1936
Oct. 27 & 28.
1937
Sept. 13.

BETWEEN:

EFFIE WILSON .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Crown—Petition of right—Government annuity—Contract of insane person not voidable when other contracting party unaware of insanity.

Suppliant's husband died in July, 1929. In December, 1928, he had contracted for the purchase of an annuity under the provisions of the Government Annuities Act, R.S.C., 1927, c. 7, paying therefor the sum of $10,000 cash. Suppliant as sole executrix and beneficiary of deceased's will now seeks a declaration that such contract was void or voidable and that the Crown be condemned to pay to her the said sum of $10,000 less any money paid to deceased in his lifetime, on the ground that deceased at the time of entering into the contract was insane.

The Court found that deceased at the time he entered into the contract to purchase the annuity was of unsound mind and incapable of appreciating the nature of his act; that the postmaster with whom deceased had deposited the money to purchase the annuity was not an agent of the Minister in the sale of the annuity; that neither the Minister, the Superintendent, nor any of the officers of the Government Annuities Branch were aware of the deceased's state of mind at the time the contract was entered into.

Held: That contracts by way of sale and purchase made by a person apparently sane, but afterwards found to be insane, will not be set aside as against those who dealt with him on the faith of his being a person of competent understanding.

PETITION OF RIGHT by suppliant herein asking that the amount of money paid to the Crown by suppliant's husband, now deceased, for an annuity, be refunded to suppliant.

The petition was heard before the Honourable Mr. Justice Maclean, President of the Court, at St. Catharines.

J. J. Bench and *H. P. Cavers* for suppliant.

F. E. Hetherington for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (September 13, 1937) delivered the following judgment:

The suppliant is the sole beneficiary and executrix of the will of George S. Wilson, her deceased husband, late of the Town of Merritton, Ontario, who died on or about

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July 24, 1929. By this petition of right the suppliant seeks to have it declared that a contract entered into by her late husband, in December, 1928, for the purchase of a certain annuity for his life, under the provisions of the Government Annuities Act, R.S.C., 1927, chap. 7, was void or voidable, and that the Crown be condemned to repay to her the sum paid for the said annuity, $10,000, less any annuities paid the deceased in his life time, upon the ground that when the deceased purchased the said annuity he was not of sufficient mental capacity to enter into such a contract, or to understand the nature and consequences of the same, and that he was in fact insane. By the terms of the contract Wilson was to be paid $1,512.86 per annum, in monthly instalments of $126.07, and prior to his death he had received seven monthly instalments.

Generally, the suppliant's case is that for three or more years before her late husband purchased the annuity in question, he had become permanently afflicted with the insane delusion that the suppliant, and a son, were attempting to end his life by poisoning him, in order to become possessed of his property, and that this delusion caused or influenced the deceased, then seventy-three years of age and otherwise in ill-health, to purchase the annuity, and that this delusion rendered him incapable of understanding the nature and effect thereof. The deceased applied for the annuity, in the manner later to be mentioned, through one Morley Schooley, Postmaster for the Town of Merritton, and it is the contention of the suppliant that the said Schooley was at the time, in respect of the sale of annuities, the agent of the Minister of Labour, the Minister appointed to administer the Government Annuities Act, and that it was well known to Schooley that the deceased was of unsound mind at the time material. Counsel for the Crown did not, at the trial, contest the allegation that the deceased was, at the time he purchased the annuity, afflicted with the delusion mentioned, but contended that this was in any event unknown to the respondent, and that the existence of the said delusion was not sufficient to deprive Wilson of the capacity to contract; and he further contended that Schooley did not act as agent of the Department of Labour, under the provisions of the Government Annuities Act or otherwise, in the sale of the annuity in question.

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The suppliant and the deceased were married in the year 1884. Originally, the occupation of the deceased was that of a diver employed on the Welland Canal, and in the course of that occupation he had lost a leg. Later he conducted a fire insurance agency business, assisted by his wife. He had in the course of time accumulated some $10,000, which he had invested in bonds of the Dominion of Canada, and it was with the proceeds of such bonds he purchased the annuity in question. At the time of his death he was the owner of two small dwelling houses, one of which was occupied as his home, and they were appraised for probate purposes at $3,000 and $1,500 respectively, and in addition he was the owner of three bonds of the par value of $100 each.

In July, 1911, the deceased and the suppliant made mutual wills each in favour of the other, and, concurrently I understand, entered into an agreement whereby they undertook to and with each other that they would never change their respective wills then made, under which each was to leave everything he or she had to the other. In July, 1929, only a few days before his death, and about seven months subsequent to the purchase of the annuity, Wilson made a will in which he directed his estate to be divided among a number of legatees and charitable organizations, and among the specific legacies was one of $800 to " my housekeeper, Effie Rogers, of Merritton, Ontario," this being the maiden name of his wife, the suppliant. This will was declared null and void by the late Garrow J., of the Supreme Court of Ontario, in an action brought by the suppliant, on the ground of lack of testamentary capacity. This will having been declared void, the first mentioned will was probated as the last will and testament of the deceased Wilson.

It will be convenient now to review the evidence with some care, and I fear at some length. This will be desirable in the event of an appeal from this judgment, and such an appeal is I expect probable. After Wilson lost his leg and was unable to continue in his usual occupation, the suppliant for a time maintained the family by working in a cotton mill at Merritton; later, in 1922, or 1923, Wilson commenced to carry on a fire insurance business which, it seems, the suppliant looked after almost entirely during

the greater part of Wilson's life time. The suppliant testified that in 1924 or 1925 her husband commenced to develop a hostile attitude towards her, and to openly accuse her with attempting to poison him, and of this he then began to speak to others. In the early stages of this condition of mind he would partake of meals which she had prepared for him only if she would first eat or drink some of the same. The suppliant stated that in 1925 her husband's condition physically and mentally had become noticeably impaired, and he was constantly under a doctor's care; he began to keep largely to his own bedroom which he usually kept locked; his language towards her became highly improper and violent; he would frequently throw upon the floor food which she brought him in order to give her "lots of work"; he would frequently have food brought to him from outside and this he would arrange to be placed in a container outside his home and he would pull the same up to his bedroom window by a string; he became filthy in his habits and refused to use a nearby toilet; he persisted in telling persons coming to see him that his wife was attempting to poison him and that he would "never leave her a cent," and such remarks she frequently heard herself; he would also accuse his son, now deceased, of attempting to kill him; and he would frequently tell his wife that he was going to buy an annuity so that she would have to live on anything "you can get," and that she would "have to go out and pick the pebbles off the road and eat them." On one occasion, more than a year before his death, he came down stairs from his own room and turned on the gas in a stove in a room in which his wife was accustomed to lie down upon a couch and in which room she then was, and he closed the doors leading from that room; the gas was turned on outside the room in question. After Wilson returned upstairs to his room the suppliant, of course, turned the gas off—being afraid to do so while he was downstairs. She was of the opinion that he intended to "end her." It has that appearance and I have no reason for refusing to believe that her fears were well grounded. In July, 1929, at his own home, Wilson attempted suicide, and he died some days afterwards.

The suppliant, I might add, also testified that Schooley the postmaster, would visit her husband almost daily in

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his room in the last two years of his life, and if she should then happen to be in her husband's room he would tell her to leave. She stated that she overheard her husband tell Schooley that she was trying to poison him and that he would never leave her a cent. The suppliant, it might be said, was not a particularly good witness on her own behalf, but I am confident that her evidence upon vital matters may be relied upon. Her recollection, for example, as to when her husband left Merritton and went to Los Angeles, U.S.A., was not very clear, and she was not able I think to fix it accurately, but that I think is not of any consequence. Her evidence as to the part taken by her in the management of the insurance business was not very well stated. I am satisfied from all the evidence that upon her fell the major part of the work, and it is more than probable that this business could not have continued without her attention to it, and, at times at least, her livelihood depended on what she got from it.

Dr. Chapman, a medical practitioner of over thirty years' experience, knew Wilson professionally for four or five years before his death, and he stated that invariably on visiting Wilson, he would introduce his domestic affairs, and that he was afflicted with the delusion that his wife was attempting to poison him and many times this was the reason for his being called to see Wilson; frequently he would find in his room food which he had refused to eat because, he would say, his wife had put poison in it. On one occasion Wilson had an abrasion on his head and he informed Dr. Chapman that this was caused by his son hitting him with a bottle, and that the son had threatened to shoot him, which Dr. Chapman believed to be a pure delusion, and later Wilson admitted his story to be untrue. On another occasion he had pulled down the curtains from the windows in his bedroom so that he said, he could quickly give an alarm if his son attempted to shoot him. On more than one occasion Wilson spoke to Dr. Chapman about his buying an annuity, and when the latter advised against it on several grounds, Wilson would say that he, Dr. Chapman, was like all the lawyers in St. Catharines, some of whom, it seems, had similarly advised him, and whom he said were all "in a ring." On such occasions Wilson would insist he was going to buy an annuity in order to leave his wife penniless. Once Wilson explained to Dr.

Chapman the advantage of buying an annuity by saying that his wife and son wished to see him dead so that they would get his money, but if he bought an annuity it would be to their advantage to keep him alive, because, if he died everything would be gone and there would be no monthly income. After Wilson had purchased the annuity he told Dr. Chapman that Schooley had twice failed to get him an annuity, and had talked him out of it, but that in the end he went to the bank and got the "collateral" and shook the same in Schooley's face and told him if he did not get him the annuity he would see that he was dismissed from his office; then, he said, Schooley got the annuity for him. I might say that the reception of this particular piece of evidence was objected to by Mr. Hetherington, but I think it was admissible on one ground at least, and I may say I am not disposed to attach any weight to it in establishing agency on the part of Schooley.

Dr. Chapman gave it as his opinion that for the last two or three years before Wilson purchased the annuity his mind was not in a fit state to do business that directly or indirectly affected his wife. He also stated that at the time Wilson spoke to him about buying an annuity, and at the time he bought the annuity, his general health was seriously impaired and that his expectation of life was short; and that he was liable to die within a few months, or a few weeks. Shortly after Wilson attempted to take his own life Dr. Chapman attended him, and asking Wilson why he had done so the reply was that he was getting so feeble that he had made up his mind "they had me," that is, his wife and son, and "rather than let them get me I was going to cheat them"; Dr. Chapman stated that the words he used may not have been the precise words used by Wilson on that occasion, but that in substance they were.

Dr. Currey, medical officer of health for the City of St. Catharines, and in that capacity having occasion to examine persons as to their mental state, gave evidence. He stated that after Wilson attempted to take his own life he was called in by Dr. Ludwig, since deceased, to examine Wilson and to give his opinion as to the wisdom of sending him to some institution for the insane; he found him to be too weak to warrant sending him to such an institution,

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though insane. He found his condition, senile dementia, was of long standing; that his case was not one of acute mental illness, but one due to some other cause, and the cause, as usual, was existent for many years. He said Wilson's condition was due to a circulatory condition, "which by closing off the vessels in the brain caused his insanity," and that, in his experience, a case such as Wilson's would take at least two years to reach the state he found him in, at the time mentioned. He gave it as his opinion that Wilson could not possibly have been sane in November, 1928, after seeing his condition a few months later, with that type of insanity.

Dr. Poirier had been requested to call upon Wilson in May, 1929, after the purchase of the annuity, and his evidence confirms in several respects the testimony of the other medical witnesses already mentioned, and particularly in respect of Wilson's delusions as to his wife. He found Wilson's mind definitely disordered. He visited Wilson also in July following, on the occasion of his attempted suicide. His opinion was that Wilson was suffering from a progressive deterioration, beginning as a circulatory and kidney condition, affecting his mental condition, and which had been in progress a long time; he stated that Wilson's ideas respecting his wife were undoubtedly thoroughly fixed and had existed for a long time, and if they were insane delusions, then he had been insane for some time; and that Wilson's mental condition had probably been growing worse gradually for years, and between November, 1928, and May, 1929, but that his condition six months prior to May, 1929, would not be a great deal different from what it was when he saw him in May, 1929. He said Wilson's trouble had not come on in six months, it had been coming on for years progressively, for three or four years at least.

Mr. McRae, Inspector of the London and Lancashire Fire Insurance Company in Toronto, a company represented by Wilson at Merritton, gave evidence, which was corroborative of much that has already been mentioned. In respect of the insurance business McRae dealt largely with the suppliant, though remittances to his company were largely made by Wilson, by cheque. Another officer of the same insurance company, Mr. Spencer, gave evidence to much

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the same effect; he stated that the suppliant attended to all the insurance business, including the correspondence, and cheques were filled out by the suppliant though usually, I gather, signed by Wilson. In 1926, Wilson consulted Mr. McCarron, a solicitor, regarding the sale of his insurance business, but Wilson's instructions were so unsatisfactory and changeable that in the end McCarron declined to have anything more to do with it. In 1926 Wilson asked McCarron to draw his will, at the time instructing him that he was not going to leave his wife or his son a cent, and that he wished to dispose of his property in such a way that his wife would receive nothing. Mr. McCarron in the end did not draw the will because he did not consider him of testamentary capacity. Mrs. Patterson, a family friend, last saw Wilson in August or September, 1928, when he spoke to her about his wife attempting to poison him in order to get his money. Mrs. Patterson's evidence was of importance in other respects but I shall not delay to repeat more of it. Mr. Carson, manager of the Bank of Nova Scotia at Merritton, between 1921 and 1934, at which banking office Wilson kept his account, testified that for three or four years prior to his death Wilson would express to him fear of his life at the hands of his wife and son, and he would speak of disposing of his property so that his wife and son would have no object in getting rid of him, or of poisoning him. Wilson discussed with Carson, several times, the matter of his buying an annuity, and Carson advised against it, having in mind his mental condition. Carson states that Wilson relied on him a great deal to look after his banking business, and business matters generally; he would fill out his cheques, or the suppliant would, and he would tell Wilson they were in order. Carson said: "He could sign his name, and I knew the cheque was in order and would assure him it was all right and he would sign the cheque." Carson also stated that he had a great deal of hesitation in dealing with him as a customer of the bank, and that he had to be careful of everything he did with him. I think it is clear that whatever business Wilson himself attended to, he was guided largely by Carson, who did for him more than might be expected ordinarily by a bank customer.

Then there was some evidence particularly directed to the relations between Wilson and Schooley, and I should

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make a brief reference to the same. The post office was just across the road from the residence of Wilson, and I am satisfied that both Schooley and his wife, for some years prior to the purchase of the annuity in question, very frequently called to see Wilson. Schooley seems to have regularly called to see Wilson, chiefly in his bedroom, and Wilson was heard by the suppliant telling Schooley about her intention to poison him. Wilson's delusion at least must have been well known to Schooley; he could hardly have failed to become aware of the same. The whole community I have no doubt were aware of it, as appears from the testimony of one witness at least. Unfortunately Schooley was dead at the time of the trial. Schooley wrote several letters to the Superintendent of the Government Annuities Branch on behalf of Wilson, and the matter of the purchase of an annuity must have been the subject-matter of discussion between them. I shall presently refer to such letters.

Some correspondence passing between Wilson and the Superintendent of the Government Annuities Branch, and also between Schooley and the said Superintendent, was put in evidence, and for more than one reason this correspondence should be referred to with some exactness.

In December, 1923, and January, 1924, Wilson wrote the Superintendent for information concerning the cost of annuities, and he requested that the replies thereto be sent to Schooley and this was done. Apparently Wilson did not pursue the matter further in those years. His next inquiry directed to the Superintendent was in February, 1925, wherein he asked that there be sent him a handbook of information relating to annuities, which was supplied him, and on March 7 following he wrote stating that he had ten thousand dollars to invest in an ordinary life annuity and he inquires what annuity that amount of money will purchase, and he made a similar inquiry on May 13, 1927, but nothing ensued from this correspondence. On November 24, 1928, Wilson deposited with Schooley $10,000 and on that date Schooley wrote the Superintendent stating this fact. This letter states that he had that day "accepted $10,000, ten thousand dollars, for the purchase of an immediate annuity for Geo. S. Wilson," and he therein states Wilson's age, and he asks what amount of annuity this sum of money will purchase for Wilson, (1) to cease at

death, and (2) guaranteed for twenty years, and he requests that blank forms of application for each form of annuity be sent him.

In a letter dated November 20, 1928, which date is obviously in error, Wilson himself wrote the Superintendent stating that he had a few days ago "deposited $10,000, number 33662, to purchase an annuity," but that he had not made up his mind as to the plan of annuity he wished to purchase, and he asks that his application be held over for a few days. He asks if he should "take a second party in on it," what would be the extra cost, if any. In due course this letter was answered by the Superintendent directly to Wilson. Wilson, as will appear from a letter written in June, 1929, evidently had in mind some man as the second party, and Schooley also wrote the Superintendent on November 28, asking what amount of annuity $10,000 would buy on the "last survivor immediate annuity" plan for two persons, and Wilson's age is given, and the age of the other person is stated as being 48 years; this second person could not therefore have been Wilson's wife, and consequently Wilson must have had some one else in mind; Schooley's letter was answered in due course by the Superintendent. A few days later, December 6, 1928, Wilson wrote the Superintendent stating that he had decided to take the ordinary life plan annuity and he stated that he wished the annuity to be remitted to him on the 24th day of each month. On December 15, following, the annuity contract was forwarded to Wilson by the Superintendent, and on December 19, Wilson in acknowledging receipt of the contract stated that he had examined it and found the same satisfactory. On March 14, 1929, Wilson wrote the Superintendent asking that his March annuity be directed to him at Los Angeles, U.S.A., to which place he was about to proceed. The same request was later made in respect of the April annuity. On June 15, 1929, Schooley wrote the Superintendent, at the request of Wilson, to ascertain what amount of annuity payable monthly, a further sum of $8,000 would purchase, on three different stated plans, the last being "a last survivor annuity," the letter stating "another man with him aged 48 years." This second party would likely be the same person Wilson had in mind in his own earlier

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inquiry of the same nature, and which I have already referred to. This correspondence, appearing in the evidence as exhibits, are typewritten copies of original letters. On reference to the original letters I found that some of Wilson's letters were typewritten, and others were written evidently by some person other than himself, but not, I think, by Schooley; in some cases Wilson's signature is obviously impressed by a stamp of some sort, while in other cases the signature is in type; and in one case Wilson's signature is in his own handwriting though the body of the letter is not. There is only to add in this connection that the application form for the annuity contains a declaration made by Wilson on November 30, 1928, before a notary public, and to the effect that the statements contained in the application were true.

Reference must be made to some of the provisions of the Government Annuities Act because of the claim that Schooley, under the terms of that Act and regulations made thereunder, and as postmaster at Merritton, acted as the agent of the Minister of Labour in the sale of the annuity in question. Sec. 13 (*d*) provides that the Governor in Council may make regulations

as to the selection of agents of the Minister to assist in executing the provisions of this Act, and the remuneration, if any, to such agents therefor.

Regulation no. 4 provides:

That the agents permanently appointed to assist in executing the provisions of this Act, and their remuneration shall be such as may be recommended by the Minister of Labour and approved by the Governor in Council; but the Minister may from time to time employ such temporary assistance as in his opinion is required, and upon such terms as may be agreed upon.

Regulation 7 (*a*), (*b*) and (*c*) are as follows:

7. Payments on account of the purchase of Canadian Government Annuities may be made at any Post Office or Sub-Post Office in the Dominion of Canada where a Money Order Office is established, during the hours at which the office is required to be open for the transaction of Post Office business, and the Postmaster or Acting Postmaster of such office is hereby authorized and required to receive such payments, and to remit the same in manner instructed by the Superintendent of Annuities; or the purchaser may, if he prefers, send his payments direct to the Superintendent of Annuities by registered letter; or payments may be made in person at the Annuities Department, Ottawa. Where payment is made by cheque, bank draft, money order, or postal note, it should be drawn to the order of the Receiver General of Canada.

(*a*) Every Postmaster or Acting Postmaster of any Post Office or Sub-Post Office in the Dominion of Canada where Money Order business is transacted, other than those whose salaries are paid on a city office

basis, shall be allowed a commission of five per cent on all moneys remitted by him for the purchase of deferred annuities.

(*b*) A commission of one per cent shall be allowed to any Postmaster or Acting Postmaster as aforesaid on all moneys remitted by him for the purchase of Immediate Annuities.

(*c*) The said rates of commission shall be allowed the Postmaster or Acting Postmaster not only on all moneys remitted by him, but also on all moneys remitted to the Department direct by or on behalf of a purchaser where it can be shown to the satisfaction of the Department that the Postmaster or Acting Postmaster was instrumental in inducing the said purchaser to purchase.

There was put in evidence a sample of a circular letter forwarded to postmasters from time to time, by the Government Annuities Branch, and in that circular letter appears the following:

I am forwarding to you under separate cover all supplies necessary for the transaction of Government Annuities business.

I am also sending to you herewith a copy of instructions to Postmasters as to the proper method of handling payments received for the purchase of annuities.

The posters should be placed in a conspicuous position in your office where they may be seen by the public. The descriptive booklets are, of course, for distribution to persons who make inquiry, or to those persons who you feel might be interested in the purchase of Government Annuities.

Postmasters who are on a commission basis are allowed a commission of eleven-fortieths of one per cent on applications secured or payments received for the purchase of immediate annuities and one per cent on deferred annuities.

Many postmasters throughout Canada who devote a portion of their time towards the sale of Government Annuities receive a considerable proportion of their income from this source. I would, therefore, suggest that you familiarize yourself with the various plans of annuity available in order that you may be in a position to intelligently deal with persons making inquiry.

The Department of Labour is actively promoting the sale of these annuities and it would be to your personal advantage to do what you can to increase the number of applications being received from your vicinity.

Upon the evidence I feel compelled to reach the conclusion that when Wilson entered into the contract to purchase the annuity he was of unsound mind, and was incapable of knowing what he was doing, except perhaps the mechanical act of signing his name to some letters and other documents, referable to the contract. The evidence which I have narrated leads, I think, irresistibly to the conclusion that he was incapable of managing his affairs in the sense of disposing of such a large and liquid a portion of his property to the end in question. Considering his physical and mental condition, his age, and all the

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other circumstances of the case, I cannot but think that the purchase of the annuity in question was the act of a person of unsound mind. Long before the material date he became afflicted with the insane delusion mentioned, which had no existence, and he was apparently incapable of being reasoned out of that delusion, and at no time was it shown that he had any lucid interval; in fact everything indicates he was becoming progressively worse. At the time of his death his insanity is not susceptible of debate, and there is nothing to indicate that seven or eight months earlier his mental condition was less unfavourable. I might refer to a definition of a "delusion" to be found in Halsbury, Volume 21, 2nd Ed., paragraph 472. It is as follows:

> A man who suffers from illusions or hallucinations is not necessarily insane; he may be able to recognize such illusions or hallucinations for what they really are; it is the inability to realize that they are illusions or hallucinations which is indicative of insanity. A man, who, having conceived something extravagant to exist which has no existence but in his own heated imagination, and who is incapable of being permanently reasoned out of that conception, is said to be under a "delusion"; and, if the delusion is one which, in the judgment of an ordinary person, no man in possession of his senses could have entertained, the man suffering from such delusion is to be held as being of unsound mind.

Coming now to a discussion of the law applicable to the case. I had the advantage of very careful and able arguments from counsel, and a great number of authorities were referred to. Most of the authorities relevant to the major point in this case were referred to and discussed at length in the Australian case of *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1), and they are also to be found in contributed articles published in the Canadian Fortnightly Journal, Vol. 5, at page 248, and Columbia Law Journal, Vol. 21, at page 424. The general theory of the law in regard to acts done and contracts made by parties affecting their rights and interests is that in all cases there must be a free and full consent to bind the parties. It is stated in Halsbury, Vol. 21, 2nd Ed., p. 280, that:

> Consent is an act of reason accomplished by deliberation, and it is upon the ground that there is a want of rational and deliberate consent that the conveyances and contracts of persons of unsound mind are gener-

(1) (1904) 1 C.L.R. 243; (1904) A.C. 776.

ally deemed to be invalid; or, in other words (subject to the exceptions mentioned below), there cannot be a contract by a person of unsound mind.

What has been said to be the modern rule, as to the capacity of persons of unsound mind to enter into contracts, was laid down in the case of *Molton* v. *Camroux* (1). In that case the administrators of one Lea, sued an assurance society for the recovery of sums paid by Lea in respect of two annuities which were determinable with his life, and it was proved that Lea was of unsound mind at the date of the purchase of the annuities. It was the plaintiff's contention that Lea being of unsound mind could not make a valid contract. It was held by Pollock C.B. that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo,* such a contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him, and it was held that such was the contract there, for it was the purchase of an annuity which had ceased. From that it followed that unsoundness of mind would now be a good defence to an action on a contract, if it could be shown that the defendant was not of capacity to contract, and the planitiff knew it. On appeal to the Exchequer Chamber the judgment below was affirmed (2). There was the suggestion in this case, in both courts, that distinction might be drawn between executory and executed contracts, but such a distinction does not seem to have been recognized or adopted in later cases; at any rate that is not of importance here because the contract in question was executed, and the annuity had ceased before action was brought.

The next case of importance to be decided, over forty years later, was *Imperial Loan Co.* v. *Stone* (3). This was an action on a promissory note signed by the defendant as surety; the contract was executory on his part, and he had received nothing and consequently there was nothing to be restored. The statement of defence alleged that the defendant was not capable of understanding the transac-

(1) (1848) 2 Exch. 487. (2) (1849) 4 Exch. 17.
(3) (1892) 1 Q.B.D. 599.

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tion, and that the insanity of the defendant was known to the agent of the plaintiff who was present when the note was signed; on behalf of the plaintiff it was contended that when total incapacity is proved there is no contract on which to proceed, and that the contract of suretyship was one which should be based on the free and voluntary agency of the individual who enters into it. In the court below it appears judgment was entered for the defendant notwithstanding that the jury, though finding the defendant insane when he signed the note, were unable to agree upon the question as to the knowledge of the plaintiff's agent who was present when the note was signed, and the plaintiff applied for judgment or a new trial. The Court of Appeal ordered a new trial on the ground that it was necessary to show not only the incapacity of the defendant, but also the plaintiff's knowledge of that fact. In the Court of Appeal Lord Esher, M.R., stated (p. 601):

> When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding upon him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

Fry., L.J., quoting with approval Pollock, C.B., in *Molton* v. *Camroux*, stated (p. 602):

> that there had been grafted on the old rule the exception that the contracts of a person who is *non compos mentis* may be avoided when this condition can be shewn to have been known to the plaintiff,

and he added that so far as he knew that was the only exception. The judgment of Lopes, L.J., may also be referred to. He said (p. 602):

> 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 ground 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. Applying that in the present case, it is apparent that the verdict entered for the defendant cannot stand, but that there must be a new trial.

The Australian case of *McLaughlin* v. *Daily Newspaper Co. Ltd.* (1) presents some new features. In that particu-

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

lar case the plaintiff being insane, and incapable of managing his affairs, but having lucid intervals, executed a power of attorney giving his wife absolute power to dispose of his real and personal estate. Acting under the power of attorney, the wife sold and transferred certain shares held by the plaintiff in the defendant company, who had no notice of the insanity, to third persons who also had no notice. The plaintiff on recovering his sanity, brought a suit against the defendant to compel it to rectify its register by entering his name as holder of a number of shares equal to the number sold. The suit was dismissed by the Chief Judge in Equity in the court below, who was of the opinion, upon the evidence, that the plaintiff sufficiently understood the nature of the power of attorney when he signed it, and further, that whether he did or not, he was bound by the acts of his attorney. On appeal the High Court found, upon the evidence, that the plaintiff did not, when he executed the power of attorney, know that it was a power of attorney, and that this fact was known to the attorney when she procured its execution, and that the power of attorney was absolutely void, and that the plaintiff was entitled to the relief prayed. Further, it was held, that it was immaterial whether the defendants had or had not notice of the insanity. It seems to have been admitted that before the plaintiff's recovery the proceeds of the shares were applied for his benefit, partly in maintenance of himself and his family.

The High Court of Australia, after a careful review of the authorities, was of the opinion that the decision in *Molton* v. *Camroux* (*supra*) and *Imperial Loan Co.* v. *tone* (*supra*), were in principle the same, and that it was settled law that, on the ground of public policy, like in the case of obligations implied by law, a contract made by a person of unsound mind with another person who was not aware of his incapacity, was valid; that if the man dealing with the person of unsound mind is aware of his insanity, the contract is voidable at the option of the latter, and that the validity of a contract made with an apparently sane person is to be determined by the application of the same rules as are applied in ordinary cases. They expressed doubt as to whether the doctrine of *Molton* v. *Camroux* (*supra*) and *Imperial Loan Co.* v. *Stone* (*supra*)

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applied to the case of a deed or power of attorney, and they thought it unnecessary to decide that question, but they thought if an agent were directly appointed, and had no knowledge of the unsoundness of mind of his principal, the appointment was good as between the principal and agent, and possibly as between the principal and an innocent third party; a point which does not arise in this case. Many authorities seem to distinguish between a deed or power of attorney and a sale and purchase in the market overt. The basis of the decision in the Australian case was, that the plaintiff did not know what he was doing except that he knew he was signing his name, that is to say, the plaintiff did not intend to execute a power of attorney; that the wife knew of her husband's incapacity when the power of attorney was signed; that the plaintiff did not intend to appoint his wife as his agent, and that therefore the power of attorney was void and the deed of transfer a nullity. They said:

> We are herefore compelled to the conclusion that whether a power of attorney given by a person of unsound mind is void or voidable is to be determined on the same principles as in the case of a power of attorney given by a sane person and that if it is shown that the insane person did not know what he was doing, that is, that he did not intend to execute a power of attorney, and the person who procured the execution was aware of the fact, it is absolutely voidable. In such a case any person setting up the authority must be bound by the ordinary rule that it is for the parties alleging agency to prove it; and in the case supposed he can no more prove it than if the power of attorney had been a forgery as in the case of *Oliver* v. *Bank of England* (1).

On motion for special leave to appeal to the Privy Council, their Lordships, in refusing leave, after hearing arguments on both sides, expressed the opinion that the judgment of the High Court was right, that is, the power of attorney being void everything else was. The decision in the Australian case does not seem to assist us here, and it would seem that so far as the case under discussion is concerned the authorities to which I have referred remain undisturbed.

The latest case to which I was referred was *York Glass Co. Ltd.* v. *Jubb* (2), in which an executory contract made by a lunatic was upheld. The Court of Appeal confirmed the judgment of Lawrence, J., and affirmed the doctrine

(1) (1902) 1 Ch. 610.

(2) (1924) 131 T.L.R. 559; (1926) 134 L.T.R. p. 36.

laid down in *Molton* v. *Camroux* (*supra*) and *Imperial Loan Co.* v. *Stone* (*supra*). Pollock, M.R., stated therein, that the result of the authorities appeared to be that dealings by way of sale and purchase by a person apparently sane, but afterwards found to be insane, would not be set aside as against those who had dealt with him on the faith of his being a person of competent understanding. The contract in this case was entered into by correspondence.

It follows, I think, from the authorities which I have discussed, and which seem to have been followed in this country, that I am bound to hold that the suppliant must fail in her petition unless it be shown that Schooley acted as the agent of the Minister in the sale of the annuity to Wilson, and that he was then aware of Wilson's mental state. Upon the evidence before me, something may be said in support of that contention. It cannot be contended that the Minister, the Superintendent, or any of the officers of the Government Annuities Branch, were aware of Wilson's state of mind when the contract was entered into, nor can unfairness of dealing be imputed to them. In transactions of such a nature as the one before me, it should be possible to provide some procedure whereby the mental condition of applicants might be disclosed to the Minister so that his mind would be brought to bear on the question of the expediency of selling an annuity. Any authorized body selling annuities cannot well be imposed upon unless there has been some misrepresentation or error as to the age of the applicant, and for that situation the contract provides for an adjustment, if and when the fact is discovered. I have given anxious consideration to this point and I have concluded that I cannot hold that Schooley was the agent of the Minister in the sale of the annuity in question, although I entertain no doubt that Schooley was aware of Wilson's condition, and it is quite possible that he advised Wilson against the purchase of the annuity. I do not think that Schooley can be considered an agent of the Minister in the sense contemplated by regulation no. 4. A careful analysis of regulation no. 7, I think, will show that certain postmasters are constituted depositaries of payments made by applicants on account of the purchase of annuities, which they are required to forward to the Government Annuities Branch at Ottawa, and in such

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cases postmasters are allowed a commission; Schooley was allowed and paid a commission of one per cent, under regulation 7 (*b*), for remitting to Ottawa the deposit of $10,000 made by Wilson with Schooley, as postmaster at Merritton. Regulation 7 (*c*) provides for the payment of a commission to postmasters on all moneys remitted directly or indirectly to the Government Annuities Branch, by the purchaser of an annuity, provided it can be shown that the postmaster was instrumental in inducing the purchaser to buy the annuity. It does not appear that Schooley either claimed or was paid any commission on that ground. The acceptance of the deposit of $10,000 by Schooley, as postmaster, would not of itself constitute agency; postmasters are required to accept such deposits for the convenience of applicants for annuities, Wilson in this case.

A careful reading of Schooley's letters to the Superintendent leaves me with the impression that they were written on behalf of, or at the request of Wilson, for the purpose of securing certain information for the latter; these letters do not possess the characteristics usually found in those of an agent to his principal. Wilson himself carried on the major part of the correspondence with the Superintendent of the Government Annuities Branch and the contract appears to have been consummated between them; the contract was forwarded direct to Wilson and he it was who acknowledged receipt of the same; and the Superintendent does not seem to have treated Schooley as its agent in the transaction. Schooley's few letters to the Superintendent would not indicate that he had solicited Wilson to purchase the annuity, and neither do the letters of Wilson. The circular letter which I have already referred to, and which was circulated among postmasters by the Superintendent, and certain of the evidence of the Superintendent himself, point rather strongly to agency, but, on a careful examination of the same, I think, it will be found that both must be construed in a qualified sense, in their application to the facts of this case, and that neither establish agency on the part of Schooley in the controversy here. I do not think, upon the facts before me, it can be said that Schooley acted as the agent of the Minister in the sale of the annuity in question to Wilson. I do not think therefore that I would be justified in holding that Schooley was the

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agent of the Minister in this transaction, or that Schooley's knowledge of Wilson's mental condition can be held to be the knowledge of the Minister, and I reach that conclusion with some regret.

The foundation for the suppliant's contention that the Minister had knowledge of Wilson's state of mind therefore fails, and the petition is accordingly dismissed. This is a case, I think, where I would be justified in declining to make any order as to costs.

Judgment accordingly.