CASE and COMMENT

McEWEN v. JENKINS AND BRADLEY *et al*

Will — Annulment — Insanity — Plaintiff particular legatee — Heirs at law — Executors sued personally — Interest in the will — Power of attorney — Burden of proof — C.C. 232, 349, 351, 831, 919, 981a and foll., 985, 986.

by Arnold Sharp*

The Supreme Court, due to the necessary implication which must be deduced from the recent decision handed down in the case of *McEwen v. Jenkins and Bradley*,[1] has indicated its position in a controversy which has been evident both in the doctrine and jurisprudence of Quebec civil law. The two predominating schools of thought that have developed as a result of conflicting interpretations of the law are concerned with the nature of the nullity which attaches to acts of insane persons not having received the protection of legal interdiction.

John Calvin Holland, in his eighty-fourth year, bequeathed his property to defendant Charles Ruiter Jenkins and Wesley H. Bradley (mis en cause) in trust as executors and trustees. Holland suffered a stroke on January 20, 1948 and was hospitalized until his death on March 15, 1949. Previous to his death, while in hospital, he executed a power of attorney before witnesses in favor of Jenkins on January 30, 1948. Holland was at no time interdicted. The plaintiff, Dame McEwen, a cousin of the deceased and one of his heirs at law instituted an action against the defendant and Bradley personally to have it declared that J. C. Holland was not, after January 20, 1948, of sound and disposing mind, memory or judgment, and that he was incapable of assenting to, and understanding any act of alienation of his property and was under undue influence, power, and control of the defendant Jenkins. She asked for the will and the power of attorney to be set aside as null and void and that accounts be rendered by Bradley and Jenkins.

In the court of first instance, Mitchell J. declared the will and the power of attorney null and void; for, once the presumption of mental capacity had been rebutted by the presentation of a *prima facie* case of incapacity, the defendants had failed to establish that the testator was, at such time, of sound intellect and capable of alienating his property. Jenkins was ordered to render an account of his administration under the power of attorney.

---

*Of the Junior Board of Editors, McGill Law Journal; Second Year Law Student.

[1][1958] S.C.R. 719.

Dame McEwen, not satisfied with this remedy in that no accounting had been ordered from Bradley as executor and trustee, appealed; Jenkins was the only person to file a cross appeal.

The Court of Appeal, by majority judgement, dismissed the appeal, declared valid the power of attorney on the cross appeal; but as to the question of the will, it maintained the decision of the trial court which held the will invalid. The Court of Appeal pointed out that since no interested party had appealed the point, it was *res judicata.*

Jenkins argued before the Court of Appeal that an action to annul the power of attorney, if it existed, would be vested in Holland's legal representatives. Once his will was set aside his heirs at law, not some of them but all of them, must be plaintiffs or at least parties to the action. The necessity for this rule is to avoid a plurality of actions.[2] Mr. Justice Hyde agreed that this is the rule to be applied where one is dealing with a relative nullity such as the incapacity of minors and of persons interdicted for prodigality. He maintains, however, that this case does not deal with a question of relative nullity but rather an absolute nullity.

> I am of the opinion that if the plaintiff can establish Holland's incapacity at the time of execution of the power of attorney, an essential element of the contract [consent] would be missing and it would be an absolute and radical nullity which she, as an interested person, would be entitled to ask the Court to declare.[3]

Justice Hyde looks to the French civil law and notes that art. 1124 C.N. does not include non-interdicted insane in its terms as does art. 986 C.C. He states, however, that the natural incapacity of such persons is recognized by the French jurists despite the omission, and being unable to provide the essential element of consent, the contracts entered into by them are considered absolute nullities. The learned Judge maintains that it is evident our codifiers, by including the fifth paragraph in art. 986, did not intend to depart from the French law but wished to make certain that it was carried on into our code. Thus the Appeal Court has, in the *McEwen* case, upheld the theory that absolute nullity attaches itself to the acts of a non-interdicted insane person.

The view expressed by Justice Hyde is a direct contradiction of the doctrine stated by Mignault who maintains these acts are attached with a relative nullity. This statement is justified by the rather specious argument that because it is so declared in respect of interdicted persons it must, with even greater reason, apply to persons who have not even been interdicted.

> Il est à peine nécessaire d'ajouter que la personne aliénée ou ses représentants, peuvent seuls demander l'annulation du contrat. L'article 987 C.C. à la vérité, ne parle que des interdits, mais ce qui est vrai de ceux-ci, l'est à plus forte raison de ceux qui n'ont pas été frappés d'interdiction. Dans ce cas comme dans l'autre, la nullité est relative.[4]

---

[2]*Davidson v. Cream* (1897) 6 Q.B. 34 at 43.

[3]Hyde J. [1955] B.R. 800.

[4]Mignault, *Traité de Droit Civil Canadien* Vol. 5 P. 196.

The learned Judge in the case of *Charlebois v. Tremblay*[5] relied on this statement, maintaining:

> Il n'y a pas de distinction à faire entre les actes judiciaires et extra-judiciaires. Cet art. 987 C.C. s'appliqu'à plus forte raison aux aliénés qui n'ont pas été interdits.[6]

The Court, accepting the opinion expressed by Mignault, stated in *Normandin v. Nadon*[7] that the acts of an insane person are attached with a relative nullity:

> L'incapacité qui découle de l'aliénation mentale est une incapacité relative et non absolue; c'est une incapacité de protection et l'art. 78 C.P. doit être lu avec les art. 986 et 987 C.C. qui règlent l'état et la capacité des parties.[8]

Taschereau J. cites the above case with approval in *Rosconi v. Dubois*:[9]

> M. le juge Archambault, dans un jugement très élaboré, fait une revue de la jurisprudence et conclut avec raison que la nullité des actes faits, soit par l'interdit, soit par la personne souffrant d'aliénation mentale notoire, n'est pas absolue, mais uniquement relative, et comme elle est établie en faveur de ces deux classes de personnes, elle ne peut être invoquée que par elles-mêmes ou leur représentants légaux.[10]

The learned Justice maintains that this principle must apply to art. 986 C.C. par. 5,[11] and in both art. 986 C.C. and art. 335 C.C. there is only a relative nullity. He supports his argument by stating:

> Il serait en effet étrange que l'acte ne soit qu'annulable sous 335 C.C. (qui n'est pas nul de plein droit) dans le cas où il y a interdiction et que la notoriété est établie, et que la nullité serait absolue s'il n'y avait pas d'interdiction ni de notoriété. Il suffira de se rappeler que dans les deux cas la demande en annulation ne peut être faite que par l'incapable lui-même ou par son représentant, ce qui ne serait pas le cas si la nullité avait un caractère différent et était absolue.[12]

The theorists, by applying a relative character of nullity to the acts of non-interdicted insane persons, and the jurisprudence in which this concept is crystallized, conclude that the sanction which results from these acts is one whose end is of private interests and prescriptible nature. This sanction of nullity may be invoked or ratified by the party the law wishes to protect. Accordingly, an action to annul a juridical act entered into by one who is insane, regardless of interdiction, may be taken only by the insane contractor or his legal representatives. Thus no recourse is open to those parties with whom the insane person has contracted.

This theory of relative nullity is strongly disputed by Trudel. In his re-examination of the character of acts effected by one lacking mental capacity he concludes that these acts are not relatively null but that the nullity which attaches to them is absolute.

---

[5][1943] B.R. 621.

[6][1945] *Revue Légale* 367.

[7]*Ibid.* at 361.

[8]*Ibid* at 366.

[9][1951] S.C.R. 554.

[10][1951] S.C.R. 554 at 576.

[11]Art. 986 (5) "Those legally incapable of contracting are . . . Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness, or other cause, or who by reason of weakness of understanding are unable to give a valid consent."

[12][1951] S.C.R. 554 at 576.

> Le contrat exige un consentement. L'incapacité naturelle exclut la possibilité d'un acte de volonté et rend tout contrat irréalisable. Les principes fondamentaux de la convention suffisaient à empêcher la formation même d'un contrat par une personne qui ne peut pas accomplir un acte d'intelligence, donner un consentement. L'art. 986 ne crée donc pas l'incapacité, il la constate tout simplement; mieux encore, il observe que les facteurs dans ces circonstances sont impuissants à satisfaire l'essentiel requis pour l'existence d'un contrat. C'est du droit naturel élémentaire.
>
> La conclusion semble évidente; le contrat n'est qu'une chimère, c'est un néant. Plus que nul, il n'a jamais existé. C'est la perfection de ce que la langue juridique dénomme inexactement une nullité absolue radicale. Toute personne intéressée serait recevable à demander au tribunal de constater pareille nullité, de détruire cette apparence trompeuse de contrat. Tels sont les prolongements des lois fondamentales du consentement de sa nécessité ontologique dans le contrat.[13]

The more recent jurisprudence has reflected this absolute theory of nullity expressed by Trudel. In the case of *Quincy v. Kedroskie*,[14] which dealt with the right of a husband to take an action to annul his marriage on the grounds of of lack of consent due to the insanity of his wife, the trial Judge cited Mignault and held this action in nullity a relative one which therefore barred the plaintiff from claiming the inexistence of the marriage. However, Barclay J. in the Court of Appeal stated that the action was open to the husband as want of consent resulting from insanity constitutes a complete nullity which may be invoked by any person interested. He cites Mignault writing of "Les causes des nullités absolues."

> Les nullités de cette nature ont toutes pour fondement la violation d'un principe d'ordre public; c'est pour cela qu'elles peuvent être invoquées en tout temps et par toute personne intéressée.[15]

Mignault continues to state seven causes which give rise to absolute nullity, among them:

> Le défaut absolu de consentement.
>
> Ainsi, lorsqu'une personne atteinte de folie, et par suite, absolument privée de raison, se marie, le marriage qu'en apparence elle contracte n'a aucune existence légale; il existe ni pour ni contre personne, et la nullité peut en être demandée en tout temps.[16]

Bernard v. Leduc[17] substantiates this line of reasoning by holding that consent given to marriage in a moment of insanity creates an absolute nullity of the marriage.

> Dans ce cas, ce que l'on appelle marriage est une nullité absolue, ou un acte inexistant, si l'on peut dire, et que tout intéressé, en tout temps, peut demander la déclaration de nullité de la célébration du marriage.[18]

Whereas Mignault stated that acts of a non-interdicted insane person are of relative nullity[19], he has thus contradicted himself in his writings on marriage, where he maintains that an act of an insane person in consenting to

---

[13]Trudel Vol. 7 p. 70.

[14][1951] B.R. 593.

[15]Mignault, P. B. *Traité de Droit Civil Canadien* Vol. 1 p. 416.

[16]*Ibid.*

[17][1956] *Revue Légale* 522.

[18]*Ibid* at P. 523.

[19]Mignault, P. B. *Traité de Droit Civil Canadien* Vol. 5 p. 196.

marriage is absolutely null.[20] Trudel would agree with Mignault's contradicting opinion and attacks his theory of relative nullity:

> En conclusion. Les directives de l'ancien droit et de notre jurisprudence sont opposées à l'opinion de Mignault. Nous préférons voir une nullité radicale, une absence de contrat dans la convention que voudrait faire une personne privé de raison. Les principes fondamentaux du contrat y conduisent. L'absence réelle de consentement empêche la formation du contrat. Cette absence est indiscutable quand l'homme n'a pas l'exercice de ces facultés intellectuelles au moment du contrat.[21]

To evaluate the conflicting opinions put forward by the authors and the jurisprudence, it is necessary to ascertain the essential criterion which constitutes the basis of the nullity of acts of insane persons. The cause of this nullity will influence its nature; the end to which the legislator aims in the creation of an incapacity will be the greatest factor in determining the type of nullity according to its effect on individual welfare or public order. These legislative ends determine the character of the nullity.

Mignault maintains that acts of insane persons who are not interdicted are relatively null. He arrives at this conclusion by simply extending the relative nullity which is afforded to the interdicted insane to apply, by the same token, to acts of those whose mental incapability has not been judicially declared. It is respectfully submitted that this extension is erroneous, and that Mignault has failed to make a distinction between the juridical bases of nullity in each of these situations. The legislative aim, which is a determining force on the character of the nullity, is of a different nature in each case. Mignault has correctly stated that the nullity which attaches to interdiction is a relative one. This is declared in art. 987 C.C.: "Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted." Interdiction, established solely in favour of the interdicted, is thus a relative incapacity which may be invoked by him or his legal representative in order to annul a juridical act. The legislative end for which this relative nullity is created is the protection of the individual and therefore only he is able to avail himself of its benefit. However Mignault has founded his statement of the relative nullity of acts of the non-interdicted insane on the same basis upon which interdiction rests, namely the legislative desire to protect the individual. It is respectfully suggested that this is not so. The juridical basis upon which the nullity of an act of an insane rests is not individual protection, but the lack of a valid consent which according to art. 984 C.C. is an essential element of contract. Due to insanity at the time of contract, there is no expression of "volonté éclairée". The legislative aim is one of social policy as it is a matter of public order that a 'consent legally given' be essential to a contract recognized in law. An act of an insane person lacking this essential element of contract due to his mental incapacity is non-existent in law and thus absolutely null. Pouliot J. in *Michalson v. Glassford*[22] states:

---

[20] *Ibid* Vol. 1, 416.

[21] Trudel Vol. 7 p. 75.

[22] 22 R. de J. 485.

> L'existence bien constatée de l'aliénation mentale au moment de l'exécution d'un contrat, alors même qu'elle ne serait pas rendue publique par une interdiction judiciaire, rend la partie contractante incapable de contracter, par conséquent le contrat inexistant.[23]

The French author, Henri Mazeaud, writing of the character of the nullity attached to acts of 'aliénés qui ne sont ni interdits ni internés' does not recognize this absolute 'inexistence.'

> L'acte auquel le consentement fait défaut est nul. Certains auteurs prétendent même que cet acte est plus que nul, qu'il est inexistant. Il ne semble pas, sur un plan plus général, que la théorie de l'inexistence mérite d'être retenue dans le domaine des incapacités, elle ne présenterait que des inconvénients, et serait contraire à la volonté des rédacteurs du Code civil.
>
> En effet, lorsqu'un individu privé de raison a accompli, au moins en apparence, un acte juridique, lui seul mérite protection; l'acte doit donc être frappé d'une nullité seulement relative. Admettre l'inexistence serait permettre au tiers qui a contracté d'écarter un acte favorable à l'intérêt de l'aliéné; la sanction ne jouerait donc plus comme une mesure de protection de l'aliéné.
>
> Le législateur a d'ailleurs précisé la sanction dont il frappe les actes passés par les aliénés interdits; cette sanction est la nullité relative. Il serait alors illogique de sanctionner de façon différente et plus complète l'acte accompli par un aliéné qui n'a été l'objet d'aucune mesure de protection.[24]

It appears, therefore, that Justice Hyde's remarks in the *McEwen* Case[25] stating that contracts entered into by the non-interdicted insane are considered by the French civil law as absolute nullities, are opposed to the modern French doctrine expressed by Mazeaud. This author, like Mignault, considering the cause of this nullity to be founded upon the concept of individual protection, logically concludes that the character of the nullity is a relative one for only the person whom the law wishes to protect should be afforded the benefit.

The protection which the law creates for the individual suffering from insanity is interdiction. The Quebec civil law neither states nor implies that it wishes to protect those insane persons who have not taken advantage of this legal safeguard. The authors who uphold the theory of relative nullity have applied the concept of protection to a class of persons, the non-interdicted insane, which has avoided the legal protection available to it through interdiction. If this theory is accepted, the legislative aim to protect insane persons by interdicting them is defeated.

Mazeaud himself writes:

> Les aliénés qui ne bénéficient d'aucune mesure de protection sont malheureusement trop nombreux. Les familles répugnent souvent à rendre publique la déficience mentale d'un de leurs membres; elles préfèrent conserver celui-ci, sans faire provoquer ni son interdiction, ni son internement. Rien ne distinguant extérieurement ces aliénés des majeurs ordinaires, aucune protection ne peut être organisée.[26]

This statement recognizes the number of insane persons who lack legal protection due to a family pride which hesitates to declare one of its members insane, and the fact that there are no indications which distinguish these non-interdicted persons from those juridically capable, with the result that contracting parties lack means of knowing that they are dealing with an insane. Interdiction is the solution in both these situations; it offers protection to the

[23] *Ibid* at p. 490.

[24] Mazeaud. *Leçons de Droit Civil* 2nd Ed. p. 1320.

[25] [1955] B.R. 785 at p. 799.

[26] Mazeaud, *Leçons de Droit Civil*. Vol. I 2nd Ed. p. 1320.

insane and publicity to contracting parties. However, in attaching a relative nullity, the protection afforded by interdiction, to acts of the non-interdicted insane, Mazeaud casts this solution aside and renders interdiction obsolete. There is no reason in claiming the 'social stigma' of interdiction if one may avail oneself of the same protection without becoming interdicted. It is respectfully submitted that the authors, in erroneously applying a relative nullity to the acts of insane persons, short-circuit the legislative aim to protect these persons through interdiction. Rather, an act of an insane person lacking an essential element of contract due to his mental incapacity is non-existent in law and thus absolutely null. This nullity must rest not on the basis of protection, but upon the absence of a valid consent without which there exists no contract. It may be claimed by any interested party and is not confined, as is a relative nullity, to the insane himself.

The plaintiff appealed from the judgement of the Court of Queen's Bench in the *McEwen v. Jenkins and Bradley* case on the grounds that this court dismissed her appeal and maintained the appeal of the defendant Jenkins in holding the power of attorney valid. The Supreme Court maintained the plaintiff's action and held the will and the power of attorney to be null and void for lack of mental capacity. Although the Supreme Court, in reversing the question of fact, contradicts the judgement of the Appeal Court which held the power of attorney valid, it has upheld the conclusions of the lower courts in accepting the theory of absolute nullity for it has recognized the right of any interested person, as was the plaintiff McEwen in this case, to bring an action in nullity against an act of an insane person. The Court held:

> The plaintiff being an heir abintestate if the will was void had sufficient interest to attack the power of attorney so as to increase the value of the estate.[27]

The Supreme Court has thus quashed the theory of relative nullity and in maintaining that an absolute nullity attaches to acts of insane persons has permitted interested parties other than the insane or his legal representatives to request the courts to declare the inexistence of such acts.

> Parce qu'il est interdit, le fou pourra demander, selon 334 C.C. la revision de l'acte posé. Mais lui seul pourra alléguer ce moyen, car l'interdiction a pour but sa protection. Les autres intéressés pourront aussi demander que le contrat soit déclaré nul, non parce qu'il y a interdiction, mais bien parce qu'il n'y a pas eu possibilité d'expression d'une volonté éclairée. L'interdit invoque les dispositions du Code portant sur le chapitre des incapacités. Le co-contractant recourt à l'art. 984 dans le chapitre des obligations. Le premier recours ne détruit pas l'autre, ni le second le premier. Nous sommes dans deux ordres différents.[28]

Consequently the courts have now recognized two parallel actions, based on distinctly separate juridical foundations, to annul the acts of insane persons. These actions rest upon the relative nullity of legal interdiction established in favour of the incapable who alone is able to allege this protection, and secondly, upon the absolute nullity resulting from lack of consent, an essential element of contract, which may be invoked by any interested party.

---

[27][1958] S.C.R. 719 at 720.

[28]Cardinal J. *La Revue du Notariat.* Vol. 60 p. 153.