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Manfred S. Guttmacher

Henry Weihofen

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## MENTAL INCOMPETENCY

By MANFRED S. GUTTMACHER and HENRY WEIHOFFEN\*

**L**EROY RUCKLES was one of the little people of the world, a socially unsophisticated man of meager intellectual endowment who might have lived and died scarcely noticed had he not chanced to strangle his wife one night. He was an odd looking little man, with big ears and big nose, small eyes and a receding chin. For 22 years he had worked as an unskilled laborer, ever since he had left the 5th grade at the age of 14. Simon Binet tests showed he had borderline intelligence. His earnings were small but his wants were few and his tastes simple. He lived in a boarding house and spent his evenings in a neighborhood tavern, where he played shuffleboard or rummy, and limited himself to two beers a night. He had never been arrested in his life. He was bashful around women and had had little to do with them. Then one day while visiting his sister's house, he met his sister's friend Agnes, who was recounting the tragic suicide of her second husband two months earlier. While escorting Agnes home, at his sister's suggestion, she suggested marriage. Leroy took it as a joke; she was practically a stranger and sixteen years over his own age of 36. But when he reported the suggestion to his sister she was enthusiastic. After a few weeks of active campaigning by the two women, he acquiesced. Agnes got the license and the ring, the sister engaged the minister, and Leroy was married.

Only then did he learn that Agnes was an old circus performer known as the Gypsy Queen, whose feature attraction was the tattooing that covered every inch of her body except her head and hands. She was also an alcoholic, foully obscene and physically

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\*The substance of this study will appear in a forthcoming book on *Psychiatry and the Law* by Professor Weihofen, Professor of Law at the University of New Mexico, and Dr. Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore, to be published by W. W. Norton & Company, Inc.

abusive, as well as sexually very demanding. Neighbors had her arrested and fined for disturbing the peace four times in as many months. Her fearful temper and threats to kill him frightened Leroy, who, as he later reported, had before his marriage been in only one fight: a man had hit him apparently mistaking him for someone else. "I did not fight back," said Leroy, "I just went and got on the streetcar."

On the evening that marked their fifth month of wedded bliss, Agnes decided that a celebration was called for. They went to a tavern, where Agnes soon moved to a table with six men, who bought her a drink every time she exposed one of her tattooed legs. With some effort Leroy got her out of the place and back home, the target, meanwhile, of a continuing stream of abuse. Even after he got her upstairs, she got up and again made for the tavern. After another struggle he once more got her upstairs, and then lay across the bed himself in sheer exhaustion. Her drunken abuse continued. Then, somehow, he had shut off that torrent of obscenity. His belt was pulled tight around her throat.

Suddenly realizing what he had done, he rushed confusedly around the streets looking for a fire house from which to call an ambulance. He finally got one, and rode with his dead Agnes to the City Hospital. Then he returned to their room and sat there until the police came at dawn and took him away.

In the eyes of the law, this simple soul was fully competent to fend for himself. The marriage to The Gypsy Queen into which he was so meekly led was almost certainly not void or voidable on the ground of insanity. Any contracts or business deals in which he might have been victimized by shrewder individuals could not have been avoided. And if he had nevertheless been able to accumulate any wealth worth leaving to his heirs, his will could not have been overturned for lack of a disposing mind and memory. The law sets a low standard of competence to carry on the ordinary affairs of life.

In part, this is due to an outworn conception of man's mental processes, a concentration of attention upon *intellectual* power to comprehend the nature of the transaction involved, and a failure to appreciate the importance of temperament, the driving force of the emotions, the development of inhibitions and the soundness of the central nervous system in determining how the human organism reacts to situations. But in part it reflects a deliberate policy judgment. It is a serious matter to deprive a person of his civil

capacities or to relieve him of his civil responsibilities. Even though we no longer favor quite as rugged a form of individualism as we did half a century ago, we are still reluctant to exercise too much paternalistic restraint on what we regard as both the right and the obligation of the individual to live his own life and abide by the consequences. We do not believe that society should ordinarily interfere to protect fools against their own folly. Infants and insane persons we do so protect, but the latter must be "insane" to the extent that they cannot be expected to take care of themselves, and not merely to the extent that therapy is indicated. The policy is no doubt sound enough, but better insight into the unitary nature of the mental process might lead courts to realize that some persons now held to be competent actually do need the law's protective hand. Some of the inveterate alcoholics, compulsive gamblers and psychopaths merit such protection.

It would be very helpful if we were able to make valid generalizations on the relationship of each of the various mental disorders to competency. Unfortunately, this is not practical. The psychiatrist's judgment as to an individual's ability to make a valid deed or contract depends on many variables. The diagnostic label attached to the disorder is not as important as the degree of ego involvement, or to put it more simply, the degree that judgment is affected. Furthermore, one must include consideration of whether the condition is static, progressive, or improving. Take, for example, a case of general paresis. The case may be a very early one, with a negative mental status examination, but with a history of transient paralysis and temper outbursts and with positive neurological and serological findings. Or it may be a case that has been treated with malaria combined with the proper anti-syphilitic drugs, arresting the disease at a level of relative intellectual effectiveness. Or the treatment may not have succeeded in halting the destructive process at nearly so favorable a point.

The background of the patient must also be considered. A senile woman who had had little or no business experience would be less competent to exercise the modicum of judgment required in the selling of a piece of property than an equally senile individual who had been continually engaged in such transactions for half a century.

### 1. Guardianship Proceedings

Whereas commitment proceedings are in the nature of police measures to protect society at least as much as the patient him-

self, proceedings for the purpose of appointing a guardian or committee for the person and estate of an alleged insane person are solely for his own benefit and the protection of his estate. The test of whether the person is in such condition that a guardian should be appointed is whether his mental faculties are so impaired as to render him incapable of protecting himself or properly managing his property.

The legal emphasis upon the intellectual process tends to underestimate the significance of the emotional instability which characterizes certain forms of disorder. It is necessary that the law recognize how seriously disordered emotional states can jeopardize the material interests of an individual. A patient in an even relatively mild manic state may be in such an expansive and euphoric mood that he wants to embark on all kinds of extravagances and madcap ventures. Generally, his best protection is commitment to a mental hospital, in which case incompetency proceedings are often unnecessary. Patients in an abnormally depressive mood, in which feelings of worthlessness and guilt are often very prominent, may occasionally as an evidence of their distorted view of themselves, wish to give large sums away as a means of atonement. The contrary is more likely to be true. The seriously depressed patient is often deluded with the belief that all of his assets have been dissipated and he refuses to pay even for necessities.

Senility may entail a childish suggestibility which permits the person to be grossly imposed upon in business dealings. Since some lessening of mental as well as physical vigor with age is the normal fate of all living creatures, the courts are reluctant to find a person incompetent merely because he shows some decrease in mental efficiency. The fact that he has exhibited some impairment of memory or childishness or even some susceptibility to influence from others, is not enough if his debility has not reached the stage where he is unable intelligently to manage his ordinary affairs. That he has not managed his property judiciously, or that he has acted improvidently, is not necessarily evidence of incapacity, although it is admissible as evidence tending to that conclusion. In California, Indiana, Kentucky, Michigan and several other states, the statutes extend to cases of old age and physical as well as mental infirmity.<sup>1</sup> In most states, physical deficiencies are material only insofar as they affect mental capacity. Although loss of sight, hearing or speech, or lack of education, may in fact render a per-

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1. For a digest of statutory provisions governing guardianship, see 5 Vernier, *American Family Laws* §308 (1938).

son unable properly to take care of himself or his property, the statutes do not ordinarily cover such cases.

Although guardianship proceedings are in almost all states provided for in separate statutes, the procedure is generally similar to that where commitment is sought. A petition is presented by a relative or friend (or, in about seventeen states, any other person). Notice must be given to the person, and in at least fifteen states, to certain others, such as his next of kin, or the person with whom he resides, or certain officials. A few states unfortunately still provide not only that the person is entitled to be present if he desires, but that his presence is required. A few states provide for the appointment of a guardian *ad litem*. The purpose is a worthy one—to assure that the person's interests will be protected in the proceedings. But there is reason to doubt whether this device actually is worth the expense involved. At least in some states, appointment as guardian *ad litem* has at times served merely as a political plum involving only formal appearance.<sup>2</sup> Missouri requires appointment of an attorney to represent the person, and this would seem to be more effective. Washington requires the prosecuting attorney to act where the person is not otherwise represented. Apparently all states give the person a hearing before he is adjudged incompetent, and the right to such a hearing is constitutionally protected.

Error and abuse may occur at times, notwithstanding the existence of statutes which purport to protect against arbitrary action or trumped up charges, as the case of a Wichita, Kansas, dentist illustrates. He had a large office and owned property worth \$80,000 in Indiana and other property in Wichita worth at least \$15,000, a large bank account, and also some farm land in Howard County, Missouri, where he had lived until about ten years previously. In 1938, his brother, Bernard, who still lived in Howard County, received a phone call from an unknown person, saying his dentist brother was losing his mind. Bernard went to Wichita, and on observation decided that his brother's mind was indeed affected. A trip to Indiana was arranged. En route, while driving through Howard County, Bernard asked his brother to stop at the court

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2. "Not so many years ago, the appointment as guardian *ad litem* in Denver was consistently given to one lawyer who, it is agreed by all who know, did practically nothing to earn his fees. Yet it would probably be impossible to show that commitments were any more arbitrary than they are today. Eliminating the guardian *ad litem* would save the state about 22% of the present cost of each commitment." See Weihofen, *Commitment of Mental Patients—Proposals to Eliminate Some Unhappy Features of our Legal Procedure*, 13 Rocky Mt. L. Rev. 99, 111 (1941).

house, in order that Bernard might attend to certain business. The business turned out to be the filing of an information alleging that the dentist was insane. A notice was prepared on the spot by the court, setting a date for a hearing. Armed with this notice, a deputy sheriff arrested the dentist as he stood on the sidewalk waiting for his brother to finish transacting his "business." He was promptly taken to jail and from there to the state hospital, on written request of the sheriff that he be held "until proper commitment papers be executed and submitted."

Although the notice had advised the defendant that he was entitled to be present at the hearing and to be represented by counsel, the asylum had a rule that inmates could not be released for the purpose of appearing at hearings or for any other purpose, and defendant therefore was not present. The court found him to be mentally incompetent and appointed his brother Bernard guardian. Thereafter Bernard applied for and obtained an order that the dentist be restrained and confined in the state hospital. He also applied to the court for letters of guardianship for the purpose of selling and otherwise controlling certain of the property, and this order was granted.

In some way, information of the dentist's incarceration reached friends of his in Indiana, and they came to Missouri and retained counsel to effect his release. Application for habeas corpus was denied. About this time, the hospital gave notice that it would no longer keep him because he "had been restored to reason." Bernard and a sheriff thereupon went to the hospital and somehow obtained the release of the inmate to them, obtained an order from the probate court directing further custody for "examination, treatment and attention," then took him to Kansas City and had him placed in a private sanitarium, all without the knowledge of his counsel. Only on petition to the Federal Court for a writ of habeas corpus was a determination had that the confinement was illegal because the victim was not even a resident of Howard County, and the court therefore had no jurisdiction of the case, and also because the lack of opportunity to appear at the hearing violated due process of law.<sup>3</sup> The case not only illustrates the danger of loose procedure generally, but also shows that the provision found in so many statutes for the "arrest" of the alleged insane person as soon as a petition suggesting his insanity is filed, is not only in most cases a wholly unnecessary brutality, but may be a means of

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3. *Shields v. Shields*, 26 F. Supp. 211 (W.D. Mo. 1939).

holding him incommunicado and preventing his defending himself.

The issue is usually tried before a court, typically the probate or county court, without a jury. In a considerable number of states, a jury is still used, and a few of these have held that a jury trial is required by state constitutional provisions preserving the right to trial by jury. But such provisions merely perpetuate the right as it existed at the time the state constitution was adopted, and the sound view is that there was no right to a jury trial in incompetency proceedings at common law. Some of the state courts which have held the contrary seem to have done so on the basis of a misreading of history. At common law, the writ *de idiota inquirendo* or *de lunatico inquirendo* was used to determine the need for either appointment of a guardian or commitment. Proceedings under a writ *de idiota inquirendo* were had before a jury, because adjudication of idiocy had the effect of vesting wardship over the lands and the person of the adjudged idiot or "natural fool" in the Crown, and in administering the estate, the king could keep the profits. Property rights being thus involved, it was deemed proper to give the person against whom proceedings having such serious consequences were being prosecuted the protection of a trial by jury. But in the case of lunatics, the presumption was indulged that the person who had been visited with unsoundness might recover, and so the king was required to keep the estate safe and maintain the lunatic and his household out of the rents and profits and "take nothing to his own use." Eventually, the pity of juries and the clemency of the Crown assimilated the position of idiots to that of lunatics, and a jury trial was thereafter not allowed in either case. Since all this was ancient history long before the adoption of any state constitution in this country, there is no basis for the argument that by adopting the existing common law, the state constitution requires jury trial in incompetency proceedings.<sup>4</sup>

From a psychiatric standpoint the most desirable method of inquiry into the competency of an individual would be by a court-appointed commission composed, perhaps, of two competent psychiatrists and a lawyer. They would carry out as extensive an investigation as they deemed necessary, examining the patient, hearing witnesses, studying hospital records, etc. Their report

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4. Beverley's Case, 4 Co. Rep. 123b (1603); 1 Bl. Comm. 303; Constitutional Right to Jury Trial in Proceedings for Adjudication of Incompetency or Insanity, 91 A. L. R. 88 (1934); Note, 18 U. Chi. L. Rev. 361 (1951).



would be presented to the judge. The presence of the alleged incompetent would in most instances not only be unnecessary but undesirable. He would, of course, be represented by counsel. There seems to be no place for jury participation in such a procedure, which is essentially a technical inquiry.

The examination of the alleged incompetent should be kept on as informal a plane as possible, both because that is the most effective way of getting a real understanding of the individual and because it does less violence to his peace of mind.

Almost all the states in the Union have adopted the Veterans' Guardianship Act, either in its original or its revised form. This provides specific procedure for guardianship of incompetent veterans, orphans of deceased veterans and other beneficiaries of the Veterans' Administration. The Veterans' Administration functions in a manner somewhat analogous to a guardian *ad litem* on behalf of the incompetent or other beneficiary, and attorneys of the Administration appear in the state courts in cases of guardianship of veterans. About 80,000 beneficiaries of the Veterans' Administration are under guardianship, and about half of these are mentally incompetent, so the act governs a large number of cases.

## 2. Contracts

So far as the effect of mental incompetency is concerned, no valid basis exists for a distinction between contracts, deeds and most other juristic acts designed to create or affect rights and duties. What is said here of contracts can be taken to apply as well to conveyances and to gifts. In all such cases, when incompetency is raised as a defense, two questions have to be answered:

1. What type or degree of mental disorder will the law recognize for this purpose? Or as the lawyers like to put it, what is the "test" of incompetency?

2. What legal effects flow from such incompetency?

To answer the first question, the law must look for guidance to psychiatry, but the second is a question of legal principle and policy to which psychiatry has nothing to contribute.

- a. *The Test of Mental Incompetency.* Although the courts employ varying phraseology, they agree in essence that a contract or other legal transaction will not be set aside on the ground of mental incompetency if the person had sufficient mental capacity

to understand the nature and effect of the particular transaction.<sup>5</sup> A higher degree of mental capacity may be required to understand a complex instrument or transaction than a simpler one.<sup>6</sup> The psychiatrist is continually dissatisfied with the law's readiness to make generalizations. He cannot help asking what kind of transaction is involved. The degree of judgment needed in selling a large business is very different from that required in selling an automobile, the ceiling price of which can be found in the Automobile Red Book or accurately gauged by nearly anyone familiar with cars. Intellectual capacity and judgment are not discrete ponderables that one can weigh and measure in vacuo. They can only be properly evaluated in regard to the task at hand. Of course, gross distortions and deficiencies are easily recognized and are readily dealt with, but proper evaluation of milder ones calls for real wisdom.

Where the mental unsoundness is manifested in delusions, older cases tended to treat this as a distinct situation governed by a distinct rule. The rule applied apparently was that the delusion affected the validity of the transaction only if it directly concerned the latter. Thus where a husband had an insane delusion that his wife was having an affair with an undertaker, and for that reason deeded all his property to his son, the court held that the delusion vitiated the deed.<sup>7</sup> But the legal principle governing the effect of mental incompetency should remain constant without regard to the form of mental disorder involved. The "understanding" test is broad enough to cover cases evidenced by delusion; a person who acts under an insane delusion can be said not to understand the nature and effect of his act. He may understand that he is executing a deed which will give his son title to the property, but we can also take a broader view and say that if he thought he was

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5. For cases on the effect of mental incompetency on contracts, see Williston, *Contracts* 738-757 (rev. ed. 1936); Cook, *Mental Deficiency and the English Law of Contracts*, 21 Col. L. Rev. 424 (1921); and a series of articles by Professor Milton D. Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 Mich. L. Rev. 1189 (1940); *Judicial Tests of Mental Competency*, 6 Mo. L. Rev. 141 (1941); *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 Tex. L. Rev. 554 (1943). See also a Note, 32 Col. L. Rev. 504 (1932).

6. *Parker v. Marco*, 76 Fed. 510 (1896); *Seerley v. Sater*, 68 Iowa 375, 27 N. W. 262 (1886). See also *Everly's Adm. v. Everly's Admr.*, 205 Ky. 711, 175 S. W. 2d 376 (1943), to the effect that it takes greater mental capacity to make a contract at arm's length with an opponent than to make a gift.

7. *Eubanks v. Eubanks*, 360 Ill. 101, 195 N. E. 521 (1925); *accord*, *McCambridge v. Daly*, 109 N. J. Eq. 43, 156 Atl. 372 (1931); *Riggs v. American Tract Society*, 95 N. Y. 503 (1884).

cutting off a faithless wife, whereas in fact he was depriving an innocent one, he did not truly understand the nature and effect of the act.

Many lawyers have had experience with clients who suddenly develop a penchant for reckless speculative ventures or grandiose projects, extravagances or notions of great wealth. These developments may be the first symptoms of general paresis. The liability of such a person on his contracts has given the courts much trouble, but medically, a diagnosis of paresis in such cases would indicate incompetency.

It is sometimes claimed that a contract was executed during a lucid interval of a person admittedly disordered. This conception of mental disorder interrupted by "lucid intervals" has troubled lawyers since Roman times. Psychiatrists today would be inclined to question whether in most cases the patient's lucidity during such intervals was not more apparent than real. There are, of course, lucid intervals between the recurring attacks of manic depressives, but in the case of paresis, the pathological process in the brain does not recede unless the patient is effectively treated, and the presumption should be against any truly lucid intervals.

b. *Effect of Mental Incompetency.* The policy question involved in deciding what effect the law should give to the fact that one of the parties was mentally disordered at the time of the transaction calls for a balancing of equities between two parties, both of whom may be equally innocent and deserving. An illustrative case is one in which the medical author was asked by an able and socially minded lawyer to examine psychiatrically a sixty-five year old Negress who had sold her house three months before. The lawyer was connected with a financial agency or company that had become involved in the purchase of the property. He grew suspicious when he discovered that the purchase price of the small row brick dwelling was only \$1500, while another house in the same block had brought \$3800 a short time before.

Henrietta was a tall, aged but physically well-preserved Negress. Her physical examination showed a marked hypertension, 205/110, and a very high degree of arteriosclerosis, as evidenced by the visualization of her retinal arteries. She said that she was sixty-five, but was unable to give the year of her birth. When asked the date, which was actually January 12, 1950, she replied, "October something, I can't even remember. I have been poorly myself and it has gone to my head. It must be around 1930 or 1934." She said

that her husband had died five years before, in 1927 or 1928. She knew the address at which she had been born and recalled in some detail the grammar school which she had successfully completed. She had worked as a domestic but had stopped working some time before because of failing health.

A test of intellectual functions showed marked unevenness in her performance. Surprisingly enough, she was able to repeat seven digits forward, but only four backward. When given a street address or a color and the name of a flower to remember, at the end of three minutes all she could recall was "something about numbers." In subtracting seven from a hundred serially, she started off quite well but rapidly tired, making eight mistakes. She recalled her multiplication tables quite well and did very simple calculations fairly well, but became very confused by even simple arithmetic problems. Her vocabulary was good, her general information spotty. She named as Mayor of Baltimore a man who was mayor at the turn of the century. It was obvious that we were dealing with a woman with good native endowment, but in whom serious deterioration had occurred.

A history obtained from the sister and a neighbor indicated that Henrietta was clearly not competent to execute a valid deed of sale at the time of the examination and that there was every reason to believe that she was incompetent to do so three months earlier, when the deed was executed. Assuming this diagnosis to be correct, should the purchaser be allowed to keep the property? It is not enough to say that it is unjust to hold a person legally bound who is mentally incapable of understanding the import of the transaction. The other party may be equally innocent, and may have acted in good faith. Where the agreement has not yet been carried out, or where the consideration can be restored, one possible answer would be to declare the transaction void and restore the parties to the status quo ante. That is the result which the purchaser in this case voluntarily chose. Upon being shown the psychiatric report, he decided to "call the whole thing off" rather than enter into litigation. A committee was appointed, the house was again put up for sale, and this time it brought \$4000.

But suppose Henrietta had spent or lost the money and was unable to return it? In such a case, or where for any reason the parties cannot be restored to their former position, the courts are faced with a dilemma for which no easy solution exists. The conclusions reached are conflicting, and the subject is badly confused

with much shallow and contradictory reasoning. Any attempt to summarize "the law" on the subject must necessarily be an oversimplification of the many inconsistencies and distinctions found in the cases.

Under the influence of medieval notions that insanity was a "visitation from God" (a belief which seemed to be held along with the antithetical notion that the insane were "possessed" of the Devil), the older English law held that a person could not raise as a defense to a contract the fact that he was insane at the time he entered into it, because a man should not be allowed to "stultify himself." Although this view is found reflected in English cases down to a century ago, it never received much support in this country and is accepted nowhere today. It was superseded by the opposite rule, that the contracts of insane persons are absolutely void. This rule in turn has largely been abandoned in favor of the rule that such contracts are merely voidable under certain circumstances, although, as said, the present state of the law is still much confused.

The situation where the courts are most nearly unanimous in result is where there has been an adjudication of incompetency and a guardian appointed. Adjudication and guardianship is held to render all contracts of the person under guardianship void,<sup>8</sup> and the courts will usually not inquire whether the person was in fact incompetent, so long as he was under active guardianship.<sup>9</sup> The fact that the other party had no actual notice of the adjudication, and acted in the bona fide supposition that the person was sane, does not avail him; the court record of adjudication is constructive notice to all the world of the incompetency. Laymen unfamiliar with the devious nature of legal reasoning must be warned not to take this reference to "constructive notice" too literally or to assume that lawyers do. The word "constructive" is a lawyer's verbalism by which two things radically different are spoken of as if

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8. Longley v. McCullough, 68 R. I. 395, 27 A. 2d 830 (1942); Blegg Co. v. Peterson, 51 S. D. 502, 215 N. W. 529 (1927), noted in 41 Harv. L. Rev. 536 (1928).

9. Gingrich v. Rogers, 69 Neb. 527, 96 N.W. 156 (1903); Carter v. Bechwith, 128 N. Y. 312, 28 N. E. 582 (1891). However, one writer has found from a study of several hundred cases that the courts are not likely to be impressed by proof of *foreign* adjudication; also that they are not inclined to require proof of legal restoration, if there is evidence that the case has been medically terminated. See Virtue, *Restitution from the Mentally Infirm*, 26 N. Y. U. L. Q. Rev. 132, 147-8 (1951); Field v. Koonce, 178 Ark. 862, 12 S. W. 2d 772, (1929) (where the guardianship has become inactive, even though never legally terminated, evidence admitted to show sanity at the time of the transaction).

they were the same. This is not for the purpose of deceiving anyone, but to achieve an illusion of symmetry and consistency which is comforting even though known to be false. What lawyers really mean by "constructive notice" is that even though there is no notice at all, the law will, for reasons of policy, treat the situation as if there were notice. The reason of policy in this instance is that it would be impossible to carry out the manifest purpose of appointing a guardian unless the appointment were given the effect of vesting control of the property in the guardian, and empowering him alone to transfer it.<sup>10</sup> Under this reasoning, it is the appointment of a guardian, and not merely the adjudication of insanity, that is determinative, in the absence of statutes expressly declaring void all agreements made after adjudication.<sup>11</sup> However, there is a strongly held view that the adjudication itself should be considered a conclusive determination of incompetency, effective until judicially terminated.

Commitment or hospitalization by the better rule is merely presumptive evidence of incompetency during the period spent in the institution.<sup>12</sup> Courts which reach the contrary result frequently do so by failing to distinguish commitment from an adjudication of insanity. In some states, statutes expressly declare that persons committed to state institutions are legally incompetent to contract. Under the Ohio law, for example, no person in a mental hospital, except a voluntary patient, is deemed competent to make contracts or deeds unless approved by the committing court. Much sounder would be the very opposite provision: that every patient in a mental hospital retains his civil rights, including the right to contract, unless he has been adjudicated incompetent. Such express preservation of rights is included in the model act governing the hospitalization of the mentally ill drafted under the auspices of the Federal Security Agency.

Psychiatrists are unanimously of the opinion that the fact that a patient has been committed to a hospital as insane should not

10. *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446 (1889).

11. See Williston, *Contracts* §257 (rev. ed. 1936).

12. Most states today recognize that commitment to a hospital does not of itself constitute a determination of incompetency or a deprivation of civil rights. The fact that a person has been committed to a hospital is competent evidence to show incompetency, but is not conclusive. See *Fleming v. Bithell*, 56 Idaho 261, 52 P. 2d 1099 (1935); *Mitchell v. Mitchell*, 312 Mass. 165, 43 N. E. 2d 779 (1942); *State v. Bucy*, 104 Mont. 416, 66 P. 2d 1049 (1937); *Leick v. Pozniak*, 135 N. J. Eq. 67, 37 A. 2d 302 (1944); *Quarterman v. Quarterman*, 179 Misc. 759, 39 N. Y. S. 2d 737 (1943); *Ex parte Gilbert*, 71 Okla. Cr. 268, 111 P. 2d 205 (1941); 68 A. L. R. 1309 (1930); 7 A. L. R. 573 (1920).

*ipso facto* affect his competency. These are two entirely separate and distinct issues and should be kept so. Every effort should be made to avoid the stigma of incompetency. It is a purely practical device and is only required when there are financial assets that might be dissipated or when it is necessary to prevent the mentally disordered patient from entering into some contractual relationship such as marriage, which might be contrary to his best interests. Many patients in psychiatric hospitals sign and endorse checks, make out tax returns, etc., and are entirely competent to do so.

Where no guardianship is involved, three main theories are found in the cases.

1. The contracts of a mentally incompetent person are wholly void.

2. Such contracts are voidable at the election of the incompetent or his representative.

3. Such contracts are binding where the other party acted innocently, the contract is a fair one, and the parties cannot be put back in status quo. Only where these conditions do not obtain is the contract voidable.

Historically, the trend has been from the first of these rules to the second and more recently the third.

*Theory that Contracts are Void.* Under the influence of the older subjective theory of contracts, in which a "meeting of the minds" was deemed essential to the formation of a contract, it seemed self-evident that there could be no contract when one of the parties had not sufficient mind to give assent. Some of the cases used more extreme language, saying that the necessary assent of two minds was lacking in such a case because "a person *non compos mentis* has nothing which the law recognizes as a mind."<sup>13</sup> This is quite invalid; even of a helpless imbecile it is scarcely correct to say that he does not have something recognizable as a mind. The statement was moreover legally superfluous. It was enough for the logic of the theory to say that the incompetent did not have *enough* mind to give a valid assent. Without such assent, there was no contract, and any attempt to contract was a mere nullity. It was accordingly held that a person *non compos mentis* could not execute a deed, contract, negotiable instrument, or other

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13. *Dexter v. Hall*, 15 Wall. 9 (U.S. 1872). The Georgia court still says that to avoid a contract, the person must be "entirely without understanding." *Jones v. Smith*, 206 Ga. 162, 56 S. E. 2d 462 (1949).

obligation, and his acts purporting to do so were absolutely void.<sup>14</sup>

It is not at all certain, however, that all the courts which have declared such contracts to be void mean what they say. Strictly, if a contract is void, it can be repudiated by either party, and not only by the incompetent; it cannot be ratified; and may even be denied by third persons. Whether any court would be willing to accept these logical consequences of voidness is doubtful. On the contrary, it appears that at least in some cases the courts in declaring such contracts void actually meant no more than that they were voidable.<sup>15</sup>

*Theory that Contracts are Voidable.* Until recently, the majority rule in the United States was that contracts of mental incompetents are voidable on his part, but not by the other party, and this still seems to be the law in a large number of states.<sup>16</sup> Generally, this rule applies not only as against a party who did not know and could not reasonably suspect the fact of incompetency, but also against subsequent innocent parties. Thus if an incompetent sells his automobile to B who in turn sells it to C, it may be recovered not only while in the hands of B but also C.<sup>17</sup> So far as third parties are concerned, however, the rule has been changed by the Uniform Sales Act, which has been adopted in most American states and which provides that the bona fide purchaser of a chattel from one who has a voidable title acquires good title.

Courts frequently support the rule that contracts of mental incompetents are voidable by analogy to the rule governing infants. But it is one thing to put upon a party dealing with a young person the risk of ascertaining the definite and objective fact of age; it is a much more burdensome thing to saddle him with the hazard that the person he is dealing with, although apparently normal, may not be held to come up to some rather vague standard of mental competency, should the question eventually be put to some judge or jury. In permitting contracts to be avoided on the

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14. *Edwards v. Davenport*, 20 Fed. 756 (1883); *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178 (1895); *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290 (1886).

15. See Williston, *Contracts* §250 (rev. ed. 1936).

16. *Luhrs v. Hancock*, 181 U. S. 567 (1901); *Wright v. Waller*, 127 Ala. 557, 29 So. 57 (1900); *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892 (1901); *Cash v. Bank of Lowes*, 196 Ky. 570, 245 S. W. 137 (1922), noted in 11 Ky. L. J. 167 (1923); *Brewster v. Weston*, 235 Mass. 14, 126 N. E. 271 (1920), noted in 29 Yale L. J. 930 (1920); *Goldberg v. McCord*, 251 N. Y. 28, 166 N. E. 793 (1929).

17. *Warren v. Fed. Land Bank*, 157 Ga. 464, 122 S. E. 40 (1924); and cases collected in Williston, *Contracts* §252 (rev. ed. 1936). The contrary rule has been adopted in Iowa and some other states. See Williston, *loc. cit.*; Note, 4 U. Cin. L. Rev. 244 (1930).



ground of mental incompetency, we should recognize frankly that the law is going farther than it goes in infancy cases to protect those deemed unable to protect themselves, as against protecting the security of transactions.

Under the "voidable" rule, a contract made while a party is incompetent may be ratified by him after he regains his sanity, and ratification will be implied from any conduct indicating his willingness to be bound. Indeed, mere failure to disaffirm is probably enough.<sup>18</sup> During his incompetency, a guardian appointed subsequent to the transaction may disaffirm it for him,<sup>19</sup> (if he was under guardianship at the time, his act is not only voidable but void, as already said, and so needs no disaffirmance). After his death, his heirs or representatives may ratify or disaffirm.<sup>20</sup>

Mental incompetency does not give the other party a right to disaffirm. He is in the awkward position of being bound himself, but subject to the possibility of having the other party disaffirm.<sup>21</sup> It has been held that after he learns of the other's incompetency, he must take care of the property he received in the transaction with a view to returning it on demand.<sup>22</sup> He is, however, entitled to return of the consideration paid, at least if it is still unspent; the incompetent will not in most states be allowed to disaffirm the contract and yet retain the benefit of it. But even this seems to have been permitted in some cases.<sup>23</sup>

*Theory that Contracts May be Binding if Not Inequitable.* The prevailing theory today, both in England and in the United States, is that where the incompetency was not known to the other party

18. *Weickenant v. Eccles*, 173 Mich. 695, 140 N.W. 513 (1913); see Restatement, Contracts, §§ 89, 93 (1932); Williston, *op. cit. supra* note 16, § 253.

19. *Neale v. Sterling*, 117 Cal. App. 507, 4 P. 2d 250 (1931); *Norelius v. Home Sav. Bank*, 200 Iowa 613, 203 N. W. 809 (1925); *Pritchett v. Plater Co.*, 144 Tenn. 406, 232 S. W. 961 (1921). *Finch v. Goldstein*, 245 N. Y. 300, 157 N. E. 146 (1927) (the incompetent's committee was permitted to ratify a conveyance made prior to adjudication of incompetency). Even where no guardian has been appointed, the incompetent can disaffirm by his next friend. See *Wynne v. Fisher*, 156 Ga. 656, 119 S. E. 605 (1933).

20. *Walsh v. Stockyards Tr. & Sav. Bank*, 340 Ill. 57, 172 N. E. 25 (1930); *Bullard v. Moor*, 158 Mass. 418, 33 N. E. 928 (1893). See *Walker v. McLaurin*, 227 N. C. 53, 40 S. E. 2d 455 (1946).

21. *Kohler v. Kohler*, 316 Ill. 36, 146 N. E. 476 (1925); *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. 178 (1895). But see *Rattner v. Kleiman*, 36 S. W. 2d 246 (Tex. Civ. 1931), where defendant bought land from an incompetent and gave his note therefor. When sued on the note, defendant pleaded the plaintiff's insanity and offered to return the land. Held for defendant.

22. *Patton v. Washington*, 54 Ore. 479, 103 Pac. 60 (1909).

23. *Smith v. Thornhill*, 25 S. W. 2d 597 (Tex. Com. App. 1930), noted in 9 Tex. L. Rev. 606 (1931).

and no advantage was taken of the incompetent, and the contract has been executed and the parties cannot be put back in status quo, the contract is binding and cannot be avoided on the ground of incompetency.<sup>24</sup>

This theory reflects two modern viewpoints:

(1) The older subjective view of contract, requiring a "meeting of the minds," has been largely superseded by an objective view, under which actual mental assent is not essential, so long as each party has by his conduct led the other to believe that he has given such assent. A mental incompetent may lead another justifiably to believe that an agreement has been effected, and so there is today no theoretical obstacle to holding a binding contract to be in effect.

(2) On the policy level, commercial interests are always in favor of protecting bona fide purchasers. In Roman and medieval times no less than today, the merchants have had to push a reluctant law to uphold bona fide sales against defects of legal formality in the transaction and against the claims of prior claimants from whom it may have been stolen or obtained by fraud. This pressure asserts itself today in laws giving corporate stock many of the attributes of negotiability in cutting off the equities of prior holders as against innocent purchasers for value, and in the Uniform Sales Act, already mentioned, which makes no exception for the case of sales by incompetents in declaring that the innocent purchaser from one having voidable title acquires valid title. Although commerce and property rights are both important social interests, the modern trend, where they conflict, is to favor trade over title.

These two influences must be balanced against the paternal policy of the law to protect certain classes in the community who are unable to protect themselves. Where the other party knew he was dealing with a person who was mentally incompetent, there is little equity in his position. The same is true where he took advantage of the other's deficiency. Even if neither of these facts are present, if the parties can be put back in status quo, there is no hardship in allowing rescission. On the other hand, where the consideration has been spent or dissipated and so cannot be returned, and where the other party was both innocent and fair, we

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24. The leading case upholding this view is *Moulton v. Cameroux*, 2 Exch. 487, 33 Lunat. 162 (1846); 4 Exch. 17 (1849). A recent American case is *Sjulin v. Clifton Furniture Company*, 41 N. W. 2d 721 (Iowa 1950). Other cases supporting the same rule are collected in *Williston, op. cit. supra* note 16, §254.

are faced with the really difficult case—that of determining which of two innocent persons should suffer the loss. In this situation, there seems good sense in the modern cases which say in effect that other things being equal, we will favor the result which facilitates trade and commerce and promotes the security of transactions.

All jurisdictions agree that a person however mentally disordered may make himself liable for necessities furnished to him. This is not an exception to anything said above, for this liability is not based on contract, but on what the law calls "quasi-contract." This term is again an example of the lawyer's penchant for putting his new wine in old bottles, for this "almost contract" is actually the very opposite of a contract; the liability is imposed not because the parties so agreed but because the law so provides. In this instance, it is imposed because it is the policy of the law to enable persons under disability, such as incompetents and infants, to obtain necessities and to pledge their credit to get them. Since the obligation does not rest on contract, the amount due does not depend upon what the incompetent may have agreed to pay, but upon the value of the necessities furnished. For the same reason, even one under guardianship may bind himself for necessities where his guardian fails to furnish them. What are necessities depends largely upon the facts of each case. The courts try to limit the concept to food and clothing, but needed medical services would certainly be included and this should include cost of hospitalization in a mental institution. It has also been held that legal services to obtain release from an asylum or to effect the settlement of an estate may come under this heading.<sup>25</sup>

### 3. Wills

In will contests, the question whether mental incapacity should be deemed to render the act void or merely voidable, which has given the courts so much difficulty in contract cases, does not arise. If the testator was mentally incompetent, the effect can only be to render the will void.

Will cases also differ from others in which the question of mental condition arises in that the person is always dead at the time of the controversy and so not available for examination. Contracts, deeds or other acts may sometimes be questioned after the person's death on the ground that he was insane at the time, but this happens relatively infrequently. Suits on life insurance

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25. Williston, *op. cit. supra* note 16, §255. See *In re Holder's Estate*, 168 Kan. 657, 215 P. 2d 166 (1950).

policies which provide for non-liability in case of suicide sometimes involve the question whether the suicide was committed with a sane mind or not, but most insurance policies today do not exclude liability for suicide. It is therefore largely in will cases that the question of sanity arises post mortem, and must be decided without the possibility of personal expert observation or examination. The evidence will necessarily have to come from lay observers such as relatives or friends or from a general medical practitioner such as the family doctor. The nearest approach to expert diagnosis that can be obtained will be an opinion in response to hypothetical questions based on observations testified to by laymen—not a very satisfactory basis for diagnosis.

In some cases, however, the testator's appearance and conduct at the time of writing the will may reveal pronounced evidence of mental disease. Depression, suspicious or paranoid ideas, or episodes of marked confusion are significant symptoms. Competent presentation of physical condition, appearance and conduct, together with family history, may provide a convincing basis for an expert opinion of advanced disease and incapacity.

Where there is reason to believe that a will may be contested—as where an old man marries his nurse or housekeeper and writes a new will cutting off relatives who had expected to inherit—it will be prudent for the lawyer drawing the will to have his client examined by a psychiatrist, with a view to having the psychiatrist's testimony available in case of suit, and perhaps to attach a copy of the psychiatric report to the will. It is strange that lawyers, who usually are most careful to guard against all loopholes that might defeat their clients' purposes, rarely take this precaution even where the danger is fairly evident.

After death, if there is any question of testamentary capacity, a brain autopsy should be performed. Sometimes the evidence of arteriosclerosis or senile psychosis will be so clear that a psychiatrist can base a valid opinion of mental incapacity upon the autopsy alone. Ordinarily, however, the presence of arteriosclerosis will not of itself prove a testator's mental incapacity. Marked cerebral arteriosclerosis may exist without causing mental symptoms. A person with cerebral arteriosclerosis may become psychotic, however, as a result of an emotional storm. Trauma, surgery, hypertension, decompensated heart disease, toxic factors or malnutrition may also precipitate psychosis in the aged. Another disease associated with old age is cerebral softening, or encephalomalacia. This

is a sequel of embolism with resulting paralysis. When cerebral softening involves the areas of mentation, a definite personality change occurs; the patient is very susceptible to suggestion and is apt to be easily influenced by others.

Courts sometimes suggest a distinction between testamentary and contract cases by pointing out that the power to dictate how one's property should pass after death is not a natural right, but is rather a privilege conferred by statute, which in every system of law is rather carefully limited. The Anglo-American legal system has favored greater freedom of testamentary disposition than most, but even here the law today does not allow a man to cut off completely his wife and minor children. Any attempt, however, to distinguish testamentary from contract cases on this basis necessarily assumes that freedom of contract *is* a natural right. It is true that Blackstone considered it the "absolute right" of every Englishman to freely use, enjoy and dispose of all acquisitions "without any control or diminution, save only by the laws of the land."<sup>26</sup> But the idea that unlimited freedom of making promises and disposing of property was a natural right began only with the *laissez faire* economics of Adam Smith. It was taken up by utilitarians like Mill, as an instrument to abolish antiquated institutions, and later in the 19th century by those who sought to minimize the social welfare functions of the state. Today, even though it is perhaps still true that we favor as much freedom of contract for the individual as may be consistent with the welfare of society, the difference, if any, between contracts and wills in this regard is at most a matter of degree. The right to contract like the right to make a will is subject to the limitations imposed by the sovereign, and these may be changed from time to time. All talk of "natural rights" in these fields merely evidences the human tendency to regard established and familiar ideas as immutable and God-given imperatives.

Courts have recognized that both intellectual and emotional elements must be considered in determining the competency of an individual to make a valid will. The test of testamentary capacity as typically stated in the statutes is that the testator must be of "sound mind and memory." The courts have read into these phrases the qualification "with reference to making a will," so that a will can be upset only if the testator's mental unsoundness was such as to prevent a rational decision with respect to the

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26. See 1 Bl. Comm. 134.

particular will, at the time it was made. A "sound mind" for testamentary purposes is one that enables the testator to understand the condition of his estate, his obligations towards those who are related to him or who have legal or moral claims upon him, and the import and effect of the provisions of his will. Many legal opinions have stressed the fact that one can normally expect impairment of intellectual acuity and of memory in the aged and infirm and that "mere weakness of mind" does not of itself establish the unfitness of the testator. It has been held that it is not proof of incapacity that the testator had to be prompted in recalling his property and the objects of his bounty, or that he omitted the name of a child in his will, presumably out of forgetfulness.

An important supplement to the law governing mental incompetency is supplied by the doctrine of "undue influence," which permits a will, conveyance or gift to be cancelled if it was obtained by the deception, threat or persistent suggestion of a domineering relative or confidant knowingly taking advantage of a weak-willed person. Courts have recognized the marked suggestibility of the aged and the infirm. Shakespeare spoke of old age when one again becomes toothless as "second childishness." Modern psychologists have stressed the resemblances between old age and childhood at the deeper levels—senility is in many respects a regressive process. Many aged persons, particularly if they had earlier in life been rather dependent individuals, establish a real childish dependence when they become senile. Together with this, they often exhibit the suggestibility, the petulance and the inconstancy that one observes normally in small children. Recognizing this fact, one of the chief foci for consideration by the court in will cases is whether undue influence had been exerted upon the testator. Many aged individuals are easy prey to the flattery of younger persons. Others may acquiesce out of the pain, loneliness, and despair of an old man or woman facing death and without the physical and emotional stamina to cope with the importunities of those around them. Senile paranoid conditions must also be kept in mind. Certain aged individuals develop delusions of persecution which may involve persons to whom they had seemed very close and these may result in their excluding them from later wills.

Courts have sometimes laid it down broadly that it requires less mind to make a will than to make a contract, but this seems much too broad. In either case, the question must be addressed to the particular transaction involved. Some contracts may be simpler

to understand than some wills. And a mental aberration may affect a will even though it does not render the person incapable of contracting generally. In Illinois, the courts at one time adopted the rule that if a person is capable of transacting ordinary business, he is capable of making a valid will. But in 1898, a case arose in which a will was challenged on the ground that the disposition was induced by the testatrix' belief in a spiritualistic manifestation favorable to the devisee. This having been established, the will was upset although the jury found specially that the testatrix possessed sufficient mental capacity to transact ordinary business.<sup>27</sup>

Even weakness of mind making necessary the appointment of a guardian has been held not necessarily inconsistent with capacity to make a will. In a Virginia case, a will was upheld even though it was executed on the very day that a guardian was appointed. The court held that although the testatrix by reason of age and physical infirmities had reached such a stage of mental deterioration that it was expedient to appoint a committee to manage her property, she was not so deteriorated as to be incapable of making a will.<sup>28</sup> But the fact of guardianship is prima facie evidence of incapacity to make a will, and the burden of showing the contrary is on the proponent.

Delusions are the subject of a surprisingly large number of cases.<sup>29</sup> Although until less than a hundred years ago the courts held that a person afflicted with any kind of delusion was of "unsound mind" for testamentary purposes, the present rule is that delusion will render a will invalid only if it appears directly to have influenced its terms. Delusion may affect testamentary capacity, where it (1) goes to the instrument, as where the testator believes he is forced to sign it, or (2) goes to the property to be disposed of, e.g., a delusion that he is much wealthier or much poorer than he actually is; or (3) concerns his relatives or others having legal or moral claims on him, as where he believes some of them are plotting his death; or (4) concerns the disposition, as where he leaves his property for a peculiar purpose or makes an odd choice of beneficiary.

Sometimes two or more of these types of delusion are found in combination, as where a person develops an irrational antipathy

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27. *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197 (1898).

28. *Gilmer v. Brown*, 186 Va. 630, 44 S. E. 2d 16 (1947). See also cases in annotation, 8 A. L. R. 1375 (1920); and Note, 5 Nat. Bar J. 417 (1947).

29. See annotation, *Insane Delusion as Invalidating a Will*, 175 A. L. R. 882 (1948).

toward members of his family and so disinherits them and leaves his property to some unusual beneficiary. In a 1947 Pennsylvania case, the testatrix was a woman who had never married. She lived with her parents until their death in about 1928, when she was 32 years old, and was devoted to them. But beginning about 1935, when she was 40, her attitude changed. In 1939, she wrote "My father was a corrupt, vicious, and unintelligent savage, a typical specimen of the majority of his sex. Blast his wormstinking carcass and his whole damn breed." And in 1943 she wrote on a photograph of her mother, "The moronic she-devil that was my mother." She became neurotically feminist and developed a morbid hatred of men. She looked forward to the day when women would bear children without the aid of men, and all males would be put to death at birth. On the other hand, in her dealings with her lawyer and with her bank over a period of years, she was entirely reasonable and apparently normal. From 1925 she had been a member of the National Women's Party and she had worked as a volunteer in its office. She left her estate to the party. The jury's finding that the will was directed by an insane delusion was upheld in the upper court.<sup>30</sup>

Where the testator entertained a peculiar religious belief, the courts have often had difficulty. Belief, almost by definition, is not a rational matter, and any religious belief is likely to seem senseless not only to agnostics but to adherents of opposing beliefs. Yet one of the more elementary implications of our constitutional guarantees of religious liberty is that a person is not to be adjudged insane merely because he adheres to a peculiar sect, or even because he constitutes himself a sect of one. And certainly belief in communication with the spirit world or in miraculous manifestations could not be declared evidence of mental disorder without impugning the sanity of millions. Yet hearing voices and seeing visions are significant symptoms of mental disorder. Belief in faith healing, Christian Science, spiritualism and transmigration of souls has each been held not in itself to demonstrate mental disorder, even when embraced in extreme form.<sup>31</sup>

Perhaps the sound line of distinction is between mere belief and the delusion of actual experience. One may believe almost anything without being in any way mentally disordered. Belief in witchcraft was once very general, and courts themselves solemnly found thousands of persons guilty of being witches and condemned

30. *Re Strittmater*, 140 N. J. Eq. 94, 53 A. 2d 205 (1947).

31. *E.g.*, *Owen v. Crumbaugh*, 228 Ill. 380, 81 N. E. 1044 (1907).



them to being burned at the stake or hanged. Even today, a person who takes witchcraft seriously is not necessarily a mental case; he may merely be very ignorant and very superstitious. Education and environmental background are factors which must be taken into consideration. On the other hand, if one not only believes in witches, but claims to be one, or if one not only believes in saints appearing before mortals in visions, but habitually sees such visions, a psychiatric examination is indicated.

#### 4. Marriage and Divorce

Mental defect or disorder may have any of four legal effects upon marriage. The law may (1) forbid mentally ill persons to marry; or it may make mental illness grounds for (2) annulment, or (3) divorce, or (4) a defense to grounds for divorce.

*Prohibiting Marriage of the Mentally Ill.* Almost half of the states have laws intended to prevent insane persons from marrying. Some of these forbid issuance of a license; others forbid the ceremony. But the clerk at the marriage license window can hardly be expected to diagnose the mental condition of applicants, and the officiating clergyman or justice of the peace is usually in no better position to do so. A few states have devised more effective procedures. Iowa requires all applicants for a marriage license to submit an affidavit from some disinterested party stating facts to show the age and competence of the applicants. The state board of control furnishes to the clerks quarterly a list of persons who have been inmates of state mental institutions or who have been placed under guardianship and whose competence to marry has not subsequently been adjudicated. The clerks are not to issue licenses without first checking whether the name of either party appears on the list. Anyone refused a license may bring a court action to determine his competency to marry.

New Hampshire implements the prohibition against issuing a license to an insane person by authorizing the clerk to forward to the state board of health the application of any person suspected by him of being insane. The board investigates and notifies the clerk whether the license should issue. The applicant himself may also apply to the board for a determination, when a question arises of his qualification. Michigan relies upon threat of criminal punishment. A person who has been confined in a public mental institution or who has been adjudicated insane, feebleminded or epileptic is forbidden to marry without filing a certificate from two physi-

cians that he has been "completely cured" and that there is no probability that he will transmit the defect or disability to his issue. Fine and imprisonment threatens not only the person who knowingly marries in violation of this provision but also anyone who advises, aids or assists in such violation. Delaware, New Jersey, Virginia and a few other states also have detailed provisions designed to implement the prohibition against marriage of the mentally ill.

The primary objective in forbidding such marriage, presumably, is to prevent the procreation of defective offspring. Yet these laws are based on no scientific proof of the inheritability of the disorder. The laws apply to all "insane" persons, or to "idiots," "imbeciles," "feble-minded," "lunatics" or persons of "unsound mind." The premise seems to be that all mental disorder is inheritable. A leading authority on American family law has warned, "Should society fail to prevent the marriage of mental deficient, it would be confronted by increasing numbers of family histories like those of the Jukes and the Kallikaks."<sup>32</sup> But recent studies indicate that the views of a generation or more ago regarding the heritability of mental defect or disease were exaggerated, and certainly there never was any basis for the assumption that "insanity" or "lunacy" was generally inheritable.

A few states have restricted the prohibition somewhat by permitting marriage where the woman is past forty-five years of age. Only a few, such as Nebraska and New Hampshire, have made use of sterilization as a solution of the eugenical aspect. But many states provide no method of enforcing the professed policy against such marriages except annulment at the election of the incompetent spouse. This, however, confuses two quite distinct legal concepts. Prohibition against such marriage is based on the assumption (dubious though it may be) that such marriages are eugenically undesirable; the state therefore forbids them, regardless of the intent or desires of the parties. Annulment at the election of one of the parties, however, rests on the premise that intelligent consent to the marriage was lacking. If there is a public policy against the marriages of persons afflicted with certain forms of mental illness, it should be enforced by legal prohibition, and not be treated as a matter depending upon the consent or ratification of the parties.

*Annulment.* Marriage is a kind of contract, even though it has

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32. See 1 Vernier, American Family Laws 188 (1931).

certain special effects not true of contracts generally. The general principle that mental incompetency may be a defense to an action on a contract therefore applies, and a party may question the validity of a marriage entered into by him, on the ground that he was incapable of understanding what he was doing. Whether such incapacity should render a marriage void or merely voidable is part of the broader problem with respect to contracts generally, which as we have just seen has given the courts no little trouble. The answer in the marriage cases is essentially the same as in contract: the older cases said the transaction was void, but the more modern trend is to hold it voidable. However, the effect upon marriage is generally governed by statute, and in at least twelve states the statutes specifically declare such marriages to be void, or "absolutely void." Montana for good measure declares the marriage of a feeble-minded person void *and incestuous*! However, some of these statutes are ambiguous. The New York act declares the marriage "void from the time its nullity is declared by a court." This would seem to mean in effect that it is voidable.<sup>33</sup>

As pointed out in connection with contracts, to hold the transaction wholly void means that it is to be regarded as a nullity, having no more legal effect than if it had never occurred. With respect to marriage, this would have a number of important consequences, of which it will suffice here to mention only three.

First, if a marriage is wholly void, no decree of a court is necessary. A decree, when issued, merely declares an accomplished fact. Such a decree may be issued for the good order of society and for the peace and conscience of a party, as, for example, to establish his freedom to marry someone else, but he is not required to obtain such a decree. This is expressly provided by the Michigan and Wyoming acts, and also seems to be the law of Alabama, Georgia, Florida and perhaps other states.

Second, if the marriage is void, children born thereof are illegitimate. However, "more humane considerations of social welfare have quite conclusively demonstrated the folly of a policy that exacts the penalty of bastardy from the children of legally prohibited marriages,"<sup>34</sup> and statutes now very generally declare the issue of void or voidable marriages to be legitimate.

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33. For citations to statutes and cases on annulment and divorce, see Vernier, *op. cit. supra* note 31, §41 and vol. 2, §72; Keezer, *Marriage and Divorce* §1125 *et seq.* (3rd ed. 1946); McCurdy, *Insanity as a Ground for Annulment or Divorce in English and American Law*, 29 Va. L. Rev. 771 (1943); Notes, 40 L. R. A. 737 (1897); Ann. Cas. 1912D 1127.

34. See Vernier, *op. cit. supra* note 32, §48. See also vol. 2, §247.

A third consequence of holding the marriage of an incompetent void is that both parties are affected equally, whereas under the rule of voidability, a contract can be avoided only by the incompetent party. The other party would have to rely not on the incapacity of the incompetent to understand what he was doing, but on a wholly different theory—namely, mistake and failure of consideration, in that instead of getting the sound spouse he reasonably thought he was getting, he got one whose capacity to perform the duties of marriage, including that of procreating and rearing children, is materially impaired. In short, his objection would have to be that he did not get what he bargained for. But in the absence of fraud, the law of marriage does not generally recognize mistake as a ground for avoiding a marriage; one takes a spouse for better or for worse. By statute in England, and in many if not most of the states, however, either party may avoid a marriage on the ground of mental unsoundness.<sup>35</sup>

The prevailing view in the United States today is that a marriage of an incompetent is not void, but voidable. As already said, in the absence of statute, only the incompetent may avoid, and not the other party. The incompetent, of course, can validly act to avoid or ratify only after his restoration to reason. However, even during his disability, he may, by statute, be allowed to bring suit for annulment through his guardian or next friend. In at least seven or eight states, interested relatives have been given standing to initiate annulment proceedings under certain conditions. In the absence of statute, neither relatives nor a general guardian have power to consent or object to the marriage. The reasons for the rule that an adjudicated incompetent is incapable of conducting business affairs do not necessarily apply to marriage.<sup>35a</sup>

The statutes are typically of no help in defining the degree of mental unsoundness which will suffice to avoid a marriage, for they merely refer to "insanity," "insane person or idiot," "imbecile," "insane or feeble-minded," or "lunatics." In about a dozen states, the statutes do lay down some sort of test by referring to persons "incapable of contracting" or of "consenting" for want of understanding. This is essentially the common law test, under

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35. See Keezer, *op. cit. supra* note 33, §448; McCurdy, *op. cit. supra* note 33, 793, n. 109.

35a. On similar reasoning, a guardian has no power to bring a divorce proceeding on behalf of his insane ward. And this has been held even where the ward has expressed the desire for a divorce during lucid intervals. *Phillips v. Phillips*, 203 Ga. 106, 45 S. E. 2d 621 (1947), 32 Minn. L. Rev. 827 (1948).

which the defect or disorder must be such as to prevent an understanding of the obligations assumed by the contract of marriage and capacity to give intelligent consent thereto.

Should a person be allowed to have his marriage annulled on the ground that although his mental condition is not so seriously abnormal as to prevent his understanding the nature and effect of marriage, yet marriage would aggravate his condition and impair his mental health? This has been held a valid ground for breaking an engagement to marry, but there seems to be no recognition of such ground for annulment.<sup>36</sup> This seems, if anything, a ground for terminating a marriage, not for denying that a valid marriage exists.

To members of the medical profession, and to sociologists as well, what has been said so far of annulment for mental incompetency will perhaps seem irritatingly abstract and unrealistic: the problem is treated as an exercise in manipulating the rules governing the legal abstraction called "contract"; incapacity to give intelligent consent to the marriage, as in other contracts, renders the transaction void or voidable as the case may be, and all the other consequences flow logically. If this seems an artificial basis for solving the social and psychiatric problems of marriage, it may be answered that annulment is not a concept well adapted to the implementing of social policy. It is a legal concept, involving legal consequences. Social and scientific judgments that the marriage of certain types of individuals should be prevented or terminated must be effected by preventive measures such as discussed above, or by divorce. However, the logical distinction between annulment and divorce is not always maintained. The New York law allows "annulment" of a marriage at the instance of the sane spouse whenever the other has been incurably insane for five years. Since the insanity may have arisen subsequent to the marriage, this is in effect a divorce, even though called "annulment." Such statutory terminology does not necessarily indicate logical befuddlement on the part of the legislators but, rather, it is a matter of pragmatic politics. Divorce under the name of annulment may smell sweeter to the church and other groups opposed to divorce.

*Divorce.* Incurable insanity today is a ground for divorce in England and in more than half of the American states. This repre-

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36. The New York courts frankly recognize that the action is "in reality to dissolve a marriage." *Kuphal v. Kuphal*, 177 Misc. 255, 29 N. Y. S. 2d 868 (1941).

sents almost wholly a twentieth century development. In 1897, only three or four states permitted it. Traditionally, divorce is allowed only for marital wrongdoing by one spouse against an innocent spouse. Divorce for reasons not involving fault is still something of an anomaly in our law, and the principle followed in some other countries, that a marriage may be dissolved whenever it becomes clear that the parties cannot get along, is repudiated utterly—in theory; in practice, divorce by mutual consent is quite possible and quite frequent. Insanity as a ground not only involves no fault, but permits renunciation of marital duty for mere misfortune. "The constancy of husband and wife to one another in sickness or health, in accordance with the marriage vow, is the crown of matrimony," wrote James Schouler, in 1882.<sup>37</sup> But those who favor divorce for insanity argue that while physical illness is one of the risks which the innocent spouse must bear, mental illness is not,<sup>38</sup> at least where it may affect children, or where it subjects the spouse to physical danger, or actually disrupts the marriage relation by the insane spouse's being confined in an institution.

Most of the jurisdictions permitting divorce for insanity do so only where the insane spouse has been committed to an institution for a period of years. The California law specifically refers to types of disorder rendering one "dangerously mentally ill." Apparently none of the statutes deal specifically with the possibility of transmitting the disorder to offspring. Many of them either specifically provide that the divorce shall not relieve from the duty to support, or allow the court to award alimony.

The requirement of commitment to an institution has apparently been felt to obviate the necessity of a statutory definition of "insanity." North Dakota specifies "paranoia, paresis, dementia praecox, Huntington's chorea, or epileptic insanity." Most other acts merely refer to "incurable insanity," or "idiocy or lunacy." Although the term "incurable insanity" is not so vague and indefinite as to be open to constitutional objection on that ground, it is vague enough to have given the courts some difficulty. Few physicians would be willing to testify that any mental illness or any other illness, is absolutely incurable. All they can say is that in the light of present day medical knowledge, it is their opinion that

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37. See Schouler, *Husband and Wife* 558 (1882).

38. See Silving, *Divorce Without Fault*, 29 Iowa L. Rev. 927 (1944): "There is hope that mankind will gradually move away from the fault principle with its orientation to the past and adopt a forward looking attitude of cooperation for the future shaping of sound human relations."

a certain disease is incurable. Courts have therefore held that incurability is sufficiently proved if the experts testify that recovery is not reasonably probable.<sup>39</sup>

Medical testimony is expressly required in a number of states. Kansas, Mississippi and North Dakota require examination by three physicians who are recognized authorities on mental diseases, one of whom must be the superintendent of a state hospital and all of whom must agree as to the existence of incurable insanity. At least eight other states call for testimony of physicians or of hospital staff members.

It is not clear under some of these statutes when the insanity must have had inception. Under some, it is sufficient that the defendant "is" insane, or that insanity "exists"; others require that he "have become" insane. Presumably under the latter type of statute, one who discovers after marriage that his or her spouse is insane has no ground for divorce unless it can be proved that the condition developed after the marriage.

Insanity may be a defense to an action for divorce. Thus if one spouse seeks a divorce on the ground of cruelty, desertion, or adultery, it is a defense that the wrong complained of was done while the defendant was so mentally ill as to be irresponsible. The test of irresponsibility in this connection probably is the same as in criminal cases; namely, capacity to understand the nature of the act and that it was wrong. Some grounds for divorce, however, do not require any wrongful intent. For example, living separate and apart for a certain length of time is sometimes made ground for divorce without regard to fault. In such case, it could logically be argued that the tort rule should apply and not the criminal law concept of *mens rea* or wrongful intent; that it should be no defense that the defendant lived apart from his spouse only because he wandered away while deranged, or because he was involuntarily committed to an institution. But where the question has arisen, most courts have, on one basis or another, held that insanity is a defense even where fault is not required.<sup>40</sup>

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39. *Wirz v. Wirz*, 96 Cal. App. 2d 171, 214 P. 2d 839 (1950).

40. See Keezer, *Marriage and Divorce* §526 (3rd ed. 1946). Contrary to the decisions in most states, Louisiana has held that under a statute authorizing divorce for seven years' living apart, it is no defense that one of the parties was insane during part of this period. *Galiano v. Monteleone*, 178 La. 567, 152 So. 126 (1934); other cases are collected in 4 A. L. R. 1333 (1919). Cases dealing with the effect of insanity on the right to divorce on other grounds are collected in 19 A. L. R. 2d 144 (1951).

### 5. Torts: Competency to Give Consent and Liability for Committing

In tort cases, mental incompetence may become an issue in connection with the question of consent. Punching another on the nose, for example, is ordinarily a legal wrong, but if the punchee consented to being punched, as by engaging in a boxing match, there is no liability. As the legal maxim goes, to one who consents no wrong is done. But mental incompetence, or intoxication or infancy, may render a person incapable of giving intelligent consent. The question sometimes arises in connection with the question whether a patient had given valid consent to a surgical operation. There is little law on the subject, but the sounder rule would seem to be that the defendant who inflicts legal harm on another has the burden of proving that he had consent. If he did not have it, he is liable even though he reasonably thought he had.

A more important question concerns the liability of mentally disordered persons for injuries inflicted by them on others. The law on this subject is still surprisingly unsettled.<sup>41</sup> The American cases generally say that insanity is no defense to an action for tort. This rule originated centuries ago, as part of the law governing the old action of trespass, in which a person could be held liable for any injury directly inflicted by him, whether he was in any way at fault or not. A man acted at his peril. If his act caused physical damage, it had to be paid for, even though the damage was accidental. Later, influenced by the rising importance of commerce and the popularity of laissez faire economics, the law developed the general principle that a person should not be held liable for an act done without fault on his part. This encouraged free enterprise, and since it was felt that enterprise benefited society, there was no policy in imposing undue burdens upon the entrepreneur. This also seemed to accord with the sense of justice, for the blameless actor escaped. Yet even when this view was most widely accepted, during the individualistic 19th century, the older rule persisted in the case of infants and insane persons. In such cases, the courts said that "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." Rarely did the courts bother to explain why this should be so, when the opposite rule was applied to sane adults. Eminent legal

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41. See Prosser, *Torts* 1089 (1941); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 Mich. L. Rev. 9 (1924); Note, 34 Cornell L. Q. 274 (1948). On liability of a guardian for his ward's torts, see Note, 21 Tulane L. Rev. 679 (1947).



writers have criticized the rule for this illogicality, but it is perhaps significant that the legislatures have not felt moved to change it. Apparently the result seems desirable. During the twentieth century there has been a general waning of our enthusiasm for unrestrained individual enterprise. We still adhere to it as a desideratum, but we have found it necessary to impose more and more restrictions. In the field of torts, we have in more and more situations come to the view that it is preferable to protect the victims of enterprise rather than to foster enterprise, and we have accordingly introduced for such situations the ancient rule of strict liability, regardless of fault. The vestigial rule regarding infants and insane persons thus has weathered the flood tide of individualism. Today, although other explanations are sometimes offered, its soundest rationale rests on a balancing of social interests: although the law favors commercial activity, and therefore refuses to burden legitimate and useful activity with the hazard of strict liability, the activities of infants and insane persons are not likely to be of such social value that we should favor them over equally blameless victims.

If the rule were adhered to, there would therefore be no psychiatric problems in cases of torts by disordered defendants. However, the problem is complicated by the fact that the courts have laid down various qualifications of the general rule. One well settled qualification is that a person of unsound mind will not be assessed more than actual compensatory damages; punitive or exemplary damages will not be allowed. Punitive or exemplary damages are, as the former term indicates, penal in nature, and this limitation accords with the criminal law rule. The test of when a person is of unsound mind within the meaning of this rule is similar to that followed in criminal law. In California, Montana, Oklahoma and North and South Dakota, statutes specifically provide that a person of unsound mind is not liable in exemplary or punitive damages "unless at the time of the act he was capable of knowing that it was wrongful." Other states, having no such express statutes, would no doubt apply essentially the same test.

A distinction has been made between cases where the wrongdoer is merely mentally disordered and cases where, as in an epileptic seizure, he is wholly unconscious.<sup>41a</sup> Probably most courts

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<sup>41a</sup>. Where the defendant's act (e.g., driving a car in such a manner as to result in an accident and injury) was due to loss of consciousness caused by *physical* illness, some cases have held that there is no liability. *Armstrong v. Cook*, 250 Mich. 180, 229 N. W. 433 (1930); *Cohen v. Petty*, 65 F. 2d 820

would refuse to hold an epileptic liable for harm done during a seizure. What he does during such a fit might be held not only to be unintended, but even to be not his act. Here we run into the legal distinction between act and intent. By an act, the law means nothing more than a voluntary contraction of the muscles. Intent refers to the desire to bring about certain physical consequences by the act, or at least the knowledge that such consequences necessarily will follow the act. In most mental cases, the person is not so disordered but that his muscular movements can be said to be "voluntary" and therefore his acts. But involuntary reflex or spastic jerks, or the movements of a somnambulist, can be said not even to be acts, let alone acts done with any intent. Some courts, however, have applied the general rule even to harm done while unconscious or in a delirium, and have held the defendant liable for such wholly unconscious conduct. And probably most courts would agree with the holding in a recent Wisconsin case,<sup>42</sup> that an epileptic truck driver, who knew he was subject to spells of unconsciousness, was negligent in undertaking to operate a motor vehicle. Here fault is attributable not because of what was done during the seizure, but because of the conscious undertaking to drive, knowing that a seizure might occur.

Textwriters and courts in dicta commonly lay down a serious qualification of the rule that insane persons are liable for their torts, to the effect that where the tort charged requires a specific intent, such as intent to defraud, or actual malice, insanity rendering the defendant incapable of entertaining such an intent is a defense. Similarly, it has been contended that insane persons should not be held liable for negligence, if their mental condition rendered them incapable of exercising reasonable prudence; that the rule in such cases should be similar to that applied to infants, who are

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(D.C. Cir. 1933). *Contra*: Leary v. Oatts, 84 S. W. 2d 486 (Tex. Civ. App. 1933). In *People v. Freeman*, 61 Cal. App. 2d 110, 142 P. 2d 435 (2d Dist. 1943) driver was held not guilty of *crime* of negligent homicide when automobile accident resulted from unconsciousness caused by epilepsy; epilepsy was distinguished from "insanity." Is there a valid difference between cases of unconsciousness due to physical illness and epilepsy on the one hand, and cases of mental disorder (excluding epilepsy) on the other? In *Sforza v. Green Bus Lines*, 150 Misc. 180, 268 N. Y. S. App. 466 (N.Y. Munic. Ct. 1934), a bus driver was held not absolved from tort liability for negligent operation by reason of the fact that he had suddenly become insane.

42. *Eleason v. Western Casualty and Surety Co.*, 254 Wis. 134, 35 N. W. 2d 301 (1948); *accord*, *State v. Gooze*, 81 A. 2d 811 (N.J. Super. 1951) (defendant, suffering from disease known as Meniere's syndrome, who knew he might lose consciousness at any time and who had been cautioned not to drive alone, held guilty of wantonness when he "blackened out" while driving, causing death of another). Note, 1 Baylor L. Rev. 499 (1949).

held only to the standard of care that could be expected of ordinary children of similar age. Apparently in England, it is now the law that persons who because of mental unsoundness or of youth are incapable of a wrongful state of mind are not liable for either aggressive wrongs or negligence. On the other hand, the few American cases squarely in point reject the distinction, and hold insane defendants liable for torts requiring intent and torts based on negligence.<sup>43</sup> But the question cannot be said to be fully settled in either England or in the American states. Psychiatry should be able to afford substantial help to the legal profession in working out sound and realistic solutions.

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43. The Restatement of Torts, as originally published, contained a caveat, that "The Institute expresses no opinion as to whether insane persons are required to conform to the standard of behavior which society demands of sane persons of the protection of others." In the 1948 supplement, this caveat is withdrawn; upon authority of the cases decided since 1929, the Restatement now takes the position that an insane person is liable where a normal adult would be. Restatement of the Law (1948 Supp. Torts) §283. There still remains a question whether conduct that would constitute contributory negligence of a normal adult would constitute a defense against an insane plaintiff. See caveat in section 464 of the Restatement, which remains unchanged in the supplement.