APP: APP at p.p. 442/4, 446:-
(1976) 1 NSWLR 729.
DICTUM p 438 APP (1978) 1 WLR 770.

Appl. & Cons. 25 NSWLR 644.

[HIGH COURT OF AUSTRALIA.]

GIBBONS . . . . . APPELLANT;
PLAINTIFF,

AND

WRIGHT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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SYDNEY, 1953, *Nov.* 23-25.

1954, *April* 23.

Dixon C.J., Kitto and Taylor JJ.

Lunacy—Insanity—Test of mental capacity for the validity of transactions—Effect of incapacity on conveyances, powers of attorney and contracts—Void or voidable—Who may elect to avoid a voidable transaction.

The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires in respect of every transaction a capacity in each party to understand the general nature of what he is doing by participating in that transaction. The requirement is satisfied, where a transaction is contained in a written instrument, if each party is capable of understanding the general purport of the instrument when it is explained to him.

A power of attorney given by a person incapable of understanding the nature of the authority it purports to confer is void, and so is an instrument bearing the signature of a party who, when he affixed his signature to it, was incapable of understanding that he was making a signature; but an instrument other than a power of attorney, signed by a party as to whom it is proved only that he was incapable of understanding the general purport of the instrument, is not void but is at most voidable.

If an instrument is voidable by reason of the mental incapacity of a party, unless and until an election to avoid it is made by that party or his representatives it is valid and cannot be treated as void at the instance of other persons.

McLaughlin v. *Daily Telegraph Newspaper Co. Ltd.* (1904) 1 C.L.R. 243, discussed.

Decision of the Supreme Court of Tasmania (Full Court) affirmed.

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APPEAL from the Supreme Court of Tasmania.

In an action brought by Bessie Melba Gibbons in the Supreme Court of Tasmania by way of writ of summons dated 23rd April 1947, the statement of claim was substantially as follows:—

1. The plaintiff was the widow of Gustav Gibbons who died at Launceston, Tasmania, on 4th April 1943.

2. The defendant Reginald Charles Wright was the executor of the will of Olinda Gibbons, who died at Hobart, Tasmania, on 30th November 1946, and executor of the will of Ethel Rose Gibbons, who died at Hobart, on 20th January 1946. Wright was sued as executor in each case.

3. The defendant Leonard Charles Pitfield was, and was sued as, the Recorder of Titles of the State of Tasmania.

4. Immediately before the death of Gustav Gibbons he, Ethel Rose Gibbons and Olinda Gibbons were seised of an estate in fee simple as joint tenants in certain lands situate at and known as Nos. 5 and 7 Liverpool Street, Hobart (being land held under the provisions of the general law) and certain lands situate at and known as Nos. 1 and 3 Liverpool Street, and Nos. 42, 44, 46 and 48 Park Street, Hobart (being lands held under the provisions of the *Real Property Acts* and comprised in certificate of title registered vol. 328, fol. 93).

5. Upon the death of Gustav Gibbons those lands vested in Ethel Rose Gibbons and Olinda Gibbons by a survivorship for an estate in fee simple as joint tenants.

6. By an indenture made 14th April 1943 between Olinda Gibbons and Ethel Rose Gibbons of the one part and the plaintiff Bessie Melba Gibbons of the other part, Olinda Gibbons and Ethel Rose Gibbons covenanted with the plaintiff to do all such acts and things and to execute all such assurances and other documents as should be necessary to vest in the plaintiff the same right, title, estate and interest of and in those lands which was vested in Gustav Gibbons immediately preceding his death.

7. By an indenture made on 3rd July 1944 between Olinda Gibbons and Ethel Rose Gibbons of the one part and those two persons and the plaintiff of the other part, those two persons conveyed to themselves and the plaintiff as joint tenants in fee simple the said lands situate at and known as Nos. 5 and 7 Liverpool Street, Hobart.

8. By memorandum of transfer No. 105160 dated 3rd July 1944, Olinda Gibbons and Ethel Rose Gibbons transferred to themselves and the plaintiff as joint tenants in fee simple the said lands situate

at and known as Nos. 1 and 3 Liverpool Street, and Nos. 42, 44, 46 and 48 Park Street, Hobart.

9. By a document dated 6th December 1945, and purporting to have been registered by the recorder of titles on 21st January 1946 as transfer No. 109689, Olinda Gibbons purported in consideration of the transfer by Ethel Rose Gibbons to her of the one-third share of Ethel Rose Gibbons in the joint tenancy referred to in par. 8, to transfer to Ethel Rose Gibbons the similar one-third share of Olinda Gibbons in that joint tenancy, to hold as tenant in common with Olinda Gibbons and the plaintiff; and Ethel Rose Gibbons purported, *mutatis mutandis*, for a similar consideration, to transfer her said one-third share in that joint tenancy to Olinda Gibbons to hold as tenant in common with Ethel Rose Gibbons and the plaintiff.

10. Alternatively, at the time of the execution of that document on 6th December 1945, Olinda Gibbons and Ethel Rose Gibbons, or, alternatively, one or other of them, were not or was not of sound mind and understanding, nor capable of understanding or entering into the said purported transaction.

11. That purported transaction was ineffective to sever the said joint tenancy, and the result thereof was to leave the interests of the said three parties as fixed by the transactions recited in par. 8.

12. Ethel Rose Gibbons died on 20th January 1946.

13. Olinda Gibbons died on 30th November 1946.

14. As survivor of Ethel Rose Gibbons, Olinda Gibbons and herself the plaintiff was and remained solely entitled to an estate in fee simple in possession of the whole of the said lands.

15. The defendant Wright, as executor of the will of Olinda Gibbons claimed that prior to the death of Ethel Rose Gibbons on 20th January 1946, the said joint tenancy subsisting between those two persons and the plaintiff in respect of the said lands had been severed and that the plaintiff was now entitled only to a one-third undivided share in those lands as a tenant in common.

The plaintiff claimed (a) against the defendant Wright as executor of the will of Olinda Gibbons deceased, a declaration that the plaintiff as the survivor of Ethel Rose Gibbons, Olinda Gibbons and herself is solely entitled to an estate in fee simple in possession in the whole of the said lands; (b) against Wright as such executor, and against the defendant Pitfield as recorder of titles, (i) a declaration that the said purported transfer No. 109689 was and is ineffective to sever the said joint tenancy referred to in par. 8, and (ii) rectification of the register of titles by removal or cancellation

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of that purported transfer, and of the endorsement of the particulars thereof on the said certificate of title vol. 328, fol. 93; and (c) further or other relief.

In his defence the defendant Wright admitted each and every allegation in pars. 1-5, 8, 9, 13 and 14 of the statement of claim, and denied each and every allegation in pars. 6, 7, 10 and 15 of the statement of claim. Alternatively, the defendant, by cl. 7a said that the indenture referred to in par. 7 of the statement of claim was and remained an instrument within the meaning of s. 13 of the *Deceased Persons Estate Duties Act* 1931 and that instrument was not at the date of the commencement of the action and had not yet been registered pursuant to those provisions and therefore the disposition therein expressed was and remained without effect. By cl. 11 of the defence, alternatively to cll. 6 and 7 of the defence wherein he denied each and every allegation in pars. 6 and 7 respectively of the statement of claim, the defendant Wright said that if Ethel Rose Gibbons was not of sound mind and understanding on 6th December 1945 she was not of sound mind and understanding at the time of the execution of the indentures mentioned in pars. 6 and 7, namely on 14th April 1943 and 3rd July 1944 respectively and was not capable of understanding or executing those indentures. By cl. 12, alternatively to cll. 6 and 7 of the defence Wright said that at the time of making those indentures Olinda Gibbons and Ethel Rose Gibbons stood in a confidential relationship to Bessie Melba Gibbons and were under the influence of Bessie Melba Gibbons, and Olinda Gibbons and Ethel Rose Gibbons in executing those indentures had no competent independent advice. By cl. 16 Wright said that by indenture of mortgage dated 11th October 1944 and registered on 16th January 1945 and made between Olinda Gibbons of the one part and Wright of the other part, Olinda Gibbons, in consideration of the sum of ten pounds then paid by Wright to her, conveyed unto Wright and his heirs all that her equal one-third share and part of and in the lands referred to in the statement of claim as lands held under the general law to hold the same unto and to the use of Wright in fee simple subject to the proviso for redemption therein contained. By cl. 17 Wright said that by indenture of mortage dated 11th October 1944 and registered on 16th January 1945 and made between Ethel Rose Gibbons of the one part and Wright of the other part, Ethel Rose Gibbons, in consideration of the sum of ten pounds then paid by Wright to her, conveyed unto Wright and his heirs all that her equal one-third share and part of and in the lands referred to in the statement of claim as lands held under the general law to

hold it unto and to the use of Wright in fee simple subject to the proviso for redemption therein contained.

Wright counterclaimed: (a) an order or judgment setting aside the indentures dated 14th April 1943 and 3rd July 1944 respectively, mentioned in pars. 6 and 7 of the statement of claim, and (b) alternatively, a declaration that the joint tenancy subsisting in the lands mentioned in par. 4 of the statement of claim was severed by the indentures of mortgage dated 11th October 1944 mentioned in cll. 16 and 17 of the defence, and by the memorandum of transfer No. 109689 mentioned in par. 9 of the statement of claim.

Upon a point of law raised by the pleadings coming on for hearing before trial, *Clark* J., on 23rd January 1948, made an order that the joint tenancy subsisting in the land under the *Real Property Act* was not severed by the memorandum of transfer dated 6th December 1945, registered No. 109689 but that the joint tenancy subsisting in the land under the general law comprised and described in an indenture of conveyance dated 3rd July 1944 was severed by the indentures of mortgage dated 11th October 1944. On appeal the High Court discharged that part of the order which related to the land under the *Real Property Act* and in lieu thereof made a declaration that the joint tenancy on that land was severed by reason of the making and registration of the said memorandum of transfer (*Wright* v. *Gibbons* (1)).

The plaintiff filed her reply, dated 24th August 1951, in which she said: (a) that the defendant ought not to be heard to make the allegations in cl. 7a of the defence in that if the indenture was not so registered that was by default of the defendant as executor of the estates respectively of Olinda Gibbons and Ethel Rose Gibbons; (b) alternatively, the plaintiff denied that non-registration of the indenture had the effect alleged; and (c) that if non-registration had the effect alleged by the defendant in cl. 7a of the defence then the plaintiff said that the alleged indentures referred to in cl. 9 of the defence were, or each was, an instrument within the meaning of s. 13 of the *Deceased Persons Estate Duties Act* 1931, and the same and none of the same have been registered pursuant to those provisions and therefore the depositions therein expressed are without effect. The plaintiff denied that Ethel Rose Gibbons was not of sound mind and understanding when she executed the indenture mentioned in pars. 6 and 7 of the statement of claim. Each allegation in cl. 12 of the defence was denied and the allegations in cll. 16 and 17 were not admitted. Further, that

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if the indentures referred to cll. 16 and 17 of the defence were executed then the plaintiff said that at the time of the execution thereof Olinda Gibbons and Ethel Rose Gibbons, or, alternatively, one or other of them, were not or was not of sound mind and understanding, nor capable of understanding or entering into those purported transactions.

After evidence had been tendered by the parties at the hearing of the action in August and September 1951, the jury found (1) that at the time of the signing of the deed of gift of 14th April 1943, (a) Ethel Rose Gibbons was capable of understanding the effect of that deed, and (b) Ethel Rose Gibbons and Olinda Gibbons did not stand in a confidential relationship to Bessie Melba Gibbons and were not under her influence, and (c) in executing that deed Ethel Rose Gibbons and Olinda Gibbons did have independent advice; (2) that at the time of executing the conveyance, and transfer of 3rd July 1944, (a) Ethel Rose Gibbons was capable of understanding the effect of those documents, and (b) Ethel Rose Gibbons and Olinda Gibbons did not stand in a confidential relationship to Bessie Melba Gibbons and were not under her influence, and (c) in executing those documents Ethel Rose Gibbons and Olinda Gibbons did have independent advice; (3) that at the time of executing the mortgages of 11th October 1944 and of executing the transfer of 6th December 1945 neither Ethel Rose Gibbons nor Olinda Gibbons was capable of understanding the nature and effect thereof.

It was ordered and declared that the two indentures of mortgage each dated 11th October 1944 and the memorandum of transfer dated 6th December 1945, No. 109689, was each a nullity and of no effect, and the recorder of titles was ordered to rectify and amend the relevant certificate of title by removal or cancellation therefrom of the purported memorandum of transfer No. 109689 dated 6th December 1945.

It was further ordered and declared, *inter alia*, (1) that, having regard to the failure of the defendant upon the production in evidence of the indenture of conveyance made 3rd July 1944 to object to it or to object to the hearing and trial proceeding and having regard to the whole conduct of the trial by the defendant on the basis that the said indenture of conveyance was in evidence, the defendant was and is precluded from relying upon the fact that that indenture of conveyance was not registered with the Commissioner of Taxation under the provisions of the *Deceased Persons Estate Duties Act* 1931 as a ground for denying to the

(1) (1949) 78 C.L.R. 313.

plaintiff the benefit of the jury's findings; and (2) that the plaintiff was entitled solely to an estate in fee simple in possession of the whole of the said lands and hereditaments under the general law and under the *Real Property Act*.

The defendant Wright appealed to the Full Court of the Supreme Court of Tasmania.

The Full Court, on 14th April 1953, ordered that unless Bessie Melba Gibbons applied before 2nd May 1953 for leave to amend the statement of claim so as to allege knowledge of the unsoundness of mind attributed to the testatrices Olinda Gibbons and Ethel Rose Gibbons on the part of the defendant as a party to the two several indentures of mortgage impugned in the statement of claim, the appeal should be allowed. The application not having been made the Full Court allowed the appeal and discharged and set aside the judgment of the trial judge.

From that decision the plaintiff appealed to the High Court.

Further facts appear in the judgment hereunder.

P. H. Opas, for the appellant. The problem in this case is whether the deed of a lunatic is void *ab initio*, or merely voidable. Knowledge by one or other of the parties to the documents challenged of the lack of capacity in the other of them is immaterial. The question of good faith does not enter into the consideration. Once there is a finding by a competent tribunal that the parties to a deed in the case of the transfer and conveyance, and the mortgagors in the case of mortgages, were incapable of understanding the effect of their execution thereof, the deeds are nullities. The jury's findings on the facts cannot be challenged. The Full Court was in error in holding that the deed of a lunatic is not void *ab initio*. The real matter of importance is: What is the effect of what the parties did? The weight of the authorities is in favour of the proposition that even executed as opposed to executory contracts for valuable consideration come within the rule that in the circumstances mentioned the deeds are nullities, the only possible exception being in those cases where so long a time has elapsed after completion of the transaction that the parties cannot be restored to their original position—and even that is open to doubt. In *Wright* v. *Gibbons* (1) this Court decided that the result of the transfers between the two sisters of their respective one-third interest was to sever the joint tenancy and create a tenancy in common but that was a decision merely on the result of such a transfer and it cannot affect the position that in view of the finding of the jury the transfers

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are nullities. The parties by their conduct allowed those questions to go to the jury.

[DIXON C.J. referred to *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1).]

The starting point to a true understanding of the authorities dealing with the validity of transactions carried out by persons *non compos mentis* should be a consideration of the distinction drawn between a feoffment and livery of seisin and bare execution (*Thompson* v. *Leach* (2)). Deeds had their strength solely by their execution, but the solemn ceremony connected with livery of seisin was apparently considered to be binding on a man, although he could treat it as voidable if he did not understand its effect. By virtue of s. 35 (4) of the *Real Property Act* 1862 (No. 16) (Tas.) the documents in the case are deeds, and that was recognized in the questions put to the jury. The distinction between void and voidable conveyances as discussed in *Thompson* v. *Leach* (2) has now disappeared, and the old cases are still relevant because of the approval of the principles they laid down and which have been approved in modern times; they operate to render void *ab initio* any conveyance by a lunatic using that word in the sense of a person *non compos mentis*. In *Beverley's Case* (3) the distinction between feoffment and a deed is clearly demonstrated. The decision in *Molton* v. *Camroux* (4), although at first glance appearing to be so, is not against the submission now made to the Court. The annuity in that case was challenged after the lapse of twenty-seven years. The limitation used by *Patteson* J. in the appellate court (5) means "limited to the position" where on an executed contract the parties cannot be restored to their original position: see *Wilson* v. *King* (6) in which *Molton* v. *Camroux* (4) was distinguished, and the decision was based upon the Privy Council's opinion in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (7). *Molton* v. *Camroux* (4) has no application where the parties can be restored to their former position. The observations appearing in *Price* v. *Berrington* (8) are *obiter dicta* and were not necessary for the decision in that case: see *Theobald* on *The Law Relating to Lunacy* (1924), at pp. 223, 224. *Elliot* v. *Ince* (9) lays down only a narrow

(1) (1904) 1 C.L.R. 243, at p. 269.
(2) (1698) Carth. 435; Comb. 438, 468; 1 Lr. Raym. 313; 3 Mod. 301; 12 Mod. 174 [87 E.R. 199].
(3) (1603) 4 Co. Rep. 123b [76 E.R. 1118].
(4) (1848) 2 Ex. 487 [154 E.R. 584]; (1849) 4 Ex. 17 [154 E.R. 1107].
(5) (1849) 4 Ex., at pp. 18-20 [154 E.R., at p. 1108].
(6) (1938) Can. S.C.R. 317.
(7) (1904) 1 C.L.R. 479.
(8) (1851) 3 Mac. & G. 486, at pp. 495, 497, 498 [42 E.R. 348, at pp. 351-353].
(9) (1857) 7 De G.M. & G. 475 [44 E.R. 186].

principle sufficient to cover its own peculiar facts, and cites *Molton* v. *Camroux* (1) with apparent approval but only for the purpose of distinguishing it, so as to hold void a deed of a lunatic altering a settlement. The judgment in *Elliot* v. *Ince* (2) should be read together with *Thompson* v. *Leach* (3); *Beverley's Case* (4) and *Ball* v. *Mannin* (5). Those cases are in the appellant's favour. The appellant relies upon the conveyance and transfer and the mortgages being void in law. As they are nullities she is free to avoid them and rely on her position as sole surviving joint tenant. However, in *Clerk* v. *Clerk* (6) a settlement made by a lunatic, even though reasonable and for the convenience of his family was set aside by a court of equity. Findings by juries as to unsoundness of mind have been acted upon by the courts (*Frank* v. *Mainwaring* (7); *Snook* v. *Watts* (8); *Jacobs* v. *Richards* (9); *Jenkins* v. *Morris* (10) and *Manning* v. *Gill* (11)). The facts in the last-mentioned case are similar to the facts in this case, namely, the defendant suggested to Olinda Gibbons that a mortgage be given; the amount of the mortgage was nominal; the defendant suggested the transfer between the parties of their one-third interests, and again the consideration was nominal; there was a finding of insanity by a jury; and the deed held invalid in the first instance. *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (12) as approved by the Privy Council (13) is consistent only with the proposition that a deed of a lunatic is void *ab initio*. It was there held that knowledge of the insanity is immaterial. The principles enunciated in *Molyneux* v. *Natal Land & Colonization Co. Ltd.* (14) are inconsistent with the proposition that only a voluntary disposition of property by a lunatic is void, and that a disposition for value is voidable only. The cases cited show that it is the deed which is void because it is a deed: see also *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (15); *In re Walker* (16); *In re Marshall* (17); *Elliot* v. *Ince* (18) and *Dexter* v. *Hall* (19). The relevant law in the

(1) (1848) 2 Ex. 487 [154 E.R. 584]; (1849) 4 Ex. 17 [154 E.R. 1107].
(2) (1857) 7 De G.M. & G., at p. 487 [44 E.R., at p. 190].
(3) (1698) Carth. 435; Comb. 438; 468; 1 Lr. Raym. 313; 3 Mod. 301; 12 Mod. 174 [87 E.R. 199].
(4) (1603) 4 Co. Rep. 123b [76 E.R. 1118].
(5) (1829) 1 Dow. & Cl. 380 [6 E.R. 568]; 3 Bli. N.S. 1 [4 E.R. 1241].
(6) (1700) 2 Vern. 412 [23 E.R. 865].
(7) (1839) 2 Beav. 115, at p. 124 [48 E.R. 1123, at pp. 1126, 1127].
(8) (1848) 11 Beav. 105 [50 E.R. 757].
(9) (1854) 18 Beav. 300, at p. 305 [52 E.R. 118, at p. 120].
(10) (1880) 14 Ch. D. 674, at p. 684.
(11) (1872) L.R. 13 Eq. 485, at p. 488.
(12) (1904) 1 C.L.R. 243.
(13) (1904) 1 C.L.R. 479.
(14) (1905) A.C. 555, at pp. 562, 563.
(15) (1904) 1 C.L.R., at p. 267.
(16) (1905) 1 Ch. 160.
(17) (1920) 1 Ch. 284.
(18) (1857) 7 De G. M. & G. 475 [44 E.R. 186].
(19) (1873) 15 Wall 9 [21 Law. Ed. 73].

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United States of America is not uniform and therefore is not of any assistance to this Court (1). The jury's findings should not be lightly disturbed but they should be disturbed if it was wrongly directed. The pleadings raise the issues which were properly put to the jury in the form of questions which were either agreed upon by the parties or, at least, not objected to by the defendant. The question of knowledge of the one party of the state of mind of the other of them, or of the bona fides of the parties is irrelevant on the authorities cited, so that if pleaded they would be unnecessary. The Full Court below was in error in insisting on their being pleaded as a condition precedent to judgment for the plaintiff. The defendant took his stand on upholding the validity of the challenged documents by showing that the sisters were of full understanding when the mortgages, transfer and conveyances were signed, or, alternatively, were not of full understanding when the deed of gift and subsequent transfer were executed and further did not have independent advice at such time. He failed entirely in his defence. It is too late on appeal to say no case has been made out on the pleadings, when he allowed the trial to proceed to judgment without demur and did not even raise this in the notice of appeal (*Genders* v. *Ajax Insurance Co. Ltd.* (2)). If any of those points had been raised they could have been cured by amendment. If they were allowed to be raised at this late stage a very grave injustice would be done. The Full Court below was in error in allowing the defendant to raise the matters on which he there succeeded. As he failed on the grounds of which he did not give notice the appeal should be dismissed. The evidence clearly shows that the ladies were of unsound mind and were not capable of understanding the deed. That is sufficient to invalidate it (*Molyneux* v. *Natal Land & Colonization Co. Ltd.* (3)).

[DIXON C.J. referred to *Re Estate of Park* (4).]

The conduct of the parties in this case is a material point.

H. S. Baker, for the respondent. To set aside documents as void there must be fraud (*Tremillis* v. *Benton* (5)). The separate interests were conveyed each to the other. Those interests were identical. Not only is there not any case on the pleadings but also there is not any case on the facts. The financial position of those elderly ladies was bad. This interest was practically their only asset. The defendant was in contact with them in connection with a large

(1) 46 Amer. L.R. 417; 95 Amer. L.R. 1442.
(2) (1950) 81 C.L.R. 470.
(3) (1905) A.C., at pp. 562, 563.
(4) (1954) P. 112.
(5) (1892) 18 V.L.R. 607, at pp. 620-623.

number and variety of matters personal to them. In the presentation of the case to the jury there was not any attempt by the trial judge to direct the attention of the jurors to two or three points which had great legal importance. The vital significance of the time factor was not referred to. The real question for the jury was what was the state of mind of the ladies concerned on 11th October 1944. The trial judge did not make any attempt to explain to the jury the very important features in the case, or the terms of a complicated document involving an "old system" mortgage. There was no question of bad faith so far as the defendant is concerned; his good faith was expressly admitted. The mortgage was a perfectly good legal mortgage. The absence of knowledge as to the state of mind may not have any significance at all. The only question could well be one of insanity: see *Imperial Loan Co. Ltd.* v. *Stone* (1). *Jenkins* v. *Morris* (2) has no value in respect of the point for which it was cited on behalf of the appellant. The question is: Did the ladies understand the effect of the deed? The way the question ought to be put in various circumstances is shown in *Halsbury's Laws of England*, 2nd ed., vol. 21, p. 293. The document was a protective measure which severed the joint tenancy and benefited the parties. Mere incapacity does not invalidate the transaction. If people appear to understand they are taken as understanding and are bound by what they do (*Molton* v. *Camroux* (3)). The issue was lack of knowledge. In allowing the question of amending the pleadings to be raised at that stage the Full Court below exercised a discretion it was fully entitled to exercise. The court went to great pains to be fair to the parties and to give full opportunity for this element to be tried. The powers of the court are to be found in the *Supreme Court Civil Procedure Act* 1932 (Tas.), particularly ss. 33 (5), 39 (5) and 47 (3). A "fatal" objection in law can always be taken in the appellate court. If it is incurable he is not prejudiced, except as to costs. The following cases are based on principles which the Court would not now accept: *Frank* v. *Mainwaring* (4); *Ball* v. *Mannin* (5); *Imperial Loan Co. Ltd.* v. *Stone* (1); *Molton* v. *Camroux* (3); *York Glass Co. Ltd.* v. *Jubb* (6); *Howard* v. *Digby* (7) and *Elliot* v. *Ince* (8): see also *Williams* on *Vendors and Purchasers*, 4th

(1) (1892) 1 Q.B. 599.
(2) (1880) 14 Ch. 674.
(3) (1848) 2 Ex. 487 [154 E.R. 584]; (1849) 4 Ex. 17 [154 E.R. 1107].
(4) (1839) 2 Beav. 115 [48 E.R. 1123].
(5) (1829) 1 Dow. & Cl. 380 [6 E.R. 568]; 3 Bli. N.S. 1 [4 E.R. 1241].
(6) (1925) 134 L.T. 36.
(7) (1834) 2 Cl. & Fin. 634 [6 E.R. 1293].
(8) (1857) 7 De G.M. & G. 475 [44 E.R. 186].

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ed. (1936), pp. 863, 864, and *Halsbury's Laws of England*, 2nd ed., vol. 21, pp. 280, 281. The transaction was for the benefit of the two ladies. There is some ground for taking the view in this case that these two elderly and impoverished ladies were doing an act which was definitely for their benefit. The appellant is a stranger to the transaction and therefore has no *locus standi* to challenge it, although in *Elliot* v. *Ince* (1) a stranger was heard in respect of a unilateral act altering a settlement having an entail. All the cases cited are of persons who were themselves interested in the transaction. That is not this case. A stranger, such as is the appellant, is not in any better position than the lunatic, because the transactions are void, not voidable: *Williams* on *Vendors and Purchasers*, 4th ed. (1936), pp. 863, 864. Persons who claim through or under an incapacitated person cannot be in a better position than that incapacitated person: *Halsbury's Laws of England*, 2nd ed., vol. 21, p. 281. The appellant does not claim through or under either of the ladies. She was one of three joint tenants. To sever the joint tenancy was a legal incident of their estates. All the transactions were, in the circumstances, clearly for the benefit of the ladies (*McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (2); *Howard* v. *Digby* (3)). The summing-up by the trial judge was deficient in many material respects. Reference to the respondent as being an "adversary" was not adequately explained or dealt with. There is nothing in the circumstances to show that sub-s. (8) of s. 33 of the *Supreme Court Civil Procedure Act* 1932 (Tas.) is applicable. The jury should have been reminded that the court looks with care and suspicion at an uncorroborated claim against the estate of a deceased person (*Bank of New South Wales* v. *Rogers* (4)). All the incidents relied upon do not suggest by themselves a lack of capacity or a lack of understanding of the deed on the part of the ladies (*Birkin* v. *Wing* (5); *Pilkington* v. *Gray* (6)). "Eccentricity" was discussed in *Jarman* on *Wills*, 8th ed. (1951), vol. 1, p. 53, and *Halsbury's Laws of England*, 2nd ed., vol. 21, p. 297. The importance of the time factor was dealt with in *Jarman* on *Wills*, 8th ed. (1951), vol. 1, p. 51; *Halsbury's Laws of England*, 2nd ed., vol. 21, pp, 290, 295; *Parker* v. *Felgate* (7); *Perera* v. *Perera* (8) and *Ferguson* v. *Borrett* (9). There was not any finding by the jury that the transferee or mortgagee knew of the alleged

(1) (1857) 7 De G.M. & G. 475 [44 E.R. 186].
(2) (1904) 1 C.L.R., at pp. 270, 271.
(3) (1834) 2 Cl. & Fin., at pp. 661, 663 [6 E.R., at pp. 1303, 1304].
(4) (1941) 65 C.L.R. 42, at p. 83.
(5) (1890) 63 L.T. 80, at p. 81.
(6) (1899) A.C. 401, at p. 407.
(7) (1883) 8 P.D. 171.
(8) (1901) A.C. 354, at p. 361.
(9) (1859) 1 F. & F. 613 [175 E.R. 875].

incapacity. Indefeasibility of title was dealt with in *Percy* v. *Youngman* (1); *Coras* v. *Webb* (2) and *Hall* v. *Loder* (3).

P. H. Opas, in reply.

Cur. adv. vult.

April 23, 1954.

THE COURT delivered the following written judgment:—

The appellant was the plaintiff in an action in the Supreme Court of Tasmania against the respondent as executor of the respective wills of Olinda Gibbons deceased and Ethel Rose Gibbons deceased. The plaintiff sought in the action to establish a title, as the last survivor of three joint tenants, Olinda Gibbons, Ethel Rose Gibbons and herself, to an estate in fee simple in possession in two parcels of land situate respectively in Liverpool Street and Park Street, Hobart. After a trial before *Morris* C.J. and a jury the plaintiff obtained judgment, but on appeal the judgment was set aside by the Full Court. From the Full Court's order the plaintiff now appeals to this Court.

The title to the land in Park Street and part of the land in Liverpool Street is under the provisions of the *Real Property Act*, and the title to the remainder of the land in Liverpool Street is governed by the general law. Until 4th April 1943, the fee simple in the lands of both descriptions was vested in Olinda Gibbons and Ethel Rose Gibbons, who were sisters, and their brother Gustav Gibbons, as joint tenants. On that date the brother died. On 3rd July of the same year, the sisters, pursuant to a covenant to do so entered into on 14th April 1943, conveyed the land under the general law, and transferred the land under the *Real Property Act* to themselves and the appellant (who is Gustav's widow) as joint tenants. Shortly afterwards, however, they purported to sever the joint tenancy thus created. As to the land under the general law, each sister on 11th October 1944 mortgaged her interest to a solicitor, who happens to be the respondent, by means of a deed of conveyance with a proviso for redemption, to secure a loan of £10. As to the land under the *Real Property Act*, the sisters on 6th December 1945 executed a memorandum of transfer (subsequently duly registered) whereby each transferred to the other her one-third share in the joint tenancy in consideration of a similar transfer by the other to her.

(1) (1941) V.L.R. 275, at pp. 279, 282.
(2) (1942) Q.S.R. 66; 35 Q.J.P.R. 137.
(3) (1885) 7 L.R. (N.S.W.) Eq. 44, at p. 49.

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If these instruments took effect according to their terms, they were effectual to sever the joint tenancy and to cause the lands to be vested in the three ladies as tenants in common in equal shares: *Wright* v. *Gibbons* (1). But Ethel Rose Gibbons having died in January 1946, and Olinda Gibbons having died in November of the same year, the appellant claims in these proceedings that for want of mental capacity on the part of each sister the mortgages and memorandum of transfer were ineffectual to destroy the joint tenancy, and that accordingly the appellant is now solely entitled to the lands by survivorship.

At the trial the learned Chief Justice of Tasmania left four questions to the jury. The first two related to the instruments of 14th April 1943 and 3rd July 1943 as a result of which the appellant had come to be a joint tenant with Olinda and Ethel Rose in the subject lands, and the answers to those questions denied that certain suggested grounds existed for invalidating those instruments. The third question was whether, at the date of the mortgages of 11th October 1944, (a) Ethel Rose Gibbons was capable of understanding the effect of the deed which she executed, and (b) Olinda Gibbons was capable of understanding the effect of the deed which she executed. The fourth question was whether, at the date of the transfer of 6th December 1945, (a) Ethel Rose Gibbons was capable of understanding the effect of the deed, and (b) Olinda Gibbons was capable of understanding the effect of the deed. To each part of the third and fourth questions the answer returned by the jury was No.

These answers appeared to the learned Chief Justice to entitle the plaintiff to declarations that the two indentures of mortgage of 11th October 1944 and the memorandum of transfer of 6th December 1945 were nullities and of no effect, and he ordered judgment to be entered accordingly. The appeal to the Full Court was based upon a number of grounds, but the court found it unnecessary to deal with more than one. Their Honours held that a disposition of property made for valuable consideration by a person incapable of understanding its effect is not wholly void, but is voidable if, and only if, the disponee knew or had reasonable grounds to know of the disponor's lack of understanding and did not act in good faith. They further held that the transactions in question were for valuable consideration; but as facts sufficient to bring the case within the principle of law they had stated had neither been alleged in the statement of claim nor found by the jury, their Honours gave the parties an opportunity to amend the

(1) (1949) 78 C.L.R. 313.

pleadings, and expressed their readiness to order a new trial if the amendments were made. The appellant, however, declined to amend, and accordingly the appeal was allowed and the judgment given at the trial was discharged.

In the course of the case here and below, the question was discussed whether the jury's answers to the third and fourth questions were sufficient to establish such a degree of mental deficiency as the law considers relevant to validity. The expression " the effect of the deed ", taken apart from context, is ambiguous, and in order to know what the jury meant by its answers it is necessary to consider the summing-up of the presiding judge. Unfortunately no official shorthand note was taken, and considerable discrepancies are found to exist amongst notes which were made by four of the professional gentlemen in court. The learned Chief Justice was not asked to settle the points of difference until fourteen months after the trial, and naturally he was unable to do more than correct two or three misapprehensions. The four versions of the summing-up attribute to his Honour a variety of expressions describing what it was that the sisters must have been capable of understanding. The deed, the nature of the deed, the document, what they signed, what they were doing; all these forms of words are said to have been used, together with more general statements, such as that the question was whether the sisters could not understand, or were of sound mind. It seems reasonably clear, we think, that the expression " the effect of the deed " as used in the questions asked of the jury referred to the broad operation of the deed, as distinguished from its precise terms.

The learned Chief Justice was clearly right in treating the validity of the instruments in suit as depending upon the possession by Ethel Rose Gibbons and Olinda Gibbons of a degree of understanding relative to the nature of that which they were doing. The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. The case of *Ball* v. *Mannin* (1) though somewhat confusedly reported, is an authority in point. The House of Lords had before it certain exceptions to a charge delivered to a jury. The trial judge, after saying that the question to be tried was whether the person whose deed was in question was a person of unsound mind, added that to constitute such unsoundness of mind as should avoid a deed at

(1) (1829) 1 Dow. & Cl. 380 [6 E.R. 568]; 3 Bli N.S. 1 [4 E.R. 1241].

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law, the person executing the deed must be incapable of understanding and acting in the ordinary affairs of life. As to this, Lord *Tenterden*, who delivered the leading judgment, said: " perhaps in that he went too far, but that was a matter of which the plaintiff in error was not, under this bill of exceptions, entitled to complain " (1). Then he turned to the appellant's main contention, that in order to avoid a deed the unsoundness of mind of the party executing it must amount to that degree of unsoundness which constitutes idiocy, a test which, it was said, " implies a total absence and deprivation of the faculty of reason in the party, and is not a question of degrees, but of the nature and quality of the mind and faculty, directly at variance with the language and direction of the learned judge " (2). To this contention their Lordships gave no countenance. They approved a statement in the charge that as one test of the requisite capacity the jury was at liberty to consider whether the person concerned was capable of understanding what he did by executing the deed, when its general purport was explained to him. The principle which the case supports, and for which *Boughton* v. *Knight* (3); *Jenkins* v. *Morris* (4); *Birkin* v. *Wing* (5) and *Estate of Park* (6) may also be cited, appears to us to be that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. As *Hodson* L.J. remarked in the last-mentioned case, " one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case " (7).

Ordinarily the nature of the transaction means in this connection the broad operation, the " general purport " of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out: *Manches* v. *Trimborn* (8). In the present case, it was necessary, we think, that the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole, each of them would be entitled to a one-third

(1) (1829) 1 Dow. & Cl., at p. 391 [6 E.R., at p. 572].
(2) (1829) 1 Dow. & Cl., at pp. 386-387 [6 E.R., at p. 570].
(3) (1873) L.R. 3 P. & D. 64, at p. 72.
(4) (1880) 14 Ch. D. 674.
(5) (1890) 63 L.T. 80.
(6) (1954) P. 112.
(7) (1954) P. 112, at p. 136.
(8) (1946) 174 L.T. 344, at p. 345.

share which would pass to her estate if she still owned it at her death. This is apparently not what the learned Chief Justice put to the jury. It was the direct effect of the instruments according to their terms, and not the resultant severance of the joint tenancy, that seems to have been referred to by the expression " the effect of the deed ", in the questions ultimately formulated. But a jury which found the sisters incapable of understanding the direct effect of the deeds could hardly have found them capable of understanding the indirect effect of the deeds in severing the joint tenancy. We shall therefore consider the case on the footing that the appellant has established that, at the respective dates of the mortgages and the memorandum of transfer, the sisters lacked that capacity to understand which was necessary for the complete validity of the instruments.

But proof of this was not enough to entitle the appellant to succeed in the action if the result was that the instruments were merely voidable ; for an instrument voidable by reason of the incapacity of a party, or by reason of any form of imposition upon a party, is valid unless and until it is avoided by that party or his representatives. It is clearly not open to other persons, such as one claiming adversely to the party, to elect against the validity of the instrument ; and perhaps it was a realization of this which led the appellant to decline the opportunity she was given by the Full Court to amend the pleadings and have a new trial of the action. Neither Ethel Rose Gibbons nor Olinda Gibbons purported in her lifetime to avoid the instruments severing the joint tenancy, and the respondent as their executor has always affirmed their validity. Consequently the appellant must fail unless the law is that a deed disposing of property is absolutely void if at the time of its execution the disponor was incapable of understanding what he was doing, in the sense we have mentioned. As to whether this is the law, there is a singular lack of modern authority. The matter was discussed in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1), and the opinion was there expressed that every deed executed by a lunatic is void, at least unless the lunacy was unknown to the person who procured the execution of the deed. The deed there in question, however, was a power of attorney, and not one directly affecting property. What was said in the judgment, therefore, went beyond the necessities of the case. The present appeal raises the problem in an acute form.

The law relating to persons who are lunatics so found must be put on one side at the outset. Such a person is held incompetent

(1) (1904) 1 C.L.R. 243.

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to dispose of his property, not because of any lack of understanding (indeed he remains incompetent even in a lucid interval), but because the control, custody and power of disposition of his property has passed to the Crown to the exclusion of himself. Accordingly his disposition is completely void: *Re Walker* (1). For a similar reason, the conveyance of a person in respect of whom, though he is not a lunatic so found, a receiver has been appointed under s. 116 (1) (d) of the *Lunacy Act* 1890 (Imp.) (53 and 54 Vict. c. 5), has been held to be void: *Re Marshall* (2).

The development of the law in relation to the validity of acts done by a person of unsound mind not being a lunatic so found was much affected in earlier times by the currency of a doctrine (which grew up in the reign of Edward III despite earlier authority to the contrary: 2 Bla. Comm. 291), that no man of full age should be heard to set up in the courts his own insanity. This rule against disabling his own person, or stultifying himself, as it was variously called, applied to the party himself and to his privies in estate (as reversioners or remaindermen) and in tenure (as by escheat), but it is important to notice that it never applied to his privies in blood (as heirs) or his privies in representation (as executors or administrators): *Beverley's Case* (3). The doctrine was whittled away and finally abandoned. Its history is briefly recounted in the "learned note" to *Gore* v. *Gibson* in the Jurist (4), to which Baron *Parke* referred during the argument in *Molton* v. *Camroux* (5): "This case, and the authorities referred to in it, shew how difficult it is to eradicate a false principle, which has once become established in the law of any country. It is expressly laid down by *Littleton* S. (405), that 'no man of full age shall be received in any plea, by the law, to disable his own person', or, as Lord *Coke* expresses it, to stultify himself (*Beverley's Case* (3)); and, as a corollary from this enlightened proposition, no person was allowed to avoid any civil act by shewing he did it while he was *non compos mentis* or in a state of intoxication, or could avail himself of the latter for any purpose, civil or criminal. (Co. Litt. 247.b.). It is, however, both just and important, to remark that a contrary opinion was strongly maintained by *Fitzherbert*, in his *Natura Brevium* (202.d.), and the more ancient authorities seem not to be uniform on the point. The doctrine of *Littleton* and *Coke*, however, completely prevailed (*Stroud* v. *Marshall* (6); *Cross* v. *Andrews* (7)); and

(1) (1905) 1 Ch. 160.
(2) (1920) 1 Ch. 284.
(3) (1603) 4 Co. Rep. 123b [76 E.R. 1118].
(4) (1845) 9 Jur. 140, at p. 142.
(5) (1848) 2 Ex. 487 [154 E.R. 584].
(6) (1595) Cro. Eliz. 398 [78 E.R. 643].
(7) (1598) Id. 622.

the ingenuity of courts in modern times has been frequently exercised in qualifying and restricting its mischievous operation, so that it is now almost, if not entirely, at an end. (See *Kent's Commentaries*, vol. 2, p. 451)" (1).

Even while the doctrine still flourished, the courts allowed an exception from it in the case of a contract made by a lunatic with a person who at the time was aware of the lunatic's insanity: *Imperial Loan Co.* v. *Stone*, per *Fry* L.J. (2). But it came to be held, not only that proof of knowledge of the lunacy enabled the lunatic to avoid liability under the contract despite the rule against stultifying himself: *Dane* v. *Viscountess Kirkwall* (3), but also that without proof of that knowledge (or at least proof of "the greatest reason to believe" that the lunacy existed) the lunacy was not sufficient to enable the contract to be treated as invalid, even by the lunatic's privies in representation to whom the rule against pleading his insanity had never applied: *Molton* v. *Camroux* (4). This step having been taken, it was possible for *Lopes* L.J. in *Imperial Loan Co.* v. *Stone* (5) to state the principle to be deduced from the cases in these terms: "A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. 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. A defendant who seeks to avoid a contract on the gound of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed" (6).

Once the law had become committed to this view, it could not be maintained that problems concerning the contracts of persons of unsound mind could be solved by the simple formula: a contract requires the assent of both parties; a person of unsound mind is incapable of assenting; therefore no contract can come into existence between parties of whom one is of unsound mind. This appears not to have been appreciated at first. Consider, for instance, the case of *Gore* v. *Gibson* (7). To an action by an indorsee of a bill of exchange against the indorser, the defendant pleaded that at the time of making the indorsement he was unable (through

(1) (1848) 2 Ex., at p. 491 [154 E.R., at p. 585].
(2) (1892) 1 Q.B. 599, at pp. 601-602.
(3) (1838) 8 C. & P. 679 [173 E.R. 670].
(4) (1848) 2 Ex. 487 [154 E.R. 584]; (1849) 4 Ex. 17 [154 E.R. 1107].
(5) (1892) 1 Q.B. 599.
(6) (1892) 1 Q.B., at pp. 602-603.
(7) (1845) 13 M. & W. 623 [153 E.R. 260].

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intoxication) to comprehend the meaning, nature or effect of the indorsement, and that the plaintiff then had notice of this. The position was put clearly by Baron *Parke*: "The averment in this plea that the defendant indorsed the bill, means merely that he wrote his name upon it; then the plea goes on to state, as matter of avoidance, that the act of so writing his name is not obligatory on him, because he was in fact non compos mentis when he did it" (1). Earlier he had said: "But where the party, when he enters into the contract, is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it". (As the context shows, void here meant voidable: *Matthews* v. *Baxter* (2)). Yet in this very case *Pollock* C.B. (3) spoke of a contract requiring the assent of both parties, giving that as the reason for saying that when one of the parties was incapable of assenting there could be no binding contract. *Alderson* B. said: "When it is shewn that the contract by indorsement was made when the defendant was in such a state of drunkenness that he did not know what he was doing, and especially when it appears that the plaintiff knew it, I cannot doubt that the contract is void altogether" (4). (Again, void meant voidable, as was to be pointed out in *Matthews* v. *Baxter* (2)). Although this acknowledged that a contract was made by the indorsement, and that in some circumstances the contract could not be avoided, the learned Baron added: "It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism". In such a case, however, the signature would simply not be a signature having any relation to the bill of exchange at all. Though it would be on the same piece of paper, it would not be an indorsement of the bill. But a person who, having in truth indorsed the bill, sets up his inability to understand what he was doing, is necessarily seeking to avoid a contract made in fact. And so it was laid down in *Matthews* v. *Baxter* (2), the view of *Parke* B., that the mental incapacity of one of the contracting parties is "matter of avoidance" only, being thus affirmed.

This, of course, was not a new view. It had been "unanimously resolved" to this effect by the King's Bench in *Beverley's Case* (5) "upon argument, and on good consideration". The logical flaw in the contrary theory was that it erroneously assumed that a

(1) (1845) 13 M. & W., at pp. 626, 627 [153 E.R., at p. 262].
(2) (1873) L.R. 8 Exch. 132.
(3) (1845) 13 M.& W., at p. 626 [153 E.R., at p. 262].
(4) (1845) 13 M. & W., at p. 627 [153 E.R., at p. 262].
(5) (1603) 4 Co. Rep. 123b [76 E.R. 1118].

plea that the defendant was unable to understand the nature of the document sued upon is equivalent to, or involves, an allegation that he did not intend to sign it. In truth the plea does not deny the defendant's execution of the document. It assumes his execution of it. It concedes that his mind, such as it was, went with his act. What it asserts is that the state of his mind was such that if the other contracting party was aware of it he ought not to be allowed to insist upon the contract. The essence of the plea is, therefore, not that the contract was not signed by the defendant, but that "a person who takes an obligation from another under such circumstances is guilty of actual fraud": per *Parke* B. in *Gore* v. *Gibson* (1); *Bullen & Leake, Precedents of Pleading*, 3rd ed. (1868), p. 606, note (b). For this reason, it is necessary to reject the suggestion made by *Griffith* C.J. in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (2), that the principle upon which a contract made with a lunatic by a person who is aware of his insanity is held not to be binding upon the lunatic is fundamentally the same as the principle which renders void *ab initio* a contract signed by a person who is fraudulently induced by the other party to believe that it is a contract of a different nature. The reason for holding a contract of the latter kind void is that the party imposed upon did not really sign his name as a signature to any such contract as appears on the piece of paper. In that sense, "his mind did not go with his pen"; *Carlisle & Cumberland Banking Co.* v. *Bragg* (3); *Foster* v. *Mackinnon* (4). "The deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class": *National Provincial Bank* v. *Jackson* (5). No doubt it would be correct to apply the same reasoning to a case in which a lunatic wrote his name on a paper which in fact contained a contract, but did so in a frenzy, not even being aware what were the motions his hand was performing. That would be a simple case of *non est factum*, for the truth would be that the signature was not a signature to that document; it would be the kind of case which *Alderson* B. suggested in *Gore* v. *Gibson* (6), when he spoke of a somnambulist writing his name in his sleep. But if the case made is only a case of incapacity to understand the nature of that to which admittedly the signature was affixed, no analogy exists with cases in which a seeming contract is held to be completely void for want of intention that the signature shall apply to any contract of such a kind. Indeed, after *Molton*

(1) (1845) 13 M. & W. 623, at p. 626 [153 E.R. 260, at p. 262].
(2) (1904) 1 C.L.R. at pp. 272-274.
(3) (1911) 1 K.B., at p. 496.
(4) (1869) L.R. 4 C.P.D. 704, at p. 711.
(5) (1886) 33 Ch. D. 1, at p. 10.
(6) (1845) 13 M. & W. 623, at p. 627 [153 E.R. 260, at p. 262].

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v. *Camroux* (1), whatever doubt may have persisted as to what must be proved in addition to mental incapacity in order to avoid a contract, it was the settled doctrine of English law that the contract of a lunatic was not void but was voidable only. Subsequent cases have confirmed this: *Beavan* v. *McDonnell* (2); *Imperial Loan Co.* v. *Stone* (3); *Tremills* v. *Benton* (4); *Baldwyn* v. *Smith* (5); *Bawlf Grain Co.* v. *Ross* (6); *York Glass Co.* v. *Jubb* (7).

This being the state of the law with respect to contracts, how can it be otherwise with respect to conveyances? If the only objection to a conveyance is that the conveyor was incapable of understanding what he was doing by executing it, there is no ground for denying that it was in truth signed, sealed and delivered by the conveyor as his deed. If it be said that the mind of the conveyor did not go with his acts, the answer applies with no less force than it does in the case of a contract that that is not what is established by proof of a mere absence of capacity to understand the nature of the document. We need not stay to consider whether, in order to avoid the deed, it is necessary to prove, in addition to the conveyor's incapacity, knowledge on the part of the conveyee that the incapacity exists, or whether other circumstances making the transaction less than fair to the conveyor will suffice. (Even in regard to contracts, the question whether unfairness matters, if the party dealing with a person of unsound mind is ignorant of his condition, appears not yet to have been finally resolved: per *Sargant* L.J. in *York Glass Co.* v. *Jubb* (8)). The point to be observed here is that proof of a conveyor's incapacity to understand the nature of the instrument is not proof that it is not his deed, and it therefore provides no logical ground for holding that the deed is void. Whether the authorities nevertheless require that conclusion to be accepted remains now to be considered.

In the decisions on the subject, the special case of a power of attorney receives frequent mention. It is important to recognize, however, the unique character of a power of attorney as an instrument not affecting the title to property or the rights or obligations of persons, but merely conferring an authority. The conception of a power of attorney voidable by reason of lack of understanding in the grantor would not be without its difficulty; it would mean that an authority to bind the grantor would be retrospectively

(1) (1848) 2 Exch. 487 [154 E.R. 584]; (1849) 4 Exch. 17 [154 E.R. 1107].
(2) (1854) 9 Exch. 309; 10 Exch. 184.
(3) (1892) 1 Q.B. 599.
(4) (1892) 18 V.L.R. 607.
(5) (1900) 1 Ch. 588.
(6) (1917) 55 Can. S.C.R. 232.
(7) (1925) 134 L.T. 36.
(8) (1925) 134 L.T., at p. 43.

defeasible, with the result that acts done in exercise of that authority would be rendered void, not upon proof of such circumstances, amounting to the perpetration of a fraud by the other party to the act, as the grantor would have had to establish if he had done the act himself, but upon proof of circumstances constituting a fraud by the donee of the power, whose guilt might not be accompanied by any unfairness at all on the part of the other party. But whether or not this consideration has been at the back of it, the fact is that from early times the power of attorney of a lunatic has been regarded as void. (We use the word lunatic in this connection as referring to a person incapable of understanding the nature of the acts or transactions which the particular power of attorney purports to authorize). Decisions to this effect have meant that the power of attorney is inefficacious as a source of authority to the donee to act on behalf of the lunatic. But so to hold is merely to illustrate the general rule of law that a lunatic cannot appoint an agent: *Stead* v. *Thornton* (1); *Tarbuck* v. *Bispham* (2); *Elliot* v. *Ince* (3); cf. *Drew* v. *Nunn* (4); *Yonge* v. *Toynbee* (5). In order to reach this conclusion there is no necessity to consider whether the power of attorney is the lunatic's deed, for whether it is or not it cannot have any operation to create the relationship of principal and agent. That such a power of attorney confers no authority on the donee was the actual decision of this Court in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (6), and the actual decision of the Supreme Court of the United States in *Dexter* v. *Hall* (7); and it was this proposition alone which the Privy Council affirmed in *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin* (8). But, as we have said, in the reasons given for the decision in *McLaughlin's Case* (6) in this Court the general topic of the void or voidable character of a deed executed by a lunatic was discussed, and the view was put forward that every such deed is absolutely void, at least unless it was procured innocently. The Court's consideration of the matter was much influenced by *Dexter* v. *Hall* (7), and to that case it is necessary now to turn.

The judgment, which was prepared by *Strong* J., begins with some observations of a general character which are sufficiently met by what has been said already. These are followed by the remark: "It must be admitted, however, that there are decisions

(1) (1832) 3 B. & Ad. 357 (n) [110 E.R. 134].
(2) (1836) 2 M. & W. 2, at p. 8 [150 E.R. 643, at p. 646].
(3) (1857) 7 De G.M. & G. 475, at p. 486 [44 E.R. 186, at p. 190].
(4) (1879) 4 Q.B.D. 661.
(5) (1910) 1 K.B. 215.
(6) (1904) 1 C.L.R. 243.
(7) (1873) 15 Wall. 9 [21 Law. Ed. 73].
(8) (1904) A.C. 776, at p. 780.

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which have treated deeds and conveyances of idiots and lunatics as merely voidable and not void " (1). *Beverley's Case* (2) is referred to as one such decision, and other cases, both English and American, might also have been mentioned. But there is one clear decision to the contrary, and the judgment of *Strong* J. fastened upon it. That is the case of *Thompson* v. *Leach* (3). Lands had been devised to A for life, remainder to his sons successively in tail, remainder to B in tail, remainder to the devisor's right heirs. A, while yet having no son, executed a surrender of his life estate to B. A was *non compos* at the time. After the surrender A had a son. If the surrender was merely voidable and therefore effectual unless and until avoided, the particular estate which supported the contingent remainders limited in favour of A's sons in tail became merged in B's remainder in tail. The result of this would have been that the contingent remainders were destroyed ; for a mere right of action, such as the right to avoid the surrender, would be insufficient to support a contingent remainder, and a contingent remainder once extinct could not be revived. On the other hand, if the surrender was completely void the contingent remainders were not destroyed, and A's son became entitled in possession upon A's death. The King's Bench considered that the deed was void, and accordingly held that the contingent remainder became an estate vested in possession at A's death. The judgment was affirmed in Parliament " without much debate " : *Leach* v. *Thompson* (4). Sir *Bartholomew Shower*, who reported the case, set out the arguments of counsel in some detail, but as was his custom he gave no account of the reasons for the decision. Possibly the House acceded to the final submission made in argument, that " the Word *amens* or *demens* imply that the Man had no Mind, and consequently could make no conveyance ". If so, the case would seem to have been treated as one of complete dementia in which it was impossible that there should have been any real execution of the deed, rather than as one in which the deed was duly executed but by a person incapable of understanding its effect. It is enough to say, however, that as there is no record of any principle of law laid down in the case by the House of Lords it is the judgment of the King's Bench which has to be considered. The numerous reports of the case vary a good deal in their accounts of the judgment, but the reasoning of the judges appears to be accurately stated in the Modern Reports :

(1) (1873) 15 Wall. 9, at p. 26 [21 Law. Ed. 73].
(2) (1603) 4 Co. Rep. 123b [76 E.R. 1118].
(3) (1698) Carth. 435 ; Comb. 438, 468 ; 1 Ld. Raym. 313 ; 3 Mod. 301 ; 12 Mod. 174 [87 E.R. 199].
(4) (1698) Show. P.C. 150 [1 E.R. 102].

" The grants of infants, and of persons *non compos*, are parallel both in law and reason; and there are express authorities that a surrender made by an infant is void; therefore this surrender of a person *non compos* is likewise void " (1).

The proposition that an infant's surrender is void was, of course, erroneous. In support of it the case of *Lloyd* v. *Gregory* (2) was cited; but in *Zouch dem. Abbott* v. *Parsons* (3), it was shown that *Lloyd* v. *Gregory* (2) decided no such thing. The notion that by the common law an infant's conveyance is void, was finally exploded in *Zouch dem. Abbott* v. *Parsons* (4) and, apart from statute, it has been held ever since that infancy makes a disposition merely voidable: *Lumsden's Case* (5); *Martin* v. *Gale* (6). It is remarkable that although, in *Dexter* v. *Hall* (7), *Strong* J. cited *Zouch dem. Abbott* v. *Parsons* (4) as laying it down " that deeds of an infant which do not take effect by delivery of his hand are void ", he did not advert to the fact that this statement appears (8) as part of a quotation from *Perkins' Profitable Book*, which goes on: " but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate ". Nor did he refer to the observation which the judgment makes upon this: " The words which do take effect are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest ". It may be added that in the next paragraph of the judgment in *Zouch's Case* (4) there is a quotation from *Brooke's Abridgment*, which includes the sentence: " And besides, the delivery of a deed can not be void; but only voidable ".

The judgment in *Thompson* v. *Leach* (9) proceeded, therefore, upon a misconception of the law in relation to deeds executed by infants. The case did not deter *Blackstone* from writing that " Idiots and persons of nonsane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances and purchases are voidable,

(1) (1869) 3 Mod. 301, at p. 310 [87 E.R. 199, at p. 204].
(2) (1638) Cro. Car. 502 [79 E.R. 1032]; W. Jones 405 [82 E.R. 212].
(3) (1765) 3 Burr. 1794, at pp. 1806, 1807 [97 E.R. 1103, at p. 1110]; 1 W. Bl. 575, at p. 578 [96 E.R. 332, at p. 333].
(4) (1765) 3 Burr. 1794 [97 E.R. 1103].
(5) (1868) 4 Ch. App. 31.
(6) (1876) 4 Ch. D. 428.
(7) (1873) 15 Wall. 9 [21 Law. Ed. 73].
(8) (1765) 3 Burr., at p. 1804 [97 E.R., at p. 1109].
(9) (1698) Carth. 435; Comb. 438; 1 Ld. Raym. 313; 3 Mod. 301; 12 Mod. 174 [87 E.R. 199].

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but not actually void " (1). The case of *Campbell* v. *Hooper* (2) is a decision to this effect, for it was there decided that foreclosure can be decreed in respect of a mortgage given by a lunatic. A case which was cited in *Dexter* v. *Hall* (3) as having followed *Thompson* v. *Leach* (4) was *Yates* v. *Boen* (5), but in that case as *Parke* B. pointed out in *Gore* v. *Gibson* (6), *Thompson* v. *Leach* (4) was relied upon only as having decided that, despite the supposed rule against stultifying oneself, under the rules of pleading then in force a defendant was entitled to prove his insanity, as a ground for avoiding a deed, under the plea of *non est factum*. (The rules were later altered to require that a defence of insanity be specially pleaded: *Harrison* v. *Richardson* (7)). It was further said in *Dexter* v. *Hall* (3) that the doctrine of *Thompson* v. *Leach* (4) was asserted also in *Ball* v. *Mannin* (8). In that case, however, no consideration was given by the House of Lords to the distinction between void and voidable deeds. The parties had agreed below that the sole question to be tried was whether a certain deed was or was not " valid at law "; and the decision given in the House of Lords was confined by the bill of exceptions to certain limited objections to the trial judge's direction to the jury as to what constituted " such unsoundness of mind as should avoid a deed at law ".

Except as a decision that a power of attorney is void if the donor was incapable of understanding its effect when he gave it, the case of *Dexter* v. *Hall* (3) cannot be regarded as a satisfactory authority. It was largely responsible, nevertheless, for the views which were expressed as to deeds generally in the judgment in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (9). Of the authorities referred to in *McLaughlin's Case* (9) and not already discussed, there are only two to which particular reference need be made. One is *Jenkins* v. *Morris* (10), as to which *Griffith* C.J. said that in that case the validity or invalidity of the deed was treated as being dependent upon the mental condition of the person by whom it was executed, and that no question of knowledge or want of knowledge of his condition on the part of the other party was raised. The answer was given by *Fry* L.J. during the argument in *Imperial*

(1) 2 Bla. Comm. 291.
(2) (1855) 24 L.J. Ch. 644.
(3) (1873) 15 Wall. 9 [21 Law. Ed. 73].
(4) (1698) Carth. 435; Comb. 438; 1 Ld. Raym. 313; 3 Mod. 301; 12 Mod. 174 [87 E.R. 199].
(5) (1738) 2 Str. 1104 [93 E.R. 1060].
(6) (1845) 9 Jur. 141.
(7) (1835) 1 M. & Rob. 504 [174 E.R. 174].
(8) (1829) 1 Dow. & Cl. 380 [6 E.R. 568]; 3 Bli. N.S. 1 [4 E.R. 1241].
(9) (1904) 1 C.L.R. 243.
(10) (1880) 14 Ch. D. 674.

Loan Co. v. *Stone*, as reported in the Law Journal (1), when he pointed out that it by no means follows from the fact that the only issue which had been directed to be tried in *Jenkins* v. *Morris* (2) was whether the person concerned was or was not of sound mind, that the finding of the jury upon that issue determined the matter. The other case was *Howard* v. *Digby* (3), from which *Griffith* C.J. quoted two extracts from the speech of Lord *Brougham*. In neither of these passages was the learned Lord Chancellor concerned to distinguish between void and voidable instruments. The case was one in which the personal representative of a deceased lunatic wife was seeking to enforce against the husband a liability for arrears of pin-money, and the question for decision was whether the husband could set off amounts he had expended in supplying his wife during her lifetime with those things to which pin-money was usually applicable. The point the Lord Chancellor was making was simply that, although a lunatic, as he thought, was incapable of binding himself consensually (and presumably he meant binding himself conclusively), yet he (and his representative) could become liable for money or money's worth received. The principle applied seems to be that which the Court of Appeal was later to explain in *In re Rhodes* (4), namely that a lunatic's receipt of goods or other benefits suitable to his position in life may give rise to an obligation, which is implied by law and to which the lunacy affords no answer, to pay for those necessaries (as they are called) out of his own property. This, indeed, had been laid down by the King's Bench eight years before *Howard* v. *Digby* (3), against the opposition of Lord *Brougham* himself when appearing as counsel in *Baxter* v. *Earl of Portsmouth* (5). His lordship's language in *Howard* v. *Digby* (3) ought not to be read as a pronouncement upon the question which we have here to decide.

Upon the authorities as they now stand, it appears to us that we ought to regard it as settled law that an instrument of conveyance executed by a person incapable of understanding its effect, in the sense of its general purport, is not on that account void, though in the circumstances it may be voidable by the conveyor or his representatives.

If consideration of the merits of the appeal had led to the opposite conclusion, a serious question would have arisen by reason of the fact, to which the Chief Justice drew attention during the argument,

(1) (1892) 61 L.J.Q.B., at p. 450.
(2) (1880) 14 Ch. D. 674.
(3) (1834) 2 Cl. & F. 634 [6 E.R. 1293].
(4) (1890) 44 Ch. D. 94.
(5) (1826) 5 B. & C. 170 [108 E.R. 63].

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that in earlier proceedings in the same action orders have been made declaring that the joint tenancies subsisting between Olinda Gibbons, Ethel Gibbons and the appellant were severed by the indentures of mortgage executed on 11th October 1944 and the memorandum of transfer executed on 6th December 1945. This came about in the following manner. The statement of claim alleged incapacity on the part of Olinda Gibbons and Ethel Rose Gibbons in respect of the memorandum of transfer but it did not do so in respect of the indentures of mortgage as the plaintiff was then, apparently, unaware that those instruments existed. They were set up, however, by the defence, which contained a counterclaim for a declaration that the joint tenancy in the whole of the land was severed by the three instruments. At this stage, that is to say before reply, the parties obtained by consent an order for the determination of a point of law before the trial, the point, as stated in the consent order, being " whether by reason of the acts deeds and instruments admitted or alleged in the defence (that is, the indentures of mortgage and the memorandum of transfer) the joint tenancy subsisting between the plaintiff and Olinda Gibbons and Ethel Rose Gibbons was severed ". The point of law came before *Clark* J., who made an order that the joint tenancy subsisting in the *Real Property Act* land was not severed by the memorandum of transfer, but that the joint tenancy subsisting in the land under the general law was severed by the indentures of mortgage. On appeal, this Court discharged that part of the order which related to the *Real Property Act* land, and in lieu thereof made a declaration that the joint tenancy in that land was severed by reason of the making and registration of the memorandum of transfer (1). Subsequently, in 1951, the plaintiff filed her reply, and therein alleged for the first time a want of mental capacity in Olinda Gibbons and Ethel Rose Gibbons in respect of the indentures of mortgage. The action was then brought on for trial, neither party appreciating, apparently, that the order of *Clark* J., as varied by the order of this Court, in terms concluded in favour of the defendant the ultimate question whether the joint tenancies were severed. It is difficult to see how, in the present appeal, the Court could have given a decision inconsistent with its own previous order and with an order of the Supreme Court from which no appeal had been brought. There was no accidental slip in either order, for the intention of both courts plainly was to answer the precise question which the parties had joined in submitting for decision.

(1) (1949) 78 C.L.R. 313.

The question was not expressed hypothetically, and if it had been the courts might well have declined to give an answer while the issues of fact remained undetermined.

However, it has seemed desirable to consider the appeal on its merits. For the reasons which have been stated the appellant's claim in the action cannot be sustained, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Butler, McIntyre & Butler*, Hobart, by *Stephen, Jaques & Stephen.*

Solicitors for the respondent, *Crisp & Wright*, Hobart, by *J. W. Maund & Kelynack.*

J. B.