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CONTRACTS MADE BY AGENTS ON BEHALF OF PRINCIPALS WITH LATENT MENTAL INCAPACITY: THE COMMON LAW POSITION

PETER WATTS*

ABSTRACT. *The common law regarding the formation of contracts made through an agent on behalf of a principal suffering from latent mental incapacity is still undeveloped. This article argues that, in general, such a principal can confer actual authority to contract on an agent so long as the agent (reasonably) is, and remains, unaware of the incapacity. On the same basis, an incapax principal can manifest to a third party that such an appointment has been made, thereby creating apparent authority in the agent.*

KEYWORDS: *mental incapacity, agency, conferral of authority, capacity to contract.*

I. INTRODUCTION

This article is concerned with how the common law resolves the legal questions that arise where an agent purports to make a contract on behalf of a person whose mental capacity, unbeknownst to the agent or the third party, is impaired ("an incapax person"). The general question as to where contract law should set the balance between upholding the efficacy of contracting and protecting the mentally disabled is a difficult one. Matters are made more complex where agents are involved.

The common law cannot be expected to provide more than basic solutions, but one might hope that those solutions would cohere with the general principles of contract formation and the law of agency. Those principles do not dictate, however, that differences between types of case should be ignored. It would not follow, for instance, that merely because an agent's actual authority might automatically terminate upon the principal's death, a principal's supervening mental incapacity would have the same effect. The fact of death is usually readily determinable, even if an agent by reason of distance is unaware of the event, and reasonably so. But the determination whether a person is suffering from a degree of mental

* Q.C., Law Faculty, The University of Auckland, and Herbert Smith Freehills visitor to the University of Cambridge, 2014. I am grateful for the comments of Professor F.M.B. Reynolds and Professor Richard Nolan on a draft of this article. The usual caveats apply. Address for correspondence: Law Faculty, University of Auckland, Private Bag 92019, Auckland, New Zealand. Email: pg.watts@auckland.ac.nz.

impairment of which the law will take cognisance often cannot be completed until a court rules on the matter, having heard medical and other evidence. The case for protecting those who act on reasonable appearances of competence before any such determination is made is considerably stronger.

As it happens, the Commonwealth case law on the relevant points of agency law is fairly thin and unsettled. In England and Wales, as elsewhere, there have been a number of statutory interventions, some dealing with persons who have been formally designated as needing protection, and others directed to persons who have not been so designated. In relation to the latter class of persons, most prominent have been the statutory interventions directed to agents who have acted, or purported to act, under a power of attorney.[1] In *Dunhill v Burgin*,[2] the UK Supreme Court recently confirmed, perhaps problematically, that the Civil Procedure Rules also have an important role to play where the relevant contract takes the form of a compromise of court proceedings.[3] This article confines itself to the common law, and to cases where the putative contract has been made by an agent, as opposed to cases where the incapax person has made the contract but had assistance from agents.[4] The Court in *Dunhill* found that it did not need to address the common law position on this topic but noted the lack of clarity that currently besets it.[5]

II. A Chain of Argument

One might expect the starting point to be that the mere interposition of an agent between the incapax person and the third party would not produce a different result from that which the law has settled upon where the incapax person makes a contract directly with the third party. Generally speaking, the law of agency attempts to ensure that people are not in a different position by deploying agents than if they undertook the relevant task themselves: *qui facit per alium, facit per se*.[6] Equally, the third party who chooses to deal with an agent rather than directly with the principal takes some risks, and one would not expect those to be less merely because the principal had a mental disability. In particular, parties who choose to deal solely with an agent assume the risk as to whether the agent is empowered to bind the principal; the agent will usually be taken to warrant his or

1 See Powers of Attorney Act 1971, s. 5, not confined to the mentally incapable, and the Mental Capacity Act 2005.
2 [2014] UKSC 18; [2014] 1 W.L.R. 933. See also *Blankley v Central Manchester and Manchester Children's University Hospitals NHS* [2015] EWCA Civ 18 at [37].
3 See CPR, Part 21. Even at common law, courts would sometimes withhold enforcement orders in relation to compromises made by counsel with apparent, but without actual, authority: see *Neale v Gordon Lennox* [1902] A.C. 465.
4 For an example of a case of the latter sort, see *Taylor v Walker* [1958] 1 Lloyd's Rep. 490, 514.
5 [2014] UKSC 18; [2014] 1 W.L.R. 933, at [31].
6 See e.g. *Tesco Supermarkets Ltd. v Nattrass* [1972] A.C. 153, 199, per Lord Diplock.

her authority to bind the principal, but the principal will be bound only if the agent has actual or apparent authority to bind the principal. The point of this in the present context is that third parties cannot get very far simply by pleading their ignorance of the principal's mental incapacity because they dealt with an agent. The agent's authority must still be established as with any contract purportedly made with an absent principal.

With those preliminary observations, one can turn to key aspects of the common law dealing with contracts made directly by incapax persons. Two things in particular should be noted.

First, the common law, including in this context the jurisprudence of equity, accepted that protection should be offered to persons suffering from degrees and types of mental incapacity well short of profound and complete insanity.[7] Indeed, to trigger the law's concern, it is sufficient that a party by reason of mental limitations is not capable of understanding the substance of the particular transaction being entered into. Dicta of the High Court of Australia in *Gibbons v Wright*,[8] replicating in part a dictum in *Ball v Mannin*,[9] are widely cited in this respect:

> 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.... [The fact finder needs] 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.

It will be seen, nonetheless, that there may well be legal significance in a person's being profoundly insane.

Secondly, at least in cases short of profound insanity, a contract made with an incapax person cannot be avoided where the other party neither knew nor ought to have known of the incapacity.[10] This latter principle is commonly labelled the *Imperial Loan* principle, after *Imperial Loan Co. v Stone*,[11] a case followed by the Privy Council in *Hart v O'Connor*.[12] Capacity to contract is, therefore, judged objectively, in the same way that intention to contract, and the content of the terms of the

7 See *Re The Estate of Park* [1954] P. 112; *Gibbons v Wright* (1954) 91 C.L.R. 423, 437; *Re Beaney* [1978] 1 W.L.R. 770. See also *Everett v Griffiths Lewis* [1920] 3 K.B. 163, 198; affirmed [1921] 1 A.C. 631. For an account of the older categories and degrees of insanity recognised by common lawyers, see J. Broome and V. Fowke, *Pope's Treatise on the Law and Practice of Lunacy*, 2nd ed. (London 1890), ch. 1.

8 (1954) 91 C.L.R. 423, 437.

9 (1829) 1 D. & Cl. 380, 391, 6 E.R. 568, 572.

10 As to constructive knowledge being sufficient, see *Molton v Camroux* (1849) 4 Exch. 17, 19; 154 E.R. 1107, 1108; *York Glass Co. Ltd. v Jubb* (1926) 134 L.T. 36, 41; *Hart v O'Connor* [1985] A.C. 1000, 1014. Cf. *Kakavas v Crown Melbourne Ltd.* [2013] HCA 25; (2013) 298 A.L.R. 35 (alleged unconscionable bargain).

11 [1892] 1 Q.B. 599.

12 [1985] A.C. 1000. See also *Daily Telegraph Newspaper Co. Ltd. v McLaughlin* (1904) 1 C.L.R. 243, 272.

contract, are judged objectively.[13] Again, there are penumbral uncertainties. In particular, it is not clear what the position is where the other party deals with the incapax person by letter or remote communication, without ever having met that person. Does the mere fact that the other party *might* (not would) have observed the incapacity had he or she dealt face to face make that party a person who ought to have known of the incapacity? Where there is no doubt that the incapacity would have been apparent in a face-to-face transaction, should the law allow a party to be better off by having dealt by post, email, or the internet? One might expect the answer to that latter question to be "no", although reported decisions on these points are scant.

Integrating the foregoing general propositions of the law of contract with those from the law of agency raises other questions. However, these are best explored by developing a chain of argument, as follows:

(1) If the third party asserting a contract has had no dealings whatsoever with the incapax principal, but only with the agent, then that party's position is dependent, in the usual way, on the agent's state of actual authority. An agent's actual authority is in turn dependent on a grant of authority from the principal.

(2) This then raises the question of whether a person can grant, or be deemed to grant, actual authority to an agent when that person by reason of mental impairment is unable to appreciate the substance of the delegation being made. If, as the *Imperial Loan* principle provides, a contract with an incapax person is prima facie valid, then at least where there is a contract of agency, that contract ought to be effective to confer actual authority where the agent did not know, or had no reason to know, of the incapacity.[14]

(3) It would remain conceivable that, if there really were a rule that only a capax person can confer authority, the contract might have efficacy only to create a binding promise without in fact conferring authority. Certainly, the conferral of authority and contracting are separate concepts, rather like the passing of title to property and contracting. One can have the one without the other. It is established, too, that a principal can terminate actual authority even when to do so puts the principal in breach of contract.[15] The *Imperial Loan* principle, however, is not just a principle of contract formation. It extends to the execution of relevant promises, such as the conveyance of property interests.[16] In these circumstances, there would need to be good reasons for leaving

13 Authority is scarcely necessary, but see *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 607; *Gissing v Gissing* [1971] A.C. 886, 906; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900, at [14].

14 This was accepted in *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2014] EWHC 168 (QB), at [30]. The point was left open on appeal: [2015] EWCA Civ 18 at [37].

15 *Bowstead & Reynolds on Agency*, 20th ed. (London 2014), Article 120.

16 See, e.g. *Hart v O'Connor* [1985] A.C. 1000.

an incapax person exposed to contract damages for failing to confer the promised authority, rather than giving the contract its full efficacy, resulting in the incapax party not being in breach but the agent empowered. It is not easy to conceive of compelling reasons. It is true that in some cases the conferral of authority might be open-ended and an incapax person might not be then equipped to put the brakes on the agent's activities. But agents can equally be appointed for a single transaction, and it would seem wrong to base a rule on a statistically doubtful generalisation.

(4) As for the conferral of authority where there is no contract of appointment, most of the reasons for the law's taking an objective approach to determining whether parties are willing to contract still apply. In the generality of cases, it is in the interests of both principals and agents that it not be necessary to establish that the principal had an actual intention to delegate. So, it would often be contrary to a principal's interests if a third party could go behind appearances of a delegation to an agent and assert that there was no contract because of a lack of actual intent to delegate and that it is now too late to ratify.[17] Plainly, if an agent were not able to rely on a manifestation of a delegation, the chances of the agent's being exposed to liability to the third party for breach of warranty of authority would be greatly magnified. It is not surprising, therefore, that, in his classic formulation of the concepts of actual and apparent authority in *Freeman & Lockyer v Buckhurst Park Properties Ltd.*,[18] Diplock L.J. treated their ascertainment as governed by the same objective principles as applied to contracting. Elsewhere, the conferral of authority is said to turn on "a unilateral manifestation of will" by the principal.[19] The word "manifestation" is synonymous with appearances, rather than actuality.

(5) It follows that an incapax person can manifest an intention to appoint an agent and that, so long as the agent does not know or has no reason to know of the incapacity (a test which may not protect agents who deal remotely with principals in circumstances where the incapacity would have been apparent had they dealt face to face), the conferral of authority would prima facie be valid. It seems likely, however, that actual authority would terminate were the agent to become aware of the incapacity, without the principal, or someone on his or her behalf, having to take steps to revoke the authority. It would not necessarily follow that, where there was a contract of agency,

17 A prospect constrained, but not eliminated, by *Bolton Partners v Lambert* (1889) 41 Ch.D. 295.

18 [1964] 2 Q.B. 480, 502. See also *Restatement of the Law 3d, Agency* (St Paul 2006), at §2.02, and the commentary thereto.

19 *Bowstead & Reynolds on Agency*, para. 1–006.

the contract would cease to exist in its totality, even though its main incident had come to an end.[20]

(6) Where the third party has had some interactions with the principal, the prospect of apparent authority arises. If an incapax person can make a contract, or at least manifest an intention to do so, as *Imperial Loan* provides, then such a person ought to be able to make a representation, including one as to the appointment of an agent. In other words, it would be peculiar if a promisee could rely on the incapax principal's communications if they involve an offer or an acceptance, but not if they indicate only that an agent will negotiate the contract for the principal.

It is necessary now to test this line of argument against the legal sources.

III. *Daily Telegraph Newspaper Co. Ltd. v McLaughlin*

Secondary sources, such as the important Victorian monograph, *Pope's Treatise on the Law and Practice of Lunacy*,[21] and leading cases on direct contracting, such as *Molton v Camroux*[22] and *Gibbons v Wright*,[23] tell us that the law of mental incapacity has had a topsy-turvy history. Some very early authorities are said to have afforded absolute protection to the incapable, but other early sources, notably Chief Justice Coke, concluded that "no man should be allowed to stultify himself, or shew that he was non compos mentis, or of non-sane memory".[24] There is some risk that this hearsay material paints an unduly duplicitous view of the early law, but one is left to conclude that there is not much to inhibit a modern court from adopting the schema outlined above, or something rather like it. In essence, this regime adopts a middle course between the interests of incapax parties and those of innocent third parties. It adapts the principles adopted for direct contracting by *Molton*, which principles were cemented in *Imperial Loan*, and then re-pointed in *Hart v O'Connor*.

There is in fact only one modern authority of import on the effect of mental incapacity on contracts purportedly made by an agent for an incapax principal, and it is largely consistent with the above chain of argument. This is the decision of the High Court of Australia in *Daily Telegraph Newspaper Co. Ltd. v McLaughlin*.[25] Even then, for reasons which will be addressed shortly, the Court did not have to rule on many of the key issues. Griffith C.J., however, delivered a most erudite and careful joint

20 See *Blankley v Central Manchester and Manchester Children's University Hospitals NHS* [2015] EWCA Civ 18 at [40], affirming [2014] EWHC 168 (Q.B.).
21 Note 7 above.
22 (1849) 4 Exch. 17, 154 E.R. 1107.
23 (1954) 91 C.L.R. 423.
24 See *Beverley's Case* (1603) 4 Co. Rep. 123b, 76 E.R. 1118.
25 (1904) 1 C.L.R. 243.

judgment. The case went on appeal to the Privy Council,[26] but that Court simply affirmed the reasoning below.

The agency at issue in *McLaughlin* took the form of a purported power of attorney. The power was executed by a husband in favour of his wife. The document was found to have been thrust in front of him by his 17-year-old son. The boy was innocently doing his mother's bidding, in a period when the father lacked lucidity. The wife, perceiving her husband's failing mental health, apparently hoped to avoid having to engage formal committal processes by being appointed attorney. One surmises that she was prepared to chance that the document would never be challenged. There having been a challenge, she had no prospect of pleading ignorance of her husband's condition, and the relevant third parties (companies in which the wife had purported to transfer shares owned by the husband), not having had any dealings with the husband, could not be in any better position than she. A plea of apparent authority, in other words, was out of the question.

The Court held that, in the particular circumstances of the case, the power of attorney was a nullity, as consequentially were the share transfers. Indeed, it concluded that the facts were strong enough to trigger the *non est factum* doctrine. In places in his judgment, Griffith C.J. appears to have been willing to leave open the possibility that the *non est factum* doctrine did not lead to automatic voidness against an innocent party,[27] but he also indicated that the cases supported the opposite conclusion.[28] In any event, it is crucial to an appreciation of the case that the Court concluded that the husband did not even realise that he was signing a document of any legal import. If the *non est factum* doctrine were available in exceptional circumstances to the sane, so too it must be available to the insane. The Chief Justice made this point in the following way:

> If, as we think, the ground of these decisions is the absence of intention to execute such a document as that actually executed, the principle is equally applicable to the case of a document executed by a lunatic without any intention to execute it. Otherwise, as already pointed out, a person of unsound mind would have less protection than a sane person.[29]

It is for this reason that, in the discussion in the preceding part of this article, it was signalled that cases of profound insanity may be different from those where lesser incapacity is present. Certainly, Griffith C.J. thought so. And it is difficult to contradict his reasoning in the just-cited quotation.[30]

26 [1904] A.C. 776.

27 See (1904) 1 C.L.R. 243, 274, 276.

28 (1904) 1 C.L.R. 243, 273. Later Australian case law has since confirmed that contracts caught by the doctrine are nullities – see *Ford v Perpetual Trustees Victoria Ltd.* [2008] NSWSC 29; (2008) 70 N.S.W.L.R. 611, at [83], implicitly affirmed on this point in [2009] NSWCA 186; (2009) 75 N.S.W.L.R. 42, at [30].

29 (1904) 1 C.L.R. 243, 276. See also *Ford* [2009] NSWCA 186, at [38].

30 See also the early case *Gore v Gibson* (1845) 9 Jur. 140, discussed further below.

Judges, however, have not found it easy to formulate the tests by which the *non est factum* doctrine is triggered,[31] and plainly the doctrine would be capable of disturbing a great number of transactions if its application were not tightly constrained. The courts have generally been very conscious of this,[32] as will be seen from the subsequent decision of the High Court of Australia in *Gibbons v Wright*.[33]

Given that the potential role for the *non est factum* doctrine in the law of insanity is not confined to cases involving agents, it is perhaps surprising that it attracted little attention in the judgments in *Imperial Loan Co. v Stone*[34] and *Hart v O'Connor*.[35] However, the *Daily Telegraph* case was cited by the Privy Council in *Hart v O'Connor* without any criticism, and the advice delivered by Lord Brightman is couched in a way that is consistent with a residual role for the doctrine. In particular, note the reference to *ostensible* sanity in the following passage from Lord Brightman's judgment:

> To sum the matter up, in the opinion of their Lordships, the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane.[36]

Lord Brightman extracted this *ratio decidendi* from a line of cases that also refers to the need for ostensible sanity before mere voidability becomes the accepted consequence of the dealing. It is further apparent that the precondition of ostensible sanity is objective because the cases go on to say that notwithstanding ostensible sanity a party will not be able to enforce a contract if he or she in fact knows that the promisor is suffering from a sufficiently debilitating incapacity. In other words, there are two elements to the test – ostensible sanity on the part of the promisor and lack of knowledge of mental deficiency on the part of the promisee. Where insanity is profound, promisees will not usually be able to establish the first element and, except where they deal remotely, they are also likely to have difficulty with the second.[37]

31 See *Chitty on Contracts*, 31st ed (London 2013), ch. 5, section 4.
32 See *Saunders v Anglia Building Society* [1971] A.C. 1004, 1015–16, 1019, 1025–27; *Petelin v Cullen* (1975) 132 C.L.R. 355, 359.
33 (1954) 91 C.L.R. 423, 443.
34 [1892] 1 Q.B. 599.
35 [1985] A.C. 1000.
36 [1985] A.C. 1000, 1027.
37 As alluded to in the introduction to this article, the unambiguous nature of death assists in explaining why death of the principal automatically terminates authority, whether or not the agent knows of the death – see *Bowstead & Reynolds on Agency*, Article 119. Whether someone is a minor is also unambiguous. While mere viewing cannot confidently establish age, usually proof can be insisted upon.

In that part of his judgment that precedes his conclusion that the case before him is one of *non est factum*, Griffith C.J. discussed at length the position where the principal's mental incapacity is less profound. He brings out the two elements of ostensible sanity and the third party's state of knowledge in a dictum that was cited with approval in *Hart v O'Connor*:

> The principle of the decision seems to be the same in both cases [*Imperial Loan* and *Molton v Camroux*[38]] which, in our judgment, establish that a contract made by a person actually of unsound, but apparently of sound, mind with another who deals with him directly, and who has no knowledge of the unsoundness of mind, is as valid as if the unsoundness of mind had not existed.[39]

The Chief Justice goes on to indicate that, *non est factum* apart, it is probable that the appointment of an agent by an incapax person is effective if the former is unaware of the incapacity of the latter.[40] It would be fair to say, however, that the judge ultimately sat on the fence on the issues. Hence, he adverted, tentatively, to the notion that powers of attorney "may, perhaps, stand on a different footing".[41] At another point, he said that, in view of the very old cases, there is difficulty in extending the *Imperial Loan* principle to the case of powers of attorney or "any other appointment of an agent".[42] There then followed, nonetheless, the following passage:

> In the view, however, which we take of the facts of this case, it is not necessary to decide this question. For the further extent to which they [i.e. *Imperial Loan* and *Molton*] could be carried in such a case would seem to be that if the agent, being directly appointed, has no knowledge of the unsoundness of mind of his principal, the appointment is good as between principal and agent, and, possibly, as between the principal and an innocent third party dealing with the agent. In such a case it would seem that the agent would, at any rate, be entitled to an indemnity from his principal for any act done under the authority.[43]

There is also a later passage that suggests that the Chief Justice thought the issue of the validity of a power of attorney should be determined by the general principles applicable to the validity of powers given by a sane person:

> We are, therefore, compelled to the conclusion that the question whether a power of attorney given by a person of unsound mind is void or voidable (assuming that it is not necessarily void) is to be

38 (1848) 2 Exch. 487, 154 E.R. 584; and (1849) 4 Exch. 17, 154 E.R. 1107.
39 (1904) 1 C.L.R. 243, 272. See also *Tremills v Benton* (1892) 18 V.L.R. 607, 622, also cited with approval by Lord Brightman in *Hart* [1985] A.C. 1000, 1027.
40 See (1904) 1 C.L.R. 243, 272.
41 Ibid., at pp. 271, 275.
42 Ibid., at p. 275.
43 Ibid.

> determined on the same principles as in the case of a power of attorney given by a sane person.[44]

Griffith C.J. further pointed out that two of the older cases said to establish the automatic voidness of the appointment of an agent by a lunatic, *Stead v Thornton* and *Tarbuck v Bispham*,[45] were cases where the third party was aware of the incapacity.[46]

Finally, one should address a dictum of Lord Cranworth L.C. in *Elliot v Ince*[47] to which Griffith C.J. adverted, in which the Lord Chancellor suggested that the voidability doctrine of *Molton v Camroux* might not apply to cases where the transaction did not involve consideration. In *McLaughlin*, the Chief Justice observed that an appointment of an attorney is often gratuitous and that that might explain why a power of attorney granted by an incapax person had been said to be void.[48] It would be wrong, however, to treat the appointment of an unremunerated agent by an incapax person as if it were a gift. The situations are not analogous. *Imperial Loan* may not be applicable to gift transactions, but in such cases the worst prospect the donee faces is a surrender of the subject matter of the gift. Defences such as change of position are likely to be available to the donee. Gratuitous agents, in contrast, are more likely to be donors of their labour than recipients of any largesse, and could well have exposed themselves to liability on a warranty of authority. They should be treated in the same way as those acting for reward.[49]

IV. *Gibbons v Wright*

Gibbons v Wright[50] is a case that did not involve agents. It does, however, contain some *obiter dicta* on the subject. These unfortunately involve a misinterpretation of the *McLaughlin* case. The principal focus of the case was on the effect of incapacity on a contract negotiated directly between the parties, and the Court's conclusion on that score is that it makes the contract voidable only.

One can start by observing that the joint judgment of Dixon C.J., Kitto, and Taylor JJ. took a narrow approach to the use of the *non est factum* doctrine in the context of mental incapacity. The Court drew a strong distinction between cases where the incapax party was unable to understand the nature of the document signed, with cases where that party was unaware that he or she was signing a document at all, or at least a document of

44 Ibid., at p. 276.
45 *Stead v Thornton* (1832) 3 B. & Ad. 357, 110 E.R. 134; *Tarbuck v Bispham* (1836) 2 M. & W. 2, 150 E.R. 643.
46 (1904) 1 C.L.R. 243, 267.
47 (1857) 7 D.M. & G. 475, 487, 44 E.R. 186, 190.
48 1 C.L.R. 243, 275.
49 It seems unlikely that restitutionary solutions could provide satisfactory protection for agents.
50 (1954) 91 C.L.R. 423.

significance. In the latter category, the Court instanced an incapax party signing a contract "in a frenzy, not even being aware what were the motions his hand was performing".[51] The signature of a somnambulist would be the same. In such cases, the signer's "mind did not go with his pen".[52] But very heavy intoxication would not qualify. In that respect, the Court reinterpreted *Gore v Gibson*,[53] where the promisor was "in such a state of drunkenness that he did not know what he was doing", as making the contract only voidable, and not void, even though the judgments in *Gore* used the word "void". The Court's licence for doing that was *Matthews v Baxter*.[54] It is not, however, clear that *Matthews* went as far as the Court in *Gibbons* states.

One cannot tell from reading the judgment in *Gibbons* whether the Court considered that in *McLaughlin* the earlier panel of the same Court had taken the *non est factum* doctrine too far because, rather than tackling that case head on, the Court concluded that the case turned on the presence of an agent in the fact pattern. First, the Court said that the ratio of *McLaughlin* was confined to powers of attorney. These documents were said to be governed by special rules, including automatic invalidity where the donor of the power is mentally incapable.[55] Secondly, the Court thought that in fact there might be a "general rule of law that a lunatic cannot appoint an agent", citing a number of older cases. The Court added that, insofar as dicta in *McLaughlin* did support a view that all deeds executed by an incapax party were void, rather than merely voidable, the dicta were wrong.

It is respectfully suggested that the Court in *Gibbons* was wrong on all these points. The ratio of *McLaughlin* turns on the *non est factum* doctrine, not on rules of agency law. As we have seen, Griffith C.J. indicated a preference for there not being automatic invalidity of appointment of agents by incapax parties, whether or not the appointment be made by power of attorney. And he certainly did not take the view that all deeds executed by incapax persons are void.

The reasoning in *Gibbons* in relation to powers of attorney was particularly unconvincing. The Court suggested, admittedly tentatively, that, if powers of attorney signed by an incapax person were only voidable, the position of outside parties might turn on the attorney's state of knowledge of the incapacity, not the outside party's.[56] This is true, but the position could only be worse for outside parties if automatic voidness applied.[57] If there

51 Ibid., at p. 443.
52 Ibid., being a quotation from *Carlisle & Cumberland Banking Co. v Bragg* [1911] 1 K.B. 489, 496.
53 (1845) 13 M. & W. 623, 153 E.R. 260.
54 (1873) L.R. 8 Exch. 132.
55 91 C.L.R. 423, 444, 448.
56 Ibid., at p. 445.
57 See also A.H. Hudson, "Some Problems of Mental Incompetence in the Law of Contract and Property" (1961) 25 Conv. 319.

were a special rule for powers of attorney, it might be better justified on the open-ended authority that such documents tend to confer. However, the most detailed of the older textbook treatments of powers of attorney, MacKenzie, *The Law of Powers of Attorney and Proxies*,[58] confidently asserted that there was no such special rule:

> A lunatic who appoints an attorney is bound by the acts of that attorney, within the scope of his authority, if, at the time of receiving the power of attorney, and, at the time of doing the act, the attorney was ignorant of the defective capacity of the donor of the power.

The cases cited in *Gibbons* for the inability of an incapax person to appoint an agent also do not support the Court's view. None of the five cases referred to by the Court was analysed by it. Something, however, should be said about each of them here.

In relation to the first two, *Tarbuck v Bispham*[59] and *Stead v Thornton*,[60] in each case the relevant agent had actual knowledge of the principal's incapacity, as Griffith C.J. observed in *McLaughlin*, and so fell within the proviso to the *Imperial Loan* principle. Not only had the agent in *Stead v Thornton* been aware of his principal's incapacity for some time (the principal was his brother), but the facts were not concerned with action taken by the agent in the past but rather with an assertion that the agency was continuing at the date of the hearing in order that the agent might refuse to acknowledge the third party's rights. This was an untenable assertion. And, in *Tarbuck v Bispham*, it appears that at the relevant time the incapax principal had been formally declared insane (he had been the subject of "a commission of lunacy"), which may have borne on the reasoning in the case.

Gibbons's third authority was *Elliot v Ince*.[61] We have already seen that this case turned on the relevant transaction being a gift not a contract. A power of attorney was involved but neither the reported argument of counsel nor the judgment of Lord Cranworth made anything of the agency.[62]

The fourth case was *Drew v Nunn*.[63] This case was concerned with supervening incapacity and Brett L.J. did seem to think that insanity would automatically terminate an agent's actual authority.[64] However, the point was certainly obiter, because the judge held that the agent in

58 V.S. MacKenzie, *The Law of Powers of Attorney and Proxies* (London 1913), 92–93. The Powers of Attorney Act 1971, s. 5, and its predecessors (including the Conveyancing Act 1881) may have been drafted on an assumption that powers of attorney granted by incapax persons were *ipso facto* void, but that could not be decisive of the common law: see *Pritchard v Briggs* [1980] Ch. 338, 398.

59 2 M. & W. 2.

60 3 B. & Ad. 357.

61 (1857) 7 De G.M. & G. 475, 44 E.R. 186.

62 Ibid., at pp. 487, 488.

63 (1879) 4 Q.B.D. 661.

64 Ibid., at p. 665. A similar assumption was made in *Evans v James* [2000] 3 E.G.L.R. 1 but it is clear that the relevant solicitor had actual knowledge of the stroke that caused his client's disability. The issue has been left open in *Blankley v Central Manchester and Manchester Children's University Hospitals NHS* [2015] EWCA Civ 18 at [36].

question still had apparent authority, on the basis of a holding out made by the principal while he remained mentally sound.[65] Moreover, the judge had already remarked that the defendant's "insanity was such as to be apparent to any one with whom he might attempt to enter into a contract." The agent, his wife, was plainly fully aware of his disability. These facts may have coloured his dictum. Then, in a dictum later in his judgment, Brett L.J. stated:[66] "As between the defendant and his wife, the agency expired *upon his becoming to her knowledge insane*" (emphasis added). The judgment, therefore, is equivocal on the issue. Bramwell L.J.'s judgment is even more equivocal, generally taking a very narrow view of when insanity will annul an agent's authority, and favouring the ability of an incapax person to continue to be able to make representations to third parties. Cotton L.J. did not give a judgment, but rather asked Brett L.J. to report his views. Brett L.J. duly reported that Cotton L.J. did not wish to decide whether insanity automatically terminated the wife's authority.

The relevance of the last case, *Yonge v Toynbee*,[67] is even more tenuous. The case did not involve a contract, rather the authority of a firm of solicitors to defend litigation. The Court of Appeal held that the firm whose client, unknown to it, had lost mental capacity was personally liable for the costs of the plaintiff wasted in responding to the pleadings filed on behalf of the incapax defendant. The point that the firm's actual authority automatically terminated upon incapacity appears not to have been argued, but rather assumed by all parties. The focus of the case was on the basis of the firm's liability for the costs. Rather strangely, the Court seemed to think that that liability rested on an implied warranty of authority. It is difficult to see that there was a warranty here, since what was the consideration sought from the other party, who rather was suing the defendant? Arguably, the solicitor's liability, if any, should in such circumstances rest on some other principle.[68]

V. Modern Secondary Sources

There have not been any significant cases since *Gibbons v Wright* on the topic of mental incapacity and the appointment of agents. However, it seems reasonable to speculate that the dicta in that case have influenced later academic views.[69] The criticisms in this article of those dicta do not

65 4 Q.B.D. 661, 666.
66 Ibid., at p. 667.
67 [1910] 1 K.B. 215.
68 The difficulties of *Yonge v Toynbee* on this issue were adverted to by Buxton L.J. in *AMB Generali Holding AG v SEB Trygg Liv* [2005] EWCA Civ 1237; [2006] 1 Lloyd's Rep. 318, at [60]. *Yonge v Toynbee* was assumed to be correct in *Bank of Scotland v Qutb* [2012] EWCA Civ 1661, another wasted-costs case. That case, however, involved death of the principal not mental incapacity and in circumstances where the litigation friend knew of the death.
69 One should note that Raphael Powell in his text on agency law had already adopted the view that incapax principals could not appoint agents: *The Law of Agency* (London 1952), 312. See also the differing

detract from the fact that the case remains one of the more important Commonwealth authorities on mental incapacity in direct contracting. The style of the judgment suggests that the revered Dixon C.J. played a major part in its writing. It is not surprising, therefore, that the dicta in it have been accepted at face value.

Professor Hudson, writing in 1959, argued for the inability of an incapax person to confer authority on an agent, citing *Gibbons* and *McLaughlin*.[70] In respect of the latter case, it must respectfully be maintained, of course, that he made the same mistake as the Court in *Gibbons*. In the article, and in subsequent writing,[71] Professor Hudson betrayed a dislike of the *Imperial Loan* principle, preferring a rule that gives more protection to the incapax party. The subsequent affirmation of the *Imperial Loan* principle in *Hart v O'Connor* makes it unlikely, however, that English courts, at least, will reopen the principle. This then puts pressure on finding a rationale for finding that the principle, all the same, does not operate where the incapax party acts through an agent. None is provided.

When the 13th edition of *Bowstead on Agency* appeared in 1968,[72] the authors took the view that incapacity precluded the grant of authority, again in reliance on *McLaughlin* and *Gibbons*, and referring to Professor Hudson's article. There is, however, a sense of hesitancy throughout the paragraph. Editions of the work from the first, in 1896, through to and including the 12th in 1959 had taken the opposite view (allowing for a touch of circularity), as follows:

> An infant or lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract.[73]

Halsbury's Laws of England seems also to have lost its confidence that the *Imperial Loan* principle applies to contracts made through agents.[74] The first three editions accepted that the principle applied in such circumstances, but subsequent editions have fallen silent on the topic.

The US *Restatement of the Law 3d, Agency* does not address the issues in relation to an initial grant of authority, but does take the stance that supervening incapacity does not take effect until the agent, or the third party in relation to a particular transaction, has "notice" of a loss of capacity.[75] This

views in H. Goudy, "Contracts by Lunatics" (1901) 17 L.Q.R. 147; and R. Wilson, "Lunacy in Relation to Contract, Tort and Crime" (1902) 18 L.Q.R. 21. Cf. R. Munday, "The Capacity to Execute an Enduring Power of Attorney in New Zealand and England" (1989) 13 N.Z.U.L.R. 253.

70 A.H. Hudson, "Agency and Insanity" (1959) 37 Can. Bar Rev. 497.

71 See A.H. Hudson, "Mental Incapacity in the Law of Contract and Property" [1984] Conv. 32.

72 F.M.B. Reynolds and B. Davenport, *Bowstead on Agency*, 13th ed. (London 1968), 14.

73 In Article 6 in each edition.

74 See *Halsbury's Laws of England*, 1st ed. (London 1907), vol. 1, para. 330, and compare with *Halsbury's Laws of England*, 5th ed. (London 2008), vol. 1, para. 6.

75 *Restatement of the Law 3d, Agency*, above note 19, at §3.08. See also §3.11 in relation to apparent authority. "Notice" is defined in §1,04(4) as including knowledge and reason to know.

view is in sympathy with the thesis of this article. It might be thought, nonetheless, that the *Restatement*'s formulation of principle is unnecessarily complex, by providing that incapacity terminates actual authority but that that termination is not fully effective until notice arises. Why does actual authority just not continue? The explanation may be that the Reporter wanted to deal with the situation where the third party knows of the incapacity but the agent does not. But this is an issue that can arise with fully competent principals where the third party learns of the principal's revocation of authority before the agent does.[76]

VI. Conclusion

There has been relatively little Commonwealth case law on the effect of a principal's mental incapacity on the appointment of an agent. The purpose of this article has been to suggest the likely solutions to the questions that arise, based on such principles as have become established relating to the formation of contracts and the appointment of agents.

It is suggested, therefore, that, at common law, in considering whether an incapax party's conferral on an agent of authority to make contracts is effective, appearances matter, as with contracts formed directly by the parties to them. Where the mental disability is profound and self-evident, the appointment is likely to be ineffective, including where the appointment takes place by remote communication. Where the incapacity is not patent, the efficacy of the appointment turns on whether the agent is aware or ought to have been aware of the disability. The appointment will endure only so long as the agent reasonably remains unaware of the incapacity. Similarly, where the latent incapacity arises only after the agency has commenced, termination of authority is likely to turn on whether the agent became aware, or ought to have become aware, of the incapacity. Where the incapax party sufficiently represents to the third party that he or she has appointed an agent to negotiate the relevant contract, the agent may have apparent authority to conclude the contract, again subject to the third party's state of knowledge. In all events, no third party can plead a contract against an incapax party when the incapacity was known to him or her, whatever the agent's state of knowledge.

76 *Bowstead & Reynolds on Agency* deals with this in para. 8–008, tentatively suggesting that actual authority continues but that the third party cannot rely on it.