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Robert M. Brucken S.Ed.
University of Michigan Law School

David L. Genger S.Ed.
University of Michigan Law School

Denis T. Rice S.Ed.
University of Michigan Law School

Mark Shaevsky S.Ed.
University of Michigan Law School

William R. Slye S.Ed.
University of Michigan Law School

See next page for additional authors

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Robert M. Brucken S.Ed., David L. Genger S.Ed., Denis T. Rice S.Ed., Mark Shaevsky S.Ed., William R. Slye S.Ed., and Robert P. Volpe S.Ed.

MENTAL ILLNESS AND THE LAW OF CONTRACTS

INTRODUCTION

"There is no greater inequality
than equal treatment of unequals."[1]

Current estimates indicate that at least six out of every hundred persons of the population of the United States have some form of mental disorder.[2] Since law acts upon human individuals, it must recognize the capabilities and limitations of those individuals. Consequently mental illness is important and influential in the development of legal rules. Perhaps this is indicated by recently developed interest of the legal profession in problems of law as related to mental illness,[3] and by the inclusion for the first time of a special topic, "Mental Health," in the *Sixth Decennial Digest.*[4]

Certain legally consequential actions, such as making a will or a gift, are more "mental" in their essential characteristics than others, such as negligent acts. Contracts, viewed basically as agreements, are among these actions which are more "mental" in nature. It is to be expected, then, that the law of contracts is affected in many important ways by mental illness[5] of any of the parties.

[1] MENGER, DAS BÜGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN, 4th ed., 30 (1908), as translated and quoted in Green, "Public Policies Underlying the Law of Mental Incompetency," 38 MICH. L. REV. 1189 at 1221 (1940).

[2] E.g., Felix and Kramer, "Extent of the Problem of Mental Disorders," 286 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 5 at 8 (March 1953); Glover, "Mental Health, Everybody's Business," PUBLIC AFFAIRS PAMPHLET 196, at p. 23 (May 1953). Of these 9,000,000 persons, it is estimated that on any given day approximately 525,000 are in prolonged-care mental hospitals.

[3] See, e.g., Ross, "Commitment of the Mentally Ill: Problems of Law and Policy," p. 945 supra; "The Mentally Disabled and the Law," a comprehensive report on the rights of the mentally ill undergoing preparation by the American Bar Foundation; Symposium, "Psychiatry and the Law," 29 TEMP. L.Q. 233 (1956).

[4] "Mental Health," SIXTH DECENNIAL DIGEST, vol. 21, p. 1152.

[5] "Mental illness," as used in this study, means any form of mental disorder, deviation or defect, including mental deficiency or feeblemindedness, psychoses, including the senile psychoses, and the psychoneuroses. A list of medical or psychological terms suggested for lawyers is included in note 161 infra. The following are some of the other terms which are frequently used throughout this study:

Mentally ill person: that person, a party to the contract or contractual relationship in issue, who has or has had mental illness that may affect the relationship. This term is also used to designate a person merely *alleged* to be mentally ill, and a person who may have subsequently been cured of his mental illness. This person is also referred to as the *ill* person, or where his mental illness meets certain criteria, the *incompetent* person.

Healthy person: that person, a party to a transaction, as above, who does not have, is not alleged to have, or has not had mental illness. He is the party other than the

For this reason the editors of the *Michigan Law Review* have chosen to study these effects in detail, and to present the results of this study with the threefold purpose of analyzing and discussing the relevant rules of law and their underlying justification, suggesting some evaluations of these rules in light of modern science, and aiding the practicing attorney in his preparation of a case or transaction in which mental illness of a contracting party is involved.[6]

Mental illness at a particular stage of a contract (such as the agreement stage or the performance stage) can have varying effects throughout the remaining course of the contract. The traditional and most important problem relative to mental illness and the contract is the situation created when mental illness exists at the time of agreement (the problem of contractual capacity). One principal result of mental illness at this time may be the avoidance of the contract by the mentally ill person. Since case law in this area is extensive, the major portion of the study is concerned with this problem (parts II, III and IV) and the effects of such incapacity throughout the remaining course of the contract. Mental illness occurring after agreement and at the time of performance of a party to a contract can also have important effects on the remainder of the contract, and these effects are discussed in part V. Finally, there can be a number of other effects caused by mental illness which occur after agreement but do not directly affect performance. These are discussed in part VI.

Various strands of other branches of law interweave into the subject of this study in a manner that makes a thorough consideration difficult if not impossible without deviating somewhat into these other areas. Particularly is this true of the law of fraud and undue influence, to which reference will often be made. Never-

mentally ill person in a bilateral situation. He is also referred to as the *competent* individual.

Successors or representatives: those persons who claim through or under either of the parties to a contractual transaction, including but not limited to heirs, personal representatives, guardians, purchasers, assignees or donees.

The term "power of avoidance" is defined in note 27 infra, and the terms "void" and "voidable" are used in the special sense described in Part IV-A-2.

[6] As an aid to the practicing attorney, an outline of the types of evidence utilized to prove or disprove contractual incapacity is included in the appendix. Also included is a checklist of items which should be considered in order to minimize the risk of later avoidance of a transaction with a person suspected to be mentally ill. A list of statutory provisions on this topic also appears in the appendix.

theless, and despite the artificiality, an endeavor has been made to limit the subject to contract law as affected by mental illness.

I. PERSPECTIVES, POSTULATES AND POLICIES

A. *Perspectives*

Even before Justinian, Roman lawyers recognized that, "An insane person cannot contract any business whatever, because he does not understand what he is doing."[7] Similar references can be found in the *Corpus Juris Civilis*[8] and by later jurists such as Grotius.[9] Canon law also recognized the effect of mental illness on law, and refers to state law for decision as to enforceability of promises.[10] Early English common law held that since contracts were based on a meeting of the minds in agreement (the subjective view of contract law), there could be no such agreement if one of these minds was incapable of understanding.[11] Later English law developments prevented a person who had regained sanity from avoiding a contract on the basis of incapacity at the time of agreement, although his representatives or successors were allowed to avoid on this ground.[12] The reason given for this surprising result was that a person should not be allowed to "stultify himself" by a plea of incapacity.[13] By 1690, however, courts had again returned to the position of allowing a contract agreed to by an incompetent person to be avoided,[14] and in 1849 an English court even indicated that incapacity might be a defense in a contract action if it were proved that the plaintiff knew or should have known of the other party's disability.[15]

In the civil law systems articles 104 and 105 of the German Civil Code provide that declarations of will (the basis of con-

7 PICKETT, MENTAL AFFLICTION AND CHURCH LAW 13 (1952).

8 SHERMAN AND ROBINSON, ROMAN READINGS IN ROMAN LAW 125 (1933).

9 Cook, "Mental Deficiency and the English Law of Contract," 21 COL. L. REV. 424 at 425 (1921).

10 PICKETT, MENTAL AFFLICTION AND CHURCH LAW 199 (1952); AUGUSTINE, A COMMENTARY ON THE NEW CODE OF CANON LAW, 3d ed., Canon 1529, p. 590 (1931).

11 Cook, "Mental Deficiency and the English Law of Contract," 21 COL. L. REV. 424 at 425 and 428 (1921).

12 Beverley's Case, 4 Co. Rep. 123b, 76 Eng. Rep. 1118 (1603). The court took the statement of the law from *Coke on Littleton.*

13 Cook, "Mental Deficiency and the English Law of Contract," 21 COL. L. REV. 424 at 429 (1921).

14 Thompson v. Leach, 3 Mod. Rep. 301, 87 Eng. Rep. 199 (1690).

15 Molton v. Camroux, 2 Exch. 487, 154 Eng. Rep. 584 (1849).

tract)[16] by persons "suffering from an impairment of the mental faculties precluding a free determination of the will" are void. Article 1124, read with articles 502 and 503, of the French Civil Code indicates that mental illness can prevent a person from making a valid contract or, in some cases, can result in avoidance of a previous contract. Similar effects of mental illness on contract law can be found in Scandinavian law,[17] Islamic law (and the Egyptian Civil Code of 1948),[18] and Russian law.[19]

It is probable that every major legal system today recognizes the profound influence that mental illness of a party can have on a contract. This suggests the likelihood that the relationship between mental illness and contract law is one "of the principles, notions, and distinctions which are common to systems of law."[20]

B. *Postulates*

Any study of this kind involves many postulates, most of which are so common to Anglo-American law that they need not be expressed. Among the less common postulates underlying this study, however, are two which must be explained because they may not be readily accepted by the reader.

The first of these is implicit in the analysis and organization of the subject matter, as explained in the Introduction. The effect of mental illness on contract law is studied by assuming that mental illness occurs at one stage of the contract, and then examining the effects of that mental illness on the rest of the contract as if no further mental illness were involved. In other words, for purposes of this study it is assumed that all parties to the contract are mentally healthy up to a certain chronological point in the contract or contract formation, then mental illness of one party occurs at that point of the relationship, and immediately thereafter the illness ends and all parties are healthy again throughout the remainder of the contract relationship. This "turn-on, turn-off" quality of mental illness can actually be manifested[21]

16 German Civil Code of 1896. See also article 145 et seq.

17 ARNHOLM, ALMINNELIG AVTALERETT 213-225 (Oslo, 1949).

18 KHADDURI AND LIBESNY, LAW IN THE MIDDLE EAST 196 (1955). See also articles 1 and 45 of the Egyptian Civil Code of July 16, 1948.

19 Code Civil de la Russie Sovietique, art. 8 (1923). See LES CODES DE LA RUSSIE SOVIETIQUE, Traduit par Jules Patouillet (Paris, 1925).

20 Austin, "On the Uses of the Study of Jurisprudence," LECTURES ON JURISPRUDENCE, 2d ed., vol. 3, p. 351 (London, 1863).

21 WHITE, THE ABNORMAL PERSONALITY 299-302 (1948).

and, for purposes of this study, an assumption that all mental illness can occur in this manner is justified for two reasons. First, even a gradually increasing or decreasing mental illness may meet a specific test for a legal consequence (such as a test for contractual incapacity that results in the consequence of avoidance)[22] at a point which can occur at any single time during the course of a contract. Thus, for the consequence of avoidance, mental illness must satisfy the test for contractual incapacity at only one time, the time of agreement. Second, even if mental illness exists throughout a period of time, sufficient evidence may exist only at one point within that period in order to satisfy a trier of fact that legal consequences should attach.

A second postulate that must be explained is that generally decisions concerning the effects of incapacity to convey land are applicable in contract situations. This postulate is supported by eminent secondary authority and some cases,[23] but it does not hold true when the conveyance of land is not made in an arms-length transaction. Thus decisions involving conveyance of land as a gift or in a testamentary manner (reserving a life estate), may not be applicable to a contract case.[24] Deed cases involving arms-length transactions have been utilized in this study, but the nature of such cases has been specifically designated in the footnotes.

C. *Policies*

Basically, the law of contracts as affected by mental illness is the battleground for two conflicting policies or interests.[25] The first of these is the policy of upholding the security of transactions, or reasonable expectancies of contracts. The other is the policy of protecting mentally weak individuals from the consequences

22 See Part II infra.

23 See 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., 736 (1929); 1 WHARTON AND STILLE, MEDICAL JURISPRUDENCE, 5th ed., 12 (1905); 1 WILLISTON, CONTRACTS, rev. ed., 738 (1936); Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 557 (1943). This and four other related articles have been reprinted in MENTAL INCOMPETENCY TO MAKE A CONTRACT OR WILL (1944). Christian v. Waialua Agr. Co., (9th Cir. 1937) 93 F. (2d) 603 at 611, revd. on other grounds 305 U.S. 91 (1938); Wells v. Wells, 197 Ind. 236 at 245, 150 N.E. 361 (1925).

24 See notes 83 and 84 infra, Part II-C.

25 See the thorough analysis of policies involved in contractual capacity problems in Green, "Public Policies Underlying the Law of Mental Incompetency," 38 MICH. L. REV. 1189 (1940), also reprinted in MENTAL INCOMPETENCY TO MAKE A CONTRACT OR WILL (1944).

of their own acts and the acts of others. There are, of course, other factors such as fault of one party or unjust enrichment which introduce additional considerations. But most of the troublesome situations of mental illness and contract law turn on a clash of the two basic policies. For instance, where the competent or healthy party *knows* of the illness or incompetence of the other party, the policy of securing reasonable expectations no longer weighs so heavily. Likewise where a mentally incompetent person obtains only necessaries by his contract, the policy of protecting the incompetent is not as critical in importance. Derivative principles and variations on these two policies also exist, as where a mentally ill person is dead, the power of his heir to avoid a contract may be based on protection of the incompetent's family, instead of the incompetent himself. Even here it could be argued, however, that allowing the incompetent's successor or representative in interest to avoid puts other healthy parties on notice to take care in contracting with the mentally infirm, thus thrusting part of the burden of protection of incompetents on the healthy party to a contract.

The policy of protecting a mentally ill person is also demonstrated by the influence on a court that mental illness can have in contract situations where fraud or undue influence is alleged. The interaction of mental illness and these related principles is an important but separate topic.[26] A study of that interaction may suggest the possibility that mental illness is one basis on which a court can rest its desire to control an unfair bargain.

II. THE TESTS OF MENTAL INCAPACITY TO CONTRACT

Mental illness occurring at the time of agreement or contract formation is the starting point of this study. Such mental illness of a party to a contract may have various effects, but perhaps the most drastic of these is the creation of a power of avoidance[27] in

[26] See, e.g., Green, "Fraud, Undue Influence, and Mental Incompetency," 43 COL. L. REV. 176 (1943), also reprinted in MENTAL INCOMPETENCY TO MAKE A CONTRACT OR WILL (1944). See Part IV-A, infra.

[27] If a court can find that one party to a contract did not have capacity to contract at the time of the agreement, it will, as Part IV will indicate, allow the party or his successor or representative to "avoid" the contract. Throughout this study the term "power of avoidance" has been used to indicate the ability of one party to "get out" of the contract in some manner, *if he wishes*. Cf. Corbin, "Legal Analysis and Terminology," 29 YALE L.J. 163 (1919).

the ill party or his successors. Since slight or mild mental illness would not seem to warrant the protection granted a party through a power of avoidance, however, some criterion must be satisfied before such protection is granted. This criterion is termed "incapacity to contract," and will be the subject of this part and part III (evidence). The question here presented, then, is what degree and what sort of mental illness in a party during the agreement stage will have the legal effect of creating a power of avoidance.

In reality it may be impossible to formulate a single test or set of tests which if met will in all cases induce a court to attach the power of avoidance to a contract relationship. The only real test may be that quantum and quality of proof that will lead a court in any given case to invoke the policy of protecting the mentally ill person or his family through permitting him to avoid his contract. The extent of this quantum will be influenced by factors not strictly connected with the mental condition of that person, such as hints of unfairness, fraud, or undue influence.[28] Nevertheless the courts and statutes do speak of "tests" for mental incapacity. It is the purpose of this portion of the study to examine those tests, as developed by the judiciary, as stated in legislation, and as weighed against findings of science in the mid-twentieth century.

A. *Tests for a Power of Avoidance*

1. *The "Understanding" Test.* The judicial test for a power of avoidance most often encountered in the decisions involving mental capacity to contract concerns the party's ability to understand. As stated by one leading writer, "The proper inquiry is whether he is capable of understanding and appreciating the nature and effect of the one particular act or transaction which is challenged."[29] Although courts almost universally state this test in terms of understanding, the precise phraseology varies from a rather simple, "did he know what he was doing and the nature of the act done"[30] to the more lengthy "was he mentally competent to deal with the subject before him with a full understanding of his rights . . . whether he actually understood the nature, purpose

[28] See Part IV-A and Part III-B, infra.

[29] 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §262, p. 737 (1929).

[30] Plainse v. Engle, 262 Wis. 506 at 511, 56 N.W. (2d) 89, 57 N.W. (2d) 586 (1952); Boorman v. Northwestern Mutual Relief Assn., 90 Wis. 144 at 148, 62 N.W. 924 (1895).

and effect of what he did."[31] The decisions reveal a series of variations on this theme and it is doubtful that there is any legal significance in the omission or addition of certain words or phrases.[32] Perhaps, as a leading commentator has suggested, these variations reflect the insignificance of a stated test to the court's actual process of allowing avoidance of a contract where the decision is prompted, among other factors, by an inarticulate standard of the normality or abnormality of the transaction.[33]

The courts do, however, express an almost universal interest in a party's ability to understand. Proof of a mental illness or deficiency alone is not sufficient to warrant a finding of incapacity under this test. The judicial test actually includes two requirements—a mental illness and an impairment of the understanding by that mental illness. "Mere infirmity of mind or body, not amounting to an incapacity to understand the nature and consequence of the act done" is not sufficient to fulfill the test.[34]

Since the ability to understand seems to be the key to this judicial test, a judicial definition of the term "understanding" would prove helpful. The courts have usually failed to provide any such definition. One court did elaborate, and said:

> "We are dealing with 'understanding' and not with mere 'consciousness.' 'Understanding' . . . suggests the concept of a mind with the faculty of applying its powers of reason to the elements it comprehends, to the end that a judgment or conclusion may be formed."[35]

31 Drum v. Bummer, 77 Cal. App. (2d) 453, 175 P. (2d) 879 (1946).

32 Hardee v. Hardee, (Ala. 1956) 93 S. (2d) 127; Hanks v. McNeil Corp., 114 Colo. 578, 168 P. (2d) 256 (1946); Tecklenberg v. Washington Gas and Elec. Co., 40 Wash. (2d) 141, 241 P. (2d) 1172 (1952); Parrish v. Peoples, 214 Minn. 589, 9 N.W. (2d) 225 (1943); Leick v. Pozniak, 135 N.J. Eq. 67, 37 A. (2d) 302 (1944); In re Estate of Crawford, 176 Kan. 537, 271 P. (2d) 240 (1954); Allen v. Kelso, (Mo. 1954) 266 S.W. (2d) 696; Kaleb v. Modern Woodmen, 51 Wyo. 116, 64 P. (2d) 605 (1937); Summer v. Boyd, 208 Ga. 207, 66 S.E. (2d) 51 (1951); Drum v. Bummer, 77 Cal. App. (2d) 453, 175 P. (2d) 879 (1946); Rogers v. Central Land Investment Co., 149 Minn. 347, 183 N.W. 963 (1921); Cathcart v. Stewart, 144 S.C. 252, 142 S.E. 498 (1927); Evans v. First Nat. Bank of Stillwater, 193 Okla. 665, 146 P. (2d) 111 (1944); In re Wann's Estate, 176 Pa. Super. 498, 108 A. (2d) 820 (1954); Martin v. Teachers' Retirement Bd., 70 N.Y.S. (2d) 593 (1947); Oswald v. Seidler, 136 N.J. Eq. 443, 42 A. (2d) 216 (1945); Cole v. Waite, 151 Tex. 175, 246 S.W. (2d) 849 (1952); Conners v. Eble, (Ky. 1954) 269 S.W. (2d) 716; Cook v. Hagen, 301 Ky. 346, 192 S.W. (2d) 97 (1946); Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E. (2d) 599 (1944); Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950).

33 Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 (1941); Green, "Proof of Mental Incompetency and the Unexpressed Major Premise," 53 YALE L.J. 271 (1944).

34 In re Nightingale's Estate, 182 S.C. 527 at 542, 189 S.E. 890 (1936).

35 Fisher v. Gorman, 65 S.D. 453 at 459, 274 N.W. 866 (1937).

Thus it seems that the law intends to protect a person who is without the ability to apply some sort of reasoning power, a power to balance future contingencies against present interests so that the decision or judgment to contract or not to contract may be made. Such a person certainly is in an unequal bargaining position in contract negotiations.

How can a court measure or determine the ability to "understand?" Although early English theories of mental capacity may have been influenced by the dualist ideas of separation of mind and body,[36] and although this may explain the seemingly subjective phraseology of the "understanding" test, it would nevertheless seem that proof in the court room would at that time have had to be directed to the overt manifestations of a person's state of mind, i.e., his behavior. Modern psychiatry rejects the dualistic concept of mind and body, taking the view that:

> "Body and mind are inextricably fused into a personal unity and are therefore no longer viewed as separate and distinct elements, but merely as different aspects of a living organism of which mind is the subjective phase of its existence and relationships."[37]

The mind expresses itself in the behavior or response of the organism to stimuli. Psychiatry and psychology, as studies of the mind, take an objective, behavioristic approach by basing their knowledge on the individual's behavior. Whether because of modern scientific ideas, the development of more objective viewpoints in contract law generally, or merely the lack of a real alternative, the courts today do seem to be basing their determination of contractual incapacity on the behavior of the individual. This is illustrated by the fact that the behavior of the individual at the time of the transaction seems to carry more weight with the courts than testimony of experts as to contractual capacity.[38]

Although the tests of contractual capacity seem to have been judicially developed, six states have enacted statutory provisions of a type similar to the following:

[36] See Green, "Public Policies Underlying the Law of Mental Incompetency," 38 MICH. L. REV. 1189 (1940) and Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 (1941) for a discussion of the effect of philosophical dualism on the early law.

[37] NOYES, MODERN CLINICAL PSYCHIATRY, 3d ed., 1 (1948).

[38] See Part III-B, infra.

"A person entirely without understanding has no power to make a contract of any kind.

"A contract of a person of unsound mind, but not entirely without understanding before adjudication is subject to rescission."[39]

Although these statutes are concerned with understanding, they do not state as clear a test of what is required for contractual incapacity as do the judicial tests. It appears, however, with regard to judicial applications of these statutes, that they are generally interpreted to be identical with the old "understanding" test. Thus the Idaho court has held that in order to have rescission of a contract, proof that the party did not have the mental capacity to understand the purpose and effect of the contract is required.[40]

2. *The "Insane Delusion" Test.* As the "understanding" test seems to apply only to mental illness and deficiency which results in some impairment of the judgment or the reasoning process, the courts have on some occasions gone beyond that test and formulated an additional criterion, the so-called "insane delusion" test.[41]

An insane delusion has been defined as a

"fixed belief in the mind of the patient of the existence of a fact which has no objective existence, but is purely the figment of his imagination, and which is so extravagant that no sane person would believe it under the circumstances of the case, the belief, nevertheless, being so unchangeable that the patient is incapable of being permanently disabused by argument or proof."[42]

The cases present vivid examples of transactions motivated by such delusions, e.g., a maker of a promissory note labored under the delusion that unless he made the note he would be killed or

[39] Idaho Code Ann. (1948) §§32-106 and 32-107; Cal. Civ. Code Ann. (Deering, 1949) §§38 and 39; Mont. Rev. Code (1947) §§64-110 and 64-111; N.D. Rev. Code (1943) §§14-0101 and 14-0102; S.D. Code (1939) §§30-0801 and 30-0802; Okla. Stat. Ann. (1956) tit. 15, §§11 and 22.

[40] Ratliff v. Baltzer's Admin., 13 Idaho 152, 89 P. 71 (1907); similar construction in Mullin v. First Guaranty State Bank, 113 Okla. 84, 239 P. 161 (1925); Fischer v. Gorman, 65 S.D. 453, 274 N.W. 866 (1937); Fleming v. Consolidated M.S. Co., 74 Mont. 245, 240 P. 376 (1925); Jacks v. Estee, 139 Cal. 507, 73 P. 247 (1903).

[41] See, generally, Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 at 151-152 (1941).

[42] 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §266, p. 748 (1929).

imprisoned,[43] or, a husband believed his wife was having illicit relations with another man and deeded his property to a son.[44]

Some courts have recognized the need to protect parties who enter into transactions because of insane delusions, typically stating the test to be "whether that insane delusion, if a person has it, is a moving cause to some act which would not have been done except for that delusion. . . ."[45]

As has been suggested, it may be that the understanding test is broad enough to encompass the insane delusion situation.[46] Thus a Colorado court, referring to an earlier Illinois decision, stated the legal test of incapacity to include the situation where ". . . the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding the nature and effect of the agreement or of acting rationally in the transaction."[47] However, the court did add to the understanding test the idea of ability to *act* rationally in the transaction.

It does not seem necessary or advisable to require proof of compliance with the "understanding" test in the insane delusion case, since authority suggests a more meaningful test—did the insane delusion motivate the contract. It is medically conceivable for a person to be capable of understanding the nature and effect of a particular contract, and yet be motivated by a false belief caused by mental illness. It would seem as necessary to protect such an individual as it is necessary to protect a person who cannot understand.

3. *Ability To Control Actions.* Thus far, this discussion has dealt with the two tests of contractual incapacity which have most often been stated by the courts. At least three decisions have indicated a modification of these tests by suggesting an added criterion—the ability of "acting rationally in the particular transaction."[48] Or as stated by another court, the test of contractual in-

43 Ellars v. Mossbarger, 9 Ill. App. 122 (1881).

44 Eubanks v. Eubanks, 360 Ill. 101, 195 N.E. 521 (1935) (deed).

45 Meigs v. Dexter, 172 Mass. 217, 52 N.E. 75 (1898); Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 at 152 (1941).

46 See Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 at 152 (1941); GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 334 (1952).

47 Hanks v. McNeil Corp., 114 Colo. 578 at 585, 168 P. (2d) 256 (1946).

48 Poole v. Hudson, 46 Del. (7 Terr.) 339, 83 A. (2d) 703 (1951), which stated in somewhat similar fashion the test discussed in Warwick v. Addicks, 35 Del. (5 W.W. Harr.) 43, 157 A. 205 (1931); Hanks v. McNeil Corp., 114 Colo. 578, 168 P. (2d) 256 (1946).

capacity is whether the person is "incapable of understanding *and* acting with discretion in such business."[49]

The cases which state this added criterion seem to be considering situations where a lack of sufficient understanding for contractual capacity is involved, and not situations of uncontrolled or irresponsible behavior where the party might possess understanding sufficient to justify a finding of capacity under the understanding test. Thus, the ability to control one's behavior as a criterion for avoidance of a contract or a test of contractual incapacity, is at best supported only by the dicta above. Though the inability to control overt manifestations leading to contract would seem to place a person in as unequal a bargaining position as he who cannot understand his action, an authoritative judicial statement to this effect has not been found. The validity from a scientific viewpoint of protecting such an individual will be considered below.

4. *Insufficient Factors.* The examination of the tests of contractual incapacity can perhaps be brought more sharply into focus by reference to what can be called "insufficient factors"—factors which, in themselves, do not indicate incapacity. Thus none of the following alone is sufficient for a trier of fact to reach a conclusion that "incapacity" existed: senile dementia,[50] old age,[51] the influence of opiates,[52] disease,[53] physical distress and pain,[54] intoxication,[55] poor business judgment, eccentricity and irritability,[56] an improvident contract,[57] and in some cases commitment.[58]

49 Howells State Bank v. Novotny, (8th Cir. 1934) 69 F. (2d) 32 at 35. Emphasis added.

50 Kaleb v. Modern Woodmen, 51 Wyo. 116, 64 P. (2d) 605 (1937); Holman v. Stockton Savings and Loan Bank, 49 Cal. App. (2d) 500, 122 P. (2d) 120 (1942).

51 Cleland v. Peters, (W.D. Pa. 1947) 73 F. Supp. 769; Pontes, Gdn. T. Cruz v. Pontes, 40 Hawaii 620 (1954); English v. Porter, 109 Ill. 285 (1884); Daugherty v. Daugherty, 115 Ind. App. 253, 57 N.E. (2d) 599 (1944); Cook v. Hagen, 301 Ky. 346, 192 S.W. (2d) 97 (1946); Rose v. Rose, 298 Ky. 404, 182 S.W. (2d) 977 (1944); Hiett v. Shull, 36 W. Va. 563, 15 S.E. 146 (1892).

52 Poole v. Hudson, 46 Del. (7 Terr.) 339, 83 A. (2d) 703 (1951).

53 English v. Porter, 109 Ill. 285 (1884).

54 Mead v. Gilbert, 170 Md. 592, 185 A. 668 (1936).

55 Seminara v. Grisman, 137 N.J. Eq. 307, 44 A. (2d) 492 (1945) (but if intoxication is so complete as to render a party incapable of understanding, then it may give a power of avoidance).

56 Page v. Prudential Life Ins. Co., 12 Wash. (2d) 101, 120 P. (2d) 527 (1942).

57 Rogers v. Central Land Investment, 149 Minn. 347, 183 N.W. 963 (1921).

58 Estate of Schalla, 2 Wis. (2d) 38, 86 N.W. (2d) 5 (1957).

B. *The Findings of Science*

The "understanding" test of contractual capacity has remained the same, at least in its verbal formulation, since 1895,[59] and almost the same since the seventeenth century.[60] On the other hand, the science of the mind and mental behavior has largely developed in the past half-century. Although this is not the place to present a complete picture of the sciences of mental illness,[61] nevertheless it is interesting and valuable to note some of the comparisons and contrasts between the various tests for mental contractual capacity and the approach of present-day science.

Mental illnesses, including psychoses, neuroses, and deficiencies, may have various causes, either organic or non-organic, and a number of manifestations or symptoms. It is these manifestations or symptoms that are the concern of the law of contractual capacity, because the interest involved is the protection of a mentally ill person from those symptoms which may put him in an unequal bargaining position or render him unable to appreciate or control his actions.

An impairment of judgment is recognized by science as a symptom or manifestation of several forms of mental illness. Illnesses caused by an organic destruction of brain tissue result in what is referred to as dementia—a progressive loss of intellectual capacity which involves, among other effects, an impairment of judgment.[62] The senile psychoses known as senile dementia, which is characterized by cerebral atrophy or actual organic destruction of the brain cells progressively result in such judgment impairment in business affairs that one psychiatrist has noted that a guardian is usually necessary for people so affected.[63] Further examples of such judgment impairment due to organic causes are found in the psychoses connected with syphilitic meningo-encephalitis, gen-

[59] See CLEVENGER, MEDICAL JURISPRUDENCE OF INSANITY OR FORENSIC PSYCHIATRY 242 (1898).

[60] Thompson v. Leach, 3 Mod. Rep. 301, 87 Eng. Rep. 199 (1690).

[61] An attorney will find GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW (1952), and Coon, "Psychiatry for the Lawyer," 31 CORN. L.Q. 327 (1946) to be helpful. An excellent text is NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed. (1958). Fay, "The Practical Role of Psychiatry in the Effective Practice of Law," 29 TEMP. L.Q. 327 at 329 (1956), contains an extensive reading list for the attorney.

[62] NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 128 (1958); Coon, "Psychiatry for Lawyers," 31 CORN. L.Q. 327 at 356 (1946); OVERHOLSER, THE PSYCHIATRIST AND THE LAW 28 (1953).

[63] NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., c. XVIII, 287-294 (1958); see especially 294.

erally known as paresis,[64] and the psychoses connected with cerebral arteriosclerosis.[65]

Defects in judgment are also found to be manifested in mental deficiency which is caused by brain damage either before birth, or during infancy or adolescence.[66] Since mental deficiency manifests itself at birth or early in the development of an individual,[67] and since by definition a mentally deficient person cannot take care of himself,[68] it is unlikely that he would ever amass any property or engage in business affairs. Consequently this type of mental illness probably is rarely encountered in the contract situation. On the other hand the dementia type of mental illness progressively affects individuals who at one time probably possessed normal competency and who were possibly engaged in business when they became afflicted. These individuals are much more likely to be encountered in a contract situation, especially during the period when the illness is progressing.

Judgment impairment, however, is only one of the many and varied symptoms and manifestations of mental illness. For those types of mental illness characterized by such impairment, the "understanding" test seems to be an effective criterion for invoking the protective policy of the law.

A second manifestation of mental illness appears to have been recognized by the courts in the less frequently invoked "insane delusion" test. Delusions are symptoms of many different forms of mental illness also, including psychoses due to organic brain damage[69] and schizophrenia.[70] Delusions represent part of a patient's withdrawal from reality due to his inability to cope with it. Although such delusions are highly colored by the emotional needs and desires of the individual,[71] they are very real to him and his behavior will be governed and affected by them to the extent that

64 Id., chapter XIV, 238-256; see especially 243.

65 Id., chapter XVI, 262-267.

66 Id., chapter XXII, 324-340; see especially 324; OVERHOLSER, THE PSYCHIATRIST AND THE LAW 26 (1953).

67 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 324 (1958).

68 Jervis, "The Mental Deficiencies," 286 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 26 (March 1953).

69 OVERHOLSER, THE PSYCHIATRIST AND THE LAW 28 (1953); Coon, "Psychiatry for the Lawyer," 31 CORN. L.Q. 327 at 359 (1946).

70 Coon, "Psychiatry for the Lawyer," 31 CORN. L.Q. 327 at 344 (1946); OVERHOLSER, THE PSYCHIATRIST AND THE LAW 32 (1953); NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 397 (1958).

71 OVERHOLSER, THE PSYCHIATRIST AND THE LAW 32 (1953).

he lives in a semi-dream world. Since delusions are a substitute of phantasy for reality it is unlikely that making of contracts (a rather real activity) will be included in this semi-dream world.[72] Nevertheless, as previously indicated, insane delusions can motivate contractual action. To this extent the "insane delusion" test seems to be a valid criterion for invoking legal protection.

A third manifestation of mental illness which is relevant to contractual capacity problems is exemplified by the manic phase of the so-called manic-depressive psychosis. This phase is manifested by an attitude of extreme exhilaration, eagerness, and energetic activity, known as hypermania to the scientist. During this period, the hypermaniac may spend money extravagantly and pawn his belongings to carry out ambitious schemes, of which he abounds. He may also undertake business ventures which he has no ability to carry out, and which soon fail or are abandoned.[73] The scientist does not consider this psychosis as a disturbance or impairment of any psychological faculty such as the judgment process or intellectual capacity, but rather as a reaction in response to inner conflicts with which the individual is unable to cope.[74] This manic reaction can be thought of, however, as a disturbance of the stream of thought. Although the manic may communicate a flood of ideas and thoughts, he really evades thinking.[75] He cannot maintain concentration on any specific idea so that his illogical utterances will appear to be the expression of an impaired judgment. In this sense, the manic reaction should be protected by the understanding test for incapacity as it is ordinarily stated. The insane delusion test does not seem to apply to the manic reaction since delusions are not conspicuous symptoms and if they do exist, they are not systematized.[76] Perhaps the soundest criterion for the protection of the hypermaniac can be found in that modification of the understanding test which includes the ability to act rationally in a particular transaction.[77] The psychiatrist would agree that the hypermaniac does not act rationally in his ventures.

72 See Coon, "Psychiatry for the Lawyer," 31 CORN. L.Q. 327 at 351 (1946), where schizophrenia (characterized by delusions) is considered more of a sociological or criminal law problem than a contractual problem.

73 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 355 (1958); Coon, "Psychiatry for the Lawyer," 31 CORN. L.Q. 327 at 331 (1946).

74 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 356 (1958).

75 Id. at 357.

76 Id. at 358.

77 See notes 48 and 49 supra.

From this brief, scientifically-oriented analysis it appears that mental illness can place a contracting party in a position of inequality by working one of two general effects upon him: (1) his intellectual abilities can be so affected that his judgment is impaired; (2) the overt act of entering into the agreement, as differentiated from the purely mental process involved in deciding whether to enter, may be a reaction to the stress and conflict of the person's needs, instincts and desires. The psychiatrist considers all behavior as motivated by the psychological needs of the person.[78] The mentally ill person may attempt to satisfy his needs by direct action—the making of a contract; or the person may attempt to satisfy his needs by symbolic activity, such as the delusion which in turn may motivate the making of a contract. Consequently it would seem that a complete test for contractual incapacity should provide protection for those persons whose contracts are merely uncontrolled reactions to their mental illness, as well as for those who could not understand the nature and consequences of their actions. This suggests that courts might use the understanding test, the insane delusion test, and a further test to cover uncontrolled actions all as a set of alternative tests for creating a power of avoidance.

It is true that any broadening of the test of contractual incapacity would mean additional conflict with the policy of the sanctity of contract and the concept of the enforceable promise. If the protection policy of the law is to have real meaning, however, the law cannot ignore any mentally ill person who is rendered unequal and incapacitated by his illness and who deserves protection from the consequences of his acts.

There is an interesting parallel between the ideas here developed and the recent developments in the criminal test of responsibility. The criminal law test was originally the "ability to distinguish right from wrong,"[79] but has in some recent cases been modified to absolve responsibility if the crime was a "product of mental disease or defect."[80] The similarity exists in the extension in the criminal area from an "understanding" test to a test or tests which embrace more than one manifestation of mental illness (e.g., defect in ability to decide).

[78] NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 3d ed., 9 (1948).
[79] The rule of M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).
[80] Durham v. United States, (D.C. Cir. 1954) 214 F. (2d) 862 at 875.

C. *Other Mental Tests in the Law*

The above discussion has concerned only the criteria or tests of mental illness occurring at or during formation of a contract which stimulate the courts to provide the ill party or his representative or successors with a power of avoidance. There are, however, other tests for other legal effects of mental illness, including other effects in the law of contracts. For instance, the test of mental "disability" necessary to permit discharge under a personal service contract is different from that of contractual capacity.[81]

Outside the area of contracts there are various other mental tests for legal consequences. The tests for criminal responsibility have already been mentioned. The test for testamentary capacity, as another example, has been stated to be whether the testator has the ability to understand the nature and extent of his estate, those persons who have a natural claim upon his bounty, and what disposition he is making of his estate.[82] Courts indicate that this test differs from that of contractual capacity,[83] and that it takes less mental capacity to make a will than it does to make a contract. Likewise courts have indicated that less mental ability is required to make a valid gift than to make a contract.[84] Although the capacity to execute a deed is generally considered to be identical with the capacity required to contract,[85] courts have indicated that to deed a gift only gift capacity may be needed,[86] and to deed land reserving a life interest only testamentary capacity may be needed.[87] The test of mental incapacity required for a court to appoint a guardian also differs from the contractual capacity test.[88] In this situation the court must consider a general capacity to conduct business that may occur in the future, as opposed to considering a particular past transaction (where the court must take into account the policy of security of transactions and the claims of the

81 See Part V, infra.

82 ATKINSON, WILLS, 2d ed., 232 (1953).

83 In re Holloway's Estate, 195 Cal. 711, 235 P. 1012 (1925); Whitehead v. Malcorn, 161 Ga. 55, 129 S.E. 769 (1925); Sutherland State Bank v. Furgason, 192 Iowa 1295, 186 N.W. 200 (1922). See Green, "Judicial Tests of Mental Incompetency," 6 Mo. L. REV. 141 at 152 (1941), for a more exhaustive treatment of testamentary capacity.

84 McCutcheon v. Bichon, 267 Ky. 694, 103 S.W. (2d) 176 (1937).

85 See note 23 supra.

86 McCutcheon v. Bichon, 267 Ky. 694, 103 S.W. (2d) 176 (1937).

87 Sharkey v. Sisson, 310 Ill. 98, 141 N.E. 427 (1923) (deed).

88 In re Easton, 214 Md. 176, 133 A. (2d) 441 (1957); In re Valentine's Guardianship, 4 Utah (2d) 355, 294 P. (2d) 696 (1956); Charley v. Norvell, 97 Okla. 114, 221 P. 255 (1924).

healthy party). This is strikingly illustrated by a recent Florida decision in which the court refused to allow a person to avoid a previous contract, but proceeded to declare her incompetent and appointed a guardian for her.[89]

The significance of these distinctions to the attorney is that he must be prepared to litigate his cases or plan the transactions of his clients in the judicially-expressed terms of the particular test applicable to the situation before him.

III. PROOF OF CONTRACTUAL INCAPACITY

Important as the "test" for contractual incapacity may be as a conceptual or verbal prerequisite for the creation of a power of avoidance, the real prerequisite is that quantum of proof which a court will hold to be sufficient to satisfy the applicable test. In other words, what proof of incapacity must the mentally ill person present to be able to avoid the contract?

In order to evaluate his case effectively or plan a transaction,[90] an attorney must consider: (1) who has the ultimate burden of persuasion in a trial; (2) what evidence of mental illness or other factors will influence the court to attach unusual effects to the course of the contract; and (3) who has the burden of producing such evidence (as distinguished from the ultimate burden of persuasion) at various stages of a trial.

A. *The Burden of Persuasion*

Whether it be in an action by the mentally ill person to avoid (e.g., to rescind),[91] or in an action on the contract by the healthy party,[92] courts have universally assigned the burden of ultimate persuasion (as well as the burden of pleading)[93] on the issue of contractual capacity to that person who asserts the incapacity of

89 Donnelly v. Mann, (Fla. 1953) 68 S. (2d) 584.

90 See outline and checklist of evidence in Appendix infra.

91 Hermanson v. Seppala, 272 Mass. 197, 172 N.E. 87 (1930); Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950) (deed); Albertson v. Schmidt, 128 Cal. App. 343, 17 P. (2d) 158 (1932) (deed).

92 See, e.g., Fielder and Brown v. Jennings, 131 S.C. 26, 126 S.E. 448 (1924); Jones v. Winstead, 186 N.C. 536, 170 S.E. 89 (1923).

93 Equitable Life Assur. Soc. v. Welch, 239 Ala. 453, 195 S. 554 (1940); Albertson v. Schmidt, 128 Cal. App. 343, 17 P. (2d) 158 (1932) (deed); Jones v. Winstead, 186 N.C. 536, 170 S.E. 89 (1923).

a party to the contract.[94] To satisfy this burden, most courts have said that the party alleging incapacity must persuade by a "preponderance"[95] or a "fair preponderance"[96] of the evidence, while others have used different verbal formulae such as "sufficient and satisfactory"[97] or "clear and convincing."[98]

B. *Nature of the Evidence*

The attorney must consider the nature, admissibility and relative importance of the different kinds of evidence that may be used to satisfy the burden of persuasion, that is, to convince the trier of fact. Since almost any conceivable fact is considered relevant on the issue of capacity,[99] admissibilty usually poses little problem, and will be discussed only when affected by some other rule of evidence. An accurate assessment of the relative importance of various kinds of evidence is perhaps impossible, but some of the broad principles drawn from the cases will be mentioned. Further development of the relative importance of evidence will be found in subdivision C, below, where the various presumptions and burdens of producing evidence are discussed.

The nature of evidence of contractual incapacity can be roughly classified into five basic categories: evidence of facts surrounding the transaction in issue, evidence of a person's general business ability, effect of adjudications, evidence of the mental and physical condition of an individual, lay or expert opinion evidence.

Two important factors cut through the discussion of these categories of evidence. The first, the effect of science on proof of mental incapacity, will be mentioned throughout, but will also be particularly discussed in section 5 below. The second factor is the influence of the actions or relationship of the healthy party to

[94] Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950) (deed); Albertson v. Schmidt, 128 Cal. App. 343, 17 P. (2d) 158 (1932) (deed). But see Greenwood v. Greenwood, (E.D. Pa. 1956) 145 F. Supp. 653; Alexier v. Matzke, 151 Mich. 36, 115 N.W. 251 (1908).

[95] Jones v. Jones, 137 N.Y. 610, 33 N.E. 479 (1893) (dictum); Grand Lodge A.O.U.W. v. Brown, 160 Mich. 437, 125 N.W. 400 (1910), where the court held that the burden was not satisfied by showing the mentally ill person to be irritable and despondent.

[96] Hemphill v. Holford, 88 Mich. 293, 50 N.W. 300 (1891).

[97] Jarrett v. Jarrett, 11 W. Va. 584 (1877).

[98] See, e.g., Rath's Committee v. Smith, 180 Ky. 326, 202 S.W. 501 (1918). See also Ray, "Burden of Proof and Presumptions," 13 TEX. L. REV. 33 (1934).

[99] 2 WIGMORE, EVIDENCE, 3d ed., §228 (1940).

the contract, that is, indications of fraud, undue influence, breach of confidential relationship, inadequacy of consideration, or secrecy. These factors can have a strong effect in leading a trier of fact to find mental incapacity in a transaction.[100]

1. *Facts Surrounding the Transaction in Issue.* Since the determination to be made by the trier of fact is whether there is capacity to form the contract under scrutiny, rather than the more general determination of a party's "sanity," courts focus attention on the circumstances of the disputed transaction. It has been stated that ". . . things a person does and says at or about the time he enters into a contract are the best indicia of his mental capacity to make the same. . . ."[101] From a judicial standpoint, mental illness is important only if it affects the person's capacity to contract under the relevant test of the jurisdiction (usually "understanding").[102]

The facts surrounding the transaction in issue which courts have treated as important include the activity of the mentally ill person in promoting the contract, such as placing advertisements, corresponding, fixing prices and payment dates, and related acts.[103] An explanation of the transaction to the ill person is considered significant, especially if it is by his own attorney.[104] The validity of this position may be questioned, however, in light of the difficulty of understanding legal terminology and the human reluctance to admit inability to understand some business matters. Courts are reluctant to consider explanations by an opposing attorney as proof of capacity.[105] Explanations by disinterested third

100 See discussion in Part IV-A-3, infra.

101 Jimenez v. O'Brien, 117 Utah 82 at 95, 213 P. (2d) 337 (1949).

102 See discussion in §4 of this subdivision.

103 Johnson v. Mayfield, 163 Neb. 872, 81 N.W. (2d) 308 (1957) (deed); Jones v. Mead, 111 Okla. 16, 237 P. 445 (1925) (deed).

104 See, e.g., Henkel v. Alexander, 198 Md. 311, 83 A. (2d) 866 (1951) (deed); Borovansky v. Para, 306 Ill. App. 60, 28 N.E. (2d) 174 (1940) (deed); Patterson v. Snider, 305 Pa. 272, 157 A. 612 (1931); Dyke v. Howe, 244 Mich. 129, 221 N.W. 127 (1928) (deed); Sharkey v. Sisson, 310 Ill. 98, 141 N.E. 427 (1923) (deed); Willemin v. Dunn, 93 Ill. 511 (1879) (deed). But in Bowman v. Illinois Central R. Co., 11 Ill. (2d) 186, 142 N.E. (2d) 104 (1957), cert. den. 355 U.S. 837 (1957), the court ignored the explanations of an attorney who had inadequately and incompletely represented his client. The attorney settled for $15,000 for which the client signed a release, but another attorney successfully contested the issue of the plaintiff's incapacity to sign the release and obtained a judgment of $200,000.

105 Legler v. Legler, 187 Ore. 273, 211 P. (2d) 233 (1949) (deed—confidential relationship breached and secrecy present); Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1936) (deed—secrecy and perhaps fraud present).

parties, such as notaries,[106] relatives,[107] or a legal secretary,[108] have occasionally been utilized and probably have as much probative value as an attorney's explanation.[109]

The opinions of lay persons present at the transaction as to a person's mental ability are often relied on heavily by the courts.[110] Almost as significant is a statement by the mentally ill person made shortly before or after execution of the agreement,[111] or a notation on the document itself[112] indicating his intent or satisfaction with the transaction.

If the transaction is completed in the privacy of the mentally ill person's room[113] or if he is too weak to sign the document and must have assistance,[114] additional evidence of his incapacity to contract is provided.

If an execution or revocation of a will has been made nearly simultaneous with the making of the contract, evidence of capacity to make or revoke the will may be evidence of capacity to contract. At least one case argues that a party may not, in such a case, argue capacity in one instance and incapacity in the other.[115] Another overlap between the capacity tests for contracts and wills occurs when a will, made at a time when capacity is unchallenged, pro-

106 Kelley v. Davis, 216 Ark. 828, 227 S.W. (2d) 637 (1950) (deed).

107 Schmidt v. Humble Oil & Refining Co., (5th Cir. 1955) 219 F. (2d) 551 (sister and brother-in-law).

108 Hardee v. Hardee, 265 Ala. 669, 93 S. (2d) 127 (1957) (deed).

109 The factor of independent advice is highly persuasive to the courts. See discussion and additional cases in Green, "Proof of Mental Incompetency and the Unexpressed Major Premise," 53 YALE L.J. 271 at 293 (1944).

110 See, e.g., Johnson v. Lane, 369 Ill. 135, 15 N.E. (2d) 710 (1938) (deed—scrivener and notary); Kasbohm v. Miller, 366 Ill. 484, 9 N.E. (2d) 216 (1937) (deed—attorney and notary public); Deanes v. Tomlinson, (Miss. 1951) 54 S. (2d) 474 (deed—deputy chancery clerk and tax assessor). But see Thomas v. Dumas, 207 Ga. 161, 60 S.E. (2d) 356 (1950), where the court placed no emphasis on the testimony of two attesting witnesses to the effect that the grantor appeared competent. However, there was also evidence that the grantee had notice of the incompetency at the time of the conveyance. See also §5 of this subdivision.

111 Dyke v. Howe, 244 Mich. 129, 221 N.W. 127 (1928) (deed); Deanes v. Tomlinson, (Miss. 1951) 54 S. (2d) 474.

112 Timm v. Schneider, 203 Minn. 1, 279 N.W. 754 (1938).

113 Payne v. Payne, 12 Cal. App. 251, 107 P. 148 (1910) (deed).

114 Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1936) (deed).

115 Deanes v. Tomlinson, (Miss. 1951) 54 S. (2d) 474. In Schenck v. Going, (4th Cir. 1956) 237 F. (2d) 251, the court compared the capacity of the grantor in the will and deed despite a time interval of 21 months between the instruments. These decisions seem of doubtful validity in light of the discussion in Part II-C, supra, where the differences between various tests for incapacity are discussed.

vides an indication that a later contract is merely fulfilling the ill person's estate plans.[116]

Of considerable importance in every case is the wisdom of the transaction. Logically an improvident agreement should not necessarily relate to ability to understand the nature and consequences of the transaction,[117] but courts may on occasion say that no person who could understand the contract would execute such a bargain.[118]

2. *Evidence of General Business Ability.* Although facts surrounding the transaction in issue are usually most important in establishing mental incapacity, if these are unavailable or inconclusive, courts will turn to evidence of the general business ability of the mentally ill person. In so doing, however, many courts fail to consider any qualitative or quantitative differences between the instant and previous transactions. They apparently assume that if a person adequately handles minor tasks he is competent to transact complicated matters. Thus mention is made of such factors as being a good homemaker,[119] doing jury and church work,[120] or collecting rentals[121] as indicating ability to understand a contract. Other courts consider only prior transactions similar in complexity to the contract in issue,[122] or the volume of recent business handled by the mentally ill person.[123]

Sometimes the improvidence of a prior transaction is considered. It appears that whenever the previous dealings considered

116 Legler v. Legler, 187 Ore. 273, 211 P. (2d) 233 (1949) (deed) (dictum). See also cases in 82 A.L.R. 963, 973 (1933).

117 "But . . . the making of an improvident contract is not sufficient in itself to show lack of capacity to make contracts. If this were so, the number of incompetents would be legion." Rogers v. Central Land & Investment Co., 149 Minn. 347 at 352, 183 N.W. 961 (1921). See also Jorgenson v. Winter, 69 Wash. 573, 125 P. 957 (1912). It has been said that a bad bargain may be understandable under the circumstances. Waggoner v. Atkins, 204 Ark. 264, 162 S.W. (2d) 55 (1942) (deed).

118 "The greater the improvidence [of the transaction] the nearer is the approach to incapacity. If alone indecisive, it may be taken into account with other evidence." Oullette v. Ledoux, 92 N.H. 302 at 306, 30 A. (2d) 73 (1943) (deed). See also Campbell v. Lux, 146 Ark. 397, 225 S.W. 653 (1920) (deed).

119 Bradburn v. McIntosh, (10th Cir. 1947) 159 F. (2d) 925; Somers v. Pumphrey, 24 Ind. 231 (1865) (deed). See also Klein v. Kent, (Mich. 1959) 95 N.W. (2d) 864, where the court mentioned that the grantor did her own grocery shopping, attended church regularly, and paid her own doctor bills as evidence of capacity to execute a land contract.

120 Pledger v. Birkhead, 156 Ark. 443, 246 S.W. 510 (1923) (deed).

121 In Meister v. Finley, 208 Ore. 223, 300 P. (2d) 778 (1956), evidence of this character was regarded as sufficient to uphold a will but not a deed.

122 Kelley v. Davis, 216 Ark. 828, 227 S.W. (2d) 637 (1950) (deed); Callis v. Thomas, 154 Md. 229, 140 A. 59 (1927) (deed); Titcomb v. Vantyle, 84 Ill. 371 (1877) (deed).

123 Chamberlain v. Frank, 103 Neb. 442, 172 N.W. 354 (1919) (deed).

had been prudent in the eyes of the court, the instrument in issue has been upheld; but where the prior dealings had been deemed improvident, avoidance was allowed.[124] This factor by itself is not conclusive but rather indicates that a court will carefully scrutinize the evidence in the present case where previous transactions disclose characteristics of incapacity.

3. Effect of Adjudications. Evidence of the outcome of prior or subsequent adjudications of various types can have profound and often determinative effect upon the question of contractual incapacity. The determinative effects of such adjudications are discussed in subdivision C, below, with other presumptions. Even when an adjudication does not have presumptive or determinative effect, however, it can have evidentiary value for the ultimate burden of persuasion. It is this latter value that is now to be discussed.

(a) *Adjudication of incompetency.* Rendered in a formal proceeding instituted to appoint a guardian to control the estate, an adjudication of this type declares the mentally ill person unable to manage his property. With regard to admissibility of such adjudications in later suits involving contractual incapacity, there is a three-way division of authority. Some courts regard the record as irrelevant,[125] while many will treat it as relevant.[126] Other courts have taken an intermediate position and will admit evidence of the adjudication where it is accompanied by evidence showing that substantially the same mental condition existed at the time of the contract as existed at the time of adjudication.[127] In some cases, particularly those where adjudications are given a presumptive or decisive effect by statute, the effect of an adjudication of incompetency may be to render subsequent contracts "void,"[128] at least until there is a later adjudication of competency. Other

[124] Layne v. Layne, 277 Ky. 295, 126 S.W. (2d) 416 (1939) (deed—imprudent). The person properly handled previous business transactions in the following cases: Kelley v. Davis, 216 Ark. 828, 227 S.W. (2d) 637 (1950) (deed); Rogers v. Central Land & Investment Co., 149 Minn. 347, 183 N.W. 961 (1921); Crosby v. Dorward, 248 Ill. 471, 94 N.E. 78 (1911) (deed); Saffer v. Mast, 223 Ill. 108, 79 N.E. 32 (1906) (deed).

[125] Black v. Boyer, (Tex. Civ. App. 1929) 21 S.W. (2d) 1094; Rhoades v. Fuller, 139 Mo. 179, 40 S.W. 760 (1897); Nichols v. Pool, 47 N.C. 23 (1854).

[126] Acree's Committee v. Blalock, 211 Ky. 450, 277 S.W. 464 (1925); Nichol v. Thomas, 53 Ind. 42 (1876) (deed).

[127] Small v. Champeny, 102 Wis. 61, 78 N.W. 407 (1899); Schindler v. Parzoo, 52 Ore. 452, 97 P. 755 (1908).

[128] A "void" contract has certain possible effects that differ from a "voidable" contract. This will be discussed in Part IV-A-2, infra, and the Appendix. In both the void and the voidable situation, the mentally ill person and his successors are said, in this study, to have a "power of avoidance."

cases provide that the effect is merely to render the contract "voidable."[129]

(b) *Adjudications of "insanity."* An adjudication resulting from a summary proceeding declaring that a person is to be placed in a hospital or institution for the mentally ill is generally considered less significant than an adjudication of incompetency. If the adjudication of "insanity" resulting from such proceeding occurred prior to the contract transaction, some courts will admit it as relevant.[130] A few statutes declare the subsequently made contract to be "void," while others merely declare it "voidable."[131] Where the adjudication of insanity follows the making of the contract, the courts have divided on admissibility.[132]

(c) *Adjudication of incapacity for a different agreement.* There is little law defining the evidentiary significance of an adjudication that a party lacked capacity to contract for a different transaction than the one in issue. It has been held, however, that such an adjudication will raise a presumption of continuing incapacity.[133] Therefore it would seem that such an adjudication would also have evidentiary value in cases where it may not have presumptive effect.

(d) *Other adjudications.* It is conceivable that the following adjudications may also be important, provided that any hearsay objection may be overcome: that a person is competent or incompetent to be a witness, act as trustee or executor under a will, receive criminal sentence or punishment, or execute a will. The importance attached to such adjudications will probably depend upon the degree of relationship between the particular adjudication and the issue of incapacity in the instant case.

4. *Physical and Mental Condition.* Evidence concerning old age and physical disabilities does not usually directly concern the person's ability to understand the terms of the contract and thus apparently has little probative value.[134] Such evidence, however,

129 See discussion in Part IV-A-2, and note 226 infra.

130 See 5 WIGMORE, EVIDENCE, 3d ed., §1671(5) (1940).

131 See Parts IV-A, D, and E, infra, and Appendix.

132 See on inadmissibility: Dewey v. Allgire, 37 Neb. 6, 55 N.W. 276 (1893) (dictum). On admissibility: Wathens v. Skaggs, 161 Ky. 600, 171 S.W. 193 (1914) (deed) (dictum); Avery v. Avery, 42 Cal. App. 100, 183 P. 453 (1919).

133 Davis v. Davis, 24 S.D. 474, 124 N.W. 715 (1910) (deed).

134 E.g., Calveard v. Reynolds, 281 Ky. 518, 136 S.W. (2d) 542 (1940) (deed); Miller v. Jeffrey, 129 Ore. 674, 278 P. 946 (1929) (deed); Bradley v. Bradley, 185 Iowa 1272, 171 N.W. 729 (1919) (deed).

often is emphasized in the presence of fraud, undue influence, breach of fiduciary duty, inadequacy of consideration or secrecy.[135]

Unless directly affecting the transaction in issue or the individual's business judgment, psychoneurotic and psychotic disorders are insufficient to prove incapacity.[136] Additional evidence indicating a lack of "understanding" is necessary.[137]

Because it is present in many contractual incapacity cases, senile dementia deserves special attention. As a progressive deterioration of cortical areas of the brain, it causes a severe diminution of mental faculties.[138] Courts are reluctant to find contractual incapacity on a diagnosis of senility without the presence of additional factors (for example, testimony of business associates).[139] In many situations it is difficult to distinguish senility from the reduced intellectual vigor usually found in old age.[140] Furthermore, senility might affect mental ability in areas other than business judgment. Although it may not be desirable unreasonably to hinder persons from entering into contracts with older persons, perhaps this policy should relate to the effect to be given contracts made with incompetents rather than with the establishment of proof of contractual incapacity.

Although insignificant without other factors, evidence of minor mental disturbances or weaknesses,[141] eccentricities, illiteracy, alcoholism, and the use of drugs may become important if interrelated with fraud, undue influence, breach of fiduciary duty, or inadequacy of consideration.[142]

135 See further discussion in Part IV-A-2, infra.

136 Kelley v. Davis, 216 Ark. 828, 227 S.W. (2d) 637 (1950) (deed). This is due basically to the judicial test being expressed in terms of understanding the transaction in issue, not the mental stability of the ill party.

137 See, e.g., McEvoy v. Tucker, 115 Ark. 430, 171 S.W. 888 (1914) (deed), testimony of co-workers and supervisor. But Kemmerer v. Kemmerer, (Ohio App. 1956) 139 N.E. (2d) 84, seemed to require only slight additional evidence, though the court's reasoning is somewhat unclear.

138 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 289, 290, 293 (1958); EWALT, STRECKER AND EBAUGH, PRACTICAL CLINICAL PSYCHIATRY, 8th ed., 148-149 (1957).

139 See cases in note 137 supra.

140 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 289 (1958).

141 See Part II-A-4, infra.

142 See, e.g., Wilkie v. Sassen, 123 Iowa 421, 99 N.W. 124 (1904) (illiteracy); Waggoner v. Atkins, 204 Ark. 264, 162 S.W. (2d) 55 (1942) (deed—alcohol and drugs); Saliba v. James, 143 Fla. 404, 196 S. 832 (1940) (alcohol—deed). In Nelson v. Nelson, 136 Kan. 1, 12 P. (2d) 800 (1932), the court never referred to business ability but mentioned the fact that the mentally ill person came into a room of strangers wearing only a nightgown and during probate proceedings was more interested in eating an ice-cream cone than in listening to the proceedings.

As yet rarely utilized in contract cases are mental examinations by a physician or psychiatrist, conducted on the same day as the execution of the agreement.[143] If specifically undertaken to determine a person's business understanding (rather than merely his general mental ability) such an examination could be of great value to a court. The drawback, however, is that such an examination might in itself suggest to a court the existence of incapacity in an individual. It might also, as a practical matter, be difficult or inappropriate to suggest or persuade an individual to undergo such an examination, since it seems to imply doubt as to his competency.

5. *Opinion Testimony.* Courts often consider both lay and expert opinion testimony as to a person's "sanity." Such lay opinion is admissible as an exception to the rule prohibiting opinions,[144] but the value of lay opinions depends on the particular importance of the facts from which the opinion is formulated. Thus the weight of an opinion of incapacity diminishes if the witness has never transacted business with the mentally ill person,[145] or if he had merely engaged in "normal transactions" with the mentally ill person.[146] The actions of the spouse of the mentally ill person are important as an indication of her opinion. If a husband submits to the control of his wife, this might denote incapacity.[147] Conversely, it could be argued that if she unites with him in the deed, there is an indication that she thought he was competent.[148]

Expert testimony (opinion of a psychiatrist, psychologist, or

143 Hagan v. Lambert, (R.I. 1931) 152 A. 740 (deed), and Ramsdell v. Ramsdell, 128 Mich. 110, 87 N.W. 81 (1901) (deed), are the only decisions placing stress upon a prior medical examination. The question usually arises in determining testamentary capacity. A recent will case, In re Wagner's Estate, 75 Ariz. 135, 252 P. (2d) 789 (1953), placed more emphasis upon opinions of competency by numerous business acquaintances and friends than on an examination by two psychiatrists shortly before execution of the will. Probably many contractual capacity cases would suffer the same fate in view of the general aversion to expert tsetimony.

144 7 WIGMORE, EVIDENCE, 3d ed., §§1933, 1937, 1938 (1940). For the requisite foundation for lay opinions, see cases in 40 A.L.R. (2d) 15, 141-150 (1955).

145 Bordner v. Kelso, 293 Ill. 175, 127 N.E. 337 (1920) (deed).

146 Crosby v. Dorward, 248 Ill. 471, 94 N.E. 78 (1911) (deed); Wade v. Northup, 70 Ore. 569, 140 P. 451 (1914).

147 Ring v. Lawless, 190 Ill. 520, 60 N.E. 881 (1901) (deed).

148 See implication in Evers v. Webb, 186 Iowa 1172, 173 N.W. 264 (1919) (deed). Both this case and Ring v. Lawless, 190 Ill. 520, 60 N.E. 881 (1901) (deed), could possibly involve hearsay problems of non-assertive conduct. See Wright v. Doe Dem Tatham, 7 Ad. & El. 313, 112 Eng. Rep. 488 (1837).

physician) is admissible through the use of several procedures: the hypothetical question; a case history of the mentally ill person's background and disorders; and an opinion based upon personal examination of the mentally ill party by the testifying expert.[149] Many courts dislike use of hypothetical questions,[150] and case histories usually present hearsay problems.[151] Further disdain of expert testimony by some courts has been due to the inadequacy of many personal examinations of the mentally ill person,[152] especially as they are often oriented more toward an overall picture of the person's mental condition than to his capacity to contract.

Although expert opinion may frequently be of immeasurable value, greater emphasis today is usually placed upon testimony of persons present at the execution of the contract or testimony of business associates or friends. The reasons for this attitude probably include the fact that the test for incapacity (usually "understanding") is focused on the mentality of the ill person during the transaction; the belief that incompetency is a matter of common sense within the knowledge of ordinary people;[153] the feeling of some courts that experts are hired partisans and not objective witnesses; and finally the fact that many personal examinations are conducted a long period after occurrence of the transaction in issue.[154]

Despite these objections it is safe to conclude that the trend is to place more emphasis upon expert testimony.[155] This trend should prevail as attorneys and judges continue to recognize the enormous prevalence of mental illness in the nation, overcome their aversion to psychiatrists,[156] and learn of the advances (as well

149 2 WIGMORE, EVIDENCE, 3d ed., §§672-686 (1940). See the discussion in GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 215, 221, 224 (1952).

150 Evers v. Webb, 186 Iowa 1172, 173 N.W. 264 (1919) (deed).

151 See cases cited in 175 A.L.R. 274, 276, 282, 286 (1948).

152 Jimenez v. O'Brien, 117 Utah 82, 213 P. (2d) 337 (1949); Sharkey v. Sisson, 310 Ill. 98, 141 N.E. 427 (1923) (deed).

153 Kasbohm v. Miller, 366 Ill. 484, 9 N.E. (2d) 216 (1937) (deed); Sharkey v. Sisson, 310 Ill. 98, 141 N.E. 427 (1923) (deed). See discussion in OVERHOLSER, THE PSYCHIATRIST AND THE LAW 110-111 (1953).

154 Henkel v. Alexander, 198 Md. 311, 83 A. (2d) 866 (1951) (deed); Clark v. Leonard, (Mo. 1950) 232 S.W. (2d) 474 (deed).

155 Kemmerer v. Kemmerer, (Ohio App. 1956) 139 N.E. (2d) 84; Thomas v. Dumas, 207 Ga. 161, 60 S.E. (2d) 356 (1950); Smith v. Smith, 254 Ala. 404, 48 S. (2d) 546 (1950) (petition of inquisition, but interesting dictum); Herzog v. Ross, 358 Mo. 177, 213 S.W. (2d) 921 (1948) (deed); Kaplan v. Copeland, 183 Va. 589, 32 S.E. (2d) 678 (1945); McCutcheon v. Bichon, 267 Ky. 694, 103 S.W. (2d) 76 (1937) (deed) (dictum).

156 A poll of 4,000 residents of Louisville, Kentucky, reported in Maisel, "When

as the limitations) of psychiatry. There are still qualifications, however, on the weight to be placed upon expert testimony.[157] For example, the opinions of experts, even when unanimous, are not conclusive on the judge or jury.[158] Also, the person alleging incapacity undoubtedly should provide additional testimony pertaining to the alleged incompetent's business conduct, or opinions of observers at the time the contract was executed.[159]

In order to be of more assistance to the trier of fact in cases of this type, medical experts should direct their examination toward the capacity test (e.g., "understanding") rather than to a general conclusion of the person's mental stability.[160] On the other hand, courts might aid in the communication process with experts by utilizing the terminology adopted by the American Psychiatric Association.[161]

Expert opinion would seem to have varying utility, depending

Would *You* Consult a Psychiatrist," 127 COLLIER'S, May 12, 1951, p. 13, showed that only in the legal profession was there a relatively large measure of distrust of psychiatry. This became especially evident in asking whether experts are unable to agree if the illness of a person is sufficient to commit him to an institution. The general public believed it was more true than false by a margin of 5-3, attorneys by 4-1.

157 Undoubtedly the weight is influenced by the experience and skill of the expert. Herzog v. Ross, 358 Mo. 177, 213 S.W. (2d) 921 (1948) (deed). But see the argument in GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 210 (1952), for allowing general practitioners (M.D.s) to testify as experts on psychiatric questions.

158 Smith v. Smith, 254 Ala. 404, 48 S. (2d) 546 (1950) (inquisition); In re Wagner's Estate, 75 Ariz. 135, 252 P. (2d) 789 (1953) (will).

159 Kemmerer v. Kemmerer, (Ohio App. 1956) 139 N.E. (2d) 84; Kaplan v. Copeland, 183 Va. 589, 32 S.E. (2d) 678 (1945).

160 But many courts state that opinions cannot be stated in terms of legal conclusions, i.e., "capacity." See 7 WIGMORE, EVIDENCE, 3d ed., §1958 (1940).

161 These terms are listed in NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 164-168 (1958). Some of the more important or significant of these terms are set out below as a guide or means of orientation to the attorney or court which does not have such reference readily available. The American Psychiatric Association classifies mental disorders into three broad categories:

I. "Disorders Caused by or Associated with Impairment of Brain Tissue Function." Among the "Acute Brain Disorders" placed in this category are the acute brain syndromes associated with infection, drug, poison or alcoholic association and trauma. Chronic brain syndromes associated with central nervous system syphillis, other intracranial infections, mongolism, prenatal maternal infectious diseases, trauma, alcohol, cerebral arteriosclerosis, senile brain disease and disturbance of growth or metabolism are listed under the subheading of "Chronic Brain Disorders."

II. "Mental Deficiency." In this category are listed the mental deficiencies, familial, hereditary or undetermined cause, of mild, moderate or severe degree.

III. "Disorders of Psychogenic Origin or Without Clearly Defined Clinical Cause or Structural Change in the Brain." Among these disorders, often termed "functional," or "afflictive," are listed the involitional psychotic reaction, the manic and depressive reac-

on which of the three basic categories of mental illness is involved. In the first category, disorders caused by or associated with impairment of brain tissue, expert testimony could offer valuable assistance. Only physicians could determine the extent of physical deterioration of the brain. However, the expert diagnosis as to the effect upon contractual capacity would not alone be determinative. Since the rate of degeneration is often difficult to measure and the intellectual deterioration could be localized in non-business judgment areas, there is latitude for lay evidence as to the transaction and general business ability.

The second group of mental disorders relates to mental deficiency, measured by the IQ standard.[162] Again expert opinion is of utmost importance, for measurement of intelligence generally furnishes an adequate guide for evaluation of a person's understanding of the nature of the contract in question. However, the measurement should be related to adult business experience, as an individual with the intelligence of a twelve-year-old certainly cannot from a contractual standpoint be treated as being that age. His adult business dealings should be considered. Equity courts have historically protected persons of limited mental ability where additional factors such as fraud or undue influence exist.[163] But they should be able to examine the intellectual ability of the person without reference to those additional circumstances.

The third class of mental illness, which includes psychoses, psychoneuroses, and character disorders, developes without known structural change in the brain.[164] Expert opinion would be invaluable with regard to the psychoses in determining the degree of divorcement from reality, or the extent of the delusional system of the person. Lay testimony could also assist here, because of the

tions, the various schizophrenic reactions, the paranoid reactions, the various psychoneurotic disorders, the personality disorders and the transient situational personality disorders.

A standard text, such as NOYES AND KOLB, should be consulted for complete definitions and explanations of these terms. The Psychiatric Glossary for Lawyers in DAVIDSON, FORENSIC PSYCHIATRY 315 (1952), contains short, concise and helpful definitions of frequently used psychiatric terms.

162 Terms generally used are idiot (IQ of 0-20); imbecile (20-50); moron (50-70); borderline (70-90). See EWALT, STRECKER, AND EBAUGH, PRACTICAL CLINICAL PSYCHIATRY, 8th ed., 156 (1957); NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 330 (1958).

163 See discussion in Part IV-A-3, infra.

164 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 166 (1958); STRECKER, BASIC PSYCHIATRY 40 (1952).

unpredictable factors in a particular case. Psychoneuroses and character disorders, being customarily localized (i.e., hysteria, anxiety, obsession-compulsion), present limited opportunities for expert testimony.

By focusing on the psychiatric aspects of mental illness, courts could increasingly utilize expert testimony evaluating those disorders which significantly affect contractual capacity. There would still remain considerable latitude as to the value of lay opinions. In contract cases expert testimony is not subject to the difficulties present in other fields, as for instance in testamentary cases where the expert is ordinarily unable to examine the center of controversy. Undoubtedly a disadvantage of expert opinion, however, is the inevitable likelihood of disagreement among experts in this area.

6. *Conclusions.* It is possible to state only generally that some evidentiary factors are more significant than others. To a degree this is due to the presentation of evidence as an integrated picture rather than in isolation but decisions have also intertwined reasons for holding persons to contracts, principles of fairness and justice, and the actual facts and opinions establishing incapacity or capacity. While probably providing a just result in most cases, it is unfortunate that judicial flexibility has developed at the expense of clarity in the standards and policies being applied by the courts. It would seem more desirable to separate the policies and standards of mental capacity from those involving other factors such as fraud or unfairness. This would enable the courts more accurately and rationally to appraise the policies and standards actually applied. If the mental capacity test itself does not provide the protection needed in a given contract situation, then the court could proceed to considerations of other policies involving fraud or unfairness.

C. *Burdens and Presumptions*

It seems doubtful that any precise rules of proof of contractual incapacity can be established. Courts are too often impressed by circumstances not logically bearing on the issue of mental ability, and closely balanced evidence on that issue itself will provide room for discretion by the trier of fact. Nevertheless, as an aid to evaluating the relative weight and importance of certain types of evidence, it should be helpful to study certain specific effects of

that evidence in a trial on the issue of incapacity. Instead of viewing the evidence as a whole and its relation to the ultimate burden of persuasion, this subdivision will review decisions as to three other possible effects of evidence: (1) the effect of satisfying the burden of initially producing evidence so as to prevent adverse rulings on motion for nonsuit or directed verdict,[165] (2) the effect of imposing upon the other side the burden of producing contrary evidence without which a court will direct a verdict against that other side, and (3) the conclusive effect of certain kinds of evidence, from which a verdict will be rendered despite any contrary evidence that may be produced.

1. *Satisfying the Initial Burden of Producing Evidence.* As in the case of the burden of persuasion, the burden of initially producing evidence on the issue of contractual capacity always falls on the party alleging incapacity.[166] Generally only a small quantum of evidence is required to satisfy this burden.[167] However, evidence of the following non-adjudicatory facts (facts other than evidence of the outcome of adjudications) may be held insufficient to satisfy this initial burden: evidence showing only a weakness of the body,[168] such as occasional headaches;[169] evidence of mental distress, such as depression, discouragement, worry, irritability,[170] and suicide;[171] evidence of a weakness of the mind,[172] such as ec-

165 The burden of producing evidence is the duty of offering satisfactory evidence of a particular fact in issue on pain of an adverse ruling on that issue by the judge if such evidence is not produced. MCCORMICK, EVIDENCE §306 (1954); 9 WIGMORE, EVIDENCE, 3d ed., §2487 (1940).

166 Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.E. 826 (1923); Jones v. Winstead, 186 N.C. 536, 120 S.E. 89 (1923). Cf. New York Life Ins. Co. v. King, 93 F. (2d) 347 (1937) (suicide under insurance policy); Roche v. Nason, 185 N.Y. 128, 77 N.E. 1007 (1906) (will); Cropp v. Cropp, 88 Va. 753, 14 S.E. 592 (1892) (deed); Banker v. Banker, 63 N.Y. 409, affd. 4 Hun 259 (1875) (marriage).

167 Peters v. Peters, 376 Ill. 237, 33 N.E. (2d) 425 (1941) (will); Mangum v. Brown, 200 N.C. 296, 156 S.E. 535 (1930) (release); MCCORMICK, EVIDENCE §306 (1954); 9 WIGMORE, EVIDENCE, 3d ed., §2494 (1940).

168 Eakin v. Hawkins, 52 W. Va. 124, 43 S.E. 211 (1902) (deed); Weed v. Mutual Benefit Life Ins. Co., 70 N.Y. 561 (1877) (life insurance); In re Sarah Collins, 18 N.J. Eq. 253 (1867) (adjudication proceedings).

169 Weed v. Mutual Benefit Life Ins. Co., 70 N.Y. 561 (1877) (life insurance).

170 New York Life Ins. Co. v. King, (8th Cir. 1937) 93 F. (2d) 347 (life insurance).

171 Matter of Anderson, 149 N.Y.S. (2d) 109, 3 Misc. 869 (1956) (change of beneficiary); Boney v. Smallwood, 202 Ga. 411, 43 S.E. (2d) 271 (1947) (change of beneficiary); New York Life Ins. Co. v. King, (8th Cir. 1937) 93 F. (2d) 347 (life insurance); Supreme Council of Royal Arcanum v. Wishart, (3d Cir. 1912) 192 F. 453 (life insurance); Roche v. Nason, 185 N.Y. 128, 77 N.E. 1007 (1906) (will).

172 Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950). Cf.

centric behavior,[173] forgetfulness,[174] old age,[175] extreme old age,[176] or evidence of a hereditary trait for mental illness in the family of the mentally ill person.[177]

Evidence of prior temporary incapacity (and probably subsequent temporary incapacity will be treated the same way) has been considered inadequate to satisfy the initial burden.[178] If such temporary incapacity were close enough in time to the transaction in question, it would seem that a contrary result might be warranted. Mere admission to a mental institution for care,[179] or appointment of a guardian,[180] without a formal adjudication of incompetency or insanity, will generally also be inadequate without more, although the frequency of such admissions may be significant if statutes do not forbid its consideration.[181]

Some courts have even indicated that evidence of a prior adjudication of insanity,[182] or subsequent adjudication of incompetency,[183] may not fulfill the initial burden. These holdings are probably based on a theory that such evidence does not reflect on the more precise question of contractual capacity.

Johnson v. Mayfield, 163 Neb. 872, 181 N.W. (2d) 308 (1957) (deed); Travis v. Travis, 81 Fla. 309, 87 S. 762 (1921) (deed); Eakin v. Hawkins, 52 W. Va. 124, 43 S.E. 211 (1902) (deed); Trimbo v. Trimbo, 47 Minn. 389, 50 N.W. 350 (1891) (deed); In re Sarah Collins, 18 N.J. Eq. 253 (1867) (adjudication proceedings).

173 Masius v. Wilson, 213 Md. 259, 131 A. (2d) 484 (1956) (deed); Roche v. Nason, 185 N.Y. 128, 77 N.E. 1007 (1906) (will); Eakin v. Hawkins, 52 W. Va. 124, 43 S.E. 211 (1902) (deed).

174 Masius v. Wilson, 213 Md. 259, 131 A. (2d) 484 (1956) (deed); Taylor v. Pegram, 151 Ill. 106 at 119, 37 N.E. 837 (1894) (will).

175 Wathens v. Skaggs, 161 Ky. 600, 171 S.W. 193 (1914) (deed).

176 In re Sarah Collins, 18 N.J. Eq. 253 (1867) (adjudication proceedings). Cf. Johnson v. Mayfield, 163 Neb. 872, 181 N.W. (2d) 308 (1957) (deed).

177 Howells State Bank v. Novotny, (8th Cir. 1934) 69 F. (2d) 32 (change of beneficiary).

178 Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.E. 826 (1923). Cf. Equitable Life Assur. Soc. v. Welch, 239 Ala. 453, 195 S. 554 (1940) (life insurance policy); Hall v. Britton, 216 Ala. 265, 113 S. 238 (1927) (mortgage deed); Johnson v. Fondren, 204 Ala. 656, 87 S. 94 (1920) (deed); Richardson v. Smart, 152 Mo. 623, 54 S.W. 542 (1899) (gift); Stewart v. Flint, 59 Vt. 144 (1886) (deed).

179 Poole v. Newark, 40 Del. 163, 8 A. (2d) 10 (1939) (withdrawal of bank deposit); Fletcher v. Miller, 185 Wash. 299, 52 P. (2d) 304 (1936) (lease); Hallohan v. Rempe, 120 N.Y.S. 901, 66 Misc. 27 (1910) (deed); Cropp v. Cropp, 88 Va. 753, 14 S.E. 592 (1892) (deed).

180 Poole v. Newark, 40 Del. 163, 8 A. (2d) 10 (1939) (withdrawal of bank deposit); Morse v. Caldwell, 55 Ga. App. 804, 191 S.E. 497 (1937) (guardianship).

181 Wright v. Jackson, 59 Wis. 569, 18 N.W. 486 (1884) (deed); Wis. Stat. (1957) §319.31.

182 Knox v. Haug, 48 Minn. 58, 50 N.W. 934 (1892) (deed). *Contra,* see note 134 supra.

183 Lilly v. Waggoner, Conservator, 27 Ill. 395 (1862) (deed). See Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.E. 826 (1923).

2. *Presumptions and Shifting Burdens.* Another effect that evidence can have, at least theoretically, is to shift the burden of producing evidence to the other party on pain of a directed verdict against him if he is unable to produce contrary evidence. This effect has often been manifested in the form of a "presumption," that is, the evidence submitted "raises a presumption" of incapacity which the other party must overcome.[184] When the opposing party produces evidence, the cycle may again be repeated—the contrary evidence first satisfying the burden of production recently imposed (so that in a jury trial the case can go to the jury), or being sufficient to re-shift the burden back to the beginning party. These three steps will be briefly discussed.

(a) *Evidence that may shift the burden of producing evidence to the party upholding capacity.* While substantial proof of incapacity at the time of agreement may have the effect of shifting the burden to the party upholding competence,[185] evidence that the mentally ill person was permanently and continuously incompetent prior to the time of the transaction may also have this effect.[186] The problem of showing such permanence and continuance may be a difficult one. Furthermore, the court will be influenced by the proximity in time of the condition proved, allowing less weight to a condition which existed a considerable length of time in advance of the transaction.[187] Some conditions which may be temporary, if occurring immediately before the transaction, may be termed "permanent" by the court,[188] indicating its belief in the probative value of that evidence for proving incapacity at the transaction time itself.

A condition of prior incompetency may be established simply by use of ordinary evidence, such as lay testimony of the mentally

184 MCCORMICK, EVIDENCE §308 (1954).

185 Cf. Wright v. Jackson, 59 Wis. 569, 18 N.W. 486 (1884) (deed); 9 WIGMORE, EVIDENCE, 3d ed., §2495 (1940).

186 Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.E. 826 (1923). Cf. Fletcher v. Miller, 185 Wash. 299, 52 P. (2d) 304 (1936) (lease); Hall v. Britton, 216 Ala. 265, 113 S. 238 (1927) (mortgage deed); Hudson v. Hudson, 144 N.C. 449, 57 S.E. 162 (1907) (deed); Stewart v. Flint, 59 Vt. 144 (1886) (deed); Trish v. Newell, 62 Ill. 196 (1871) (will); Corbit v. Smith, 7 Iowa 60 (1858) (deed); Hix v. Whittemore, 45 Mass. 545 (1842) (service of process).

187 Turner v. Rusk, 53 Md. 65 (1879) (deed); Trish v. Newell, 62 Ill. 196 (1871) (will). Cf. Roberts v. Pacific Tel. & Tel., 93 Wash. 274, 160 P. 965 (1916) (release).

188 Hermanson v. Seppala, 272 Mass. 197, 172 N.E. 87 (1930) (deed). Cf. Richardson v. Smart, 152 Mo. 623, 54 S.W. 542 (1899) (gift).

ill person's condition. There are at least two other ways of proving prior incompetency. The first is to use expert testimony to show that the mentally ill person was afflicted with a type of mental defect or disturbance which could and did render its victim permanently and continuously incompetent.[189] This approach may be particularly helpful where the individual had in some other connection undergone psychiatric examination prior to the transaction.

Another way to prove prior incompetency so as to shift the burden of producing evidence is through use of evidence of prior adjudications. Adjudications of incompetency will generally be treated as raising a rebuttable presumption of incapacity at the time of the later agreement,[190] regardless of the time-period between the adjudication and the agreement[191] or any actual discontinuance of the guardianship.[192] An adjudication of "insanity" will raise a similar presumption in some courts,[193] although others hold to the contrary.[194] It has been held that a judgment of incapacity at the time of a prior transaction will also raise a presumption of continuing incapacity to contract.[195]

The validity of giving adjudications of insanity this presump-

189 The following afflictions may be held to have this effect: senile dementia, First Nat. Bank v. Sarvey, 198 Iowa 1067, 198 N.W. 496 (1924) (note); Greenwood v. Greenwood, (E.D. Pa. 1956) 145 F. Supp. 653 (deed); paresis, In re Kehler, (2d Cir. 1908) 159 F. 55, cert. den. 212 U.S. 573 (1908) (bankruptcy proceeding). Cf. Stewart v. Flint, 59 Vt. 144 (1886) (deed); severe epilepsy, Corbit v. Smith, 7 Iowa 60 (1858) (deed); paresis, Pritchett v. Plater, 144 Tenn. 406, 232 S.W. 961 (1920). Cf. Valiente & Co. v. Succession of Fuentes, (1st Cir. 1935) 76 F. (2d) 78; manic depressive psychosis, Turley v. Turley, 374 Ill. 571, 30 N.E. (2d) 64 (1940) (mortgage); schizophrenia, Davidson v. Piper, 221 Iowa 171, 265 N.W. 107 (1936) (deed); hebophrenic schizophrenia, Parkinson v. Mills, 172 Miss. 784, 159 S. 651 (1935) (marriage); deafness and dumbness from birth, Potts v. House, 6 Ga. 324 (1849) (will); Perrine's Case, 41 N.J. Eq. 409, 5 A. 579 (1886) (adjudication proceeding). *Contra:* Succession of Herbert, 33 La. Ann. 1099 (1881) (adjudication proceedings); deaf, dumb, and blindness from birth, Brown v. Brown, 3 Conn. 299 (1820) (deed).

190 Medical College v. Maynard, 236 N.C. 506, 73 S.E. (2d) 315 (1952); Small v. Champeny, 102 Wis. 61, 78 N.W. 407 (1899) (dictum); Feild v. Koonce, 178 Ark. 862, 12 S.W. (2d) 772 (1929).

191 Medical College v. Maynard, 236 N.C. 506, 73 S.E. (2d) 315 (1952); Aetna Life Ins. Co. v. Cornelius, 226 Ala. 452, 147 S. 632 (1933); Jones v. Schaffner, 193 Iowa 1262, 188 N.W. 787 (1922) (deed). But see Jones v. Winstead, 186 N.C. 536, 170 S.E. 89 (1923).

192 Medical College v. Maynard, 236 N.C. 506, 73 S.E. (2d) 315 (1952).

193 Martello v. Cagliostro, 202 N.Y.S. 703, 122 Misc. 482 (1924) (deed); Summer v. Boyd, 208 Ga. 207, 66 S.E. (2d) 51 (1951).

194 Leggate v. Clark, 111 Mass. 308 (1873) (deed). See also cases in 7 A.L.R. 568, 590 (1920), supplemented in 68 A.L.R. 1309, 1316 (1930).

195 Davis v. Davis, 24 S.D. 474, 124 N.W. 715 (1910) (deed).

tive effect is questionable in light of the fact that the test for that adjudication may differ considerably from the test for incapacity.[196] In the cases of adjudication of incompetency to manage property, however, where the test will be similar to that for incapacity,[197] such effect may be justified since it merely imposes a burden on the other party to bring forth evidence.

The discussion above concerns evidence of prior permanent incompetency. Courts have been generally unwilling to give a presumptive or shifting-burden effect to evidence of subsequent incompetency.[198] Since accurate knowledge as to the prior course of a mental illness seems difficult to deduce from knowledge at a later period,[199] this unwillingness is probably justified. On the other hand, it would seem that certain mental diseases develop slowly enough, or are so permanent, as to lead to a conclusion that they existed within certain periods prior to the time of examination.[200] Thus a court would be justified in giving the same effect to evidence of this type obtained by the subsequent examination as it does to certain evidence of prior incompetency.

A "reach-back" effect has been recognized in the case of certain adjudications subsequent to the agreement in issue. Adjudications that find a condition of incompetency to manage prop-

196 Moneta v. Hoinacki, 394 Ill. 47, 67 N.E. (2d) 204 (1946) (deed); Waters v. Waters, 201 Iowa 586, 207 N.W. 598 (1926) (will).

197 In re Lamont's Estate, 95 Utah 219, 79 P. (2d) 649 (1938) (guardianship proceedings); In re Johnson's Estate, 286 Mich. 213, 281 N.W. 597 (1938) (guardianship proceedings). See Colo. Rev. Stat. Ann. (1953) §§71-1-7, 71-1-3. Cf. Mich. Comp. Laws (1948) §703.1. For a discussion of the test of capacity, see Part II, supra.

198 For cases indicating that a prior presumption will not be raised by non-adjudicatory evidence, see Von Meyer v. Varcoe, 106 Misc. 426, 175 N.Y.S. 862 (1919) (deed); Trish v. Newell, 62 Ill. 196 (1871) (will); Corbit v. Smith, 7 Iowa 60 (1858) (deed). Cf. Sommerville v. Greenhood, 65 Mont. 101, 210 P. 1048 (1922) (transfer of stock); Roberts v. Pacific Tel. and Tel., 93 Wash. 274, 160 P. 965 (1916) (release); Odom v. State, 174 Ala. 4, 56 S. 913 (1911) (criminal). For cases indicating that the presumption will not be raised by adjudicatory evidence, see Shell, Guardian, v. Sheets, Guardian, 202 Ark. 708, 152 S.W. (2d) 301 (1941); Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.C. 826 (1923). Cf. Huffaker v. Brammer, 193 Ky. 267, 235 S.W. 727 (1921) (deed); Andrews v. Andrew's Committee, 120 Ky. 718, 87 S.W. 1080, 90 S.W. 581 (1920) (divorce); Avery v. Avery, 42 Cal. App. 100, 183 P. 453 (1919) (deed); Swanstrom v. Day, 46 Misc. 311, 93 N.Y.S. 192, affd. 101 App. Div. 609 mem., 92 N.Y.S. 1147 mem. (1905) (deed). But see Davidson v. Piper, 221 Iowa 171, 265 N.W. 107 (1936), where the court pointed out the incompetence shown to exist subsequent to the conveyance; Jones v. Schaffner, 193 Iowa 1262, 188 N.W. 787 (1933) (deed), where the court recognized a minority view.

199 This proposition seems to be assumed by psychologists and psychiatrists, and is supported by their descriptions of the unpredictable nature of many mental illnesses. See NOYES, MODERN CLINICAL PSYCHIATRY, 3d ed., cc. 8-28 (1948).

200 See note 189 supra, especially Davidson v. Piper.

erty,[201] or insanity[202] during a prior stated period, have been held to raise a presumption of incapacity to contract during the prescribed period.

(b) *Satisfying a burden that has been shifted to a party alleging capacity.* This poses the same problem, in reverse, as the satisfaction of the initial burden of proof, and is basically a matter of weighing the evidence. Courts have indicated that evidence of lucid intervals not closely proximate in time to the transaction will not satisfy the burden, however.[203]

(c) *Shifting the burden back to the party alleging incapacity.* Evidence which may be strong enough not only to satisfy a burden of producing evidence imposed on those alleging capacity, but to re-shift this same burden back to the opposition, includes: evidence showing that the court terminated or knowingly permitted the termination of the guardianship of the ill person;[204] and evidence that this person had been discharged from a mental institution as cured[205] or improved.[206] Adjudications of sanity[207] and

201 Richie v. Shephard, 143 N.Y.S. 19, 158 App. Div. 192 (1913). See also In re Kehler, (2d Cir. 1908) 159 F. 55, cert. den. 212 U.S. 573; Mieczkowski v. Mieczkowski, 141 N.J. Eq. 367, 57 A. (2d) 517 (1948), a 28-year reach-back provision; Yauger v. Skinner, 14 N.J. Eq. 389 (1862), where by way of dictum a broad interpretation was given to the language of a one-year "reach-back" provision to include a period one year and 14 days prior to the adjudication. An adjudication of incompetence rendered subsequent to the contract which lacks a "reach-back" provision is generally denied the effect of raising a presumption of prior incapacity. Morris Fertilizer Co. v. Bonner, 126 S.C. 284, 119 S.E. 826 (1923); Shell v. Sheets, 202 Ark. 708, 152 S.W. (2d) 301 (1941); Swanstrom v. Day, 46 Misc. 311, 93 N.Y.S. 192, affd. 101 App. Div. 609, 92 N.Y.S. 1147 (1905) (deed). See also cases in note 198 supra.

202 Mulholland v. Sterling Motor Truck Co., 309 Pa. 590, 164 A. 597 (1933). Where admissible, courts generally refuse to give evidence of a subsequent adjudication of insanity a presumptive effect unless it contains a "reach-back" provision. Avery v. Avery, 42 Cal. App. 100, 183 P. 453 (1919).

203 Pike v. Pike, 104 Ala. 642, 16 S. 689 (1894) (deed); Picketts v. Jolliff, 62 Miss. 440 (1884) (mortgage); Turner v. Rusk, 53 Md. 65 (1879) (deed). Cf. note 178 supra.

204 Doris v. McFarland, 113 Conn. 594, 156 A. 52 (1931). Cf. Miller v. Rutledge, 82 Va. 863, 1 S.E. 202 (1887). But see Martello v. Cagliostro, 202 N.Y.S. 703, 122 Misc. 306 (1924) (dower release). For cases dealing with the significance of a practical termination of the guardianship, see Thorpe v. Hanscom, 64 Minn. 201, 66 N.W. 1 (1896) (deed); Elston v. Jasper, 45 Tex. 409 (1876) (settlement).

205 Doris v. McFarland, 113 Conn. 594, 156 A. 52 (1931). But see Lindberg v. Mutual Nat. Bank, 318 Ill. App. 195, 47 N.E. (2d) 551 (1943), where the court did not indicate that the discharge was of any particular significance; Feild v. Koonce, 178 Ark. 862, 12 S.W. (2d) 772 (1929).

206 Federal Land Bank of St. Louis v. Lewis, 199 Ark. 120, 132 S.W. (2d) 488 (1939) (mortgage).

207 Roberts v. Washington Trust Co., 313 Pa. 584, 170 A. 291 (1934), cert. den. 292 U.S. 608 (1934), reh. den. 292 U.S. 613 (1934) (deed); Guardianship of Farr, 169 Wis. 451, 171 N.W. 951 (1919) (guardianship proceeding); Cathcart v. Mathews, 105 S.C. 329, 89 S.E. 1021 (1916) (adverse possession).

competency[208] (in many states) and perhaps judgments of competency to make a specific contract[209] will have this result.

3. *Conclusive Evidence.* In a few situations the courts will hold that certain evidence conclusively establishes the incapacity of a party to a contract. These situations involve statutes which prescribe this effect, usually for adjudications. It should be noted that adjudications of insanity or incompetency to manage property have diverse results prescribed for them by statutes. Some statutes, to prevent interference with the guardian's discharge of his duties in managing the ward's estate, make one or both of these adjudications conclusive evidence of incapacity until the guardianship ceases.[210] Other statutes make such adjudications conclusive evidence of incapacity until a subsequent adjudication of competency, regardless of whether a guardian exists or not.[211] The purpose of this type of statute seems to be to give more protection to the mentally ill person, and to make it clear to all persons what the result of transactions with the ill person will be. A few statutes make adjudications of insanity conclusive of incapacity only during that time when the person is confined, thus protecting healthy parties who contract without notice of the adjudication.[212]

In the absence of statutes, no evidence will be held conclusively to establish a condition of incapacity (or capacity). Although many courts have stated that an adjudication of incompetency[213] or insanity[214] is conclusive evidence of incapacity at the time of the

208 This result would seem to follow in light of the presumptive effect given adjudications of sanity which are normally less significant than adjudications of competence. See note 207 supra. But see Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E. (2d) 475 (1940) (disability insurance policy and release); Emery v. Hoyt, 46 Ill. 258 (1867) (note).

209 Cf. Davis v. Davis, 24 S.D. 474, 124 N.W. 715 (1910) (deed).

210 Martello v. Cagliostro, 202 N.Y.S. 703, 122 Misc. 482 (1924) (deed); Thorpe v. Hanscom, 64 Minn. 201, 61 N.W. 1 (1896); Topeka Water-Supply Co. v. H.C. Root, 56 Kan. 187, 42 P. 715 (1895); Elston v. Jasper, 45 Tex. 409 (1876). See also Summer v. Boyd, 208 Ga. 207, 66 S.E. (2d) 51 (1951).

211 Jackson v. Van Dresser, 188 Tenn. 384, 219 S.W. (2d) 896 (1949); Kay v. Kay, 53 Ariz. 336, 89 P. (2d) 496 (1939).

212 Davenport v. Jenkins' Committee, 214 Ky. 716, 283 S.W. 1044 (1926).

213 Turpin's Admr. v. Stringer, 228 Ky. 32, 14 S.W. 794 (1929). Cf. Toepffer v. Toepffer, 151 Kan. 924, 101 P. (2d) 904 (1940) (divorce); Pritchett v. Plater & Co., 144 Tenn. 406, 232 S.W. 961 (1920). *Contra:* Johnson v. Johnson, 214 Minn. 462, 8 N.W. (2d) 620 (1943); Mott v. Mott, 49 N.J. Eq. 192, 22 A. 997 (1891) (deed).

214 In re Estate of Strohmeier, 164 Kan. 675, 192 P. (2d) 181 (1948); Akin v. Akin, 163 Ga. 18, 135 S.E. 402 (1926) (suit for alimony). *Contra:* United States v. Halliday, 116 F. (2d) 812, revd. on other grounds 315 U.S. 94 (1941) (disability insurance).

adjudication, no case has been found which so bound the party claiming capacity.[215] These courts may merely be saying that under the doctrine of res judicata, an adjudication of incompetency or insanity conclusively decides the condition of the mentally ill person only between the parties to the litigation.[216]

IV. EFFECTS OF MENTAL ILLNESS OCCURRING AT THE AGREEMENT STAGE OF THE CONTRACT

Mental incapacity at the time of agreement will allow the mentally ill person to escape any obligations of a purely executory contract. But suppose the contract is partly executed? Are there additional prerequisites to the power of avoidance other than proof of incapacity? Can the power be lost? And if the power of avoidance is not desired, or cannot be obtained on the basis of the mental illness alone, what other effects on the contract can mental illness during agreement have? These and other questions are considered in this part.

It is with regard to the effects of mental illness on the contract that the conflicting arguments surrounding such illness become especially apparent. The policy of protecting the mentally ill person competes with the policy of ensuring reasonable expectations where, under objective views of contract analysis, the manifestation of agreement by a person would tend to be sufficient to hold him to the contract.[217] In addition, however, there are other policy conflicts in the effects of mental illness; for instance, those which concern difficult problems of unraveling the contract relationship once a court decides to allow a party to avoid the contract.[218]

The various rules governing avoidance of a contract due to fraud or the infancy of a party are closely analogous to those governing avoidance due to mental illness.[219] While these rules may thus be fruitful sources of argument for the attorney in men-

215 For the contrary position, see Cathcart v. Mathews, 105 S.C. 329, 89 S.E. 1021 (1916) (adverse possession).

216 Medical College of Virginia v. Mayard, 236 N.C. 506, 73 S.E. (2d) 315 (1952). Cf. Sutton v. Sutton, 222 N.C. 274, 22 S.E. (2d) 533 (1942). See also Pope v. Bolin, 224 Ala. 322, 140 S. 382 (1932) (adjudication proceeding).

217 Compare with analysis of policy in Part I-C, supra.

218 See subdivision F, infra.

219 This policy is analogous to that of protecting infants. See 1 WILLISTON, CONTRACTS, rev. ed., §§226-238 (1936).

tal incapacity cases, they are not discussed in this study. Cases concerning avoidance of conveyances in arms-length transactions are used to establish conclusions when contract cases are unavailable, since courts usually consider the rules to be the same in both situations.[220]

Although the most important effect of mental illness during agreement is the creation of a power of avoidance, the other effects of such illness will be discussed first. This is because some of the problems of these other effects underlie or intertwine the remaining problems of the power of avoidance. Except for subdivision A, which discusses these other effects, this part assumes that the mental illness of a party during agreement is sufficient to satisfy one of the tests of incapacity and that this sufficiency can be proved. The next four subdivisions after A will discuss: who can avoid, against whom, the methods of avoidance, and the ways of losing the power of avoidance. The final two subdivisions concern the unraveling of the contractual relationship when the contract is to be avoided.

A. *The Illegal, "Void," or Fraudulent Contract*

As stated, mental illness during the agreement stage may have effects on the contractual relation other than a power of avoidance based on mental incapacity.

One of these effects may have just the opposite result from a power of avoidance, allowing a mentally ill party to enforce a contract which otherwise would be unenforceable (the illegal contract). A second effect, that of rendering the contractual relationship totally void ab initio exists in reality only as a logical possibility, but it serves to introduce the distinction between the "void" and the "voidable" contract which is quite important in the mental illness setting. The third effect to be discussed is the utilization of mental illness as a "plus factor" in creating a power of avoidance where the mental illness alone is not sufficient to create that power.

1. *The Illegal Contract.* Mental illness of a party may relieve him from the harshness of the law in dealing with contracts rendered illegal by the law of the appropriate jurisdiction. The general rule is that such contracts cannot be enforced by either party,

220 See Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 557 (1943); 1 WILLISTON, CONTRACTS, rev. ed., §249 (1936).

by way of specific performance or damages, and that no restitution for benefits conferred under the contract will be given.[221] This rule is subject to various exceptions, however. One exception permits restitutionary remedies when the parties are not *in pari delicto*,[222] and should provide a remedy for one who, because of mental illness, was unaware of the illegality. Such a party would be without fault, while the healthy party may have known of the illegality or at least have had the capacity to investigate. Moreover, if the mentally ill party is thus justifiably ignorant of the illegality, he may also be entitled to damages for the nonperformance of the healthy party.[223]

The test of mental illness in this context should probably be whether the party was capable of understanding that the contract was or might be illegal. Even if this standard is not met, the mental illness may contribute to a finding of fraud, duress, undue influence, or mistake, themselves separate grounds for permitting restitution or damages under the illegal contract.[224]

2. *The "Void" Contract.* In the period when a contract was considered to be wholly based on a subjective meeting of the minds, it was easy to think in terms of a contract made with a mentally incompetent person being totally "void," since the minds did not and could not have met. Even at that time, however, and certainly in later times of more objective contract theories, there seemed to be no such thing as a "void" contract relationship, in the sense that a nullity or no legal relationship at all arose from the manifested acts of contracting with a mentally incompetent person.[225] It appears that the healthy party could at least be held to the contract, and that third parties could not attack it as void.

Nevertheless the courts have in the past spoken, and continue today to speak, of a distinction between "void" and "voidable" contracts. Agreements made with incompetent persons in certain

221 See generally 6 CORBIN, CONTRACTS, cc. 79-90 (1951); 6 WILLISTON, CONTRACTS, rev. ed., cc. 49-52 (1938).

222 See 6 CORBIN, CONTRACTS §1537 (1951); 2 CONTRACTS RESTATEMENT §604 (1932).

223 Cf. 6 CORBIN, CONTRACTS §1538 (1951); 2 CONTRACTS RESTATEMENT §599 (1932). These sections do not deal specifically with mental illness.

224 The works cited in notes 221, 222, and 223 supra discuss generally the remedies under an illegal contract entered into as a result of such elements as fraud or undue influence.

225 The term "void" has been criticized as failing to indicate that "a number of legal relations have been created." 1 CORBIN, CONTRACTS §7 (1950). See also 1 WILLISTON, SALES, rev. ed., §29 (1948).

specific situations result in "void" rather than "voidable" contracts, and certain effects of the "void" contract differ from the normal effects of the "voidable" contract. This distinction has already been encountered in this study in part III-B, where adjudicatory evidence was discussed. A brief summary of some of the aspects of this distinction may help to clarify a very confusing area of law.

Today a contract with a mentally ill person is usually merely "voidable" through subsequent agreement or court action.[226] The contract may be termed "void," however, in many jurisdictions when there has been an adjudication of incompetency with a guardian of the estate of the mentally ill person appointed prior to the contract, and in some jurisdictions when there has been a commitment of the mentally ill person to a mental hospital.[227] This departure from the general rule is justified by the purposes served by guardianship proceedings, namely, giving constructive notice of the mental illness to all and permitting the guardian to act effectively for the ward without the ward's interference.[228] But the departure is questionable when applied to other proceedings, although the "void" effect is often specified by statute.[229] Statutes in a few jurisdictions declare as "void" contracts entered into by certain mentally ill persons before any adjudication of incompetency.[230]

Quite often the fact that a contract is "void" instead of "voidable" will make little difference in result. In either instance the power of avoidance may be lost by ratification, undue delay, or estoppel.[231] The same parties may be allowed to exercise the power in both situations.[232]

Historically, the primary difference between "void" and "void-

226 See generally Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 (1943).

227 Id. at 576-580.

228 See Green, "Public Policies Underlying the Law of Mental Incompetency," 38 MICH. L. REV. 1189 at 1213 (1940), agreeing that the fact of adjudication is sufficient protection to the public.

229 Statutes declaring contracts "void" after guardianship proceedings and/or commitment are compiled in the Appendix.

230 Alabama statutes declare all contracts of mentally ill persons "void," and a few western states declare contracts "void" when the mentally ill party is "entirely without understanding." See Appendix.

231 See subdivision E infra.

232 See subdivision B infra.

able" contracts was that the former could be avoided in a court of law, while an action in equity was necessary to avoid a "voidable" contract. This distinction is being obliterated by modern procedural reform.[233] Nevertheless some differences still remain. For instance if a contract is termed "void" it may be avoided even against a subsequent bona fide purchaser from the healthy party (where the contract involved transfer of property). If merely "voidable," the contract might not be subject to avoidance as against such a person.[234] In some jurisdictions the "void" contract may be avoided without restoring the other party to his status quo, while avoidance of a "voidable" contract would require such restoration.[235]

3. *Mental Illness as a Plus Factor.* Fraud, duress, and undue influence are generally considered to be distinct grounds for avoidance of a contract, and need not involve a showing of mental illness.[236] However, a mentally ill party may be more likely than the average person to believe misrepresentations made to him or succumb to outside influence, even if his illness is not severe enough to permit avoidance on the ground of mental incapacity alone.[237] Consequently a court seems justified in allowing mental weakness to supplement those other grounds in creating a power of avoidance.[238] If a composite approach is permitted, a showing of mental weakness, together with facts falling short of fraud, duress, or undue influence will often permit avoidance in situations where the evidence will not sustain avoidance on any single ground.[239]

Likewise, mental weakness will often cause misunderstanding of the terms of the contract by the mentally ill person, possibly resulting in avoidance on the ground of mistake.[240] If the mistake

233 See subdivision D infra.

234 See subdivision C infra.

235 See subdivision F infra.

236 See generally 5 WILLISTON, CONTRACTS, rev. ed., c. 45 (fraud and misrepresentation) and c. 47 (duress and undue influence) (1937).

237 See Green, "Fraud, Undue Influence and Mental Incompetency," 43 COL. L. REV. 176 (1943). See also Green, "Proof of Mental Incompetency and the Unexpressed Major Premise," 53 YALE L.J. 271 (1944), comparing the types of evidence sustaining avoidance on the various grounds.

238 E.g., Wells v. Wells, 197 Ind. 236, 150 N.E. 361 (1926) (deed). See Virtue, "Restitution from the Mentally Infirm," 26 N.Y. UNIV. L. REV. 291 at 294-300 (1951), and cases cited therein.

239 See Green, "Fraud, Undue Influence and Mental Incompetency," 43 COL. L. REV. 176 at 195 (1943), advocating avoidance on composite grounds.

240 See generally 3 CORBIN, CONTRACTS, cc. 27-29 (1951); 5 WILLISTON, CONTRACTS, rev. ed., c. 46 (1937).

is unilateral, as will normally be the case, rescission is usually the appropriate remedy.[241] If the healthy party knew that the mentally ill party misunderstood the contract terms, however, the mentally ill party may also be able to obtain reformation of the contract.[242]

It is evident that mental weakness will often be a major factor in permitting avoidance on grounds of fraud, duress, undue influence, mistake and the like. To the extent that the judicial tests of incapacity[243] set a requirement too high for the protection of all mentally ill, and to the extent that sufficient evidence[244] cannot be produced to prove incapacity, these alternate grounds present needed additional protection for the ill party.

B. *Who Can Avoid*

Turning now to the most important effect of mental illness during agreement—avoidance—it is assumed that one of the parties to the contract lacked the capacity to contract under the relevant test for the jurisdiction concerned and that sufficient proof of this fact is available. If this lack of capacity gives rise to a power of avoidance,[245] who can exercise it?

1. *The Healthy Party and His Successors.* Decided cases generally hold that the healthy party and those claiming through him *cannot* exercise the power of avoidance.[246] Since the law has created the power of avoidance only for the protection of the mentally ill party, in the usual case it is sufficient that he alone can avoid or ratify.[247] Avoidance by the healthy party would destroy the mentally ill party's option to ratify.[248]

This rule may work hardship on the healthy party, for he will

241 Cf. 3 CORBIN, CONTRACTS §614 (1951). Existence of the mistake may also result in refusal of specific performance to the other party. Cf. 3 CORBIN, CONTRACTS §612 (1951). These sections do not deal specifically with mental illness.

242 Cf. 3 CORBIN, CONTRACTS §608 (gift), §610 (knowledge of other party) (1951) (not dealing specifically with mental illness). 2 CONTRACTS RESTATEMENT §505 (1932) limits reformation for unilateral mistake to the case where the other party not only knows that a mistake has been made but knows what was intended by the mistaken party.

243 Discussed in part II, supra.

244 Discussed in part III, supra.

245 See note 27 supra as to the meaning of "power of avoidance."

246 E.g., Fannin v. Conn, 311 Ky. 690, 225 S.W. (2d) 102 (1949) (deed); McClure Realty and Investment Co. v. Eubanks, 151 Ga. 763, 108 S.E. 204 (1921) (lease).

247 Palmer v. Lititz Mutual Ins. Co., (W.D. S.C. 1953) 113 F. Supp. 857; Reynolds v. Earley, 241 N.C. 521, 85 S.E. (2d) 904 (1955) (lease and purchase option).

248 Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E. (2d) 226 (1947) (tort release).

often be uncertain whether a power of avoidance exists (i.e., whether the other party is mentally ill to the requisite degree) and, if so, whether it will be exercised. The problem becomes acute when land titles are involved, and there is authority that a healthy purchaser under a land contract may avoid the contract if there is a mentally ill person in the vendor's chain of title.[249] What protection is generally afforded the healthy party rests on the doctrines of laches, estoppel, and implied ratification by the mentally ill party,[250] and in the requirement that on avoidance by the mentally ill party, the healthy party be placed in statu quo.[251]

2. *The Mentally Ill Party and His Successors.* There are roughly at least three classes of persons who *may* exercise the power of avoidance. The first of these classes, those persons who are asserting the interests of the mentally ill party himself,[252] includes the mentally ill party after recovery from the mental illness.[253] If he has been adjudicated incompetent, his guardian or committee is the proper party to assert the power of avoidance.[254] If there has been no adjudication, or if there is no guardian or committee, his power may be asserted by his next friend, guardian ad litem, or other special representative.[255]

The second class of persons who may avoid the contract is composed of those persons asserting interests descended from the mentally ill party at his death. This class includes the appropriate heirs, executors, or administrators who will receive the benefits

249 Rattner v. Kleiman, (Tex. Civ. App. 1931) 36 S.W. (2d) 249 (implied warranty of capacity of vendor); Coombs v. Witte, 104 N.J.L. 519, 140 A. 408 (1928) (deed); Brokaw v. Duffy, 165 N.Y. 391, 59 N.E. 196 (1901) (deed).

250 See discussion in subdivision E, infra.

251 See discussion in subdivision F, infra. Relief may also be provided by a declaratory judgment action, discussed in subdivision D, infra.

252 These parties are listed in 1 WILLISTON, CONTRACTS, rev. ed., §253 (1936); 5 TIFFANY, REAL PROPERTY, 3d ed., §1371 (1939).

253 In Anonymous v. Anonymous, 3 App. Div. (2d) 590, 162 N.Y.S. (2d) 984 (1957) (deed), the mentally ill party was permitted to sue without a showing of recovery, the court stating that a guardian ad litem could be appointed later if one were necessary.

254 E.g., Marten v. Wagner, 198 Okla. 273, 178 P. (2d) 618 (1947) (deed). The guardian must be the guardian of the estate of the mentally ill party, not of his person only: Scheuer v. Atlantic Milling Sales Corp., (App. Div. 1921) 187 N.Y.S. 497 (securities). His right to represent the mentally ill party will normally exclude others from acting: Kilbe v. Myrick, 12 Fla. 419 (1868) (deed).

255 E.g., Wynne v. Fisher, 156 Ga. 656, 119 S.E. 605 (1923) (deed—next friend); Jenifer v. Kincaid, 191 Md. 120, 59 A. (2d) 765 (1947) (deed—special trustee); Gulf Production Co. v. Colquitt, (Tex. Civ. App. 1930) 25 S.W. (2d) 989 (deed—receiver in prior divorce action).

of avoidance.[256] It does not include *potential* heirs (where the mentally ill party is still alive),[257] nor those who at his death take no interest in the specific property involved in the contract.[258]

The third class of persons who may avoid the contract is composed of those persons asserting interests derived from the mentally ill party during his lifetime. These interests are usually property interests, not just contract interests, but are discussed here because the power of avoidance fills one of its designated purposes by permitting restoration of property passing under the contract to the mentally ill party and those claiming under him. The most frequently encountered example is the case where the mentally ill party sells property to one party, and then later sells the same property to another party. If the vendor had not recovered from his mental illness before the second sale, the second purchaser will have no greater power to avoid the first sale than will the first purchaser to avoid the second sale, both sale contracts being equally avoidable. Thus neither sale can be avoided by either healthy party on the ground of the mental illness of the common vendor,[259] and determination of title would be by other rules of law.

If the vendor had recovered from his mental illness before the second sale, the first sale may be avoided.[260] Two possible analyses are available, either that the second sale acts as an avoidance of the first by the mentally ill party himself,[261] or that the power of avoidance passed by sale to the second purchaser, who may then avoid the first sale.[262] A purchaser in this sense is one claiming

256 See 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §551 (1929). See also 1 A.L.R. 1517 (1919) (executors and administrators); 2 A.L.R. 431 at 437 (1919), 33 A.L.R. 51 at 52 (1924) (heirs).

257 E.g., Sellman v. Sellman, 63 Md. 520 (1885) (deed); Baldwin v. Golde, 88 Hun (N.Y.) 115, 34 N.Y.S. 587 (1895) (deed). See McMillan v. Deering & Co., 139 Ind. 70, 38 N.E. 398 (1894) (deed), where, before the death of the mentally ill life tenant, plaintiff-holders of a remainder interest were unable to avoid a deed of the remainder by the life tenant, who had been given power to convey the fee.

258 E.g., Campbell v. Kuhn, 45 Mich. 513, 8 N.W. 523 (1881) (administrator unable to avoid deed as the realty would descend directly to the heirs); Langley v. Langley, 45 Ark 392 (1885) (deed—widow without dower rights in the realty involved).

259 *Accord,* Davis Sewing Machine Co. v. Barnard, 43 Mich. 379, 5 N.W. 411 (1880) (creditor v. grantee under prior deed).

260 Breckenridge's Heirs v. Ormsby, 24 Ky. (1 J.J. Mar.) 236 (1829) (mortgage); Clay v. Hammond, 199 Ill. 370, 65 N.E. 352 (1902) (deed). See 5 TIFFANY, REAL PROPERTY, 3d ed., §1371 (1939).

261 Suggested in 5 TIFFANY, REAL PROPERTY, 3d ed., §1371 (1939).

262 Breckenridge's Heirs v. Ormsby, 24 Ky. (1 J.J. Mar.) 236 (1829) (mortgage). The parties were the second purchaser and the heirs of the mentally ill party, and the court observed that the equities favored the purchaser.

the property involved[263] through the mentally ill party,[264] not one claiming it through a common grantor, as with successive life estates and remainders.[265] As the mentally ill party has parted with his interest in the property to the second purchaser, this is not a matter of protecting him, but of protecting the second purchaser. Therefore it would seem that the power of avoidance (along with the duty to make restitution, if any) should pass to the purchaser if the parties to the second sale so intend;[266] for the first purchaser, against whom avoidance is to be had, is in no worse position whether his purchase is avoided by the mentally ill party, his heirs, or his assignees.

Another common example of one asserting such derivative rights is the creditor of the mentally ill party who seeks to avoid the latter's sale or gift in order to subject the property transferred to the payment of the debt. A recent decision has permitted a general creditor to assert the power of avoidance, holding the action to be for the benefit of the estate of the deceased mentally ill debtor, similar to a corporate shareholder's derivative suit for the benefit of the corporation.[267] Several cases have permitted avoidance by general creditors[268] and judgment creditors,[269] while one jurisdiction has refused the action and remitted the creditor to

263 In Vogel v. Zuercher, (Tex. Civ. App. 1911) 135 S.W. 737, the lessee of a mentally ill party was not permitted to attack his grantor's subsequent deed of the reversion, presumably because he could show no interest in the reversion.

264 Fannin v. Conn, 311 Ky. 690, 225 S.W. (2d) 102 (1949) (attack not permitted by person who conveyed land to the mentally ill party); McClure Realty & Investment Co. v. Eubanks, 151 Ga. 763, 108 S.E. 204 (1921) (attack on lease not permitted by one who held the interest of the mentally ill person by court decree but could not show that he held it through her).

265 McMillan v. Deering & Co., 139 Ind. 70, 38 N.E. 398 (1894) (plaintiff holders of remainder interest unable to avoid deed of remainder by mentally ill life tenant having power to convey fee). *Contra,* Willoughby v. Trevisonno, 202 Md. 442, 97 A. (2d) 307 (1953), where on the same facts the attack was allowed on the ground that a remedy was necessary immediately, rather than after the death of the life tenant, so that the grantee could not sell to a bona fide purchaser.

266 This intention should be measured by the price and other terms of sale. The vendor should then be estopped from asserting the power of avoidance in derogation of the sale.

267 Chandler v. Welborn, 156 Tex. 312, 294 S.W. (2d) 801 (1956) (deed). The holding was limited to the case of a deceased debtor leaving insufficient assets to satisfy his creditors, when the property sought by the creditor would be subject to his claim if owned by the debtor, and when the heirs and personal representative are adversely interested and attempt to uphold the transfer.

268 Riley v. Carter, 76 Md. 581, 25 A. 667 (1893), where the deed attacked was an assignment for the benefit of creditors that was in the debtor's interest, so that he was unlikely to avoid it himself.

269 Sampson v. Pierce, (Mo. App. 1930) 33 S.W. (2d) 1039 (creditors' right to avoid deed not challenged by the grantee).

his attack of the transfer as a fraudulent conveyance.[270] Federal law does not assist, as the Bankruptcy Act follows state law on this question.[271] In most cases the transfer can also be attacked as a fraudulent conveyance, and the attack based on the mental illness of the debtor-transferor may be unnecessary. And since the policy favoring protection of the mentally ill and his family, upon which the right of avoidance is based, is not served by giving this right to one whose interests will usually be adverse to the protected party and his estate, extension of the creditor's rights to include the power of avoidance appears unsound in principle and unwise in its duplication of existing rights. While it may be that a remedy is needed,[272] refinement of the law of fraudulent conveyances seems more appropriate.

3. *Joint Interests.* Complications arise when the contract rights of the mentally ill party are held jointly with a healthy party. If the mentally ill party chooses to avoid the contract, the healthy co-party should also be released unless the interests are actually severable. If the mentally ill party does not avoid, the same considerations for denying a power of avoidance to the healthy party in a two-party contract are applicable to the healthy co-party, and he should not be permitted to avoid the contract.[273]

4. *"Void" Contracts.* Although the term "void" might imply that a contract could be successfully attacked by anyone (e.g., by a creditor), the better view would seem to be that only those who can avoid a "voidable" contract should be allowed to avoid a "void" contract. This is sufficient to protect the mentally ill person, and is supported by dictum in one case.[274]

270 Brumbaugh v. Richcreek, 127 Ind. 240, 26 N.E. 664 (1891) (deed—judgment creditor); Rollet v. Heiman, 120 Ind. 511, 22 N.E. 666 (1889) (deed—judgment creditor). See 1 WILLISTON, CONTRACTS, rev. ed., §253 (1936). 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §550 (1929), suggests that the judgment creditor, but not the general creditor, can assert the right of avoidance.

271 52 Stat. 879 (1938), as amended, 11 U.S.C. (1952) §110(e). See 4 COLLIER, BANKRUPTCY, 14th ed., §§70.78, 70.90 (1942). The trustee may attempt to avoid the bankrupt's deed as a fraudulent conveyance: 52 Stat. 875, 878, as amended, 11 U.S.C. (1952) §§107(d), 110(e).

272 See Chandler v. Welborn, 156 Tex. 312 at 319, 294 S.W. (2d) 801 (1956) (deed); Riley v. Carter, 76 Md. 581 at 598, 25 A. 667 (1893) (deed).

273 The reluctance of courts to find incompetency in these cases is discussed in Virtue, "Restitution from the Mentally Infirm," 26 N.Y. UNIV. L. REV. 132 at 152 (1951). Problems also arise in connection with the sale of a homestead when one spouse is mentally ill, and statutes often provide for sale by court order. See 45 A.L.R. 395 at 432 (1926), 155 A.L.R. 306 (1945).

274 See San Francisco Credit Clearing House v. MacDonald, 18 Cal. App. 212, 122 P. 964 (1912) (promissory note).

C. *Against Whom Can Avoidance Be Asserted?*

The next question concerning the power of avoidance is: against whom may it be asserted? Since, as indicated above, the healthy party can rarely avoid, this section deals with avoidance by the mentally ill party and his various successors in interest as against the healthy party and his successors. The possible scope of the power of avoidance ranges from avoidance against the original healthy party to avoidance against his most remote assignee, with the contract either still executory or in some degree performed.

If the contract is still executory, or if no property interests have passed to the healthy party, the mentally ill party can avoid against all remote assignees.[275] If property interests have passed to the healthy party, however, and are now in the hands of a bona fide purchaser for value without notice of the mental illness, the power of avoidance often may not be exercisable against such purchaser. If the contract were "voidable" on grounds other than mental illness, such as fraud in the inducement and undue influence, the bona fide purchaser would take free of the power of avoidance.[276] When the power of avoidance is based on mental illness, however, the strong policy of protecting the mentally ill party from the consequences of his irrational acts obscures the picture, and has often been permitted to override the conflicting policy of protecting the security of transactions and of property interests created by them.[277] Since the power of avoidance is given to conserve the property of the mentally ill, a refusal of avoidance when the property is held by a bona fide purchaser dilutes the protection. This is because the contract consideration, or money damage remedies, may be inadequate due to an increase in the value of the property, insolvency of other possible defendants, or the irreplaceable nature of the property.

An initial factor to consider is the remoteness of the bona fide purchaser from the original healthy party. Since it places an onerous burden on a remote purchaser to compel him to litigate the question of the competency of vendors far removed in his chain

275 See 1 CONTRACTS RESTATEMENT §167 (1932) (not dealing specifically with mental illness).

276 See 5 WILLISTON, CONTRACTS, rev. ed., §1531 (1937); 2 CONTRACTS RESTATEMENT §476, comment *e* (1932).

277 These policies are discussed in part I-C, supra.

of title, one quite remote should be held to take free of the power of avoidance, particularly if much time has passed.[278]

Remoteness will not of itself avail the purchaser who is but two steps removed from the mentally ill party, as in the more frequent case where *X* contracts with the mentally ill party under circumstances in which the contract can be avoided as against *X* and *X* then sells to the one against whom avoidance is sought. If *X*'s vendee is a bona fide purchaser for value without notice of the mental illness, the policies favoring security of transactions and protection of the mentally ill strongly conflict. One line of authority protects the bona fide purchaser if his purchase from *X* were under such circumstances (e.g., without knowledge of the illness) that if *X* were the ill party, *X* could not obtain avoidance.[279] This view seems to depend on the proposition that the bona fides of the purchaser protects the mentally ill party. Since the purchaser had no direct dealings with the mentally ill party, however, this proposition would seem incorrect.[280] A different line of authority permits the mentally ill person to avoid the contract even against the subsequent bona fide purchaser from *X*. This view objects to *X* defeating the power of avoidance by merely selling to a bona fide purchaser.[281]

Since, as has been pointed out, neither the mentally ill party nor the subsequent bona fide purchaser will be completely unprotected,[282] the true issue is usually who gets the property and

278 Goldberg v. McCord, 251 N.Y. 28, 166 N.E. 793 (1929) (deed). See Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 567 (1943). This principle is not applicable if the remote grantee knew of the defect in his title; e.g., Brokaw v. Duffy, 165 N.Y. 391, 59 N.E. 196 (1901) (deed). See subdivision E, infra, for circumstances in which the ill party could not avoid.

279 Odom v. Riddick, 104 N.C. 515, 10 S.E. 609 (1890) (deed—actually involving a remote grantee); Christian v. Waialua Agricultural Co., 33 Hawaii 34 (1934), revd. (9th Cir. 1937) 93 F. (2d) 603, reinstated 305 U.S. 91 (1938) (deed); Brown v. Khoury, 346 Mich. 97, 77 N.W. (2d) 336 (1956) (deed); Chestnut v. Weekes, 180 Ga. 701, 180 S.E. 611 (1935) (deed); Begley v. Holliday's Committee, 248 Ky. 453, 58 S.W. (2d) 654 (1933) (deed).

280 The bona fides of the purchaser is some assurance that the transaction will be a fair one, and is discussed in relation to avoidance and return to status quo in subdivision F, infra.

281 Hovey v. Hobson, 53 Me. 451 (1866) (deed), involving a remote grantee; Jones v. Lind, (Tex. Civ. App. 1948) 211 S.W. (2d) 587 (deed); Atkinson v. McCulloh, 149 Md. 662, 132 A. 148 (1926) (contract and deed); Brewster v. Weston, 235 Mass. 14, 126 N.E. 271 (1920) (deed); McKenzie v. Donnell, 151 Mo. 461, 52 S.W. 222 (1899) (deed); Dewey v. Allgire, 37 Neb. 6, 55 N.W. 276 (1893) (deed); Hull v. Louth, 109 Ind. 315, 10 N.E. 270 (1887) (deed).

282 The mentally ill party has an action against X for the proceeds of his sale to the bona fide purchaser: Sprinkle v. Wellborn, 140 N.C. 163, 52 S.E. 666 (1905) (deed). The bona fide purchaser may also recover from X the price paid: DeVries v. Crofoot, 148

who must be satisfied with a money judgment. In many cases restoration of the property to the mentally ill party will mean its subsequent sale to supply funds for his support. If the mentally ill party has since died and his heirs are suing, the purchaser can often show more reliance on title to the specific property than can the heirs. Under these circumstances it may often make sense to refuse avoidance if the other remedies of the mentally ill party appear adequate for the protection of him and his heirs.

What has been said thus far applies to "voidable" contracts. If the contract is "void," it could be casually concluded that no subsequent purchaser can take free of the power of avoidance.[283] In the case of the mentally ill party who has not been adjudicated incompetent, however, the conflicting policies discussed above continue to exist, and the solution should be the same, absent legislative command that absolute protection be given.[284] If the mentally ill party was adjudicated incompetent before he entered into the contract, additional reasons (constructive notice and the desire to make guardianship effective) appear for allowing avoidance against subsequent purchasers.[285]

Statutes have been adopted in many jurisdictions protecting the subsequent bona fide purchaser in certain types of transactions. The Uniform Sales Act protects him if the contract is "voidable" only,[286] and the Uniform Commercial Code contains similar provisions.[287] The Uniform Negotiable Instruments Law does not protect a holder in due course from the right of avoidance of a prior mentally ill party[288] but remits him to his rights at

Mich. 183, 111 N.W. 775 (1907) (deed); Lack v. Brecht, 166 Mo. 242, 65 S.W. 976 (1901) (deed). See 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §258 (1929).

283 E.g., German Savings & Loan Society v. DeLashmutt, (C.C. Ore. 1895) 67 F. 399 (deed), holding the contract void under the outmoded rule of Dexter v. Hall, 15 Wall. (82 U.S.) 9 (1872).

284 A few jurisdictions have such statutes (see appendix for list): e.g., Mattos v. Kirby, 133 Cal. App. (2d) 649, 285 P. (2d) 56 (1955) (deed "void" by statute); Hood v. Holligan, 229 Ala. 539, 158 S. 759 (1935) (deed not within statute protecting original bona fide purchaser and therefore "void" even as to subsequent bona fide purchaser under a second statute).

285 E.g., Gibson v. Westoby, 115 Cal. App. (2d) 273, 251 P. (2d) 1003 (1953) (deed), permitting avoidance of a "void" contract against a bona fide purchaser. These additional reasons are discussed in subdivision A-2, supra.

286 1 U.L.A. §24 (1950). Cases dealing with infancy have construed this section of the act to have this effect: e.g., Jones v. Caldwell, 216 Ark. 260, 225 S.W. (2d) 323 (1949). See 16 A.L.R. (2d) 1420 at 1425 (1951). See 1 WILLISTON, CONTRACTS, rev. ed., §252 (1936); Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 575 (1943).

287 Uniform Commercial Code §2-403(1) (1952).

288 See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., 756-758 (1948);

common law.[289] The provisions on negotiable instruments in the Uniform Commercial Code follow the Sales Act in permitting a holder in due course to take free of the power of avoidance if the contract of the mentally ill party is "voidable" only.[290] These typical statutes are indicative of a modern trend toward preferring the need for security of commercial transactions over the desire for protection of the mentally ill party. They reduce the power of avoidance on the ground of mental illness to the size of a power of avoidance on other grounds, such as fraud and undue influence.

D. *Procedural Methods of Avoidance*

In addition to the self-help methods of avoidance (e.g., voluntary rescission, provided that the parties then have capacity[291]), there are several methods of avoidance through court action. The most modern is the declaratory judgment proceeding.[292] Other actions can be classified as positive actions to avoid or as defenses to actions on the contract by the healthy party or his successors in interest.[293] Common questions are the type of action required (legal or equitable), whether the formalities of disaffirmance and tender must precede the action or defense, and what must be contained in the pleadings.

BRITTON, BILLS AND NOTES §126 (1943). Section 22 does provide for tracing of title to the instrument through infants and corporations exceeding their powers, and it has been argued that it should be applied by analogy to mentally ill parties: BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., 436 (1948); BRITTON, BILLS AND NOTES §160 (1943).

289 E.g., Hillsdale Nat. Bank v. Sansone, 11 N.J. Super. 390, 78 A. (2d) 441 (1951) (note of a mentally ill party not a negotiable instrument); Beale v. Gibaud, (W.D. N.Y. 1936) 15 F. Supp. 1020. Most cases ignore the N.I.L. and follow the law applicable to all contracts, e.g., Wadford v. Gillette, 193 N.C. 413, 137 S.E. 314 (1927) (following the rule of Odom v. Riddick, note 279 supra, a deed case); Hellman Commercial Trust & Savings Bank v. Alden, (Cal. App. 1928) 268 P. 688, affd. 206 Cal. 592, 275 P. 794 (1929) (following the local statutes applicable to all contracts of adjudicated incompetents).

290 Uniform Commercial Code §3-305 (1952). See comment (5) under that section. A subsequent holder who is not a holder in due course is remitted to his common law rights by §3-306(b). Title may be traced through the mentally ill person, even though his contract is "void," by the provisions of §3-207; see comments (1) and (2) under that section.

291 Local law varies as to whether the guardian and others representing the mentally ill party can rescind the contract without court action. See 1 WILLISTON, CONTRACTS, rev. ed., §253 (1936); comment, 36 CALIF. L. REV. 606 (1948).

292 See 2 ANDERSON, DECLARATORY JUDGMENTS, 2d ed., c. 12 (1951); BORCHARD, DECLARATORY JUDGMENTS, 2d ed., part 3, c. 2 (1941). These authors set forth various circumstances under which declaratory judgment proceedings will enable the parties to determine whether a power of avoidance exists for fraud, mistake, or undue influence, before a "legal structure" has been built upon the contract, and the proceeding should also be available when the power of avoidance will be based on mental illness. E.g., Sperry v. Saul, 14 Misc. (2d) 161, 178 N.Y.S. (2d) 421 (1958) (power of attorney and trust deed).

293 The types of actions available are discussed infra.

1. *Positive Action at Law.* The logical rule is that only a court of equity can rescind a "voidable" contract, and only a "void" contract can be avoided at law.[294] The possible legal actions include ejectment or replevin for specific property passing under the contract, or trover or assumpsit (quasi contract) for its value.[295] Avoidance of a "voidable" contract can be had at law, however, if the plaintiff first attempts rescission out of court by giving notice of his disaffirmance to the healthy party and tendering back benefits received under the contract.[296] Thus, disaffirmance and tender have become jurisdictional prerequisites to the avoidance at law of a "voidable" contract. The awkward results of these formalistic requirements have caused courts to excuse disaffirmance and tender by finding the contract to be "void,"[297] and by delineating numerous exceptions to the requirements.[298] These exceptions have become so broad that they almost swallow the rule,[299] but they still present hurdles for the plaintiff unable to bring his case within an exception.[300]

294 See 2 CONTRACTS RESTATEMENT §481, comment *a* (1932). The circumstances rendering the contract "void" or "voidable," and the effects of each type of contract, are outlined in section A-2, supra.

295 Many courts refused to permit avoidance for mental illness in the strictly legal actions of ejectment and replevin: e.g., Walton v. Malcolm, 264 Ill. 389, 106 N.E. 211 (1914) (deed); Moran v. Moran, 106 Mich. 8, 63 N.W. 989 (1895) (deed). See Virtue, "Restitution from the Mentally Infirm," 26 N.Y. UNIV. L. REV. 132 at 144 (1951). The codes have been construed to permit the actions, e.g., Smith v. Ryan, 191 N.Y. 452, 84 N.E. 402 (1908) (deed). See 20 HARV. L. REV. 419 (1907).

296 E.g., Paulen v. Springfield Consolidated Ry. Co., 166 Ill. App. 382 (1911) (avoidance of tort release refused for lack of tender before verdict although mentally ill party was in mental hospital at time of release). See 2 CONTRACTS RESTATEMENT §480 (1932); 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §§573, 574 (1929).

297 This may explain why many courts at one time held all contracts of mentally ill persons to be "void." See Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 574 (1943). The courts also look for fraud in the *factum* to render the contract "void;" e.g., Rubenstein v. Dr. Pepper Co., (8th Cir. 1955) 228 F. (2d) 528 (executed sale); comment, 32 COL. L. REV. 504 at 510 (1932). See also 134 A.L.R. 6 at 68 (1941).

298 Excusing disaffirmance: Wells v. Wells, 197 Ind. 236, 150 N.E. 361 (1926) (deed, notice of the mental illness); Hull v. Louth, 109 Ind. 315, 10 N.E. 270 (1866) (deed, incompetency continued with no guardian appointed, so that no one was competent to disaffirm); as to waiver and other facts excusing disaffirmance, see 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §571 (1929). Tender is required when plaintiff is not entitled under law to retain benefits received by him: see 2 CONTRACTS RESTATEMENT §480 (1932); 5 WILLISTON, CONTRACTS, rev. ed., §1530 (1937); comment, 36 CALIF. L. REV. 606 at 610 (1948); 134 A.L.R. 6 at 68 (1941); see subdivision F as to circumstances under which the contract may be avoided without return of consideration.

299 See comment, 36 CALIF. L. REV. 606 at 610 (1948); 26 VA. L. REV. 222 (1939).

300 E.g., Fields v. Union Central Life Ins. Co., 170 Ga. 239, 152 S.E. 237 (1930), where avoidance of a deed was sought on the ground that the contract was void, the court holding it voidable and dismissing the action because of lack of prior disaffirmance and tender.

Aside from their historical background, these requirements have been supported by two arguments: they seek to promote out-of-court settlements by requiring those seeking avoidance first to notify the other parties and attempt a reconciliation; and they permit simple money judgments in courts of law. The parties seeking avoidance must keep open throughout the action their tender of benefits received, avoiding the necessity for conditional judgments resembling equity decrees.[301] However, the first argument is diluted by the exceptions that arose,[302] while the second argument (logically consistent with the exceptions) is overcome by the power of the modern court, sitting in law and equity, to render conditional judgments and decrees.[303]

Although the codes had as their purpose the merging of law and equity, they have been held to incorporate these jurisdictional prerequisites into civil actions legal in nature, so that in some jurisdictions the plaintiff is still faced with the necessity of disaffirming and tendering if he fails to bring his action as an equitable one.[304]

2. *Positive Action in Equity.* A "voidable" contract can be avoided through equitable rescission, supplemented by the cancellation of deeds or negotiable instruments and the quieting of title to realty.[305] In equity prior disaffirmance and tender of benefits received are not prerequisites to avoidance as the chancellor can mould his decree to do justice to all parties.[306]

Modern courts, with merged law and equity jurisdiction, frequently overlook the equitable nature of an action for avoidance. Thus, disaffirmance and tender prior to the action or in the plead-

301 Barkley v. Barkley, 182 Ind. 322, 106 N.E. 609 (1914) (deed). See generally 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §569 (1929); comment, 36 CALIF. L. REV. 606 at 611 (1948).

302 See comment, 36 CALIF. L. REV. 606 at 611 (1948).

303 See Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 574 (1943); comment, 31 COL. L. REV. 124 (1931).

304 Smith v. Ryan, 191 N.Y. 452, 84 N.E. 402 (1908) (deed—ejectment), following Gould v. Cayuga County Nat. Bank, 86 N.Y. 75 (1881) (tort release—avoided for fraud), which is strongly criticized in 5 CORBIN, CONTRACTS §1103, n. 2 (1951), as failing to "bridge the gulf" between law and equity; Georgia Power Co. v. Moody, 55 Ga. App. 621, 190 S.E. 926 (1937) (tort release); Morris v. Great Northern Ry. Co., 67 Minn. 74, 69 N.W. 628 (tort release). In Fields v. Union Central Life Ins. Co., 170 Ga. 239, 152 S.E. 237 (1930), a basically equitable action for cancellation of a deed was dismissed for lack of tender.

305 2 CONTRACTS RESTATEMENT §481, comments *a* and *b* (1932). It is arguable that the adequacy of the legal remedy under a "void" contract precludes equitable jurisdiction; e.g., Scott v. Leigeber, 245 Ala. 583, 18 S. (2d) 275 (1944) (deed—plaintiff out of possession).

306 2 CONTRACTS RESTATEMENT §481 (1932). See 5 WILLISTON, CONTRACTS, rev. ed., §1529 (1937).

ings have still been required in actions to cancel deeds.[307] There are, however, decisions to the effect that the requirements are excused when the action is labeled as an equitable one.[308] Other cases have dismissed an action for lack of allegations of disaffirmance and tender, where the action was not labeled as equitable or for rescission.[309] If modern courts possess merged legal and equitable powers, it would seem that they need not deny equitable remedies for failure to request them by name. Furthermore, it will often be difficult to ascertain, before trial, whether the power of avoidance is legal or equitable, that is, whether the contract is "void" or "voidable," and thus it may be difficult to label the pleadings.[310] The ultimate solution is that of permitting avoidance in either case, without formalities (including tender in the pleadings and request for an equitable remedy), when warranted by the facts of the case.[311] By abolishing these formalities, more actions for avoidance would likely be tried on their merits.

3. *Defense to Contract Action.* The rules for asserting the defense of mental illness are much the same as those for affirmative actions of avoidance, discussed above. If the contract is "void," avoidance can be a simple defense, and no disaffirmance or tender is necessary to avoid the contract. If the contract is only "voidable," avoidance can be by defense at law or by affirmative equitable relief, such as a counterclaim for rescission (and cancellation of deeds or negotiable instruments), and the rules for affirmative

307 Ortman v. Kane, 389 Ill. 613, 60 N.E. (2d) 93 (1945), where specific performance of the contract was refused the competent party because he made no tender of the purchase price in his pleadings, while avoidance was granted the mentally ill party because he tendered return of the down payment in his pleadings. In Mullins v. Barrett, 204 Ga. 11, 48 S.E. (2d) 842 (1948) (deed—action for cancellation) lack of tender in the pleadings was excused because no consideration was received, thus suggesting that the exceptions to tender before suit apply to tender in the pleadings.

308 Morris v. Ratliff, (Tex. Civ. App. 1956) 291 S.W. (2d) 418 (deed); Cole v. Waite, 151 Tex. 175, 246 S.W. (2d) 849 (1952) (deed); Mullins v. Barrett, 204 Ga. 11, 48 S.E. (2d) 842 (1948) (deed—court also referring to lack of consideration as excusing tender in the pleadings).

309 Rubenstein v. Dr. Pepper Co., (8th Cir. 1955) 228 F. (2d) 528 (executed sale); Wilhite v. Davis, (Tex. Civ. App. 1957) 298 S.W. (2d) 928 (deed).

310 The effect of a prior adjudication may be uncertain (see part III, supra); or uncertainty may exist as to the extent of the mental illness, i.e., whether it is sufficient to render the contract "voidable," or whether the contract is "void" under statutes voiding contracts of persons "entirely without understanding" (see Appendix for list of statutes).

311 This was done in Ipok v. Atlantic & N.C. Ry. Co., 158 N.C. 445, 74 S.E. 352 (1912) (tort release), although the case fell into one of the above exceptions. See forceful argument in 5 CORBIN, CONTRACTS §§1103, 1116 (1951).

actions of avoidance at law and in equity apply.[312] The effect of modern codes and equitable defense statutes should be to permit the equitable counterclaim even when the original action is of a legal nature. This would permit avoidance without disaffirmance and tender, as is true with a "void" contract.[313]

E. *Loss of the Power of Avoidance*

Although the incapacity of a party to a contract during the agreement stage may give to him or his successors a power of avoidance, there are several ways in which this power can be lost. A loss of the power of avoidance may be explained by one or more of several theories, viz., ratification, affirmance, estoppel, laches or running of the statute of limitations. These theories are not applied with technical precision,[314] and the same kind of behavior, e.g., acceptance of consideration by a restored incompetent, may be labeled ratification, ratification by estoppel, or simply estoppel. For this reason the following discussion is organized to emphasize factual circumstances rather than legal categories. But it should be kept in mind that more than one of the above-mentioned theories may be relevant in a single factual setting.

1. *Ratification or Affirmance.* Ratification, if by a competent person, destroys the power of avoidance.[315] The clearest case of ratification is an express promise made by the incompetent after he has regained his capacity.[316] The consideration for this may be supplied by the earlier transaction[317] and it is probably legally possible to ratify any contract of an incompetent in this manner.[318] The ill person cannot ratify if he does not have mental capacity.

312 E.g., Ortman v. Kane, 389 Ill. 613, 60 N.E. (2d) 93 (1945) (defense to bill for specific performance, requiring tender in the pleadings); Hull v. Louth, 109 Ind. 315, 10 N.E. 270 (1866) (cross-complaint to cancel deed and quiet title, with disaffirmance excused by one of the exceptions above).

313 See CLARK, CODE PLEADING, 2d ed., §§98, 101 (1947) (dealing with fraud and mistake).

314 Matter of Kroll, 8 Misc. (2d) 133, 169 N.Y.S. (2d) 497 (1957).

315 1 CORBIN, CONTRACTS §6 (1950); Lawrence v. Morris, 167 App. Div. 186, 152 N.Y.S. 777 (1915) (by former mentally ill person after having been adjudged competent); Bunn v. Postell, 107 Ga. 490, 33 S.E. 707 (1899) (by administrator). The obligation is based on both the ratification and the prior transaction, 1 CORBIN, CONTRACTS §227 (1950) (ratification of infants' contracts).

316 1 CORBIN, CONTRACTS §6 (1950); Lawrence v. Morris, 167 App. Div. 186, 152 N.Y.S. 777 (1915).

317 1 CORBIN, CONTRACTS §228 (1950).

318 Even those held to be "void" rather than "voidable." Lawrence v. Morris, 167 App. Div. 186 at 193, 152 N.Y.S. 777 (1915). Matter of Kroll, 8 Misc. (2d) 133 at 135, 169 N.Y.S. (2d) 495 (1957) (to the effect that the former incompetent actually makes a new contract embodying the terms of "void" transaction).

Strictly speaking, the problem of what capacity is required to ratify involves a question of mental illness occurring at a later stage of the contract than agreement, as discussed in Part VI, but since it is so closely connected with the problems of avoidance due to mental illness during agreement, it must be considered here. Courts do not mention any specific tests for capacity to ratify, but the tests seem to be the same as those used to determine contractual capacity.[319] It should be noted, however, that some of the circumstances present may be less complex, and therefore require less capacity to understand than negotiating a contract in the first instance.

A guardian generally cannot himself ratify the contract,[320] for the reason that such a decision involves discretion[321] and his job is limited to conserving his ward's property.[322] He may usually petition a court to ratify,[323] but even the court may be without power in the absence of express statutory authority.[324] Statutes authorizing a court to ratify an incompetent's transaction are strictly applied.[325] A statute authorizing judicial sale of an incompetent's property may be construed to operate *in rem* so as to transfer title, but not to authorize ratification of the incompetent's transaction.[326]

Another problem pertains to the sort of conduct that amounts to ratification. The term "ratification" is used without great precision in this area and should be understood to mean not only ratification in the technical sense, but any facts which indicate an assent to the transaction so as to defeat the power of avoidance.

319 See, for example, Perper v. Edell, 160 Fla. 477 at 483, 35 S. (2d) 387 (1948) (dictum—contract may be ratified by mentally ill person in lucid interval or upon recovering his mental capacity); note, 47 MICH. L. REV. 269 (1948). Cf. Brandon v. Bryeans, 203 Ark. 1117 at 1120, 160 S.W. (2d) 205 (1942) (deed—can ratify when restored to sanity).

320 Gingrich v. Rogers, 69 Neb. 527, 96 N.W. 156 (1903) (deed); Rannells v. Gerner, 80 Mo. 474 (1883) (deed); King v. Sipley, 166 Mich. 258, 131 N.W. 572 (1911) (deed); in Fixico v. Fixico, 186 Okla. 656, 100 P. (2d) 260 (1940), the mentally ill person was not bound by the acquiescence of her guardian in receiving the benefits to which the mentally ill person was entitled under the agreement. But some jurisdictions permit this under certain conditions, e.g., Finch v. Goldstein, 245 N.Y. 300, 157 N.E. 146 (1927) (deed); Hermanson v. Seppala, 272 Mass. 197, 172 N.E. 87 (1930) (deed) (dictum).

321 See In re Reeves, 10 Del. Ch. 324, 92 A. 246 (1914), affd. 10 Del. Ch. 483, 94 A. 511 (1915) (deed).

322 See Matter of Hills, 264 N.Y. 349, 191 N.E. 12 (1934) (will).

323 King v. Sipley, 166 Mich. 258, 131 N.W. 572 (1911) (deed).

324 Gingrich v. Rogers, 69 Neb. 527, 96 N.W. 156 (1903) (deed); Rannells v. Gerner, 80 Mo. 474 (1883) (deed); Neal v. Holt, (Tex. Civ. App. 1934) 69 S.W. (2d) 603 (deed) (court lacked power except as conferred by statute).

325 Neal v. Holt, (Tex. Civ. App. 1934) 69 S.W. (2d) 603 (deed).

326 Rannells v. Gerner, 80 Mo. 474 (1883) (deed).

Types of conduct other than express promise[327] may amount to a ratification, and it is not necessary that the person ratifying have knowledge of his right to avoid or the effect of his action in ratifying.[328]

Ratification can result from an intent to be bound that is manifested by rendering performance under the contract, either in whole[329] or in part.[330] A unilateral declaration by the restored individual will also suffice,[331] but an offer to repurchase property conveyed by a challenged deed has been held not to constitute a ratification.[332]

Ratification will also be implied from a demand for and receipt of the consideration owing to the incompetent, as under a contract for the sale of realty[333] or personalty.[334] There does not have to be an express demand, as long as an intent to appropriate the benefit is shown.[335] Even where the acceptance of benefits did not constitute a ratification, it has been held to constitute an estoppel *in pais*, thus barring disaffirmance.[336]

If the restored incompetent brings suit on the contract against the other party to the transaction, there is clearly an election of remedies preventing later exercise of the power of avoidance. This doctrine of election of remedies has also been applied where the former incompetent sued a third party on a theory which implies acceptance of the challenged transaction, e.g., a suit for an accounting against an agent who sold the incompetent's property, in which the proceeds of the sale are claimed.[337] Such a suit is not *necessarily* a ratification, however, as the issue of ratification is one of fact.[338]

2. *Loss Through Delay.* The power of avoidance may also be lost through inaction of a mentally ill person restored to health or his successors in interest. The most obvious illustration of loss of

327 See note 316 supra.

328 1 WILLISTON, CONTRACTS, rev. ed., §253 (1936).

329 Schaps v. Lehner, 54 Minn. 208, 55 N.W. 911 (1893) (deed).

330 Rosenfeld v. Erhart, 202 Ill. App. 617 (1916) (intoxicated person); but see 1 WILLISTON, CONTRACTS, 3d ed., §152 (1957).

331 Cathcart v. Stewart, 144 S.C. 252, 142 S.E. 498 (1927) (deed).

332 Hermanson v. Seppala, 272 Mass. 197, 172 N.E. 87 (1930) (deed).

333 Arnold v. Richmond Iron Works, 67 Mass. (1 Gray) 434 (1854) (deed).

334 Bunn v. Postell, 107 Ga. 490, 33 S.E. 707 (1899).

335 Matter of Kroll, 8 Misc. (2d) 133, 169 N.Y.S. (2d) 497 (1957); Watkins v. Stulb & Vorhauer, 23 Ga. App. 181, 98 S.E. 94 (1919).

336 Dool v. First Nat. Bank of Calexico, 209 Cal. 717, 290 P. 15 (1930) (mortgage).

337 Blinn v. Schwarz, 177 N.Y. 252, 69 N.E. 542 (1904) (deed). Compare Jefferson v. Rust, 149 Iowa 594, 128 N.W. 954 (1910) (deed).

338 Ibid.

the right of disaffirmance by delay is through operation of the statute of limitations, which starts running against the incompetent if and when he regains his capacity,[339] though the running of the statute is arrested by subsequent periods of incapacity. It begins to run against the heirs of the incompetent upon his death.[340]

Aside from the statute of limitations, delay may furnish a basis for estoppel or laches. It has been said that mere delay, without more, should prevent avoidance.[341] In cases where delay results in loss of the power, however, there is almost always some element of actual harm to the other party,[342] a factor which is essential to the operation of laches. A delay of less than two months may be too long if the sane party has acted innocently and is exposed to substantial injury,[343] but a lapse of five years between recovery and avoidance was not a bar where the good faith of the other party was doubtful.[344]

Laches will not operate against the incompetent as long as his disability continues.[345] If the incompetent has acquiesced in the transaction and had subsequent lucid intervals, it may be necessary to demonstrate that the acquiescence was his intelligent act during a lucid interval.[346]

The heirs of the incompetent must act promptly,[347] however, and are subject to an additional hazard in that they may be estopped from avoiding if they are present at the execution of a contract or deed and, knowing of their ancestor's incapacity, do nothing to put the other party on notice of this fact.[348]

3. *Conclusion.* It should be emphasized, particularly with reference to the delay cases, that the question of ratification or affirm-

339 Cathcart v. Stewart, 144 S.C. 252, 142 S.E. 498 (1927) (deed); Jefferson v. Rust, 149 Iowa 594, 128 N.W. 954 (1910) (deed).

340 Reaves v. Davidson, 129 Ark. 88 at 93, 195 S.W. 19 (1917) (deed).

341 1 WILLISTON, CONTRACTS, rev. ed., §253 (1936).

342 Murphy v. Johnson, (Tex. Civ. App. 1932) 54 S.W. (2d) 158; Wood v. Newell, 149 Minn. 137, 182 N.W. 965 (1921); Reaves v. Davidson, 129 Ark. 88, 195 S.W. 19 (1917) (deed); Brandt v. Phipps, 398 Ill. 296, 75 N.E. (2d) 757 (1947) (deed).

343 Rusk v. Fenton, 77 Ky. 490 (1879) (deed).

344 Brandt v. Phipps, 398 Ill. 296, 75 N.E. (2d) 757 (1947) (deed).

345 Jefferson v. Rust, 149 Iowa 594, 128 N.W. 954 (1910) (deed).

346 Cf. Beasley v. Beasley, 180 Ill. 163, 54 N.E. 187 (1899) (deed). Cf. Hardenbrook v. Sherwood, 72 Ind. 403 (1880).

347 Murphy v. Johnson, (Tex. Civ. App. 1932) 54 S.W. (2d) 158; Lexington and Eastern Ry. Co. v. Napier's Heirs, 160 Ky. 579, 169 S.W. 1017 (1914) (deed).

348 See Lexington and Eastern Ry. Co. v. Napier's Heirs, 160 Ky. 579 at 586, 169 S.W. 1017 (1914) (deed) (dictum).

ance is frequently just one factor in balancing the equities of the incompetent against those of the party against whom the disaffirmance is asserted. If the other party has acted in complete good faith, paid an adequate consideration and is exposed to substantial loss if avoidance is permitted,[349] or if the incompetent is seeking to gain an unfair advantage,[350] a ratification will be readily found. On the other hand, circumstances such as delay and acceptance of benefits which would ordinarily constitute ratification will not have that effect where the other party appears to be taking advantage of the incompetent's unequal position.[351]

F. *Unraveling the Contract Prior to Avoidance: The Status Quo Problem*

If the court decides to protect a person who was mentally ill during agreement by allowing him to avoid the contract, and if the contract has been partly or wholly executed, there are still difficult problems of how to unravel the relationship in light of benefits or losses that may have been incurred by either party. The unraveling can be viewed from two perspectives. First, it can be approached through an inquiry into what the end result will be, that is, after the "dust has settled on the battlefield," where will the parties stand? This approach includes the ultimate questions of loss and benefit involved. The second approach is to ask how much of this "unraveling" must occur *prior* to the actual avoidance, that is, before the contract is formally ended.

Putting aside, temporarily, the question of what portion of the unraveling must be done prior to avoidance, the ultimate question of loss or benefit involved will be viewed briefly in the abstract.

In the two-party contract situation (considered with respect to the total assets of both parties to the contract), there can be an overall or total net gain in assets, an overall net loss, or no overall net change. Each of these situations may involve varying distributions of the assets between the two parties.

Where there has been no overall change in net assets, it could be that neither party has gained or lost, or that one party has

[349] Watkins v. Stulb & Vorhauer, 23 Ga. App. 181, 98 S.E. 94 (1919); Rusk v. Fenton, 77 Ky. 490 (1879) (deed).

[350] This element was present, inter alia, in Wood v. Newell, 149 Minn. 137, 182 N.W. 965 (1921).

[351] Brandt v. Phipps, 398 Ill. 296, 75 N.E. (2d) 757 (1947) (deed); Jefferson v. Rust, 149 Iowa 594, 128 N.W. 954 (1910) (deed).

gained the equivalent amount that the other has lost. In the former case there would seem to be no problem to halting the contract and leaving the parties as they are, and the cases support this result.[352] In the latter case, fairness would seem to call for restoration of the equilibrium, whether by a prerequisite of placing the other in statu quo or on a quantum meruit recovery.[353]

Where there is an overall net gain, problems of readjustment can seemingly be solved by reference to the rules regarding unjust enrichment if the distribution is unequal. If the distribution is equal, there will probably be no lawsuit, as both parties will generally be satisfied with their position.

The difficult problem arises when there is an overall net loss, caused by external economic conditions, dissipation of goods by the ill person, or some other reason.

Although fault might in some instances be the basis for distributing the net loss,[354] it is difficult to rely on any policy of fault in the mental illness contract situation because the parties are often equally innocent, the ill party being unable to understand what he is doing, and the healthy party being unable (as a layman without knowledge of psychology) to detect the ill person's sickness. Some courts nevertheless seem to feel that, all other things being equal, the mentally ill person is the one who caused the loss since friends or relatives could have protected him by warning or formal adjudication of incompetency.[355] A few cases have held, however, that any loss should fall on the healthy party because he could have ascertained the illness of the other (whereas the ill person could do nothing to protect himself)[356] or because healthy parties seldom unwittingly enter into contracts with mentally ill persons.[357] This position can be criticized in light of modern developments of science which indicate the difficulty of detecting mental illness in many instances.

352 Most courts allow the mentally ill person to avoid an executory contract. See note 373 infra.

353 See Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950), where it was not important whether the healthy party had knowledge of the mentally ill person's incapacity, which would make placing the healthy party in statu quo unnecessary, since the mentally ill person had retained all the goods passing to him under the contract.

354 See Part IV-F-2-c, infra.

355 E.g., Edward v. Miller, 102 Okla. 189, 228 P. 1105 (1924).

356 E.g., Jordon v. Kirkpatrick, 251 Ill. 116, 95 N.E. 1079 (1911).

357 Gibson v. Soper, 72 Mass. (6 Gray) 279 (1856) (deed). Compare Fay v. Burditt, 81 Ind. 433 at 440 (1882).

Turning from the broader perspective, the remainder of this subdivision concerns the question how much restoration must occur prior to actual avoidance. This discussion can be viewed as an analysis of further prerequisites for avoidance. The proof of mental incapacity is one such prerequisite, and the ways of losing the power of avoidance discussed previously can be called negative prerequisites to the power of avoidance—circumstances that must not have happened for the power to be available. The next subdivision will complete the picture of unraveling by discussing the readjustment of assets that may occur after the avoidance, through such remedies as restitution. The close relationship between these two subdivisions should be recognized, since together they develop the final position of the parties. Except for the overall loss situation, the distinction between the two general problems considered is primarily procedural.

Restoration of benefits from the contract as a prerequisite to avoidance of that contract is usually discussed by the courts as the "status quo" requirement. In any case where the mentally ill person is allowed to avoid, he will be relieved of further obligation under the contract and the healthy party will be required to return any property that he received under the contract, or their value, to the mentally ill person.[358] The majority of American courts feel that, subject to certain exceptions, it would be inequitable to allow the mentally ill person to avoid without placing the healthy party in statu quo.[359] There are, however, two minority views on this subject, thus providing a slight three-way split of authority which can be designated as the English view, the American majority view, and the American minority view.

1. *English View.* The current English view is that as long as the contract is fair and there was no knowledge of the incompetency by the healthy party, the contract cannot be avoided

358 If the suit is in equity, provision for the return of property can be made in the decree. Anderson v. Nelson, Olson, Nelson, 248 Mich. 160, 226 N.W. 830 (1929); Hudson v. Union and Mercantile Trust Co., 148 Ark. 249, 230 S.W. 281 (1921); Pritchett v. Plater and Co., 144 Tenn. 406, 232 S.W. 961 (1920). If the suit is in law, legal actions for return of property can be used. Poole v. Newark Trust Co., 40 Del. 163, 8 A. (2d) 10 (1939) (assumpsit); Warner v. Warner, 104 Ind. App. 252, 10 N.E. (2d) 773 (1937) (replevin); Matthieson and Weichers Refining Co. v. McMahon's Administrator, 38 N.J.L. 536 (1876) (trover).

359 1 WILLISTON, CONTRACTS, rev. ed., §254 (1936); 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §276 (1929); Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 569 (1943); 95 A.L.R. 1442 (1935); 46 A.L.R. 416 (1927).

even if executory.[360] This view favors protection of the security of transactions at the expense of protecting the mentally ill person. Since a healthy party who knew of the incapacity of the other is said to be guilty of fraud,[361] English courts seem to treat the contracts of mentally ill persons no differently from fraudulent contracts generally.

The current English view was adhered to in some jurisdictions of the United States in a few cases,[362] but no longer seems to be the law in any states,[363] except possibly Michigan, Kentucky, and Louisiana.

Michigan seems to adopt the approach that the court should weigh the equities of both parties and then decide whether to enforce the contract in accordance with what the court feels should be the equitable result.[364] It is difficult to say whether the Michigan court will feel that a return which places the healthy party in statu quo will be enough to allow the mentally ill party to avoid.[365]

In Kentucky it is not clear whether the contract can be avoided if the healthy party could be placed in statu quo,[366] or whether the the contract can be avoided only when there exists unfairness or knowledge of the incapacity by the healthy party.[367]

360 York Glass Co. v. Jubb, 134 L.T.R. 36 (1925), note, 25 COL. L. REV. 230 (1925); Imperial Loan Co. v. Stone, [1892] 1 Q.B. 599; Brown, "Can the Insane Contract?" 11 CAN. B. REV. 600 (1933); Cook, "Mental Deficiency and the Law of Contract," 21 COL. L. REV. 424 (1921).

361 See Price v. Berrington, 7 Hare 394 at 402, 68 Eng. Rep. 163 (1849); Gore v. Gibson, 13 M. & W. 623 at 626, 627, 153 Eng. Rep. 260 (1845); Brown, "Can the Insane Contract?" 11 CAN. B. REV. 600 at 607 (1933).

362 E.g., Farmers Nat. Life Ins. Co. v. Ryg, 209 Iowa 330, 228 N.W. 63 (1929), note, 14 MINN. L. REV. 679 (1930); Clay v. Clay's Committee, 179 Ky. 494, 200 S.W. 934 (1918) (deed); Shoulters v. Allen, 51 Mich. 529, 16 N.W. 888 (1883); Rhoades v. Fuller, 139 Mo. 179, 40 S.W. 760 (1897) (deed); Mutual Life Ins. Co. v. Hunt, 79 N.Y. 541 (1880); Loman v. Paullin, 51 Okla. 294, 152 P. 73 (1915) (deed); Beals v. See, 10 Barr. (Pa.) 56 (1848).

363 E.g., Sjulin v. Clifton Furniture Co., 241 Iowa 761, 41 N.W. (2d) 721 (1950); Doty v. Mumma, 305 Mo. 188, 264 S.W. 656 (1924); Verstandig v. Schlaffer, 296 N.Y. 62, 70 N.E. (2d) 15 (1946) (deed), note, 47 COL. L. REV. 675 (1947); Duroderigo v. Culwell, 52 Okla. 6, 152 P. 605 (1915) (deed); First Nat. Bank of Birmingham v. Fidelity Title and Trust Co., Administrator, 251 Pa. 529, 97 A. 75 (1916). See Chew & Goldsborough v. Bank of Baltimore, 14 Md. 299 at 318 (1859), where the court criticizes the English view.

364 Brown v. Khoury, 346 Mich. 97, 77 N.W. (2d) 336 (1956) (deed).

365 Compare Aninos v. Petrouleas, 314 Mich. 536, 22 N.W. (2d) 879 (1946) (deed), with Anderson v. Nelson, Olson, and Nelson, 248 Mich. 160, 226 N.W. 830 (1929).

366 Fitzpatrick's Administrator v. Citizens' Bank and Trust Co., 231 Ky. 202, 21 S.W. (2d) 254 (1929).

367 Everett v. Downing, 298 Ky. 195, 182 S.W. (2d) 232 (1944). Cf. Casebier v. Casebier, Committee, 193 Ky. 490, 236 S.W. 966 (1921) (deed).

Louisiana law, because of its roots in the Napoleonic Code, treats this subject somewhat uniquely, although the mentally ill person is usually held to the contract unless there had been "interdiction" (i.e., adjudication) or knowledge of his incapacity by the healthy party.[368]

2. *American Majority View.* The great majority of American jurisdictions currently adopt the view that, except in a few specific instances, placing the healthy party in statu quo (the position he originally occupied before the contract was entered into)[369] is a condition precedent to the exercise of the mentally ill person's power of avoidance. If this condition is not met, the contract will be upheld.[370] Some cases which contain language apparently committing the court to the English view also contain language which seems to indicate that, had restoration of the healthy party to his status quo been possible, the contract could have been avoided.[371]

The main policy reason underlying the return to the status quo requirement was a feeling that the mentally ill person should not be allowed to benefit from the contract at the expense of the equally innocent healthy party. If the healthy party is placed in statu quo, his only loss is his expectation that the contract would be performed. Another reason for the adoption of the status quo requirement was that before the mergers of law and equity, a

368 See comment, 22 TULANE L. REV. 598 (1948).

369 The problems of determining what constitutes "the status quo" are the same in the mental illness field as in other areas of the law and are consequently considered outside the scope of this study. For a discussion of these problems generally, see 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §§616-637 (1929); 5 CORBIN, CONTRACTS §§1114-1115 (1951); 5 WILLISTON, CONTRACTS, rev. ed., §§1460, 1460A, 1478 (1937); RESTITUTION RESTATEMENT §§65-66(1937).

370 Carr v. Sparks, 213 Ga. 606, 100 S.E. (2d) 583 (1957); State Bank of Downs v. Criswell, 155 Kan. 314, 124 P. (2d) 500 (1942) (mortgage); Cash v. Ryan, Sr., 5 Tenn. App. 575 (1927); Young v. Stevens, 48 N.H. 133 (1868). Cf. Riggan v. Green, 80 N.C. 237 (1879) (deed).

371 See, e.g., Manufacturers Trust Co. v. Podvin, 10 N.J. 199, 89 A. (2d) 672 (1952). At 207, the court says it is the "settled rule of law" that contracts made in good faith, for full consideration, and without knowledge of the insanity will be upheld; at 210, the court allowed recovery of a deposit made before the sane party had knowledge on the grounds that the mentally ill person's execution of the purchase contract was a "wholly void act," and that the consideration received did not benefit him. See note, 38 VA. L. REV. 1082 (1952). Cf. Dominick v. Rhodes, 202 S.C. 139 at 152, 24 S.E. (2d) 168 (1943) (deed): ". . . 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. And certainly an executed transaction of that kind would not be set aside unless the parties could be restored to their original position."

court of law could not issue conditional decrees or balance equities.[372]

The courts adopting the American majority view have formulated certain specific instances where the ability to restore the healthy party to his status quo is no longer a condition precedent to avoidance, and they will allow the mentally ill person to avoid and recover back his consideration regardless of whether the competent party can be restored to his status quo. These situations occur where the performance by the healthy party is still executory, or where there is a "void" contract, knowledge by the healthy party of the incapacity of the mentally ill person, an unfair contract, or no benefit to the mentally ill person.

(a) *Executory contracts.* If no performance has been rendered by the healthy party, the mentally ill person can always avoid, since the healthy party is clearly in statu quo.[373]

(b) *"Void" contracts.* If the contract is one described by the jurisdiction as "void," for example, where the mentally ill person had been adjudicated incompetent prior to attempting to contract,[374] courts hold (at least in the older decisions) that no formal rescission is necessary. Avoidance by the mentally ill person is thus not conditioned on his placing the healthy party in statu quo. Although courts have permitted such avoidance without either a tender back of benefits received by the mentally ill party or a provision in the judgment requiring their restoration,[375] the healthy party may still be able to recover these benefits under restitutionary remedies, not dependent on the existence of a contract.[376]

372 See Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 574 (1943); 5 CORBIN, CONTRACTS §1103 (1950). See part IV-D, supra.

373 Cundall v. Haswell, 23 R.I. 508, 51 A. 426 (1902); Corbit v. Smith, 7 Iowa 60 (1858); Green, "The Operative Effect of Mental Incompetency on Agreements and Wills," 21 TEX. L. REV. 554 at 568 (1943); 1 WILLISTON, CONTRACTS, rev. ed., §254 (1936).

374 See Part IV-A-2, supra.

375 See, e.g., Baird v. Pacific Electric Ry. Co., 39 Cal. App. 512, 179 P. 449 (1919) (avoidance of release in tort action); Dozier v. Schuermann, 175 Okla. 298, 52 P. (2d) 1063 (1935) (defense to note); Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E. (2d) 226 (1947) (dictum, as court found contract only voidable). Cf. Channell v. Jones, 184 Okla. 644, 89 P. (2d) 769 (1939) (deed), and Kiley v. Danahey, 61 Mont. 608, 202 P. 1110 (1921) (deed). Compare Ivey v. May, 231 Ala. 339, 164 S. 732 (1935), where the mentally ill party, having offered to do equity, was required to restore the portion of the consideration received that had not been dissipated.

376 In Nielson v. Witter, 111 Cal. App. 742, 296 P. 121 (1931), the mentally ill person recovered payments made to the healthy party under a void contract; in the companion case, Estate of Nielson, 111 Cal. App. 742, 296 P. 122 (1931), the healthy party recovered back the reasonable value of services rendered to the mentally ill person, which value

(c) *Actual or constructive knowledge by the healthy party of the incapacity of the mentally ill person.* All jurisdictions adopt the view that if the healthy party to the contract had notice of the mentally ill person's incapacity, the mentally ill person can avoid without placing the healthy party in statu quo.[377] Such a situation is viewed as fraud and lack of good faith.[378] But this explanation is not entirely satisfactory, since a defrauded party to a contract must usually restore the other party to the status quo as a condition precedent to avoidance.[379]

The reason for this difference in treatment between mentally ill persons and defrauded persons can be explained if one keeps in mind the fact that the mentally ill person may still be liable to the healthy party under restitutionary principles. The problem really becomes one of who is to bear the loss caused by any goods dissipated by, or services not beneficial to, the mentally ill person. The courts follow the policy that if the healthy party had notice of the mentally ill person's incapacity and thus knew that the mentally ill person was incapable of appreciating the consequences of his acts, this should shift to the healthy party the risk of whatever loss arises from the transaction.[380] Consequently, in the healthy party's restitution action, he will be unable to recover this loss. This is justified because a mentally ill person is probably more likely to dissipate goods or contract for non-beneficial services than a healthy person who has been defrauded.

A question then arises with regard to when the healthy party had, or should have had, actual knowledge. This has not caused the courts as much trouble as would seem likely, largely for three reasons. First, knowledge is usually a jury question and depends on the facts of each case.[381] Second, the initial determination of

was fixed by the court at less than the contract price. See RESTITUTION RESTATEMENT §139, comment *a* (1937). Recovery in quasi-contract may be had in the same action in which avoidance is sought by the mentally ill person. Cf. First Nat. Bank v. Headrick, 190 Okla. 164, 121 P. (2d) 566 (1941) (deed).

377 1 WILLISTON, CONTRACTS, rev. ed., §254 (1936); 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §257 (1929).

378 Tubbs v. Hilliard, 104 Colo. 164, 89 P. (2d) 535 (1939); Warner v. Warner, 104 Ind. App. 252, 10 N.E. (2d) 773 (1937); Litchfield & Madison Ry. Co. v. Shuler, 134 Ill. App. 615 (1907). Cf. Schindler v. Parzoo, 52 Ore. 452, 97 P. 755 (1908).

379 5 WILLISTON, CONTRACTS, rev. ed., §1528 (1936); 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §§617, 618 (1929).

380 Ivey v. May, 231 Ala. 339, 164 S. 732 (1935) (deed); Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897) (deed).

381 State ex rel. United Mutual Ins. Assn. v. Shain, 349 Mo. 460, 162 S.W. (2d) 255 (1942); Warner v. Warner, 104 Ind. App. 252, 10 N.E. (2d) 773 (1937).

the mentally ill person's incapacity rests, to a great extent, upon factors observable by the healthy party tending to show that the mentally ill person did not understand the transaction into which he was entering.[382] And third, in many cases where the healthy party is charged with knowledge of the incapacity, the contract was unfair to the mentally ill person. This tends to show that the healthy party not only had knowledge of the incapacity, but actually took advantage of it.[383] In the absence of any proof tending to show a personal subjective knowledge of the incapacity, courts will not say that the healthy party should have known of the incapacity unless they feel that prudent-minded people, knowing the facts the healthy party did, would have considered the mentally ill person incapable of handling his estate.[384] Mere eccentricity or weak-mindedness will not be enough.[385]

In some jurisdictions, an adjudication of incompetency is judicially treated as constructive notice to the world of the mentally ill person's incapacity.[386] Like statutes explicitly providing that contracts made by an adjudicated mentally ill person are "void," this view allows the mentally ill person to avoid without placing the healthy party in statu quo.[387]

(d) *Unfairness of the contract.* Many courts which follow the American majority view state that as long as the contract is "fair," in addition to there being a benefit to the mentally ill person and no knowledge of his incapacity by the healthy party, it will not be avoided unless the competent party is restored to his status quo. This might lead one to assume that if the contract resulted in any amount of unfairness to the mentally ill person, he could avoid without making the appropriate restoration. There seems to be little authority for this latter position, however,[388] as most

382 See Part III-B-1, supra.

383 See, e.g., Tubbs v. Hilliard, 104 Colo. 164, 89 P. (2d) 535 (1939); Peter v. Englert, 118 N.J. Eq. 456, 180 A. 228 (1935); Fecht v. Freeman, 251 Ill. 84, 95 N.E. 1043 (1911). Cf. Reed, Administrator v. Brown, 215 Ind. 417, 19 N.E. (2d) 1015 (1939) (deed).

384 E.g., Cummins's Administrator v. Walker's Committee, 252 Ky. 5, 66 S.W. (2d) 48 (1933).

385 See, e.g., Evans v. York, (Mo. App. 1946) 195 S.W. (2d) 902; Poole v. Newark Trust Co., 40 Del. 163, 8 A. (2d) 10 (1939); Norelius v. Home Savings Bank of Kiron, 200 Iowa 613, 203 N.W. 809 (1925). See also 31 L.R.A. (n.s.) 1159 (1911).

386 See Part IV-A-2, supra.

387 See, e.g., Pennsylvania Co. for Banking and Trusts v. Philadelphia Title Ins. Co., 372 Pa. 259, 93 A. (2d) 679 (1953) (mortgage); Gurnett and Co. v. Poiner, (1st Cir. 1934) 69 F. (2d) 733; Reeves v. Hunter, 185 Iowa 958, 171 N.W. 567 (1919).

388 See Carawan v. Clark, 219 N.C. 214, 13 S.E. (2d) 237 (1941), holding that the healthy party did not meet his burden of showing no unfair advantage was taken when

cases hold that restoration to the status quo is excused only if the consideration given by the healthy party is so grossly inadequate as to show bad faith.[389]

(e) *No benefit to the mentally ill person.* Since one of the policies behind the American majority view is that the mentally ill person should not enjoy the benefits of a contract without complying with its terms, it might seem to follow that if the mentally ill person received no benefit from the transaction, he should always be able to avoid. Even if the mentally ill person did not benefit, however, the healthy party may still have suffered a detriment. Three different situations arise in this area: first, where the consideration passing to the mentally ill person turned out to be worthless to both parties; second, where the mentally ill person never expected to receive a tangible benefit; and third, where the mentally ill person expected to receive a tangible benefit but the consideration was either diverted from him or dissipated by him.

In the first situation, where the consideration was deemed "worthless" (e.g., "worthless" stock), there seems to be no difficulty in holding that the mentally ill person can avoid without restoration since the healthy party is still essentially in statu quo.[390]

The second situation is that in which the mentally ill person did not expect to receive a tangible benefit from the contract, for instance where he is an accommodation maker, endorser, or a surety on a promissory note. Even though the healthy party cannot be placed in statu quo, except by payment, the courts are likely to hold that the mentally ill person can avoid.[391] This is probably a good result in these cases, since although there is legal consideration running to the mentally ill person from the healthy

the facts showed that the mentally ill person gave $500 plus a boat worth $250 in exchange for a boat worth $400.

389 See, e.g., Tubbs v. Hilliard, 104 Colo. 164, 89 P. (2d) 535 (1939). Cf. Clay v. Clay's Committee, 179 Ky. 494, 200 S.W. 934 (1918) (deed); Fecht v. Freeman, 251 Ill. 84, 95 N.E. 1043 (1911) (deed); Eldredge v. Palmer, 185 Ill. 618, 57 N.E. 770 (1900) (deed); Seerley, Guardian v. Sater, 68 Iowa 375, 27 N.W. 262 (1886) (deed).

390 Ohio Valley Fire and Marine Ins. Co.'s Receiver v. Newman, 232 Ky. 363, 23 S.W. (2d) 548 (1930).

391 Hughes v. Crean, 178 Minn. 545, 227 N.W. 654 (1929); Doty v. Mumma, 305 Mo. 188, 264 S.W. 656 (1924); North-Western Mutual Life Ins. Co. v. Blankenship, 94 Ind. 535 (1883); Wirebach v. First Nat. Bank, 97 Pa. 543 (1881). See 34 A.L.R. 1403 (1925). But see Searcy v. Hammett, 202 N.C. 42, 161 S.E. 733 (1932), where the court talks in terms of "legal consideration" rather than "benefit" and holds a mentally ill endorser liable.

party, it is based on the idea of reliance by the healthy party, and in any other case where the contract is avoided, the healthy party's reliance interests in the contract being performed have also been defeated.

Where, in the third situation, the mentally ill person expected to receive a benefit but the consideration was either diverted from him (e.g., contracting mentally ill person derived no benefit because another person absconded with his proceeds from the contract) or dissipated by him, this is not considered sufficient to excuse the mentally ill person from restoring the healthy party to the status quo.[392] The courts reason that in the case of two innocent parties the loss should not be shifted from one party to another equally innocent,[393] and the benefit from the exercise of the power of avoidance runs generally to the mentally ill person's relatives and heirs, who have at least a moral duty to watch over the mentally ill person's transactions.[394] It is precisely at this point that the courts adopting the American minority view split from those following the American majority view, by making the healthy party absorb any loss resulting from dissipation or diversion.

3. *American Minority View.* A few American jurisdictions adopt the view that the mentally ill person can always avoid the contract, regardless of whether the healthy party can be placed in statu quo.[395] Courts adopting this view lean heavily on an infancy analogy and stress the idea that mentally ill persons should be protected to the same extent as infants.[396]

392 Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E. (2d) 226 (1947); Atlanta Banking and Savings Co. v. Johnson, 179 Ga. 313, 175 S.E. 904 (1934); Sparrowhawk v. Erwin, 30 Ariz. 238, 246 P. 541 (1926); Edwards v. Miller, 102 Okla. 189, 228 P. 1105 (1924); Morris v. Great Northern Railway Co., 67 Minn. 74, 69 N.W. 628 (1896). *Contra,* Jordon v. Kirkpatrick, 251 Ill. 116, 95 N.E. 1079 (1911) (mortgage).

393 Georgia Power Co. v. Roper, 201 Ga. 760, 41 S.E. (2d) 226 (1947); Atlanta Banking and Savings Co. v. Johnson, 179 Ga. 313, 175 S.E. 904 (1934).

394 Edwards v. Miller, 102 Okla. 189, 228 P. 1105 (1924). In Virtue, "Restitution from the Mentally Infirm," 26 N.Y. UNIV. L. REV. 132 at 149, 150 (1951), the author reports that out of 831 cases brought to avoid a mentally ill person's contract, heirs or devisees were a party in 135 cases. There is no way of knowing in how many cases the heirs were the ones ultimately benefited.

395 First Nat. Bank of Rogers v. Tribble, 155 Ark. 264, 244 S.W. 33 (1922); Hovey v. Hobson, 53 Me. 451 (1866) (deed); Hermanson v. Seppala, 272 Mass. 197, 172 N.E. 87 (1930) (deed); Woolbert v. Lee Lumber Co., 151 Miss. 56, 117 S. 354 (1928) (deed). Texas had followed the minority view [see Houston Land and Trust Co. v. Sheldon, (Tex. Civ. App. 1934) 69 S.W. (2d) 796], but now has adopted the majority view by statute. Tex. Civ. Stat. (Vernon, Supp. 1958) art. 5561a, §7.

396 See Woolbert v. Lee Lumber Co., 151 Miss. 56, 117 S. 354 (1928) (deed); Reaves v. Davidson, 129 Ark. 88, 195 S.W. 19 (1917) (deed).

The results under the American minority view do not deviate from those under the American majority view as much as might initially appear. Even though any loss arising from the transaction is borne by the healthy party, he may under this view recover for goods and services benefiting the mentally ill person.[397] Thus if the amount of goods and services benefiting the mentally ill person equals the amount furnished him by the healthy part, the healthy party is placed in statu quo.

G. *Unraveling the Contract Subsequent to Avoidance: Restitutionary Remedies*

If a restoration to the status quo has not been required by the court prior to avoidance, or if other benefits or losses remain to be adjusted after avoidance, some further unraveling of the contract may be necessary. This final process complements the status quo requirement so that even though restoration to status quo is not required for avoidance, the net position of the parties will often be the same as if it had been required.

As long as the contract has not been fully performed, the avoidance action voids any executory promises and the parties are relieved from any further performance under the contract. Since the mentally ill person has by his exercise of the avoidance power been placed in the position he occupied prior to the contract (including the return to him of property, or its value, furnished under the contract), the only problems arise when the contract has been partly or wholly executed by the healthy party.

Since the concept of unjust enrichment does not depend on assent to contractual obligations, the healthy party may recover from the mentally ill person under this theory.[398] The recovery is usually provided for in the avoidance judgment or decree itself,[399] although there seems to be no reason why a subsequent restitution action could not be maintained. The quantum of the

397 Cf. Jackson v. Banks, 144 Miss. 392 at 397, 109 S. 905 (1926) (deed); Brewster v. Weston, 235 Mass. 14 at 16, 126 N.E. 271 (1920) (deed).

398 General Pulaski Building and Loan Assn. v. Provident Trust Co., 338 Pa. 198, 12 A. (2d) 336 (1940); RESTITUTION RESTATEMENT §139 (1937).

399 E.g., General Pulaski Building and Loan Association v. Provident Trust Co., 338 Pa. 198, 12 A. (2d) 336 (1940); Hudson v. Union and Mercantile Trust Co., 148 Ark. 249, 230 S.W. 281 (1921). Cf. Oullette v. Ledoux, 92 N.H. 302, 30 A. (2d) 13 (1943) (deed); Woolbert v. Lee Lumber Co., 151 Miss. 56, 117 S. 354 (1928) (deed); Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897) (deed).

recovery will be determined by whether any property furnished under the contract is returnable by the mentally ill person or whether the mentally ill person derived a benefit from the property or from any services furnished under the contract.

1. *Property Returnable by the Mentally Ill Person.* If the mentally ill person still has property given him by the healthy party under the contract, he is required to return it.[400] Otherwise his act of avoidance would result in a windfall to him and a corresponding detriment to the healthy party.

2. *Property or Services Benefiting the Mentally Ill Person.* If the mentally ill person received services or property which he can no longer return, it is important to determine whether such items were of benefit to him. The mentally ill person is uniformly held liable for the value of necessaries furnished him.[401] In addition, he is liable to make restitution to the healthy party for any property or services which, although not necessaries, were not dissipated by him nor valueless to him, to the extent that he derived a benefit from them.[402]

3. *Property or Services Not Benefiting the Mentally Ill Person.* It may be that the mentally ill person derived no benefit from the property or services because they were worthless to him or because, in the case of property, he dissipated it. Thus, although the healthy party gave up valuable consideration, the mentally ill person derived no actual benefit from it, and the question presented is which party will bear this net loss.

If the mentally ill person is required to place the healthy party in statu quo before being allowed to avoid (under the rules developed in subdivision F supra), any net loss is absorbed by the mentally ill person. Whether or not he benefited from the transaction should have no effect on determining the exact status

400 Pennsylvania Co. for Banking and Trusts v. Philadelphia Title Ins. Co., 372 Pa. 259, 93 A. (2d) 679 (1953) (mortgage); Norelius v. Home Savings Bank, 200 Iowa 613, 203 N.W. 809 (1925); cf. Ivey v. May, 231 Ala. 339, 164 S. 732 (1935) (deed). Compare Buddy v. Buddie, 2 N.J. Super 424, 64 A. (2d) 377 (1949).

401 See 1 WILLISTON, SALES, rev. ed., §34 (1948); 1 WILLISTON, CONTRACTS, rev. ed., §255 (1936); 2 BLACK, RESCISSION AND CANCELLATION, 2d ed., §256 (1929); WOODWARD, QUASI CONTRACTS §202 (1913). The Uniform Sales Act, 1 U.L.A. §2 (1950), permits restitution for sales of goods within the act, and several states have statutes permitting it for all necessaries, e.g., Cal. Civ. Code (Deering, 1949) §38. See Appendix for list of similar statutes. See 121 A.L.R. 1501 (1939); 143 A.L.R. 672 at 747 (1943); 22 A.L.R. (2d) 1438 (1952); 56 A.L.R. (2d) 13 (1957) (attorney fees); 7 A.L.R. (2d) 8 (1949) (support). See RESTITUTION RESTATEMENT §113, comment *d* (1937), defining necessaries in another context.

402 See cases cited in notes 399 and 400 supra.

quo of the healthy party.[403] But if the mentally ill person is required only to compensate for property or services that actually benefited him,[404] then the status quo of the healthy party is irrelevant and this party absorbs any loss arising from the transaction. This result protects the mentally ill person from his own illness—any loss is felt to have been the result of his mental illness.[405] A third possibility is to have each party bear a portion of the resulting loss. Although not explicit in the decisions, some courts may accomplish this result by speaking in terms of "adjusting the equities" rather than in terms of benefit to the mentally ill person,[406] or by their determination of the quantum of the "benefit" or "status quo" in any particular case.[407]

V. MENTAL ILLNESS OCCURRING AFTER AGREEMENT: AT THE TIME OF PERFORMANCE

The effects on a contract of one party's mental illness at the time of agreement have been discussed in the preceding pages of this study. Attention will now be directed to the effects on a contract of mental illness that does not occur until after agreement. There are many effects of this nature, but the most important relate directly to performance. For example, if a scientist contracts to give his services for a designated period of time and becomes mentally ill before the period ends, contract rules of impossibility and failure of consideration obviously are involved. In such a case, should either party be excused? Should the measure of recovery or of performance be changed? This part will consider these questions. Part VI will conclude the study by treating the remaining effects of supervening mental illness.

A. *The Bilateral Contract*

Mental illness occurring after mutual promises are exchanged can affect performance of a contract in two ways. First, mental

403 This is exemplified in the cases holding that the fact that the mentally ill person dissipated the goods will not excuse him from placing the healthy party in statu quo. See IV-F-2-(e), supra.

404 This measure is applied by those states following the American majority view where restoration of the healthy party to his status quo is excused. Cf. Morris v. Hall, 89 W. Va. 460, 109 S.E. 493 (1921) (deed); Creekmore v. Baxter, 121 N.C. 31, 27 S.E. 994 (1897) (deed), and those cases following the American minority view, note 395 supra.

405 See Gibson v. Soper, 72 Mass. (6 Gray) 279 at 281-282 (1856) (deed).

406 Weseman v. Latham, 153 Cal. App. (2d) 841, 315 P. (2d) 364 (1957). Cf. Brown v. Khoury, 346 Mich. 97, 77 N.W. (2d) 336 (1956) (deed).

407 See Virtue, "Restitution from the Mentally Infirm," 26 N.Y. UNIV. L. REV. 291 (1951).

illness of a promisor can impair his ability to perform. Second, mental illness of a promisee can alter his desire for the performance, his ability to supervise or approve the performance, or his capacity to enjoy the results.

1. *Mental Illness of a Promisor.* Courts generally examine the promisor's supervening inability to perform in the context of "impossibility." Mental illness may affect a promisor's ability to remember a date for payment or to convey a deed, but since these acts are readily delegable they are not considered as rendered truly impossible by supervening mental illness.[408] Performance of the non-personal bilateral contract is thus unaffected by subsequent mental illness. But where there is some personal flavor to the contract,[409] where the required acts can be properly rendered only by the particular promisor, supervening mental disability can excuse both obligations: the promisor's because of impossibility,[410] the promisee's because of failure of consideration.[411] Four salient questions then arise. (a) What is a personal service contract? (b) What mental disability is sufficient to excuse performance? (c) How should foreseeability influence placement of the risk of mental illness? (d) What effects on performance and what judicial means of implementing these effects arise from the promisor's supervening mental illness?

(a) *What is a personal service contract?* The answer to this question lies in normal contract law and is not unique to mental illness situations. The crucial test is whether performance by a

408 See Penny v. Spencer Business College, (La. 1956) 85 S. (2d) 365; Guardianship of Cornaz, 8 Cal. (2d) 347, 65 P. (2d) 784 (1937). Cf. Foster v. Warner, 42 Idaho 729, 249 P. 771 (1926) (physical disability of third person). See 2 CONTRACTS RESTATEMENT §455, comment *a*, illus. 3 (1932); 6 CORBIN, CONTRACTS §1334 and cases in n. 6 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1940 (1938). The underlying validity of the contract is not affected by later mental illness; Baroudi v. Hales, (Fla. 1957) 98 S. (2d) 515.

409 Once beyond a simple promise to pay a sum certain, almost any performance requiring some prolonged activity by promisor may conceivably be deemed personal, and the contract labeled a personal service contract. Compare 2 CONTRACTS RESTATEMENT §459, illus. 2 (1932), with Green v. Gilbert, 21 Wis. 395 (1867). Cf. Graves v. Cohen, 46 T.L.R. 121 (1929) (relation of horse-owner to jockey). See 6 CORBIN, CONTRACTS §1334 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1940 (1938).

410 2 CONTRACTS RESTATEMENT §459 (1932). The impossibility excuse applies whether promised performance was that of the promisor himself, Hathaway v. Cronin, 301 Mass. 419, 17 N.E. (2d) 312 (1938), or that of a third person whose performance was to be obtained by promisor, Spalding v. Rosa, 71 N.Y. 40 (1877). See generally 6 CORBIN, CONTRACTS §1334 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1940 (1938). Suits for breach of promise to marry, though not actually personal service contracts, involve personal promises so that disability can also excuse. Sanders v. Coleman, 97 Va. 690, 34 S.E. 621 (1899).

411 1 CONTRACTS RESTATEMENT §282 (1932).

particular person was understood by the parties to be a vital part of the consideration. The following factors must be analyzed: (1) whether a special skill of some type was involved; (2) the intent of the parties as revealed in their language; (3) the custom with regard to the relations involved; and (4) the circumstances of the agreement.[412] Skillful presentation of the equities can often help persuade the court to a personal rather than non-personal interpretation of a given contract. Action subsequent to the agreement may also influence the court to view the contract as non-personal; thus acceptance of performance by a promisee from an agent of a mentally ill promisor may provide evidence of a belief that the obligation was non-personal.[413]

(b) *Mental disability to perform.* This topic roughly parallels the question of the test for incapacity in mental illness during the formation of a contract, discussed in Part II. Here, however, the focus changes to the issue of what quantity or quality of mental illness, occurring after agreement, can legally affect performance of the contract. This question is unique to mental illness situations and falls in an area where no accurate tests or criteria have yet been formulated.

The black-letter proposition is that a duty of personal performance is discharged by any illness which makes the promisor's action "impossible or seriously injurious to his health."[414] Two levels of illness are initially discernible. First, the relatively trivial illness—such as a fainting spell—that merely excuses the mentally ill promisor from liability for a less-than-perfect performance. Second, there is illness that so substantially impairs the promised performance that the promisee is justified in terminating the contract and obtaining someone else to complete the task.[415] In

412 The contract can spell out the parties' intent to have performance be personal. 6 CORBIN, CONTRACTS §1334, n. 5 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1941 (1938). It can likewise evince an intent to have performance readily delegable. See 6 CORBIN, CONTRACTS §1334, and cases in n. 4 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1941, n. 14 (1938). Compare Penny v. Spencer Business College, (La. 1956) 85 S. (2d) 365, with Stewart v. Loring, 5 Allen (87 Mass.) 306 (1862). Promisor may undertake the risk of mental illness, but this must be clearly manifested, 2 CONTRACTS RESTATEMENT §459, coment *e* (1932).

413 See Husheon v. Kelley, 162 Cal. 656, 124 P. 231 (1912) (lease).

414 2 CONTRACTS RESTATEMENT §459 (1932).

415 Compare Rubin v. International Film Co., 122 Misc. 413, 204 N.Y.S. 81 (1924) (physical disability, 1½ hour delay) with Johnson v. Walker, 155 Mass. 253, 29 N.E. 522 (1892) (typhoid, 7 week absence). See Carver v. Fitzsimmons, 5 Cal. App. (2d) 320, 42 P. (2d) 1066 (1935) and Dickey v. Linscott, 20 Me. 453 (1841).

support of this dichotomy it may be argued that in the event of an unforeseen mental illness (for which he did not assume the risk) the promisor should be generally excused to the exact extent that his performance is actually affected, but that the dissatisfied promisee should not, in every such case, be able to treat the entire contract as discharged for failure of consideration. Recognition of the foregoing dichotomy also results in a judicial buffer-zone in which the promisee must accept something less than he bargained for. As long as the zone is narrow, it has practical justification. With respect to proof, it is hard to distinguish a mental illness from one or a few isolated symptoms impairing performance (such as a headache or fainting spell). If an employee faints for the second time in a week, he ought to be excused if he is not feigning; while before the employer should be able to fire him, there should be a further showing that the spells relate to some material disability.[416]

In addition, no realistic promisee actually anticipates 100 percent maximum performance by the promisor at all times, but rather realizes the possibility of ordinary and trivial impairment. The disabled promisor should not, however, escape any greater portion of his obligation than that exactly warranted by his difficulty. Mental exhaustion that could excuse failure to perform on Monday will not excuse malingering the rest of the week.[417]

In determining the degree of mental illness which will let the disappointed promisee terminate a contract, the following factors bear: (1) the particular quality and type of performance promised; (2) the severity of the illness involved; and (3) the current duration of the illness and its prospects for cure. The first factor, quality and type of performance, can be readily seen in the different effect that a mild mental illness could have on employment for scientific research as opposed to employment for plowing fields. As for the second factor, severity of the illness, some medically recognized disturbances may not be significant enough to excuse poor performance. For example, psychoneuroses, which can manifest themselves in sloppy, erratic, or unreliable behavior, will probably continue to be treated under traditional contract theories of material or trivial breach, while doctrines of supervening mental illness

416 Somatic disturbances may have at their bases psychological disturbances, but can also be the result of essentially physiological or other somatic factors. HUTT AND GIBBY, PATTERNS OF ABNORMAL BEHAVIOR 234 (1957).

417 See Fisher v. Monroe, 16 Daly 461, 12 N.Y.S. 273 (1891).

are reserved for cases of organic disorder and other more serious afflictive disorders.[418]

It is on the third-named factor, duration of illness, that the courts have primarily focused, rather than on qualitative differences. Courts have avoided rigid duration tests, substantially agreeing with the Virginia view that "no fixed or certain formula" is available.[419] The issue is ordinarily a jury question. But the Virginia court was able to rule as a matter of law that if illness was "wholly incapacitating and so protracted as to render it impossible for the employee substantially to perform his duties in compliance with the terms of the agreement, and the employer's interest be thereby materially affected, he will be afforded an election to regard and treat the contract as broken."[420] An attack of mental illness may conceivably last several weeks before the employer becomes entitled to cancel the contract.[421]

When the alleged mental illness does not excuse the failure of the promisor to perform (e.g., if the illness is trivial but the breach is substantial, or if the illness is sham), a case of unilateral breach results. Here the promisee has an action for damages against the promisor if he elects to recognize the breach, although he may elect to waive the breach and continue waiting for full performance.[422] In this latter course the promisee runs the risk that what was initially too brief or trivial to be recognized as mental illness discharging the promisor's duty (and thus could arguably

418 See 1 CONTRACTS RESTATEMENT §§274, 275 (1932) on material versus trivial breach. Psychoneuroses may often manifest themselves in poor work. Coon, "Psychiatry for the Lawyer: The Principal Psychoses," 31 CORN. L.Q. 327 at 329 (1946); LANDIS AND BOLLES, TEXTBOOK OF ABNORMAL PSYCHOLOGY 72-89, 113-114 (1947); Malamud, "The Psychoneuroses," in 2 PERSONALITY AND THE BEHAVIOR DISORDERS, Hunt ed., 833 at 857 (1944). Some mental disturbances initially manifest themselves by hyperefficiency. LANDIS AND BOLLES, this note supra, at 76. See analysis of tests and proofs of mental illness, parts II-A and III-B, supra, in this study.

419 Citizens Home Ins. Co. v. Glisson, 191 Va. 582 at 589, 61 S.E. (2d) 859 (1950).

420 Id. at 590. Compare Fahey v. Kennedy, 230 App. Div. 156 at 159, 243 N.Y.S. 396 (1930): "Just when in the course of a temporary illness this election [to treat the contract as breached] may be exercised is difficult to determine, depending largely on the nature of the employment and the necessities of the employer." Compare Gaynor v. Jonas, 104 App. Div. 35, 93 N.Y.S. 287 (1905) (1½ days, dismissal not justified); Rubin v. International Film Co., 122 Misc. 413, 204 N.Y.S. 81 (1924) (1½ hours); Spindel v. Cooper, 46 Misc. 569, 92 N.Y.S. 822 (1905) (2 weeks); West Chicago Park Commissioners v. Carmody, 139 Ill. App. 635 (1908) (sham illness will not justify nonperformance—six months absence may not necessarily discharge the contract); Rench v. Watsonville Meat Co., 138 Cal. App. (2d) 482, 292 P. (2d) 85 (1956).

421 See Gaynor v. Jonas, 104 App. Div. 35, 93 N.Y.S. 287 (1905).

422 1 CONTRACTS RESTATEMENT §317 (1932). See Rubin v. International Film Co., 122 Misc. 413 at 416, 204 N.Y.S. 81 (1924).

have been malingering) may gradually develop into substantial disability until it excuses the promisor's performance altogether and ends any possible claim for breach of contract.

(c) *Foreseeability of mental illness.* Although apparently no case has raised the issue of foreseeability of supervening mental illness, analogy from the physical disability cases indicates that no promisor who had good reason to anticipate his subsequent disability at the time he contracted should be able to use that disability as an excuse.[423] Similar reasoning would prescribe a different rule when both parties are aware of the chance of later disability; in this case, the promisee might even be held to have assumed the risk of the promisor's illness.[424]

Foreseeability is difficult to apply in the mental illness area. Admittedly, in some types of illness it would not be unreasonable to expect a temporarily recovered person to foresee a possible relapse. Examples of this predictable type are alcoholism[425] and organic disorders such as brain tumors or general paresis.[426] But what about the emotional, or afflictive, disorders? A schizophrenic patient may apparently recover, learn at the hospital that he is considered well, and be discharged. When this person later takes employment, he knows of his prior difficulty but has no sound medical means to predict chances for relapse. He may be normal for the rest of his life.[427]

Indeed, the person's rehabilitation may be distinctly impaired if he is required to inform prospective employers of any prior mental illnesses. Great reluctance to hire such persons may result in further discouragement and maladjustment. If hired, special

423 See Jennings v. Lyons, 39 Wis. 553 at 558 (1876), plaintiff denied even quantum meruit recovery where he and his wife executed a joint personal service contract as farm-helper and domestic, and she had to cease working four months later because of pregnancy known at time contract was made: "For when the performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is held answerable." See also Gem Knitting Mills v. Empire Printing and Box Co., 3 Ga. App. 709 (1907) (dictum).

424 See Ptacek v. Pisa, 231 Ill. 522, 83 N.E. 221 (1907).

425 See Coon, "Psychiatry for the Lawyer: Common Psychiatric States Not Due to Psychosis," 31 CORN. L.Q. 466 at 484-487 (1946); LANDIS AND BOLLES, TEXTBOOK OF ABNORMAL PSYCHOLOGY 181-195 (1947).

426 See Coon, "Psychiatry for the Lawyer: The Principal Psychoses," 31 CORN. L.Q. 327 at 356-362 (1946); LANDIS AND BOLLES, TEXTBOOK OF ABNORMAL PSYCHOLOGY 196-206 (1947).

427 See NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., pp. 416-419 (1958). Cf. Shackleford v. Hamilton, 93 Ky. 80, 19 S.W. 5 (1892), where no duty was imposed on defendant in breach of promise suit to disclose previous syphilis to plaintiff when he proposed, since he believed he was cured though in fact he was not.

stigma may be attached to their performance. On the other hand, rigid enforcement of the bargain and of the parties' expectations would require that a released patient or previously disturbed person fully disclose any known facts which might later affect his performance. The courts have yet to come to grips with the disclosure problem in mental illness cases. Somewhere a balance must be struck between the foregoing divergent policies. It would seem unreasonable to require the promisor to disclose an isolated nervous breakdown, just as it would seem unreasonable to require disclosure of minor physical ailments such as strep-throat. Before imposing a duty of disclosure, a *pattern* of disability (mental or physical) might reasonably be required. Of course, the promisee could make it clear that he bargains for a promisor who is free of any mental or physical defects by specifically questioning him. This, apparently, is the modern trend in employment questionnaires; the employer wants the opportunity to reject an applicant on the basis of past medical history, even though he may not use this opportunity.

Beyond the agreement stage, difficulties of proof rather than considerations of policy become paramount. Trying to reconstruct the earlier foreseeability of a present mental illness is thorny. Here, more than in any other phase of supervening mental illness, the expert plays a critical role.[428] The expert alone can advance qualified opinions as to the probabilities of recurrence in any particular kind of mental illness. Then the jury can determine the extent to which the afflicted party had, or ought to have, foreseen these probabilities. Properly guided by the court, the jury could then decide whether a duty of disclosure existed in the particular case. When the issue arises the court should appraise the peculiar facts involved, including: (1) the nature of the mental illness (organic, functional, progressive, recurrent); (2) the extent of arms' length bargaining; (3) the type of work (whether the sort that would reasonably be expected to put strain on the mind); and (4) surrounding facts such as the actual length of time the promisor was able to perform effectively before incurring the disabling mental illness.

[428] E.g., even predicting subsequent psychiatric disorder from direct traumatic injury to the brain is extremely difficult; Siegal, "Cerebral Traumata—Concept and Valuation of Psychophysiologic Aftermaths," 14 DISEASES OF THE NERVOUS SYSTEM 163-171 (1953). Even in syphilitic brain infections (paresis) psychotic reactions are not universal; HUTT AND GIBBY, PATTERNS OF ABNORMAL BEHAVIOR 313 (1957).

(d) *Effects and results.* Loose and imprecise as the foregoing principles may be, in the context of particular litigation they may assume various definable limits. Who is suing whom, and for what type of recovery, may influence judicial analysis. For instance, though illness readily relieves the stricken promisor from liability for breach of contract, it should hardly assist him to recover his lost expectations.[429] The legal remedies and effects of mental illness of the promisor should be contrasted with similar issues involving promisee's mental illness, which are treated in a later subdivision.

In cases where the promisee is suing, the foregoing discussion makes it clear that he has no right to damages against the truly disabled promisor of a personal contract. Where an advance payment was made, however, the promisee should be allowed to obtain restitution, less the value of any part performance he has received.[430]

On the other hand, when the promisor sues, conflicting policies come into play. When he becomes mentally disabled through no fault of his own, and cannot fulfill the exact specifications of the personal contract, the promisor should certainly escape total forfeiture of all past efforts if the efforts have benefited the other party.[431] Conversely, courts have never been anxious to enforce a contract other than the one the parties actually executed. To treat any disability as "minor," thus depriving the promisee of a chance to elect discharge and seek performance elsewhere, necessarily enforces a judicially-altered contract against him. Reconciliation of these conflicting policies underlies almost all decisions in mental illness cases.

The mentally ill promisor may sue on the contract or in quantum meruit for services rendered. When he sues on the contract, he runs the risk of setting up an all-or-nothing situation. Should he be found to have been mentally disabled, the court in its reluctance to "rewrite" the contract will not excuse full

429 Davidson v. Gaskill, 32 Okla. 40, 121 P. 649 (1912); Patrick v. Putnam, 27 Vt. 759 (1855); Jeter v. Penn, 28 La. Ann. 230 (1876); all of which involved a plaintiff who sought contract recovery but obtained only quantum meruit when disability made full performance impossible.

430 Hudson v. Hudson, 87 Ga. 678, 13 S.E. 583 (1891) (supervening insanity prevented performance). But see Williams v. Butler, 58 Ind. App. 47 (1914) (money merely paid as inducement to take job, not recoverable).

431 2 CONTRACTS RESTATEMENT §468, comment *a*, illus. 2 (1932). See cases collected in note 429 supra.

performance and also compensate him for it.[432] In a strict pleading jurisdiction, pleadings based on contract damages may then result in nonsuit.[433] If the trier of fact finds that the promisor was *not* mentally disabled, then either (1) he was willing and able to perform but promisee wrongfully rejected further performance, in which case promisor recovers *all* (damages on the contract),[434] or (2) promisor himself was at fault (having used mental illness as an alibi for neglect or laziness) and recovers *nothing*.[435]

When the mentally ill promisor makes a quantum meruit claim, he will sometimes find the courts measuring recovery with reference to the contract terms.[436] It might be questioned whether pro rata measurement of the value of services is realistic. When the promisor's illness stems from organic brain disorder which has gradually reduced the quality of his performance until the day the contract is discharged, it can be argued that the promisee who continues to accept performance should be bound by the agreed terms right up to the time he finally notifies the promisor that the contract is terminated.[437] But an objective appraisal of the benefit conferred upon promisee would consider the effects of progressive debilitation. In any event, the contract price (or its pro rata portion) is generally invoked as a limit on the quantum meruit recovery.[438] Some authority would let the disappointed promisee deduct from the promisor's compensation the damages sustained

432 See note 429 supra.

433 See Johnston v. Board of Commissioners of Bernalillo County, 12 N.M. 237 at 244-245, 78 P. 43 (1904) (dictum).

434 Spindel v. Cooper, 46 Misc. 569, 92 N.Y.S. 822 (1905); Lambert v. Laing & Thompson Iron Works, 124 Ore. 197, 264 P. 362 (1928). The contract language may specially reject deductions for time lost for sickness. Red Cross Mfg. Co. v. Stroop, 79 Ind. App. 532, 135 N.E. 351 (1922).

435 West Chicago Park Commissioners v. Carmody, 139 Ill. App. 635 (1908) (feigned illness, $500 deposit on construction contract forfeited). See Lyon v. Pollard, 20 Wall. (87 U.S.) 403 (1874), and Hetkowski v. Dickson City Borough School District, 141 Pa. Super. 526, 15 A. (2d) 470 (1940); no recovery in cases where disability was real but resulted from immoral and willful acts.

436 E.g., Fenton v. Clark, 11 Vt. 557 (1839). Rigid pro rata measurement was applied in Jeter v. Penn, 28 La. Ann. 230, 26 Am. Rep. 98 (1876), dividing the number of days in the year by the number of days worked.

437 See Rubin v. International Film Co., 122 Misc. 413, 204 N.Y.S. 81 (1924) (dictum); Fahey v. Kennedy, 230 App. Div. 156, 243 N.Y.S. 396 (1930). See 21 A.L.R. (2d) 1241 (1952).

438 See Coe v. Smith, 4 Ind. 79 (1853); Johnston v. Board of Commissioners of Bernalillo County, 12 N.M. 237, 78 P. 43 (1904) (dictum). If only the full performance would have had any value, quantum meruit recovery could conceivably be denied. See American Publishing House v. Wilson, 63 Ill. App. 413 (1896); Dorsey v. Clarke, 223 Ky. 619, 4 S.W. (2d) 748 (1928) (dictum).

by termination of the contract.[439] Such a deduction is unusual in cases of impossibility, and it can be strongly contended that the approach is inconsistent with the notion that the promisor's disability is excused for the very reason that he is blameless.

2. *Mental Illness of the Promisee.* Mental illness of the promisee as it relates to performance may cause either the promisee or the promisor to desire discharge of the contract obligation. The promisor wants discharge in those situations where promisee's supervening mental illness has made performance more difficult. This problem arises when aged grandparents agree to and do convey property to their grandchildren in return for a promise to support the grandparents for the rest of their lives. It would be unfair to let the promisors keep the property without performance, even if the promisees later sustain mental illness which makes performance much more difficult than the promisors had hoped. It is generally held that the promisors in such arrangements undertook the risk of the promisees' disabilities, and that mere increased difficulty is not the equivalent of impossibility.[440] Should there be any distinction drawn between types of mental illness, a continuing obligation to perform would be most logically imposed in cases involving reasonably anticipated illnesses such as senile psychosis,[441] and less often imposed in the case of sudden disorder such as traumatic epilepsy.[442]

In other instances the promisee himself may want discharge. Since he cannot argue impossibility because the promisor stands ready to perform, another rationale must be found. If the promisee's mental illness has made the promisor's performance completely useless, the promisee might argue frustration of purpose.[443]

439 See Davidson v. Gaskill, 32 Okla. 40, 121 P. 649 (1912) (dictum). Compare Patrick v. Putnam, 27 Vt. 759 (1855) (damages measured by loss incurred in hiring substitute). Cf. Stolle v. Stuart, 21 S.D. 643, 114 N.W. 1007 (1908).

440 Ptacek v. Pisa, 231 Ill. 522, 83 N.E. 221 (1907). Good faith may be a factor. Compare Rexford v. Scholfield, 101 Mich. 480, 59 N.W. 837 (1894), with Penas v. Cherveny, 135 Minn. 427, 161 N.W. 150 (1917). Note that in all cases the promisees had fully performed.

441 NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 287-296 (1958); Rothschild, "Senile Psychoses and Psychoses with Cerebral Arteriosclerosis," Kaplan ed., MENTAL DISORDERS IN LATER LIFE, 2d ed., 289, 294-307 (1956).

442 NOYES, MODERN CLINICAL PSYCHIATRY, 3d ed., 211 (1948). See JELLIFFE AND WHITE, DISEASES OF THE NERVOUS SYSTEM 667-681 (1915).

443 1 CONTRACTS RESTATEMENT §288 (1932); 6 CORBIN, CONTRACTS §1353 (1951). See dissenting opinion of Thacher, J., in Mohrmann v. Kob, 291 N.Y. 181 at 191-197, 51 N.E. (2d) 921 (1943), to the effect that husband's duty to pay monthly allowances to wife under separation agreement, contingent on wife's future chastity and on his own

The frustration rationale would require a showing that promisee's continued mental ability was essential to the ultimate purpose of the contract, and that both parties recognized this purpose, as where promisee orders promisor to make ceramic figurines which both parties understand have value to promisee only as objects which promisee can artistically decorate for sale.

The frustration rationale has apparently not yet been advanced in the supervening mental illness situation. However, frustration may be implicit in personal contract cases where courts have talked in terms of impossibility,[444] mutuality,[445] or an implied condition precedent of continued supervision and control by the promisee.[446] It was pointed out above that true impossibility does not exist. Mutuality, which would discharge the mentally ill promisee in the personal service contract merely because the promisor could have been relieved because of mental illness, is neither well supported nor logically convincing.[447] As for the notion of an implied condition precedent of promisee's continued health and sanity, it might be better understood as frustration of a mutually understood purpose that the promisee be able to oversee and enjoy the fruits of the performance. If frustration were accepted as the doctrine relieving promisees of subsequently useless contracts, it might not be as difficult to find elements of personal supervision or oversight as conditions precedent.[448] Until now, cases where a promisor has been able to enforce obligations against a mentally ill promisee have involved full performance by the former, with nothing left save payment of compensation.[449] Perhaps if those

voluntary election to procure a divorce, should be terminated when husband becomes insane, thereby frustrating the purpose of the contract which was his continuing ability to obtain a divorce. Frustration is on the whole not yet widely used by the courts. Anderson, "Frustration of a Contract—A Rejected Doctrine," 3 DEPAUL L. REV. 1 (1953); Smit, "Frustration of Contract: A Comparative Attempt at Consolidation," 58 COL. L. REV. 287 at 307-315 (1958).

444 See Harrison v. Conlan, 92 Mass. 85 (1865) (death).

445 O'Bryon's Estate, 2 Fay. L.F. 16, 87 P.L.J. 121, 9 Som. 191 (1939) (no recovery by promisor against mentally ill promisee though promisor rendered performance after disability arose). See Babcock v. Goodroch, 3 How. Pr. (n.s.) 52 (1879) (death); Lacey v. Getman, 119 N.Y. 109 at 116, 23 N.E. 452 (1890) (death); Homan v. Redick, 97 Neb. 299, 149 N.W. 782 (1914).

446 Graves v. Cohen, 46 T.L.R. 121 (1929). See Lacey v. Getman, 119 N.Y. 109, 23 N.E. 452 (1890).

447 See O'Bryon's Estate, 2 Fay. L.F. 16, 87 P.L.J. 121, 9 Som. 191 (1939). Note that Homan v. Redick, 97 Neb. 299, 149 N.W. 782 (1914), relied on by O'Bryon's Estate, is weak authority for the mutuality argument.

448 E.g., Graves v. Cohen, 46 T.L.R. 121 (1929) (horse-owner and jockey).

449 Sands v. Potter, 165 Ill. 397, 46 N.E. 282 (1896) (promisee adjudged insane after

same contracts had still been at the executory stage, the courts could have found promisee's supervision or oversight to be important and could have denied recovery. But analogy from cases involving the promisee's death indicates that even in executory situations the promisee's duty can be so clearly delegable and non-personal that subsequent mental illness will not discharge liability.[450] A careful attorney for a promisee in such predicaments will therefore always try to emphasize whatever elements in the contract suggest desirability of personal oversight by his client.

Another perplexing difficulty that arises in instances of promisee's mental disability is to determine at what point the performing party will be legally obliged to take notice of the disability and regard the contract as discharged. A guardian appointed for the promisee presumably could notify the promisor of the contract's cancellation. But the ill promisee who is not yet adjudged incompetent may be incapable of giving notice himself. The promisor, in an action to recover for his performance, may well be legally charged with notice of the time when the contract is terminated, so that any performance he had rendered subsequent to that time will not be covered by the contract terms.[451]

B. *The Unilateral Contract*

1. *Generally.* Although none of the mental illness cases appears to fall within a simple unilateral contract analysis, a conceivable situation would include the following elements: an offer looking toward acceptance by performance of specified acts; part performance by the offeree, binding the offeror to a conditional contract;[452] then completion by the offeree of all but a trivial part of the desired performance; and finally, supervening mental illness, thwarting perfect performance. Thus assume *A* offers $1000 to *B* for a complete compilation of slander cases within a given time. *B* begins his research and binds *A*. After completing 50 out of 51

promisor's full performance). See Kelley v. Thompson Land Co., 112 W. Va. 454, 64 S.E. 667 (1932) (dictum cites Williston approvingly).

450 Majority holds that in the event of death of the promisee, the promisor can finish performance. 6 WILLISTON, CONTRACTS, rev. ed., §1941, n. 5 (1938). See Dumont v. Heighton, 14 Ariz. 25, 123 P. 306 (1912).

451 Cf. American Nat. Ins. Co. v. Jackson, 12 Tenn. App. 305 at 309 (1930); Kowalski v. Aetna Life Ins. Co., 266 Mass. 255, 165 N.E. 476 (1929); Rollinger v. Dairyland Creamery Co., 66 S.D. 592, 287 N.W. 333 (1939). The promisor might also argue that the contract involves a power coupled with an interest which is not terminated by the insanity of the promisee. See Levy v. Wilmes, 239 Ill. App. 229 (1926).

452 1 CONTRACTS RESTATEMENT §45 (1932).

jurisdictions, *B* is stricken with traumatic illness. General contract principles would seem to indicate that *B* may recover on the contract terms, less an offset for the uncompleted portion.[453] On the other hand, it might be argued that since the end product is the important thing in unilateral contracts, performance would generally have to be considered as delegable and therefore not excusable for subjective impossibility. Here the rejoinder could be that if *A* makes his offer directly to *B* it must be because *B* has certain talents, so that destruction of those talents ends hope of full performance. Consequently, the use of impossibility concepts in unilateral contract situations may be guided by whether the offer is made to a specified person or just made known generally. But as a practical matter (possibly explaining the absence of pertinent cases), would not the courts reach for a bilateral interpretation in any instance where the offer is directed at an identifiable offeree?[454]

Even if recovery on the contract is not obtainable, the disabled offeree in a unilateral contract should obtain quasi-contract recovery for any benefits he may already have conferred upon the offeror.[455] Certainly, if in doubt whether he has "substantially" performed, the offeree in a strict pleading jurisdiction should make his claim in quasi-contract.

2. *The Insurance Policy Contract.* Although conventional unilateral contracts must be analyzed by conjecture rather than on the basis of case law, one type of unilateral arrangement has provided a substantial amount of relevant legal precedent: the insurance policy contract. The insurance policy typically has a unique inception; here the offeror (the insured) offers an act in return for a promise. The act is his payment of the first premium, and the promise received is the insurer's promise to pay the contract sum upon the occurrence of certain stipulated events.[456] By accepting the premium, the insurer becomes bound as the promisor of a unilateral contract.[457] The insured promisee can with-

453 1 CONTRACTS RESTATEMENT §§301(b), 275-276 (1932); 6 CORBIN, CONTRACTS §1362 (1951); 3 WILLISTON, CONTRACTS, rev. ed., §808 (1936).

454 3 CORBIN, CONTRACTS §635 (1951); 1 CONTRACTS RESTATEMENT §31 (1932).

455 2 CONTRACTS RESTATEMENT §468, comment *a*, illus. 2 (1932); 6 CORBIN, CONTRACTS §1371 (1951); 6 WILLISTON, CONTRACTS, rev. ed., §1977 (1938).

456 PATTERSON, ESSENTIALS OF INSURANCE LAW, 2d ed., 72 (1957); 5 WILLISTON, CONTRACTS, rev. ed., §1330 (1937).

457 VANCE, HANDBOOK ON THE LAW OF INSURANCE, 3d ed., Anderson ed., §12 (1951); 5 WILLISTON, CONTRACTS, rev. ed., §1330 (1937).

draw at any time although the insurer cannot, and the promisee may even control the occurrence of conditions on which the insurer's liability hinges.[458] Through an evaluation of the materiality of these conditions, courts have distinguished between those that are excused by impossibility (such as mental illness) and those that are not.[459] Thus, timely payment of premiums has never been excused (since vital to promisee's performance),[460] prompt notice and proofs of loss or disability have sometimes been excused (as less material),[461] and bringing suit within a specified time has been most often excused.[462]

Because the strict rule against excusing non-payment of premiums could cause forfeiture of entire policies to those whose earning powers had been impaired by physical or mental disability, the insurance companies introduced "disability clauses" which initially sought to provide both monetary benefits and waiver of premiums during the period of disability of the insured.[463] Although payment of benefits clauses are rarely included in policies today, premium-waiver clauses are still commonly found. Operation of the waiver is made dependent on the furnishing of timely notice and proof of the insured's disability to the

458 KRUEGER AND WAGGONER, THE LIFE INSURANCE POLICY CONTRACT 17-19 (1953); 3 CORBIN, CONTRACTS §633 (1951).

459 VANCE, HANDBOOK ON THE LAW OF INSURANCE, 3d ed., Anderson ed., §27 (1951); 6 CORBIN, CONTRACTS §1362 (1951); 3 WILLISTON, CONTRACTS, rev. ed., §808 (1937); 1 CONTRACTS RESTATEMENT §301, comment *a*, illus. 4 (1932). See generally Corbin, "Supervening Impossibility of Performing Conditions Precedent," 22 COL. L. REV. 421 (1922); Patterson, "Supervening Impossibility of Performing Conditions in Insurance Policies," 22 COL. L. REV. 613 (1922).

460 VANCE, HANDBOOK OF THE LAW OF INSURANCE, 3d ed., Anderson ed., §54 (1951); 15 APPLEMAN, INSURANCE LAW AND PRACTICE §8232 (1944); 6 CORBIN, CONTRACTS §1364 (1951); 3 WILLISTON, CONTRACTS, rev. ed., §808, n. 5 (1937). See 15 A.L.R. 318 (1921).

461 VANCE, HANDBOOK OF THE LAW OF INSURANCE, 3d ed., Anderson ed., §27, p. 152, and cases in n. 6 (1951); 3 APPLEMAN, INSURANCE LAW AND PRACTICE §§1416, 1417 (1944); 6 CORBIN, CONTRACTS §1362 (1951); 3 WILLISTON, CONTRACTS, rev. ed., §808, n. 10 (1937). See 142 A.L.R. 852 (1943).

462 20 APPLEMAN, INSURANCE LAW AND PRACTICE §11632 (1947); 6 CORBIN, CONTRACTS §1366 (1951); 3 WILLISTON, CONTRACTS, rev. ed., §809, n. 4 (1937). Only two cases involving supervening mental illness were found, in both of which timely suit was excused: Order of United Commercial Travelers of America v. Etchen, 27 Ohio App. 422, 16 N.E. 636 (1928); Powell v. Liberty Industrial Life Ins. Co., (La. 1941) 1 S. (2d) 834, annulled on other grounds, 197 La. 894, 2 S. (2d) 638 (1941).

463 HUEBNER, LIFE INSURANCE, 4th ed., 362 (1950). Clauses providing payment of disability benefits proved economically disastrous in the 1930's because of miscalculated costs and broad judicial interpretations of the disability covered. KRUEGER AND WAGGONER, THE LIFE INSURANCE POLICY CONTRACT 268-272 (1953). See broad judicial criteria in 1 APPLEMAN, INSURANCE LAW AND PRACTICE §§641-645 (1944).

insurer. Most courts will now excuse the conditions of notice on grounds of impossibility.[464]

Mental illness thus raises two distinct problems in the excuse of insurance policy conditions. First, what test should determine when an insured has become "permanently and totally disabled" within the meaning of the insurance policy language? Second, what test should determine as a matter of law and not language, whether mental illness will excuse the required notice and proofs of the disability mentioned?

(a) *Disability within the contract language.* Since the thrust of disability benefit and premium waiver clauses is relief of the burden imposed by decreased earning power, judicial tests have generally been phrased in terms of inability, on the basis of past training and experience, to perform a gainful occupation. Complete mental collapse has not been necessary.[465] If the insured has been adjudged incompetent and hospitalized or institutionalized, dispute over applicability of a disability clause would seem unlikely. But when the insured can engage in some normal activity or has periods of buoyancy and depression, or when a functional disorder is still in its progressive stages, dispute over his disability is probable. The courts do not require continuous mental disorder.[466] They may be reluctant to recognize as a qualifying dis-

[464] Braunfeld, "Impossibility of Notice by the Disabled: A Problem in the Law of Contracts," 1950 INS. L.J. 555, summarizes the development of the doctrine excusing notice and proofs. On the split of authority, see 3 APPLEMAN, INSURANCE LAW AND PRACTICE §1365 (1944) (notice and proof of loss); 15 APPLEMAN, INSURANCE LAW AND PRACTICE §8317 (1944) (notice and proof of disability); VANCE, HANDBOOK ON THE LAW OF INSURANCE, 3d ed., Anderson ed., §54 (1951). See 142 A.L.R. 852 (1943). The majority position is endorsed by 1 CONTRACTS RESTATEMENT §301, comment *a*, illus. 4 (1932). Three reasons justifying excuse of conditions of notice and proof have been advanced: (1) giving notice is merely a condition subsequent, therefore excusable as are all conditions subsequent [Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S.W. 847 (1927)]; (2) giving notice is not a material part of the consideration [Schlintz v. Equitable Life Assur. Soc., 226 Wis. 255, 276 N.W. 336 (1938)]; (3) forfeitures should be avoided [Rhyne v. Jefferson Standard Life Ins. Co., 196 N.C. 717, 147 S.E. 6 (1929)].

[465] See Rosenthal v. Colonial Life Ins. Co. of America, 118 N.J. Eq. 182, 178 A. 202 (1935). Total disability does not mean complete helplessness, New York Life Ins. Co. v. Razzook, 178 Okla. 57, 61 P. (2d) 686 (1936), nor does "permanent" mean that the insured will never recover, Minnesota Mutual Life Ins. Co. v. Marshall, (8th Cir. 1928) 29 F. (2d) 977. Thus the insured may be deemed permanently and totally disabled even though able to practice law sporadically, Missouri State Life Ins. Co. v. Holt, 186 Ark. 672, 55 S.W. (2d) 788 (1932), or act as night watchman occasionally, Illinois Bankers' Life Assur. Co. v. Lane, 189 Ark. 261, 71 S.W. (2d) 189 (1934). For the more lenient test laid down in war risk insurance, see Dean v. United States, (W.D. Okla. 1957) 150 F. Supp. 541 (mental "normalcy" rather than earning-power).

[466] E.g., Missouri State Life Ins. Co. v. Holt, 186 Ark. 672, 55 S.W. (2d) 788 (1932); Atlantic Mutual Life Ins. Co. v. Worley, 161 Va. 951, 172 S.E. 168 (1934). But see Gowe

ability a disease such as alcoholism, despite the fact that it may medically be recognized as an uncontrollable mental illness.[467] Yet once the insured has adequately shown his permanent and total disability, absent contrary language in the policy, the burden of showing later improvement and recovery shifts to the insurer.[468]

(b) *Disability to excuse notice and proof.* A different standard must apply to a determination of what mental illness can excuse timely notice and proof (whether of disability or of loss). Two sound reasons support this difference. First, although disability that can waive premiums is contemplated and provided against at the time of contracting, theoretically neither party ever considered that the insured might incur a mental disability so severe that notification might be prevented.[469] Second, the fact that no contract language provides for the excuse means that a judicially-created standard will be imposed, which must be a standard that recognizes the fact that one can be unable to earn a living and yet be able to give notice.[470]

Courts recognize the differences, both conceptual and practical, between the foregoing degrees of mental illness.[471] As one court notes, "insanity which would constitute permanent and

v. Mutual Life Ins. Co. of N.Y., 139 Neb. 1, 296 N.W. 163 (1941), where insured suffering from depressive psychosis with paranoid features was able to lease property, collect rents, and attend to other business matters.

467 Compare Gaines v. Sun Life Assur. Co. of Canada, 306 Mich. 192, 10 N.W. (2d) 823 (1943), with New England Life Ins. Co. v. Hurst, 174 Md. 596, 199 A. 822 (1938). Psychiatry recognizes alcoholism as an emotional and physical illness: NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 191-212 (1958); Ewalt, "Mental Health Problems Affecting Social Relations," 286 ANN. AM. ACAD. 74, 77-79 (1953). Alcoholism may be mistaken for other underlying mental illnesses, JELLIFFE AND WHITE, DISEASES OF THE NERVOUS SYSTEM 719-727 (1915). See generally Selzer, "Alcoholism and the Law," 56 MICH. L. REV. 237 (1957).

468 Equitable Life Assur. Soc. v. Johnson's Administrator, 257 Ky. 306, 77 S.W. (2d) 943 (1934).

469 Braunfeld, "Impossibility of Notice by the Disabled: A Problem of the Law of Contracts," 1950 INS. L.J. 555 at 565. Cf. Bean v. Philadelphia Fire & Marine Ins. Co., 88 N.H. 415, 190 A. 131 (1937), excusing notice of loss.

470 E.g., in paranoid-schizophrenia, one may be unable to pursue a gainful occupation, yet be able to give notice. HUTT AND GIBBY, PATTERNS OF ABNORMAL BEHAVIOR 274 (1957). See also Coon, "Psychiatry for the Lawyer: The Principal Psychoses," 31 CORN. L.Q. 327 at 360 (1946) (organic brain disease); NOYES AND KOLB, MODERN CLINICAL PSYCHIATRY, 5th ed., 268-287 (1958) (convulsive disorders), 191-212 (alcoholism). But one may appear alert and yet be mentally disturbed. Rothschild, "Senile Psychoses and Psychoses with Cerebral Arteriosclerosis," Kaplan ed., MENTAL DISORDERS IN LATER LIFE, 2d ed., 300-301 (1956) (presbyophrenic senile psychotic); JELLIFFE AND WHITE, DISEASES OF THE NERVOUS SYSTEM 635-642 (1915) (manic-depressive).

471 E.g., American United Ins. Co. v. Goodman, 201 Ark. 634 at 639, 642, 146 S.W. (2d) 907 (1941).

total disability within the meaning of the policy would not necessarily render an insured incapable of complying with the terms of the policy relative to furnishing due proof of disability."[472] The standard for excusing notice should be more stringent than that allowing waiver of premiums.[473] Some courts favor a vague test, asking whether the insured was "mentally incapable of exercising such normal, reasoned judgment as was essential to the conduct of business transactions."[474] Others seek more explicit criteria. They might excuse the condition of notice under any one of three circumstances: (1) insured is mentally incapable of knowing he had the policy; (2) insured is mentally incapable of knowing that he is mentally ill (and entitled to the waiver); (3) insured is incapable of knowing that he is required to furnish proof of his disability.[475]

Yet the definitiveness of the legal test does not truly measure its medical validity. In mental illness, concise or rigid patterns are unworkable. Each mentally ill person presents a peculiar problem. Some persons committed to asylums are still able to carry on contractual affairs with reasonable awareness of the legal implications.[476] Conversely, some who are apparently normal in everyday affairs may actually have a mental illness.[477] The struggle is made case by case. Wide latitude is accorded the opinions of medical experts who have attended the insured, and their opinions can overcome other evidence that might disprove mental dis-

472 McGill v. Travelers Ins. Co., (8th Cir. 1943) 133 F. (2d) 709 at 713, reh. den. 134 F. (2d) 612 (1943).

473 See Atlantic Life Ins. Co. v. Swann, 160 Va. 125, 168 S.E. 423 (1933), where court held that the standard of reasonableness could apply to ability to earn a living but not to ability to give notice.

474 Schlintz v. Equitable Life Assur. Soc., 226 Wis. 255 at 262, 276 N.W. 336 (1937). The Oklahoma court simply asks if the insured was "incapable of furnishing proof," Columbian National Life Ins. Co. v. Zammer, 178 Okla. 207, 62 P. (2d) 63 (1936).

475 The three alternative tests restated here were enunciated in Magill v. Travelers Ins. Co., (8th Cir. 1943) 133 F. (2d) 709, reh. den. 134 F. (2d) 612 (1943). In Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783 at 798, 297 S.W. 847 (1927), the court said the insured must have been "able to carry on the ordinary affairs of life, and this meant that his mind must be capable of sustained effort so that he would comprehend such affairs as needed his attention, and not merely that he might talk with seeming intelligence upon a subject brought directly to his attention by some one." Compare the early test of Insurance Companies v. Boykin, 12 Wall. (79 U.S.) 433 (1870), which asks only if the insured can make "an intelligent statement."

476 See notes 58, 89, 179, and 180 supra.

477 Compare authorities cited in last part of note 470 supra. Certain manic states can be mistaken for mere buoyant confidence. JELLIFFE AND WHITE, DISEASES OF THE NERVOUS SYSTEM 634-637 (1915).

ability.[478] Opinions of laymen based on contemporaneous observation are also admissible to help the jury reconstruct the insured's mental condition at an earlier time.[479]

Courts agree that no single or isolated instances of normal behavior should overcome evidence of general inability to give notice. Thus, the insured cannot be found mentally capable of giving notice merely because he endorsed some checks,[480] wrote a letter concerning the premium,[481] or the surrender value of his policy,[482] inquired about his discharge in a letter,[483] taught stenography at intervals,[484] or was released from an institution on parole.[485] Nor should it matter whether the insured's illness was organic (and thus more easily diagnosed) or functional.[486] The overriding practical consideration in notice-excuse cases is the difficulty of reconstructing an earlier mental state. It is highly difficult to ascertain this earlier state merely on the basis of present medical observation.[487] Opinions and reports of laymen who observed the mentally ill person at the prior time are therefore valuable and necessary.[488] Occasionally, a previous course of conduct may suggest that deviation from that conduct resulted from supervening mental illness, as where the insured had not missed payment of premiums for fifteen years.[489] But as a rule courts will avoid any fixed method of determining mental illness and attempt to apply the particular facts of each situation to the peculiar illness at hand.

478 See Schlintz v. Equitable Life Assur. Soc., 226 Wis. 255, 276 N.W. 336 (1937). A general practitioner rendered an expert opinion based on contemporaneous observation of the insured at time of collapse in State Life Ins. Co. v. Barnes, (Tex. Civ. App. 1933) 58 S.W. (2d) 189. Compare evidentiary rules in part III-B of this study.

479 Hilmer v. Western Travelers Accident Assn., 86 Neb. 285, 125 N.W. 535 (1910); Jefferson v. Standard Life Ins. Co., 199 N.C. 443, 154 S.E. 752 (1930).

480 Bennett v. Metropolitan Life Ins. Co., 173 Ore. 386, 145 P. (2d) 815 (1944).

481 Whetstone v. New York Life Ins. Co., 182 S.C. 150, 188 S.E. 793 (1935).

482 Schlintz v. Equitable Life Assur. Soc., 226 Wis. 255, 276 N.W. 336 (1937).

483 Bean v. Philadelphia Fire & Marine Ins. Co., 88 N.H. 415, 190 A. 131 (1937).

484 American United Life Ins. Co. v. Goodman, 201 Ark. 634, 146 S.W. (2d) 907 (1941).

485 Hickman v. Pan-American Life Ins. Co., 186 La. 997, 173 S. 742 (1937).

486 See Bean v. Philadelphia Fire & Marine Ins. Co., 88 N.H. 415, 190 A. 131 (1937).

487 See Part III-B, supra. Mere retroactive diagnosis not enough to show mental illness equal to permanent and total disability 8 years before, Galloway v. United States, 319 U.S. 372 (1942). But such later diagnosis has some relevance, Halliday v. United States, 315 U.S. 94 (1942). Cf. note 199, supra.

488 Indeed the facts concerning a mentally ill person's previous experience and habits are important parts of diagnosis. See generally, NOYES, MODERN CLINICAL PSYCHIATRY, 3d ed., 100-122 (1948).

489 See Hickman v. Pan-American Life Ins. Co., 186 La. 997, 173 S. 742 (1937).

C. *Statutory Developments*

Twenty-two jurisdictions have enacted statutory provisions concerning incomplete contracts in which one party incurs supervening mental illness.[490] The statutes have had only limited objectives, and have not tried to clarify or modify any of the problems raised in the foregoing discussion, although they have formalized procedures. Thirteen of the statutes relate only to real estate contracts,[491] of which only one (Iowa) deals with both purchase and sale by the mentally ill person. The primary purpose of such statutes is to provide for completion of the conveyance. Nine other jurisdictions have statutes covering contracts involving personal as well as real property,[492] but only five of these cover both purchase and sale.[493]

VI. MENTAL ILLNESS OCCURRING AFTER AGREEMENT: THE REMAINDER

Even if mental illness is absent or insignificant at the agreement stage, and even if supervening mental illness does not affect performance, mental illness occurring after agreement may affect other aspects of the contractual relationship. These remaining problems of supervening mental illness and contract law will be explored in this part.

A. *Formalities of the Contract: Statute of Frauds*

When an individual has contractual capacity at the time he

490 *Arkansas:* Ark. Stat. Ann. (1947; Supp. 1957) §57-628; *California:* Cal. Code Ann. (Deering, 1953) §1537; *Colorado:* Colo. Rev. Stat. Ann. (1953) §152-13-33; *Florida:* Fla. Stat. (1957) §745.16; *Hawaii:* Hawaii Rev. Laws (1955) §338-12; *Idaho:* Idaho Code (1948) §15-1837; *Illinois:* Ill. Rev. Stat. (1957) c. 3, §275, and c. 29, §2 (deeds); *Indiana:* Ind. Stat. Ann. (Burns, 1953) §8-142; *Iowa:* Iowa Code (1958) §668.13; *Maine:* Me. Rev. Stat. (1954) c. 158, §18; *Maryland:* Md. Ann. Code (1957) art. 16, §112; *Massachusetts:* Mass. Laws Ann. (1955) c. 204, §1; *Michigan:* Mich. Comp. Laws (1948) §§707.19, 709.49; *Minnesota:* Minn. Stat. (1957) §525.69; *Nebraska:* Neb. Rev. Stat. (1943) §38-701; *New Jersey:* N.J. Stat. Ann. (1953) §3A:22-3; *Ohio:* Ohio Rev. Code (Baldwin, 1958) §2111.19; *Oregon:* Ore. Rev. Stat. (1957) §126.340; *Pennsylvania:* Pa. Stat. Ann. (Purdon, 1954; Supp. 1958) tit. 50, §3512; *South Dakota:* S.D. Code (1939; Supp. 1952) §35-2021; *Washington:* Wash. Rev. Code §11.92.130; *Wisconsin:* Wis. Stat. (1957) §§296.02 to 296.05.

491 California, Colorado, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Ohio, Oregon, South Dakota, Washington.

492 Arkansas, Florida, Idaho, Illinois, Indiana, Maryland, New Jersey, Pennsylvania, Wisconsin.

493 Maryland's statute applies only to purchases by the incompetent or insane party; those of Florida, Idaho and Indiana apply only to a sale or conveyance. Arkansas, Illinois, New Jersey, Pennsylvania, and Wisconsin have the broadest statutes, generally providing for judicial enforcement of "valid," "legally subsisting," or "specifically enforceable" contracts. For the status of the law in the absence of special statutes, see generally 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., Symons, §368 (1941); 5 POMEROY, EQUITY JURISPRUDENCE, 5th ed., Symons, §§1402, 1405(b) (1941).

makes an oral agreement which falls within the statute of frauds, but later becomes mentally ill to the point of incapacity prior to the execution of a written memorandum which would validate the oral agreement, or prior to part or full performance of the obligations which would remove the contract from the statute, the basic question presented is what constitutes the "contract." Is it (1) the oral agreement, or (2) the subsequent conduct? If the contract is considered to be (1) the oral agreement, with the subsequent conduct being regarded merely as a condition precedent to enforcement, then on the one hand it can be argued that the mentally ill person should be held to the contract because he entered into it at a time when he needed no protection. On the other hand, it can be argued that the subsequent conduct is similar to ratification or affirmance, and a certain capacity should be required for it to be effective.[494] If (2), the subsequent conduct, is said to constitute the contract, however, then the party did not have capacity to contract at that time and consequently has a power of avoidance as discussed in Parts II, III, and IV.

Applicability of these alternative viewpoints turns on normal contract law. The approach used may be influenced by the statutory language of the statutes of frauds, which may read either that an unwritten contract is "void" or "invalid," or that "no action shall be brought" on it.[495] In the situation of a subsequent memorandum, the courts seem to agree that whether the statute says "void" or merely "no action," the subsequent memorandum relates back to validate the prior oral agreement.[496] Consequently the first two arguments apply. Likewise, where an equity court gives relief to a part-performing vendee in a land contract,[497] the courts also indicate that it is the oral contract being enforced,[498] and the first two arguments would be applicable.

At law, courts generally hold that full performance of an oral contract also validates the oral contract itself, and this would

494 See Part IV-E, supra.

495 See statutory list in 2 CORBIN, CONTRACTS §284 (1950).

496 See, e.g., Mead v. Leo Sheep Co., 32 Wyo. 313, 232 P. 511 (1925); Sadler Machinery Co. v. Ohio Nat. Inc., (6th Cir. 1953) 202 F. (2d) 887, applying the Ohio statute; 2 WILLISTON, CONTRACTS, rev. ed., §590 (1936).

497 Pound, "The Progress of the Law, 1918-1919, Equity," 33 HARV. L. REV. 929 at 936 (1920); Kepner, "Part Performance in Relation to Parol Contract for the Sale of Lands," 35 MINN. L. REV. 1, 431 at 432 (1950-1951). What constitutes part or full performance of the contract falls outside the scope of this study.

498 2 CORBIN, CONTRACTS §421 (1950); Pound, "The Progress of the Law, 1918-1919, Equity," 33 HARV. L. REV. 929 at 936 (1920).

certainly seem to be the case where the statute read "no action shall be brought."[499] Thus again the first two arguments apply. But in an old case in which the statute made an oral contract "void," the plaintiff (in a trover action seeking the value of goods delivered under the oral contract) was competent at the time of the oral contract but subsequently became incompetent prior to and during the period of performance.[500] It was held that the "agreement" arose from the full performance conduct rather than the prior oral contract, and thus the contract was voidable for lack of capacity. This may have been due to a recognition of the policy which protects mental incompetents from their later validating actions although they had entered into an oral agreement while competent.

B. *Assignment*

An assignment of contractual rights requires contractual capacity by the assignor, and this capacity is probably measured by the same test as that required for the original contract.[501] While this is a simple proposition, an additional problem of assignment could arise under the following circumstances. *A* and *B* contract at a time when *B* has sufficient contractual capacity. Subsequently *B* becomes mentally ill and then assigns his interest in the contract to *C*. If *B* lacks the ability to understand this transaction, he may set the assignment aside. If *C* desires to enforce a claim against *A*, however, the question is whether *A* may raise the defense of *B*'s contractual incapacity. Analogizing from the law of negotiable instruments, it might be said that *A* may use *B*'s defense if *B* has given *C* a "void" title (e.g., *B* being under an active guardianship at the time of the assignment),[502] but cannot if *B* has given *C* a voidable title.[503] One possible solution in the latter situation would be to have *A* implead *B*, to prevent double liability, and if *B* elects

499 1 CONTRACTS RESTATEMENT §219 (1932); 2 WILLISTON, CONTRACTS, rev. ed., §528 (1936).

500 Matthiessen & Weichers Refining Co. v. McMahon's Administrator, 38 N.J.L. 536 (1876).

501 See, e.g., Wolcott v. Connecticut General Life-Ins. Co., 137 Mich. 309, 100 N.W. 569 (1904); Gulf, C. & S.F. Ry. Co. v. Stubbs, (Tex. Civ. App. 1914) 166 S.W. 699, both cases discussing the void-voidable distinction of assignments made with incompetent persons but not mentioning any difference from the contractual capacity test.

502 See Parts III-B, and IV-A, D, and E, supra.

503 See 2 WILLISTON, CONTRACTS, rev. ed., §432 (1936), although all cases there cited as authority for the general law of contract involve negotiable instruments. For cases concerning the *jus tertii* defense in negotiable instruments as to titles voidable for fraud, see 66 A.L.R. 797, 800 (1930).

to exercise his power of avoidence against *C*, *A* would be under no duty to *C*.[504] If this is not done, however, or if *A* is unaware of *B*'s mental illness and performs for *C*, then upon a suit by *B* against *A*, *A* might defend on the ground of performance. If *A*'s defense were successful, *B* would have to set aside the assignment to *C* and seek restitution of the money paid by *A* to *C*.

C. *Discharges by Subsequent Consent*

A number of methods for discharging a contract which was validly executed involve the later consent of both parties. The more common include accord and satisfaction, novation, mutual rescission, and alteration. These typically require the same requisites as the formation of a contract.[505] Consequently, when a person, competent at the time of agreement, later becomes mentally ill and during this illness executes one of these consensual discharges or modifications, it seems that courts will probably apply the same capacity test to determine the validity of the discharge as it would to determine the validity of the initial agreement.

D. *Subsequent Illegality*

The subsequent illegality of a contract generally terminates the parties' obligations.[506] If, due to mental illness developing after execution of the valid contract, however, the mentally ill party is unaware of the subsequent illegality and continues to perform, it would seem that he should receive the protection of the court by way of an action in unjust enrichment for benefits conferred upon the healthy party.[507]

E. *Law Suits on the Contract*

Although not strictly a matter of contract law, mental illness can affect the actual bringing of a lawsuit on a contract. Included among the effects of mental illness in this category are the prob-

504 2 WILLISTON, CONTRACTS, rev. ed., §432 (1936); 1 CONTRACTS RESTATEMENT §169 (1932).

505 There are some 19 topics on methods of discharging contracts listed in 2 CONTRACTS RESTATEMENT §§385-453 (1932), with §410, comment *a*, stating that the same requisites are necessary for discharge as for the formation of a contract, except for renunciation or an executed gift.

506 But a party is responsible for a breach occurring while the contract was legal. See 2 CONTRACTS RESTATEMENT §§608 and 468 (1932).

507 The plaintiff would not be regarded as in pari delicto with the defendant. 6 CORBIN, CONTRACTS §1534-1537 (1951). But see American Mercantile Exchange v. Blunt, 102 Me. 128 at 133, 66 A. 212 (1906) (dictum).

lems of the tolling of the statute of limitations,[508] and the problem of capacity to sue and be sued.[509] The attorney should remember that the tests for the quantity of mental illness required either to toll the statute of limitations[510] or to require a guardian for suit,[511] may differ from those which result in a power of avoidance[512] or an impossibility defense.[513]

SOME GENERAL CONCLUSIONS: MENTAL ILLNESS AND THE LAW OF CONTRACTS

Although a number of specific conclusions or recommendations have been mentioned throughout this study, three very broad conclusions may be appropriately reviewed. First, although the sciences of psychology and psychiatry have developed mainly in the last half century, the test for incapacity to contract has remained the same since 1895 and basically the same for centuries. In fact, it can be generalized that the new mental sciences have influenced the law of mental illness and contracts very little. This suggests that attorneys and courts may be overlooking arguments based on the findings of these sciences. One such argument may be the need for a broader test of incapacity to protect understood but uncontrolled actions by mentally ill persons.

A second conclusion is that the courts have intertwined and perhaps confused principles based on policies of protecting the mentally ill with principles surrounding fraud, undue influence, and similar factors. Since this approach makes it very difficult

508 The statutes generally state that mental illness cannot suspend the statute once it has commenced running but must exist when the cause of action accrues. The statutes usually either extend the period for a stated number of years after the removal of disability, or allow a period after the recovery equivalent to the original limit. See Blume and George, "Limitations and the Federal Courts," 49 MICH. L. REV. 937 at 974-975 (1951); Littell, "A Comparison of the Statutes of Limitation," 21 IND. L.J. 23 at 34-36 (1945).

509 E.g., Wiesmann v. Donald, 125 Wis. 600, 104 N.W. 916 (1905) (quasi-contract suit); Maloney v. Dewey, 127 Ill. 395, 19 N.E. 848 (1889) (collateral attack on foreclosure of trust deed).

510 Some courts indicate that an adjudication of incompetency is not necessarily the requisite "insanity" for statute of limitations exceptions. See Thlocco v. Magnolia Petroleum Co., (5th Cir. 1944) 141 F. (2d) 934, cert. den. 323 U.S. 785 (1944). However, other courts regard an inability to manage personal affairs as "insanity." Cases are cited in 9 A.L.R. (2d) 964 at 965 (1950). See also the discussion in "Developments in the Law—Statutes of Limitations," 63 HARV. L. REV. 1177 at 1231 (1950), advocating tolling if the mental illness prevents the person from bringing suit in his own name.

511 See cases cited in note 509 supra and Sengstack v. Sengstack, 4 N.Y. (2d) 502, 151 N.E. (2d) 887 (1958) (separation suit), note, 27 FORD. L. REV. 629 (1959).

512 See text at note 88 supra.

513 Cf. Part V-A.

either to evaluate the court's rationale, or accurately to predict a decision in a given situation, it would seem desirable to distinguish carefully between rules concerning granting and enforcing a power of avoidance based on mental incapacity, and rules concerning relief from fraud, undue influence, and similar activities of the other party.

Finally, it appears that a body of discernible mental illness law in the area of supervening mental illness as it affects performance of a contract has yet to develop. Courts initially approached the performance problems in terms of traditional impossibility concepts, and have not ranged far from those basic concepts. As the law evolves, it is natural to expect problems of supervening mental illness to fall generally into a pattern with physical disability problems, and more broadly, into impossibility concepts. At the same time, the many problems uniquely posed by mental illness would be expected to produce sophisticated doctrines that advance beyond well-established generalities. Foreseeability of the illness, frustration of the contract's basic purpose, and qualitative differences between mental diseases are some issues that still remain relatively unexplored.

Robert M. Brucken, S. Ed. *Mark Shaevsky, S. Ed.*
David L. Genger, S. Ed. *William R. Slye, S. Ed.*
Denis T. Rice, S. Ed. *Robert P. Volpe, S. Ed.*

APPENDIX A

I. OUTLINE CHECKLIST OF EVIDENCE FOR AND AGAINST INCAPACITY

Because of the wide range of evidence considered relevant in the proof of a condition of mental capacity or incapacity, this checklist is offered to the attorney as a guide to collecting the various types of facts which should be considered in the evaluation or preparation of a given contract transaction.

A. Mentally Ill Person's Activities and Condition

1. Other business dealings
   a. use of agent for those dealings
   b. degree of complexity of those dealings (as compared with transaction in question)
   c. time of dealings (in relation to instant transaction)
   d. nature of those dealings (in comparison with instant transaction)
      (1) another similar contract, deed, etc.
   e. prudence of prior or subsequent transactions
   f. opinion of prior or subsequent business associates
      (1) degree of business carried on with the ill person
      (2) time
2. Age

3. Physical condition
   a. recent illness
      (nature, seriousness, and duration)
   b. operations
      (number and nature)
   c. hospitalizations
      (number and duration)
   d. physical disabilities
      (1) infirmities and their duration
      (2) deaf, dumb, or blind
         a. length of time
         b. severity
      (3) invalid
         (length of time)
      (4) severe pain
4. Intelligence and education
5. Record of mental illness in family
   a. specific mental disease
   b. hospitalizations
      (number and duration)
   c. commitments
      (voluntary and involuntary, number and duration)
   d. adjudications
      (insanity, incompetency, incapacity in other transactions)
   e. guardianships
      (nature of proceeding)
   f. suicide attempts
6. Adjudications, prior and subsequent
   a. incompetency
   b. insanity
   c. incapacity in other transactions
   d. restoration
7. Guardianship
   a. under incompetency or insanity proceeding
   b. under other proceeding
   c practical termination
   d. official termination
8. Commitment or hospitalization
   a. voluntary or involuntary
   b. length
   c. nature and severity of illness
   d. nature of treatment
   e. continued control of business affairs
   f. discharge as cured, improved, or otherwise
9. Mental illness without adjudication or hospitalization
   a. visits to psychiatrists, etc.
   b. delusions, obsessions, eccentricities, etc.
      (length, severity, recurrence, permanence)
10. Opinion of family, friends, neighbors as to mental stability and business judgment
   a. observation of "peculiar" behavior
11. Use of excessive alcohol and drugs

B. Facts of the Transaction
1. Active participation in the contract
   a. advertising, correspondence
   b. definition of terms, payments, dates, etc.

2. Place of transaction
   a. office
   b. home
      (1) bedridden
3. Explanation of the transaction to the mentally ill person
   a. by his attorney
   b. by other attorney
   c. by other party to transaction
   d. by his friends, family
   e. by disinterested third person
4. Statements of ill person at time of transaction
   a. indicating awareness of practical consequence of transaction
   b. indicating satisfaction
   c. requesting or rejecting provisions
   d. questions concerning significance of certain provisions
5. Opinions of observers
   a. physical appearance
   b. mental condition
      (1) "normal"
      (2) satisfaction with transaction
   c. clarity of communication
6. Correspondence of transaction with long-standing plan
   a. complementary to testamentary or another inter vivos transaction
   b. consideration for past services
   c. past statements of intention
7. Ability to recall transaction when questioned at a distant time
   a. the occurrence of the transaction
   b. basic elements of transaction
8. Fairness and naturalness of transaction
   a. difference between "value" given and received
   b. with whom made
      (1) children, distant relatives, etc.

C. Expert Testimony
1. Analysis of case history
2. Interpretation of personal mental and physical exam
   a. whether remote or proximate to the transaction

Caveat: factors tending to show presence of undue influence, confidential relations, or fraud (e.g., other party to contract is a friend or close relative, lived with and cared for the mentally ill person, or the use of persuasion and the absence of an arms length transaction), while affording a separate basis for avoiding the transaction, may also influence the decision of the court on the issue of capacity.

II. PLANNING LEGALLY EFFECTIVE TRANSACTION WITH A PERSON SUSPECTED TO BE MENTALLY ILL

To achieve the optimum probability of upholding the validity of a contract executed by a person believed to be mentally ill, the attorney should strive to satisfy as many of the following factors as possible.

1. Be certain that the party has been adjudged competent again if he had at any time been adjudicated incompetent or committed to an asylum.

2. Have the mentally ill person actively participate in the determination of the terms and conditions of the contract.

3. Execute the contract in the attorney's office.

4. Explain the meaning of the contract in nonlegal terms to the mentally ill party.

5. Have a disinterested third person experienced in handling similar dealings explain the meaning to the party.

6. Have the mentally ill person note on the contract itself or an attached paper that he recognizes the legal consequences of his action (e.g., a notation that grantor intends to move after conveying his residence).

7. Have the witnesses at the execution of the contract ask the mentally ill person if he is satisfied with the results of the contract.

8. Above all else—be certain the contract is fair and just.

APPENDIX B

STATUTES DEALING WITH CONTRACTS OF THE MENTALLY ILL

The following is a list of statutory provisions determining the effect of mental illness on contractual capacity in certain situations. Where no provision is listed for a jurisdiction, reference must be made to case law, which may reach the same result as under a statute (e.g., "voidness"). The nature and effect of the presumptions of incapacity or of restoration to capacity are discussed in part III; the distinctions between "void" and "voidable" contracts, and the effects of each (in many cases, identical), are discussed in part IV. The types of statutes listed are designated within the table as follows:

A. Statutes declaring contracts "void"
   1. Before any adjudication of incompetency (see part II for the tests of incompetency under these statutes)
   2. After guardianship proceedings ("voidness" may be conditioned on the filing of proper notices, and in some jurisdictions attaches only to contracts involving realty)
   3. After final commitment to a mental hospital

B. Statutes declaring contracts "voidable"
   1. Before guardianship proceedings (see part II for the tests of incompetency under these statutes)
   2. After guardianship proceedings

C. Statutes creating presumptions
   1. Presumption of incapacity, after adjudication of incompetency
   2. Presumption of restoration to capacity, after release from mental hospital or lapse of guardianship

D. Statutes declaring that commitment will have no effect on contractual capacity
   1. All commitments to mental hospitals
   2. Temporary commitments
   3. Voluntary commitments

	A. VOID	B. VOIDABLE	C. PRESUMPTION	D. NO EFFECT
Ala. Code (1940)	(1) tit. 9, §§41, 42, 43			
Alaska Comp. Laws Ann. (1949)				(1) §51-4-20h(j) (Supp. 1958)
Cal. Civ. Code Ann. (Deering, 1949)	(1) §38 (2) §40	(1) §39	(2) §40	
Colo. Rev. Stat. Ann. (1953)	(2) §71-1-21			(1) §71-1-23 (Supp. 1957)
Conn. Gen. Stat. (1958)	(2) §§45-73, 45-74			
Del. Code Ann. (1953)	(2) tit. 12, §3914(f) (Supp. 1956)			(1) tit. 16, §5126
D.C. Code Ann. (1951)	(2) §21-507			

	A. VOID	B. VOIDABLE	C. PRESUMPTION	D. NO EFFECT
Fla. Stat. Ann. (1943)			(1) §394.22(10) (Supp. 1958)	(2) §394.22(12) (Supp. 1958)
Ga. Code Ann. (1936)	(2) §20-206	(1) §20-206		
Hawaii Rev. Laws (1955)				(3) §81-34
Idaho Code Ann. (1948)	(1) §32-106 (2) §32-108	(1) §32-107	(2) §32-108	(1) §66-346 (Supp. 1957)
Ill. Rev. Stat. (1957)	(2) c. 3, §278	(1) c. 3, §278		(1) c. 91½, §5-11 (3) c. 91½, §4-8
Ind. Stat. Ann. (Burns, 1953)	(2) §8-411			(2) §22-4713 (Supp. 1957)
Iowa Code (1958)			(1) §670.10	
Kan. Gen. Stat. (1949)			(1) §59-2260	
Ky. Rev. Stat. (1958)	(2) §202.145		(2) §202.310	
La. Civ. Code Ann. (Dart, 1945)	(1) art. 402, 1788, 1789 (2) art. 401, 1784, 1788, 1791			
Me. Rev. Stat. (1954)	(2) c. 158, §§6, 29			
Minn. Stat. Ann. (1947)	(2) §525.453			
Mo. Ann. Stat. (Vernon, 1956)	(2) §475.135, §475.345			(1) §202.847(1) (Supp. 1958)
Mont. Rev. Code Ann. (1947)	(1) §64-110 (2) §64-112	(1) §64-111	(2) §64-112	
Nev. Rev. Stat. Ann. (1957)	(2) §41.300		(2) §41.300	
N.H. Rev. Stat. Ann. (1955)	(2) §§462:27, 464:9			
N.M. Stat. Ann. (1953)				(1) §34-2-15
N.Y. Civ. Pract. Act (Cahill-Parsons, 1955)	(2) §1361			
N.C. Gen. Stat. (1958)				(1) §122-46
N.D. Rev. Code (1943)	(1) §14-0101 (2) §14-0103	(1) §14-0102		(1) §25-0320 (Supp. 1957)
Ohio Rev. Code Ann. (Baldwin, 1958)	(2) §2111.04 (3) §5123.57			(3) §5123.57
Okla. Stat. (1951)	(1) tit. 15, §22 (2) tit. 15, §24	(1) tit. 15, §23	(2) tit. 58, §855 (Supp. 1958)	(3) tit. 43A, §64 (Supp. 1957)
Pa. Stat. Ann. (Purdon, 1954)	(2) tit. 50, §3511			
R.I. Gen. Laws Ann. (1956)	(2) §33-15-33			
S.D. Code Ann. (1939)	(1) §30.0801 (2) §30.0803	(1) §30.0802		(2) §30.01A07 (Supp. 1952)
Tenn. Code Ann. (1955)		(2) §34-1014 (Supp. 1958)		(3) §33-1207 (Supp. 1958)
Tex. Stat. Ann. (Vernon, 1958)			(1) art. 5547, §83	(1) art. 5547, §83 (3) art. 5547, §24
Utah Code Ann. (1953)				(1) §64-7-48
Vt. Stat. Ann. (1947)	(2) §§3316, 3317			
Va. Code Ann. (1950)				(2) §37-99 (Supp. 1958)
Wash. Rev. Code Ann.			(2) §71.02.650	(2) and (3) §71.02.650
W. Va. Code Ann. (1955)	(3) §2661			
Wis. Stat. Ann. (1958)	(2) §319.215		(1) §51.005	