Correspondence

The Testator and the Concubine

TO THE EDITOR:

Miss Wasserman, in her comment in your February issue on the decision in *H et al.* v. *Dame T*, makes several assumptions which merit careful analysis. She assumes that moral principles can be applied to particular cases with the same precise uniformity that appropriate formulas are applied to statistical data. She has, indeed, evolved a formula for resolving moral problems arising out of freedom of willing. Concubinage is immoral. To bequeath goods to a concubine is to reward concubinage. Such a disposition of property is contrary to public order and good morals and must therefore be invalidated. This seems to be the general line of Miss Wasserman's thought.

The danger inherent in this sort of approach is that the human person is regarded as a mere digit in an equation to be solved by applying a predetermined combination of moral principles. Behind it is the assumption that law is the instrument of absolute value, or, from a relativist point of view, whatever hierarchy of values is accepted by Society. There is also the assumption that it is the function of civil law to regulate every possible human relationship by a rigorous application of those moral principles which have been deduced from the reigning concepts of value. I believe such assumptions are dangerous. They place human life under that tyranny of the absolute, of which Dostoievsky's Grand Inquisitor is the incarnation and archtype. In the long run they destroy the possibility of a fully moral life.

Moral living might be broadly defined as a free, uniquely human, creative response to value. Any act to be completely moral must issue from the free exercise of choice. That is to say, it must not be determined by anything outside the character of the agent. The moral response is creative because it stimulates the endeavour to express value through the complex medium of human relationships. But it must be free from every sort of exterior coercion. It is therefore essential to distinguish positive human law from the moral law, and to define the sphere of the former in order that the latter may have a deeper and fuller application. I would suggest that it is the function of civil law to regulate relationships within the community in such a way that the fully moral life is possible for all. It would follow that the individual must possess the greatest possible freedom to exercise self determination within the limits of the common good. It is equally necessary, in the interests of morality, that there should be wide areas in personal relationships where the human conscience is the sole arbiter of good. The good may be imperfectly understood, and its very partial realization may inflict anguish for which there can be no redress in law. That is the cost of the freedom which guarantees the integrity of the moral life.

The functions of positive human law and morality are complementary. The positive law of a country is directed against acts prejudicial to the welfare of society. A mature moral judgment is concerned with intentions, motives and inner attitudes of mind as well as external acts. It is doubtful whether any court is able to assess justly the subjective factors in a human act.

In the case of *H et al.* v. *Dame T*, Miss Wasserman can find only one motive to account for the testator leaving his estate to the woman with whom he had been living. She concentrates upon the irregularity of the union, and allows that fact to dissolve all other considerations. She ignores circumstances and, by isolating one factor in the relationship, concludes that it was the intention of the testator to reward the legatee for giving him her body.

As Mr. Léon Lalande suggests in his letter in your March issue, no moralist can assess the motive and intention of an act without weighing all the circumstances in which the act was committed. A Christian moralist, furthermore, must approach his task with mercy, compassion and charity, for these also are absolute Christian values. This man and woman had lived together for many years. It is not unreasonable to presume that the man's testament was the recognition of a relationship of which loyalty, fidelity and mutual helpfulness were as much part as the sexual union. The contentious condition that the woman, in order to inherit, must be living with the man at the time of his decease, could also be interpreted as expressing an intention to stabilize the union by making it dissoluble only by death. All that these two seemingly lacked was the blessing of their union by a Christian body. The essential condition of Christian marriage is not a religious ceremony but the avowed intention to enter a life-long union, and the consummation of that intention in the sexual act.

"It is unthinkable", Miss Wasserman writes, "that Christian morality ever allowed, or ever would allow, a concubine to receive the whole of a testator's estate whilst the brothers and sisters were ignored." Kinship is here set over against moral worth. Which category is to determine validity? If it is kinship, then regardless of the moral worth of the legatee the will of the testator is invalid, for his brothers have a legal right to receive his goods upon his decease. If it is moral worth, then without respect to kinship the motives of the claimants must be examined. Sexual irregularity is not the only form of immorality. Covetousness, or an inordinate desire to acquire property, is also immoral from the point of view of Christian morality. It is more subtly, but at least as equally, destructive of public order and good morals as licentiousness. It would be most difficult for a court to probe such subjective factors, but if moral worth is to be the determining category they must be examined and judged. The danger in Miss Wasserman's confusion of categories is that both the human person and the common good will be pressed into slavery to a corporation of kin.

Christian morality could not regard the cases of *H et al.* v. *Dame T* and *King* v. *Tunstall* as of the same order. The sexual irregularity involved in the former is technically fornication, in the latter adultery. The same degree of gravity is not attached to fornication as to adultery. One is an abuse of the rights of the subject over his own person. The other is the breaking of a contract which is at once both legal and sacred. A wife stands in a contractual relationship to her husband, and it is the natural and moral obligation

of a father to support his children. A brother does not stand in the same relationship to brother as husband to wife. Even so, it is necessary to consider all circumstances, and not only the adulterous union, if a moral judgment is to be made.

JOHN W. KERR*

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"Nonsense" and Provincial Autonomy

TO THE EDITOR:

Mr. Peter Wright's answer to my letter in your last issue requires further clarification of my position on the constitutional doctrine of provincial autonomy versus Canada's treaty-making power, a doctrine he terms "practical nonsense".

I must first say that he is mistaken in the hope he seems to have that I am going to agree with him once it is explained to me that "practical nonsense" means "something which does not make sense in practice". My contention is that it is no argument against a doctrine merely to say that it does not make sense. Whether it does make sense or not is something that requires demonstration. This is what Mr. Wright does not seem to appreciate, because he goes on to speak of the "absurdity" of providing no automatic relation between the treaty-making and the treaty-performing power. There is not much difference between absurdity and nonsense.

If the absence of an "automatic relation" between the treaty-making and the treaty-performing power stamps a constitution as absurd, then it must be said that the British constitution was absurd for centuries, and still is, because to this day it remains true that "treaties to which Great Britain is a party are not as such binding upon the individual subjects, but are only contracts binding in honour upon the contracting States" (*Arrow River & Tributaries Slide & Boom Co. Ltd.* v. *Pigeon Timber Co. Ltd.*, [1932] S.C.R. 495, at p. 510). Throughout the centuries before the advent of responsible government the "absurdity" was complete and it has not yet been removed entirely, seeing that there is never any legal certainty that the executive that signs a treaty will not be dismissed before Parliament has passed implementing legislation.

Mr. Wright argues by analogy that it should be considered as humiliating for a country to default in performing a treaty as it is for an individual to default in performing a contract. The fallacy of this argument is that it overlooks the fact that treaties are not signed by the nation itself but by representatives. Under any constitutional doctrine other than absolutism or dictatorship, national executives, no matter how exalted, are always invested with limited authority. The President of the United States was recently reminded by his Supreme Court that there were limits to the power of his high office. Everyone knows that the United States Senate refused to ratify the Versailles treaty which another president had written.

Any political system embodying a real division of authority necessarily implies as a consequence that *ultra vires* decisions are to be invalidated by

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the courts. In South Africa Mr. Malan is just showing what becomes of minority rights when "humiliation" of this kind is objected to. In the Russian conception of "democracy" courts of law are not considered as impartial arbiters but as agencies of the government. We rightly judge this unfair because we believe that a division of authority is a necessary ingredient of "the rule of law". This being so, on what basis is any given division to be branded as "absurd" in itself?

The existing division between the treaty-making and treaty-performing power is but a facet of the division of the executive and legislative powers. The United States Constitution is proof positive that this last division is no absurdity. Its exponents do not deny some inconvenient results in practice, but they will not admit that inconvenience makes the division "practical nonsense". In the recent steel decision Judge Brandeis' words in *Myers* v. *U.S.* were recalled: "The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

I cannot agree with Mr. Wright's contention that our present constitution 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. Whenever they are in doubt about the limits of their authority, the Supreme Court of Canada is open to them for a decisive opinion on a reference.

I must also object to Mr. Wright's description of his initial remark as "a statement of fact". This wording is unfortunate because, if taken literally, it would be a manifestation of the state of mind which, I contend, is responsible for the unfortunate difficulty Mr. Wright and I both deplore. Some contemporary United States politicians have, in their attempts to disguise dictatorial tendencies, tended to obscure the distinction between fact and opinion, as when a United States president called "fact-finding boards", tribunals whose essential function was not to find facts but to make recommendations for the settlement of labour disputes. Such examples of distortion of language should not be allowed to obscure the point that the question whether a certain doctrine makes sense or not is a matter of opinion, not a matter of fact. What we must do is to make an honest effort to understand each other's contentions and avoid looking at them in the light that all views opposed to our own are absurd, and that this is a "fact".

My purpose in discussing these issues is to show that provincial autonomy is a question both sides of which are worth considering. No compromise is possible on any subject-matter so long as the question is whether it makes sense or not, but a compromise becomes possible when it is appreciated that the question is one of convenience or expediency. We shall never make any progress towards a solution of our constitutional difficulties until this is realized.

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