CASE AND COMMENT

COMPANY LAW—RIGHT OF DIRECTORS TO ENTER INTO AGREEMENTS BINDING THEIR FUTURE DECISIONS.—The decision of the Quebec Court of Queen's Bench in the case of *Bergeron* v. *Ringuet et Pagé et al.*[1] is of interest to all lawyers who are called upon to prepare agreements among shareholders. An agreement between the plaintiff and the two defendants at a time when they were three of the seven shareholders of St. Maurice Knitting Mills Ltd. provided for their acquisition of the shares of another shareholder which would give them control of the company. The parties also agreed that once such control had been obtained they would assure the plaintiff's permanent election to the board of directors and his appointment as secretary-treasurer and assistant general manager at a weekly salary of one hundred dollars. Similar stipulations were made in favour of the defendants and in clause 11 of the agreement the parties agreed to vote unanimously at all meetings of the company. Clause 12 provided that if any of the parties did not adhere to the terms of the agreement his shares would be transferred gratuitously to the other two parties.

In 1952 at a meeting of directors and shareholders the two defendants failed to carry out the terms of the agreement and the plaintiff took an action demanding the transfer to him of the shares of the two defendants. Their chief defence was that the agreement was illegal.

The Superior Court rejected the action on the ground that clause 12 could not be interpreted as giving a recourse to one party against the other two. In appeal this reasoning was not endorsed by any of the three judges of the Court of Queen's Bench where Chief Justice Galipeault and Mr. Justice Owen found in favour of the plaintiff while Mr. Justice Pratte dissented. The Chief Justice found nothing illegal in the agreement and decided that it should be given its full effect. The dissenting judge however distinguished between the rights of the parties to make an agree-

[1] [1958] Q.B. 222.

ment binding their decisions as shareholders on the one hand and as directors on the other. He said:

> But the situation of the directors is quite different from that of the shareholders. A director is appointed by the shareholders but he is not really their agent; he is an administrator obliged by law to manage a patrimony which is not his own, nor that of his co-directors, nor that of the shareholders, but rather that of the company, a juridical person absolutely distinct from those that direct it or those that own the share capital. In this quality, a director must act in good conscience, in the sole interest of the patrimony submitted to his management. This pre-supposes that he has the liberty to choose, at the very moment when a decision is to be made, that which appears to him to conform to those interests which the law requires him to safeguard.[2]

He went on to say that a director who has irrevocably given up his freedom of choice has rendered himself incapable of doing what the law requires of him and that clause 11 requiring unanimity at all meetings had that effect and was therefore invalid. He further held that clause 11 was not severable from the agreement and it therefore invalidated it in its entirety.

Mr. Justice Owen agreed that the undertaking of solidarity at directors' meetings required by clause 11 might be contrary to public order but he considered that it was not necessary to decide this since the clause was separable from the other provisions of the contract to which he would give full effect. He went on to point out that the defendants "had failed to comply with other clauses in the contract, *e.g.* to vote plaintiff's salary (clause 4), to elect him secretary-treasurer and assistant general manager (clause 5), to name him a director of the company (clause 14)."

It is curious to note that in enunciating the doctrine that a director may not give up his freedom of choice, Mr. Justice Pratte applied it only to clause 11 and not to clauses 4 and 5 which required the directors to vote the plaintiff a salary and to appoint him as secretary-treasurer and assistant general manager. It is just as strange that Mr. Justice Owen in admitting the probability that "insofar as directors' meetings are concerned the undertaking of solidarity by the three parties to the contract is contrary to public order" and consequently that clause 11 might be null, did not also consider the probability that for the same reason clauses 4 and 5 might also be null and direct himself to the further question whether they also were severable, leaving only clause 14 as an effective ground for the action. This is difficult to understand when one considers first that all three appeal judges maintained that clause

[2] Translation mine.

11 applied only to those matters which were not specifically agreed upon in the agreement and second that it was the breach by the defendants of matters which were specifically agreed upon in clauses 4, 5 and 14 which gave rise to the action.

Further support has since been given to this anomalous treatment in a comment on this case by Mr. Marie-Louis Beaulieu, Q.C., who approves the principle enunciated in the dissenting judgment of Mr. Justice Pratte.[3] He goes on to state that it is not contrary to public order or law for "two or more shareholders holding the majority of the shares of a company to agree on the direction to be given to the affairs of the enterprise, on its operations, *or even on the officers to be elected.*"[4]

I fully agree that as a general principle directors may not validly bind their future decisions and I suggest that in the case discussed this principle should have been applied to invalidate clauses 4 and 5. Since the case has been appealed to the Supreme Court we may yet see this done.

While it might be interesting to consider the proper application, interpretation and effect of clause 11 which was subjected to close examination in the judgments, what seems to me to be of special interest in this case is that portion of the judgment of Mr. Justice Pratte already quoted in which he declares that a director must act in the sole interest of the patrimony submitted to his management and that this patrimony is *not that of the shareholders* but of the *company* which is a juridical person quite distinct from the shareholders. For him, it is illegal for a director to surrender his right to judge what is in the interests of his company.

It is my contention that this doctrine does not apply in the case where the wishes of all the shareholders of a company are *known to the directors.* In such a case the directors should give primary consideration to the fulfillment of those wishes *even if they are different* from what the directors conceive to be in the best interests of the *company.* As a necessary corollary, agreements made by directors binding the future use of their discretion are valid where all the shareholders of the company are parties to the agreement or otherwise consent thereto.

The Companies Acts appear to support the principle that the ultimate test of a director's action should be his conception of the interests of the shareholders since these Acts provide that matters of major importance must have the express approval of the shareholders. They are made the final judges of what is desirable and it

[3] (1958), 18 R. du B. 395. [4] Translation mine.

has never been suggested that in arriving at their decision they should be motivated by any considerations other than what they consider to be desirable in their own interests.[5] The shareholders certainly need not confuse themselves by trying to consider what might be in the interests of their company as a separate juridical entity.

It is true that in most cases the interests of the company will be the same as the interests of the shareholders. Thus Maston & Fraser set forth in conjunction the two propositions that "It is a director's duty to give his whole ability, business knowledge, exertion and attention to the best interests of the *shareholders* who have placed him in that position" and that "Directors by reason of their fiduciary obligations in the exercise of their powers are bound to act with the utmost good faith for the benefit of the *company*."[6] They did not consider these two statements to be contradictory. However, one can think of situations where this might be the case and I suggest that in such a situation the directors owe first allegiance to the desires of the shareholders, and by that I mean the *expressed* desires of *all* the shareholders, over and above any possible contrary duty to the company *per se*. For example, where all the shareholders of company A are also all the shareholders of company B and the two companies work together in a joint enterprise, it may happen that they will wish to effect certain changes which will benefit the total overall enterprise but which will actually be to the detriment of company A. In this case it would seem to be quite proper for the directors of company A to take cognizance of the clearly expressed desires of the shareholders and to authorize actions in accordance with such desires which are not in the interests of their company. If all the shareholders of a company have clearly indicated that they want something to be done I consider that the directors should do it if it is not illegal. The practical sanction, of course, is that if the decisions of the shareholders

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[5] It may be that this general statement is not wholly applicable to the case where a shareholder votes as a member of a class. In the case of *British American Nickel Corp. Ltd.* v. *M. J. O'Brien Ltd.*, [1927] 1 D.L.R. 1121, Viscount Haldane of the Judicial Committee of the Privy Council said: "But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly."

[6] Company Law of Canada (4th Ed., 1941), p. 580.

are not carried out by the directors then the shareholders will replace them with directors who will do so.

If it is not proper to maintain that directors should at all times make decisions in accordance with the known wishes of all the shareholders but solely those which they consider to be in the best interests of the company as such then it follows that directors should not do such things as declare dividends or authorize the dissolution of a profit-making company as these could never be interpreted as being in the interests of the company.

If we accept the principle that directors must act according to their estimate of the best interests of the shareholders, it must follow that directors should be bound to act in accordance with what the shareholders express *in an agreement* to be their desires. It must follow further that there should be nothing illegal in those of the shareholders who are also directors expressly binding themselves in such an agreement to act in accordance therewith. For such undertakings to be legally binding it is necessary that all the shareholders are parties to the agreement at the time it is made and that at the time the undertakings are to be carried out by the directors there are no shareholders who have not joined the agreement or who have repudiated it. Such a consideration appears to have been a factor in the mind of Chief Justice Galipeault in his decision in the *Bergeron* case when he says:

> In June and July 1952 as at the time of the contract to which the *mis-en-cause* Jean became a party, the four contracting parties were the sole shareholders of the company.[7]

To what extent this consideration influenced his decision I do not know. In this quotation the Chief Justice is referring to a second agreement made between the plaintiff, the two defendants and the *mis-en-cause*, Jean, which reiterated the provisions of the first agreement except for the sanction demanded by the plaintiff in his action. For this reason it was not in issue in the suit and Jean was not a defendant.

Actually, however, the Chief Justice was incorrect in stating that at the time of the second agreement, which preceded the events complained of in 1952, the four parties thereto were all the shareholders since there was actually a fifth shareholder at that time and the second agreement provided for the acquisition of his shares. Yet, at the time of the breach complained of by the plaintiff there were only four shareholders and by the combined effect of the first and second agreements, all four had previously agreed

[7] Translation mine.

and consented to the undertakings by the directors. The question which arises is whether those undertakings had become legal as soon as the four parties became the sole shareholders of the company. In my opinion the undertakings by the directors *when given* were invalid and being null *ab initio* subsequent changed circumstances could not revive them. If they are severable the plaintiff's action should succeed on clause 14 alone which is legal. If they are not severable the whole agreement was null *ab initio* so that when the parties acquired all the issued shares a new agreement became necessary. This does not mean that the new agreement had to be in writing. Possibly there is evidence in the record of the *Bergeron* case which would show that after the four parties became the sole shareholders of the company a new verbal agreement came into being. If so, I consider that such an agreement was legal *in toto*.

The inherent flaw in any agreement among less than all the shareholders of a company which provides for their future acquisition of the remaining shares of the company and which also imposes obligations on the parties with respect to their future conduct as directors can, I believe, be removed simply by making these obligations expressly subject to a *suspensive condition* which will take effect only *when the remaining shares are acquired.* In the case of pre-incorporation agreements, of course, there is an inherent suspensive condition as the mutual undertakings governing the parties' future actions as shareholders and as directors are necessarily suspended until they become shareholders and directors. It follows that a pre-incorporation agreement binding the future directors is valid and enforceable after the company is formed for so long as the parties hold all the issued shares and have not repudiated it.

Everyone is acquainted with the situation where two or more separate groups agree in a pre-incorporation agreement to form a company for the purposes of a joint undertaking. The groups often agree to elect to the board their respective nominees to the end that each group will have representation on the board. When such a company is formed to whom do such directors owe their allegiance? I contend that each director's prime duty is not to the company, nor to the interests of the shareholders generally but to the interests of the shareholders whose *nominee he is* and any agreement whereby each such director acknowledges this restricted loyalty is valid provided, again, that all the shareholders are parties thereto. This is not really an exception to the principle that the wishes of all the shareholders should govern since what they have

implicitly indicated is their desire to have each director make his decisions according to his appreciation of the interests of the group of shareholders which nominated him. A director's loyalty to a portion only of the shareholders is not a concept repugnant to company law which recognizes that a board may consist of directors elected by different classes of shareholders if this is provided in the company's charter. In such a case, the law approves a director elected by a particular class of shareholders acting in the interests of that class, rather than in the interests of all the shareholders generally or in the interests of the company as a separate juridical entity.

However, I believe that there remains one major exception to the proposition that directors are bound by their promises given to and agreed upon by all the shareholders. This is in the event of repudiation when a shareholder to an agreement changes his mind about it and advises the directors that he is no longer in favour of the directors acting in accordance with its terms. What is then the duty of the directors? They are aware of differing desires among the shareholders. Should they therefore ignore the agreement as no longer expressing the interests of all the shareholders and act according to their own assessment of those interests, or should they consider that the objecting shareholder has irrevocably committed himself in the agreement and is not free to indicate that he has changed his mind and that any such indication is without effect and should be ignored? I believe that the directors may not ignore the fact that the agreement no longer has the support of all the shareholders. They must therefore consider themselves free to act thenceforth as directors according to their own assessment of the interests of the shareholders. Of course any repudiating shareholder exposes himself to all the sanctions imposed by the agreement or by law for breach of contract and the obligations of the parties *as shareholders* remain unaffected. Naturally the directors must be in a position to prove the repudiation if they want to rely on it.

Since according to the view expressed above repudiation by a shareholder releases the directors, as such, from their obligations under an agreement there is no advantage in making directors, as such, parties thereto. All that is required is an agreement among the parties as shareholders. No one disputes that shareholders may oblige themselves in any way they please as they do not owe an obligation to anyone but themselves.[3] Thus where it is the desire

[3] See *supra*, footnote 5.

to control by an agreement matters under the jurisdiction of the directors, the shareholders alone can agree therein *to cause the directors* to decide those matters in a certain way. When all the shareholders are parties, this type of agreement is just as effective, for the reasons given above, as an agreement in which the directors oblige themselves, as such. Moreover, it has the added advantage that it is not illegal if less than all of the shareholders of a company are parties, provided that the ends agreed on are not oppressive to the minority shareholders.

KENNETH S. HOWARD*

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AGENCY AND INSANITY—APPLICATION OF THE CONTRACT RULES AS TO CAPACITY—RECENT DEVELOPMENTS IN ENGLAND.—Support can be found both in judicial dicta and textbook opinion for the proposition that the ordinary contractual rules governing the capacity of a lunatic not so found apply in agency relationships as between principal and third party. It will be recalled that these rules, based on *Molton* v. *Camroux*,[1] *Imperial Loan Co.* v. *Stone*[2] and *York Glass Co.* v. *Jubb*[3] are to the effect that a lunatic not so found is bound by his contracts unless he can show that at the time of contracting he was so insane as not to know what he was doing and this was known to the other party. If the lunatic can establish these two facts then the contract is voidable.[4]

Halsbury's *Laws of England*[5] takes the view that these rules do apply as between principal and third party and Chitty *on Contracts*[6] and Bowstead, *Digest of Agency*[7] use language which is not inconsistent with such a view.

Professor Powell in his *Law of Agency*[8] appears to take a somewhat different standpoint.[9] He says:

> On the principles laid down in *Imperial Loan Co.* v. *Stone*[10] if an insane person, not so found, appoints or is appointed an agent, he can avoid the relation if he can prove the existence of his incapacity at the time of the appointment and the other party's knowledge of it. Until it is avoided, the appointment is valid. However, in *Yonge* v. *Toynbee*[11]

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[1] (1848), 2 Ex. 487, affd. (1849), 4 Ex. 17.

[2] [1892] 1 Q.B. 599.

[3] (1925), 42 T.L.R. 1.

[4] For a critical examination of these cases see Brown, Can the Insane Contract? (1933), 11 Can. Bar Rev. 600.

[5] (3rd ed., 1952), Vol. I, p. 149 and n.(s).

[6] (21st ed., 1955), Vol. I, p. 581.

[7] (11th ed., 1951), p. 14.

[8] (1952).

[9] P. 312.

[10] *Supra*, footnote 2.

[11] [1910] 1 K.B. 215.

the authority of a solicitor who had commenced an action for his principal while the latter was sane, was held to have terminated when the principal was certified insane. In other words, the mere existence of the insanity, whether known to the other party or not, terminated the authority.[12] If that is so, the mere fact that the principal or the agent is insane at the time of the appointment must necessarily render the initial creation of the relation abortive. That means that the rule laid down in *Imperial Loan Co.* v. *Stone*[13] does not apply to the relation between principal and agent, whether it is created by a contract or a non-contractual agreement. It also means that the insanity of the principal or of the agent terminates the relation between them, without regard to any question of the supervening contractual incapacity of the one who becomes insane, or to the other party's knowledge of the insanity.

Though Professor Powell's remarks are limited to the relationship between principal and agent *inter se*, it would seem to follow from his reasoning that if a lunatic purported to appoint an agent, or if an initially sane principal became insane before the agent had dealt with the third party, then the lunatic's liability to the third party would not and could not depend on the express authority since that would be non-existent, but would arise, if at all, upon an estoppel by holding-out.[14] Hence it would seem that not only does the *Imperial Loan Co.* rule not operate between principal and agent but that it does not operate between principal and third party.[15] The practical effect of this may be to deprive the

[12] Reference to *Drew* v. *Nunn* (1879), 4 Q.B.D. 661.

[13] *Supra*, footnote 2.

[14] See *Drew* v. *Nunn*, *supra*, footnote 12. Brett L.J.'s refusal at p. 667 to term the holding-out in this case an estoppel seems an unwarranted distinction. See Scrutton J. in *Willis, Faber* v. *Joyce* (1911), 27 T.L.R. 388. At p. 389 Scrutton J. treats the basis of liability in *Drew* v. *Nunn* as being the same as in *Scarfe* v. *Jardine* (1882), 7 App. Cas. 345, *i.e.* estoppel. See also the reconciliation of *Drew* v. *Nunn* and *Yonge* v. *Toynbee* in Cheshire & Fifoot, Law of Contract (4th ed., 1956), p. 410 and Wilson, Principles of Contract (1959), p. 231. Professor Powell, Agency (1952), p. 323 doubts the correctness of the decision in *Drew* v. *Nunn*, but not only did Brett L.J. (then Lord Esher M.R.) seem untroubled by second thoughts in *Republic of Chili* v. *London and River Plate Bank* (1894), 10 T.L.R. 658, but it was accepted without any adverse comment by Scrutton J. in the *Willis, Faber* case. Neither of these latter cases, however, involved insanity. See also *Re Parks* (1957), 8 D.L.R. (2d) 155.

[15] This conclusion is accepted by Anson on Contract (20th ed., 1952), at p. 418, who, however, doubts *Yonge* v. *Toynbee*, at pp. 419-420. Furthermore Professor Powell's conclusion was anticipated by the High Court of Australia in *McLaughlin* v. *Daily Telegraph* (1904), 1 C.L.R. 243, at p. 275, affd. *sub. nom. Daily Telegraph* v. *McLaughlin* by the Privy Council [1904] A.C. 776. See *op. cit.*, *supra*, footnote 4, at p. 621. The decision in the *McLaughlin* case that the dealings with the third party were utterly void without regard to that party's lack of notice of insanity is consistent with the present submission as to the implications of Professor Powell's argument and the inapplicability of *Imperial Loan Co.* v. *Stone* between principal and third party. See *Gibbons* v. *Wright* (1954), 91 C.L.R. 423, at p. 445.

third party of all rights against the lunatic when the former's knowledge of the "agency" comes from the agent alone, there being no apparent authority, or where the lunatic is an undisclosed principal. If *Imperial Loan Co.* applied there would be a valid contract if the third party did not know of the insanity. Even if the insanity were known to him a voidable contract would come into existence.

Against this conclusion must be set some remarks of Havers J. in the recent case of *Taylor* v. *Walker*.[16] The facts of the case in outline were that the plaintiff sought to set aside a settlement of a motor accident claim, which he had entered into with the defendant, on the grounds that the plaintiff's agents had been bribed by the defendant's agents and that he, the plaintiff, had been insane at the time when the settlement was concluded. The plaintiff won his case on the bribery ground but the learned judge expressed the view that he would have failed on the lunacy contention. On this Havers J. said:

> By his statement of claim the plaintiff did also seek to set aside this compromise upon the ground that, at the time he made it, he was of unsound mind, and this was known to the first defendant or his agent. This clearly would be the law: that in order to avoid a fair contract upon that ground, the mental incapacity of the one contracting party must be known to the other contracting party. The authority for that is the case of *Imperial Loan Co.* v. *Stone*. Lord Esher said at p. 601:
> [. . . When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.]
> Lopes L.J., at p. 603, said this:
> [In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties.]
> Mr. Beney (counsel for the plaintiff) conceded that, on the facts of this case, even if the plaintiff was of unsound mind at the time this agreement was made, there was no evidence that this incapacity was known to Mr. Walker or his agents, and this plea therefore fails.

These remarks were *obiter* and since Havers J. did not have the benefit of full argument or the citation of *Yonge* v. *Toynbee*[17] the persuasive force of his statement of the law must, with respect, be regarded as to that extent diminished. Further it may be remarked that *Imperial Loan Co.* v. *Stone*[18] was not itself an agency case. It may also be appropriate to note that of the six cases cited by

[16] [1958] 1 LI. R. 490, at p. 514.
[17] *Supra*, footnote 11.
[18] *Supra*, footnote 2.

Halsbury[19] for the view that the *Imperial Loan Co.*[20] rule does apply in agency situations, four, *Imperial Loan Co.* v. *Stone*,[21] *Molton* v. *Camroux*,[22] *York Glass Co.* v. *Jubb*[23] and *Beavan* v. *McDonnell*[24] were not agency cases, in another, *Campbell* v. *Hooper*,[25] no reference was made in the judgment to the agency aspects of the case and in only one, *Elliot* v. *Ince*,[26] are there dicta, not necessary for the decision, which would support the application of the *Imperial Loan Co.* rule as between principal and third party.

For the contrary proposition, however, it is possible to cite Brett L.J. in *Drew* v. *Nunn*.[27] He said:

> In my opinion, if a person who has not been held out as agent assumes to act on behalf of a lunatic, the contract is void against the supposed principal, and the pretended agent is liable to an action for misleading an innocent person.

It will be noted that in this passage the contract between principal and third party is spoken of as void, and not as valid or voidable as would have been the case if the view of Havers J. that the ordinary contractual capacity rules applied as between principal and third party had been taken by Brett L.J. Further, Brett L.J. adopted this position despite the fact that *Molton* v. *Camroux*[28] and other authorities relied on by the court in *Imperial Loan Co.* v. *Stone*[29] were cited in argument in *Drew* v. *Nunn*.[30] As has already been pointed out, the result in *Daily Telegraph* v. *McLaughlin*[31] also tells against the *Taylor* v. *Walker*[32] view.

The problem of a lunatic's capacity to act as a principal was also considered recently by the Supreme Court of New Brunswick, Appeal Division, in *Re Parks*.[33] There the question was whether certain payments made on behalf of a person of unsound mind by her attorney could be recovered for her estate. It was held that they could be recovered on the ground that the payees had constructive, if not actual, knowledge of the insanity. Bridges J. delivering the judgment of the court, made some general remarks about the capacity of a lunatic principal, outlining the facts of *Drew* v. *Nunn*[34] and *Yonge* v. *Toynbee*[35] and remarking that some

[19] *Op. cit.*, *supra*, footnote 5.
[20] *Supra*, footnote 2.
[21] *Ibid.*
[22] *Supra*, footnote 1.
[23] *Supra*, footnote 3.
[24] (1854), 9 Ex. 309.
[25] (1855), 3 Sm. & G. 153.
[26] (1857), 7 De G. M. & G. 475, at p. 488.
[27] *Supra*, footnote 12, at p. 666.
[28] *Supra*, footnote 1.
[29] *Supra*, footnote 2.
[30] *Supra*, footnote 12. See (1879), 4 Q.B.D., at p. 663.
[31] *Supra*, footnote 15.
[32] *Supra*, footnote 16.
[33] *Supra*, footnote 14, at p. 160 *et seqq.*
[34] *Supra*, footnote 12. Bridges J. in outlining *Drew* v. *Nunn*, at p. 160 appears with respect to misrepresent the accepted English position for he

writers had found it difficult to reconcile these cases.[36] He went on to say that he thought that the most satisfactory reconciliation was to be found in a passage from Halsbury[37] which he cited. It runs:

> If the principal becomes a person of unsound mind, the agency as between the principal and agent is determined, but is not *ipso facto* revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal.[38]

It is submitted, however, that this passage is insufficient as a complete reconciliation at least for English purposes. As has been seen,[39] Halsbury elsewhere takes the view that the *Imperial Loan Co.* rule may operate between principal and third party. The passage cited in *Re Parks*[40] fails to make clear whether the authority which "is not *ipso facto* revoked with regard to a third person" is an apparent authority dependent upon the general rules of holding out and estoppel or an authority governed by the *Imperial Loan Co.* rule. The importance of this in England and jurisdictions

says that if the lunatic in that case had attempted to contract in person he could not have done so. In England the generally accepted view is that no lunatic not so found is incapable of entering into at least a voidable contract. See Brown, *op. cit., supra*, footnote 4. But see *Johnson* v. *Simmonds* 1953 The Times, Nov. 15th and a note by the present writer in (1957), 35 Can. Bar Rev. 205. *Re Rhodes* (1890), 44 Ch. D. 94, at p. 105 per Cotton L.J. See also *Gibbons* v. *Wright, supra*, footnote 15, at p. 443.

[35] *Supra*, footnote 11.

[36] In addition to works already cited these cases are discussed by Chitty, *op. cit., supra*, footnote 6, pp. 581 and 641-642, Salmond & Winfield, Contract, p. 497 (k). Sutton & Shannon on Contracts, (5th Ed.) p. 504-505. It is suggested that if one accepts the two points made in the last-mentioned work (a) that the two cases should if possible be reconciled since *Drew* v. *Nunn* was cited in argument in *Yonge* v. *Toynbee* and the court in the latter case expressed no disapproval of it (b) that reconciliation on the ground that the third party has a right to elect between principal and agent is unsatisfactory because if the third party has a right of action against the principal it is difficult to see what damage he has sustained from the agents' breach of warranty of authority where consequent damage is of the gist of the action, then the most satisfactory reconciliation is that suggested by Cheshire & Fifoot, and Wilson, *ops. cit., supra*, footnote 14 namely that *Drew* v. *Nunn* depends on apparent or ostensible authority (estoppel) and *Yonge* v. *Toynbee* on express or actual authority. If the effect of this is to narrow the operation of *Yonge* v. *Toynbee* this seems a not wholly unsatisfactory result for *Drew* v. *Nunn* appears to be more practically just.

[37] *Supra*, footnote 5, p. 244.

[38] The four authorities cited by Halsbury for this passage seem, apart from *Drew* v. *Nunn*, to be of weak authority. In *Beaufort* v. *Glynn* (1856), 3 Sm. & G. 213 it was left undecided whether an attorney can act when his principal is insane. See Powell, *op. cit., supra*, footnote 8, p. 312 n. In *Platt* v. *Depree* (1893), 9 T.L.R. 194 the insanity was that of the third party. In *Re Walden Ex. p. Bradbury* (1839), Mont. & Ch. 625 one of the two judgments, that of Sir George Rose, at p. 633, went on a ground which was disapproved by Lord Cranworth in *Elliott* v. *Ince*, 7 De G. M. & G., at p. 487, namely that a lunatic is bound by all transactions for his benefit.

[39] *Supra*, footnote 5.

[40] *Supra*, footnote 14. The reference to *Drew* v. *Nunn* may indicate that Halsbury is here speaking of apparent authority as not being revoked.

which accept the English rule is that in the first case knowledge on the part of the third party of the incapacity (always assuming, of course, that the unsoundness of mind is so serious as to affect contractual capacity) would mean that any transaction would be null and void, whereas in the second case such knowledge would merely render the transaction voidable at the lunatic's option. Also, as already indicated, the distinction would be important when there was "actual" but no apparent authority.

It is suggested that *Re Parks*[41] is consistent with the view of *Drew* v. *Nunn*[42] (holding out and estoppel) which has been here adopted since Bridges J. in reviewing *Drew* v. *Nunn*[43] mentioned the element of holding out and furthermore *Re Parks*[44] could itself be regarded as potentially a simple holding out case since the insane principal's contact with the third party had not been wholly through her agent but had included an element of direct contact, as the mention of her dealings with a Mr. Scarborough shows.[45] Again the citation from Turgeon J.A. in *Watson* v. *Powell*[46] appears to relate to a situation of apparent authority and holding out rather than a case where reliance is placed on express or actual authority.

It may be significant that Bridges J. saw fit to cite this passage from a case which, as he remarked, had nothing to do with insanity. Hence it seems to follow that if the person of unsound mind had been held liable she would have been held liable on the authority of *Drew* v. *Nunn*;[47] that *Drew* v. *Nunn*[48] was regarded as decided on the same basis as ordinary cases of apparent authority and holding out and therefore *Re Parks*[49] lends no support to the *Taylor* v. *Walker*[50]—Halsbury[51] view that the special *Imperial Loan Co.* rules as to a lunatic's capacity operate between principal and third party. The force of the case on this point is admittedly weakened by the fact that, as his summary of *Drew* v. *Nunn*[52] shows, Bridges J. did not seem to be adverting to the English rules of capacity[53] but that still does not negative the point that it lends no support to the view that the rules are to apply in agency relationships.

The final conclusion suggested is, therefore, that the *Taylor* v. *Walker*—Halsbury view should, for the present at least, be treated with cautious reserve. Since the *Imperial Loan Co.* rule has met

[41] *Ibid.*
[42] *Supra*, footnote 12.
[43] *Ibid.*
[44] *Supra*, footnote 14.
[45] *Supra*, footnote 14, at p. 160.
[46] (1921), 58 D.L.R. 615.
[47] *Supra*, footnote 12.
[48] *Ibid.*
[49] *Supra*, footnote 14.
[50] *Supra*, footnote 16.
[51] *Supra*, footnote 5.
[52] *Supra*, footnote 12.
[53] *Supra*, footnote 34.

with so much hostile criticism[54] perhaps it may be hoped that when a court is squarely faced with an invitation to apply it between principal and third party it will refuse to do so. The ordinary holding out rules seem perfectly capable of giving a just and reasonable solution in this type of case.

A. H. HUDSON*

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FEDERALISM — CIVIL-LAW AND COMMON-LAW JURISPRUDENCE — INTERPRETATION OF PROVINCIAL STATUTES BY SUPREME COURT OF CANADA: POSITIVISM AND NATURAL LAW — CANCELLATION OF LIQUOR LICENCE — FALSE ARREST AND MALICIOUS PROSECUTION BY PROVINCIAL POLICE OFFICERS — DELICTUAL RESPONSIBILITY UNDER QUEBEC CIVIL CODE.—The decision of the Supreme Court of Canada, in *Roncarelli* v. *Duplessis*,[1] affirms that even a king is under God and the Law; and there is enough support to be found for this elemental proposition,—not merely in Sir Edward Coke and in the seventeenth century mainsprings of common-law constitutionalism,[2] but also in Saint Thomas Aquinas and authoritative Catholic writings on man and the state, to make its current reiteration by the Supreme Court (even though only by majority vote) good sense for a country like Canada that has a mixed, (more strictly dualist) jurisprudential tradition.

For the majority decision in the *Roncarelli* case is good natural-law jurisprudence, using that term now, in the broader, more general sense in which natural law is normally opposed to positivism, as a conception of ultimate values in law shaping and controlling the interpretation of the positive law, whether code, constitution, statute, or ordinary case law. The majority judges' extreme moral revulsion at the display of naked power by the Premier of Quebec, in his intervening to fulfil (in his own words)

[54] See in addition to *supra*, footnote 4: (1901), 17 L.Q. Rev. 147; (1921), 21 Col. L. Rev. 424. *Contra*, however, (1902), 18 L.Q. Rev. 21; (1925), 25 Col. L. Rev. 230.

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[1] (1959), 16 D.L.R. (2d.) 689.

[2] "Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England . . . . With which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*." Case of Prohibitions (1608), 12 Rep. 65. And *cf.* Plucknett, A Concise History of the Common Law (5th ed., 1956), pp. 48-53.

"an imperious duty" to cancel restaurateur Roncarelli's liquor licence "not temporarily but definitely and for always",[3] simply because Roncarelli had put up bail for members of the Jehovah's Witnesses, served to bridge the gap between the judicially-postulated right (*not* to have one's liquor licence cancelled for reasons "totally irrelevant to the sale of liquor in a restaurant"),[4] and the concrete machinery remedy actually sanctioned by the court's majority in the *Roncarelli* case (an action for damages in delict under article 1053 of the Quebec Civil Code).[5] It is good to have an authoritative Canadian answer, now, to the stock seminar question with which English professors of jurisprudence, since Dicey's day, have titillated their students: Could the "sovereign" English Parliament *legally* make a law ordering the killing, at birth, of all blue-eyed babies?[6] The present writer, who has never believed that contemporary English jurisprudence is committed to legal positivism for any better or stronger reason than that it has never had any need or occasion in modern times to be committed to anything else—England is a bland society, after all, that is not rent by partisan passion and prejudice—has never doubted the answer that English judges would sensibly have given, if such a classroom problem had ever materialised in real life. For Canadian purposes, anyway, the question is now resolved. In answer to claims of omnipotent, uncontrolled (provincial) executive power, Mr. Justice Rand, characteristically, echoes Dicey in indignantly posing his own rhetorical question: "Could an applicant be refused a [liquor] permit because he had been born in another Province, or because of the colour of his hair?"[7] All the same, I suggest, it might have been a politically stronger decision if some one of the six majority judges—and *a fortiori*, perhaps, the lone Quebec judge among the majority, Mr. Justice Abbott—had assumed some special responsibility, in his opinion, for filling in the steps between infringement of the *right* and vindication of that right in terms of a legally-based *remedy*. Professor Frank Scott has rightly reminded us that the Quebec Civil Code, by virtue of the generality of its language and drafting and the philosophic breadth of its principles, is a reservoir of hitherto largely unsuspected opportunities for ef-

[3] Per Martland J., *supra*, footnote 1, at p. 738.
[4] Per Rand J., *ibid.*, at p. 706.
[5] Art. 1053 of the Civil Code of the Province of Quebec states: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."
[6] See generally Dicey, Law of the Constitution (9th ed., 1939), pp. 41-3.
[7] Per Rand J., *supra*, footnote 1, at p. 705.

fectuation of civil liberties values, contrasting to the relative poverty, in this regard, of conventional common-law doctrine;[8] but surely it is not quite enough, in a case concerning Quebec, for an essentially common-law-composed majority simply to utter the common-law maxim, *ubi ius ibi remedium*, without any direct or systematic canvassing of the civil-law *doctrines* or *jurisprudence* as to the particular remedy embraced by the court. The majority of the court, in this particular aspect of its work and research preparatory to decision, has, I suggest, done less than justice to the Quebec strain in Canadian jurisprudence; and, considering the degree of overlapping and repetition in the majority opinions, it might be argued, further, that in this respect it has not fully discharged its obligations in opinion-writing in terms of supplying the profession and general public with a clear and ordered rationalisation of the doctrinal bases of decision.

These particular difficulties with the majority position stem, undoubtedly, from a lack of internal court organisation and a certain absence of co-ordination in individual justices' work, manifest over a very much longer period of Canadian constitutional history than spanned by any of the incumbent justices' terms. Should the Chief Justice perhaps institute a formal conference of the court at regular, even weekly, intervals during term to try to ensure (without derogating from the necessary freedom of any individual judge to file a separate opinion, whether concurring or dissenting), that there is at least one official "Opinion of the Court" in each case reflecting the minimum consensus of the majority justices and covering each step necessary to the majority's decision?[9] Be that as it may, it can be said that Mr. Justice Rand's concurring opinion—written on the eve of his stepping down from the court on reaching the mandatory retiring age of seventy-five years—contains all the qualities of mind and style that have made him tower above his contemporaries (judges, law professors, practitioners)—the transcending moral vision; the quick, sure grasp of the underlying philosophic principles without which the

[8] Scott, The Bill of Rights and Quebec Law (1959), 37 Can. Bar. Rev. 135.

[9] In the *Roncarelli* case, Martland J.'s opinion, *supra*, footnote 1, at p. 732 *et seqq.*—comes closest to being an "Opinion of the Court" since it is concurred in (without opinion) by Locke J., *ibid.*, at p. 709, and expressly approved, as to its main reasoning, by Kerwin C.J.C., *ibid.*, at p. 691; but Martland J.'s opinion can still only muster three votes in a case in which nine judges sat. Of the other three majority judges, Rand J.'s opinion *ibid.*, at p. 696 *et seqq*, is concurred in (without opinion) by Judson J., *ibid.*, at p. 746; while Abbott J. also filed a separate opinion, *ibid.*, at p. 727 *et seqq*. The three dissenting judges each filed individual opinions and these are examined in detail below.

low-level legal doctrine is only a multitude of single instances; the clarity and directness and economy of verbal expression. In striking down what he pointedly characterises as a form of "vocation outlawry",[10] Mr Justice Rand adds to his well-known catalogue of "Rights of the Canadian Citizen" [11] further, economically-based, rights—presumably, a freedom of choice of economic vocation, which might be available in the future not merely in professional licensing situations analogous to the present case but conceivably also more generally in regard to entry into any type of employment controlled by external authority, whether government, professional association, or trade union.

Mr. Justice Rand's opinion, in comparison with other majority opinions, shows a sensitiveness to the special societal facts underlying the Roncarelli problem-situation,—the conflict between the militant, aggressively proselytising, Jehovah's Witnesses' organisation on the one hand and the Roman Catholic Church in Quebec and French Canadian civilisation-values generally.[12] Mr. Justice Rand's fact-finding is detailed and dispassionate, even if his conclusions from the facts are not so clearly identified by him as in, say, his *Saumur* case opinion.[13] It does not seem unfair to say, however, that Mr. Justice Rand's vote, in the *Roncarelli* case, reflects once more his frequently avowed preference for the "Open Society" idea;[14] or that these same, essentially Protestant,[15] values may have operated as causal factors in some of the other majority opinions, as inarticulate major premises to decision. For the most striking feature of the *Roncarelli* case is that the two French-Canadian judges[16] dissented, and that all three of the dissenters (Taschereau, Cartwright, and Fauteux JJ.) have a keen awareness —frankly acknowledged in their individual opinions—of the societal background to the *Roncarelli* case.[17] From the technical viewpoint, the dissenters, once their fact-finding is made, go on different ways. Mr. Justice Cartwright finds that the licensing power

[10] Per Rand J., *supra*, footnote 1, at p. 706.

[11] For an elaboration of Mr. Justice Rand's "Rights of the Canadian Citizen" concept, see my discussion, Judicial Review in the English-Speaking World (1956), p. 190 *et seqq*. Mr. Justice Rand's "Rights of the Canadian Citizen"—the "Padlock" Case (1958), 4 Wayne L. Rev. 115; The Supreme Court and the Bill of Rights—the Lessons of Comparative Jurisprudence (1959), 37 Can. Bar. Rev. 16, at pp. 35-7.

[12] See especially his remarks, *supra*, footnote 1, at pp. 696-8.

[13] *Saumur* v. *Quebec*, [1953] 4 D.L.R. 641, at pp. 670-1.

[14] Consult Popper, The Open Society and Its Enemies (1945).

[15] See generally Weber, *Die protestantische Ethike und der Geist der Kapitalismus* (1904); Tawney, Religion and the Rise of Capitalism (1926).

[16] Taschereau J. and Fauteux J.

[17] See per Taschereau J., *supra*, footnote 1, at pp. 693-4; per Cartwright J., *ibid.*, at pp. 709-10; per Fauteux J., *ibid.*, at pp. 718-20.

as to liquor permits was an "administrative" power (not a "judicial" or "quasi-judicial" one),[18] and that it therefore permitted an unfettered discretion—the provincial legislature had intended the liquor commission to be a "law unto itself":[19] the damage done by the Premier of Quebec to Roncarelli is therefore a *damnum sine injuria*, not an actionable wrong.[20] Mr. Justice Taschereau, while covering the same ground as Mr. Justice Cartwright, rests ultimately on the technical defence made by the Premier of Quebec that he had not been given proper notice of the action as required by article 88 of the Code of Civil Procedure of the Province of Quebec,[21] Mr. Justice Taschereau thus directly negativing the majority judges' position that the Premier was not "acting in the performance of his duties" and therefore not protected by article 88.[22] Mr. Justice Fauteux agrees with Mr. Justice Taschereau in approving the Premier's defence under article 88 of the Quebec Code of Civil Procedure—as I interpret Mr. Justice Fauteux's position in this regard, on the basis of deference to provincial (Quebec) courts' interpretation of a provincial statute (here the Quebec Code of Civil Procedure, and specifically the ambit of the defence under article 88).[23] This is a judicial approach that has strong elements in common with Mr. Justice Felix Frankfurter's well-known stress, in American constitutional jurisprudence, on the duty of federal courts to defer to state courts' views on matters of interpretation of state statutes, and it can be defended as being good federalism on its own account. It is a pity, therefore, (if I am correct in my conclusion that this is Mr. Justice Fauteux's point) that he did not more frankly acknowledge the federalistic considerations to which he was responding in his decision; and it is a little surprising that, while espousing an aspect of the doctrine of judicial self-restraint that is all too rare in Canadian constitutional jurisprudence, Mr. Justice Fauteux should have devoted the balance

[18] *Ibid.*, at pp. 714-5. [19] *Ibid.* [20] *Ibid.*, at p. 717.

[21] Article 88 of the Code of Civil Procedure of the Province of Quebec states: "No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile."

[22] The Continental (French) distinction between *faute personnelle* and *faute de service* seems especially relevant here: it is, surprisingly, not referred to by either majority or minority judges in the *Roncarelli* case. Consult generally Schwartz, French Administrative Law and the Common-Law World (1954).

[23] See especially per Fauteux J., *supra*, footnote 1, at pp. 726-7.

of his opinion to a demonstration that Roncarelli's action was well-founded, a demonstration which, in the light of Mr. Justice Fauteux's conclusion that article 88 provided a good defence, anyway, would really be irrelevant and unnecessary. Chief Justice John Marshall of the United States Supreme Court did, it is true, act very much the same way in his seminal opinion in *Marbury* v. *Madison*,[24] which really established the institution of judicial review in the common-law world, in holding for the Secretary of State on a technicality but then going on to read a lecture—surely the most extended *obiter dictum* of all time—to the Jefferson administration; but then Chief Justice Marshall's was the official "Opinion of the Court". It might be said that Mr. Justice Fauteux, like the majority of the court, relies on natural law to find a violation of a right, but that, unlike the majority, he takes refuge in positivism to deny any legal remedy for the right that he has found to be trampled on. In the context of the *Roncarelli* case, it does seem a little like trying to have the best of both possible worlds, at one and the same time.

Some extra light is thrown on these particular aspects of the *Roncarelli* case by the decision of the Supreme Court of Canada in *Lamb* v. *Benoit*,[25] which was handed down on the same day, though the actual opinions in support of it were not published until six weeks after those in the *Roncarelli* case. There is some internal evidence, in *Lamb* v. *Benoit*, to suggest that it was actually decided and researched by the court some time after the *Roncarelli* case, for the opinion-writing (and especially, perhaps, the dissent of Mr. Justice Fauteux), manifests some extra refinement of judicial thinking upon the more troubled aspects of the *Roncarelli* case rationale.

Lamb v. *Benoit* is a six-to-three decision[26] awarding damages, in the sum of $2,500, against an officer of the Provincial Police of Quebec, for false arrest and malicious prosecution of a member of

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[24] (1803), 1 Cranch 137. [25] (1959), 17 D.L.R. (2d.) 369.

[26] *Lamb* v. *Benoit*, once again, is a multiple-opinion decision. Three of the six majority justices filed individual opinions—Rand J., *ibid.*, at p. 381 *et seqq.*, concurred in by Judson J., *ibid.*, at p. 408; Locke J., *ibid.*, at p. 384, concurred in by Martland J., *ibid.*, at p. 408; Cartwright J., *ibid.*, at p. 398, concurred in by Kerwin C.J.C., *ibid.*, at p. 371. The problem of finding the principle (*ratio decidendi*) of the case is ameliorated, though not solved, by the happy fact that Cartwright J. expressly adopts Rand J.'s "reasons" as to the main aspects of the case, *ibid.*, at p. 401: this has the effect of marshalling four votes (Rand, Judson, Cartwright JJ, Kerwin C.J.C.) behind Rand J.'s opinion, but it is still one vote short of a bare majority and so cannot be considered as an Opinion of the Court.

The three dissenting justices each filed individual opinions—Taschereau J., *ibid.*, at p. 371; Fauteux J., *ibid.*, at p. 401; Abbott J., *ibid.*, at p. 406.

the Jehovah's Witnesses. The action was based once again upon article 1053 of the Quebec Civil Code, the majority of the Supreme Court of Canada reversing a judgment of the Quebec Court of Queen's Bench which had itself affirmed the trial court's dismissal of the action for false arrest and malicious prosecution.

Lamb v. *Benoit*, as with the *Roncarelli* decision, is an affirmation, in a Canadian context, of Dicey's classic constitutional proposition as to the personal liability of public officials, in terms of possible actions for damages by aggrieved citizens, for acts done by the public officials in their official character but in excess of their authority.[27] After the *Roncarelli* decision, the only point with which we need be particularly concerned, in *Lamb* v. *Benoit*, is the Supreme Court majority's negativing of a defence based upon the six-month prescription period established by section 24 of the Provincial Police Force Act of Quebec:[28] "Every action against an officer of the Police Force by reason of an act done by him or a complaint lodged by him in his official capacity . . . . shall be prescribed by six months". Now section 36 of the Provincial Police Force Act expressly over-rides any incompatible provisions of the Magistrate's Privilege Act of Quebec,[29] which also applies to police officers and which, by section 5, prescribes by six months any action brought against a police officer "for anything done by him in the performance of his public duty", and, by section 7, extends the protection of the Act to the police officer "in all cases where he has acted in good faith in the execution of his duty although he has acted clearly contrary to law." The majority, in *Lamb* v. *Benoit*, held that an act done by a police officer "in his official capacity" under section 24 of the Provincial Police Force Act was no different from an act done by him "in the performance of his public duty" or "his duty" in terms of sections 5 and 7 respectively of the Magistrate's Privilege Act, and was therefore subject to the requirement of "good faith" contained in the latter Act, the majority of the court, for these purposes, equating the protection given by the two statutes to police officers. However, the three dissenting judges in *Lamb* v. *Benoit*—Justices Taschereau, Fauteux, and Abbott—insisted that section 24 of the Provincial Police Force Act was clear in its terms and that it could not, therefore, be qualified by any requirement,—which, in effect, would have to be written in to the Provincial Police Force Act by reading it in conjunction with the Magistrate's Privilege Act—that a police

[27] Dicey, *op. cit.*, *supra*, footnote 6, pp. 193-5.
[28] R.S.Q., 1941, c. 47. [29] R.S.Q., 1941, c. 18.

officer who had clearly acted as such in making an arrest should have acted "in good faith".

The point at issue between the majority and minority of the Supreme Court, in *Lamb* v. *Benoit*, is of the same technical nature as focussed on by two of the three dissenters (Justices Taschereau and Fauteux) in the *Roncarelli* case, namely the interpretation of a (Quebec) provincial statute affording a procedural defence to the action: but there is this difference, in the case of *Lamb* v. *Benoit*, that this time all three Quebec judges (Justices Taschereau, Fauteux, and Abbott) are in agreement as to the proper interpretation of the Quebec statute. *Lamb* v. *Benoit* thus raises the question adverted to in Mr. Justice Fauteux's dissent in the *Roncarelli* case as to the proper degree of deference that a federal (Dominion) instrumentality like the Supreme Court of Canada should give to provincial courts in the interpretation of provincial statutes, considerations of federal comity here being relevant; and perhaps also, in the special context of Canadian federalism, the further question as to how far the common-law majority on the Supreme Court of Canada ought to respect the views of the civil-law minority when it is a matter of interpretation of the Quebec Civil Code and Quebec civil-law jurisprudence generally or, for that matter, as in the present case, a Quebec statute.[30]

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[30] In the course of his thoughtful concurring opinion, Cartwright J. draws upon Walton, Scope and Interpretation of the Civil Code of Lower Canada (1907), p. 42, as authority for the proposition that "questions which concern the relation of the subject to the administration of justice belong to the public law, and are, therefore, governed by the law of England, and not by that of France". Cartwright J. speculates as to "whether the law governing an action for malicious prosecution is considered as a part of the criminal law defining the privilege, or the conditions of immunity, of a citizen who sets that law in motion, in which case it would seem that the law upon the subject should be uniform throughout Canada, or whether it is regarded simply as a branch of the law of torts"; he resolves, finally, to reserve his opinion on the question "until a case arises in which it is necessary to decide it", *supra*, footnote 25, at p. 400.

Carried to its logical conclusion, Cartwright J.'s reasoning would seem to imply that there may be scope for a special branch of Dominion common law, analogous to the various provincial laws of torts, covering such matters at malicious prosecution: in the present case, however, this would seem to have the immediate consequence that the plaintiff Jehovah's Witness would be improperly in court, his action being rooted in Provincial law—in article 1053 of the delicts section of the Quebec Civil Code. A more modest application of Cartwright J.'s ideas might be to focus on the nature and quality of the particular provincial law in respect to which it is argued that the Supreme Court of Canada ought to defer to provincial courts' views: matters concerning substantive private law *may* be intrinsically provincial in character and perhaps therefore the views of provincial courts ought to carry some extra weight as to their final interpretation and application, but no such arguments seem to apply to questions of procedural, adjectival law which can hardly claim any peculiarly provincial significance.

These are issues, obviously, of too transcending importance to the working of a federal polity like Canada, to be solved by the Supreme Court, *uno ictu*, in the first case that comes along for decision; and perhaps a certain amount of trial-and-error experimentation by the court in the fact-contexts of particular cases will be desirable before a wise policy solution can be arrived at. American experience, and particularly the contributions of Mr. Justice Frankfurter to federal constitutional theory, will be most useful and fruitful, but should not be regarded as decisive or conclusive without more, since the philosophic key concepts of American and Canadian federalism are rather different: in a culturally pluralistic society like Canada, the judges, if anything, should defer rather more to local or provincial claims to the determination of policy than in the case of a monistic society like the United States. In any case we are indebted to the minority in *Lamb* v. *Benoit* for raising these important, and in a Canadian context rather novel, aspects of federal constitutional theory and practice,[31] even if we are not necessarily persuaded, as yet, by the argument.

The majority judges insistence, in *Lamb* v. *Benoit*, on equating the Provincial Police Force Act with the Magistrate's Privilege Act sits rather uneasily with Mr. Justice Taschereau's demonstration, in his dissenting opinion, of the quite distinct and different historical origins of the two provincial statutes;[32] and with the iteration, by the dissenters as a whole, that the language of section 24 of the Provincial Police Force Act is quite clear and unambiguous and that there is no ground, therefore, (on common-law rules of statutory construction, certainly), for having recourse to extrinsic aids to interpretation to read into its terms an obligation that the police officer concerned must have acted "in good faith". One wonders, however, why the majority judges did not take the more direct route to decision of relying on section 24 of the Provincial Police Force Act itself, without recourse to the rather

[31] In his excellent article in the Canadian Bar Review recently, Dean Horace Read chides me with being "overly sanguine", in regard to the Supreme Court of Canada and Canadian judges generally, as to the "possibilities of a creative role and a quickening self-reliance in adjudication since appeals to the Privy Council were abolished." Read, The Judicial Process in Common Law Canada (1959), 37 Can. Bar Rev. 265, at p. 289. I feel sure that Dean Read might now wish to amend his conclusions, which were surely reached before reading the assorted judicial opinions in the *Roncarelli* case and in *Lamb* v. *Benoit:* whatever criticisms can fairly be levelled at the majority and minority opinions in those cases, no one, I suggest, can accuse them of being mechanical or lacking in courage and imagination.

[32] *Supra*, footnote 25, at p. 376.

dubious support provided by other statutes. Section 24 of the Provincial Police Force Act accords the protection of the six months prescription period to acts done by a police officer "in his official capacity" (in the French text, "en cette qualité d'officier"). It is the essence of Dicey's Rule of Law concept—viewed, now, in its substantive, as distinct from its purely procedural, aspects—that the purely arbitrary actions of governmental officials can claim no cloak of legality and protection from the personality of those who perform them:[33] that there is, so to speak, a stage at which *official* actions, by reason of their grossness or enormity, shade off into purely *private* actions to which the various official defences do not avail. The analogies between this particular common-law-derived constitutional law proposition and continental civil-law constitutional notions—see the French concept of the *voie de fait*—are both proximate and clear. Such a judicial approach, articulated frankly and openly in the official opinions, would, of course, expose the natural-law considerations to which the majority judges seem, in fact, to have responded in *Lamb* v. *Benoit*, quite as much as in the *Roncarelli* case; but it would be a type of natural law that would be readily comprehensible to both French Canada and English Canada and adequately based in both main elements (civil law and common law) of Canadian jurisprudence, and therefore more capable, in its own right, of outweighing the federalistic-type arguments adverted to by the three dissenting judges which, otherwise, would seem to be most persuasive.

In their broader aspects, and looking now to the future, both the *Roncarelli* case and also *Lamb* v. *Benoit* proclaim that governmental powers are not to be exercised arbitrarily. More specifically, the *Roncarelli* case declares (and the holding is important in the development of Canadian administrative law), that the executive must not use powers given for one purpose (here, control of liquor in restaurants), for another, totally distinct and unrelated purpose (here, the protection of the Roman Catholic Church from allegedly insulting or abusive proselytising activity). But the majority opinions, in the *Roncarelli* case and for that matter in *Lamb* v. *Benoit*, do not, formally, have anything to say on Church and State relationships in Canada, or, in particular, anything to say on the vexed question of how far or in what manner claimed interests in speech or religion,—when they are employed "aggressively" by one political, religious, or social out-group in the community,

[33] See generally Dicey, *op. cit.*, *supra*, footnote 6, p. 193 *et seqq.*

against other political, religious, or social out-groups or even against the majority of the community—ought to be moderated by considerations of community order and well-being or even of public politeness and good manners. For the necessary balancing of these and similar-type interests, we are still left with the *Saumur* case,[34] a five-to-four decision in which the crucial, tie-breaking vote (of Mr. Justice Kerwin, as he then was),[35] being directed to a narrow, statutory construction point easily capable of being distinguished in future problem-situations, seems to have been designed by its author deliberately to leave the policy issues open until such time as a mature community consensus should have developed.[36] The problem presumably would come up, if at all, in the future in an administrative-law setting, and one may wonder what the court's answer might be in the case of a narrowly drawn provincial statute, directed avowedly to protection of the religious feelings of existing religious groups, and, say, predicating the user of provincial streets or public places for proselytising purposes upon the maintenance of certain defined (and judicially reviewable) standards in public discussion and debate. The further, purely criminal law, aspects of the problem one might have thought as having been foreclosed altogether by the final result of the labyrin-

[34] *Supra*, footnote 13. [35] *Ibid.*, at p. 661 *et seqq.*

[36] Do I detect, in Chief Justice Kerwin's opinions in constitutional cases, another, more highly personalised aspect of the doctrine of judicial self-restraint—a sort of "wait-and-see" philosophy which, if lacking in the spectacular and unlikely, for that reason, to draw the plaudits of the law-review commentators, nevertheless, in its cautious pragmatism, may quite possibly offer better political prospects, long-range, of synthesising the two main streams of Canadian constitutional jurisprudence, than more dynamic methods? Note, quite apart from his *Saumur* case opinion, his laconic, twelve-line opinion in the present *Roncarelli* decision—*supra*, footnote 1, at pp. 691-2—which seems deliberately pitched in rather dry, colourless terms; also his stress, in the "Padlock" case,—(*Switzman* v. *Elbling* (1957), 7 D.L.R. (2d.) 337, at p. 341)—that "in cases where constitutional issues are involved, it is important that nothing be said that is unnecessary"; finally, his shift of position as between the two Supreme Court hearings in *Boucher* v. *The King*. The first time that the case was before the Supreme Court of Canada, Kerwin J. was part of the three-to-two majority (Rinfret C.J.C., Kerwin J., and Taschereau J.—Rand and Estey JJ. dissenting) refusing to direct an acquittal on an argument that the evidence could not support a conviction, though ordering a new trial, [1950] 1 D.L.R. 657, at p. 666 *et seqq.* On the second occasion, Kerwin J. was part of the five-to-four majority (Kerwin J., Rand J., Kellock J., Estey J., and Locke J.,—Rinfret C.J.C., Taschereau, Cartwright, and Fauteux JJ. dissenting) holding in favour of entering a verdict of acquittal on the score that there was no evidence upon which a jury, properly instructed, could convict, [1951] 2 D.L.R. 369; characteristically, Kerwin J.'s *volte face* from his earlier holding is recorded in a modest, twenty-five lines opinion, in which he notes, baldly, that "since the distribution of my reasons in this appeal, there has been a reargument as a result of which I have been persuaded that the order suggested by me is not the proper one to make", *ibid.*, at p. 379.

thine proceedings in *Boucher* v. *The King*,[37] and the majority (again five-to-four) holding, there,[38] that it is not, in Canada, seditious libel "to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects".[39] But that was all eight years ago, and the composition of the court has changed since that time, and the minority judges at least in the *Roncarelli* case still seem to have their doubts as to the correctness and full wisdom of the *Boucher* holding.[40] And so, whatever happens to the new Canadian Bill of Rights, we look like having a period of judicial soul-searching as the Supreme Court approaches the elaboration — case by case, and without the comfortable but deluding certainty of purely black-and-white type dichotomies — of a Canadian civil liberties jurisprudence.[41]

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[37] 95 C.C.C. 119, [1950] 1 D.L.R. 657, [1951] 2 D.L.R. 369.

[38] [1951] 2 D.L.R. 369.

[39] See the comments by Fauteux J., *supra*, footnote 1, at p. 720.

[40] See especially the remarks of Taschereau J., *ibid.*, at p. 693; by Catwright J., *ibid.*, at p. 710; and by Fauteux J., *ibid.*, at pp. 719-20.

[41] As a footnote to the *Roncarelli* case, the actual basis for computation of damages to be awarded to Roncarelli, employed by the Supreme Court of Canada, remains obscure, even conceding Martland J.'s point that the amount must be determined "in a somewhat arbitrary fashion", *ibid.*, at p. 746. Roncarelli had originally claimed $118.741, and the action was maintained by the trial judge to the extent of $8,123.53, ([1952] 1 D.L.R. 680); on appeal, Roncarelli asked that the amount actually allowed be increased by $90,000, and this request was dismissed by the Court of Queen's Bench (Quebec) when it allowed the respondent's (Duplessis) appeal. The original sum of $8,123.53 had been computed by the trial judge on the basis of $1,123.53 for loss of value of liquor seized by the Commission; $6,000 for loss of profits from the restaurant from December 4th, 1946, the date of cancellation of the permit, to May 1st, 1947, the date when the permit would normally have expired; and $1,000 for damages to Roncarelli's personal reputation. The Supreme Court of Canada allowed the original $8,123.53, plus a sum of $25,000 as "damages for the diminution of the value of the good-will and for the loss of future profits", per Martland J., *ibid.*, at pp. 745-6, making a total amount of $33,123.53, "together with interest from the date of the judgment in the Superior Court, and costs." *ibid.* The final amount may seem rather low in view of Martland J.'s finding that the total net income from the restaurant for the three years prior to 1946 was $23,578.88.

As a further point, it seems to be assumed that the amount of damages awarded in the *Roncarelli* case, may properly be chargeable to the Quebec Provincial Treasury. But, in Dicey's classical examples at least, it seems clear that the liability in damages is that of the offending official personally, and not of the government that he claims to have represented: the authority of the Quebec Provincial Treasury to meet, from public funds, the amount of the damages award in the *Roncarelli* case, is questionable in the absence, certainly, of provincial legislation specifically authorising such payment.

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