AGENCY, INFANCY AND INCAPACITY

by C. W. O'HARE*

The maxim *qui facit per alium per se* is itself illustrative of one of the essential characteristics of the agency relationship, namely that the agent is empowered to act on behalf of his principal *vis à vis* a third person.[1] The agency transaction, therefore, reveals three legally cognizable dealings—between the principal and the third party, the principal and the agent, the agent and the third party. It is the objective of this article to examine the effect of the contractual incapacity of the infant upon each of these relations. Clearly, the use of the agency concept is not confined to the formation of contracts. Where, for the purpose of illustration, it is assumed that the creation or purported creation of the agency relationship is designed to effect, by way of agent, a contract between the principal and the third party, that contract will be referred to as the primary contract; otherwise the non-contractual purpose will be referred to as the primary object. The contract between the principal and the agent will be referred to as the agency contract and where the appointment is not founded on contract it will be referred to as the agency appointment.

The Infant as the Third Party

The disability of the infant to contract with the principal or with the agent constitutes the classic incapacity of the infant to enter into contracts. The validity of the contract and its enforceability by or against the infant third party is a product of the law relating to the contractual capacity of infants. This holds true whether the contract in question be the primary contract with the principal (and in the case of an undisclosed principal with the agent also) or the collateral contract with the agent for warranty of authority.

Excluding the effect of recent or proposed legislative law reform, the infant's contractual disabilities may be stated succinctly as follows. An infant is bound to pay a reasonable price for goods purchased, if those goods are suitable to his condition of life and to his actual requirements at the time of their sale and delivery.[2] This

* LL.M. (Syd.), Solicitor of New South Wales, Barrister and Solicitor of Victoria, Lecturer in Law, Monash University.

1 W. A. Seavey, "The Rationale of Agency", (1920) 29 *Yale Law Journal* 859, 868; G. H. L. Fridman, *The Law of Agency* 2nd ed. p. 8.

2 N.S.W.: Sale of Goods Act 1923-1953, s.7; Qld: Sale of Goods Act 1896, s.5; Tas.: Sale of Goods Act 1896, s.7; S.A.: Sale of Goods Act 1895-1952, s.2; W.A.: Sale of Goods Act 1895, s.2; Vic.: Goods Act 1958, s.7.

statutory provision is intended to enact the common law contractual or quasi-contractual obligation upon an infant to pay a reasonable price for necessaries supplied to him.[3] Contracts of service are also binding upon him whether in the nature of necessaries or tuition which is subsequently for his benefit,[4] but contracts by which the infant acquires an interest of a permanent nature are capable of being repudiated during infancy or within a reasonable time after the attainment of majority.[5] In Tasmania and Victoria, a contract to lend money to an infant is void.[6] In all Australian states, with the exception of Western Australia,[7] the ratification of a contract for loan, by the infant after he comes of age, is void.[8] In Tasmania and Victoria contracts which give credit to an infant for the purchase of goods, other than necessaries, are void,[9] as are accounts stated with an infant.[10] At common law, all other contracts are not binding upon the infant until he ratifies the contract upon attaining his majority.[11] Such ratification must be in writing to be enforceable against the infant in all states,[12] except Tasmania and Victoria[13] where such enforcement is not available.

THE INFANT AS THE PRINCIPAL

As the principal in the tripartite agency relationship, the infant's legal incapacity may afflict two contracts. As to his ability to enter into the primary contract with the third party (by means of the agent) the learned text-writers agree that as a general proposition whatever a person has power to do himself he may do by means of an agent,[14] or, stated in the converse form, whatever a person cannot do himself he cannot do by means of an agent.[15] In other words, capacity to contract by means of an agent is co-extensive with the capacity of the principal himself to make the contract which the agent is authorised to make.[16]

Although this principle is universally accepted and acceptable, it is unfortunate that the syntax of its pronouncement has been inverted

3 G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract*, 2nd Aust. ed., pp. 510-514.
4 *Ibid.*, pp. 515-517.
5 *Ibid.*, pp. 517-519.
6 Vic.: Supreme Court Act 1958, s.69; Tas.: Infants Relief Act, 1875, s.1.
7 C. L. Pannam, *The Law of Money Lenders in Australia and New Zealand*, (1965), pp. 345-348.
8 N.S.W.: Money-lenders and Infants' Loan Act 1941, s.37; Qld: Money Lenders Act 1916, s.10; Tas.: Infants' Relief Act 1875, ss.1, 2; S.A.: Money-lenders Act 1936, s.11; Vic.: Supreme Court Act 1958, ss.70, 71.
9 Tas.: Infants' Relief Act 1875, s.1; Vic.: Supreme Court Act 1958, s.69.
10 *Ibid.*
11 G. C. Cheshire and C. H. S. Fifoot, *op. cit.* pp. 521-523.
12 *Ibid.*
13 Tas.: Infants' Relief Act 1875, ss.1, 2; Vic.: Supreme Court Act 1958, ss.70, 71.
14 *Halsbury's Laws of England*, 3rd ed., Vol. 1, p. 147.
15 *Ibid.*
16 *Bowstead on Agency*, 13th ed., p. 13.

from the translation of the maxim which it explains. Adherence to the emphasis of the maxim *qui facit per alium facit per se* (freely translated as 'he who acts through another acts in person') on the rights and obligations of *the principal vis à vis the third party*[17] may have averted misconceptions which surround the infant's agency contract. The judicial authorities commonly cited as expounding the relevant law,[18] are invariably directed to the legal relations between the principal and the third party or to persons subjected to a legal incapacity other than that arising out of infancy. They are silent about the infant principal's capacity to enter into the agency contract. It is undeniable that if a contract is entered into by an agent, then the contract is the contract of the principal and that, subject to recognised exceptions,[19] a principal may enter into a contract by means of an agent. It does not necessarily follow that whenever the principal purports to act through the medium of another, that other is his agent. Logically, before a determination of the relations between the principal and the third party can be made, it is imperative to examine the validity of the relationship between the principal and "the agent" through whom the principal acted. In particular, it is essential to scrutinize the infant principal's ability to appoint the agent. In historical perspective the relevant legal principles have been categorised by two competing schools of thought.

Agency contract void

The contention that the appointment of the agent by the infant principal is void, whether the vehicle of appointment be contract or otherwise, was critically reviewed by Professor Webb[20] in the light of a dictum by Denning L.J. in *Shephard* v. *Cartwright*[21] whereby His Lordship announced:

> " . . . the appointment by an infant of an agent . . . has always been void. It has been the law of this country for many centuries that an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everything done by the agent on behalf of the infant is also void and incapable of ratification".[22]

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17 For example, Sir Edward Coke illustrated the application of the allied maxim, *qui per alium facit, per seipsum facere videtur,* by a reference to the satisfaction of the master's obligation *vis-à-vis* a third party when the required act is performed by the servant. Coke, *Institutes of the Laws of England,* Sect. 433, 258a.

18 For example, *R.* v. *Longnor* (1833) 4 B. & Ad. 647; *In re Whitley Partners, Ltd* (1886) 32 Ch. D. 337; *Christie* v. *Permewan, Wright & Co. Pty Ltd* (1904) 1 C.L.R. 693; *Motel Marine Pty Ltd* v. *I.A.C. (Finance) Pty Ltd* (1964) 110 C.L.R. 9.

19 *Halsbury's Laws of England,* 3rd ed., Vol. 1, p. 148.

20 P. R. H. Webb, "The Capacity of an Infant to Appoint an Agent", (1955) 18 *Modern Law Review 461.*

21 [1953] Ch. 728.

22 *Ibid., 755.*

Brief examination of the cases cited in support of this proposition is merited.

Denning L.J. relied upon the authority of two cases, *Ex. P. Zouch, Abbot and Hallet* v. *Parsons*[23] and *Doe d. Thomas* v. *Roberts*,[24] the latter of which was also cited with *Oliver* v. *Woodroffe*[25] in Simpson, *On the Law of Infants* where it was stated:

> " . . . it is a general rule that an infant cannot appoint an attorney or an agent. Such an appointment is void".[26]

In *Zouch* v. *Parsons*, a first mortgagee brought an action in ejectment against a second mortgagee to recover the land which was the subject of both mortgages. Both mortgagees had derived their respective interests by assignment, but the first mortgagee had been assigned his interest by an infant. The issue to be tried on special case was to determine whether the conveyance by the infant was void or merely voidable. Lord Mansfield, L.C., in the course of his judgment, said:

> " . . . all such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand are void: all gifts, grants or deeds made by infants by matter in deed or writing which do take effect by delivery of his hand are voidable, by himself, by his heirs and by those who have his estate. The words which do take effect are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest".[27]

In *Thomas* v. *Roberts*, the executor of a will had for some years accepted rent from a tenant who had remained in occupation of the demised premises after the termination of his tenancy upon the death of the lessor. When the infant next-of-kin brought action by their next friend, the executor, the defendant argued that a fresh tenancy had been created with the infants as lessors, by virtue of the acceptance by the executor of the rent. Of this, Baron Parke observed:

> "A next friend cannot bind an infant because an infant cannot appoint an agent. If an infant makes a feoffment by letter of attorney, *nil operatur*; otherwise if he make the feoffment in person".[28]

In *Oliver* v. *Woodroffe*, the infant defendant gave the plaintiff's attorney a cognovit authorising him to appear and confess the action brought against him to recover a sum for necessaries supplied. By

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23 (1765) 3 Burr. 1794.
24 (1847) 16 M. & W. 778.
25 (1839) 4 M. & W. 650.
26 A. H. Simpson, *A Treatise on the Law and Practice relating to Infants*, 3rd ed., p.8.
27 (1765) 3 Burr. 1794, 1804.
28 (1847) 16 M. & W. 778, 780 and at 781: ". . . the lease of an infant to be good, must be his own personal act."

statute, a cognovit was required to be attested by an attorney appointed by the defendant, which procedure was followed by the infant. Baron Parke asserted:

> "We come to this conclusion . . . which is fatal to the validity of the cognovit . . . it is bad because it falls within the principle which prevents an infant from appointing and appearing in Court by attorney; he can appear by guardian only".[29]

The above dicta have not been expressly challenged from the bench. To a certain extent, however, they may be rationalized to a limited precedent value. The statement of Denning L.J. in *Shephard* v. *Cartwright* must be classed as pure obiter which was not commented upon by the House of Lords when reversing the decision of the Court of Appeal.[30] The verdict in *Thomas* v. *Roberts* was equally justified on the grounds that, upon the facts in that case, the infants had not attempted to appoint the executor their agent. Indeed the jury had found that the executor acted not as "the authorized agent for the children, but as next friend, and without any authority to act".[31] The dicta of Lord Mansfield in *Zouch* v. *Parsons*[32] and Baron Parke in *Oliver* v. *Woodroffe* may be confined to the appointment by infants of attorneys rather than agents in general. Certainly there is substantial authority for the narrower principle that at common law an infant cannot appoint an attorney to confess judgment or represent him in court[33] or for any other purpose.[34]

In the United States of America, the popular view is to limit the application of these decisions to the appointment by infants of attorneys to appear in court.[35] However, judgments which canvass the broader spectrum do exist in the case books. Letters of attorney of whatever nature and other instruments delegating naked authority by infants have been declared void.[36] Some United States judges have been prepared, like Lord Denning, to affirm the extreme abstraction. For example in *Fonda and Hoag* v. *Van Horne*[37] the comment was made:

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29 (1839) 4 M. & W. 650, 653.

30 [1955] A.C. 431.

31 (1847) 16 M. & W. 778, 778.

32 Indeed, the reference to letters of attorney in the quotation cited *supra, n.27* is not recorded in the report of the case at 1 Bl. W. 575.

33 *Holland* v. *Jackson* (1659) Bridgm. J. 69, 73; *Stokes* v. *Oliver* (1696) 5 Mod. Rep. 209, 209-210; *Saunderson* v. *Marr* (1788) 1 Bl. H. 75, 75; *Stephens* v. *Lowndes* (1845) 14 L.J.C.P. 229, 230; *Day* v. *Victorian Railway Commissioners* (1949) 78 C.L.R. 62, 83. And see Bacon, *Abridgement of the Law*, 7 ed., Vol. IV, p. 382; Blackstone, *Commentaries on the Laws of England*, 3rd ed. T. M. Cooley, Bk. 1, p. 463.

34 Bacon, *op. cit.*, Vol. IV, pp. 360-361; *Whittingham's Case* (1603) 8 Co. Rep. 42 b (headnote); *Biddell* v. *Dowse* (1827) 6 B. & C. 255, 265; *Re Keane, Lumley* v. *Desborough* (1871) L.R. 12 Eq. 115, 123.

35 S. Williston, *A Treatise on the Law of Contracts*, 3rd ed., Vol. 2, pp. 11-13; *Casey* v. *Kastel* (annotation) (1924) 31 Am. L.R. 1001-1002.

36 *Bool v. Mix* (1837) 17 Wend. 119, 131; *Dexter* v. *Hall* (1873) 21 L. ed. 73, uo; *Wambole* v. *Foote* (1878) 2 N.W. 239, 241.

37 (1836) 15 Wend. 631.

> "It may be for the benefit of an infant to appoint an attorney or agent to sell his lands but such an act would be clearly void".[38]

In *Siegelstein* v. *Fenner and Beane,*[39] the court said:

> "At common law powers of attorney and agencies of all sorts were among those contracts of an infant which were absolutely void . . .".[40]

The trend of American courts is to treat the agency contract as being voidable at the option of the infant and thus enable the infant to effect, via the agent and with the same degree of perfection, that which he could have achieved himself by dealing directly with the third person. As Professor Webb explains, if we are not prepared to adopt this approach, two further categories must be annexed to the list of contracts reflecting the incompetency of the infant—the void agency contract and the void primary contract when formed by way of an agent.[41]

Agency contract voidable

The United States courts have generally been constrained to reject the proposition that the appointment of an agent by an infant is void, yet to acknowledge its historical validity.[42] The following extract from *Courselle* v. *Weyerhauser*[43] typifies this development:

> " . . . the almost universal modern doctrine is that all the facts and . . . the almost universal modern doctrine is that all the acts and contracts of an infant are merely voidable. Upon this rule there seems to have been ingrafted the exception that the act of an infant in appointing an agent or an attorney, and consequently all acts and contracts of the agent or attorney under such appointment, are absolutely void.
>
> On principle we think the power of attorney of an infant and the acts and contracts made under it, should stand on the same footing as any other act or contract and should be considered voidable in the same manner as his personal acts and contracts are considered voidable".[44]

Traditionally, the English and Australian courts are more reluctant than their American counterparts to deviate from the strict adherence to precedent for reasons of social expediency. Professor Webb, however, contends that modern English common law may have come to recognise, implicitly, the validity of the infant's agency contract. Notable cases comprising disputes over contracts of service and instruction to infants are cited to substantiate his argument.[45]

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38 *Ibid.*, 633.
39 (1941) 17 S.E. 2nd 907.
40 *Ibid.*, 909.
41 P. R. H. Webb, *op. cit.*, pp. 461-462.
42 *Casey* v. *Kastel* (1924) 142 N.E. 671, 673; *Blomquist* v. *Jennings* (1926) 250 Pac. 1101, 1103; *King* v. *Cordrey* (1935) 177 Atl. 303, 306-307.
43 (1897) 72 N.W. 697.
44 *Ibid.*, 699.
45 P. R. H. Webb, *op. cit.*

In *Mackinlay* v. *Bathurst*[46] and *Shears* v. *Mendeloff*,[47] infants entered into contracts for their management by the respective contractees, which *inter alia*, empowered the contractees to bind the infants in contracts with third parties, and to that extent agency relationships existed. However, to the extent that the contractees' performance of services could not affect the infants' legal positions *vis-à-vis* third parties, the contracts were merely contracts of service, and it was on this basis that the cases were argued and adjudged. True it is that in the former case the contractee was suing for commission in respect of services rendered as agent and in the latter case Avory J., recognised that "the agreement was nothing more than an appointment of the plaintiff as the defendant's agent on commission",[48] nevertheless, neither court analysed the contract before it by reference to a legal principle exclusive to the law of agency, but rather, each applied the classic tests of competency as if the contract were the orthodox infant's contract and arrived at a decision which would have prevailed irrespective of the agency relationship. In the celebrated case of *Doyle* v. *White City Stadium*,[49] the court accepted that the infant's primary contract in dispute had been formed by medium of his agent and, as neither party questioned the authority of the signatory, proceeded to adjudicate on the substantive merits of the primary contract. Nor in *De Francesco* v. *Barnum*[50] and *Murray* v. *Harringay Arena Ltd*,[51] did the courts attach any particular significance to the relationship of the infant and his agent. One may readily infer from these decisions that the infant's agency contract is not void but bears the same legal characteristics as the orthodox infant's contract.

The likely categories into which the agency contract could be grouped, would be either the contract for service by the agent beneficial to the infant (in the nature of necessaries or instruction) in which case it would be binding upon the infant, or the contract which would be unenforceable against the infant in Tasmania and Victoria and which, elsewhere in the states of Australia, would not be binding on the infant unless and until he were to ratify it in writing. Professor Webb submits that in determining whether the agency contract is to be beneficial or a necessary service to the infant, reference should be made to the primary contract or the proposed primary contract.[52] This was the approach taken by the Supreme Court of New South Wales in *McLaughlin* v. *Darcy*.[53] In

46 (1919) 36 T.L.R. 31.
47 (1914) 30 T.L.R. 342.
48 *Ibid.*, 342.
49 [1934] 1 K.B. 110.
50 (1890) 45 Ch. D. 430.
51 [1951] 2 K.B. 529.
52 P. R. H. Webb, *op. cit.*, pp. 471-472.
53 (1918) 18 S.R. (N.S.W.) 585.

that case, the plaintiff sought to recover remuneration, from the defendant's estate, for services he performed on behalf of the defendant, when, as the defendant's solicitor, he travelled from Sydney to Melbourne to interview the responsible authorities and present his client's case for obtaining a passport to travel in America. The infant client was a professional pugilist who required further tuition and experience in his art in the United States. It is not clear from the report what authority the plaintiff had been given by his client but it would appear that the solicitor was at least authorised to make representations on behalf of his client. The court directed its consideration to the contract as a conventional infant's contract and found that teaching and instruction in America would have constituted a necessary for the infant and since "what is ancillary to a necessary may be a necessary"[54] held that the contract for service and agency was binding upon the infant.

The consequence of this approach is that an agent who is appointed by an infant to contract for necessaries, to contract for beneficial service or to acquire a permanent interest on behalf of the infant, could enforce the agency contract against the infant principal.[55] The voidability theory, yet to be defined clearly, has more to commend it in the climate of modern community and commercial standards than the incongruous rule re-stated in *Shephard* v. *Cartwright,* a rule which incidentally, would place the agent in an invidious position unless he were to exclude the implied warranty of his authority to act.[56] Yet, until 7th May, 1970, we could not have discounted the possibility of being valid law, the rule denying the infant the right to act through an agent. On that date, however, Lord Denning, M.R., some seventeen years after his initial pronouncement, took up the cudgels of law reform and in *G.(A.)* v. *G.(T.)*[57] decided to clarify this vexing issue.

In *G.(A.)* v. *G.(T.),* the female complainant initiated proceedings for maintenance against an infant male whom she alleged to be the father of her illegitimate child. Statutory provisions enabled the complainant to commence proceedings out of time upon proof that the defendant had paid money for the maintenance of the child. Endeavouring to invoke this provision, the complainant sought to prove that certain payments made to her by the defendant's parents were, in fact, made on behalf of the infant defendant, by introducing into evidence admissions to this effect alleged to have been made by the parents. The Court of Appeal, on appeal from a case stated, was asked to determine, *inter alia,* whether an infant had the capacity to appoint [his parents] agents. The defendant denied the appointment

54 *Ibid.,* 591 citing *Evelyn* v. *Chichester* (1765) 3 Burr. 717.
55 P. R. H. Webb, *op. cit.,* pp. 471-472.
56 Cf. *Goldfinger* v. *Doherty* (1935) 276 N.Y. Supp. 289.
57 [1970] 3 W.L.R. 132.

in fact and argued that, as a matter of law, an agency appointment by him as an infant would have been void. In advancing this defence, the defendant relied upon the dictum of Denning L.J. in *Shephard* v. *Cartwright*. The court found no evidence to support the facts alleged and on the point of law, Lord Denning M.R. remarked:

> "I am afraid I have caused some trouble here: because in *Shephard* v. *Cartwright*, I said that ' . . . an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means'. That statement taken by itself is too wide. It must be read into its context and limited accordingly. The correct proposition is that an infant cannot appoint an agent to make a disposition of his property so as to bind him irrevocably. A disposition by an agent for an infant is voidable just as a disposition by the infant himself would be so long as it is avoided within a reasonable time after attaining full age".[58]

It is submitted untenable that the unequivocal dictum in *Shephard* v. *Cartwright* can be rationalized, in context, to that propounded in the above extract. Nevertheless, in the latter case His Lordship did express clear disapproval of the broad proposition that an infant is unable to appoint an agent. In so doing, His Lordship relied upon the implications of *Doyle* v. *White City Stadium*,[59] to equate the infant's disability in the agency contract with that of the orthodox contract. Lord Denning enunciated the general principle:

> "Whenever a minor can lawfully do an act on his own behalf, so as to bind himself, he can instead appoint an agent to do it for him".[60]

The tenor of these statements is more satisfactory than that discernable in the erstwhile dictum. There remain, however, two unresolved issues:

Firstly, the above passages focus upon the validity of the primary contract or object. It follows from the premise that if the primary contract or object is to be valid and if an agent has been interpolated to represent the infant principal then the appointment of the agent cannot be void. Yet the decision does not explain the status of the agency contract. Presumably, the agency contract does not automatically inherit the status of and suffer the fate of the primary contract or object. The implication of the English cases and of the American cases is that the agency contract should be adjudged as an orthodox trading contract and independently of the primary contract, subject perhaps to the rider that reference may be made to the primary contract to determine the state of necessity or the beneficiality of the agency contract to the infant.[61] Pursuing this line of reasoning,

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58 *Ibid.*, 137.
59 [1935] 1 K.B. 110, discussed *supra* n. 49.
60 [1970] 3 W.L.R. 132, 137.
61 *McLaughlin* v. *Darcy* (1918) 18 S.R. (N.S.W.) 585.

it becomes evident that a variety of inconsistencies between the status of the agency contract and the status of the primary contract can exist. For example, an infant may engage an agent to obtain a loan of money for him in Tasmania. It is axiomatic that if the primary contract would be void, the infant cannot overcome his incapacity in the primary contract by dealing through an agent, but it does not follow that the agency contract is also void. Conceivably, the circumstances surrounding the formation of the agency contract, as influenced by the infant's requirements for the loan, may justify the conclusion that, notwithstanding the voidness of the primary contract, the agency contract qualifies as a necessary service to the infant or at least a contract, not binding upon him but capable of ratification and, therefore, not void. And yet the opinion has been proffered that:

> "An infant can only appoint an agent in circumstances in which he himself has the power to act. This restricts an infant's capacity to appoint an agent to contracts which he himself can validly make".[62]

A further example arises where an agent is appointed to make admissions detrimental to the infant. In *G.(A)* v. *G.(T.)* it was confirmed that an infant may lawfully make admissions and, on the formulation of Denning M.R., he may lawfully appoint an agent for this purpose. If, however, reference is made to this primary object the court may be in some difficulty coming to the conclusion that the agency contract is binding upon the infant. At most it would appear to be binding only in the event of its ratification after the infant attains his majority, where possible, and until then the agent would be unable to seek redress for his commission.

Secondly, one can only speculate about the ability of an infant to give a power of attorney at common law. The grant of a power of attorney is nothing more, in principle, than the appointment of an agent. There would seem to be no cogent reason why an infant's power of attorney should not stand on the same footing as a comparable appointment of an agent. The earlier English cases cited are adamant, however, and the American courts have made the concession, that the infant is denied the right to appoint an attorney, particularly for the purpose of confessing judgment. It may well be that an infant can make detrimental admissions in legal proceedings only in person, that is, through his next friend or guardian *ad litem.* The reason attributed to this rule in the Canadian case of *Johannson* v. *Gudmundson*[63] was that such a power of attorney would not be to the infant's benefit and would therefore be void.[64] Curiously, the Law Commission (U.K.), in its report on *Powers of Attorney,*[65] made no particular reference to the incapacity of infants.

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62 G. H. L. Fridman, *op. cit.*, p. 39.
63 (1909) 19 Manitoba L.R. 83.
64 *Ibid.*, 88-89, cited in P. R. H. Webb, *op. cit.*, p. 466.
65 Law. Comm. 30.

THE INFANT AS THE AGENT

The consensus of learned authors' opinions is that an infant can act as agent and may be the donee of a power of attorney,[66] subject, of course, to his having sufficient mental capacity to form the necessary intentions to create a contract or do an act. It would be irrational to deny validity to the primary contract or primary object, effected by way of an infant agent, when the infant is not a principal party but merely the instrument of creation.[67] Two aspects of the relationship between the infant agent and the third party, however, merit some attention.

As a general proposition, a third party who contracts with an agent for an undisclosed principal, may elect to treat either the agent or the undisclosed principal as the contracting principal.[68] In the event of that agent being an infant, the contract will be subjected to rules relating to the disabilities of infants. Whether such a contract would be analysed on its face value to evaluate the necessariness or beneficiality of the subject matter of the contract to the infant or to treat property passing as the infant's acquisition, or on the other hand, to disqualify the infant as gaining any personal benefit on the basis that he is a constructive trustee of the contract for his principal, is an issue too remote from the topic of this article to delve into. To obviate the difficulties of enforcement, the third party would be wise to elect to treat the undisclosed principal as the contracting party. Even where the primary contract would have been void, had the infant been the principal party, it would appear to be valid as against the undisclosed principal.[69]

It is commonly said that the agent who procures a contract or does an act on behalf of his principal, impliedly warrants to the third party that he has the requisite authority to represent his principal in forming the contract or doing the act.[70] There is some doubt whether the liability of this type of warranty arises out of contract or quasi-contract or is otherwise derived from the law of misrepresentations.[71] In *Leggo* v. *Brown and Dureau, Ltd,*[72] the High Court rationalized the cause of action as contractual, Knox C.J. holding that the implied promise of authority being supported by the consideration of the third party in entering into the supposed primary contract.[73] Isaacs J. adverted to the elements of the liability as an inducement by the agent to the third party to enter into the primary contract on the

66 For example, *Halsbury's Laws of England,* 3rd ed., Vol. 21, p. 184.
67 G. H. L. Fridman, *op. cit.,* p. 40.
68 *Ibid.,* pp. 174-177.
69 (1932) 6 A.L.J. 88.
70 G. H. L. Fridman, *op. cit.,* p. 164.
71 *Ibid.,* pp. 165-166.
72 (1923) 32 C.L.R. 95.
73 *Ibid.,* 99.

basis of the agent's authority and the consequent reliance by the third party upon that representation.[74] His Honour affirmed that the natural inference to be drawn from the fact of the third party entering into the primary contract is that he had relied upon the representation.[75] In *Brownett* v. *Newton,*[76] the High Court expressed the rule in terms of an inducement by representation and a reliance on that representation, but pointed out that such matters were for the determination of the jury.[77] In this case also, the High Court envisaged the assertion of authority, whether express or implied, as constituting the basis of an implied contract between the agent and the third party.[78] Clearly the implied liability also exists where the primary object is non-contractual.[79] The precise conceptual nature of the liability warrants an investigation too extensive to be included here. Suffice it to say that there has evolved, concomitant with the development of the law of contract and quasi-contract, a cause of action giving rise to damages for the breach of the agent's undertaking of his authority. It is submitted that such an action would be defensible by the infant agent (until he ratified his liability in those states where ratification is justifiable) unless the action could be substantiated as the tort of deceit on the grounds of a fraudulent misrepresentation.[80]

The discussion of the rights and liabilities of the infant agent and the third party, *inter se,* presupposes that the infant is capable of being appointed agent. Here again, the affirmative statements of the text writers are focused on the validity of the primary contract.

The, now unreliable, dictum in *Shephard* v. *Cartwright* did not go so far as to suggest the appointment of an infant agent to be void. Subject to the infant having sufficient physical and mental competency there is no reason to refute a non-contractual agency appointment. If, however, the instrument of appointment is contractual then the contract should exhibit the conventional characteristics of contractual incapacity. On this basis, the agency contract would appear to qualify for one of two categories. In any given circumstances the agency contract may amount to a necessary by the payment of a commission to an infant engaged in the practice of a professional agent, e.g. a mercantile agent. Failing this the agency contract must be classed as unenforceable against the infant until ratified in writing (in those states where ratification is permissible). Consequently, the principal's remedies for the proper performance of the agent's obligations would

74 *Ibid.*, 105-107.
75 *Ibid.*, 107-108.
76 (1941) 64 C.L.R. 439.
77 See also *Lee* v. *Irons* [1958] V.R. 436.
78 See also *Black* v. *Smallwood* (1967) 117 C.L.R. 52; *Smallwood* v. *Black* [1964-5] N.S.W.R. 1973; *Irwin* v. *Poole* (1953) 70 W.N. 186.
79 *Starkey* v. *Bank of England* (1872) 7 Ch. App. 801; *British Russian Gazette and Trade Outlook Ltd* v. *Associated Newspapers Ltd* (1884) 13 Q.B.D. 363.
80 P. F. P. Higgins, *Elements of Torts in Australia,* (1970), p. 559.

be restricted, as in the case of a non-contractual agency appointment, to those obligations arising out of the agent's fiduciary position. On the other hand the infant may be able to bring action under the contract for the payment of his commission. Whatever the difficulties of enforcement, the appointment would be valid and therefore capable of supporting the link between the principal and the third party.