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THE STATUS OF MENTAL INCOMPETENTS IN CIVIL CASES IN MISSOURI

BEN ELY*

I. INTRODUCTION

The term status as used in this article means the inclusion of an individual in a limited class or group, the members of which, solely because of their membership, possess certain rights, powers, or immunities, or are subject to certain liabilities or disabilities which other persons in society do not possess, or to which they are not subject.¹ In systems of laws other than our own and in the early stages of our legal evolution status groups were numerous. The consequences of membership therein were of great importance. Among such status groups may be mentioned slaves and serfs, nobles, burgesses, and married women. Today the concept of status has a much more limited legal significance. But several status groups continue to exist. The one with which we are here concerned is that of mental incompetents. In many statutes and judicial decisions the term insanity is employed as synonymous with mental incompetence.² It must be stressed that mental incompetence is, and by its very nature must be, a legal term rather than a term of medical science. It is the task of legislatures and courts to define the standards and establish the criteria to be applied in determining whether or not an individual belongs to this particular status group, and therefore possesses legal relations with the other members of society which differ from those of persons outside the group. In establishing such standards and criteria, however, some attempt must be made to use terms meaningful to psychologists and psychiatrists since these scientists must be called upon as experts to give testimony in each case. The term insanity has lost favor among the mental scientists. The preferred term now is mental illness. This term, however, is not easy to define. It is a relative term rather than an absolute. Whether we define perfect mental health as being a condition of perfect adaptation of the individual

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1. See BOUVIER, *LAW DICTIONARY*, *sub verb*. Note that this differs from the definition of status given in the American Law Institute's *RESTATEMENT, CONFLICTS OF LAW*, § 119 (1934).

2. In the older textbooks and treatises the term lunacy is frequently used, but fortunately has now fallen into disfavor.

to his environment or an ideal perfection of the mental faculties, it is obvious that no human being ever attains a condition of complete and perfect mental health. It is equally difficult if we speak in terms of conformity to a standard of normality since this requires a knowledge of what the completely normal would be. We can pass from this assumed condition of complete mental health to that of a complete breakdown of all mental powers and disintegration of the personality by a series of steps. Between each of these steps the line of differentiation is so hazy as to defy exact definition. The whole line constitutes a continuum or spectrum.³ In each class of cases the law must draw a line somewhere along the length of the continuum placing on one side the individuals who are to be classified as competent and on the other those who are to be classified as incompetents.

We shall see that this line of demarcation has been drawn differently in different fields of the law. It will, therefore, be necessary to examine separately several different classes of cases in which the line of demarcation is drawn. With respect to each class we will have to ask two questions. First, what standards of "mental competence" has the law established for this particular group of cases? Second, what legal consequences in this particular field of the law follow from the inclusion of an individual in the class of incompetents? The present paper does not directly concern itself with mental incompetence as a defense for crime. Yet the criminal law must be referred to occasionally as it has affected the law in civil cases.⁴ Nor will we attempt to catalogue and discuss all of the various fields of the civil law in which the mental competence of the individual is an important factor. We will select only some of the most important classes of cases in which this question arises.

II. CASES OTHER THAN WILL CASES IN WHICH THE PROBATE COURT EXERCISES JURISDICTION

Aside from the question of testamentary competence, the probate courts are called on to make adjudications in matters involving the mental condition of a party under two statutes that, although somewhat inter-related, are quite separate and distinct. The first type of cases involves the involuntary commitment to a hospital, clinic, or mental institution of

3. MENNINGER, *THE VITAL BALANCE*, 1963, Chs. 5 and 6.

4. See for example Hoedemaker, "*Irresistible Impulse*" *A Defense in Criminal Law*, 23 WASH. L. REV. 1 (1948); Sobeloff, *From McNaughten to Durham and Beyond*, 15 MD. L. REV. 93 (1955).

mentally ill patients, and is governed by the mental health law found in sections 202.780 to 202.880, RSMo 1959. The second involves an adjudication of mental incompetence and the consequent appointment of the guardian of the person or estate or the person and estate of the adjudicated individual. It is based on Chapter 475 of the Probate Code.

In limini it must be remembered that the probate court, although a court of record, is one of limited jurisdiction. Its jurisdiction must be derived solely from the provisions of Section 16 of Article V of the Missouri Constitution of 1945 which reads as far as here pertinent: "[T]here shall be a probate court in each county with jurisdiction of all matters pertaining to probate business . . . the appointment of guardians and curators of minors and persons of unsound mind." This constitutional provision does not appear to confer on the probate court the power to commit a mentally ill individual for involuntary hospitalization without appointing a guardian. The great social importance of that type of procedure makes it probable that the courts will construe it liberally and will uphold the present statutory provisions on the ground that they are a mere extension of the guardianship powers expressly conferred on the probate court.⁵

A. *Involuntary Hospitalization*

The mental illness statute (sections 202.780 to 202.880, RSMo 1959) empowers the probate court to order the commitment of certain mentally ill persons to public or private hospitals or similar institutions for care, examination, and treatment without their consent. Several procedures are provided, but with one exception they are preliminary and emergency procedures only. Each of these emergency procedures envisions a final determination after a formal hearing in the probate court in which the rights of the alleged incompetent to due process of law are fully protected. This formal procedure in the probate court, spoken of as "standard judicial procedure," is regulated by section 202.807, RSMo 1959, and contains the criterion we seek. It provides that the order of hospitalization may be made if the court finds that the proposed patient is (a) mentally ill, (b)

5. In the case of *State ex rel. Fuller v. Mullinax*, 269 S.W.2d 72 (Mo. 1954), the Supreme Court held certain provisions of the original mental health act unconstitutional without passing on the question above suggested. The act was then amended by the legislature to avoid the objections ruled on in the *Fuller* case. The case of *Williams v. Pyles*, 363 S.W.2d 675 (Mo. 1963) pointed out the difference between commitment to a hospital and adjudication, but did not discuss the constitutional question here raised.

in need of custody, care or treatment in a mental hospital, and (c) because of his illness lacks sufficient insight or capacity to make responsible decisions with respect to his hospitalization. Before examining this criterion, we must note the effect which the order of hospitalization has on the legal status of the person hospitalized.

Under section 202.847, RSMo 1959 it is expressly provided that the committed individual retains all of his "civil rights" including the right to make contracts, dispose of his property, vote, etc. But there is a limitation on these rights. Apparently if the head of the hospital determines that the exercise of these rights would impair the patient's treatment, he may impose restrictions on their exercise. Thus the extent of these basic legal rights is subject to the exercise of a power in someone else, and is thereby cut down. There is, of course, an all important disability imposed on the patient. His liberty to move about as he desires and to leave the hospital if he desires is taken away.⁶

Now let us examine the operative facts that are required by the statute to be shown before this restriction of the patient's rights may be imposed. He must be mentally ill. As we have seen, that conception in itself is somewhat nebulous and hard to define. Yet it may be no more difficult for a competent medical practitioner to state that a man is suffering from mental illness than for him to say that he is physically ill. The next requirement is that the proposed patient's mental illness is of such a nature that its cure or amelioration requires treatment in a hospital rather than out-patient treatment. It is the committing court which must determine whether this fact exists or not. But in the ordinary case, the court will be guided by the medical testimony. Again it should not be much more difficult for competent physicians skilled in the field of mental disease to determine that the patient needs hospital treatment for a mental illness than for other physicians to determine that a patient needs hospitalization for pneumonia or for a heart condition. The final criterion which must be met, however, is more difficult. When has the patient's mental condition sufficiently deteriorated so that he lacks capacity to determine for himself whether or not he needs hospitalization? When a physician tells a patient who has pneumonia that he needs to be in a hospital, the final choice must be left to the patient. The patient is presumed to have sufficient judgment, that is, ability to weigh conflicting considerations and desires, and sufficient control of his own volition to say that he will or will

6. Comment, 114 U. PA. L. REV. 1067 (1966).

not go into a hospital. In the present case, however, it must be found that the patient's mental illness has taken away his judgment faculty or the exercise of his free will to the extent that his choice to stay away from the hospital will not be a responsible one. Only then is the power to make that choice for him vested in the probate court.⁷

We must reiterate that the order of involuntary hospitalization does not effect that individual's ownership of property, his right to contract, or to acquire or to dispose of property, to appoint agents, or even to make a will.⁸ Nor does such a judgment of the probate court empower the court to appoint a guardian either of the person or estate of the respondent in the proceeding.⁹ The appointment of a guardian, regardless of whether a hospitalization order has been made or not, requires an entirely different probate court proceeding which we shall now consider.

B. *Adjudication and Guardianship*

It has long been recognized that certain individuals possessing mental defects or suffering from mental illnesses are unable to manage their ordinary business affairs or to control and manage their property. For many centuries the court of chancery exercised jurisdiction to determine the general competency of "imbeciles and lunatics," and after adjudication of incompetency to appoint a committee to take over the possession and management of the lunatic's estate and the custody of his person.¹⁰ Almost

7. In some jurisdiction at least the attention given to the delicate task of balancing the interest of the patient in his own liberty of movement against the necessity of involuntary hospitalization is given far too prefatory consideration. See MENNINGER *op. cit. supra* at 311.

8. However it has been intimated that a judgment under the mental illness act gives rise to an inference that the condition of mental illness then found to exist continues in the future unless the evidence shows to the contrary. *Murphy v. Murphy*, 358 S.W.2d 778 (Mo. 1962); *Williams v. Pyles*, 363 S.W.2d 675 (Mo. 1963). But since the mere fact of mental illness does not in itself disqualify an individual from making a will, query as to whether the order of hospitalization in itself could raise any inference as to the individual's incompetence to make a will.

9. It is the practice of many probate courts in Missouri to combine the two proceedings in one case. To do so the allegations of the petition and its prayer should cover both matters. Better practice would be to treat the two proceedings as separate. In the incompetency proceeding a jury trial must be had if either party requests it. This is not true in the hospitalization proceeding at least in the probate court trial.

10. By statute of 17 Edward II, the Crown was made the guardian of imbeciles and lunatics. The king exercised this portion of his prerogative through the Lord Chancellor. Proceedings were instituted in which a jury was summoned to determine whether the person inquired about was an imbecile or a lunatic. An imbecile was one who from birth was deprived of his mental faculties. The test seemed to have been whether he knew such common things as the

from the beginning in Missouri, this jurisdiction was exercised by the same court or courts vested with ordinary probate jurisdiction.¹¹ The jurisdiction of the probate court is now exclusive. It is granted to that court by the constitutional provision above quoted. It is implemented by a statute contained in Chapter 475 of the Probate Code. That chapter governs the appointment of guardians of incompetents and of minors. It contains a series of specific provisions under which the court, after hearing with all safeguards required by due process, may enter a decree declaring the respondent to be "incompetent" after which a guardian is to be appointed by the court.¹² The duties and powers of this guardian, who acts under the supervision of the court, are carefully set out and defined. It is beyond the scope of the present article to discuss those duties and powers in detail. Here again we are concerned with the criteria for a determination of incompetency under the statute and the diminution in the status of the individual resulting from the adjudication.

The constitutional provision from which the probate court derives its power speaks of the appointment of guardians for persons "of unsound mind." This is merely an English translation of the Latin phrase *non compos mentis* which went back at least to the time of Sir Edward Coke. The same language was used in the Missouri Constitution of 1875.¹³ The

names of his parents, the date, and the place where he was found. We would now speak of him as one who lacked orientation as to person, time, or place. A lunatic was one who by reason of disease had lost these faculties. See I BLACKSTONE, COMMENTARIES 301.

11. The history of probate jurisdiction in Missouri is set forth in detail in LIMBAUGH, *MISSOURI PRACTICE* 570 (1935). Mo. CONST. art. V, § 1 (1820) vested judicial power "in a supreme court, in a chancellor, in circuit courts and in such inferior tribunals as the general assembly may, from time to time, ordain and establish." By § 10 the court of chancery was given jurisdiction in all matters of equity and a general control over executors, administrators, and guardians of minors. While no specific reference was made to guardians of incompetents, this must have been included in the general equity powers since this jurisdiction had been exercised for many centuries by the court of chancery. One year later the Constitution was amended to abolish the court of chancery and to vest its jurisdiction in the supreme and circuit courts. Section 12 gave the legislature power to establish inferior tribunals in each county to have probate jurisdiction. Mo. CONST. art. VI, § 1 (1865) created the supreme, district, and circuit courts and gave the legislature power to create inferior courts. The Constitution of 1875 first created probate courts on a constitutional basis, giving them jurisdiction over the appointment of guardians. During the period before 1875 probate jurisdiction was generally vested in the county courts, although in certain counties special probate courts were provided. By a series of statutes beginning in 1835 (Section 44 of the chapter in regard to "insane persons" and Section 15 of the chapter on courts) the county courts were given power to appoint guardians of "insane persons" and to control the conduct of such guardian.

12. § 475.075, RSMo 1959.

13. Mo. CONST. art. VI, § 34 (1875).

earlier statutes required that the person adjudicated should be "of unsound mind and incapable of managing his affairs."¹⁴ Section 475.030, RSMo 1959 provides that letters of guardianship may be issued "for any person adjudged incompetent." In section 475.075, RSMo 1959 and the subsequent sections regulating procedure on hearing, again the term used is "incompetent." For a statutory definition of that term as used in Chapter 475, however, reference must be had to section 457.010, RSMo 1959. "An incompetent is any person who is incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both." Note that this statutory definition does not employ the constitutional phrase "unsound mind." However, the incapacity of the individual to care for his person or property must arise from "insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity." In view of the constitutional requirement, it must be assumed that the above enumerated conditions amount to "unsoundness of mind." There is another particular in which this definition departs from the requirements of previous statutes. Under those statutes it was required that the court find that the respondent, in addition to being of unsound mind, was incapable of managing his affairs.¹⁵ The present definition requires only that by reason of his mental illness he be incapable of either managing his property or caring for himself or both. In the ordinary case in which the individual is capable of managing his property but incapable of caring for himself the proceeding would be instituted under the mental illness law. Therefore we ordinarily would be dealing in these adjudication proceedings with a person who was mentally ill and therefore incapable of managing his property. While the language is somewhat different, the meaning is probably about the same as that used in the former act "incapable of managing his affairs." Thus the definitions of this phrase found in the older cases are probably still applicable. The courts have frequently said that mere defect of memory as to recent events or mere eccentric behavior is insufficient to warrant adjudication and appointment of a guardian.¹⁶ In the case of *In Re Delany*¹⁷ the St.

14. See, for example, the following definition from § 458.010, RSMo 1949: "For the purpose of this article, wherever the words 'person of unsound mind' or 'insane person' occur therein, said words shall be construed to mean either an idiot, or a lunatic, or a person of unsound mind and incapable of managing his own affairs, as the case may be, upon proof as aforesaid."

15. *Burke v. McClure*, 211 Mo. App. 446, 245 S.W. 62 (K.C. Ct. App. 1922).

16. See cases collected in annotation 9 A.L.R.3d 774 (1967).

17. 226 S.W.2d 366 (St. L. Mo. App. 1950).

Louis Court of Appeals said that the proper standard to be applied was:

To say that one is of unsound mind in a legal sense imports not merely a weakness of understanding, but a total deprivation of it; and there is no basis for an adjudication that one is of unsound mind and incapable of managing his affairs unless it is shown that his powers of reasoning and comprehension have been so far destroyed or reduced by mental weakness resulting from one cause or another that he is incapable of knowing and appreciating the nature and consequence of his acts in respect to his own conduct and the management of his property.

Again in *In Re Bearden*¹⁸ the Springfield Court of Appeals used the following language: “[T]here may exist impairment of the mind, confusion, and lack of clear understanding of reason, yet if there exists sufficient reason and clearness of mind for an understanding of the nature of his act or acts, in the ordinary transactions of life, . . . the jury might find him of sound mind and capable of managing his own affairs.” The essential principal to be deduced from these quoted definitions is this: If the individual is “capable” of understanding and appreciating what he is doing in transacting his business affairs, he is not incapable of managing his property within the meaning of the statute. Yet certain words of caution are necessary. It has been said that mere defect of memory does not itself create incompetency. Yet some ability to remember essential facts at least for a short time must enter into the mental processes of an individual engaging in business. If his business involves the sale of real or personal property for example, he must be capable of remembering something about what the property costs or what similar property sells for on the market. Also the capability of an individual to manage his affairs is somewhat relative to the type of affairs he has to manage. If the person involved is in control of large financial operations and his day to day living depends thereon, certainly a larger degree of judgment and memory is necessary than would be required of a day laborer who has very little property of his own, receives only small wages, and is required to perform only routine tasks.

Consider the manner in which these applications of the proper standard are to be raised in court. The initial inquest is conducted by the probate court and may be tried without a jury unless one is demanded by a party. Usually the proceeding ends there. It may, however, be appealed to the

18. 86 S.W.2d 585 (Spr. Mo. App. 1935).

circuit court where in the absence of a jury request it will be tried to the judge sitting as a chancellor. Perhaps in a majority of cases there is no jury trial, but in a substantial minority there is. Where the case is tried without a jury, perhaps no detailed statement of the standard is necessary. The judge of the court involved is simply confronted with the rather usual problem of balancing conflicting interests. He must weigh the normal desire of every human being to manage his own affairs against the necessity of protecting him against grossly improvident conduct occasioned by his mental weakness. He must consider the magnitude of the danger to the person under inquiry himself, to the other members of his family, and to society in general which may be involved if he is allowed to remain in charge of his own affairs. And he must weigh against this the undesirability of taking a paternal attitude and in unduly restricting individual liberty merely because the tribunal believes that someone else could do a better job than the man is able to do for himself. The admonitions contained in the cases against considering mere lapses of memory, eccentric behavior, or intelligence below the common average as establishing unsoundness of mind are sound and should always be kept in mind. Perhaps no further or more detailed analysis of the standard can be or should be attempted.

Where the case is tried to a jury, some instruction as to the law is necessary. This cannot be done in the probate court but must be done in the circuit court through instructions. *Missouri Approved Jury Instructions* has not provided an appropriate form. Perhaps an instruction in the language suggested in the *Bearden* case would be adequate. Some cautionary instructions may be necessary because of the common propensity of juries to believe that they are more capable of managing other people's business than are the parties directly concerned. Yet even here there is danger in going beyond the very language of the statutory definition.

C. Legal Consequences of Adjudication

Chapter 475, RSMo 1959 provides for the appointment of a guardian of the person as well as the guardian of the estate, and such guardian of the person is given custody over the incompetent.¹⁹ He cannot cause the involuntary hospitalization of the incompetent without resorting to the procedures provided under the mental illness law as discussed above. The

19. Section 475.120, RSMo 1959. This section was adopted prior to the present version of the mental illness act. As far as it permits the compulsory institutionalization of the ward it may have been superseded by the later act. C.F. § 475.355, RSMo 1959.

principal effect of the adjudication will, therefore, be upon the property rights and other so called civil rights of the incompetent. Title to the incompetent's property remains in him, but the guardian is vested with the right of possession and management.²⁰ He is to receive and account for all income from such property whether it be rent, interest, dividends, or profits. He may, with the consent of the court and after a proper showing, sell the property or lease it or mortgage it.²¹ The incompetent no longer has the power to enter into valid contracts.²² There is some question as to his power to make a will. He cannot appoint an agent. He cannot institute a lawsuit in his own behalf except through his guardian. If he be sued the guardian would defend the action. He is without power to vote. If at the time of adjudication he holds public office, he is automatically removed therefrom.²³ Thus his status as a free individual is drastically diminished.

III. CONTRACTS

While a deed or other instrument of gift or transfer of real or personal property is actually something different from a contract,²⁴ the two classifications may be considered together. The first distinction which must be noted is that between a contract made by a person who has been adjudicated incompetent under Chapter 475, RSMo 1959 and one made by a person who, while he has not been so adjudicated, is actually mentally infirm at the time he performed his jural act.²⁵

As has been noted, the Probate Code makes the contract, deed, or transfer made by an adjudicated incompetent absolutely void unless consented to by the guardian and the court. We, therefore, turn to the second class. It is said that the contract of one who is actually incompetent although not adjudicated is voidable rather than void.²⁶ Thus if a contract is executory only, it may be enforced by the incompetent against his mentally normal opposite number. But there are exceptions even to the avoidability of the

20. § 475.130, RSMo 1959.

21. §§ 475.175, .220, .230, RSMo 1959.

22. § 475.345, RSMo 1959.

23. § 475.350, RSMo 1959.

24. An instrument of conveyance either of real or personal property is usually based upon a contract or itself embodies some of the terms of the contract. Yet it is the operative fact which destroys the complex of jural relationships constituting ownership of the transferor and creates a similar complex in the transferee.

25. Compare 29 Am. Jur., *Insane Persons*, § 66 with 29 Am. Jur., *Insane Persons*, § 67.

26. *Rubenstein v. Dr. Pepper Co.*, 228 F.2d 528 (8th Cir. 1955) (Decided under Missouri law).

contract. If the mentally normal individual does not know of the mental incompetence of the one with whom he is dealing, the latter cannot avoid the contract without restoring the status quo. If the consideration has been actually given by the normal person, it must be restored by the incompetent who has not yet performed his side of the bargain, but seeks to avoid responsibility therefor.²⁷ Of course, if the incompetent has transferred property to a normal individual who in turn has transferred to a bona fide purchaser for value, no restitution from the latter may be had.²⁸ There is a further exception. This is when a normal individual has furnished the necessities of life to a non-adjudicated incompetent. Here the normal party may recover by way of restitution from the incompetent the reasonable value of the necessities so furnished.²⁹

We turn now to the standard of incompetency to be applied in these contract cases. A further sub-classification has been adopted by the courts. The standard differs in those cases where the two parties deal at arm's length from that applied where the transaction is in essence a gift by the incompetent to the normal individual.³⁰

A. Arm's Length Contracts

What is the standard of mental incompetence to be applied where an alleged incompetent has entered into an arm's length business contract with a mentally normal person which the incompetent seeks later to avoid? The formula given by the Missouri courts seems to be rather uniform. In *Messer v. Helfer*³¹ the court laid down the rules as follows: "Mere peculiarities or eccentricities of the grantor do not make a deed invalid, if he had sufficient capacity to understand the nature and effect of the transaction."³² However, this does not tell the whole story.

27. See *Rubenstein v. Dr. Pepper*, *supra* note 26.

28. Note, 32 *Col. L. Rev.* 504 (1932).

29. This is possibly true even where the necessities have been supplied to one who has been adjudicated. See *Tock v. Tock*, 120 *S.W.2d* 169 (Spr. Mo. App. 1938).

30. *Schneider v. Johnson*, 351 *Mo.* 245, 207 *S.W.2d* 461 (1948); *Edinger v. Kratzer*, 175 *S.W.2d* 807 (Mo. 1943); *Farr v. Lineberger*, 207 *S.W.2d* 455 (Mo. 1948).

31. 278 *Mo.* 416, 212 *S.W.* 896 (1919).

32. *Cf.* *Brann v. Missouri State Life Ins. Co.*, 226 *S.W.* 48 (Mo. 1920); *Chadwell v. Reed*, 198 *Mo.* 359, 95 *S.W.* 227 (1903) (actually involving a gift transaction but treated by the court as an arm's length transaction); *Cutler v. Zollinger*, 117 *Mo.* 92 (1893); *Masterson et al v. Sheahan*, 186 *S.W.* 524 (Mo. 1916). (It is not clear whether the court treated this as a gift or a business transaction. The case involved a delusional complex which, however, did not affect the action of the grantor in this instance.) See also *Brucken, Mental Illness and Contracts*, 57 *MICH. L. REV.* 1021 (1959).

It may be possible that the mentally ill individual, while having sufficient memory and judgment to understand that the instrument he signed is a contract or a deed, may not have sufficient powers of reasoning to appreciate the value of the consideration he is getting or of the right with which he is parting. Suppose the case of a weak minded individual—not merely a foolish one—who parts with a building worth a hundred thousand dollars for five thousand dollars simply because he is mentally incapable of knowing the respective value of the building and the consideration. Perhaps in most of those cases the decision would rest on the ground of fraud or undue influence³³ rather than mental incompetence. This is because of the reluctance of the courts to set aside a contract for inadequacy of consideration. If the contracting party was by reason of mental disease, incapable of knowing the value of the thing with which he is parting and that which he is getting for it, a court of equity should not hesitate to decree avoidance of the contract on restoration of the status quo.

B. Gift Transactions

With regard to the gift transaction, the courts have frequently said that the rule to be applied is the same that would be adopted in a will case.³⁴ This is in some respects looser and in some respects more stringent than the rule above stated in regard to arm's length contracts. The analogy of the gift contract and the will is a close one. In each case the testator or grantor receives no consideration and therefore his capacity to bargain is immaterial. In each case his gift or devise disposes of property which would otherwise have gone on his death to his heirs by intestate succession. It would seem quite proper therefore to apply the same standard of mental capacity to the two transactions.

IV. WILLS

No person has an inherent and natural right to devise or bequeath his property. Such a right is given by statute only, and in the State of Missouri the statute creating the testamentary power is section 474.310, RSMo 1959. That section gives testamentary power to all persons "of sound mind" over the age of eighteen. Previous statutes³⁵ made distinctions between men and women and between the devise of real estate and bequest of

33. *Bushman v. Bushman*, 279 S.W. 122 (Mo. 1925).

34. Cases cited in note 30 *supra*.

35. See § 468.130 and § 468.140, RSMo 1949.

personal property, but all of them used the same phrase "of sound mind." Neither the present statute nor its predecessors attempt to define the term.

A general definition of testamentary capacity which is pretty well accepted in all Anglo-Saxon jurisdictions is set out as follows:

A testator, at the time of executing his will, must have sufficient mental capacity to know the natural objects of his bounty, to comprehend the kind and character of his property, to understand the nature and effect of his act, and to make a disposition of his property according to some plan formed in his mind.

Soundness of mind means ability of the testator mentally to understand in a general way the nature and extent of his property, his relation to those who naturally have a claim to benefit from the property left by him and a general understanding of the practical effect of the will as executed.^{35a}

Some Missouri cases say that in addition to the requirements stated above, the testator must have sufficient mental capability to "understand the ordinary affairs of life."³⁶ If this proposition be sound, it would mean that in the first instance we must apply to the testator the same criterion of mental soundness that is applied in the guardianship cases. The proposition could be put in more logical terms by stating that no person who is incapable of conducting the affairs of life is capable of making a will. But if that were true, it would also follow that no person is capable of making a will who is incapable of entering into an arm's length contract. But the courts have frequently said that a lesser degree of mental ability is required for the making of a will than for the making of a business contract.³⁷ Hence, it follows that the statements contained in these decisions do not represent the law of Missouri. The sole criteria of testamentary capacity in this state are those set out in the basic definition quoted at the beginning of this section.³⁸ Perhaps we should make an exception even to that rule because, as will appear from our subsequent discussion of delusions, courts require that the testator shall be exercising his own free will in performing the testamentary act.

35a. 57 Am. Jur., *Wills*, p. 81.

36. *Ahmann v. Elmore*, 211 S.W.2d 480 (Mo. 1948); *Benoist v. Murrin*, 58 Mo. 307 (1874).

37. *Crossan v. Crossan*, 169 Mo. 631, 70 S.W. 136 (1902), *Crowson v. Crowson*, 172 Mo. 691, 72 S.W. 1065 (1903).

38. *Winn v. Grier*, 217 Mo. 420, 117 S.W. 48 (1909); *Gibony v. Foster*, 230 Mo. 106, 130 S.W. 314 (1910).

In further examining the basic definition, we must have in mind the purpose to be accomplished by the requirement of testamentary mental competence. Here again we are balancing interests. While the members of a decedent's family have no natural right to inherit his property,³⁹ at least in the case of near kin such a desire is normal. To a certain extent this interest is recognized and taken into consideration by the law. But there is a countervailing interest of the owner of property in his ability to control its devolution after his death. He may have a strong feeling that his statutory heirs at law should not receive his property but that some other person or institution should get it. The ability to accomplish that result may be of great emotional importance to him. Since the adoption of the earliest statute of wills, the law has considered that the interest of the decedent in his ability to control the devolution of his property outweighs the desire of his kin to inherit. The only exception is for the special rights which have always been accorded his surviving spouse, and are now accorded to his unmarried minor children. But this recognition of the controlling importance of decedent's power to devise his property can be given effect only where his choice is free, and is based on an understanding of the meaning of the testamentary act.

A testator can understand what he is doing in making a will only if he knows what property he is devising. Hence, the requirement that he must have mental ability to know the general nature and extent of his estate. Certainly this does not mean that he must know every item of property which he possesses. If that were the requirement, only persons of very limited means could qualify. Also very few testators are capable of determining with any degree of exactness the true value of each item of property. All that is required is that the testator be mentally capable of forming a general idea of the kind of property he possesses, and of forming a fairly reasonable conception of its value. If he has such general knowledge of his estate, he must also be capable of knowing at the time he signs his will that it designates the persons who, on his death, will receive his estate or the part thereof mentioned in the will.

He is also required to have enough mind to know the "objects of his bounty." He must be able to know who the persons are to whom he is

39. Even that arch-conservative, Sir William Blackstone, in the 18th Century expressed this principle in the following language: "Accurately and strictly speaking, there is no foundation in nature or in natural law . . . why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him." II BLACKSTONE, COMMENTARIES, Ch. 1.

leaving his property and who the persons are who would get the property if he did not make a will. This does not mean that he has to understand the statute of descents. He must simply know that he is taking the property from the members of his family or some of them and giving it to someone else. Note that there is no requirement that the testator actually knows either the nature of his estate or the objects of his bounty. He must simply be mentally capable of knowing these things. Conscious memory consists in the ability to call into present actual consciousness things which have been perceived in the past. Until the act of volition is performed they are stored in the preconscious or foreconscious part of the mind. Where these previous experiences of perception have been repressed because of some internal conflict, the act of voluntarily bringing them into consciousness is at least temporarily completely inhibited. Furthermore certain purely anatomical conditions of the nervous system can prevent the active recall of things known in the past. These inhibitory conditions whether anatomical or psychological make memory in the ordinary sense impossible. If the testator cannot remember either the nature and extent of his property or the identity of the objects of his bounty or the persons who will be deprived of that property by the making of that will, his testamentary act is not intelligently performed and cannot be validated by the law.

We have stated above that the testator must act voluntarily. The testamentary act must be the product of his own free choice. For many centuries theologians, philosophers, and psychologists have debated the question of determinism versus free will. Many thinkers, either on philosophical or scientific grounds, have insisted that the idea of free choice is a mere illusion. The alleged scientific grounds on which determinism was supposed to rest have recently been subjected to considerable criticism and doubt. Many equally capable thinkers in all fields have always adopted the indeterminate philosophy. The law has always accepted the proposition that mentally normal individuals are possessed of free will. If that fundamental assumption be denied, our whole law of contracts and much of our law of torts would have to be abandoned or rewritten. Therefore, in this field of testamentary capacity we are entitled to assume that mentally normal individuals are capable of exercising a free choice. We are justified in requiring that the testamentary act be an exercise of such power of free choice.

If the complete freedom of the testator's will is interfered with by the *undue* influence of someone else, the will is not his own and will have no legal effect. A discussion of when influence is undue lies outside the scope

of this article. But we note that some testators who have the general mental capacity to know their estate and the objects of their bounty are so mentally weak as to be abnormally susceptible to suggestion. Here the mental condition of the testator, although not disqualifying him per se from the making of a will, may be and often is a factor to be considered in determining whether or not the testamentary act was produced by undue influence.

A special group of cases has considered the effect on testamentary capacity of delusions or of a delusional complex.⁴⁰ Psychology and psychiatry have long recognized the existence of delusions as a symptom of mental illness. Many of the decisions use the expression monomania or partial insanity as equivalent to the term delusion or delusional complex. Those terms are not in accordance with modern scientific thought. The following scientific definition of a delusion has been given: "A delusion may be defined as a fixed false belief out of which an individual cannot be argued by appealing to his reason or judgment."⁴¹ This is not very different from the definitions found in the Missouri decisions. But this is not to say that the presence of delusions constitutes a peculiar type or class of insanity. Rather the delusions are a symptom or syndrome appearing at certain stages in the decay or disintegration of the human mind. Always they are caused by underlying internal conflicts which bring about an imbalance or disassociation of the personality. It is to be noted that the group of false beliefs forming the delusional complex must be differentiated from a mere mistake or mistaken idea. A testator may believe, for example, that a child who purports to be his son is not really his son in the biological sense at all. Shakespeare put into the mouth of Prospero in answer to his daughter's question, "Art thou indeed my father?" the words, "Thy

40. *Benoist v. Murrin*, 58 Mo. 307 (1874); *McGrail v. Rhoades*, 323 S.W.2d 815 (Mo. 1959); *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962); see Annot., 9 A.L.R.3d 1 (1967).

41. 3 *LAWYERS' MEDICAL CYCLOPEDIA* 5 (1958) (Article by Frank J. Curran, M.D.). Compare HART, *THE PSYCHOLOGY OF INSANITY* (1929). Closely connected with delusions are hallucinations which are defined as follows in 3 *LAWYERS' MEDICAL CYCLOPEDIA* 5 (1958): "A hallucination may be described as a false sensory perception involving any of the five senses. In this condition there is no actual external stimulus. For example, a person may say that he hears voices talking to him when no one is around to talk to him, and there is no radio program in the vicinity." The true delusion as distinguished from a mere mistaken idea is a part of the disassociation of the personality brought about by a conflict between the id and the super ego causing a repression of unwanted memories and ideas. Cf. Menninger *op. cit. supra* at 226; Southard, *On the Application of Grammatical Categories to the Analysis of Delusions*, 25 *PHILOSOPHICAL REVIEW* 424-455 (1916).

mother did protest as much." The difference between a mere mistaken belief and a delusion is that the latter is the result of disorder and disintegration of the mind. Its objective distinguishing characteristics are the complete lack of any logical foundation, and that the person holding the delusional belief cannot by any logical process be persuaded to abandon it. But here we are in serious danger. It often happens that one man may hold a belief which seems completely illogical to others but which may turn out to be true. The history of science is replete with illustrations. Aristarchus, Copernicus, and Bruno in asserting that the earth revolved around the sun rather than the sun around the earth ran counter to the accepted belief of everyone else at the time. The latter lost his life for adhering to that belief. Our measure of normality can hardly be conformity to generally accepted opinion. Hence the courts properly have been very hesitant to brand a fixed belief as a delusion. This reluctance has been particularly strong where the belief lay within the field of religion and spiritual matters. Yet delusions do actually exist. The patient who insists that he is really Napoleon Bonaparte or that she is Queen Elizabeth I obviously is evidencing a syndrome of mental illness. One characteristic which is often present is a complete failure of connection between the ideas contained in the delusional complex and the other behavior of the individual. The patient who insists that she is Queen Elizabeth makes no objection when she is set the task of scrubbing the ward floor. One who says he is really John D. Rockefeller does not hesitate to bum a cigarette from an intern. The psychiatrist who has a full opportunity to examine the alleged mentally ill individual can often determine that splitting or dissassociation of the personality really exists, and that it has produced the delusional complex. When we are dealing with the validity of a will, the testator is dead and cannot be psychoanalyzed. Yet even here the courts, approaching the matter with the greatest care and discretion, may often determine that the testator when he made his will was suffering from a delusion. This does not end the matter. The delusion must have caused the testator to make the particular testamentary provisions that he did make.⁴² Granted that a testator is suffering from a delusion when he believes that he can communicate with his deceased mother. That fact standing alone would not invalidate his will. It must appear, for example, that he thought that his mother had told him to disinherit his sister, and that he acted upon that belief. Suppose the testator believed that John was not really his son, but was

42. Cases cited *supra* note 40.

the son of an illicit relationship of his wife with another man. If this has caused him to disinherit John the delusion, if delusion it were, would be sufficient to invalidate the will.

V. THE DEFENSE OF SUICIDE IN ACCIDENTAL DEATH INSURANCE

Many policies of insurance provide for the payment of a death benefit where the death of the assured has been caused, independently of any disease, solely by external, violent, and accidental means. Under Missouri statutes the insurer in an ordinary life policy may not avoid payment because the assured's death was the result of suicide.⁴³ Yet it is held that under ordinary circumstances death by suicide is not produced by "external, violent and accidental means." Therefore, under a purely accidental death policy or the double indemnity feature of an ordinary life policy, the beneficiary may not recover if the assured committed suicide.⁴⁴ However, when the suicide was committed by an "insane" assured, and was caused by the assured's mental illness, recovery may be had even under an accident policy or for double indemnity.⁴⁵ What is the criterion of insanity to be applied in these cases? Unfortunately the courts in these cases have been influenced by the rules of the criminal law defining responsibility for a commission of a crime. In denying recovery to the beneficiary we are not punishing the suicide. Yet the cases seem to have laid down a dual test. The first test is the now somewhat discredited McNaghten rule.⁴⁶ Did the assured at the time of committing suicide know the difference between right and wrong, and know that his act of suicide was morally wrong? This rule places on the psychologist or psychiatrist or other medical practitioner the undue and often impossible burden of determining what is right and what is wrong. It is true that in our society, as distinguished from some other societies notably that of the Japanese, suicide is generally considered wrong. But are there circumstances which would cause us to modify that moral judgment? Should the expert witness or the juror or the judge apply his own ethical code in passing on the matter? In any event what has the moral culpability *vel non* of the assured's act of self destruction to do with the liability of the insurer?

The other test, applied in the alternative, is the irresistible impulse rule. While this test used in criminal cases has been subjected to some

43. § 376.620, RSMo 1959.

44. *Aufrichtig v. Columbian National Life Ins. Co.*, 249 S.W. 912 (Mo. 1923).

45. *Aufrichtig v. Columbian National Life Ins. Co.*, *supra* note 44.

46. *McNaghten's Case*, 10 Clark & F. 200 (House of Lords 1843).

criticism, partly unjust, it does have great validity. There are cases in which a mentally deranged individual does have an uncontrollable desire to do a particular act, and does act under the compulsion of that desire. Certainly if suicide is produced by such an irresistible impulse, it is not intentional and therefore is accidental within the meaning of the law. We must carefully distinguish between the act of self destruction caused by an uncontrollable impulse which is itself the product of mental illness and disintegration, and one which is caused by a carefully reasoned conclusion that death is under the circumstances preferable to life. It is suggested that the true test is whether the suicide was brought about by a condition of mental disintegration or mental illness which undermined and destroyed the judgment, reasoning ability, or free will of the suicide.⁴⁷

VI. DIVORCE

Rightly or wrongly our system of divorce is based on the conception of fault. Divorce is granted to an innocent and injured spouse when the other spouse has committed any one of a series of acts which are deemed to be wrongs.⁴⁸ Thus the moral element is necessarily present in each case. Occasionally these wrongful acts of the party are ones for which, because of his mental condition, he is not morally responsible. It is natural and reasonable that the courts adopt in these cases a criterion of responsibility very similar to, if not identical with, that applied in criminal cases. Even before the enactment of our present statute on criminal responsibility, the courts here had laid down the alternative tests of knowledge of right and wrong and irresistible impulse.⁴⁹ The present statute which lays down the test of criminal responsibility adopts a combination of the McNaghten doctrine and the irresistible impulse doctrine in the alternative.⁵⁰ It thus reaches the identical result achieved by the courts in the divorce cases. In the divorce cases the courts are not bound by this statute, and might well have adopted the *Durham* rule.⁵¹ If they do this, the sole question

47. The following Missouri cases have announced the dual rule stated above in the text. *Edwards v. Business Men's Assurance Company of America*, 168 S.W.2d 82 (Mo. 1942); *Rogers v. Travelers' Inc. So.*, 278 S.W. 368 (Mo. 1925); *Lemmon v. Continental Casualty Co.*, 169 S.W.2d 920 (Mo. 1943). Of course, if the insured was incapable because of his mental illness of realizing that his act would result in death, his death would be accidental even though he were not suffering from a compulsive desire to do the act.

48. The grounds are given in § 452.010, RSMo 1959.

49. *Willis v. Willis*, 274 S.W.2d 621 (Spr. Mo. App. 1955).

50. § 552.030, RSMo (1967 supp.).

51. *Durham v. United States*, 214 F.2d 862 (1954).

will be whether the adverse party in the divorce case has committed the acts complained of as a result of a condition of mental illness. Perhaps this is going too far. It would enable a party in a divorce case to prevent the granting of a decree if his or her conduct was merely neurotic or the result of a mind in the very first or preliminary state of mental disintegration. This result might not be socially desirable. Perhaps the existing rule is the best practical solution of the problem.

VII. PARTICIPATION IN LITIGATION

Where a person has been adjudicated under Chapter 475 of the Probate Code, he may not in his own name commence an action as plaintiff in any court. The suit must be commenced by his guardian in his name. Suits against him must be defended by his guardian.⁵² If in spite of this statute the adjudicated incompetent was sued directly, and the guardian did not appear, and a judgment was rendered, it would be void and subject to collateral attack. This is fair because the adjudication of incompetency is made by a court of record, and its judgment is open to the public, and the guardian is required to publish notice of his appointment. Thus the prospective plaintiff together with all the world is placed on notice of the existence of the guardianship.

What of suits by or against a person who is actually incompetent, but not adjudicated as such? The established rule is that a judgment rendered in favor of such individual cannot be attacked either directly or collaterally on the ground of incompetence by the adverse party. On the other hand, if the judgment be rendered against the incompetent person, it cannot be collaterally attacked on the ground of his incompetence. But unless he was represented in the proceeding by a guardian ad litem,⁵³ it is subject to direct attack. If the fact of incompetence appears on the record (either the record proper in the old sense or the trial record which used to be called the bill of exceptions) the attack may be by appeal taken within the time and in the manner prescribed in the Mo. R. Civ. Pro. But if the fact of incompetence does not so appear or no appeal was taken as prescribed in the rules, direct attack may be made by a proceeding before the trial court in the nature of a petition for writ of error coram nobis. The standard of mental competence to be applied in these matters is quite clear. Was the defendant mentally ill; was his mental illness of such a

52. § 475.130, RSMo 1959.

53. *Gibson v. Pollock*, 166 S.W. 874 (K.C. Mo. App. 1914).

degree as to prevent or interfere with his intelligent conduct of or participation in his defense?⁵⁴ The same standard is applied in a criminal case in which the defendant seeks a stay of proceedings or of execution on the ground that he was incompetent to conduct his defense.⁵⁵

On occasion a mentally ill individual may be called to the stand as a witness in a case between two other parties. He will be deemed to be a competent witness if he is capable of understanding the sanction of his oath, and has no gross impairment of his powers of observation, memory, and narration that would probably interfere with his correct account of the things concerning which he has testified.⁵⁶ It is exceedingly important that the trier of the fact have before it all obtainable data bearing on the issues of the case. Sometimes this will require the acceptance of testimony from a witness who is somewhat mentally ill. It should be left to the discretion of the trial judge, subject to a measure of review in the appellate court, whether the witness should be rejected outright. The exercise of that discretion would depend on the extent of the witness' derangement weighed against the importance of receiving his testimony. But if the evidence is received, it should also be possible, subject to discretion of the court based on the complication of issues and the undue prolongation of the trial, for the opponent to bring forward evidence of the mental condition of the witness to affect his credibility.

VIII. CONCLUSIONS

We lawyers, whether we are on the bench, at the bar, in the law schools, or in the legislature, are not experts in the fields of psychology or psychiatry. We are not trained to make the fine distinctions which our professional brethren trained in those disciplines make between different types of mental conditions nor to evaluate the sometimes conflicting theories of mental disease which they have proposed. Yet we are confronted with a practical task. Obviously some individuals in society, because of mental deficiency or illness, must be treated by the law in a manner different from that used with "normal" individuals. Some must be, for their own protection, confined temporarily at least in hospitals or institutions for mental treatment even though they resist such confining. Others must be deprived of the management and control of their estate. The contracts

54. Gibson v. Pollock, *supra* note 53.

55. Polsky, *Present Insanity-From the Common Law to the Mental Health Act and Back*, 2 VILL. L. REV. 504 (1956).

56. Watts, *Psychiatric Challenge of Witnesses*, 9 VAND. L. REV. 860 (1956).

and wills made by some must be treated as legally inoperative. Somewhere we must draw a line that will separate persons deemed in law to possess all the powers and capacities of the average normal man from those upon whom these disabilities are imposed. The drawing of that line must be accomplished by lawyers since many of the considerations involved require expertise peculiar to our discipline rather than to that of mental science. We must be ready to learn from the psychologist and psychiatrist, but we may not evade our responsibility in drawing these lines of demarcation. The task is a pragmatic one. The lines must be drawn, and the standards set, in such a manner that they can be applied in the ordinary course of legal proceedings by judges and jurors who are medical laymen. The terms to be used must be understandable to judges and jurors. Yet they must not be wholly incomprehensible and meaningless to the expert witness.

In this article we have attempted to show that the lines have been drawn differently in different fields of the law. That is not a criticism of the law. Our ultimate purpose in each classification is to achieve justice. In each classification we are engaged in social engineering, to use a favorite phrase of Dean Pound. We are balancing conflicting interests. That balance will be achieved by differing definitions, depending upon the fact situation with which we are dealing. The definitions taken from the statutes and decisions in the different fields have been compared. Sometimes we find they are quite similar. At other times rather different. But this is inevitable. For the most part courts and legislatures have arrived at definitions which are as practically workable as any which could be formulated in the present state of our knowledge.

A quarter of a century ago, Professor Green in an article in this Review⁵⁷ criticized the courts for a lack of uniformity in their definition of mental incompetence. Some of his criticisms were justified. Much additional careful analysis is needed. His article was based on the then highly popular psychological theory of behaviorism. The behavioristic school of psychology, starting with the famous experiment of Pavlov and worked out in detail by Watson and Max Meyer, seems to have lost some of its popularity. While it achieved certain valuable results, the attempt made to extend their method to other social sciences and particularly to jurisprudence was not always practical. They started with the proposition that since mental and emotional states were subjective only and could not be verified by other observers, they lay outside the scope of the scientific

57. Green, *Judicial Tests of Mental Incompetency*, 6 Mo. L. Rev. 141 (1941).

method. Therefore scientists, they believed, should confine themselves to objectively observable phenomena. But even while these theories were being developed other psychologists such as James, Bergson, and Freud, were applying scientific methods to the study of mental states quite successfully. Professor Green criticizes courts and lawyers for the use of such purely subjective terms as mind, will, reason, judgment, and memory. The attempt to substitute for those terms purely behavioristic ones seems to lead to increasing confusion. It is simpler, and just as accurate, to talk about a man thinking as to talk about a series of nervous reflex actions leading to contractions of the diaphragm and vocal chords producing inaudible sounds. At any rate neither Professor Green nor any of those who followed him have so far come up with a set of definitions practically workable in court based on purely behavioristic descriptions of objective phenomena. It is believed that judges who are deciding cases on appeal or instructing lay jurors as to the properly applicable rules of law in these cases will still be forced to use the old introspective terms. They will still talk about mind and memory, capacity to reason and to make judgments, and the freedom to exercise the will. The results reached by our present methods have not been perfect from either a theoretical or pragmatic point of view. But no better standards seem available, and, on the whole, the present ones work very well.