ARTICLE 831 C.C.: THE PROBLEM OF AMENDMENT

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In this year of Our Lord one thousand nine hundred and fifty-five, animated discussion centers around the problem of whether article 831 of the Civil Code should be amended in order to provide for some type of reserve for the wife and children of a testator, any stipulation to the contrary in the will notwithstanding.

Impetus has been added to the discussion by a judgment rendered on the 25th of June, 1954, by the Court of Appeal, in the case of *Crete* v. *Fortin*,[1] a decision which reflects an increasing tendency on the part of courts in this province to interpret article 831 C.C. in terms of a freedom of willing that is completely without restriction — an interpretation, however, on which judicial opinion is not unanimous and in connection with which there are serious grounds for reflection and even disagreement with the prevailing tendency. These grounds are to be covered by the writer before consideration of the main problem, the advisability of amending article 831 C.C. and the manner of its amendment, attention being drawn on this point to an article by Me. Turgeon (to be commented on later).[2]

Crete v. *Fortin* turned fundamentally on the question whether a will in which the testator had disposed of his entire estate in favour of a woman alleged to have been his concubine, disinheriting the wife and children, contravened public order and good morals.

Readers will, of course, recall that article 831 of the Civil Code, after setting out that every person of full age and sound intellect, capable of alienating property, can dispose of it by will in favour of any person capable of acquiring, concludes as follows:

> " . . . saving the prohibitions, restrictions, and causes of nullity mentioned in this code, and all dispositions and conditions contrary to public order or good morals."

Appelants, the daughters of Ephrem Crete, had asked for the annulation of their father's will, which, disinheriting the wife and children (as previously stated), had named as universal legatee the woman with whom he was alleged to have lived in concubinage. The daughters contended that the will was immoral, contrary to public order, and constituted a nullity. Allegations had also been made that the will had been passed as the result of undue influence exercised by the legatee, Defendant in the case. Defendant made a total inscription in law, and, subsidiarily, a partial inscription, in respect of the paragraphs alleging the adulterous relationship between testator and legatee, contending that the allegations in question did not give rise to the

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[1][1954] Q.B. 585.

[2](1955), 15 R. du B. 204.

conclusion prayed for, viz., the nullity of the will. The partial inscription in law was maintained and the allegations alleging an adulterous relationship between testator and legatee were ordered struck from the record. From this interlocutory judgment an appeal was taken, which was dismissed. In the view of Judge Pratte, speaking for the Court of Appeal:

> "Suivant une jurisprudence maintenant bien établie, le legs entre concubins n'est point défendue. *(King* v. *Tunstall* (P.C.) 20 L.C.J. 49; *Russell* v. *Lefrançois,* (C.B.R.) 2 D.C.A. 245, à la page 264; 8 S.C.R. 335, at pp. 365, *in fine,* et 366; *Archambault* v. *Guerin* [1948] B.R. 408)."[3]

It is interesting to note that the decision does not state in outright fashion that such a bequest *is* moral; it simply states that a well established jurisprudence has held it not to be prohibited. The question that follows is this: whether, in the light of the restrictions that hedge in the common law doctrine of stare decisis, the three decisions cited by Judge Pratte constitute "une jurisprudence bien établie".

To begin with, according to the doctrine of stare decisis,[4] a careful distinction must be made between ratio decidendi and obiter dictum, recalling that it is the ratio decidendi which constitutes the legal principle that may be binding upon other cases;[4a] secondly, it is now accepted that what serves as authority or precedent is not merely the principle of law enunciated but the *material* facts of the case in so far as they were necessary to the decision.[5]

Keeping in mind these qualifications of the doctrine, what does one find? That neither from the point of view of legal principle nor of material facts is *King* v. *Tunstall*[6] applicable to *Crete* v. *Fortin.*[7] The holding in *King* v. *Tunstall* was this:

> "That the conjoint operation of the Imperial Act (14 Geo. 3, c.83) and of the Canadian Act (41 Geo. 3 c.4) is to abrogate the old law which prohibited gifts by will to adulterine bastards."[8]

As was stated by Judge Surveyer, commenting on this case, criticizing at the same time its application to others where the facts were different:

> "Il n'y a rien d'immoral à constituer légataire universel son enfant adultérin: au contraire, c'est un acte de réparation. Autre chose est de donner ce titre à une concubine en récompense d'un *nefarium coitum.*"[9]

In *King* v. *Tunstall,*[10] the will, which provided for a substitution in favour of the illegitimate sons of the testator were his legitimate son not to leave

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[3] *Supra,* at p. 2 of the judgment.

[4] A doctrine, incidentally, by which Quebec courts are not bound, in theory at any rate. See in this connection Mignault, "The Authority of Decided Cases" (1925), 3 Can. Bar Rev. 1, at p. 19.

[4a] There have been instances where an obiter dictum has been "raised to the dignity of a binding principle by time and repetition." This has been adversely commented upon by W. Friedman, "Stare Decisis" (1953), 31 Can. Bar Rev. 723 at p. 734.

[5] Friedmann, *Supra.*

[6] 20 L.C.J. 49.

[7] *Supra.*

[8] *Supra.*

[9] (1953), 13 R. du B. 245, at p. 253.

[10] *Supra.*

lawful issue at his death, had been passed in 1789. At the time, the Civil Code was of course not in existence. Article 10 of the Quebec Act, 1774, regulated the matter of testamentary dispositions, and the article read as follows:

> " . . . it shall and may be lawful to and for every person in the said Province, whether Canadian or English, that is Owner of any Goods or Creditors in the same, and that has a right to alienate the said Land, Goods or Creditors in his lifetime by Deed of Sale, gift or otherwise, to devise or bequeath the same at his or her death by his or her last Will and Testament to such Persons, and in such manner as he or she shall think fit, *any Law, Usage or Custom heretofore or now prevailing in the Province to the contrary hereof in any wise notwithstanding.*" (writer's italics).

The concluding clause in article 10, it becomes evident, differed in radieal fashion from the concluding clause in article 831 C.C. If, then, the decision in *King* v. *Tunstall*[11] is to be considered, it should be done with these differences of the law and of fact in mind, and the consequences flowing therefrom. In some legal circles, much is made of the following remarks of the Law Lords:

> "Nobody surely can suppose that it is a crime in a man to express by his will his wishes as to what should be the devolution of his property after his death, or that it should go in a particular direction, even although that direction should be in favour of an adulterine bastard — *leaving it open to the law to say whether the wish shall or shall not take effect.*" (writer's italics).[12]

By their own words, their Lordships admitted that the law could state whether a testator's wishes were, or were not, to take effect with regard to the direction in which the estate was to devolve. In 1789, the estate could devolve in any direction chosen by the testator. The concluding clause of article 10 of the Quebec Act made that clear. In the year 1955 the concluding clause of article 831 of the Civil Code makes it equally clear that the estate cannot devolve in a direction that contravenes public order and good morals.

Attention is now directed to the case of *Russell* v. *Lefrançois*. It was held here:

> "That, as it appeared that the only consideration for the testator's liberality to J.M. was that he supposed her to be 'my beloved wife *Julie Morin*' whilst at the time J.M. was, in fact, the lawful wife of another man, the universal bequest to J.M. was void, through error and false cause."[13]

The holding speaks for itself.

Finally, there is the decision rendered by the Court of Appeal in *Archambault* v. *Guerin*.[14] The wife sought to set aside the will of her husband which had disposed of his entire estate in favour of the woman with whom he had been living in concubinage, Defendant in the case. The nullity of the will was prayed for on the following grounds:

(a) that the will had been prepared by the notary on instructions of Defendant and not of the testator;

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[11] *Supra.*

[12] *Supra,* at p. 76.

[13] (1883), 8 S.C.R. 335, at p. 336.

[14] [1948] K. B. 408.

(b) that the testator had signed the will as the result of undue influence exercised by Defendant;

(c) that at the time the testator signed the will, he was mentally incapable of so doing.

The Appeal Court, reversing the judgment of the Superior Court, held that Plaintiff had failed to make satisfactory proof of her allegations. The position taken by Judge Barclay,[14a] upholding the validity of bequests between concubinaries, did not constitute the ratio decidendi of the case but was only obiter dictum, described by one author as the " 'hors-d'oeuvre variés' of jurisprudence."[14b]

Vaudreuil v. *Falardeau,* a decision rendered by Judge Surveyer, categorically rejects the principle of a freedom of willing that is completely without restriction.[15]

Considering these facts, the writer, fully aware of the authority of the Court of Queen's Bench, differs nevertheless with the dictum of that august tribunal that there is "une jurisprudence bien établie" on the matter of validity of wills in which a concubine is constituted universal legatee.

Can we, however, proceed on the basis that the concluding clause of article 831 C.C. is a dead letter?[15a] To do so, one must assume that when the restriction appearing at the end of the article was added — a restriction that existed neither in the Quebec Act of 1774 nor in the Act of 1801[15b] — it was done for no particular reason and with no particular purpose in mind. Such an assumption has no justification, in the absence of proof to support it. Discussion is still permissible, and, in fact, called for.

Assuming, then, that the question of validity of wills in which a concubine is constituted universal legatee is still open for discussion, the problem of public order, of good morals, now comes up for consideration.

What is meant by public order? What constitutes good morals? These are questions of transcendent importance and have been the subject matter of

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[14a]Page 2 of the judgment.

[14b]Friedmann, *Supra,* at p. 745.

[15]1950 P.R. 193.

[15a]In this connection, see the article by Judge Surveyer entitled "Un Cas d'Ingérence des Lois Anglaises dans notre Code Civil," (1953), 13 R. du B. 245, at p. 255.

[15b]*Supra,* p. 255; also p. 248.

The Act of 1801, intended to remove some misconceptions that had arisen with respect to the interpretation of article 10 of the Quebec Act, 1774, covering testamentary dispositions, read as follows:

Toute personne saine d'entendement, majeure et usant de ses droits, pourra léguer par testament ou acte de dernièr volonté, soit entre conjoints, en faveur du mari ou de la femme, soit en faveur de l'un ou de plusieurs des enfants, à son choix, ou en faveur de qui que ce soit, tous et chacun ses biens, meubles ou immeubles, quelle que soit la tenure desdits immeubles, et qu'ils soient propres, acquêts ou conquêts, *sans aucun réserve, restriction ou limitation quelconque* . . . (writer's italics).

Note again the striking difference between this clause and the concluding one in article 831.

study by many writers both in the Province of Quebec as well as in France. In a commentary of the type now submitted, restricted as to space, what is said must be stated briefly.

Trudel has expressed himself in this manner:

> "L'ordre public comprend toute chose qui intéresse plus directement la société que les individus. Dans cette notion il faut évidemment grouper d'abord tout le droit public . . .
> "Mais l'ordre public n'est pas limité par le droit public. Dans le droit civil, toute disposition qui intéresse d'abord la société se range sous cette notion."[16]

Further on, he states:

> "Les bonnes moeurs font évidemment partie de l'ordre public. Elles constituent cependant une notion bien caractéristique qu'il importe préciser quelque peu. Elles sont basées sur la morale chrétienne."[17]

Baudry-Lacantinerie takes a secular, rather than a religious, approach.

> "Qu'est-ce que l'ordre public? que sont les bonnes moeurs? Notions variables, évidemment dans le temps et dans l'espace. Mais la pensée des rédacteurs du code civile est claire. Les jurisconsultes romains l'avaient déjà exprimée dans cette formule: *privatorum conventio juri publico non derogat.* (L. 45, D., De reg. juris., 50, 17). Et les expressions 'droit public' et 'l'ordre public' ont été, à divers reprises, employées avec la même signification par Portalis, qui entendait par droit public (*hoc sensu*) tout ce qui, dans les lois 'intéresse plus directement la société que les particuliers.' On doit donc ranger parmi les lois intéressant l'ordre public et les bonnes moeurs toutes celles qui, par leur fondement, reposent sur des conceptions considérées par le législateur, organe de la pensée nationale, comme essentielles au maintient de l'existence de la société telle qu'il la veut."[18]

Laurent envisages the problem from a viewpoint in-between:

> "Mais où chercher cette morale qui servira de règle au juge? Tel sera certes le sentiment du juge, s'il est catholique. Si la société entière était catholique, la difficulté serait levée, il n'y aurait qu'une morale religieuse. Est-il nécessaire d'ajouter qu'il y a plusieurs religions et qu'elles ne s'accordent pas toujours sur la morale? Trouverons-nous plus de certitude dans la morale philosophique? Les philosophes sont divisés aussi bien que les religions. Est-ce à dire que le juge est sans règle en cette matière? Non, on exagère, quand on se plaint de l'incertitude de la morale; il faudrait dire que la morale est progressive; elle change donc, mais en s'épurant, en se perfectionnant. Et quel est l'organe de ce progrès incessant? La conscience humaine. "Il y a, à chaque époque de la vie de l'humanité, une doctrine sur la morale que la conscience générale accepte, sauf des dissidences individuelles qui ne comptent pas."[19]

Planiol et Ripert approach the problem of validity of gifts and bequests between concubinaries from the point of view of cause.

> "La jurisprudence a été conduite, sur la base de la théorie de la cause, à attenuer la latitude laissée aux concubins. Elle fait une distinction suivant le motif impulsif et déterminant qui a poussé le concubin libéral. A-t-il agi en vue de commencer, reprendre, ou remunerer des relations coupables, la libéralité est nulle. A-t-il au contraire entendu au moment de la rupture ou postérieurement réparer le préjudice porté à l'autre concubin, la libéralité est valable. Cette distinction mérite d'être approuvée. Elle pêche cependant sur un point: entre concubins il existe une foule de libéralités, spécialement des legs, dont le motif n'est point indiqué dans l'acte, et impossible à découvrir d'une façon précise. Des concubins âgés ayant vécu longtemps ensemble se font des libéralités à la manière des époux. Ces libéralités sont-elles valables? La jurisprudence se prononce pour l'affirmative. Par certains côtés, cette

[16] *Traité de Droit Civil,* t. 1, p. 87.
[17] *Op. cit.,* p. 88.
[18] *Droit Civil,* 2nd ed., vol. 1, p. 233.
[19] *Droit Civil Français,* 3rd ed., no. 56, p. 90.

jurisprudence peut se justifier, il n'existe pas d'incapacités entre concubins[20] et le motif de la libéralité étant incertain, il vaut mieux se prononcer pour la validité. Moralement et même juridiquement, cette solution est cependant critiquable; le motif de la libéralité n'est point difficile à découvrir, c'est le concubinage, et, en dehors d'une idée de réparation, cette considération est immorale et entache l'ensemble de la libéralité. Sur la base de la théorie de la cause, on pourrait arriver à une solution pratique assez voisine de celle de l'ancienne incapacité. La jurisprudence moderne est trop indulgente."[21]

The apologists for wills which constitute a concubine as universal legatee have tried to justify them as reparation for a wrong done. But can one rightfully speak of reparation where the partner to an adulterous relationship is provided for whilst the lawful wife and children are left penniless? Unless our social structure, and the set of values on which it is based, have changed in radical fashion, the answer must be in the negative.

Nor can a disposition of the type in question be justified on the basis of secular morality. For secular morality of the twentieth century, revolted by an eighteenth century policy of "laissez-faire", holds that there are certain fundamental human rights which take precedence, even over private property. One of these fundamental rights is the protection due to the family unit, basis of our social structure. A testamentary disposition which disinherits the lawful wife and children is a violation of such fundamental right.

That various jursidictions have gradually come around to this notion of thinking is made evident by legislation passed by them. In the words of Me. Turgeon:

"Dans presque tous les pays anglo-saxons, la liberté de tester n'est plus absolue: on ne l'a pas supprimée, mais on l'a restrainte par des lois particulières dans le but d'assurer la subsistance du conjoint et des enfants."[22]

In the Province of Ontario, there is a statutory enactment entitled *"The Dependents' Relief Act, ch. 101 of the Revised Statutes of Ontario"*, in virtue of which the surviving consort and the children incapable of earning their own living may institute proceedings by way of petition, where the testator has failed to make adequate provision for them. After proof made, the court has discretion to issue an ordinance to remedy the situation. Such ordinance may impose on the legatee the obligation of paying to the dependents an alimentary pension; or it may oblige the legatee to hand over a certain amount of money to the surviving consort and the children; or, again, it may order that certain moveable or immoveable property of the succession be subject to provide an income in favour of the dependents.[23] Laws similar in nature have

[20]In Quebec law, gifts *inter vivos* between concubinaries are of course limited to maintenance.

[21]*Droit Civil*, 1933 ed., vol. 5, no. 266, p. 270. Considering this difference between French law and Quebec law as to gifts *inter vivos* between concubinaries, and considering further that a bequest by will is a liberality, without the intervention of the person benefitted it is true, but a liberality nevertheless, the Quebec jurisprudence is even more indulgent than that of France.

[22](1955), 15 R. du B. 204 at p. 208.

[23]*Supra*, p. 208.

been adopted in the Provinces of British Columbia, Alberta, Manitoba and Saskatchewan.[24] In England, and also in many of the states of the United States of America, the principle of unrestricted freedom of willing has likewise been modified by statutory enactment.[25]

In France, the *légitime* or reserve has been a prominent feature of succession law for many centuries. *Pothier,* under the heading of "De la nature de la légitime", defined it in the following terms:

> "67. Les père et mère doivent par le droit naturel, à leurs enfants, une part de leurs biens, qu'on appelle *légitime.* La loi civile en a fixé le quotité. Notre coutume l'a fixé à la moitié de la part que l'enfant aurait eue dans les biens de sesdits père ou mère, s'ils n'en eussent disposé par donation entre-vifs ou dernière volonté."[26]

And under the Napoleonic Code, article 913, the proportion of the reserve is set out as follows:

> "913. Les libéralités, soit pas actes entre-vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant légitime; le tiers, s'il laisse deux enfants; le quart, s'il en laisse trois ou plus grand nombre."

The reserve provides for the children but not for the consort. Provision for the consort is made in virtue of article 205 of the Napoleonic Code. According to this article, the succession of the deceased consort owes to the surviving one aliment, where the latter is in need. The delay for making this claim is one year from the death of the predeceased consort, and where there has been a partition, one year from the completion of such partition. All the heirs owe this alimentary pension. The pension, however, is not levied out of the personal property of the heirs, but out of such property as devolved to them from the succession.

Me. Turgeon admits that the *légitime* or reserve is a happy compromise between two traditions: on the one hand, the tradition of protecting the family; on the other, the notion of individual liberty and the right to dispose of one's property as one wishes. He admits that the *légitime* or reserve is in harmony with the principles and moral tenor of the Quebec Civil Code.[27] Nevertheless, he does not approve of its introduction into the law of this province, basing his opposition on the fact (or so it would seem to him) that Quebec law on testamentary disposition is of English inspiration, different from the old and modern French law. There does not exist unanimity on this point.[28] But, admitting for the sake of argument, that essentially the law *is* of English inspiration: does that justify a further conclusion, that the law is sancrosanct? That its basis cannot be changed? Legal rules, whether of English or French origin (or any other for that matter) are the products of men's minds; as such, they are subject to analysis, criticism, and — where need be — to change.

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[24]*Supra,* p. 209.

[25]*Supra,* p. 209.

[26]Edition of Bugnet, vol. 1, pp. 370-371.

[27]*Supra,* p. 206.

[28]Billette, *Donations et Testaments,* vol. 1, p. 65.

Me. Turgeon favours the Ontario statute because of its suppleness. The law may be supple but, in the view of the writer, it is based upon a wrong principle, that of mere need. The basis for provision of the children after the death of a parent should be more than tbat. The ties of blood, the duties and sentiments that should be the consequence of such ties, are not to be computed alone in terms of dollars and cents, in terms of the daily bread. Laurent discusses the question in connection with a statement made by Montesquieu to the effect that the natural law obliges a father to supply aliment to his children but not to constitute them heirs. Laurent takes Montesquieu severely to task.

> "Est-ce que le père Montesquieu aurait rempli ses devoirs envers son fils en faisant de lui un maçon? Il lui devait l'éducation, et une éducation en harmonie avec les facultés dont la nature l'avait doué, en harmonie avec la position sociale qu'il devait occuper, donc aussi des biens qui lui permissent de continuer la vie d'aisance ou de richesse à laquelle les parents eux-mêmes destinent leurs enfants, en les élevant selon leur fortune."[29]

These remarks apply by analogy to the wife. Where a wife has been married for twenty or thirty ycars (or more or less as the case may be), has shared her husband's fortunes good and bad, has helped in the founding of the family wealth (in some instances by her actual work and assistance in the outside world; in others, by providing the background that made possible her husband's efforts in that direction), it is not fair, it is not just, that the bulk of this wealth should go to a stranger, to another woman, wbilst the wife is left to get along on the pittance of an alimentary pension. A law which limits the wife to an alimentary pension whilst a third party obtains the bulk of the family wealth, is in effect a law which sanctions selfishness and evasion of family obligations.

The modern succession law of France is not without fault either. To limit the surviving consort to an alimentary pension, and that only in the case of need, is not more justifiable, morally, in the law of France than in the law of any other jurisdiction. The principle of the reserve, or *légitime* — whose influence has been felt beyond the borders of France — should include the surviving consort as well as the children.

The Civil Code of Switzerland, as well as of other parts of Europe, provides for a reserve that includes the consort as well as the children.[30] Surely it is not too much to expect a law of succession in this province that is equally as civilized, equally as humane! Nor is there reason for assuming, as Me. Turgeon seems to have done,[31] that the economic and social fabric of this province would render difficult the working of such a law. By and large, Europe is as industrialized as the Province of Quebec; the differences in the economic and social structures between the two are not as great as the opponents of the reserve, or *légitime,* consider them to be.

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[29]*Droit Civil Français,* 3rd ed., vol. 12, p. 31.

[30]*Supra,* p. 207.

[31]*Supra,* p. 210.

But whether revision of the succession law of this province is to be made along the lines of the reserve, as in France, or along the lines of the statute as in Ontario, revision there must be to prevent the repetition of a case like *Crete* v. *Fortin*. No culture, no civilization worthy of being called such can afford to have on its statute books a law which gives validity to a will in which the lawful wife and children are disinherited whilst the partner to an adulterous relationship is bequeathed the testator's entire estate.

It was Lord Killowen who once stated that the calibre of a civilization was to be found not in the wealth and power of its cities but in its system of laws and the degree of protection afforded by these laws to the weakest and humblest of subjects. That test is as applicable to the Province of Quebec as to every other jurisdiction comprising the family of civilized nations. It is something always to be kept in mind, conscious — as we must be — of the fact that, for the things which it has failed to do as well as for the things which it has done, a people is answerable not only to the age in which it had its being but to the bar of history as well.