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INTRODUCTION

The law expects its teenagers to behave as responsible adults when questions of criminal or tort liability are involved, but expects them to behave in a much less responsible fashion when contractual liability is concerned. Because the law expects young people to be imposed upon, it gives them the privilege of avoiding their contracts. In fact, how minors behave contractually is a matter of speculation. Perhaps, their behavior depends upon how those around them think they will behave—an example of a self-fulfilling prophecy at work. Modern educational theorists apparently are of the view that an adolescent has all the mental equipment necessary to handle conceptual reasoning at an age far earlier than anyone expects.[1] Nevertheless, injustice is often visited on the adult who enters into a contractual arrangement with a minor.

For example, assume that Henry, an enterprising elderly minor, requires the use of a panel truck in his newspaper-delivery business. He approaches a truck dealer and selects a handsome blue vehicle that is certain to impress his customers. The dealer, in an excess of caution, inquires of his age and whether he might be mentally ill. "No," replies Henry, "I am perfectly all right, and I am well over the age of eighteen years."

Henry does appear to be in all respects what he says he is. He is clean-shaven, well-dressed, and short-haired. The panel-truck transaction is in no way unreasonable, either from the dealer's point of view or from Henry's, so the dealer sells the truck to Henry. Henry pays one-third of the cost in cash and finances the remaining two-thirds with the usual negotiable promissory note and security device, which the dealer promptly discounts to a local bank. The bank is in all respects a holder in due course.[2]

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[1] 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES *Developmental Psychology* 140-47 (1968).

[2] That is, it meets the test of N.C. GEN. STAT. § 25-3-302 (1965).

And now assume that as Henry drives away from the dealer's place of business, he violates the state's reckless driving statute and, as a result thereof, is involved in a two-car collision in which the panel truck is demolished and two persons are severely injured. As the law applies today, Henry has clearly violated a criminal statute and is liable for the injuries caused by his negligence. He has, in short, committed both a crime[3] and a tort.[4] But if Henry is indeed a minor (in North Carolina a person who has not yet reached the age of eighteen), he may recover his down payment and successfully avoid liability on his promises to pay any balance—even as against a holder in due course—simply by returning to the dealer the mass of twisted metal that now represents the panel truck. The contracts of minors are voidable at their option.[5]

On the other hand, if Henry were nineteen but mentally ill—suffering, let us say, from "delusions of grandeur"—he could not recover the down payment, and his legal liability to pay the balance clearly would be fixed. The contracts of the mentally ill, in the absence of notice of the illness to the other party, may be enforceable if they are fair and reasonable.[6] Moreover, the defense of mental illness is not valid against a holder in due course.[7]

A Suggested Approach

It is the purpose of this article to explore the ramifications of these diverse results in terms of contractual liability. The hypothesis of this article is that perhaps the time has come to treat the incapacity of minors in a manner similar to the incapacity of the mentally ill so as to redress the severe consequences visited upon the adult who has entered into a contractual relationship with a minor. Indeed, courts have attempted to achieve such a result through the use of fictions, and their experience with the contractual liability of the mentally ill bodes well for the application of a similar rule to the contracts of minors. Incapacity should be a device for controlling imposition on those persons who actually are imposed upon rather than an arbitrary rule that cuts hard and harsh and, at least upon occasion, turns upon something as irrelevant as chronology. It is not that some minors do not need protection

[3]*Cf.* State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969).
[4]Welch v. Jenkins, 271 N.C. 138, 155 S.E.2d 763 (1967).
[5]Fisher v. Taylor Motor Co., 249 N.C. 617, 107 S.E.2d 94 (1959).
[6]Restatement (Second) of Contracts § 18C(2) (Tent. Draft No. 1, 1964).
[7]Sprinkle v. Welborn, 140 N.C. 163, 52 S.E. 666 (1908).

from imposition; they obviously do. But many persons who happen not to be fortuitously able to argue minority are likwise imposed upon. And, of course, the converse is also true; many minors who enter into reasonable contractual arrangements and who have not been imposed upon in any fashion should bear contractual liability.

CAPACITY'S POLICY IMPLICATIONS

Within the rubrics of contract law these matters are gathered under the heading of capacity to contract.[8] As is so often the case, such a large concept embraces many overlapping and sometimes inconsistent implications of policy. The mentally incompetent's contract may be attacked for lack of capacity, but in most instances the result turns upon the reasonableness of his manifestation to the other party[9]—an approach often used to illustrate the policy of objective mutual assent.

Older cases commonly spoke of the act of the incompetent as being absolutely void.[10] In the days when contractual liability was perceived in terms of subjective meeting of the minds, this conclusion seemed to follow naturally. Moreover, it may have been that the law courts, lacking the equitable power to restore or to reconvey, could only protect the incompetent by declaring his act absolutely void.[11] In any event, the modern cases speak of the act of the incompetent not as void but rather as voidable at the incompetent's option, and then only under certain circumstances later described. The policy of protecting the expectations and reliance raised by objectively viewed acts is thus supported.

On the other hand, the incompetent who has had a guardian appointed for him has no capacity to contract, although in fact he may be perfectly able to form the requisite mental assent. The policy here disregards reasonable expectations protected by the objective theory of assent and, instead, paramounts certainty of transactions concerning valuable property of the ward and the conservation of the ward's assets.[12]

The contracts of infants are also voidable because of the infant's

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[8]RESTATEMENT (SECOND) OF CONTRACTS § 18 (Tent. Draft No. 1, 1964); RESTATEMENT OF CONTRACTS § 18 (1932).

[9]Wadford v. Gillette 193 N.C. 413, 137 S.E. 314 (1927).

[10]Joiner v. Southern Land Sales Corp., 158 Ga. 752, 124 S.E. 518 (1924); Daniel v. Dixon, 161 N.C. 377, 77 S.E. 305 (1913).

[11]ALLEN, FERSTER, & WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY 276 (1968).

[12]RESTATEMENT (SECOND) OF CONTRACTS § 18A & Comment *a* (Tent. Draft No. 1, 1964).

lack of capacity.[13] But again the reason seems not to be that a minor cannot in fact form the requisite mental assent. Rather, it is that minors can be imposed upon more easily than others and that to protect them the law must shelter them—all of them—from such consequences. The trouble is, however, that the shelter shelters them too much.

CAPACITY AND THE NORTH CAROLINA MINOR

The North Carolina case of *Greensboro Morris Plan Co. v. Palmer*[14] illustrates how far the arbitrary application of the chronological-age rule of capacity carries a good court from justice. A nineteen-year-old married, emancipated minor bought a truck on credit for use in his business. The cost of the truck was more than three thousand dollars. Profits from the use of the truck enabled the minor to pay more than two thousand dollars of the debt, but upon his eventual default the seller and the finance company found it necessary to repossess the truck and sell it at auction, where it brought seven hundred dollars. They then sued the minor for the balance due, which by their calculations came to 1,308 dollars. When the minor disclosed his defense, the seller and the finance company amended their pleadings to assert a cause of action sounding in false representation and deceit for the same amount. Three of the five justices affirmed the trial judge's decision that the minor could avoid the contract, recover the two thousand dollars paid, and not be held accountable for his tort of misrepresentation.

In so holding, the supreme court aligned North Carolina with those states that have held that a minor's intentional misrepresentation of his age has no effect on the incapacity rule. The minor not only avoided liability on that portion of his undertaking that he had not yet performed but also recovered more than two thousand dollars that he had paid on the debt. All that the dealer and finance company received as a result of the transaction was seven hundred dollars. The minor had the use of the truck without cost for at least six months and the benefit of the profits that he had made during that time.

Nevertheless, this is to make no brief for the finance company and the dealer, since the contract undoubtedly had plenty of fat in it by way of substantial interest charges, time-finance charges, and the like. But sharp practice inflicted upon a deceitful minor ought to add up to

[13]Fisher v. Taylor Motor Co., 249 N.C. 617, 107 S.E.2d 94 (1959).
[14]185 N.C. 108, 115 S.E. 822 (1923).

zero—not two thousand dollars for the minor!

If the court had applied the principle advocated in this article to the facts of *Palmer*, it could have treated the matter in equitable terms to the extent that the contract had been performed. That is to say, the court could have refused to permit the minor to exercise his privilege to the extent of actual performance and yet permitted avoidance as to the executory portion of the transaction. One could argue further that the minor ought to be held accountable in damages for his intentional misrepresentation. However, it should be sufficient to restore the parties as nearly as possible to the *status quo ante*.

Earlier cases in North Carolina support the majority's decision in *Palmer*. The plaintiffs in that case asserted the misrepresentation as an affirmative cause of action, but the minor's misrepresentation of his age in a contractual transaction may also be viewed as a defensive matter—an act that should estop him from asserting the truth that he is a minor. That an infant who has misrepresented his age cannot be estopped to assert this defense was established in *Carolina Interstate & Loan Ass'n v. Black*.[15] There a minor had executed a note and a mortgage. Subsequently, a foreclosure action was met with the defense of infancy, and the reply was that the minor was estopped to assert such a defense by her representation of full age. In holding that no estoppel could be asserted, the court used colorful language in support of the policy of the arbitrary rule:

> If the courts should sanction this doctrine [estoppel], the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened up to reckless youths to evade the law by lying. The courts would thereby put a premium upon falsehood and hold out the temptation to infants and to others, who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander and the other to extort the patrimony intended to prepare a child for future usefulness.[16]

Colorful indeed, but the result is that the knowing minor can still lie about his age, drive the car over a cliff, recover his down payment, and go his legal merry way. *Fisher v. Taylor Motor Co.*[17] illustrates this fact by holding that an infant is under no duty to account for the use

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[15]119 N.C. 323, 25 S.E. 975 (1896).

[16]*Id.* at 329, 25 S.E. at 976.

[17]249 N.C. 617, 107 S.E.2d 94 (1959).

value of goods in his possession under the contract of sale. In *Fisher* a minor represented that he was of full age (at least, according to the dealer's pleadings) and bought a car with a down payment, a promissory note, and a security device. Following a wreck that reduced the value of the new car to approximately fifty dollars, the minor brought an action to recover his down payment. In holding for the minor, the court observed that the diminution of the value of the car as a result of the wreck was the " 'very improvidence against which the law seeks to protect him.' "[18] Of course, the minor in possession of anything of value that but for the contract would have been the adult's must return it to the adult. The legal effect of the minor's avoidance of the contract for the purchase of the personalty is to revest title in the seller.[19]

Another North Carolina case involving the estoppel argument deserves brief attention. In *McCormick v. Crotts*[20] McCormick sold Crotts a motion picture projection machine and snaplight lens for use in the Garden Theater in Biscoe, North Carolina. Crotts bought on credit, and later McCormick found it necessary to sue on the promissory note and to foreclose the security instrument that had accompanied the transaction. Crotts filed an answer in which he asserted as a defense that the machine was defective. Nearly twenty months later but prior to trial, Crotts amended his answer to include a defense of infancy and asked that a guardian *ad litem* be appointed for him. The guardian then tendered back the equipment and demanded a return of the money paid. The trial judge, however, held for the seller, accepting the argument that because Crotts did not assert the defense of infancy in his initial pleading, he was estopped to raise it later. The supreme court reversed for the obvious reason that if the buyer lacked the capacity to contract, his act of filing an answer was subject to the same objection.

GASTONIA PERSONNEL CORPORATION V. ROGERS AND THE COMMON LAW

For those who enjoy that many-faceted puzzle that common law opinions sometimes produce, the recent case of *Gastonia Personnel Corp. v. Rogers*[21] is a treasure. A nineteen-year-old married student, about to become a father, decided that he should abandon his schooling

[18] *Id.* at 620, 107 S.E.2d at 97, *quoting* Collins v. Norfleet-Baggs, Inc., 197 N.C. 659, 660, 150 S.E. 177, 178 (1929).

[19] Poe v. Horne, 44 N.C. 398 (1853).

[20] 198 N.C. 664, 153 S.E. 152 (1930).

[21] 276 N.C. 279, 172 S.E.2d 19 (1970).

and seek employment. He entered into an agreement with an employment agency, the terms of which included a promise to pay the agency 295 dollars if, as a result of a lead furnished by the agency, he obtained employment as a draftsman. He did gain such employment as a result of a lead furnished by the agency, but when it came time to pay he refused, valuing his economic credit and reputation for integrity, as Mr. Justice Lake was to put it in his dissenting opinion, "at something less than $295."[22] The trial court, applying the common law rule that a minor's contract is voidable at his option, gave judgment to the minor on his defense of infancy. The nonsuit was subsequently upheld by the appellate division.[23] The supreme court reversed in a sparkling modern example of common law intricacy and wisdom. If the contract with the employment agency were for a necessity, the plaintiff should have gotten to the jury, at least on the question of reasonable value. In what seems to be an obvious attempt to rectify the imbalance between the adult and the minor, four of the seven justices classified the nature of the transaction as one for necessaries and returned the case to the trial court. Plaintiff had indeed offered evidence sufficient to withstand defendant's motion for a nonsuit.

That this fiction (Mr. Justice Lake's dissent amply and ably disposes of the classification of this particular contract as one for a necessary[24]) achieves a roughly just result when an adult in good faith deals with an older minor seems only part of the case's gloss. Assume that the court does in fact decide that something that was not a necessity before is one now. If it has done that, then it has changed the law. Yet, where is the power to change law in our society—in the legislature or in the courts? That question generated several pages of argument in the opinion.

Finally, what should a sensible judge do when faced with a situation in which a rule that has been applied with rigor and severity for centuries to the facts before him creates an obvious injustice? Surely nothing is revealed to indicate that the employment agency dealt with Rogers on anything but a good faith basis; apparently, he seemed to be an adult in every respect. It does no good to talk of returning consideration here; strong precedent has it that an infant need not compensate the adult for any benefit conferred if such benefit could not be returned.

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[22] *Id.* at 292, 172 S.E.2d at 27.

[23] Gastonia Personnel Corp. v. Rogers, 5 N.C. App. 219, 168 S.E.2d 31 (1969).

[24] 276 N.C. at 288, 172 S.E.2d at 25.

THE "NECESSARIES" CONCEPT AND FAIRNESS

Rough justice between the adult and the minor who have contracted with one another has sometimes been achieved through the utilization of the concept of necessaries. Its rationale is said to be that of aiding the minor. If his credit were not available for the purchase of foodstuffs, then the privilege that he has of avoiding his contracts would actually work against him; he would not be able to buy those items on credit that he must have in order to exist.

In reading the cases one is struck by the continuing attempt to use the concept of necessaries to achieve some sort of balance in the exchange. The adult can receive at least the reasonable value of the goods sold to the minor when they are classified as necessaries, and, conversely, if the deal seems overreaching, the minor is "off the hook" by a decision that the item is not a necessary, in which case the promise is not enforceable. In *Rogers* the majority used the concept to permit an adult to get to the jury on the question of the reasonable value of the services rendered. The use of the concept in that case is indicative of judicial dissatisfaction with the arbitrary application of the privilege of avoidance given to minors. The strict application of the "necessaries" rule should have permitted the minor to avoid the contract, and, indeed, the majority opinion expressly conceded that the lower courts had correctly followed precedent. However, the time had come to change precedent—or so the majority felt.[25]

Consider now the role of the automobile. Despite the presentation of factual situations clearly indicating that the minor needed the car in his work to support himself and his family, the majority rule still holds that a car cannot be a necessary.[26] Perhaps, the reluctance to classify an automobile as a necessary (and thus give the adult some recovery) is a reflection of the widespread feeling that automotive merchandising may not represent an exchange that is foursquare, particularly when one of the parties to the transaction is a young and inexperienced consumer.

A medical education—valuable though it may be—has been held not to be a necessary in an opinion that reviews the rich history of this exception to the rule that permits minors to avoid their contracts.[27] Moreover, there is at least dictum supporting the proposition that insur-

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[25]276 N.C. at 286, 172 S.E.2d at 24.

[26]Bancredit, Inc. v. Bethea, 65 N.J. Super. 538, 168 A.2d 250 (App. Div. 1961); Barger v. M. & J. Finance Corp., 221 N.C. 64, 18 S.E.2d 826 (1942).

[27]Turner v. Gaither, 83 N.C. 357 (1880).

ance cannot be classified as a necessary.[28] Finally, a bridal gown for a young girl has been declared to be a necessary,[29] but timber to build a home bought by a young minor father has been held not to be a necessary.[30] The judge's reasoning in the latter case is intriguing. If a minor could be held to a contract to purchase timber for a home, then he could also be held to pay for the nails, the glass, and the workmen's wages—for the whole house. And if for the whole house, then for a wagon, a horse, and soon the exception would destroy the general rule.[31] Exactly so, but is this not a fair description of the consequences of the holding in *Rogers*!

In this same context some confusion exists about the role of emancipation. In the realm of contractual liability, the concept refers to the fact that a young man who is living apart from his parents and "on his own" may find himself legally bound for the reasonable value of the necessaries that he purchases.[32] If he is still within the control of his father or guardian, then he cannot even incur the limited liability that is affixed to an emancipated minor when he purchases necessaries.[33] Simply stated, this rule is based upon the proposition that no one should tell a father what to buy for his son. That statement comes from a case that could be said to have established an exception to the proposition that a minor living with his father may not incur liability for necessaries.[34] If the minor is seriously injured and requires immediate medical treatment and the father cannot be reached, the infant may be held accountable for the reasonable value of the services and treatment that he receives, especially when he later recovers such a sum from the tortfeasor who injured him.[35]

The North Carolina cases mirror the rules that accord great flexibility to this concept of necessaries. The basic question of what is a necessary is a mixed question of law and fact.[36] The decisions have it that whether a class of articles can be said to be necessaries is a matter of law for the judge to determine, but whether a given item within such a class of articles was actually a necessary for the particular minor is a

[28]Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 25, 40 S.E. 822, 823 (1902).
[29]Jordan v. Coffield, 70 N.C. 110 (1874).
[30]Freeman v. Bridger, 49 N.C. 1 (1856).
[31]*Id.* at 3.
[32]Smith v. Young, 19 N.C. 26 (1836).
[33]Britt v. Cook, 34 N.C. 67 (1851).
[34]Cole v. Wagner, 197 N.C. 692, 150 S.E. 339 (1929).
[35]Bitting v. Goss, 203 N.C. 424, 166 S.E. 302 (1932).
[36]Jordan v. Coffield, 70 N.C. 110, 113 (1874).

question of fact for the jury to determine.[37] Since all of the circumstances surrounding the status of the minor are considered—his station in life, the nature of the subject matter, and so forth—it is conceivable that almost anything could be a necessary, given the appropriate status in the infant.[38] It is this device—that the law may accord the label "necessary" to a class of articles—that enabled the court to permit the jury to determine the reasonable value of the contract to find employment in *Gastonia Personnel Corp. v. Rogers*.[39] In other words, in reversing the lower court decision that had upheld the privilege of the minor to avoid the transaction, the court classified the contract to find employment as a service that was within the class of necessaries for a minor in the status of the defendant and, therefore, a jury should rule on the question of whether in fact this particular service was a necessary for this particular infant. In so doing, the majority purported to enlarge the common law definition of a necessary:

> In the effort to protect "older minors" from improvident or unfair contracts, the law should not deny to them the opportunity and right to obligate themselves for articles of property or services which are reasonably necessary to enable them to provide for proper support of themselves and their dependents. The minor should be held liable for the reasonable value of articles of property or services received pursuant to such a contract.[40]

In the same opinion the traditional definition of a necessary also appeared. That definition is quoted here so that the reader may judge whether the "common law" was changed by the decision in *Rogers*: " 'An infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards.' "[41]

The 1971 North Carolina General Assembly lowered the terminating age of minority to eighteen years.[42] However, even at this lower age there will be many "older minors" who contract, and the utility of the concept of necessaries as a means of achieving rough justice for the adult

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[37] *Id.*

[38] Turner v. Gaither, 83 N.C. 357 (1880).

[39] 276 N.C. 279, 172 S.E.2d 19 (1970).

[40] 276 N.C. at 287, 172 S.E.2d at 25.

[41] *Id.* at 281, 172 S.E.2d at 20 (italics omitted). The definition is taken from "Coke on Littleton, 13th ed. (1788), p. 172." *Id.*

[42] N.C. GEN. STAT. §§ 48A-1 to -2 (Supp. 1971).

who deals with such a minor is still available for the judge who wishes to use it. It remains a fiction, however, and the predictability factor in any rule utilizing a fiction is obviously very low. Why not acknowledge that what one may be doing in fact is weighing the exchange in terms of fairness?

RATIFICATION, DISAFFIRMANCE, AND FAIRNESS

A common posture for a lawsuit involving the contracts or conveyances of minors is one in which an argument is made that the minor, after reaching his majority, has ratified the transaction or, conversely, that the minor has disaffirmed the transaction. The question of what acts amount to a disaffirmance or a ratification is a matter of much verbiage in the opinions. Distinctions are drawn between mere acknowledgements and express promises,[43] between executed and executory contracts,[44] between land transactions and those for personal property,[45] and between action and inaction.[46] The fundamental problem to which all these cases address themselves, however, is whether the minor, possessing a privilege to avoid a given juridical act, exercised that privilege.

Some decisions state that the minor's act of ratification must take the form of a promise,[47] and it is clear that if the minor does make a subsequent promise after coming of age, such a promise is enforceable as a contract.[48] But his power of avoidance may be lost in other ways

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[43]Bresee v. Stanly, 119 N.C. 278, 25 S.E. 870 (1896) (conditional promise insufficient); Ward v. Anderson, 111 N.C. 115, 15 S.E. 1033 (1892); Dunlap v. Hales, 47 N.C. 381 (1855) (acknowledgment of debt insufficient); Armfield v. Tate, 29 N.C. 258 (1847) (express promise sufficient); Hoyle v. Stowe, 19 N.C. 320 (1837) (acknowledgment insufficient); Alexander v. Hutchinson, 12 N.C. 13 (1826) (implied-in-fact promise sufficient).

[44]Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 25, 40 S.E. 822, 823 (1902) (executory contract relating to personalty may be avoided); State *ex rel.* Petty v. Rousseau, 94 N.C. 355, 361 (1886) (if executed, acknowledgement is sufficient ratification and no new promise of consideration is necessary).

[45]Skinner v. Maxwell, 66 N.C. 45, 47 (1872).

[46]Baggett v. Johnson, 160 N.C. 26, 31-32, 76 S.E. 86, 88 (1912) (inaction operates as ratification); Weeks v. Wilkins, 134 N.C. 516, 47 S.E. 24 (1904) (delay is affirmance); Gaylord v. Respass, 92 N.C. 553, 557 (1885) (infant must act to repudiate conveyance at majority or assent assumed); Caffey v. McMichael, 64 N.C. 508 (1870) (act of ownership after reaching majority is ratification of credit purchase); McCormic v. Leggett, 53 N.C. 425 (1862) (accepting payment is affirmance).

[47]State *ex rel.* Petty v. Rousseau, 94 N.C. 355 (1886) (ratification of an executory contract requires an express promise); Armfield v. Tate, 29 N.C. 258 (1847); *cf.* Boyle v. Stowe, 19 N.C. 320 (1837) (mere acknowledgement not enough, must be express promise).

[48]Armfield v. Tate, 29 N.C. 258 (1847); Alexander v. Hutchinson, 12 N.C. 13 (1826); RESTATEMENT OF CONTRACTS § 89 (1932).

as well. Mere delay may be enough;[49] the retention of benefits conferred on the minor may be sufficient;[50] and the acknowledgement and expression of a desire to ratify an earlier deed, written on the same piece of paper, has been held sufficient.[51] Remaining in possession and making a part payment, or, if the minor were the grantor, receiving payment after attaining full age is also sufficient to destroy the privilege of avoidance.[52] In conveyancing cases the minor has a reasonable length of time after he reaches full age in which to disaffirm, and, by analogy to a statute giving him three years in which to bring an action "against a disseissor," three years is said to be reasonable. Conversely, a delay of more than three years constitutes an affirmance. This is true even though the minor may have no cause of action concerning the land because a life estate intervenes and his interest turns on the death of the life tenant. The three-year period is measured from the date of his majority—not from the date of accrual of his cause of action.[53] The same rule has been applied to a contract to buy land, as distinguished from the conveyance itself.[54]

A similar panoply of events triggers the minor's privilege of avoidance. For example, he may disaffirm by bringing a lawsuit that contradicts his earlier acts while a minor.[55] In one interesting case the sale of crops earlier mortgaged was said to be a clear disaffirmance of the mortgage, and, therefore, the crime of disposing of mortgaged goods had not been committed by the minor.[56] A more common situation is that of the second deed: A minor deeds property while a minor and then, upon reaching full age, conveys to another. The second deed is a clear act of disaffirmance—even as against an apparent bona fide purchaser for value.[57] A somewhat different twist was present in *Pippen v. Mutual Benefit Life Insurance Company*,[58] in which a minor paid several prem-

[49]Baggett v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912); Weeks v. Wilkins, 134 N.C. 516, 47 S.E. 24 (1904).

[50]Caffey v. McMichael, 64 N.C. 507 (1870).

[51]Murray v. Shanklin, 20 N.C. 289 (1839).

[52]McCormic v. Leggett, 53 N.C. 425 (1862) (infant grant received payment); Dewey v. Burbank, 77 N.C. 259 (1877).

[53]Baggett v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912); Weeks v. Wilkins, 134 N.C. 516, 47 S.E. 24 (1904).

[54]Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916).

[55]Faircloth v. Johnson, 189 N.C. 429, 127 S.E. 346 (1925); *see* Millsaps v. Estes, 134 N.C. 486, 46 S.E. 988 (1904).

[56]State v. Howard, 88 N.C. 651 (1883).

[57]Gaskins v. Allen, 137 N.C. 426, 49 S.E. 919 (1905).

[58]130 N.C. 23, 40 S.E. 822 (1902).

iums on a life insurance policy, then cancelled the policy, and then died. His administrator claimed that the cancellation was voidable and sued for the face amount of the policy. The court held that inasmuch as the contract "was executory" and related to personalty, the contract could be avoided by him during his infancy and that one way of so disaffirming was to enter into an agreement voluntarily annulling and cancelling it. Once the minor had disaffirmed, the subsequent ratification was ineffective.

The language in the cases concerning the distinctions between executory and executed transactions[59] and real and personal property appears to be oblique judicial recognition of the fact that in transactions between adults and minors, the concepts of ratification and disaffirmance may help to achieve a just result. The privilege of avoidance may terminate when it is unfair or unjust to permit the minor to exercise this power. In *Wright v. Hepler*[60] a minor and his wife (also a minor) purchased land with a down payment, giving the seller a promissory note and a mortgage. Upon both reaching majority, they borrowed money from the minor's father and uncle and gave them a note and a second mortgage. They then brought suit against the adult with whom they had dealt, seeking the return of the down payment in exchange for the title to the property that they had purchased—property now subject, of course, to the valid deed and mortgage to the minor's father and uncle. One quickly jumps to the conclusion that such action should not be permitted, and the court agreed, holding that the mortgage to the father and uncle was a ratification of the voidable contract of sale, even though the minors were offering to return the consideration that they had received. This decision and others like it that require a minor to return any consideration he has received[61] or that treat the retention of value by the minor after he attains majority as an act of ratification[62]—a "non-act" that effectively destroys his privilege of avoidance—also are evidence of the courts' search for a way to validate a fair exchange in transactions between adults and minors.

In considering whether the transaction is fair, the conduct of the adult may also be weighed. In *Dibble v. Jones*[63] a father whose minor son owned land entered into negotiations with the plaintiffs to sell them

[59]*See also* State *ex rel.* Petty v. Rousseau, 94 N.C. 355, 361 (1886).

[60]194 N.C. 542, 140 S.E. 90 (1927).

[61]Poe v. Horne, 44 N.C. 398 (1853).

[62]Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916); State *ex rel.* Petty v. Rousseau, 94 N.C. 355 (1886); Caffey v. McMichael, 64 N.C. 507 (1870).

[63]58 N.C. 389 (1860).

the land. The plaintiffs inquired as to the age of the boy and were assured by the father that he was of full age. The father and son received two buggies and a collection of promissory notes, in return for which they signed a deed to the real property. The father than took the consideration and expended it in the operation of a grocery store. When the buyers sought injunctive relief aimed at prohibiting the son from conveying the land to someone else after he had reached full age, the court dismissed the bill. The doubt about the age of the boy and the fact that the buyers consummated the deal despite that doubt seemed to the court to be sharp dealing. The buyers, although they were on notice, chose to run the risk on the integrity of the father. Since the minor received little or no benefit from the transaction, he was permitted to disaffirm, and the buyers were not entitled to any return of consideration from the minor.

The lawyer with a problem that pertains to the exercise of this privilege of avoidance should be aware of the fact that the recent North Carolina legislation concerning minority also deals with the question of ratification. The relevant section is set forth in its entirety in an appended footnote.[64]

THE LEGISLATIVE RESPONSE

The common law rule regarding a minor's basic incapacity to contract has been widely modified by statute. Pressure for such statutory modification comes about when the rule concerning incapacity interferes with the certainty of transactions that are important because of their economic value, their frequency, or a variety of other reasons, including the level of "political clout" of those receiving the promises.

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[64]For purposes of determining the applicability of the statute of limitations which has been tolled because of minority or for purposes of determining the applicable period of time for disaffirmance of a contract of a minor upon reaching majority, because of a change in applicable law occasioned by enactment of this Chapter, Chapter 1231 of the 1971 Session Laws, the following rules shall apply:

(1) For those persons who were 21 on the effective date of applicable law, limitations shall apply as they would prior to amendment;

(2) For those persons 18 years of age but not 21 on the effective date of applicable law, any time periods for disaffirmance or application of the statute of limitations shall run from the effective date of this Chapter, to wit, July 5, 1971.

(3) For those persons not yet 18, any time periods for disaffirmance or application of the statute of limitations shall run from the person's reaching age 18.

N.C. GEN. STAT. § 48A-3 (Supp. 1971).

One notable example of this process is the California statute that prohibits a minor from disaffirming a contract to perform or render services as an actor or as a participatnt or player in professional sports when such a contract has been approved by a trial court.[65]

In North Carolina a number of statutes alter in some manner the common law rule. Some of the more important of these include section 31-1,[66] which establishes the capacity of an eighteen-year-old to make a will, and section 39-13.2,[67] which validates certain transactions by married individuals below the age of eighteen. Under this latter section the married minor is declared competent to execute jointly with his or her spouse such contracts as are ordinarily required in the financing of the purchase of real estate, but only if the other spouse is of age. Another example is a statute that permits individuals who are otherwise classified as minors to engage in such banking activities as the writing of checks and the leasing of safe deposit boxes.[68] Analogous provisions exist with respect to savings and loan associations except that the age is lowered to twelve years![69] Similarly, a minor who is seventeen years of age has full capacity to borrow money for educational purposes, so long as the purposes do not encompass a correspondence course.[70] Other specific examples of statutory modification of the common law rule with respect to incapacity are appended in a footnote.[71] Activity in this field by the 1971 North Carolina General Assembly has complicated an already complex interrelationship of rules.

A typical response to the possible enactment of the twenty-sixth amendment to the United States Constitution went something like this: If they want to vote, then they ought to have the responsibility of an adult as well. The initial result of this kind of thinking in North Carolina was the passage of legislation that came to be known as chapter 585.[72] This piece of legislative rule-making attempted to make every eighteen-year-old an adult. It contained only three sections. The first stated that the common law definition of a minor, insofar as it pertained to age,

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[65]CAL. CIV. CODE §§ 36(2)-(3) (Supp. 1971). For a discussion of the constitutionality of this section, see Warner Bros. Pictures, Inc. v. Brodel, 31 Cal. 2d 766, 192 P.2d 949 (1948).

[66]N.C. GEN. STAT. § 31-1 (Supp. 1971).

[67]N.C. GEN. STAT. § 39-13.2 (1966), *as amended*, (Supp. 1971).

[68]N.C. GEN. STAT. § 53-53 (1965).

[69]N.C. GEN. STAT. § 54-18 (1965).

[70]N.C. GEN. STAT. § 116-174.1 (Supp. 1971).

[71]N.C. GEN. STAT. § 58-205.1 (Supp. 1971) (minors fifteen years and older have full power and authority to make contracts of insurance and annuity); N.C. GEN. STAT. § 165-18 (Supp. 1971) (minor spouses of veterans empowered to contract so as to gain certain veteran's benefits).

[72]Ch. 585, [1971] N.C. Sess. L. ____.

was repealed and that a minor shall now be any person who has not attained the age of eighteen years. The second section repealed all laws and clauses in laws in conflict with this new definition, and the third section made the act effective "in the event the amendment to the Constitution of the United States of America 'providing that the right of citizens who are eighteen years of age to vote shall not be denied or abridged on account of age' is certified by the United States Administrator of General Services to have been ratified by the legislatures of at least three-fourths of the States."[73] The North Carolina act was ratified on June 17, 1971.[74]

On July 5, 1971, Robert Kunzig, the Administrator of General Services, did certify that the twenty-sixth amendment to the United States Constitution had become valid and "to all intents and purposes" a part of the Constitution.[75] North Carolina's chapter 585, which had a relatively easy passage through both legislative houses, received much closer scrutiny between the date of its ratification and July 5. Attempts were made to repeal it outright or to postpone its effective date. Although both of these attempts were unsuccessful, the scrutiny and criticism did result in the passage on July 21, 1971 of another, more technical bill, now chapter 1231.[76] This second piece of legislation amended in one way or another more than seventy different sections of the *North Carolina General Statutes* that dealt with chronological age as a determinant of juridical acts. In general terms it changed by amendment process the particular sections in which the words or symbols "twenty-one years" appeared and substituted therefor the words or symbols "eighteen years."

However, what chapter 1231 did not change seems to be as important as what it did change. For example, chapter 1231 did not amend those statutes that deal with the obligation of support of minor children. Since chapter 585 has changed the common law definition of minor from twenty-one years to eighteen years, it appears that the obligation to support one's minor children now expires at their eighteenth birthday instead of their twenty-first.[77] Altogether more than two hundred sections of the *North Carolina General Statutes* may be affected by chapter 585.

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[73]*Id.* § 3.

[74]*Id.*

[75]36 Fed. Reg. 12725 (1971).

[76]Ch. 1231, [1971] N.C. Sess. L. ——.

[77]N.C. GEN. STAT. § 50-13.4(b) (Supp. 1971); Shoaf v. Shoaf, 14 N.C. App. 231, 188 S.E.2d 19 (1972); Crouch v. Crouch, 14 N.C. App. 49, 187 S.E.2d 348 (1972).

Nevertheless, chapter 1231 did not amend all of the statutes that utilized the words or symbols "twenty-one years." Thus, if a statute contains the key language "twenty-one years" and chapter 1231 did not amend it, the old rule continues.[78] For example, one of the statutes not amended is the Alcoholic Beverage Control Act, which limits the possession of "hard liquor" to those persons twenty-one years of age and older.[79] The same kind of legislative treatment affects complicated inheritance tax and gift tax provisions in North Carolina. Section 105-4(b)[80] of the *North Carolina General Statutes* gives each child of a decedent who is "under 21 years of age" a five-thousand-dollar exemption. That section was not amended by chapter 1231 and presumably continues in force as written. Similarly, a complex provision of the gift tax law of North Carolina describes certain exclusions but bars any gift of a future interest in property. The section then explains that for this purpose a gift to a person who has not yet attained the age of twenty-one years shall not be a gift of a future interest if certain other requirements not here relevant are established.[81] Since chapter 1231 did not amend this statute, the rule remains.

There are also statutes in which an age other than twenty-one years is utilized. Sometimes both a chronological age and the word "minor" appear in conjunction, but in those cases the chronological age is always less than eighteen years, so neither chapter 585 nor chapter 1231 alters the situation. Examples of this kind of legislation include the law that prohibits individuals more than sixteen years of age from wearing masks on the public highways,[82] and the law that defines a tramp as one who is more than fourteen years of age,[83] assuming, of course, that the other criteria of the definition are met.

The use of chronological age as a dividing line for purposes of sovereign control is pervasive in our society. It is not limited solely to capacity to contract or to convey. Indeed such matters are only a minor

[78]Chapter 585 does not affect such a statutory rule because the word "minor" is not used in the rule.

[79]N.C. GEN. STAT. § 18A-3 (Supp. 1971) prohibits the manufacture, sale, transportation, or possession of any intoxicating liquor. N.C. GEN. STAT. § 18A-30 (Supp. 1971) permits persons over twenty-one years of age to possess for lawful purposes alcoholic beverages. The two enactments construed together mean that persons under twenty-one years of age who possess "intoxicating liquors" are in violation of state law. *See* State v. Carpenter, 215 N.C. 635, 3 S.E.2d 34 (1939).

[80]N.C. GEN. STAT. § 105-4(b) (Supp. 1971).

[81]N.C. GEN. STAT. § 105-188(d) (1965). See INT. REV. CODE OF 1954, § 2503(c).

[82]N.C. GEN. STAT. § 14-12.7 (1969). *See also* N.C. GEN. STAT. §§ 53-53, 54-18 (1965); *id.* § 116-174.1 (Supp. 1971).

[83]N.C. GEN. STAT. § 14-338 (1969).

part of the broad area of human behavior regulated in such a manner. Such questions as the jurisdiction of the juvenile courts, welfare payments for dependent children, the age of consent for "virtuous girls," licensing statutes, election regulations, and many, many others have all been affected in one way or another by chapters 585 and 1231. The certainty of application and the ease of establishing such a fact as age has great appeal to a lawmaker.

In terms of capacity to contract, the effect of chapter 585 and chapter 1231 is simply to lower the age of majority to eighteen years where there are no authorizing statutes fixing a lower age. This blunderbuss approach may have the practical effect of diminishing the number of transactions that might be subject to the capacity controversy. Perhaps not as many seventeen-year-olds enter into contracts as do twenty-year-olds. The arbitrariness of the rule remains with us, however. The married seventeen-year-old will still appear to be much older, will still purchase cars, and will still attempt to sell property inherited from his rich uncle.

The call for legislative—not judicial—action that was sounded in the dissenting opinion in *Rogers* has received an answer, but not one that redresses the present imbalance between the minor and the adult who deals with him. The legislature did not provide that fairness and justice should be the standards by which such exchanges are to be measured. Instead, the old rule continues at an earlier chronological point. The tough, delicate responsibility of achieving justice on a case-by-case basis still remains the glory of common law judges. Shirk this responsibility they may, but the people who give these judges their awesome power will suffer as a result.

Capacity and the Mentally Ill

If one places alongside any of the infancy cases the facts and result of *Sprinkle v. Welborn*[84] and the flexibility of the capacity rule as it pertains to the mentally incompetent, the arbitrariness of the chronological-age rule as it pertains to infants becomes apparent. At the time of the transaction in question, a jury found that Sprinkle was mentally incompetent. She had deeded her land valued at four thousand dollars in exchange for land, cattle, and other consideration of a total value of thirteen hundred dollars. Her grantee was a neighbor who had known her for years, and, while he had testified that he did not know

[84]140 N.C. 163, 52 S.E. 666 (1905).

that she was insane, there was ample evidence introduced to support the verdict of the jury otherwise. The grantee, having obtained legal title to the property, sold it to Greenwood, a purchaser for value without notice. In an action brought by Sprinkle's guardian against both the original grantee and Greenwood, the action against Greenwood was dismissed. The bona fide purchaser for value from the grantee who had dealt with the incompetent was protected.

One further aspect of *Sprinkle* needs emphasis. The trial court's holding that the grantee must restore to Sprinkle the difference between the value of the land received and the value of the consideration given was fully supported by the appellate court. In other words, the court enforced what it considered to be a fair bargain—no more, no less.

Sprinkle is also important for its test of one's mental capacity to contract. It is set forth at some length because of its learning on the subject:

> "1. The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract, and although a person may not have sufficient intelligence to manage his affairs in a proper and prudent manner, still he may be capable of making a binding contract. 2. It is not required that a person should be able to make a disposition of his property with judgment and discretion. It is sufficient if he understands what he is about. If a person knows what he is doing and is aware of the nature of the particular transaction, such person has sufficient mental capacity to make a contract, although that person may not act wisely or discreetly, or make a good bargain."[85]

On this particular point *Gaskins v. Allen*[86] provides an interesting comparison with *Sprinkle*. In *Gaskins* the deed of a minor that had been executed in 1871 was successfully disaffirmed more than two decades later, thus voiding title to property that had resided in the defendant bona fide purchasers for twenty years. The reason for such a result flowed from the fact that although the female minor soon attained her majority, she remained under the disability of coverture and could not exercise her privilege of disaffirmance until that disability had been removed.

The transfer of title by a minor is effective so far as bona fide purchasers are concerned when the subject matter of the contract is

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[85] *Id.* at 166-67, 52 S.E. at 667. The quoted material is from the instructions given by the court on the issue of mental capacity.

[86] 137 N.C. 426, 49 S.E. 919 (1905).

personal property, a statute so provides, and the minor is attempting to recover it.[87] But the general rule remains that the minor may avoid his promises when the written evidence thereof is in the hands of the bona fide purchaser, although the ratification and necessaries concepts have been utilized here also to protect the bona fide purchaser.[88] In the law of negotiable instruments, a minor may not disaffirm his transfer of title by indorsement,[89] but his incapacity as to his promise to pay may be asserted against a holder in due course.[90] The opposite is the case where the incapacity asserted by the promisor on the negotiable instrument is that of mental illness. A holder in due course takes free of such a defense.[91]

The concepts of necessaries, disaffirmance, and ratification are available for one wrestling with the problems that grow from the fact that sane people contract with those who are mentally ill. However, because of the greater flexibility of the doctrinal rules in this area, there is not as great a need to utilize such devices in order to achieve a balanced result. Consequently, the use of these concepts in cases involving the contractual liability of the mentally ill does not appear with the frequency that it appears in the infancy cases. Nevertheless, the verbal framework of the balancing act that courts must perform when resolving such issues is worth considering. The following passage represents a typical judicial statement of the doctrine concerning mental illness:

> A contract entered into by a person who is mentally incompetent is voidable and not void. . . . At the election of the incompetent and upon the return of the consideration and the restoration of the *status quo*, it will be annulled by a court of equity.
>
> Under certain conditions such a contract may be avoided by the incompetent even when he is unable to place the other party to the contract *in statu quo*, but the greater weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, of which the incompetent has received the benefit, without notice of the

[87]Jones v. Caldwell, 276 Ark. 260, 225 S.W.2d 323 (1949) (UNIFORM SALES ACT § 24 changed common law rule); N.C. GEN. STAT. § 25-2-403 (1965); *cf.* Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913) (real property).

[88]Bancredit, Inc. v. Bethea, 65 N.J. Super. 538, 168 A.2d 250 (App. Div. 1961) (infancy is real defense against holder in due course of promissory note given as part of purchase price of car if car is not a necessary).

[89]N.C. GEN. STAT. § 25-3-207(1)(a) (1965).

[90]N.C. GEN. STAT. § 25-3-305(2)(a) (1965).

[91]Wadford v. Gillette, 193 N.C. 413, 137 S.E. 314 (1927); N.C. GEN. STAT. § 25-3-305(2)(b) (1965); *see* Odom v. Riddick, 104 N.C. 515, 10 S.E. 609 (1889).

> infirmity, and before an adjucation of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position. . . .
>
> Thus, in an action to rescind . . . the plaintiff must show insanity or mental incompetency at the time the contract was entered into. Upon such showing the contract will be annulled unless it is made to appear—the burden being on the defendant—that the defendant (1) was ignorant of the mental incapacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration; (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor. . . .
>
> Upon such a showing by the defendant any inference of fraud or undue advantage is rebutted and a court of equity will not intervene.[92]

The case from which the above statement is taken is intriguing because it illustrates in a fairly definite manner how a court may view a contractual exchange and decide that it is not a fair transaction. The mentally incompetent plaintiff had exchanged his fishing boat, which was worth about 250 dollars, and 500 dollars in cash for the defendant's fishing boat, which was worth about 400 dollars. The trial court dismissed the action, but the supreme court reversed, ruling that the defendant had not carried his burden of proof on the issue of fair and full consideration.[93] The defendant had failed to show that no unfair advantage had been taken of the plaintiff. Therefore, the plaintiff was entitled to rescind and to recover damages. Here is judicial proof that North Carolina courts have considered price variations—the inadequacy of consideration—in reaching a decision that a contractual promise, otherwise binding, ought not to be enforced for reasons of justice. In a broader context it can be invoked as authority for the proposition that there is no barrier to a court's finding contracts unconscionable because of price variations.[94]

The party seeking to exercise the privilege of avoidance has the burden of proof on the question of whether he is or was mentally ill; soundness of mind is the normal condition, and everyone is presumed

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[92]Carawan v. Clark, 219 N.C. 214, 216-17, 13 S.E.2d 237, 238 (1941).

[93]*Id.* at 217, 13 S.E.2d at 239.

[94]*See* Kugler v. Romain, 9 UCC REP. SERV. 559 (N.J. June 28, 1971) (exorbitant price fixed by seller for consumer unconscionable and permits state to obtain injunctive relief); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (exorbitant price charged consumer ground for reformation).

to be sane until the contrary appears.[95] Until quite recently there has been little or no analysis concerning the nature and extent of such mental illness. In most of the North Carolina cases, this "fact" is provided for the appellate court by a jury finding.[96] In such cases the test of a person's competence is phrased in cognitive terms: Does he know what he is about; does he understand the nature of the act in which he engaged and its consequences?[97] Lay persons may testify as to their observations and give their opinion concerning the alleged competency of the person in question, and expert witnesses are also utilized for this purpose.[98] The commitment or the appointment of a guardian presumes "insanity," and such a presumption continues until it is shown that sanity has been restored.[99]

In recent years the emotional aspect of the human personality has been emphasized to a greater degree, and this emphasis has been mirrored in judicial and legal materials. Section 18C of the *Restatement (Second) of Contracts* has added an emotive or affective element to the traditional cognitive statement of the rule.[100] Under this new formulation, recently quoted with approval by the New York Court of Appeals, a person incurs only voidable contractual liability if, by reason of a mental illness or defect, he is unable to understand in a reasonable

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[95]Carland v. Allison, 221 N.C. 120, 19 S.E.2d 245 (1942); D. STANSBURY, NORTH CAROLINA EVIDENCE § 238 (2d ed. 1963).

[96]A typical set of issues is found in Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 101, 150 S.E.2d 40, 43 (1966).

[97]Hendricks v. Hendricks, 272 N.C. 340, 158 S.E.2d 496 (1968) (capacity to convey); Carland v. Allison, 221 N.C. 120, 19 S.E.2d 245 (1942) (same); Burch v. Scott, 168 N.C. 602, 84 S.E. 1035 (1915) (capacity to contract); Sprinkle v. Welborn, 140 N.C. 163, 52 S.E. 666 (1905) (capacity to convey); Morris v. Osborne, 104 N.C. 609, 10 S.E. 476 (1889) (capacity to contract); *cf.* Odom v. Riddick, 104 N.C. 515, 10 S.E. 609 (1890).

[98]*Cf.* Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966); D. STANSBURY, NORTH CAROLINA EVIDENCE § 127 (2d ed. 1963).

[99]Medical College v. Maynard, 236 N.C. 506, 73 S.E.2d 315 (1952); Tomlins v. Cranford, 227 N.C. 323, 42 S.E.2d 100 (1947).

[100](1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or

(b) he is unable to act in a reasonable manner in relation to the tranaction and the other party has reason to know of his condition.

(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be inequitable. In such a case a court may grant relief on such equitable terms as the situation requires.

RESTATEMENT (SECOND) OF CONTRACTS § 18C (Tent. Draft No. 1, 1964).

manner the nature and consequences of the transaction (the traditional cognitive test) *or*, although he may understand the transaction, is unable to act in a reasonable manner in relation to the transaction.[101] Such a justification has not yet appeared verbally in the North Carolina cases, but as early as 1954 a mental illness that reflects the distinction—a "manic-depressive psychosis"—served as grounds of the trial court's avoidance of a separation agreement.[102]

Intoxication has also been treated as a form of mental illness for the purpose of permitting avoidance of contractual duties incurred while under the influence of alcohol or drugs. A contract made by a person who was intoxicated at the time of execution is voidable under circumstances similar to the contract of a mentally ill person.[103] Moreover, a person may be mentally ill as a result of chronic alcoholism, although he was not actually intoxicated at the time he entered into the contractual relationship.[104]

MOORE AND CHESSON: TWO RECENT APPLICATIONS

In *Moore v. New York Life Insurance Co.*,[105] the executrix of the estate of the insured decedent sought to set aside a cash-surrender-value transaction that the insured had executed with the company only three days before he was committed to a hospital. In the language of the opinion, the insured's drinking habits had grown progressively worse for ten years, and, in the opinion of the plaintiff's witnesses, he was "off his rocker," irrational, and despondent. However, the insured's sister, testifying for the insurance company, said that in her opinion he was mentally competent at the time of the transaction and had sufficient capacity to understand the nature of what he was doing. The decedent also appeared normal to the agent who had transacted business with him for several years. Shortly after the insured's committment to the hospital, his wife received the check representing the cash surrender value and (by her attorney) returned it to the company and, when her husband passed away shortly thereafter, demanded the death benefit for the

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[101]Ortelere v. Teacher's Retirement Bd., 25 N.Y.2d 196, 250 N.E.2d 450, 303 N.Y.S.2d 362 (1969).

[102]Lawson v. Bennett, 240 N.C. 52, 81 S.E.2d 1962 (1954).

[103]Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966); Moore v. New York Life Ins. Co., 266 N.C. 440, 146 S.E.2d 492 (1966); RESTATEMENT (SECOND) OF CONTRACTS § 18D (Tent. Draft No. 1, 1964); *see* Burch v. Scott, 168 N.C. 602, 84 S.E. 1035 (1915).

[104]*See* authorities cited note 103 *supra*.

[105]266 N.C. 440, 146 S.E.2d 492 (1966).

estate. As part of the cash-surrender transaction, the insured decedent had also changed the designated beneficiary of the policy from his wife to his estate. The widow, suing as executrix of the estate, ratified the act of the incompetent in changing the beneficiary from the wife to the estate but avoided the act of the incompetent in cancelling the policy. Both acts probably occurred not more than a day apart.

In *Chesson v. Pilot Life Insurance Co.*,[106] the transaction in question took place *after* the alleged incompetent had been released from a mental hospital as in need of no further treatment. When he returned home, he dug out of a dresser drawer a life insurance policy on his own life and headed for the home office of the company, a trip of nearly five hours by automobile. He had borrowed against the policy earlier and now wished to cash it in for its present worth, twenty-five dollars. The insurance company executive with whom he had talked had pointed out that if he waited one month longer he would receive an additional thirty-two-dollar dividend. Nevertheless, the insured ignored the advice, obtained the money, and then disappeared for nearly three weeks. When he finally returned home, he was in such a condition that his wife sought police protection from him. In jail, awaiting transfer to a hospital, the insured suddenly jumped backward, fell against a concrete floor, and died. In her lawsuit against the insurance company for the death benefit of the life insurance policy, the wife as administratrix of the decedent's estate was successful in avoiding the cancellation on grounds of incapacity.

Moore and *Chesson* illustrate several important points. First, proof of commitment plays a significant role as evidence of the incompetency. In many cases, however, it is only that—evidence. It is not conclusive, not even for transactions made by the person while he is in the custody of the hospital. Only when there is a formal adjudication of insanity under the appropriate statutory proceedings can one say that commitment renders the contracts of the mentally ill a nullity in the same way that they are a nullity when a guardian has been appointed. Even then, it is only a presumption, and the passage of time may restore the capacity.[107] In *Chesson* a psychiatrist testified that the alleged incompetent was actually listed as a patient on the rolls of the mental hospital at the time of the transaction with the insurance company. He was a "temporary visit" patient, sent home for a week with the understanding that if

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[106]268 N.C. 98, 150 S.E.2d 40 (1966).

[107]De jure restoration of rights is a somewhat complex process. *See* N.C. GEN. STAT. §§ 35-4 to -5 (1966), *as amended*, (Supp. 1971).

he did not return, he would be discharged (as he was in fact three days *after* the cancellation transaction). The purpose of such an administrative procedure is a simple one. If, after a week at home, it seems that the mentally ill person needs further treatment, he may simply return to the hospital without the necessity of repeating the elaborate commitment procedures.[108]

Secondly, while the privilege of avoidance is often said to be personal to the individual, in these two cases the personal representatives of the decedent incompetents exercised the privilege, and in other cases heirs of the individual with the privilege have been allowed to exercise it.[109] The same logic applies in the infancy cases.[110]

Moore and *Chesson* are also examples of the breadth of the evidentiary range with respect to the issue of competency. There were many witnesses—wives, sisters, maids, ministers, and casual acquaintances—all of whom testified as to the acts and mental state of the alleged incompetent.

Actually, the only evidence of notice of incompetency residing in the insurance company concerning Chesson's mental illness was the fact that while his home was in Belhaven, he drove to Greensboro and presented himself to the executive in charge of policy cancellations at the home office, which is located in a rural part of the community. However, Chesson was neatly dressed at the time, and the executive testified that he had no reason to suspect the insured's incompetency. But since the company bore the burden of proof on the issue of lack of notice, a jury finding for the plaintiff was undisturbed. In *Moore* the notice element of the case was not discussed.

THE ROLE OF NOTICE OF INCOMPETENCY

The role of notice or knowledge of the infirmity in the party dealing with one who is mentally ill plays a part in these cases that cannot be equated to anything in the infancy cases. Whether or not the person knew that he was dealing with an infant seems irrelevant. However, such knowledge can be extremely important in dealing with one who is mentally ill. In its absence the party asserting the privilege of avoidance may

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[108]Record at 32, Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966).

[109]Walker v. McLaurin, 227 N.C. 53, 40 S.E.2d 455 (1946); Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897).

[110]Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 40 S.E. 822 (1902). *But cf.* Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 994 (1955), in which an owner of land was unsuccessful in his attempt to assert the incapacity of the option holder who had assigned his option to another.

find that he cannot do so if the contract has been at least partially performed.[111] There is authority for the proposition that the completely executory contract may be avoided by the incompetent in any event.[112] On the other hand, when the party knows that he is dealing with an incompetent, he may find himself in a worse position than if he had not entered into the contract at all. An attempt to restore the status quo may be undertaken, but if it cannot occur the incompetent may still be able to rescind the contract if such knowledge was present.[113] One who knowingly deals with an incompetent assumes the risk of such dealings. In this context one can compare *Wadford v. Gillette*,[114] in which a rescission of a deed of trust and promissory note was denied the incompetent because the party dealing with her did so in good faith and without knowledge of her disability, with *Creekmore v. Baxter*,[115] in which recovery of land was allowed because the mortgagee who eventually obtained the land knew of the incompetency of the party with whom he had dealt.

Creekmore also illustrates another utility of the concept of notice. The jury found that the mortgagee knew of the incompetent's incapacity, but was directed by the court to find that he practiced no actual fraud on the plaintiff. Thus, one can set aside the traditional contract-destroying devices of fraud, undue influence, and duress. While these concepts are perfectly legitimate and are long-tested devices for overcoming otherwise valid promises, their technical requirements need not be established in capacity cases. True, there is often overlap, particularly in the weakness-of-mind cases, but once mental incompetence has been established and the other party has failed to establish lack of notice, the technical tests of fraud, undue influence, and duress are not required to be met.[116] The notice itself serves as fraud in law, and fraud in fact is not needed.[117] The party dealing with knowledge of the other party's incompetency is "deemed to have perpetrated a meditated

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[111]Odum v. Riddick, 104 N.C. 515, 10 S.E. 609 (1889); Riggin v. Green, 80 N.C. 236 (1879); Carr v. Holliday, 21 N.C. 344 (1836).

[112]RESTATEMENT (SECOND) OF CONTRACTS § 18C(1) (Tent. Draft No. 1, 1964).

[113]Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897).

[114]193 N.C. 413, 420, 137 S.E. 314, 317 (1927).

[115]121 N.C. 31, 27 S.E. 994 (1897). *See also* Gilbert v. West, 211 N.C. 465, 190 S.E. 727 (1937); Godwin v. Parker, 152 N.C. 672, 68 S.E. 208 (1910); Reed v. Exum, 84 N.C. 430 (1880).

[116]Daniel v. Dixon, 161 N.C. 377, 77 S.E. 305 (1913). *See* Green, *Fraud, Undue Influence and Mental Incompetency—A Study in Related Concepts*, 43 COLUM. L. REV. 176 (1943) for a comprehensive review of the authorities.

[117]Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897).

fraud" upon the incompetent.[118] The fraud, if any is necessary, may be presumed from the fact of knowledge, or the knowledge may be deemed to be fraud in law.[119] In either case that is all that is necessary.

Factually speaking, lawyers may have difficulty fitting a given factual situation into any of the categories, and they may continue to plead any and all of such theories as would enable them to overcome the contractual duty that is otherwise binding. This could be an additional reason for urging the increased use of the concept of unconscionability. All of these factual situations share a common thread. There is at least an allegation that one who is in a superior position is attempting to impose contractual liability upon one who is in an inferior position. In such cases, however, the courts should look to the fairness of the exchange.[120] The doctrines by which the courts measure unconscionability, while as yet undeveloped, may well lead to a percipient examination of those factors that are now haphazardly scattered among the many labels of fraud, undue influence, weakness of mind, and duress. Professor Green has already suggested that "[a]nother standard, although for the most part inarticulate, is the standard of the fairness or the unfairness of the transaction."[121] Once notice has been established, whether to permit avoidance on grounds of mental incompetency becomes a relatively simple question. In short, the power of avoidance in the incompetent may be terminated by partial or complete performance if the contract was made on fair terms and the other party had no notice of the mental illness.[122]

ARGUMENTS FOR A FAIRNESS PERSPECTIVE

The arguments that the contracts of minors—particularly older minors, since they are usually the ones involved in the lawsuits that reach the appellate level—ought to be measured in terms of fairness, rather than by the arbitrary rule of age, has more appeal when the age of minority remains at twenty-one years. Obviously the twenty-year-old married student in *Gastonia Personnel Corp. v. Rogers*[123] appeared to

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[118]Godwin v. Parker, 152 N.C. 672, 675, 68 S.E. 208, 209 (1910); Creekmore v. Baxter, 121 N.C. 31, 33, 27 S.E. 994, 995 (1897).

[119]*See* authorities cited note 118 *supra*.

[120]*See* Riggan v. Green, 80 N.C. 236 (1879).

[121]Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 311 (1944).

[122]RESTATEMENT (SECOND) OF CONTRACTS § 18C(2) (Tent. Draft No. 1, 1964).

[123]276 N.C. 279, 172 S.E.2d 19 (1970).

have the requisite ability to enter into the transaction, and it seems unjust to permit him to avoid the resultant liability.

North Carolina and at least five other states have by statute lowered the age of minority to eighteen years,[124] and in those jurisdictions the ease of application and the certainty of result that always make an arbitrary rule attractive tend to support the continued application of the old rule at the lower age level. Nevertheless, the reality remains that sixteen and seventeen-year-olds will continue to enter into contractual relationships. In a jurisdiction like North Carolina where the common law rule has been applied so vigorously in favor of the minor, the argument that these transactions ought to be measured in terms of fairness has somewhat more weight than it might have in a jurisdiction that has developed devices such as a requirement that the consideration be returned before the minor may exercise his privilege of avoidance or a provision that gives a remedy for the minor's misrepresentation. But even there it seems less cluttered to speak of fairness and balance. Indeed, an argument can be made that age should be disregarded altogether and a system of presumptions, similar to those applied in the law of negligence, be adopted.[125] For example, by statute persons under the age of sixteen could be deemed incapable of contracting and have the privilege of disaffirmance as minors do now. Persons sixteen to twenty-one years of age could be presumed incapable of contracting, but the presumption could be rebutted by the adult's establishing capacity in fact.

I would suggest the age of fourteen as the line at which the benefits of certainty and ease of application clearly overshadow the need for discretionary justice in these factual situations. That is, the present rules would govern contracts of those younger than fourteen years; those minors who were fourteen and older would be treated in the same manner as adults, but within a broadened application of the doctrine of unconscionability as explained later.

Historically, there is some evidence that fourteen was the age in Roman law at which at least a limited capacity to contract emerged.[126] Selection of twenty-one years as the crucial time was apparently related

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[124]KY. REV. STAT. ANN. § 2.015 (1970); N.M. STAT. ANN. § 13-13-1 (Supp. 1971); N.C. GEN. STAT. §§ 48A-1, -2 (Supp. 1971); TENN. CODE ANN. § 6-648 (1971); VT. STAT. ANN. tit. 1, § 173 (1971); WASH. REV. CODE ANN. § 26.26.010 (1970).

[125]Note, *Infants' Contractual Disabilities: Do Modern Sociological and Economic Trends Demand a Change in the Law?*, 41 IND. L.J. 140 (1965).

[126]*Id.* at 143.

to the muscular development of young men in the middle ages, for at that age they could carry armor and become knights.[127] As recently as 1811, males of the age of fourteen and females of the age of twelve had the legal ability to engage in at least one juridical act in North Carolina, that of willing their personal property.[128] And at the age of twelve a minor is by statute at the present time authorized to deal in the shares of Savings and Loan Associations.[129] At the age of fourteen a person apparently has the requisite mental ability to formulate a criminal intent—a necessary ingredient of some of the crimes in our state.[130] And a fourteen-year old seems perfectly capable of committing a tort.[131] Within the same volume that reports *Gastonia Personnel Corp. v. Rogers*,[132] the North Carolina Supreme Court recognized that since a seventeen-year-old girl had the capacity to commit first degree murder, she was also perfectly capable of waiving the presence of counsel and of making a voluntary confession.[133] Why should she not have been able to contract as well?

The change in the rule with respect to the capacity of minors to contract and convey here advocated (drawing the line at age fourteen could be altered by the enactment of a statute similar to chapter 585 of the 1971 Session Laws,[134] which would substitute the age of fourteen for the age of eighteen (in that enactment) and which would add a paragraph limiting such a rule to contractual and conveyancing situations. The rule could also be changed by decision of the North Carolina Supreme Court as occurred with respect to the concept of necessaries in *Gastonia Personnel Corp. v. Rogers*.[135] Since the capacity rule is a creation of the courts, it could be revised by the courts. That a common law court can make a mistake but cannot correct it does not seem to be a satisfactory working rule in all circumstances.

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[127]James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 26 (1960).

[128]1 N. WIGGINS, WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 39 (1964).

[129]N.C. GEN. STAT. § 54-18 (1965).

[130]State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), *cert. denied*, 396 U.S. 1024 (1970); State v. Burnett, 179 N.C. 735, 102 S.E. 711 (1920) (dictum).

[131]*Cf.* Welch v. Jenkins, 271 N.C. 138, 155 S.E.2d 763 (1967) (fourteen-year-old capable of contributory negligence).

[132]276 N.C. 279, 172 S.E.2d 19 (1970).

[133]State v. Hill, 276 N.C. 1, 14, 170 S.E.2d 885, 894 (1969), *rev'd mem. on other grounds*, 403 U.S. 948 (1971).

[134]Ch. 585, [1971] N.C. Sess. L. ____, codified at N.C. GEN. STAT. §§ 48A-1, -2 (Supp. 1971).

[135]276 N.C. 279, 172 S.E.2d 19 (1970).

THE USE OF THE UNCONSCIONABILITY DOCTRINE

The problem of imposition by the superior upon one susceptible to such imposition received further treatment by the 1971 session of the North Carolina General Assembly. The 1967 legislature refused to enact article 2-302 of the *Uniform Commercial Code*—the unconscionability section—when it adopted the *Code* that year. The 1971 legislature enacted not one but two separate unconscionability statutes. Chapter 1055 of the 1971 Session Laws[136] added to the original Code the unconscionability section not adopted when the Code first passed through the legislature. Chapter 796 of the 1971 Session Laws[137] included an unconscionability provision in the Retail Installment Sales Act, importing the language of chapter 1055 and adding a definitional sub-section in which the word "unconscionable" is defined to be "totally unreasonable under all of the circumstances."[138]

These matters are relevant here because by lowering the age of minority to eighteen (or to fourteen if my suggestion were adopted), the possibility of imposition of contractual liability on those who have been fleeced is naturally increased. Typical examples in North Carolina include college students and draftees at the many military bases within the state, who seem particularly vulnerable to the tactics of sharp merchandisers. By lowering the age to eighteen, the possibilities for unconscionable practices are increased. It is, therefore, appropriate to point out that the remedy of unconscionability is now available in North Carolina. Some of the ingredients weighed by the judge in the determination of unconscionability are the status, position, experience, and ability of the party who is asserting the unconscionability. The age of the party asserting the need for avoidance of his contractual liability could be extremely relevant. He might be an experienced businessman at the age of seventeen, or he might be experienced in the particular subject matter of the contract. Similarly, it might be the type of contract situation in which a young man or woman could naturally be expected to enter, such as a contract for the delivery of newspapers. Under the unconscionability label contained in chapter 1055 of the 1971 Session Laws,[139] all of these

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[136]Ch. 1055, § 1, [1971] N.C. Sess. L. ____, codified at N.C. GEN. STAT. § 25-2-302 (Supp. 1971).

[137]Ch. 796, § 1, [1971] N.C. Sess. L. ____, codified at N.C. GEN. STAT. § 25A-43 (Supp. 1971).

[138]N.C. GEN. STAT. § 25A-43(c) (Supp. 1971).

[139]Ch. 1055, § 1, [1971] N.C. Sess. L. ____, codified at N.C. GEN. STAT. § 25-2-302 (Supp. 1971).

considerations and more would be relevant. But there should be no arbitrary, harsh application of a rule based on chronology that utilizes such an unrealistic age as twenty-one or eighteen. Instead, the determination should be made by the trial judge upon consideration of the commercial setting, the purpose and effect of the transaction, and the status and experience of the individual. Such a conscious device for the avoidance of contractual liability has clearly been needed in contract law, and experience with the rules applying to the mentally ill indicate by analogy how such a device might work. Its presence in our jurisprudence and its full utilization by the judges and lawyers of this state would further support the basic argument that there is no great need to maintain an artificial barrier against contractual liability based solely upon chronological age beyond fourteen years.