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Article abstract

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HOW HYBRID IS SAINT LUCIAN LAW?

by Andrew HUXLEY*

ABSTRACT

Following the introduction of English Law into the Civil Code of St. Lucia in 1956, a number of questions are raised about the possible influence of English case law in St. Lucia.

RÉSUMÉ

L'auteur s'interroge sur la possibilité d'une influence de la jurisprudence britannique sur le droit de Sainte-Lucie, comme conséquence de l'insertion de certains aspects du droit anglais dans le Code civil de Sainte-Lucie.

THE EFFECTS OF THE 1956 AMENDMENT ORDINANCE

I have been asked to give this paper in lieu of my friend and colleague Dorcas White, who unfortunately hasn't been able to join us at Montebello. What I shall say owes the greatest possible debt to her two articles on the St. Lucian Civil Code.[1]

In 1954 Sir Allen Lewis was appointed Commissioner for reforming the code and for preparing a new edition. His brief was 'to assimilate the Code to the law of England in the light of the present needs of the colony and to prepare draft measures suitable for enactment'.[2] Sir Allen's draft measures became law in 1956 and came into force midway through 1957. If the St. Lucian laws can now be considered a hybrid or creolized system, it is because of the changes proposed by Sir Allen and enacted by the legislative council during this two year period in the mid 1950's. The first — and most crucial — step towards anglicization of the St. Lucian legal system lay in Sir Allen's

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[1] "Some problems of a hybrid legal system: a case study of St. Lucia", [1981] *ICLQ* 862, cited hereafter as White/ICLQ. "Equity in the law of St. Lucia", 1 *Comparative Law Yearbook* 153, cited hereafter as White/CLY.

[2] s 4(3) Laws of St. Lucia (Reform and Revision) Ordinance No 21 of 1954.

response to the task imposed on him. A civilian lawyer faced with making major alterations to an existing code would doubtless begin the arduous task of redrafting. Whatever common law rules were to be introduced would appear in the relevant Book of the Code, and their relationship to existing rules (whether replacing them, subsuming them or providing a remedy additional to them) would be spelled out. But Sir Allen declined the mantle of Trebonian and Napoleon, and chose to proceed in a typically common law fashion. His changes to the Code, particularly Articles 916A and 917A, are broad policy statements of the direction in which anglicization is to proceed which leave the working out of their detailed implications for later decision by bench and bar. Thus, in the field of quasi-contract for example, the precise relationship between the Québec derived rules of the pre 1956 Code and the newly imported 'law of England for the time being relating to quasi contract' remains to be established within the context of a particular disputed case. Looked at from our vantage point here in Montebello, Arts 916A and 917A constitute a Trojan horse smuggling the common law approach of pragmatic case by case development into what had been thithertoo a proper, exhaustive civilian code.

If Sir Allen left the greater part of the job of anglicization to be decided by the courts as particular problems arose, what progress have the courts made in the intervening quarter of a century? To answer this question is more difficult than one would expect, due to two factors inherent to smaller Caribbean states like St. Lucia. The first of these is the prohibitive economics of law reporting. St. Lucian decisions are reported in the last section of the annual West Indian Reports, after sections devoted to Jamaica, Trinidad, Guyana and Barbados. Even in this underprivileged position they must compete for space with reports from other smaller Caribbean states. As the editor of the reports naturally prefers to print judgements of the widest application, a reported decision on the interpretation of the St. Lucia Civil Code is a rare bird indeed. We must look instead at the collections of unreported judgements kept at the bar library in Castries and the University of the West Indies Law Library on Barbados. But here the second factor comes into play. St. Lucia's population of about 120 000 is only averagely litigious. The University collection of unreported judgements contains about sixty cases on Tort decided since 1957, most of which deal with quantum in personal injuries or whether the facts reveal a breach of the duty of care. Of the thirty or so contract cases in the University collection, more than half are factual decisions on whether breach has taken place and, if so, what measure of damages is appropriate. Clearly the judicial elucidation of Sir Allen's broad policy statements will be a very long process indeed. After twenty five years we may still be at the beginning of the period of transition. And furthermore, on the rare occasions that a problem demanding interpretation of the 1956 changes

does present itself for judgement, it will seldom become available to an interested audience any further away than Barbados.

This lack of data is a great disappointment to any comparative lawyer interested in how solid the barriers dividing civilian from common law systems really are. The broad policy statements of the 1956 changes raise so many as yet unanswered fundamental questions that I suspect practitioners in St. Lucia can only continue to function by tacitly agreeing between themselves on the probable answers. For this reason I have couched my selection of difficulties left unresolved in the form of a series of questions addressed to our friends present here from the St. Lucia bar. They, I hope, will be able to enlighten me as to which of the points I shall raise are academic questions in the worst sense, which have been settled *sub silentio,* and which are matters of concerned debate at the Castries bar mess.

ARE THE RECEPTION PROVISIONS AMBULATORY?

How extraordinary that it still remains unclear whether English Acts passed subsequent to 1957 are received into St. Lucian law by the provisions of Arts 916A and 917A! I shall not dwell on the point, since Mr Floissac has discussed it in detail this morning and referred us to the fascinating and, to me, hithertoo unknown case of *Cools* v. *St. Lucia Agriculturalists Assoc.*[3] When one considers the importance of some of the English legislation which may or may not be in force in St. Lucia — the *Misrepresentation Act* or the *Unfair Contract Terms Act,* for example — it is difficult to see how the bar can function without tacitly assuming an answer one way or the other.

CONTRACT

Whatever the answer to the previous question Art. 917A clearly imports the English common law of contract along with relevant statute law up to 1957. This may sound less like cross hybridization and more like total replacement of French by English law, but we must study the provisos to Art. 917A:

> "Provided, however, as follows:—
>
> (a) the English doctrine of consideration shall not apply to contracts 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;

[3] 11-6-1974.

> (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."

and Art. 962 reads:

> "A party may stipulate for the benefit of a third person, when such benefit is the condition of a contract which he makes for himself, or a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified assent."

English law of contract is to apply in St. Lucia *mutatis mutandis,* but one of those things which must expressly change is the doctrine of consideration. As we have only one decision post 1957 to enlighten us on the hithertoo unknown franglais concept of 'consideration as cause'[4], I am left in doubt over the following questions. What happens to the *Foakes* v. *Beer*[5] / *Hightrees*[6] area of renegotiating an existing contractual obligation? How do we distinguish revocable offers from irrevocable options? Is an agreement to pension off your discarded mistress an enforceable contract in St. Lucia?[7] And, on a more conceptual level, can St. Lucia improve on the common law doctrines of mistake and frustration by analysing *Couturier* v. *Hastie*[8] and *Taylor* v. *Caldwell*[9] in terms of failure of cause?

What of the express saving of Art. 962? St. Lucians awoke on 30th June, 1957 equipped with two powerful exceptions to the doctrine of privity or, in civilian terms, the principle of relative effect. Sir Allen, having explicitly saved the *stipulation pour autrui,* gave them in addition, with the introduction of express and constructive trusts, the *Lloyds* v. *Harper*[10], *re Schebsman*[11] argument of evading privity by a declaration of trust over the right to sue on the contract. In the absence of post 1957 cases dealing with privity, how far could these exceptions be taken? Presumably a St. Lucian Mrs Beswick[12] could escape the rigours of privity under Art. 962 even if not her husband's administratrix. But can we use the third party stipulation in the French fashion on the borderline of contract and tort? If so we may be able to supplement the reception of the *English Fatal Accidents Acts.*[13] Or, pushing the argument to its limits, is St. Lucia in a position to create a unique

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4 *Doxilly* v. *Fadlin,* 28-5-1971, discussed in White/ICLQ at 869-70.
5 (1884) 9 App Cas. 605.
6 [1947] KB 130.
7 For the French view see *P c Docteur de L,* 7-3-1904, *D.* 1905 II 305.
8 (1856) 5 HL Cas. 673.
9 (1863) 3 B & S 826.
10 (1880) 16 Ch D 290.
11 [1944] Ch 83.
12 *Beswick* v. *Beswick,* [1968] AC 58.
13 See *C de F Paris — Orleans c Veuve Noblet,* 6-12-1932, *S* 1934 I 81.

version of liability in negligence for pure economic loss via an implied contract with a third party stipulation?

TORT

"Art. 985 Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill...."

This article provided the base for a typically civilian general theory of delictual obligation. Since 1957 it must be read subject to Art. 917A's 'extension mutatis mutandis of the law of England relating to torts'. In at least one case this exhortation has led the Court of Appeal to feel constrained to import even as heavily criticised an English rule as the scienter doctrine in animal liability[14] despite the clear strict liability rule imposed by Art. 987. Other nominate torts have made their appearance since 1957 raffishly disguised as aspects of a general theory of delict.[15] The delict of negligence has become well established as a technique for dealing with car crashes and industrial accidents, but it is by no means clear as yet whether the further reaches of English negligence are to be received. Are *Hedley Byrne* v. *Heller,*[16] *Home Office* v. *Dorset Yacht,*[17] *Anns* v. *Merton LBC*[18] to extend to St. Lucia? What advice are we to give at the moment to St. Lucian bank managers, prison officers and civil service inspectors?

But evidently some aspects of the civilian theory of delict remain. In *Thomas* v. *St. Lucia Electricity Co*[19] the plaintiff brought 'an action for negligence under Art. 985' in respect of an electric shock received from the defendant's broken power line. The judge's discussion ignored the conceptual apparatus of negligence and concentrated on whether what caused the power line to break constituted *force majeur*. After the onslaught of the nominate torts, how much else of general delictual theory remains?

TRUSTS

Unlike the 1879 introduction of trusts into Québec law, which I gather from the literature[20] is to be treated as sui generis and related to previous civilian developments, Sir Allen Lewis' introduction of the trust into St. Lucia was explicitly by reference to English Equity. Art. 916A reads in part:

[14] *Mendes* v. *Philbert,* 5-5-1971, discussed in White/ICLQ 872-3.

[15] Thus the delict of trespass (*Gaston* v. *Peter,* 19-8-1959), of detinue (*Cragwell* v. *St. Lucia Funerals,* 2-4-1971), of conversion (*Houston* v. *Emmanuel,* 19-8-1959) and of false imprisonment (*Duplessis* v. *Pierre,* 30-5-1974).

[16] [1964] AC 465.

[17] [1970] AC 1004.

[18] [1978] AC 728.

[19] 8-11-1968.

[20] Daniel N. METTARLIN, "The Québec Trust and the Civil Law", (1975) 21 *McGill L.J.* 175; Yves CARON, "The Trust in Québec", (1979) 25 *McGill L.J.* 421.

> "(1) All persons [...] may convey property [...] to trustees by act *inter vivos* or by will for the benefit of any person in whose favour they can validly dispose of their property [...]
>
> (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.
>
> (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. [...]"

The importation of express trusts causes a conceptual difficulty: to what extent has the dualistic English scheme of legal and beneficial estates been superimposed on the civilian definition of ownership in Art. 360?[21] But express trusts should present little difficulty in practise. Indeed their only main practical effect may be to marginally increase St. Lucia's attractiveness as a tax shelter. One wonders more about the reception of those twin tools of judicial activism, the resulting and constructive trusts. Two contexts which may cause problems are matrimonial property and joint bank accounts. For the first, how is the flurry of English judicial activity of the last fifteen years to be imported into the St. Lucian community of property regime? Usually the two ideas will work in parallel towards a half and half split in matrimonial assets, but what happens when the English equities point to a division between husband and wife other than 50:50? For the second, how are the presumptions of resulting trust and advancement to be squared with the simultaneous preservation in the 1956 Ordinance of the rule that gratuitous consideration will make a contract effective?

CONCLUSIONS

My posing of some unanswered questions about the 1957 changes is by no means to be taken as implied criticism of the St. Lucia bar and bench, nor of the way in which Sir Allen set about his allotted task of anglicization. I believe that the gradual case by case development of the 1956 Ordinance's possibilities will result in rules more responsive to St. Lucia's needs and more authentically St. Lucian, than could have been achieved by any one man's exhaustive once and for all redrafting. My questions reflect only the regrets of one comparative lawyer that he could not have been born two hundred years later in time to see the mature fruits of St. Lucia's experiment in hybridization.

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[21] See the discussion in White/CLY 168-171 and White/ICLQ 876-9.