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CONTRACTS--MUTUAL ASSENT--EFFECT OF INSANITY

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CONTRACTS—MUTUAL ASSENT—EFFECT OF INSANITY—Defendant listed a hotel with plaintiff, a broker, who procured a purchaser. Defendant refused to sell and pleaded insanity in defense to an action for a commission. The jury was charged to hold for defendant if it found defendant mentally incapable of entering into the contract. On appeal from a judgment for defendant, *held*, the instruction was erroneous. The unadjudicated insanity of one of the parties is not sufficient reason for setting a contract aside where the executed contract was made in good faith, for a fair consideration, and without notice of infirmity, and if the parties cannot be restored to their original positions. *Perper v. Edell*, (Fla. 1948) 35 S. (2d) 387.

Courts are in conflict as to whether a contract entered into by a person who has not been adjudicated insane is voidable on condition,¹ void ab initio,² or

¹ *Sparrowhawk v. Erwin*, 30 Ariz. 238, 246 P. 541 (1926); *Farrior v. Hughes-Law Lumber Co.*, 113 Fla. 209, 151 S. 377 (1933); *Haddock v. Callahan Grocery Co.*, 163 Ga. 204, 135 S.E. 747 (1926); *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 82 A. 837 (1912); 46 A.L.R. 416 (1927); 95 A.L.R. 1442 (1935); WILLISTON, *CONTRACTS*, rev. ed., 251 (1936).

² *Dexter v. Hall*, 15 Wall. (82 U.S.) 9 (1872); *Sothorn v. United States*, (D.C. Ark. 1926) 12 F. (2d) 936; *Metropolitan Life Ins. Co. v. Bramlett*, 224 Ala. 473, 140 S. 752 (1932).

valid.⁸ The principal case represents the great weight of authority. Two principal reasons support the decisions that the contract is voidable:⁴ a mental incompetent is not to receive a benefit without performing on his part; and where loss must be borne by one of two innocent persons, it should be borne by the one who occasioned it. It should be noted that the courts are not so much concerned with enforcing the promises as they are with preventing inequities. Moreover, enforcement is not at variance with the present day objective mutual assent theory of contracting.⁵ This doctrine of voidability on condition represents a middle course designed to protect those who have not been adjudicated insane from fraud and overreaching, while at the same time giving a measure of protection to the innocent party with whom the contract was made. The doctrine of voidness ab initio is the chief opponent of the majority view, and it is logically supported by the older subjective theory of mutual assent.⁶ The federal courts were the bulwark of this minority holding,⁷ although more recent decisions had criticized,⁸ limited,⁹ and distinguished¹⁰ the doctrine.¹¹ It is submitted that this doctrine might well be carefully re-examined in the light of commercial contract needs. At the other extreme is the English view that where the opposite party is without knowledge of the insanity the contract is valid.¹² English courts enforce executory contracts made by a mental incompetent,¹³ something our courts uniformly refuse to do,¹⁴ although there is dictum tending in that direction.¹⁵ Although American courts are hesitant to find a valid contract, they do permit alternate modes of recovery. Where necessities are furnished¹⁶ or services rendered¹⁷ under a contract, a quasi-

⁸ *Imperial Loan Co. v. Stone*, 66 L.T.R. 556, [1892] 1 Q.B. 599; *York Glass Co. v. Jubb*, 134 L.T.R. 36, 42 T.L.R. 1 (1925); 11 CAN. B. REV. 600 at 616, 622 (1933).

⁴ *Flach v. Gottschalk*, 88 Md. 368, 41 A. 908 (1898); Principal case; 46 A.L.R. 416 (1927).

⁵ WILLISTON, *CONTRACTS*, rev. ed., 22 (1936); 1 *CONTRACTS RESTATEMENT*, § 20 (1932); Green, "Effect of Mental Incompetency," 21 *TEX. L. REV.* 554 at 559 (1943).

⁶ Green, "Public Policies Underlying the Law of Mental Incompetency," 38 *MICH. L. REV.* 1189 at 1202 (1940).

⁷ *Dexter v. Hall*, 15 Wall. (82 U.S.) 9 (1872).

⁸ *Kevan v. John Hancock Mut. Life Ins. Co.*, (D.C. Mo. 1933) 3 *F. Supp.* 288.

⁹ *Beale v. Gibaud*, (D.C. N.Y. 1936) 15 *F. Supp.* 1020.

¹⁰ *Levine v. Whitney*, (D.C. R.I. 1934) 9 *F. Supp.* 161.

¹¹ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), has deprived this line of authority of particular significance today.

¹² *Imperial Loan Co. v. Stone*, 66 L.T.R. 556, [1892] 1 Q.B. 599.

¹³ *York Glass Co. v. Jubb*, 134 L.T.R. 36, 42 T.L.R. 1 (1925).

¹⁴ *Mathews v. Nash*, 151 Iowa 125, 130 N.W. 796 (1911); *Searcy v. Hammett*, 202 N.C. 42, 161 S.E. 733 (1932); *Cundall v. Haswell*, 23 R.L. 508, 51 A. 426 (1902).

¹⁵ *Dominick v. Rhodes*, 202 S.C. 139 at 152, 24 S.E. (2d) 168 (1943): "... for the law is well settled that a contract entered into with an incompetent person in good faith without fraud or imposition, upon a fair consideration, will be supported as valid."

¹⁶ *Coffee v. Owens' Admr.*, 216 Ky. 142, 287 S.W. 540 (1926); *Estate of Nielsen*, 111 Cal. App. 744, 296 P. 122 (1931).

¹⁷ *Tock v. Tock*, (Mo. 1938) 120 S.W. (2d) 169; *Fitzpatrick's Committee v. Dundon*, 179 Ky. 784, 201 S.W. 339 (1918).

contractual recovery is allowed. Recent decisions indicate that the law is in a state of flux. Some jurisdictions appear to favor an even broader contractual capacity for the mental incompetent¹⁸ while others are carefully following the doctrine of the principal case.¹⁹

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¹⁸ *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E. (2d) 168 (1943); *Aninos v. Petrouleas*, 314 Mich. 536, 22 N.W. (2d) 879 (1946).

¹⁹ *Verstandig v. Schlaffer*, 296 N.Y. 62, 70 N.E. (2d) 15 (1946).