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## I. SCOPE OF THE PROBLEM

According to the great weight of authority the contract of an insane person made prior to an adjudication of his insanity and the appointment of a guardian is voidable.[1] It is at least voidable—some courts hold it to be void.[2] Likewise, an insane person is incapable of making a valid last will and testament.[3] These are broad legal generalizations which every lawyer knows. He also knows that, as generalizations, they are too broad. He knows that there is no sharp line to be drawn between sanity and insanity, that insanity is very often a matter of degree of variation from the so-called normal individual, and he also knows that the law recognizes degrees of mental unsoundness, and that not every degree of mental unsoundness will destroy contractual or testamentary capacity.[4] Hence, the contracts of some insane persons are valid; the wills of some insane persons are valid. All of this is matter of general knowledge among lawyers. What is not matter of general knowledge among lawyers is the

†This article is a portion of a study of the law of mental incompetency. The scope of this study is restricted to contracts and wills. The term contracts, as herein used, is broadly defined so as to embrace any consensual transaction; hence, in addition to contracts in the strict sense, it includes gifts and so-called voluntary conveyances. An introductory portion of this study, dealing with fundamental concepts and public policies which underlie the law of mental incompetency, will be found in (1940) 38 MICH. L. REV. 1189.

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1. See annotations in (1927) 46 A. L. R. 416, and (1935) 95 A. L. R. 1442.
2. See (1927) 46 A. L. R. 417, 429, (1935) 95 A. L. R. 1442, 1446.
3. 1 WHARTON AND STILLE, MEDICAL JURISPRUDENCE (5th ed. 1905) 64, 65.
4. As to contractual capacity: 1 WHARTON AND STILLE, *op. cit. supra* note 3, at 11 *et seq.*; as to testamentary capacity: 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2d ed. 1899) 32.

degree or type of insanity or mental unsoundness which is sufficient to destroy contractual or testamentary capacity.

We do not need an alienist to tell us that the mental abilities of individuals range almost imperceptibly from a mind which is a total blank to a mind which is capable of the most difficult and complex mental achievements. Nor do we need the expert advice of an alienist to tell us that there is a similar diversity of degree in mental queerness. We may need the aid of a psychiatrist to measure degrees of mental strength, to put a name to various neuroses and psychoses, to diagnose a particular case, and to prescribe treatment. But we know, as a matter of general knowledge, that this wide variety in degrees and types of mental disorder exists. Certain types of mental disorder are loosely referred to as insanity. However, for legal purposes, because insanity is such a loose concept and has neither legal nor medical significance, it will be better to refer to the type or degree of mental disorder which does have legal consequences as mental incompetency. As applied to contracts and wills, therefore, mental incompetency may be defined as that type or degree of mental unsoundness which is sufficiently pronounced to destroy contractual or testamentary capacity. In order to bring to a sharp focus the problem which is the subject-matter of the present article, let me reiterate the statements made in the opening paragraph, rephrased in terms of our definition of mental incompetency. Mental strength shades imperceptibly into mental weakness. Mental health shades imperceptibly into mental illness. Both mental weakness and mental illness vary enormously in degree. The law does not attach any significance *per se* to mental weakness nor to mental illness. But it does attach significance to mental weakness or mental illness if it is sufficiently pronounced. Hence the law draws a line, based upon degree or kind of mental disorder. If the mental disorder is of a type or degree to fall below this imaginary line it is mental incompetency and results in a destruction of contractual and testamentary capacity. Our problem is to examine the cases in order to determine where and how the law has drawn this line. Involved in this problem are such subsidiary questions as the following: What *degree* or *type* of mental disorder is required to produce mental incompetency? Is mental disorder that produces mental incompetency to be measured by a qualitative or a quantitative standard? Or both? Is the line which the courts have drawn between mental incompetency and normalcy a fixed line? Does it rise and fall with the judicial tide? Is it affected by a different setting in time and place? Is the line placed at the same level for all types of transactions? Is it

the same for contracts as for wills? Is it placed at a different level if the contract or will is a complicated one rather than a simple one? And, finally, what sort of a job have the courts done in drawing this line? This imaginary line which we are seeking to examine will be referred to hereafter as the judicial test of mental incompetency.

## II. Background

Before an analysis of judicial tests of mental incompetency is attempted it is desirable to become familiar, in a general way, with the causative factors which led to the formulation of the judicial tests which are now in use.

Early English law grew in a philosophical matrix which regarded mind and matter as two totally different types of existence. The mind or soul belonged to an entirely different realm than did material things. Hence mental disorder was a spiritual rather than a material phenomenon. Accordingly, mental disorder was explained in either one of two different ways: that the afflicted individual was "possessed" by evil spirits, or that his affliction was a visitation from God to punish him for his sins.[5] The important fact to be noted is that "mind" was regarded as a distinct thing, separate and apart from body or matter. Insofar as it had any occasion to discourse on the subjects of mind and mental disorder the early English law accepted this dualistic view. The judicial tests for mental incompetency, therefore, postulated an independent mind and attempted to define the strength of mind necessary for the making of a valid contract or will. Since mind was spiritual and incorporeal and hence incapable of direct objective observation, the formulated test was necessarily a subjective one. One author, referring to contractual capacity, states the test to be "whether the person whose contract is in question possessed sufficient mind to reasonably understand the nature of the act he was doing or the business he was transacting and the consequences thereof."[6] Lord Cockburn, referring to testamentary capacity, states the test to be

> ". . . that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affec-

5. Green, *Public Policies Underlying the Law of Mental Incompetency* (1940) 38 MICH. L. REV. 1189, 1194.
6. 1 WHARTON AND STILLE, *op. cit. supra* note 3, at 12.

> tions, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."[7]

It should be emphasized, and borne in mind, that the inquiry is into the *understanding* and *memory* of the individual whose jural acts are in question; it is an attempt to probe into the inner consciousness of the author of the contract or the will; it is the degree of *his* understanding or memory which is made crucial. In short, the test is purely and wholly subjective.

Modern scientific research has undermined the old dualistic conceptions of mind and mental disorder. Philosophers may and do still argue about the composition of the universe; whether there are two separate types of existence, namely matter and spirit, or whether there is only one, and whether that one is spirit or matter. But scientists, as distinguished from philosophers, are dealing with more proximate relationships, and do not trouble themselves too much about the ultimate questions concerning the nature of reality. We are here concerned with the two relatively new sciences of psychology and psychiatry, one dealing with the nature of the mind and the other dealing with the nature of mental disorder. Both of these two sciences, for methodological purposes, have discarded dualistic conceptions, and are proceeding along behavioristic lines.[8] The mind, consciousness and intelligence are intangibles which cannot be seen, photographed nor measured in a laboratory. They exist only, for scientific purposes, in conjunction with and as manifestations of the physical body. They are reflected only in the behavior of the individual. It is only behavior which can be observed, measured and analyzed objectively by laboratory methods. Therefore, although not catagorically denying the existence of an independent entity called the mind, psychologists and psychiatrists are largely ignoring its possible existence and instead are studying behavior. Hence, for the purposes of experimental psychology, the mind of an individual may be regarded as the sum total of his behavior. And for the purposes of the psychiatrist mental disorder may be regarded as behavior by an individual which appears to be abnormal when viewed

7. Banks v. Goodfellow, L. R. 5 Q. B. 549, 565 (1870).
8. See WOODWORTH, PSYCHOLOGY (3d ed. 1934) 3, 5; ALLPORT, SOCIAL PSYCHOLOGY (1924) preface; DASHIELL, FUNDAMENTALS OF GENERAL PSYCHOLOGY (1937) 24; HENDERSON AND GILLISPIE, A TEXT-BOOK OF PSYCHIATRY (3d ed. 1933) c. 2; SADLER, THEORY AND PRACTICE OF PSYCHIATRY (1936) preface.

against the framework of that individual's place in society. The psychiatrist, too, is studying abnormal behavior, not an abnormal mind.

Modern psychiatrists do not, of course, ascribe the cause of mental disorder to a visitation from God for one's sins or to demonological possession of the individual. Nor do modern courts. Modern courts have so far assimilated the modern scientific view of mental disorder that they regard a disordered mind as due to a diseased or disordered body.[9] However, although modern courts pay lip service to the thesis that a disordered brain is often the cause of a disordered mind, they have failed to revise their tests for mental incompetency. They do not, like the psychologists and psychiatrists, purport to be examining behavior—they still purport to be examining the "mind" of the individual, that distinct entity which exists separate and apart from the body. Judicial tests of incompetency still remain purely subjective.

One more point should be noted before we examine the judicial tests. Although these tests remain subjective, the law has made one important advance in its attitude toward mental disorder. In an earlier stage of our law the theoretical basis for invalidating the contract or will of a mental incompetent was that he did not have "mind enough" to do the jural act in question. A contract required the "meeting of the minds" of two individuals, and an insane person had nothing which the law recognized as a mind. Hence, there could be no "meeting of the minds."[10] A testamentary disposition could only be made by a person who had a will which could function, and an insane person was thought to be lacking in this mental attribute. Hence he could make no legal declaration of his "will."[11] However, many of our modern courts have adopted a new theoretical basis for invalidating the contracts and wills of mental incompetents. They regard the mental incompetent as one of a class who is in an obviously disadvantageous position with his contemporaries in society and therefore cast a cloak of protection about him by permitting him, or his legal representative, to avoid his contract. Likewise, they cast a cloak of

9. Hopps v. People, 31 Ill. 385, 390 (1863); Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592, 613, 42 N. W. 156 (1889); *In re* Estate of Ayers, 84 Neb. 16, 23, 120 N. W. 491 (1909); White v. White, 108 Tex. 570, 579, 196 S. W. 508 (1917).

10. As late as 1872 the Supreme Court of the United States used this language: "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such." Dexter v. Hall, 15 Wall. 9, 20 (U. S. 1873).

11. See CHAPLIN, WILLS (1892) 12; Converse v. Converse, 21 Vt. 168, 170 (1849).

protection around the dependents of a mental incompetent by permitting them to invalidate the incompetent's testamentary dispositions of his property.[12]

## III. Analysis of Judicial Tests

Where the issue of mental incompetency is involved in a case it is perfectly natural and proper that a court should seek the aid of a psychiatrist, inasmuch as he is an expert in the field of mental disorder. However, it does not logically follow that a court should adopt the same technique nor apply the same tests that a psychiatrist would apply to determine the question. Mental incompetency for legal purposes is a vastly different thing from mental disorder for psychiatric purposes. Many types and degrees of mental disorder which have significance in a medical sense are irrelevant in a legal sense.[13] They may call for therapeutic measures but not be severe enough to change legal relations. If we admit that the legal test for mental incompetency is and should be much lower than the medical or psychiatric test for mental disorder, we still are faced with the question whether the legal test should be different, not only in degree, but in kind. For the legal test is a subjective test, and the psychiatric test is an objective one. Whether or not the legal test may still function as an efficient tool in deciding cases involving mental incompetency becomes a very pertinent question. In the preceding pages I have referred to "judicial tests of mental incompetency" and the "legal test" as distinguished from the "medical or psychiatric test." From which it might be inferred that the courts had agreed upon a uniform test for legal purposes. Such, of course, is not the case, as the following analysis of some of the decisions will make clear.

### A. *In Relation to Contracts*

The so-called "understanding test" is the one usually employed by the courts in contract cases. One of the fairest and most accurate statements of this test by a text-writer is made by Black. He says:

> "The test generally agreed upon is this: A deed or contract cannot be set aside on the ground of insanity if the person had sufficient mental capacity to understand in a reasonable manner the nature of the particular transaction in which he was engaged and its consequences and effects upon his rights and interests. It

12. Green, *supra* note 5, at 1205-1220.
13. Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69 (1907); see also annotations in (1920) 7 A. L. R. 568, 602, (1922) 16 A. L. R. 1418.

> is sometimes said that a person has capacity to make a deed if he has sufficient mind to be capable of transacting ordinary business affairs, or of pursuing his own ordinary business in his usual manner. But this is too loose. The proper inquiry is whether he was capable of understanding and appreciating the nature and effect of the one particular act or transaction which is challenged."[14]

In its glittering generality this statement has a ring of fairness to it. It appeals. It is probably as accurate a generalization as could be made from the verbalization of the tests announced by the courts. But precisely because it does reflect the tests laid down by the courts, it is ambiguous, self-contradictory, and practically meaningless. The first phrasing of the rule in the above statement requires understanding "in a reasonable manner" the "nature" of the transaction and likewise its "consequences" and "effects." The last phrasing omits "in a reasonable manner" and substitutes "appreciating." It likewise omits "consequences." It is likewise admitted that some courts apply the "ordinary business test" which Black thinks is too loose.

As a matter of fact, if one reads the cases critically it will be found that no verbal formulation of a test can be made which will fit the standards laid down by the courts. So diverse is the phraseology of the test by courts in different jurisdictions, and even by various opinions within the same jurisdiction, that no single statement of a rule can be constructed which, if it has meaning, will not exclude a majority of the cases. For instance, some of the cases say the party must have "understanding,"[15] some say "*full* understanding,"[16] others "understanding in a reasonable degree,"[17] still others require "understanding and assent,"[18] some couple "understanding and deciding,"[19] while others couple "judgment and understanding."[20] Some courts as an element of competency require "deliberate judgment,"[21] while others require a "reasonable judgment."[22] Some say

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14. 2 BLACK, RESCISSION AND CANCELLATION (2d ed. 1929) 735. Another statement likewise by an able text-writer is: "And the test of capacity as to contracts generally is whether the person whose contract is in question possessed sufficient mind to reasonably understand the nature of the act he was doing or the business he was transacting, and the consequences thereof; or, as it is sometimes expressed, whether he was capable of transacting ordinary business and of acting rationally in the ordinary affairs of life." 1 WHARTON AND STILLE, *op. cit. supra* note 3, at 12.

15. *In re* Nightingale's Estate, 182 S. C. 527, 541, 189 S. E. 890, 896 (1937); Davis v. Phillips, 85 Mich. 198, 202, 48 N. W. 513 (1891).

16. Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 442, 170 Pac. 446, 448 (1918).

17. Pass v. Stephens, 22 Ariz. 461, 470, 198 Pac. 712, 715 (1921).

18. Collins v. Isaacs, 231 Ky. 377, 381, 21 S. W. (2d) 484, 486 (1929).

19. Wright v. Wright, 139 Mass. 177, 183, 29 N. E. 380, 382 (1885).

20. Mead v. Gilbert, 170 Md. 592, 603, 185 Atl. 668, 673 (1936).

21. Kilgore v. Cross, 1 Fed. 578, 583 (E. D. Ark. 1880).

22. Pledger v. Birkhead, 156 Ark. 443, 455, 246 S. W. 510, 515 (1923).

the person must have ability to "comprehend,"[23] while others say he must have the ability to "comprehend in a reasonable manner,"[24] and still others say he must "clearly comprehend."[25] As to what the person is supposed to comprehend or understand in order to be competent the courts are likewise in disagreement. It has something to do with the act involved, but it is variously expressed as "consequences,"[26] "natural consequences,"[27] "effect,"[28] "nature,"[29] and "nature and effect."[30]

To appreciate the real extent of the confusion of the courts in trying to formulate meaningless and unworkable tests one must browse extensively in the cases. One will see the courts groping for a rule, announcing it as one of general application, and then discarding it or grafting exceptions or modifications onto it. The process is endless. It will be illustrated here by giving examples from cases in representative jurisdictions, picked at random.

In 1921, the Arkansas Supreme Court arrived at the point (as most courts do sooner or later) where it said that there was no general rule by which to test mental incompetency—that each case would be influenced by its own peculiar circumstances.[31] However, two years later, when it held that a lower court was in error in setting aside two deeds, it formulated this test of competency: capacity to retain in memory without prompting the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration—to exercise a "reasonable judgment concerning these matters in protecting his own interest in dealing with another."[32] In two important respects does this test differ from the one which we have quoted above and which Black regarded as the general rule: in the first place, this smacks of "testamentary capacity"—to retain in memory the extent and condition of his property and to comprehend how he is disposing of it—and in the second place, it introduces as an element in mental competency the ability to protect one's self against another. The testamentary flavor may be

23. Mead v. Gilbert, 170 Md. 592, 185 Atl. 668 (1936); Travis v. Travis, 81 Fla. 309, 87 So. 762, 763 (1921).
24. Lozear v. Shields, 23 N. J. Eq. 509 (1872).
25. Hill v. Day, 34 N. J. Eq. 150 (1881).
26. Pass v. Stephens, 22 Ariz. 461, 198 Pac. 712 (1921).
27. Mead v. Gilbert, 170 Md. 592, 185 Atl. 668 (1936).
28. Dennett v. Dennett, 44 N. H. 531 (1863).
29. Lozear v. Shields, 23 N. J. Eq. 509 (1872).
30. Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921); Hill v. Day, 34 N. J. Eq. 150 (1881); *In re* Nightingale's Estate, 182 S. C. 527, 189 S. E. 890 (1937); Kaleb v. Modern Woodmen, 51 Wyo. 116, 64 P. (2d) 605, 608 (1937).
31. Hawkins v. Randolph, 149 Ark. 124, 131, 231 S. W. 556, 558 (1921).
32. Pledger v. Birkhead, 156 Ark. 443, 455, 246 S. W. 510, 515 (1923).

explained by the fact that, although the transaction involved was the execution of two deeds *for a consideration*, the grantees were stepsons, the consideration was insignificant, and the transaction in effect resembled a will. The new element which the court introduced, *i. e.*, ability to protect one's self against another, will be found in many other verbalizations.

In a California case we find the court laying down as the test of competency: was the plaintiff competent to deal with the particular contract in question *with a full understanding of his rights?*[33] If this test, especially the portion which I have italicized, were generally adopted and strictly applied, contracts could practically never be enforced in court, for what party to a contract *ever* has a *full* understanding of his rights? The explanation for its use in this particular case is clear—the plaintiff received personal injuries for which a jury awarded him damages in the sum of $7,500 (which the court said was not excessive). The defendant pleaded in defense a release which it had obtained from the plaintiff for $217 plus some false representations. Plaintiff sought to avoid the release for the reason (among others) that he was suffering from traumatic hysteria when he executed it, and hence was mentally incompetent.[34]

Many courts have realized the futility of laying down a general test in broad terms, and have, instead, said that the test is whether the person understood the nature and effect of the particular act in question.[35] Some courts have gone further and have subdivided the "particular act." For example, one court has said that (where competency to execute a mortgage was involved) the test is: at the time of the transaction (a) did the mortgagor understand that he was executing a mortgage, (b) did he know what property the mortgage covered, (c) did he know to whom it was mortgaged, and (d) did he know for what amount it was mortgaged?[36]

In any field of law it is, of course, not uncommon to have two or more divergent lines of authority on a particular point. However, one can us-

33. Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 442, 170 Pac. 446, 448 (1918).

34. It is only fair to say that the "test" laid down in this case does not represent the California rule—if it, or any other state, has one. Incompetency in this case was merely one of five grounds the court found for avoiding the release, the others being fraudulent misrepresentations, palpable mistake of law, undue influence (high pressure), and gross inadequacy of consideration.

35. In addition to the case of Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 170 Pac. 446 (1918), see: Nowlen v. Nowlen, 122 Ia. 541, 546, 98 N. W. 383, 384 (1904); Collins v. Isaacs, 231 Ky. 377, 381, 21 S. W. (2d) 484, 486 (1929); Davis v. Phillips, 85 Mich. 198, 202, 48 N. W. 513, 514 (1891); Lozear v. Shields, 23 N. J. Eq. 509, 511 (1872); Jennings v. Hennessy, 26 Misc. 265, 55 N. Y. Supp. 833, 835 (1899); Kaleb v. Modern Woodmen, 51 Wyo. 116, 124, 64 P. (2d) 605, 608 (1937).

36. Parker v. Marco, 76 Fed. 510, 513 (C. C. D. S. C. 1896).

ually sort out the jurisdictions and classify them as to which line they are following. Normally the rule will be consistent within the jurisdiction. Not so, however, in regard to standards of mental incompetency for contractual purposes. Within a single jurisdiction one will see the standard wax high and wane low, not once or twice, but again and again. Something is affecting the standard, and that something seems to influence the formulation of the test just as effectively as good or bad weather produces changes in a barometer.

As one illustration of the mercurial variability of a standard within a particular jurisdiction let us examine a group of five cases from Illinois. They range in date from 1866 to 1932. In the first case the court says that for a person to be mentally incompetent,

> "there must be that degree of mental derangement, or state of imbecility of mind, that induces the belief that the party is incapable of *fully comprehending* the effect and consequences of his acts, or, at least, that he is *so weak as to be almost a mere instrument in the hands of the person seeking to obtain the advantage.* On the contrary, if a person is capable of *reasoning correctly* on the ordinary affairs of life; or is capable of contemplating and understanding the consequences which usually accompany ordinary acts, he will be held *compos mentis* . . ."[37]

The inner inconsistency of this statement is apparent. As one element of competency it predicates capacity for "fully comprehending;" but in the next breath incompetency is not shown unless the party is "so weak as to be almost a mere instrument" in the hands of another; and next the test of reasoning correctly on the ordinary affairs of life is included.[38]

In the next case the rule is somewhat purged and narrowed:

> "So long as the complainant possessed the necessary mental faculties to transact rationally the ordinary affairs of life, he must not be relieved from the responsibility that rests upon the ordinary citizen. When the mind is so deranged that a person can not comprehend and understand the effect and consequences of an act, or the business in which he may be engaged, then the law will release him from his acts."[39]

Full comprehension is deleted, as is also the idea of being a mere pawn; the emphasis is now put upon the "ordinary business" test, with an eye on the particular act in question—still an antithesis.

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37. Baldwin v. Dunton, 40 Ill. 188, 193 (1866) (italics mine).
38. The inherent contradiction of the elements to be considered in determining mental incompetency under this rule reminds one of the same incompatibility of the elements to be considered in determining "fair value" under the "rule" of Smyth v. Ames, 169 U. S. 466 (1898).
39. Titcomb v. VanTyle, 84 Ill. 371, 374 (1877).

The next case reiterates the element of capability of transacting the ordinary business or affairs of life as being crucial, but it reinjects the factor that the person, to be held, must have the capacity to protect his own interests.[40] Following this, a case is decided which holds that a grantor in a deed is competent if he has "sufficient mental capacity to comprehend the nature of the transaction and protect his own interests."[41] The "ordinary business" element has disappeared.[42] In the final case of the series the element of capacity to protect his own interests is transmuted into mental strength sufficient to compete with an antagonist, and the court announces that the standard of competency varies according to the particular situation, *i. e.*, that mental weakness which would not alone be sufficient to avoid a contract may suffice if it is accompanied by undue influence, inadequacy of consideration, or a fiduciary relation.[43] On the whole, although the standard has undergone wide variation, this series of cases represents growth, but the test remains shadowy and ephemeral.

Supplementing the "understanding test" is the "insane delusion test." An insane delusion is generally considered to be a belief in the reality of facts which do not exist and in which no rational person would believe.[44] An insane delusion may or may not justify a court in avoiding a contract. Proof of an insane delusion will result in the avoidance of the contract if the delusion is intimately related to the subject matter of the contract.[45] It will not affect the validity of the contract if it is a delusion concerning a matter not connected with the transaction in question.[46] It is largely a question of whether or not the transaction was motivated by the delusion; if it was, then relief will be granted because of the improper motivation of the contract. Viewed in this light "insane delusion" is

40. Perry v. Pearson, 135 Ill. 218, 224, 25 N. E. 636, 637 (1890). The case also reverts to the requirement of a "full comprehension of the meaning, design, and effect of his [the alleged incompetents'] acts." Note that this is an even stronger statement than that found in the first case in the series, Baldwin v. Dunton, 40 Ill. 188 (1866).

41. Bordner v. Kelso, 293 Ill. 175, 183, 127 N. E. 337, 340 (1920). On page 186 of the opinion (p. 341 of 127 N. E.) the court also says the grantor will not be considered incompetent if he "fully comprehends" the meaning and effect of the deed, but immediately goes on to say: "It does not follow that because one does not understand all the legal phraseology of a contract that he is therefore incompetent to enter into it . . . Whether or not one understands the meaning of legal phraseology is a matter of education rather than mental competency."

42. However, the opinion details much of the evidence tending to show that the grantor was competent to transact other business.

43. Thatcher v. Kramer, 347 Ill. 601, 609, 180 N. E. 434, 437 (1932).

44. 1 WHARTON AND STILLE, *op. cit. supra* note 3, at 15.

45. Furry v. Bartling, 94 N. W. 471 (Ia. 1903); Riggs v. American Tract Society, 95 N. Y. 503 (1884); Aikens v. Roberts, 164 N. Y. Supp. 502 (1917).

46. McCambridge v. Daly, 109 N. J. Eq. 43, 156 Atl. 372 (1931).

analogous to fraud and undue influence as an invalidating agent. Thus where a husband had an insane delusion that his wife was having illicit relations with the local undertaker, and for that reason deeded all his property to one son, the court set aside the deed.[47] The Massachusetts Supreme Court approved this instruction to a jury:

> "The question is 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 . . . If the act is not inspired, moved by that particular delusion, it does not affect their transactions; nor would it affect a deed."[48]

Whether the insane delusion test be viewed as a corollary to the understanding test,[49] or as a separate and independent test for a different kind of mental disorder, both viewpoints are alike in that they are subjective, they are standards to be used in measuring non-observable inner mental states. The insane delusion test is less subject to variety of statement and to consequent confusion than is the understanding test—perhaps for the reason that the insane delusion cases make up but a small fraction of the bulk of mental incompetency cases.

### B. *In Relation to Wills*

In the will cases the courts are dealing with a situation differing from the contract complex in this, that the statutes which give the right of testation require as a condition precedent to the exercise of that right that the testator have a "sound and disposing mind and memory."[50] No such statutory requirement ordinarily exists in regard to contracts. In view of this difference it might be supposed that a higher standard of mental competency would be required to make a will than to enter into a contract, but, as we shall see, such is not the case. It might also be

47. Eubanks v. Eubanks, 360 Ill. 101, 195 N. E. 521 (1935).
48. Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75 (1898).
49. This view is possible where the court, in phrasing the "understanding test" includes as an element "reason" or "rational;" in such case if a person is suffering from an insane delusion in regard to the subject matter of the contract, he cannot understand it in a reasonable or rational manner. However, many of the courts in applying the test use "understanding" in its lowest sense: if the person knows the piece of paper he is signing is a deed he "understands." Under this interpretation, the "insane delusion test" is an additional and independent one.
50. The right to make a will is a right created by statute. 1 PAGE, WILLS (2d ed. 1926) 37. Although the first wills act granted the right to everyone without qualification as to sanity, two years later the statute was amended to exclude idiots "or any person *de non* sane memory." 34 and 35 Hen. 8, c. 5, § 14 (1542), amending 32 Hen. 8, c. 1 (1540). Modern legislation generally specifies that a testator must have a sound mind, or sound mind and memory, or sound and disposing mind and memory. 1 PAGE, at 230.

supposed that because wills are more or less stereotyped,[51] while contracts are rich in variety, that the courts would have worked out a more uniform test of mental incompetency for the execution of wills. This supposition finds some support in the cases, but not as much as one would imagine, despite numerous *dicta* to the contrary. Our examination of the cases might well start with a *dictum* which asserts this so-called uniformity.

> "The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value. What is needed is a sensible, practical test, intelligible to a jury. Rejecting any arbitrary tests, and looking at the mental capacity necessary in the light of the thing to be done, viz., the making of a will, the courts now have generally reached a fairly uniform definition of testamentary capacity in the absence of special statutes. It is thus stated in Gardner on Wills, 100, sec. 31: 'A testator has a sound mind, for testamentary purposes, only when he can understand and carry in mind, in a general way, the nature and situation of his property, and his relations to the persons around him, to those who naturally have some claim to his remembrance, and to those in whom, and the things in which, he has been chiefly interested. He must understand the act which he is doing, and the relation in which he stands to the objects of his bounty and to those who ought to be in his mind on the occasion of making his will' . . . In Rood on Wills, § 111, a like rule is laid down, and it is added: 'The essential matter is power to remember; failure in fact to remember all these elements does not make the will void.' "[52]

The mental qualities which this test requires for mental competency are "understanding" and "carrying in mind," *i. e.*, memory. In regard to the latter, power to remember is the essential—actual memory is immaterial. The things to be understood and remembered are (and note that the understanding and remembering need be only "in a general way") (a) the nature and situation of his property, (b) his relations to the persons around him, and (c) to those who naturally have some claim to his remembrance, (d) the persons and things in which he has been chiefly interested, (e) the act which he is doing, *i. e.*, making a will, (f) the relation in which he stands to the objects of his bounty, and (g) to those who *ought* to be in his mind. However, after setting out this "uniform test" the court thereafter remarks[53] that where the testator leaves his property to strangers to the exclusion of his wife and children, the will should be closely scrutinized *and slight additional evidence of aberration of intellect may serve to set it aside!*

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51. Not as to content, but as to the formalities required for execution.
52. Slaughter v. Heath, 127 Ga. 747, 751, 57 S. E. 69, 71 (1907).
53. *Id.* at 756, 57 S. E. at 73.

The "uniform test" as announced by the Georgia court required understanding and memory only "in a general way." Yet the same court, in a later case, required as an element of the test of competency "a clear and full understanding."[54]

Another court,[55] in an opinion written about the same time as the first Georgia opinion, drawing its test from a different text-writer,[56] says that in order for a testator to have testamentary capacity he must possess mind to know (a) the extent and value of his property,[57] (b) the number and names of the persons who are the natural objects of his bounty,[58] (c) their deserts with reference to their conduct and treatment toward him, (d) their capacity and necessity,[59] and (e) that he shall have sufficient active memory to retain all of these facts in his mind long enough to have his will prepared and executed.[60]

The Arkansas court requires retention in memory "without prompting."[61] It does not refer to the "nature and situation" of the property, nor to its "extent and value," but instead uses "extent and *condition.*" The California test refers to the "nature and situation" of the property, and in one case[62] the test is phrased to require a "*clear* remembrance," while in another[63] *mere* understanding is sufficient, but the testator must be capable of disposing of his property *intelligently.* In Illinois if the testator has the capacity to know the *extent* of his property, the natural objects of his bounty and of understanding the "nature and effect" of the act of executing the will, he is competent.[64]

In Indiana a statute provided that "every contract, sale, or conveyance" of a person of unsound mind was void.[65] This statute was

54. Whitehead v. Malcom, 161 Ga. 55, 129 S. E. 769 (1925). However, this is not a clear-cut case of testamentary capacity, as the suit was brought for construction of a paper to determine whether it was a deed or a will, and for the purpose of cancelling the paper on the ground that the author of it was a mental incompetent.
55. Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956 (1910).
56. 1 WOERNER, *op. cit. supra* note 4, at 31.
57. Note the difference between this and "nature and situation."
58. Possibly a higher requirement than the corresponding element in the Georgia case.
59. This is a new element, not found in the Georgia "uniform" test.
60. Note that the "memory" required is much more specific, and that it must be "active;" note also that memory of persons and things in which he has been chiefly interested is omitted.
61. Puryear v. Puryear, 192 Ark. 692, 694, 94 S. W. (2d) 695, 696 (1936).
62. *In re* Huston's Estate, 163 Cal. 166, 170, 124 Pac. 852, 854 (1912).
63. *In re* Holloway's Estate, 195 Cal. 711, 732, 235 Pac. 1012, 1022 (1925).
64. Hoskinson v. Lovelette, 365 Ill. 21, 27, 5 N. E. (2d) 219, 222 (1936). Some cases say the testator must understand the "nature and elements" of the will: see Turner's Appeal, 72 Conn. 305 (1899).
65. IND. STAT. ANN. (Baldwin, 1934) § 3470.

held not to cover the execution of a will, and it was further held that even where a person had been adjudicated a mental incompetent and a guardian had been appointed for his person, this merely made a *prima facie* case of incompetency which might be rebutted.[66] It does seem a bit strange that formal adjudication of incompetency would not result in more than a *prima facie* case against the existence of a "sound and disposing mind and memory" required by the wills statute. Yet the case is not a freak. In a decision affirming the lower court's action in admitting a will to probate, the Oregon Supreme Court held that adjudication and appointment of a guardian prior to the execution of the will made merely a *prima facie* case of incompetency which was rebutted successfully by other evidence in that case.[67] In a New York case the testator spent the last thirty-two years of his life in a hospital for the insane; he made a will after he had been "in" for sixteen years; in reversing the lower court and remanding the case with directions to admit the will to probate, the court said that inasmuch as the testator had never been formally adjudicated, his mere confinement in a hospital for the insane was only *prima facie* evidence of insanity.[68] But we digress from tests.

Iowa requires not only intelligent knowledge of the property and the natural objects of the testator's bounty, but also requires for competency an intelligent exercise of *judgment* and *discretion* in the disposition of the property.[69] Kentucky adds two new elements, sensibilities and a fixed purpose:

> "It is as necessary, in order to have testamentary capacity, for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate, and a fixed purpose to dispose of it."[70]

The verbal formulation of the test by the courts in Pennsylvania sets an unusually high standard. There a "sound mind and disposing memory" connotes "a full and intelligent knowledge" of the testator's property, and "an intelligent perception and understanding of the disposition he

66. Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069 (1892).
67. Collins v. Long, 95 Ore. 63, 186 Pac. 1038 (1920).
68. *In re* Stephani's Will, 250 App. Div. 253, 294 N. Y. Supp. 624 (1937). Some courts make a distinction between the legal effect of committing a person to a hospital for the insane and of appointing a guardian or committee for him. See Finch v. Goldstein, 245 N. Y. 300, 157 N. E. 146 (1927).
69. *In re* Johnson's Estate, 222 Ia. 787, 793, 269 N. W. 792, 795 (1936).
70. McDonald's Ex'rs. v. McDonald, 120 Ky. 211, 217, 85 S. W. 1084, 1085 (1905). The "fixed purpose" element is peculiar to Kentucky. Greer's Ex'r. v. Bishop, 265 Ky. 352, 354, 96 S. W. (2d) 851, 853 (1936).

desires to make of it.''[71] However, this high standard tends to be off-set by the fact that incapacity must be established by the *manifest* weight of the evidence, and that the court will regard the evidence as a whole ''in a light most favorable to validity'' of the will.[72]

In will cases, as in contract cases, the courts have supplemented the ''understanding test'' by the ''insane delusion test,'' on the theory that while a testator may measure up to the standard of the ''understanding test'' he may yet be a monomaniac on one subject which served as the improper motivation of the disposition of the property made in the will. As one court defined it, an insane delusion

> ''. . . is a belief which is the spontaneous product of a diseased mind which comes into existence without reason or evidence to support it, and which is adhered to against reason and against the evidence.''[73]

If an insane delusion invalidates because it serves as the improper motivation of the disposition of the testator's property, it follows that the improper motivation may be due either to an insane antagonism toward or dislike of certain natural objects of the testator's bounty, or to an insane preference for or partiality toward one who is not a natural object of the testator's bounty.

As examples of the first type, the following instances may be given. An unnatural and unwarranted distrust of the testator's daughter resulting in virtual disinheritance.[74] The insane belief of the testator, originating after his wife's death, that the contestant was not his son, also resulting in virtual disinheritance.[75] Likewise, where a testatrix disinherited her husband because, entirely without reason or evidence to support it, she believed he was indiscriminately untrue to her and that his hospital (he being a doctor) was a whore-house, the court said the record ''forces the conclusion that the testatrix was suffering from an insane delusion.''[76] In a Missouri case a daughter contested her mother's will. The ''insane delusion'' which she sought to prove was that the mother believed it was wrong for any of her children to marry and leave home.

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71. *In re* Lawrence's Estate, 286 Pa. 58, 65, 132 Atl. 786, 789 (1926).
72. *Ibid.*
73. *In re* Sandman's Estate, 121 Cal. App. 9, 13, 8 P. (2d) 499, 500 (1932).
74. *In re* Huston's Estate, 163 Cal. 166, 124 Pac. 852 (1912).
75. Davis v. Davis, 64 Colo. 62, 170 Pac. 208 (1918).
76. *In re* Kaven's Estate, 279 Mich. 334, 338, 272 N. W. 696, 698 (1937). Also having a bearing on the court's opinion in this case was the fact that the estate of the testatrix consisted chiefly of what the contestant, her husband, had given to her.

The court, expressing regret that it was required so to rule, held the belief to be no insane delusion.[77]

As examples of the second type of delusion the cases on religious monomania furnish a good illustration. Courts are sympathetic to the claims of contestants in cases where testators have made no provision in their wills for their families but instead have given their estates to religious organizations. However, courts are also loath to stamp as delusions any particular types of religious beliefs. As one court said, courts are not equipped to determine whether religious views are true or false but:

> "There is, however, a broad distinction between any religious belief and insane delusions which may grow out of such belief and control the testator in the disposition of his property; and this distinction applies alike to all religious beliefs and denominations."[78]

Wills which are the product of strong beliefs in spiritualism, especially where the testator felt constrained to follow alleged instructions from the spirit world as to the terms of the will, have frequently been set aside.[79] However, even where a religious delusion exists it may be unrelated to the terms of the will and therefore of no legal significance,[80] or the court may feel that evidence of the delusion was not sufficiently strong.[81]

An interesting case arose in Wisconsin in which the testator was obsessed with the idea that his divorced wife could still get his property. This obsession influenced the provisions of the will. The supreme court reversed the lower court (which had denied probate) because the delusion was merely an erroneous view of the law and hence not an "insane delusion."[82]

### C. *A Differential Standard*

Like death and taxes, the temptation to over-generalize is always with us. It is apparent in the tests for mental incompetency which the courts

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77. Stevens v. Meadows, 340 Mo. 252, 100 S. W. (2d) 281 (1937).
78. Irwin v. Lattin, 29 S. D. 1, 10, 135 N. W. 759, 763 (1912).
79. *In re* Sandman's Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932); Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197 (1897); O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736 (1907); Irwin v. Lattin, 29 S. D. 1, 135 N. W. 759 (1912).
80. Guarantee Trust and Safe Deposit Co. v. Heidenreich, 290 Pa. 249, 138 Atl. 764 (1927).
81. Donovan v. Sullivan, 296 Mass. 55, 4 N. E. (2d) 1004 (1936). For an interesting article on the cases dealing with spiritualism, see Lee, *Psychic Phenomena and the Law* (1921) 34 HARV. L. REV. 625.
82. *In re* Jacobson's Will, 223 Wis. 508, 270 N. W. 923 (1937). *Quaere*, is the court influenced by the law of mistake, and hence distinguishing between delusions of fact and delusions of law?

have laid down. It would be so simple, artistic and satisfying if a test could be devised which would fit every case. The courts have struggled nobly to formulate such a test, and we have examined a portion of the results. However, in their efforts to find a test capable of general application the courts have not been blind to the inherent differences existing in various types of situations.

They have phrased the standard applicable to contracts and deeds in different terms from the standard applicable to wills. The difference in phraseology indicates an implicit difference in the functions of the two types of transactions. Some courts have not let the difference remain implicit, but have explicitly said that a different *degree* of competency is required for the execution of a contract than is required for the execution of a will. The California Supreme Court, in explicitly recognizing that it takes less mental capacity to make a valid will than it does to make a valid contract, said: "The law does not require the same degree of capacity to make a will as is required to execute any other legal instrument."[83] In Colorado, there is a direct holding to the effect that a judgment in one case that the testator did not have mental competency to execute a will is *res judicata* on the question of his contractual capacity in another case,[84] the theory being that if he did not have the mental capacity to execute a valid will *a fortiori* he did not have the mental capacity to execute a valid contract. Georgia recognizes the distinction.[85] Illinois squints in the same direction when its court of appeals held that a statute making all contractual acts of an adjudicated incompetent void did not apply to a change of beneficiary in a life insurance policy.[86] The Iowa Supreme

83. *In re* Holloway's Estate, 195 Cal. 711, 733, 235 Pac. 1012, 1021 (1925).

84. James v. James, 85 Colo. 154, 274 Pac. 816 (1929).

85. Potts v. House, 6 Ga. 324, 352 (1849). In this case the court said, concerning testamentary capacity (p. 350): "Still, I find no acknowledged standard of 'weights and measures' by which to regulate this as well as all similar investigations. We apprehend that this thing, from its very nature, is incapable of being fixed and determined. All attempts to draw the line between capacity and incapacity have ended where they began, namely: *in nothing.*" Later on (p. 352) the court says: ". . . it would seem that a mere *glimmering of reason* would be sufficient to sustain a will." For later Georgia cases on the proposition that it takes less mental capacity to make a will than it does to enter into a contract see: Slaughter v. Heath, 127 Ga. 747, 754, 57 S. E. 69, 72 (1907); Whitehead v. Malcom, 161 Ga. 55, 56, 129 S. E. 769, 770 (1925).

86. New York Life Ins. Co. v. Schlieper, 284 Ill. App. 411, 2 N. E. (2d) 169 (1936). Here the statute (ILL. REV. STAT. ANN. (Smith-Hurd, 1935), c. 86, § 14) provided: "Every note, bill, bond or other contract by an idiot, lunatic, distracted person or spendthrift, made after the finding of the jury, as provided in Section 1 of this Act, shall be void. . . ." The court, in holding that this statute did not apply to a change of beneficiary in a life insurance policy, said: "It does not appear to this court that these sections of the statute are in any way applicable to the matter involved here. In the first place it does not appear to us that the changing of a beneficiary in an insurance policy constitutes a

Court "concedes" that it takes greater mental capacity to make a contract than to make a will.[87] In Kentucky a deed was construed not to vest a beneficial interest until after the grantor's death, which the court said,

> ". . . did not destroy the effect of the conveyance as a deed, [but] it did have the effect to make it testamentary in character, and therefore did not require the same mental capacity to execute it as is required in one made between parties dealing at arm's length for an agreed consideration."[88]

A number of courts have repudiated the idea that testamentary capacity was to be equated with capacity to transact the ordinary business affairs of life, and have said that even though a person was no longer able to transact such ordinary business affairs and was unable to manage his estate he still might possess the mental capacity to make a will.[89]

A few courts have stated that even within a single type of transaction[90] a different degree of mental competency is required to execute a simple instrument than would be required for the execution of a complex instrument.[91] If his position is sound, it naturally follows that no general test or standard of mental incompetency can be formulated unless that test is: did the person whose mental condition is in question have sufficient mentality to understand *the particular business* in which he was engaged and which is now challenged? From a realistic standpoint that is always the issue; cases are concrete; and general tests have not proved very helpful. Some courts have, from time to time, shown a tendency to abandon the idea of general tests and to ask merely: did the individual have mind and memory sufficient for the transaction of the particular business in question?[92]

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contractual act, but rather is analogous to the making of a testamentary disposition of one's property."

87. Sutherland State Bank v. Furgason, 192 Ia. 1295, 1310, 186 N. W. 200, 206 (1922).

88. Wood v. Moss, 176 Ky. 419, 426, 195 S. W. 1077, 1080 (1917). See also, Rounds v. Rounds, 220 Ky. 98, 101, 294 S. W. 785, 786 (1927), where the court refers to "the well-recognized rule that it requires less mental capacity to make a valid will than to make a valid conveyance." For a *dictum* to the same effect see, *In re* Lawrence's Estate, 286 Pa. 58, 65, 132 Atl. 786, 789 (1926).

89. Stubbs v. Houston, 33 Ala. 555 (1859); Turner's Appeal, 72 Conn. 305, 44 Atl. 310 (1899); *In re* Sexton's Estate, 199 Cal. 759, 251 Pac. 778 (1926); Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069 (1892); Sutherland State Bank v. Furgason, 192 Ia. 1295, 186 N. W. 200 (1922) (holding one may have mental capacity to execute a deed although lacking mental capacity to do business generally).

90. *E. g.*, contract, deed, will, *etc.*

91. Parker v. Marco, 76 Fed. 510, 514 (1896), wherein the court, quoting Mr. Justice Field in Dexter v. Hall, 15 Wall. 9 (U. S. 1872), said that it was evident that a very different degree of capacity is required for the execution of a complicated contract than for a simple one. To the same effect see Seerley v. Sater, 68 Ia. 375, 376, 27 N. W. 262, 263 (1886).

92. Coffey v. Coffey, 74 Ill. App. 241 (1897); Seerley v. Sater, 68 Ia. 375, 27 N. W. 262 (1886).

However, when we reach this point we no longer have any standard or test. Each case is *sui generis* and can serve as a precedent for no other, as no two cases are identical. This solution is no more helpful, in trying to determine in advance how a case is going to be decided, than would a similar "rule" be helpful in negligence cases, *i. e.,* merely submitting to the jury in each case the question, "was the defendant negligent?" We are faced with a dilemna. We instinctively feel the justice of the proposition that each case is in a sense *sui generis,* and yet we feel also that there must be some general rule that will act as a guide, at least set outside limits. The problem is not unique in this field of the law; it exists wherever the law is compelled to draw a line between liability and non-liability, or responsibility and non-responsibility. It becomes so poignant here merely because we have no objective sign-posts to guide us. But have we none? Not as long as we are seeking to inquire into the inner non-observable mental processes of another—not as long as our standard or test of mental incompetency remains purely subjective.

## IV. An Inarticulate Behavioristic Standard

Notwithstanding the behavioristic approach of modern psychology and psychiatry the judicial tests of mental incompetency have remained subjective. An analysis of the cases enunciating these tests shows that the law on the subject is in a state of apparent irreconcilable conflict. Would this conflict be resolved if the law abandoned its subjective tests and, following the lead of psychology and psychiatry, adopted objective or behavioristic tests? It is, of course, impossible to tell without actually trying the experiment.

Even though courts still profess to be inquiring into the inner non-observable mental qualities of the alleged incompetent and are thus purporting to follow a subjective test, they are nevertheless and of necessity applying an objective standard of behavior. True, the real standard by which the courts judge mental incompetency remains inarticulate, but a little reflection will demonstrate the fact that, although professing to follow a subjective test the courts are in fact guided by an objective one and are essentially behavioristic, just as psychiatrists are. Let us look at the methodology of our law. Like the psychiatrist, the court is trying to determine the degree or type of mental disorder of a particular individual.[93]

93. It is true that the *degree* of mental disorder which the court will consider legally relevant is different from the *degree* of mental disorder which a psychiatrist would consider relevant, but otherwise the inquiry is the same.

Although the court may adopt the materialistic hypothesis to the extent of ascribing the origin of mental disorder to physical causes, yet in the standard which it lays down it is implicitly rejecting the materialistic hypothesis—it is assuming the existence of a psychic entity called "mind." Having adopted this standard—usually phrased in terms of the "understanding test"—the court then tries to determine the inner mental state of the individual. Did this individual have the ability to understand in a reasonable manner the nature of the contract? Did this individual have mind and memory sufficient to comprehend the extent of his property, to understand who were the natural objects of his bounty, and to know how he wanted his property to be distributed after his death? These are the types of inquiries the courts are setting for themselves. These are things that (in our present state of knowledge) courts can never find out.[94] They can *infer,* from the behavior of the individual, what the state of his mind was, but they can never know. The task which they have set themselves is an impossible one. But then, what do the courts actually do? They base their judgments, just as the psychiatrists do, upon the behavior of the person investigated, only they do not admit they are doing it. Having examined (from the evidence produced at the trial) the behavior of the individual, insofar as that behavior was revealed to the court, the judge (or jury) then passes upon the question as to whether or not that behavior conformed to the standard set by the law. Since the standard is phrased in terms of mind, and not in terms of behavior, the fact finder draws the necessary inference of the state of the individual's mind from his observed behavior. In other words, he must translate his actual finding into the language of the standard which has been set up. But the fact remains that what is actually happening is that judges, no less than psychiatrists, are employing an essentially behavioristic technique. The difference lies in the fact that the judges do not do it deliberately, but still conduct their inquiry as if they were not examining behavior, but instead were scrutinizing mind. Such a process is bound to result in confusion. It is reflected in the fact that the law in relation to mental incompetency has remained in such a state of hopeless conflict. The few principles of anything like general application which can be induced from the reported cases are altogether too vague to be very helpful in predicting the outcome of any particular concrete case.

94. The phantasm of today may become the reality of tomorrow. Current scientific inquiries into extra sensory perception and telepathy may ultimately make available new techniques. See Professor Rhine's popular book, NEW FRONTIERS OF THE MIND.

It used to be said that a contract was formed by the "meeting of the minds" of the two contracting parties. This idea has long since been exploded. The law does not require the minds of the parties actually to meet in order for a contract to be formed; it is sufficient if the external symbols (words) which the parties use to express their thoughts coincide.[95] Many enforceable contracts are formed where the minds of the parties never met at all but where there was an acceptance by one of the symbols used by the other. Usually the symbols used by the other parties have a well recognized meaning and hence each party understands what the other is talking about. However, even the meaning of the symbols used is determined objectively. This is strikingly illustrated by the cases holding that where particular words used in a contract have acquired a settled and plain meaning, parol evidence is not admissible to show that they were used by the parties in a different sense.[96] In such a situation the courts are obviously employing an objective standard. The objective theory of contracts, which seeks to protect the expectations of the promissee, reasonably aroused, is proceeding upon a behavioristic basis.[97] It is scrutinizing the conduct of the promisor from an objective viewpoint to see if it was of such a character as to arouse reasonable expectations.

I have stated that courts, although not admitting it, are using a behavioristic approach to the issue of mental incompetency.[98] Let me illustrate. Where a court must pass on the question of mental incompetency, where does it get its data? From two sources: first, evidence of the be-

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95. HOLMES, THE COMMON LAW (1881) 309: "If, without the plaintiff's knowledge, Hodgdon did understand the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligations must be measured by his overt acts." Holmes, J., in Mansfield v. Hodgdon, 147 Mass. 304, 306, 17 N. E. 544, 547 (1888). See also Preston v. Howell, 219 Ia. 230, 238, 257 N. W. 415, 419 (1934), where the court said: "This court has repeatedly held that mental assent to the promises in a contract is not essential."

96. Jaqua v. Witham & Anderson Co., 106 Ind. 545, 549, 7 N. E. 314, 317 (1886), wherein the court says: "The question was not what may have been the intention of the defendant in the premises, but what was the real meaning of the terms employed by him, when considered in the light of the circumstances under which they were so employed." See also Fawkner v. Lew Smith Wall Paper Co., 88 Ia. 169, 55 N. W. 200 (1893); Inman Mfg. Co. v. American Cereal Co., 133 Ia. 71, 110 N. W. 287 (1907).

97. See 1 WILLISTON, CONTRACTS (Rev. ed. 1936) 9, 17, 25, 30-39; Ferson, *The Formation of Simple Contracts* (1924) 9 CORN. L. Q. 402; Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE L. J. 169, 204; RESTATEMENT, CONTRACTS (1932) §§ 3, 20. For a criticism of the objective theory see Whittier, *The Restatement of Contracts and Mutual Assent* (1929) 17 CALIF. L. REV. 441.

98. The idea that the methods of the law are inherently behavioristic is, of course, not new. See Malan, *The Behavioristic Basis of the Science of Law* (1922) 8 A. B. A. J. 737, and (1923) 9 A. B. A. J. 43. For comments on the behavioristic approach to the law of contracts, see Cohen, *The Basis of Contract* (1933) 46 HARV. L. REV. 575, 577.

havior of the individual, and second, opinions of witnesses as to the sanity of the individual.[99] A reading of the cases will convince one that courts rely upon the evidence of behavior infinitely more heavily than they do upon the opinion evidence. Opinion evidence is of two types: opinions of lay witnesses, and opinions of expert witnesses. In regard to the former, courts uniformly disregard the opinion of a lay witness as to sanity unless the witness is in a position to detail the behavior observed upon which he based the opinion.[100] Even then the opinion is given slight, if any, weight. Likewise, courts have been notoriously discourteous to experts in allowing scant weight to their opinions.[101] Here again, the opinion must be based upon the behavior of the individual, either personally observed by the expert or related to him.[102] Case after case can be found where courts have paid utterly no attention to the opinions of experts because the behavior of the individual, as detailed by lay witnesses, pointed in the opposite direction.[103]

I have indicated elsewhere that psychiatrists are interested in the entire personality of the individual, that they are interested in that personality viewed in the light of its location in its social environment, and that the psychiatric conception of mental disorder may be viewed as the dislocation or non-integration of a personality with its social environment.[104] An analysis of the cases will show, I believe, that courts are moving along

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99. In a will contest the testator is dead and it is therefore impossible for him to take the witness stand and testify as to his own mental condition at the time he executed the will. In contract cases, however, the author of the instrument may and sometimes does take the stand and testify. This might seem to indicate that under such circumstances the court has a third source of information, *i. e.*, the testimony of the party himself as to his mental condition. However, a moment's reflection will convince one that here is in fact no exception to the statement made in the text. If the author of the instrument testifies that he was insane at the time he executed it he is merely stating his opinion which may be counterbalanced and overcome by other evidence. Also, strictly speaking, his testimony is nothing more nor less than his present vocal behavior. It gives the court or fact trier a first hand picture of the behavior of the individual being investigated—nothing more.

100. For an excellent history of the "opinion rule" and its exceptions, see 4 WIGMORE, EVIDENCE (2d ed. 1923) § 1917, pp. 100-109; see also *id.*, § 1922, pp. 117-118; for the application of the "opinion rule" to sanity, see *id.* at §§ 1933-1938, pp. 127-139.

101. For a court's castigation of medical opinion evidence on insanity in a will case see Cookson's Estate, 325 Pa. 81, 188 Atl. 904 (1937).

102. Wigmore describes as expert witnesses those "who are sought for their *special skill* in drawing inferences or making interpretations upon data either observed by themselves or furnished by others." 4 WIGMORE, EVIDENCE (2d ed. 1923) 118.

103. Puryear v. Puryear, 192 Ark. 692, 94 S. W. (2d) 695 (1936); Estate of Collins, 174 Cal. 663, 164 Pac. 1110 (1917); Des Moines Nat. Bank v. Chisholm, 71 Ia. 675, 33 N. W. 234 (1887); Callis v. Thomas, 154 Md. 229, 140 Atl. 59 (1928); Davis v. Phillips, 85 Mich. 198, 48 N. W. 513 (1891); Guarantee Trust Co. v. Heidenreich, 290 Pa. 249, 138 Atl. 764 (1927).

104. Green, *supra* note 5, at 1199-1200.

the same lines, although their major premises are as yet largely inarticulate.

This may be illustrated by a glance at the scope of the evidence which is admissible in a case upon the issue of mental incompetency. Wigmore states:

> "The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue."[105]

The entire personality of the individual is assuredly in issue in these cases. Likewise, it is recognized as competent to inquire into the social environment. In will cases the testator's general position in society is relevant, the position which he occupied toward legatees, devisees and other possible objects of his bounty, friendly or hostile relations with them, the nature, extent and source of his estate, the financial condition of beneficiaries actual or potential under the will, *etc.*[106] In contract cases the inquiry may take in relations existing between the parties, by blood, confidence or fiduciary ties, or the absence of any such elements, the improvidence of the bargain, *etc.*[107] Evidence of adjustment or non-adjustment of the individual to his environment will be received, such as success or failure in previous enterprises, change in mode of life, habits, eccentricities, and the like.[108]

## V. Conclusion

Mental disorder, if sufficiently pronounced, results in mental incompetency. Mental incompetency has the legal effect of destroying contractual and testamentary capacity. In any case where the issue of mental incompetency is presented the court must use a test to determine whether

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105. 1 Wigmore, Evidence (2d ed. 1923) 473, § 228.

106. Fountain v. Brown, 38 Ala. 72 (1861); Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956 (1910); Crandall's Appeal, 63 Conn. 365, 28 Atl. 531 (1893); Barbour v. Moore, 10 App. D. C. 30 (1897); Galloway v. Hogg, 167 Ga. 502, 146 S. E. 156 (1928); Maher v. Maher, 338 Ill. 102, 170 N. E. 221 (1930); Ramseyer v. Dennis, 187 Ind. 420, 116 N. E. 417, 119 N. E. 716 (1918); *In re* Lawrence's Estate, 286 Pa. 58, 132 Atl. 786 (1926).

107. Campbell v. Lux, 146 Ark. 397, 225 S. W. 653 (1920); Hawkins v. Randolph, 149 Ark. 124, 231 S. W. 566 (1921); Kilgore v. Cross, 1 Fed. 578 (C. C. E. D. Ark. 1880); Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921); Thatcher v. Kramer, 347 Ill. 601, 180 N. E. 434 (1932); Wilkie v. Sassen, 123 Ia. 421, 99 N. W. 124 (1904).

108. Pledger v. Birkhead, 156 Ark. 443, 246 S. W. 510 (1923); Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956 (1910); Barbour v. Moore, 10 App. D. C. 30 (1897); Parker v. Marco, 76 Fed. 510 (C. C. D. S. C. 1896); Maher v. Maher, 338 Ill. 102, 170 N. E. 221 (1930); Thatcher v. Kramer, 347 Ill. 601, 180 N. E. 434 (1932); Lawrence's Estate, 286 Pa. 58, 132 Atl. 786 (1926).

or not the individual in question falls above or below the line indicated by the test. As in every situation where the law must draw a line between liability and non-liability, between responsibility and non-responsibility, there will be borderline cases, and injustices may be done by deciding erroneously that a particular individual belongs on one side of the line rather than the other. To minimize the chances of such injustices occurring, the line should be drawn as clearly as possible. In cases involving mental incompetency the line is anything but clear. It is sometimes difficult to tell whether it is a line or merely a smudge. There is a reason for this. The standard by which mental incompetency is determined by the courts is a purely subjective one. It has no referent in the outside world. It is infinitely more vague than the standard of the hypothetical "reasonably prudent man" in negligence cases. It is a standard impossible to apply. It is a standard which defies accurate verbal formulation. And yet, with such a clumsy tool placed in their hands,[109] courts seem to have applied it to hew out a just result in a great majority of the cases. How is this possible? The answer seems to be that the orthodox judicial tests of mental incompetency have become largely a matter of ritual. They are formulated, they are solemnly intoned, and they are largely disregarded by the courts themselves. The actual decision of the case is based upon an inarticulate behavioristic objective standard. If this inarticulate objective standard could be dissected out of the cases, and formulated, it is possible that much of the irreconcilable conflict in the cases dealing with the subject could be resolved.

109. Note, however, the tool was of their own making.