

## *Correspondence*

### Union Security Clauses and the Right to Work

TO THE EDITOR:

At the May meeting of the Ontario Subsection of the Section on Industrial Relations and Labour Law, the stimulating article of Mr. Clawson's on "Union Security Clauses and the Right to Work" in the February number of the Review came under discussion and it was pointed out that the Canadian Bar Association had adopted a resolution on this subject.

This resolution was initiated by the Industrial Relations Section and passed by the Association at its 1949 Annual Meeting. It is interesting to note that while the resolution includes Mr. Clawson's suggestion that non-payment of dues should be the only ground for discharge under a union shop agreement, it also leaves the door open for the recognition of other reasons for discharge. The resolution follows:

"BE IT RESOLVED:

"That the proper representations be made to the Ministers of Labour for the Dominion of Canada and the respective Provinces to amend existing industrial relations legislation providing that, notwithstanding anything contained in a collective bargaining agreement, no employer shall be required to discharge, or to discriminate against, any employee as to whom membership in a trade union has been refused or terminated on any ground other than the failure of such employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership, unless the employer agrees that the ground advanced by the union for refusing or terminating the membership is just and reasonable; or, failing such agreement, unless the issue is referred to a Board of Arbitration constituted in accordance with the arbitration provisions of the agreement, and such Board, or a majority of such Board, declares that the ground upon which the union refused or terminated the membership of such employee was sufficiently reasonable and just to justify his discharge by the employer."

J. H. OSLER\*

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### The Testator and the Concubine

TO THE EDITOR:

The case comments by Miss Wasserman and Mr. Johnson in the February issue of the Review bring to mind observations, both of legal and ethical character, concerning a testator, his family and his concubine.

\* Of the firm of Jolliffe, Lewis & Osler, Toronto. Chairman, Ontario Subsection, Industrial Relations and Labour Law Section, Canadian Bar Association.

Miss Wasserman favours a return to old French law and a restriction upon the freedom of testamentary disposition that erupted into the private law of Quebec through the English statutes of 1774 and 1801. Her vivid comment also raises an interesting moral problem, although the case of *H et al. v. Dame T* does not seem to warrant the sharpness with which she has stated it. Here it must be borne in mind that the "concubine" had been the testator's domestic servant from the time she entered his household as an orphan at the age of thirteen. There was evidence that for part of the time at least the testator and the legatee had lived as man and wife. The argument for invalidity of the testamentary disposition in her favour was in fact based upon the words "providing the said [legatee] is still living with me at the time of my decease". And Tyndale A.C.J. held that, even if those words were found to mean "living with me in concubinage", they did not invalidate the bequest, because of the last paragraph of article 760 C.C., under which a condition contrary to good morals or to public policy is considered "as not written" and not as annulling the disposition; and, in any event, the evidence did not establish that the legatee knew the condition until the last illness. Miss Wasserman, however, takes sharp issue with the decision at the sensitive point of the case, when viewed under the closing words of article 831 C.C., which in effect prohibit dispositions "contrary to public order and good morals".

The brothers and sisters, who were the legal heirs and claimants in *H et al. v. Dame T*, presumably were not dependants of the testator and they do not appear to have had any claim upon his bounty, while the legatee had spent her life since childhood as the testator's servant.

There may be here, on the moral level, a delicate question of balance, and it is not immoral to pause and weigh it. The application of principles of Christian morality to a situation of this kind is not, I think, a mechanical operation and it would be interesting to read an expert's view of Miss Wasserman's statement that "it is unthinkable that Christian morality ever allowed, or ever would allow, a concubine to receive the whole of a testator's estate whilst brothers and sisters were ignored". Much would depend, I should think, upon circumstances. Legal rules as well as moral principles are meant to be applied with due regard to circumstances and we should not be too contemptuous of the casuism that is inherent in the moral world of human beings.

The case of *Fisher v. Holland*, so ably commented upon by Mr. Johnson in reference to the problem of domicile, illustrates how French law, in an indirect way, affords protection to the wife on the decease of her husband. The disinherited wife in that case, instead of attacking the will on moral grounds, sought to establish that she was married in community of property. Thereby she might receive more than she otherwise would have in an intestacy.

Under the old Quebec law, the *légitime* assured to the children at least one half of their legal share of the estate, and the present French civil code has substantially preserved the provision. But, as Mignault indicates (Vol. 4, p. 259), before 1774 in Quebec a testamentary provision "[limitée] à des aliments" in favour of a concubine was not illegal if it did not encroach upon the protected share of the children.

Miss Wasserman's comment also points to an anomaly in the present law of Quebec. Since the English freedom of willing was introduced in the pro-

vince, no effort has been made to keep up with developments in common law countries embodied in such statutes as the Dependents' Relief Act of Ontario and like statutes in the Western provinces of Canada, and in the Inheritance (Family Provision) Act in England. A testator there, if his estate can afford it, must make "reasonable" or "adequate provision" for the future maintenance of his wife and dependants, that is, his infant children, and his other children who through illness or infirmity are unable to earn a livelihood. Brothers and sisters however are not within the scope of these statutes. An interesting decision under the English statute is *In re Joslin*, [1941] All E.R. 302 (Ch. D.), where a testator left the whole of his small estate to his mistress and their two illegitimate children, making no provision for his lawful wife. The wife had small means, the mistress had none. It was held that, in these circumstances, the wife was not entitled to have any provision made for her by the court. The testator had to choose between his moral obligations to his mistress and their children and his obligations to his wife, his estate being too small to provide for both, and the choice he made was held to have been the right one, since his wife had some means, whereas the mistress was destitute. A similar decision under the Manitoba statute is *In re Lafleur*, [1948] 2 D.L.R. 682.

LÉON LALANDE\*

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## "Nonsense" and Provincial Autonomy

TO THE EDITOR:

I wish to take strong exception to a sentence on page 215 of Mr. Peter Wright's review, in your last issue, of Professor Laskin's *Canadian Constitutional Law*:

"A constitutional doctrine, for example, which prevents Canada from implementing labour conventions or other world agreements to which she is a party is practical nonsense".

In my article on "The Meaning of Provincial Autonomy" in your special constitutional number for December last, I quoted another typical specimen of this kind of reasoning; I did call it an argument, although I added that I had some doubt whether "argument" is the proper term, it being in my mind that "name-calling" might seem more appropriate. Today, I feel it would have been better if I had expressed my thoughts in blunter language.

Everyone is entitled to his own opinion on the subject of provincial autonomy. Although I disagree with those who are advocating unlimited legislative authority for the federal Parliament, I respect their opinion. But it seems to me that, if their opinion is as sound as they claim it to be, they ought to be able to find some other argument than branding the opposite view as nonsensical.

Turning now to the specific point involved in Mr. Wright's sentence, it should be appreciated that the scope of international agreements is unlimited. A casual look at UNO and ILO material will show that every field of human activity is covered. The governing bodies of those organizations have fully realized the difficulties over implementation that arise not only in Canada but in federations generally. They have often made special provisions for

\*Of the Bar of Montreal.

countries under a federal organization. But, so far as I know, they never decided that provincial, or state, autonomy is so much nonsense or that the only way out of the difficulty it creates in the negotiation of international agreements is to do away with it. It is true that the constitution of the United States provides for unlimited treaty-making power, but the requirements for ratification in the Senate, in which all states enjoy equal representation, are such as to amount to a definite protection of states' rights.

LOUIS-PHILIPPE PIGEON \*

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#### TO THE EDITOR:

May I thank you and Mr. Pigeon for the privilege of considering the strong exception he has taken in the letter published just above. I am a little taken aback by the vehemence with which my statement of fact has been greeted.

I should therefore make clear that the use of the words "practical nonsense" is not an example of name calling, and it is not designed to say that provincial or state autonomy is nonsense. I must apologize to Mr. Pigeon for the fact that the language I used was understood in the abusive sense to which he refers and added fuel to a fire that provides no light.

I would hope that the interpretation of the words "practical nonsense" which I had in mind would attract Mr. Pigeon's agreement rather than his vigorous dissent. I used the words in the sense that the doctrine to which I referred did not make sense in practice. The contrast in my mind was between a nation exercising the rights of nationhood and pledging the word of Canada, on the one hand, and a nation forced by constitutional doctrine to fail to carry out its pledged word. It is not a question whether or not provincial rights should be subject to a qualification in favour of the performance of treaties by legislation, but of the absurdity of providing no automatic relation between the treaty-making and the treaty-performing power. In our own lives we are humiliated when we cannot perform what we have promised, and yet our present constitution is one which makes it practically impossible for those who engage our national word in connection with international agreements to be assured that the word thus solemnly given can or will be honoured. I consider such a position practical nonsense that must be dealt with in any reform of the nation's constitution, either by limiting the treaty-making power or by providing an effective treaty-performing power.

Mr. Pigeon refers to the special provisions which are made with regard to the performance of treaties in federations generally. My point is that most federations do provide some reasonable machinery for regulating the relation between the treaty-making and the treaty-performing power in the state. Our constitution makes no provision at all, except in section 132 of the British North America Act, which only serves, in my humble judgment, to increase "that which is not sense".

I hope that with this explanation Mr. Pigeon will acquit me of the charge of being abusive. I venture the view that his letter is an excellent example of the difficulties that beset us all in undertaking any reform of the Canadian constitution. It might best be done by a convention of deaf mutes.

PETER WRIGHT†

\* Louis-Philippe Pigeon, Q.C., of Germain, Pigeon, Thibaudeau & Fortier, Quebec City.

† Of Toronto.

## Books Received

*The mention of a book in the following list does not preclude a detailed review in a later issue.*

- Current Law Year Book 1951: Being a Complete Statement of All the Law of 1951 from Every Source.* General editor: JOHN BURKE, Barrister-at-Law. London: Sweet & Maxwell, Ltd., Stevens & Sons Ltd. Toronto: The Carswell Company, Limited. 1952. Pp. cl, [paragraphs 3641], 42. (\$12.75)
- The Human Blood Groups Utilized in Disputed Paternity Cases and Criminal Proceedings.* By P. H. ANDERSEN. Springfield, Illinois: Charles C. Thomas, Publisher. Toronto: The Ryerson Press. 1952. Pp. viii, 114. (\$4.50)
- The Income Tax Act 1952.* By MISS H. G. S. PLUNKETT, Barrister-at-Law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Company, Limited. 1952. (\$7.00)
- Kenny's Outlines of Criminal Law.* An entirely new edition by J. W. CECIL TURNER, M.C., M.A., LL.B. Cambridge: At the University Press. Toronto: The Macmillan Company of Canada. 1952. Pp. liii, 576. (\$8.00)
- Law in the Making.* By CARLETON KEMP ALLEN, M.C., K.C., D.C.L., F.B.A., F.R.S.L., J.P. Fifth edition. London: Oxford University Press. Toronto: Oxford University Press. 1951. Pp. xxxii, 626. (\$6.00)
- Hipson on the Law of Evidence.* Ninth edition by SIR ROLAND BURROWS, Q.C. London: Sweet & Maxwell Limited. Toronto: The Carswell Company Limited. 1952. Pp. clxxxv, 758. (\$17.00)
- Relics of an Un-Common Attorney.* By REGINALD L. HINE, F.S.A., F.R.Hist. S., with a memoir by RICHENDA SCOTT, Ph.D. (Econ.). Toronto: J. M. Dent & Sons (Canada) Limited. 1951. Pp. xxv, 253. (\$4.50)
- The Republic of India: The Development of its Laws and Constitution.* By ALAN GLEDHILL, M.A., I.C.S. (Retd.). Volume 6, The British Commonwealth: The Development of its Laws and Constitutions. General Editor: GEORGE W. KEETON. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1951. Pp. xii, 309. (\$11.50)
- Roscoe's Criminal Evidence: The Law, Evidence and Practice in Criminal Cases.* Sixteenth edition by HIS HONOUR JUDGE A. A. GORDON CLARK and ALAN GARFITT, LL.B. London: Stevens & Sons, Limited. Toronto: The Carswell Company, Limited. 1952. Pp. lxxvi, 1068. (\$26.50)
- Russell on the Law of Arbitration.* Fifteenth edition by T. A. BLANCO WHITE. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1952. Pp. xxxviii, 412. (\$16.25)
- Securities Regulation.* By LOUIS LOSS. Boston: Little, Brown and Company. 1951. Pp. xxvii, 1283. (\$17.50)
- Share Transfer and Registration in Company Law and Practice.* By A. K. MARTIN, F.C.I.S. Business Law and Administration: A Series of Practical Studies, No. 2. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1951. Pp. xii, 139. (\$4.50)
- Terrell and Shelley on the Law of Patents.* Ninth edition by K. E. SHELLEY, K.C. London: Sweet & Maxwell, Limited. Toronto: The Carswell Company, Limited. 1951. Pp. lxxv, 679. (\$22.00)
- Testaments et Vérification.* By HERVÉ ROCH, C.R. Montréal: Wilson et Lafleur (limitée). 1951. Pp. 276. (\$5.00)