

FILE NO. 71065

October 13, 1939

Mr. Elmer F. Bernhardt, Chief  
Central Payroll Bureau  
City Hall  
Baltimore, Maryland

Dear Sir:

Please refer to your letter of October 9th, 1939, addressed to the City Solicitor, wherein you request an opinion as to whether a power of attorney executed by Robert S. Downs, who is alleged to be mentally incompetent, to his wife, Clara E. Downs, is sufficient to protect the interests of the City in connection with the indorsing and cashing of checks, issued by the City to the order of Mr. Downs, by Mrs. Downs.

The aforesaid letter indicates that the said power of attorney was executed by Mr. Downs while mentally incompetent but before any adjudication of insanity and this opinion is predicated upon the foregoing assumption.

Generally, a contract made by a person non compos mentis, before being adjudicated mentally incompetent, while not absolutely void, is voidable; such a contract is not voidable at the arbitrary discretion of the incompetent person but only when the other party to the contract knows of the disability or there is some element of bad faith or unfairness involved.

Atkinson vs. McCulloch, 149 Md. 862;  
Flach vs. Gottschalk Co., 88 Md. 368.

So far as the appointment of an agent by an incompetent is concerned, the lunatic being unable to comprehend business, he is equally wanting in discretion to select an agent to do such business. Accordingly, a person non compos mentis is no more capable of constituting an agent than of binding himself by contract.

It is, therefore, suggested that all future payments that may become due and owing to Mr. Downs be retained by the City until a committee has been