Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George Molyneux, as Executor Dative of the Estate of Henry Cowey (deceased) v. *The Natal Land and Colonization Company, Limited, from the Supreme Court of Natal; delivered the 3rd July* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
SIR HENRY DE VILLIERS.
SIR ARTHUR WILSON.

[*Delivered by Sir Henry de Villiers.*]

This Appeal raises several important questions of fact and of law, but the main question to be decided is whether, under the law of Natal, where the Roman-Dutch law prevails, a mortgage bond passed by virtue of a power of attorney executed by an insane person is legally enforceable if the mortgagor derived no benefit from the bond and the mortgagee had no knowledge of the insanity.

The declaration in the action alleged that there was owing to the Plaintiff (now Respondent) Company by the Defendant (now Appellant) as executor dative of the estate of the late Henry Cowey, the sum of 4,600*l.*, with interest thereon, for money lent to the late Henry Cowey, in security whereof he had passed his mortgage bond dated the 21st of February 1901. The prayer was for judgment for the amount and for an order declaring the property mortgaged to be executable. The defence was that, at the date of the passing of the bond and upon the granting of the power of attorney under which the same was passed, the late

37957. 100.—7/1905. [34] A

Henry Cowey was mentally and physically incapable of conducting business or of understanding the nature and effect of the bond or of the power of attorney signed by him, and that such mental and physical incapacity was well known to the Plaintiff Company and its manager at Durban, John William Rycroft. The plea further stated that Henry Cowey did not receive any value for the bond; that the amount said to be due for money lent had not in fact been lent by the Plaintiff Company to or for the benefit of Henry Cowey, as was well known to the Company and its manager, and that the bond had been obtained by the manager in collusion with one Arthur Cowey, son of Henry Cowey, to cover and secure debts due by Arthur Cowey to Rycroft or the Plaintiff Company.

At the trial before the Chief Justice and Justices Finnemore and Beaumont the charge of collusion was withdrawn. In regard to the mental condition of Henry Cowey at the date of the granting of the power of attorney in 1901 the Judges were agreed that he was then of unsound mind, and the evidence fully supports that finding. Two of the Judges, however, found that it had not been proved that Henry Cowey was insane at the time when the Plaintiff Company made the loans to Arthur Cowey upon the faith of a general power of attorney, bearing date the 17th of November 1897, from Henry Cowey, held by Arthur Cowey and shown to Rycroft, the Plaintiff Company's manager. The Chief Justice, on the other hand, was satisfied that on the 17th of November 1897 Henry Cowey was already of unsound mind (*mente captus*); that the disease of senile dementia, from which he was suffering, was progressive and continuous, and that consequently he was also of unsound mind when the loans were effected. There was also some difference of opinion upon the question

whether Henry Cowey derived any advantage from the loans secured by the bond, but their Lordships are satisfied, from the evidence, that the money raised by Arthur Cowey was solely and fraudulently devoted to his own business purposes. In regard to the allegation in the Plea that Rycroft was aware of Henry Cowey's mental incapacity and of the fact that the money had not been lent to or for the benefit of Henry Cowey, the three Judges were agreed that Rycroft had not such knowledge, but the Chief Justice, differing in this respect from his learned colleagues, held that the facts disclosed to Rycroft should have put him to inquiry, and that, if he had made inquiry, he would have discovered that Henry Cowey had received no benefit from the loans, and was quite incapable, through unsoundness of mind, of contracting. The Court, by a majority, the Chief Justice dissenting, gave judgment for the Plaintiff Company, as prayed, with costs.

Upon the pleadings and the facts just stated the simple question for decision was whether the executor dative of the estate of Henry Cowey, who had received no benefit from the loan of 4,600*l.*, was liable on a bond to secure such loan, passed by virtue of a power of attorney executed by the deceased at a time when he was insane, in favour of the Plaintiff Company, which had no knowledge of such insanity. The authorities cited in the Natal Court and before their Lordships leave no doubt as to what the answer to the question should have been. In Justinian's Institutes (3. 19. 8) it is laid down that an insane person cannot transact any business whatever; in the Digest (44. 7. 1, § 12) a passage from Gaius is quoted with approval to the effect that it is self-evident that a stipulation and a promise made by an insane person are equally of

no effect, and in another passage of the Digest (50.17.5) it is laid down, as one of the well-established rules of the ancient law, that an insane person cannot bind himself in any way by contract. This principle was incorporated in the law of the Netherlands, and none of the writers on that law cited before their Lordships introduced the qualification that the person dealing with the insane person must be aware of the insanity in order to render the contract void. Grotius, in his treatise *De Jure Belli et Pacis* (ii, 11, 5) says that the use of reason is the first requisite to constitute the obligation of a promise, which a madman, idiot, and an infant are consequently incapable of making: *Primum requiritur usus rationis; ideo et furiosi et amentis et infantis nulla est promissio.* Vinnius, in his book *De Pactis* (C. 14 Sec. 1) says that an insane person is considered in regard to all matters as being absent, asleep, and unaware of what is being done, and he elsewhere applies the same doctrine to persons who, although not lunatics in the sense of being *furiosi*, are *mente capti* or *dementes* in the sense of being destitute of any reason or intelligence. The only point upon which any doubt has been expressed by some of the commentators is whether the incapacity caused by insanity affects the validity of acts done by an insane person before he has been judicially declared to be insane and a curator appointed over him. This doubt was not shared in by Voet who, in his Commentaries (27.10.3), after saying that curators are placed over insane persons who are of age, adds that, as they are incapable of giving any consent, every contract made by them, even before the appointment of curators, is *ipso jure* null and void. That the civil law was understood in the

same sense by Pothier is clear from the following passage in his work on Obligations (Section 51): "All contracts pretended to be "made by persons interdicted for insanity, "though before interdiction, are null, provided "it be shown that they were insane at the time "of the contract, for then insanity alone, and of "itself renders them incapable of contracting, "independently of the sentence of interdiction, "which is merely a declaration of insanity." In the present case curators were appointed over Henry Cowey by reason of his insanity, but the appointment was made after the passing of the bond. In the opinion of their Lordships, however, this fact cannot affect the validity of the bond if the insanity existed—as in fact it did—when the power authorizing the bond was executed. No evidence was given as to whether Henry Cowey understood the terms of that power, and, in fact, no witness was called to prove its due execution. If signed by Henry Cowey it was so signed at a time when he was suffering from senile dementia, and, in the absence of proof that he understood the document and knew what he was doing, the presumption is that the total absence of a reasoning mind which then existed, would have prevented him from grasping its contents.

The learned Judges whose opinions prevailed in the Court below made the following remarks in their joint reasons:

"All our authorities agree in laying down the general rule "of law that obligations entered into with a lunatic must, "*primâ facie*, be regarded as null and void, because of his "incapacity to give a valid consent . . . . But whilst this "general rule or principle cannot be denied and is common to "all civilized systems of jurisprudence, our law, and the "works of the learned Roman and Dutch jurists and com- "mentators deal lightly, or not at all, with the question as to "whether such a contract is absolutely void under all or any "circumstances, or whether it may, in certain cases, be held to "be voidable only, whether, for instance, a want of knowledge

"by one of the parties of the insanity of the other party to a "contract affects the validity of the contract."

They then proceed to say that when the Dutch law is silent, the Court has to fall back on the Roman law, and that when that law is also silent, the Court should be guided by the English law, and they continue thus :—

"It is now settled law in England that such contracts are "not void but voidable at the option of the lunatic; but this "only if his state was known to the other party and if he "derived no benefit from it."

Without inquiring whether this is a correct statement of the law of England it is sufficient for their Lordships to say that the Roman-Dutch law is not silent upon the question whether a contract made by an insane person is voidable only, for the authorities expressly say that it is absolutely void. Where acts have been done on behalf of an insane person by virtue of a power of attorney given by him before he was bereft of his reason there are authorities (such as Digest 46, 3, 32, and Pothier on Obligations, Section 81), from which it might be fairly inferred that want of knowledge regarding the principal's change of condition would protect persons dealing with the agent. The power is revoked by reason of the insanity, but if the power held out the agent as a person with whom third parties might contract as such until they receive notice of the revocation of the authority, their knowledge of the insanity would have an important bearing on their right to recover upon a contract thus made. That would, however, be a very different matter from saying that an agent appointed after the insanity of the principal could, under the Roman-Dutch law, validly bind such principal. Not a trace, so far as their Lordships are aware, is to be found in that law of the rule which has sometimes been stated to be part of the law of England that a person cannot stultify himself by pleading that he was insane at the time when he purported to

enter into a contract. But even if the law of England had been applicable to the present case their Lordships are unable to agree with the majority of the Natal Court that the bond sued upon would have been enforceable. In the case of *Daily Telegraph Newspaper Company* v. *McLaughlin* (L.R., A.C. 1904, p. 776) this Board refused to give leave to appeal from a judgment of the High Court of Australia in which it had been held, in a suit for the rectification of a share register, that a power of attorney executed by the Plaintiff when he was a lunatic and did not understand what he was doing was void, and that the transfer of the Plaintiff's shares effected by the Defendant Company under such power of attorney was a nullity, although the Company had no notice of the insanity. In stating their Lordships' reasons for refusing such leave to appeal Lord Macnaghten said :—

"Their Lordships, having had the advantage of hearing "argument on both sides, see no reason to doubt that the "judgment of the High Court is right . . . . The risk to "a Company acting on a power of attorney is no doubt "considerable but the directors can protect themselves to some "extent by making careful inquiries—a precaution apparently "not taken in the present case."

If Rycroft had made the slightest inquiry he would have ascertained that Henry Cowey was not in a fit mental condition to execute the power of 1901 and, in any case, Rycroft's ignorance of the fact cannot confer validity on an instrument which was otherwise invalid.

It follows, therefore, that if the evidence in the present case had been confined to the issues raised by the pleadings it would have been impossible to support the judgment of the Natal Court. It appears, however, that the evidence actually given extended over a wider range and embraced the further questions whether Henry Cowey had given a general power of attorney to his son Arthur in 1897, whether the loans were

made by Rycroft upon the faith of such power, and whether at the date of that power and of the loans Henry Cowey had already lost the use of his reason. This additional evidence seems to have been let in in the following manner. Rycroft, who was the only witness called for the Plaintiff Company, merely produced the bond and stated that no interest had been paid thereon after the 31st of December 1901. He was then minutely cross-examined as to the consideration for the bond, and, in the course of such cross-examination, he stated that the loans had been made upon the faith of a general power of attorney held by Arthur Cowey from his father. He said that he had seen the power, but had not obtained possession of it. He did not mention the date of the power, and the only description which he could give of it was that, so far as his memory served him, it was on the usual printed form. The original was not produced at the trial, but the Registrar of Deeds produced the copy of a general power which had been lodged in the Deeds Office at the time when a bond for 7,500*l.* was passed on behalf of Henry Cowey under a special power executed by Arthur Cowey, as agent for Henry Cowey under the general power. That general power purported to be dated on the 17th of November 1897 and, as its terms were admittedly wide enough to authorise Arthur Cowey to pledge his father's credit, it became important for the Defendant to show that it was executed at a time when Henry Cowey's malady had already been established. The consequence was that the further cross-examination of Rycroft and the examination-in-chief of the Defendant's own witnesses travelled beyond the issues raised by the pleadings, and all the learned Judges treated the case as if the validity of the general power of 1897 were one of the questions at issue.

The evidence as to the genuineness of that general power is extremely meagre, and the utmost that can be stated with any degree of certainty is that on the 19th of June 1899, on which day the copy was filed with the Registrar of Deeds, there was a document in the possession of Arthur Cowey purporting to be such a general power. It was proved that Arthur Cowey had been convicted of the forgery of other documents and the fact, therefore, that the original was shown by him to the Registrar of Deeds does not necessarily prove that it was genuine or that its date was correctly stated. The doubt which exists upon these points is strengthened by the evidence of Miss Matcham, whose name appears as a witness to Henry Cowey's signature of the alleged general power. She was not produced as a witness by the Plaintiff Company, upon whom the burthen of proving the execution of the power clearly lay, but by the Defendant, who examined her as to the mental condition of Henry Cowey from 1893, when she became his housekeeper, until his death in 1902. In cross-examination she was asked whether she had ever seen Henry Cowey sign a paper and she said she had once seen him sign a blue paper, which was doubled up, but she did not know what it was. Asked when it was she said she could not say but that it was some years before his death. In the course of her re-examination she said that she remembered having once witnessed Henry Cowey's signature but that the document was not read over and that she had not the least idea what it was. She did not know when it was but she was quite certain it took place after the fire which destroyed the premises belonging to Henry Cowey in which Arthur carried on his own business. She was certain it was after the fire because the signing took place in the new premises rebuilt after

the fire. If her evidence on this point was correct the document which she witnessed could not have been executed before 1899. Whatever may have been the mental condition of Henry Cowey in 1897, their Lordships are satisfied, from the evidence of Miss Matcham and the other witnesses, that in 1899 his malady had reached a stage which entirely incapacitated him from understanding the nature of the act he was performing.

It seems, however, to have been assumed in the Court below that the general power was signed by Henry Cowey on the day on which it purports to have been executed, namely, on the 17th of November 1897, and their Lordships, therefore, proceed to consider whether he was then in a fit mental condition to execute a valid power of attorney. He was then about 80 years of age, and had retired from business as a grocer seven years previously, after giving public notice of his retirement and of the transfer of the business to his son Arthur. The premises in Durban, in which the business was carried on, belonged to Henry Cowey, but he had no further interest in the business which, however, continued to be carried on under the name of "Henry Cowey." He himself lived on the Berea, and, as his wife had died before his retirement, he employed Miss Matcham as his housekeeper. He seems never to have taken medical advice himself, but at the request of members of his family Dr. Campbell, a physician practising at Durban, used to pay him occasional visits. As far back as 1887 Dr. Campbell had to warn Henry Cowey's attendants to be particular in their supervision of him in case he should wander away in the night and injure himself. In 1895 Henry Cowey had an accident with his carriage which ran over and injured a man, and this is what the doctor says as to his mental condition at that time :

"He told me that the accident had been a kind of judgment
"to the man he had run over, and that, in the hands of
"Providence, he had been the means of compelling this man to
"realise his sins, and that he felt his position keenly in regard
"to this particular matter, and hoped that it would be for the
"ultimate benefit of this man that he had been knocked over.
"On another occasion he mistook me for a policeman. During
"my visits I found generally that he was not able to fix his
"conversation in any particular direction for any length of
"time. After my telling him that I was not a policeman, he
"appreciated the fact and shook me by the hand and was very
"glad to see me. Later on in the conversation he would
"forget that, and I had to remind him of my identity again.
"All these points led me to the conclusion that Henry Cowey
"was not in what one would call his right mind."

Later on the witness said that instead of improving his patient got very much worse after this time, and that during the last four or five years of his life his mental condition would have justified a medical certificate that he was not in a fit mental state to look after himself. In cross-examination the doctor admitted that, in his opinion, the meaning of the document authorizing the bond of 4,600*l.* could have been conveyed to Henry Cowey in January 1901, but that was the date when, according to the unanimous finding of the Court, he "was *non* "*compos mentis* and could have had no idea of "what he was doing." The doctor pointed out the difficult position he was in, as he had never seen the man's mental condition tested by a proposition of this kind. The capacity of Henry Cowey to understand the alleged general power of 1897 can only be tested by his general mental condition at that time, seeing that the Plaintiff Company produced no evidence as to whether he understood the document itself. A witness, William Smith, who had known Henry Cowey familiarly from the year 1890, said that in 1895 he saw a very great change in him and that after that date he could not do any business. On one occasion, for instance, he offered the witness a sixpence for painting the whole of

his house and stable. Further on the witness said:—

"At that time he was continually up and down out of bed. "I undressed him. He seemed to have no idea of undressing "and I put him to bed, but of course I had to lie awake "practically the whole night, because he was up a good many "times with a lighted candle and I was afraid he would set "himself on fire. In the morning I got him up and took him "to the bath. It was his custom to sit in cold water for an "hour and a half. I did not allow him to do that. When I "thought he had enough I brought him out and put his clothes "on and made him presentable. . . . On several occasions "when the kafir was working in the grounds the old man "would persist in wheeling the barrow and carrying the kafir's "tools."

The hairdresser, Cartledge, gave evidence as to the old man's incapacity to perform such a simple act as paying for his shaving, and said he was unfit for business, was incompetent to buy or sell things, and did not know the days of the week. Asked what period he was speaking of, the witness said, "1897, 1898, 1899," and in answer to the question "Why do you exclude "1900?" he said, "He was too bad to talk to then at "all." Another witness, Samuel Roberts, said that from the year 1890 H. Cowey's mental faculties were gradually failing, and gave several instances of such failure. Albert Wood, son-in-law of the old man, said that he noticed his mind beginning to give in about 1895, and that a remarkable change for the worse took place in 1896. Further on, the following evidence appears on the record:—

"*Q.* You have a daughter named Ivy. Did Mr. Cowey "come down at any time? *A.* He came down to her funeral. "*Q.* Is she still alive? *A.* Yes. *Q.* Was he properly "attired for a funeral? *A.* Yes, he had his black suit on and "a silk hat. *Q.* He did not usually wear a silk hat? *A.* "Only at funerals. *Q.* What did he bring with him? *A.* A "very large pumpkin. *Q.* What year was this? *A.* 1897."

It is not necessary for their Lordships to refer to the many other occasions mentioned by the witnesses on which the deceased showed by his conduct that he had entered his second childhood

before November 1897, and was wholly unfit to transact business of any kind. There was no question as to the credibility of the witnesses, but rather as to the inference which might fairly be drawn from the uncontradicted testimony of the different witnesses. After a careful consideration of the whole of the evidence their Lordships are unable to arrive at any other conclusion than that, at the date of the alleged general power of attorney, Henry Cowey's progressive malady had reached a stage which rendered him mentally unfit to consent to the execution of the power. It was not a case of partial insanity or of mere delusions acting on a mind otherwise sane, but a complete and general enfeeblement of the mental powers. His capacity for reasoning or for carrying on business of any kind was completely gone and, in the absence of any proof that he understood the terms of the power, the presumption is that he was wholly incapable of understanding it.

It has been urged before their Lordships that, as the general power of attorney was deemed sufficient to authorise the mortgage bond of 7,500*l.*, it should be held equally effectual to authorise the passing of the bond now in question. The validity of the bond for 7,500*l.* is not now before their Lordships, but it is right to say that it was clearly proved that the money thus raised was devoted to paying off bonds on Henry Cowey's property and re-building his burnt premises. The Roman-Dutch law, while denying the capacity of an insane person to bind himself by contract, recognises the equity of allowing a person who has in good faith expended money on behalf of a lunatic to have his expenses recouped. A person may, for instance, become *negotiorum gestor* for a lunatic, and, although he acts in such a case without any mandate whatever, he can recover

all sums legitimately expended on behalf of such lunatic (Dig. 3, 5, 3, § 5). It may well be that, upon analogous principles, the mortgagee, under the bond of 7,500*l.*, can recover that amount from the executor, but it would by no means follow that the Plaintiff Company is entitled to recover the amount of a loan raised in Henry Cowey's name and ostensibly on his behalf, but no part of which was used for his benefit. In order to render his executor liable, proof of a valid mandate to raise the loan is clearly necessary, and there can be no valid mandate from a person who, by reason of his mental disease, is incapable of giving his consent thereto.

The result is that their Lordships will humbly advise his Majesty that the Appeal should be allowed, and judgment of absolution from the instance entered, and that the Plaintiff Company should pay the costs in the Court below. The Company will also pay the costs of this Appeal.