(ii) That, saving what is prescribed by sec. 147, Parliament never intended, by sec. 149, to attach criminal sanctions to sexual acts done in private by consenting adults of different sex.[12]"

The "Just Society" can take heart with this judgment. Now it need only remove the criminal sanctions which attach when the "time, place and circumstances" result in "indecency", and it will have advanced to the stage where the Bible was 4000 years ago.[13]

KEN ARENSON*

WILLS AND TRUSTS

Wills

1. *Holograph wills.*

Perhaps the most interesting of the year's cases on wills was the decision of the Manitoba Court of Appeal in *Re Tachibana Estate.*[1] A native-born Japanese had executed, partly in English and partly in Japanese, a holograph document, clearly testamentary in character, in which his signature appeared at the beginning and in the middle but not at the end. Was this a valid holograph will by the law of Manitoba? The Court of Appeal held that it was. The document was executed in 1963, and therefore the court had to apply the provisions of the old Wills Act.[2] Section 6(1) provides that "no will shall be valid unless . . ." inter alia, it "is signed at the end or foot thereof", and states that "every will" shall be valid only if the signature is placed in the defined position. Section 6(2) states that a holograph will is valid if it is "wholly in the handwriting of the testator and signed by him." Section 6(2) is silent as to the place of signature in a holograph will; but do the words in s. 6(1), "no will is valid unless . . ." and the words in s. 7, "Every will . . ." include holograph wills? The court

12. It is possible that Parliament had thought that criminal sanctions attach in circumstances like those which existed in **Regina v. P.**, because last year the federal government proposed the following amendment to the Criminal Code in Bill C-195, section 7:

"149A(1) Sections 147 and 149 do not apply to any act committed in private between:

(a) a husband and his wife, or

(b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act . . ."

13. It is the writer's view that the municipal and provincial governments should be left with the responsibility to enact by-laws or statutes, which would protect the public from being scandalized by obnoxious behaviour on the streets, for the writer does not believe that criminal sanctions should attach to such activity.
Another suggestion, albeit less acceptable to this writer, would be to clarify section 149 by limiting its effect to acts committed in public and by expressly itemizing those indecent acts which Parliament wishes to designate as crimes.

* Student, Faculty of Law, University of Manitoba.

1. (1968) 66 D.L.R. (2d) 567; (1968) 63 W.W.R. 99.

2. R.S.M. 1954, ch. 293; now repealed and replaced by The Wills Act, S.M. 1964, ch. 57, which came into force on April 16th, 1964, and applies in general only to wills made after that date—see sections 37 and 48 of the new Act; and cf. s. 43.

held that the holograph provisions are self-contained and independent; the formalities for a valid holograph will are completely stated in s. 6(2), and the other provisions do not apply.

It seems clear that the same decision would be reached under the new Wills Act.[3] The requirement that a will be signed at its end is contained in s. 5 of the new Act, and that section is made "Subject to sections 6 and 7." Section 6 relates to informal wills of soldiers and seamen; section 7 relates to holograph wills; and neither section states any requirement as to the place of signature. The definition of the end of a will is now contained in s. 8, which differs from its predecessor (s. 7) in commencing "A will . . ." rather than "Every will . . ." The only indication that s. 8 was intended to apply also to informal wills is in the marginal note, which reads: "Place of signature: all wills", but a marginal note is inserted only for convenience of reference and forms no part of the Act.[4] It is therefore submitted that under the new Wills Act only a formal attested will is required to be signed at its end.

The decision is welcome in that it allowed the courts to uphold the testator's manifest intention;[5] but it also creates certain difficulties for the future. First, there is the factual difficulty of deciding whether a will not signed at its end is complete. This problem did not arise in *Re Tachibana,* because the last clause of the will disposed of the "balance" of the estate. But what would be the position if a testator signed his will at the beginning, then made a few specific gifts, but failed to dispose of the bulk of his estate? Second, there are difficulties with regard to alterations of the will. The statutory rule is that alterations in a holograph will are to be signed by the testator[6] (initials will suffice[7]), and the courts presume that what appear to be alterations were made after the will was executed.[8] But in a holograph will signed only at the beginning, the lack of final signature, and the absence of

3. S.M. 1964, ch. 57; see **supra.**, note 2.

4. S. 12, The Interpretation Act, S.M. 1957, ch. 33.

5. Compare **Re Casey** [1967] C.C.L. 1404, where it was held by the Surrogate Court of Nova Scotia that in the case of a formal attested will both witnesses must sign after the testator has signed or acknowledged his signature; therefore, probate was refused where a testatrix signed her will in the presence of one witness who also signed, and the next day the testatrix acknowledged her signature in the presence of that same witness and another witness, which second witness then signed the will. The decision is undoubtedly correct (see: Manitoba Wills Act, s. 5; **In the Estate of Davies** [1951] 1 All E.R. 920), but it is another manifestation of the needless ritualism which flows from the two-witness rule. Would not one witness suffice, given that a witness cannot benefit under the will (Manitoba Wills Act, s. 13)?

6. The Wills Act, s. 19. It is clear that this section applies to holograph wills, although its predecessor (s. 17 of the old Wills Act) did not so apply—**Equitable Trust Co. v. Doull** (1958) 25 W.W.R. 465, 66 Man. R. 253.

7. **Re Blewitt** (1880) 5 P.D. 116; **Re Pattullo** [1956] 1 D.L.R. (2d) 237 (B.C.)

8. **In the goods of Sykes** (1873) L.R. 3 P. & D. 26. The common practice of advising that alterations whenever made be properly executed avoids the difficulty of rebutting the presumption by evidence.

witnesses, will make it extremely difficult to decide whether apparent alterations were in fact inserted before the will was completed.[9]

Finally, it is worth noting that the Ontario Law Reform Commission has recommended that, while in general the Uniform Wills Act provisions relating to holograph wills should be adopted in Ontario, the requirement of a signature at the end should also apply to holograph wills.[10]

A second case on holograph wills raised another fundamental point. In *Re Austin*[11], the testator bought a stationer's printed will form, and filled in the appropriate blanks in his own handwriting. The whole of the dispositive part of the will was handwritten, but the words of appointment of an executor were printed and only the name of the appointee was written by the testator. In addition, the testator had filled in the blanks both in the introductory part (his name, address and the date), and in the attestation clause. He had then signed the will and had it attested by two witnesses, but unfortunately the witnesses were not both present at the same time.[11a] The document therefore stood or fell as a holograph will. The appellate Division of the Alberta Supreme Court by a majority upheld the document, on the ground that the dispositive part, entirely in the testator's handwriting, could be regarded as a complete will; the formal parts could be disregarded as surplusage, and the attempted appointment of an executor, being inessential, should not invalidate the whole document. McDermid, J. A., dissented on the ground that the appointment of the executor was intended to be part of the will, and could not be struck out as superfluous. He cited Scottish authority[12] to the effect that the test is whether the non-holograph part is "formal or superfluous", not whether it is "inessential", as decided by the majority. In the absence of authority binding on Canadian courts, the present writer would side with the majority. Clearly, however, even if *Re Austin* is accepted, its principle cannot apply if any of the dispositive part of the will is non-holograph.[13]

9. A third possible difficulty is to decide how much the court in **Re Tachibana** was influenced by the evidence before it that in Japan, the testator's domicile of origin, formal documents may be signed at the beginning or at the end. It is submitted that the ratio decidendi is firmly based on the construction of The Wills Act, and that the testator's origin was, and is for the future, irrelevant.

10. Report of the Ontario Law Reform Commission on The Proposed Adoption in Ontario of The Uniform Wills Act, Department of the Attorney General, 1968. See the Commission's Draft Act, s. 7(1), and the commentary to s. 6. The Commission gave no reasons for this proposed change.

11. (1967) 61 D.L.R. (2d) 582; 59 W.W.R. 229.

11a. One of the commonest causes of failure of home-made formal wills. This cause of failure would also be cured by a change to a one-witness rule—cf. **supra.**, n. 5.

12. **Carmichael's Executors v. Carmichael**, 1909 S.C. 1387; **Bridgeford's Executors v. Bridgeford**, 1948 S.C. 416. Neither case concerned the appointment of an executor.

13. See **Re Rigden** [1941] 1 W.W.R. 566, and **Re Griffiths** [1945] 3 W.W.R. 46, distinguished by the majority in **Re Austin.** In **Re Austin** itself, the will-form read: "I Give Devise and Bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say:" If the testator had then written simply: "To my son John", the will would presumably have failed.

2. *Probate.*

Re Bohachewski Estate[14] raises a question as to the powers of a probate court to correct errors in a will. Identical wills, *mutatis mutandis*, were prepared by a solicitor for husband and wife. The husband signed his wife's will and the wife her husband's, and the error was not noticed until the death of the husband. The Saskatchewan Surrogate Court held that the will should be admitted to probate, with the changes necessary to make the document applicable to the husband. The court relied on two previous cases, *Re Brander Estate*[15] in British Columbia, and *Re Knott Estate*[16] in Alberta. These cases undoubtedly support the present decision, but with respect the basis of the earlier cases is very insecure. In *Re Brander* Wilson J., relied on the New Zealand case of *Guardian, Trust & Executors Co. of New Zealand v. Inwood.*[17] That case, however, decided only that a probate court has power to omit from the will words and clauses introduced inadvertently or by mistake; it is surely a further large step to say that the court has power to insert the intended words or clauses.[18] No authority for this wider power was cited, and so far as is known, none exists; indeed, there is strong English authority denying the existence of such a power.[19] In these circumstances, the correct approach would have been for the court to ask whether there ought to be such a power, and whether there is any binding authority which denies the existence of such a power. *Re Brander*, therefore, may or may not be correctly decided, but its reasoning does not withstand examination. In *Re Knott*, the judge was content to follow *Re Brander*, and in *Re Bohachewski*, as we have seen, the judge followed the two previous decisions. Thus is law made!

Assuming, however, that the power of rectification exists, how far does it go? Is it limited to purely clerical errors, or does it allow the court to correct even drafting errors? If it is limited to clerical errors, what errors fall into this category? Could a Canadian court, for example, substitute "charitable *and* benevolent" for "charitable *or*

14. (1967) 60 W.W.R. 635.
15. (1952) 6 W.W.R. (N.S.) 702.
16. (1959) 27 W.W.R. 382.
17. [1946] N.Z.L.R. 614 (N.Z.C.A.).
18. Cf. the "blue pencil" test in severance of the illegal parts of contracts—**Mason v. Provident Clothing & Supply Co. Ltd.** [1913] A.C. 724.
19. See, for example, **In the goods of Schott** [1901] P. 190 ("revenue" could be struck out as inserted in error, but intended word "residue" could not be inserted); **In the goods of Swords** [1952] P. 368 (codicil revoked clauses 3 and 5 of will but testatrix relied on draft will, rather than final will in which the relevant clauses were renumbered. Held, revocation clause should be omitted from probate; but court could not alter the numbering in the codicil to make the clause apply as intended). It may be that even the limited order made in Swords was incorrect—cf. **Collins v. Elstone** [1892] P. 1 (testatrix assured by executor that comprehensive revocation clause in second will would not revoke her first will. Held, testatrix taken to have known and approved contents of her will, and therefore revocation clause could not be struck out). See also **Re Horrocks** [1939] P. 198, **infra** n. 20.

benevolent" if satisfied that the testator's intention was purely charitable?[20] If so, what has happened to the basic principle that the court is concerned to find the testator's intention as expressed in the will, not outside it? And what has happened to the formal requirements of The Wills Act? The problems are more acute than the Canadian courts have yet appreciated.

Trusts

1. *Formalities—Statute of Frauds*

The English courts have continued to be troubled with problems about formalities in the law of trusts which, it appears, have not yet arisen in Canada. The most important was the decision of the House of Lords in *Vandervell v. Inland Revenue Commissioners*.[1] The appellant wished to transfer to the Royal College of Surgeons 100,000 shares in which he owned the absolute beneficial interest, the legal title being vested in a bank. The appellant directed the bank to transfer the shares to the College, and the transfer was executed. The appellant did not in any way separately assign his beneficial interest in the shares. Since s. 53(1)(c), Law of Property Act, 1925[2], requires that a "disposition of an equitable interest" shall be in writing signed by the disponor, the Inland Revenue argued that the appellant's beneficial interest had never passed to the College, with the result that the dividends declared on the shares and paid to the College would be deemed to be the appellant's for tax purposes.[3] The appellant argued that the law does not require a separate assignment of an equitable interest co-extensive with the legal estate, when that legal estate is transferred. The only previous authority was a considered dictum by Wilberforce, J. in *Inland Revenue Commissioners v. Hood Barrs* (No. 2)[4], which was against the appellant. Nevertheless, the Court of

20. Compare **Chichester Diocesan Fund Inc. v. Simpson** [1944] A.C. 341. In **Re Horrocks** [1939] p. 198, it was held by the English Court of Appeal to be impossible to substitute "and" for "or" in "charitable and benevolent", and equally impossible to strike out "or" since on the facts this would clearly conflict with the testatrix's intention. The "charitable or benevolent" problem is unlikely to arise now in Manitoba because of s. 77(1), Manitoba Trustee Act, added by s. 3 S.M. 1964, c. 56, in force May 12, 1964.

1. [1966] Ch. 261, C.A.; [1967] 2 A.C. 291, H.L.
2. Replacing s. 9, Statute of Frauds, 1677 (still in force in Manitoba), which requires the grant or assignment of an equitable interest to be in writing; the difference if any, between a "disposition" and a "grant or assignment" is immaterial in the **Vandervell** situation. Cf. **Grey v. Inland Revenue Commissioners** [1960] A.C. 1—direction by equitable owner to his trustees to hold shares on different trusts held to be a "disposition"; the House of Lords left open the question whether it would have been a "grant or assignment" (see especially per Lord Radcliffe, at p. 16).
3. S. 415, English Income Tax Act, 1952, which deems income paid to another person to belong to the settlor, unless it "is income from property of which the settlor has divested himself absolutely by the settlement."
4. (1963) 41 T.C. 339, at p. 361.

Appeal and the House of Lords held the *dictum* wrong, and rejected the Inland Revenue's argument.[5]

The argument that s. 53(1)(c) applies to this situation, while leading to inconvenience, has the force of logic behind it. Immediately before the transfer the beneficial interest only was vested in Vandervell; now he alleges that the beneficial interest is vested in the College; how can it have reached the College without an assignmnt in writing? The reasons why the various judges did not accept this view are not entirely convincing. In the Court of Apeal Diplock, L. J., stated that "prima facie a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred. No separate transfer of the beneficial interest is necessary."[6] But in the House of Lords Lord Upjohn denied the existence of such a presumption, and stated that "it is a matter of intention in each case."[7] Harman, L. J., was content to remark that the result of the Inland Revenue's contention would be "ridiculous", and that "I do not think there is any authority constraining us to this exceedingly inconvenient conclusion."[8] But with respect, the absence of authority and even a ridiculous result do not exonerate the court from applying a statutory provision, if on its true construction that provision is applicable. In the House of Lords, both Lord Donovan and Lord Upjohn equated the transaction in *Vandervell* with a case where the absolute legal and beneficial owner of property transferred that property to another; in this situation, no one would argue that s. 53(1)(c) requires a separate assignment in writing of the beneficial interest. But it is submitted that the analogy is false, for in the *Vandervell* case immediately before the disputed transfer the legal and beneficial interests were separated; how can they be brought together again except by a separate assignment of the beneficial interest?

It is submitted that *Vandervell* is rightly decided but for the wrong reasons, and that there are two possible reasons to support the decision:

(i) because of the lack of a written assignment of the beneficial interest, the gift is imperfect, but will be perfected under the rule in *Strong v. Bird*[9] when the legal title is vested in the intended donee. It must, however, be admitted that the

5. The Inland Revenue did, however, succeeed in its second argument, that after the exercise of an option to purchase the shares granted by the College to a trust company, the company held the shares on a resulting trust for the appellant. For this reason it was held that the appellant had not "divested himself absolutely", so as to escape s. 415.

6. [1966] Ch. 261, at p. 287.

7. [1967] 2 A.C. 291, at p. 311.

8. Ibid., at pp. 297-298.

9. (1874) L.R. 18 Eq. 315.

normal situation to which the rule in *Strong v. Bird* applies is far removed from the facts of *Vandervell.*[10] Moreover, it may be that the common law rule is incapable of curing a failure to comply with a statute;

(ii) perhaps the better reason is that Vandervel, after the transfer of the legal title at his direction, is unable to assert an equitable interest against the donee, so that the equitable interest disappears. Since the transfer is not in breach of trust, there is no room for the principle that an equitable interest can be defeated only by a bona fide purchaser for value of the legal estate without notice of the equitable interest. For if the transfer is not in breach of trust, because the beneficiary instigates or concurs in it, it cannot be a breach of trust for transferee to refuse to recognise the equitable interest.[11]

Re Holt's Settlement[12] involves a highly technical point, whether an order of the court under the Variation of Trusts Act, 1958[13], is *ipso facto* effective to vary the terms of the trusts, or whether a document executed by the adult living beneficiaries is necessary to carry out the court order. Megarry, J., held that on the true construction of the Act no further document was necessary, and that was sufficient to decide the point. The learned judge, however, went on to deal with a subsidiary argument based on s. 53(1)(c), Law of Property Act, 1925[14]; the argument was that when the variation is put into effect, there is a disposition of an equitable interest, so that the adult living beneficiaries must execute a document in writing. His Lordship countered this argument by relying on the reasoning of Lord Radcliffe and Lord Cohen in *Oughtred v. Inland Revenue Commissioners,*[15] that when a specifically enforceable contract is made, the contract itself, by virtue of the constructive trust imposed by equity, passes the beneficial interest to the purchaser; and unless the contract itself is required to be evidenced in writing,[16] a purely oral contract will have this effect. This reasoning probably cannot be dismissed as *obiter,*

10. The usual case is an imperfect gift inter vivos, perfected when the intended donee is appointed a personal representative of the donor.
11. The language of acquiescence or estoppel could equally be used.
12. [1968] 2 W.L.R. 653.
13. Identical in all material respects with s. 54A, Manitoba Trustee Act (added to the principal Act by s. 2, S.M. 1964, ch. 56).
14. Identical so far as relevant here with s. 9, Statute of Frauds. Cf. **supra**, n. 22.
15. [1960] A.C. 206. Lords Radcliffe and Cohen were in the minority, but of the majority only Lord Denning expressed the view that s. 53(1)(c) applies to this situation, and he did not give any reasons for his opinion.
16. Usually contracts for the sale of land or an interest in land—s. 40, Law of Property Act, 1925 (England); s. 4, Statute of Frauds, 1677 (Manitoba). It should be noted that if the contractual requirements are fulfilled, there is no need also to comply with the statutory formalities for the creation of a trust; the contract creates a constructive trust which is exempt from these formalities—s. 53(2), Law of Property Act, 1925; s. 8, Statute of Frauds.

but with respect it does not shake the present writer's belief that the reasoning in *Oughtred* is wrong. It is submitted that where X holds on trust for Y, and Y contracts to sell to Z, or, what amounts to the same thing, Y declares himself a trustee for Z, the effect is not to assign Y's existing beneficial interest to Z, but to create a new sub-trust with Y as trustee and Z as beneficiary; thus X, the original trustee, is accountable to Y, and Y is accountable to Z, but X is not accountable directly to Z. Megarry, J., does not examine this argument, and it is submitted, therefore, that his reasoning should not be regarded as decisive.

Finally, on formalities, it is worth noting *Re Tyler*,[17] where it was held that a letter signed by the equitable owner, indicating that the trustee was to hold the trust property on trusts "of which I have told you," was a valid assignment in writing of an equitable interest.

2. *Tracing.*

Perhaps the most important case on tracing since *Re Diplock*[18] is *Re Tilley's Will Trusts*.[19] An executrix had mixed £2,237 of estate money with an unspecified amount of her own money in a bank account, over which she had overdraft facilities for an amount in excess of £22,000. Over the years the executrix used the mixed fund to purchase several properties, and the estate now claimed to be entitled to an interest in those properties proportional to the contribution made by the estate to their purchase price. The main point to emerge from the very interesting judgment of Ungoed-Thomas, J., is that, if a trustee wrongly uses trust money to purchase an asset, the beneficiary may elect between treating the asset as trust property and claiming a charge over the asset for the amount of trust money used; and equally, if an asset is bought by a trustee out of mixed fund consisting partly of trust money and partly of the trustee's own money, the beneficiary is not limited to a charge over the asset for the amount contributed by trust money, but may claim a share in the asset proportional to the amount contributed by trust money. Thus, if the asset has increased in value, the beneficiary may claim his proporionate share of that increase; while if it has decreased in value, the beneficiary may still claim his charge for the whole of the trust's contribution.[20] This principle goes a considerable distance in treating the constructive trust as a remedy to be claimed by the beneficiary rather than as a substantive institution imposed by the law, and is to be

17. [1967] 1 W.L.R. 1269.
18. [1948] Ch. 465.
19. [1967] Ch. 1179.
20. Quaere, whether the same principle would apply as against an innocent volunteer who had wrongly received trust money. Since the beneficiary is required to bear any losses **pari passu**, it is suggested that he should equally be entitled to participate in any gains.

warmly welcomed; it remains true, of course, that in order to establish a constructive trust the case has to be brought within the limited categories recognised by Anglo-Canadian common law.[21] More questionable is the learned judge's decision on the facts that the executrix had not used trust money in purchasing the several properties, but that the trust money had merely been used to reduce the executrix's overdraft, which was the true source of the money used to purchase the properties. The result was that the estate was entitled to recover only the amount of trust money originally paid in. Unless there were some special facts in the case which are not revealed in the judgment, it would appear to follow that whenever a trustee who has overdraft facilities at Bank X mixes trust money with his own in an account at Bank X, then up to the limit of the overdraft facilities assets purchased are presumed to be paid for by the overdraft; and if the account is not in fact overdrawn, any trust money used would be presumed to have been used to reduce a fictitious overdraft. This principle could be disastrous and unfair to the beneficiaries, as well as being a highly unrealistic view of the fact situation; it hardly accords with the usual strict view which courts of equity take of dealings by a trustee. In the result, *Re Tilley* can perhaps best be summed up as "two steps forward, and one back."

3. *Profits made by fiduciaries.*

Boardman v. Phipps[22] is considered in detail by Mr. Fridman in this issue of the Law Journal[23], and the present writer wishes to make only two brief points: (i) he agrees with Mr. Fridman's criticisms of the decision[24]; and (ii) he questions whether, in view of the decision of the Supreme Court of Canada in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*[25], the Canadian courts are likely to hold the scope of fiduciary duties to be extensive as did the House of Lords in *Boardman v. Phipps*. It is submitted that in *Boardman*, as in *Cropper*, the plaintiffs had with full knowledge rejected the offer of the assets later claimed; and that in both cases, it could not be said after this rejection that the defendant continued to act solely in his fiduciary capacity. At least, the Canadian courts have the opportunity to diverge from the draconian principle adopted by the House of Lords.

GRAHAM BATTERSBY*

21. For a sustained criticism of this position, and for unfavourable comparison of English with American law, see Waters, **The Constructive Trust**, passim.
22. [1967] 2 A.C. 46.
23. **Supra**, p. 17.
24. And also with the dissenting speech of Lord Upjohn, especially with that learned judge's analysis of the concept of confidential information.
25. (1966) 54 W.W.R. 329 (B.C.C.A.); (1966) 58 D.L.R. (2d) 1 (Sup. Ct. Can.).

* Senior Lecturer, Faculty of Law, Sheffield University, Sheffield, England; visiting Associate Professor, Faculty of Law, University of Manitoba, 1967-68.