponding Québec article 1054 was interpreted in Vandry's case (the first case referred to in this paper). There, delivering the opinion of the Privy Council, Lord Sumner said:

> "In the present case their Lordships have arrived at the conclusion that the language of the articles is plain, in the sense that their meaning must be found in their words, though they are far from denying that the true construction is a matter of nicety and even of difficulty [....].

> There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of faute which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of faute, which the defendant may rebut by proving affirmatively that he was guilty of no faute. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage [....].
>
> To all this the plain words of the article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the Legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Rylands* v. *Fletcher* and *Nichols* v. *Marsland* had better be left out of account. There is no reason why the Code should be made to conform to them [....]."

The problem of construing the sixth paragraph of our article 986 by reference to English law and of doing so with due regard to article 917A(3) and the decision in *Vandry's Case* is an enigma peculiar to our civil law. There are and will be no English or Québec judicial decisions to resort to. This is a problem which we will have to solve ourselves.

CONCLUSION

There are many other problems of interpretation of our Civil Code. But no statute or written law is free from such problems. The inherent imprecision of language and the resourcefulness of jurists forbid any such exemption.

One of the sources of the problems of our Code is its co-called hybridism. But what system of law to day is not hybrid? In fact, hybridism is a virtue if the right law has been derived from the right source.

Our Civil Code acquired and retained the French law of real property. It would be lamentable if the complicated English law of real property were ever substituted for the simple system which we inherited from France through Québec. The fundamental right called ownership and the owner's liberty to burden his radical title with emphyteuses, leases, servitudes, usufructs, hypothecs and other encumbrances are concepts intelligible to the simplest laymen. On the other hand, we have adopted the English commercial law. We cannot regret having done so.

If the word "hybrid" has a derogatory connotation, let us change the adjective and refer to our Code as being multilingual. Whatever language the Code uses to express itself, it is for us to use all the appropriate canons of interpretation to translate it into the justice which it was designed to achieve.