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PROOF OF MENTAL INCOMPETENCY AND THE UNEXPRESSED MAJOR PREMISE*

MILTON D. GREEN†

There is probably no individual alive who conforms to the requirements of complete normality. The author of a well-known text book on psychiatry has said: "The difference between the behavior of so-called 'normal' and 'abnormal' people is quantitative rather than qualitative. 'Crazy' people are simply extremists. It is not so much a question whether a given individual is sane or insane, but rather, how sane or insane is he?" ¹ Another text on psychiatry states: "A psychiatrist of long and fruitful experience once remarked that the chief difference between the normal man and the one who was mentally sick, was that the latter was inside the walls of a hospital and the former was not."²

From the standpoint of a physician mental disorder does not become significant in any individual case until its symptoms manifest themselves in such a way as to interfere with that individual in his daily life, or with the daily lives of his associates. The interest of the physician in mental disorder is twofold. His primary function is therapeutic: to diagnose the condition, to determine the cause, and to administer the appropriate treatment either to bring about a restoration of health, if possible, or, at least, to minimize the effects of the disease and prevent its further development. His therapeutic function in treating mental illness is, in short, the same as his function in treating bodily illness. He is trying to alleviate suffering and to restore health. His secondary function is to protect society from the disturbances which are caused by the highly anti-social types of mental disorder. This function is fulfilled by seeing that individuals so afflicted are removed from society and placed in institutions where their psychopathic behavior will not interfere with the lives of others. It is a function similar to that of quarantining persons.

* This article is one of a series of five submitted in partial fulfillment of the requirements of the Faculty of Law, Columbia University, for the degree of Doctor of the Science of Law. The other articles are: The Operative Effect of Mental Incompetency on Agreements and Wills (1943) 21 Tex. L. Rev. 554; Fraud, Undue Influence and Mental Incompetency—a Study in Related Concepts (1943) 43 Col. L. Rev. 176; Judicial Tests of Mental Incompetency (1941) 6 Mo. L. Rev. 141; Public Policies Underlying the Law of Mental Incompetency (1940) 38 Mich. L. Rev. 1189.

The author should not like to complete this series of articles without acknowledging the deep indebtedness which he owes to Professor Edwin W. Patterson, of Columbia University, who has given freely of his time and criticism.

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1. SADLER, THEORY AND PRACTICE OF PSYCHIATRY (1936) 781.
suffering from contagious diseases or confining them in hospitals until they are no longer a threat to society.

Psychiatry, although constantly adding to its store of knowledge, is a relatively new specialty in the field of medicine, and it is still groping for answers to many of the fundamental questions regarding mental disorder.\(^3\) There are various schools of psychiatry;\(^4\) techniques of diagnosis and treatment differ, and, as yet, there is not even substantial agreement on the classification of mental disorders.\(^5\) The etiology of a few types of mental disorder has been determined, but many are still classified merely according to the symptoms displayed. Inasmuch as many symptoms are common to many types of mental disorder, general agreement upon diagnosis in any particular case is extremely unlikely. "Kempf, speaking of the diagnosis and classification of nervous diseases, ventured the opinion that if twenty cases were given to twenty psychiatrists separately for diagnosis and their findings were sealed and submitted to a committee for comparison, the whole scheme of diagnosis would blow up."\(^6\)

Nevertheless, there are certain rather well defined types of mental disorder. A few of these have particular significance in cases dealing with the effect of mental unsoundness upon contractual and testamentary capacity. One type is mere mental deficiency, manifested by intellectual deficiency in development. It includes idiots, imbeciles, and morons, who are generically referred to as mental defectives. Mental deficiency is largely a congenital condition. Its chief symptom is a very low degree of intelligence and understanding, very often measured in terms of the intelligence of children. An idiot has the intelligence of a two or three year old child, an imbecile that of a child between three and seven, and a moron that of a child from seven to twelve.\(^7\) Another type is senile dementia, which may be described as the mental deterioration of old age. Among its symptoms are: loss of memory, confusion, deterioration of perception, hallucinations, melancholia, and delusions, frequently of the paranoid type. The symptoms tend to increase in number and become progressive in degree. Delusions of persecution and of marital infidelity are not uncommon in the later stages.\(^8\) Another type is general paresis, caused by damage to or destruction of brain tissue as the result of syphilitic in-

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3. NOYES, MODERN CLINICAL PSYCHIATRY (2d ed. 1934) 92.
4. Sadler lists and discusses eight main "schools." SADLER, op. cit. supra note 1, at 10-43.
5. HENDERSON AND GILLESPIE, A TEXT-BOOK OF PSYCHIATRY (4th ed. 1937) c. 2; STRECKER AND EBAUGH, op. cit. supra note 2, at 46 et seq.
6. SADLER, op. cit. supra note 1, at 212.
8. BLUEMEL, THE TROUBLED MIND (1938) c. LVI; LANDIS AND PAGE, MODERN SOCIETY AND MENTAL DISEASE (1938) 11; STRECKER AND EBAUGH, op. cit. supra note 2, 154 et seq.
PROOF OF MENTAL INCOMPETENCY

fection. Among its symptoms are: confusion, delusions (often of grandeur), diminution of intelligence, lack of judgment, loss of the finer sensibilities, and moral delinquency. These are the three types which appear most commonly in the legal controversies dealt with in this article.

Another group of mental disorders is marked by paranoid symptoms: systematized delusions of reference and of persecution; pathological suspicion; defective judgment; and sometimes hallucinations. Since the paranoid interprets life in terms of his fears, his logic is awry, and he has no sense of proportion. Dementia praecox (schizophrenia) is another type, the symptoms of which are: marked change in personality, confusion, delusions, and hallucinations. Still another type is melancholia. Among its symptoms are: confusion, diminution in intelligence, indecision, delusions, and occasionally hallucinations. It is often, moreover, a recurrent illness. Infection psychoses often follow in the wake of acute infections such as typhoid, pneumonia, and influenza, and sometimes develop after trauma. Symptoms of these psychoses include delirium, stuporous states, confusion, and hallucinations. Alcohol and drugs may also produce psychoses which are indicated by such symptoms as delirium, confusion, hallucinations, delusions, and change in personality.

Mental disorder becomes legally significant when it becomes sufficiently pronounced to destroy contractual capacity, testamentary capacity, or criminal responsibility. It may also serve as the basis for committing a person to an institution or appointing a guardian for him, or render him incompetent as a witness, or disqualify him from holding public office. The present article is concerned with mental disorder only as it affects contractual and testamentary capacity.

Courts have devised certain standards for determining whether or not mental disorder in any particular case is sufficient to destroy capacity to enter into a binding agreement or to make a valid will. The standard

9. Bluemel, op. cit. supra note 8, c. LVII; Landis and Page, op. cit. supra note 8, at 12; Strecker and Ebaugh, op. cit. supra note 2, 103 et seq.
10. Bluemel, op. cit. supra note 8, c. LIX; Henderson and Gillespie, op. cit. supra note 5, c. 10; Landis and Page, op. cit. supra note 8, at 13.
12. Bluemel, op. cit. supra note 8, c. LVIII. Under more modern classifications melancholia has been subdivided into manic-depressive psychoses and involutional melancholia. Henderson and Gillespie, op. cit. supra note 5, cc. 7, 8; Landis and Page, op. cit. supra note 8, at 13-14.
13. Henderson and Gillespie, op. cit. supra note 5, at 297 et seq.
14. Id. at 52, 281.
15. "Contractual capacity" as used throughout this article embraces consensual transactions in general, including, in addition to bargaining transactions, gifts and voluntary conveyances. Contracts to marry are not included because the consensual aspects of the marriage contract are complicated by eugenic considerations, which involve an entirely distinct problem.
as applied to wills is not the same as the standard applied to contracts, nor is there a uniform standard for either. Standards vary from state to state; and even within the same state, there is a tendency for the standard to undergo a progressive series of mutations. They have, however, one common element: the mental disorder, in order to destroy capacity, must impair the capacity of the individual to understand the transaction in question. Beyond this, courts are in hopeless conflict as to the degree of understanding which an individual must possess in order to be competent. In an earlier article the author has attempted to demonstrate that the judicial tests of mental incompetency are hopelessly inadequate as tools for deciding concrete cases, or as guides for predicting the outcome of future cases. The tests are not uniform; they are fluctuating; they are vague; and they are subjective. Nevertheless, if one reads a large block of cases dealing with mental incompetency, he will probably conclude that in the great majority of them the courts have reached just results. This feeling invites inquiry on two scores. Perhaps the judicial tests of mental incompetency are serviceable tools, despite their apparent defects. Or perhaps there is an inarticulate standard which, if it does not actually guide the courts, serves to justify the results at which they have arrived.

The purpose of the present article is to test these two propositions. To do so, it will be necessary to delve into the cases and extract the evidentiary facts which courts have deemed most significant in proving a case of mental incompetency. Each evidentiary fact thus obtained must then

16. Green, Judicial Tests of Mental Incompetency (1941) 6 Mo. L. Rev. 141.
17. There are a number of so-called presumptions regarding mental incompetency. According to one, a person is presumed to be sane, and the burden of proving the contrary is on the one who asserts it. See Stubbs v. Houston, 33 Ala. 555 (1859); Pledger v. Birkhead, 156 Ark. 443, 246 S. W. 510 (1923); In re Sandman's Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932); Titcomb v. Vantyle, 84 Ill. 371 (1877); Succession of Lambert, 185 La. 416, 169 So. 453 (1936); In re Cissel's Estate, 104 Mont. 306, 66 P. (2d) 779 (1937); Dennett v. Dennett, 44 N. H. 531 (1863); Jennings v. Hennessy, 26 Misc. 265, 55 N. Y. Supp. 833 (Sup. Ct. 1899); In re Mason's Estate, 185 Okla. 278, 91 P. (2d) 657 (1939); Kaleb v. Modern Woodmen of America, 51 Wyo. 116, 64 P. (2d) 605 (1937). This presumption unquestionably applies to capacity to enter into an agreement. See 3 PAGE, CONTRACTS (2d ed. 1920) 2808; 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2500. And according to the weight of authority, it applies also to capacity to execute a will. See 2 PAGE, supra, at 499; 9 WIGMORE, loc. cit. supra. If insanity of a permanent type is shown to have once existed, it will be presumed to have continued. See In re Alexander's Estate, 111 Cal. App. 1, 295 Pac. 53 (1931); First Nat. Bank v. Sarvey, 198 Iowa 1057, 198 N. W. 496 (1924); 2 PAGE, supra, at 505. This presumption shifts to the one asserting capacity the burden of showing that there had been a restoration to reason, or a lucid interval, at the time of the transaction in question. According to the more accepted view, presumptions are devices for allocating the risk of non-persuasion, not evidence. For this reason they are not included in our list of evidentiary facts. See 9 WIGMORE, supra, at 288 et seq. Contra: In re Mason's Estate, 185 Okla. 278, 91 P. (2d) 657 (1939).
be scrutinized to determine whether or not it is relevant to the articulate standard, capacity to understand, and, alternatively, whether or not it is suggestive of an inarticulate standard.

The evidentiary facts which courts consider relevant to the issue of mental incompetency cover a wide range. Some of them are directly and obviously pertinent to the articulate standard, capacity for understanding, while others seem to have but little probative force on this issue. Much of the evidence is, on the other hand, apparently directed to determining whether or not the transaction in question is a fair one rather than whether or not the alleged incompetent was capable of understanding it. By way of anticipation, it may be suggested that many courts seem to approach the problem in what may seem to be a reverse order; they appear to judge the transaction first; and only if it is queer, abnormal, or unfair, do they proceed to the second stage and judge the author of the transaction.

For convenience in handling, the evidentiary facts of mental incompetency will be treated under four rather arbitrary headings: (1) symptomatic conduct of the alleged incompetent; (2) opinion testimony of incompetency; (3) organic condition and habits of the alleged incompetent; (4) moral aspects of the transaction and its consequences. This classification is intended to present the evidentiary facts of mental incompetency in the order of their probative force on the articulate issue, capacity for understanding. If the hypothesis is correct that the courts are in reality employing an inarticulate standard calculated to judge the transaction and not the individual, the above classification presents the facts in inverse order of their importance.

The operative fact to be proved is mental incompetency—not insanity. From a medical point of view a person may be mentally ill or insane. But from a legal point of view, such mental illness or insanity is immaterial, that is, not an operative fact. As an evidential fact, it may give rise to an inference of mental incompetency, depending upon the type and severity of the mental illness; but it is well established that mere proof of mental weakness or insanity is not enough to invalidate an agreement or a will. In order to constitute mental incompetency the mental

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18. This classification of evidentiary facts is made merely for convenience of analysis and the categories and sub-categories are not intended to be exclusive of each other. These are the evidentiary facts which courts have stressed as significant. It is believed that the list is comprehensive.

19. See Puryear v. Puryear, 192 Ark. 692, 94 S. W. (2d) 695 (1936) (feeble-minded); In re Collins’ Estate, 174 Cal. 663, 164 Pac. 1110 (1917) (senile dementia); Willemin v. Dunn, 93 Ill. 511 (1879) (mental weakness); Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069 (1892) (had been previously adjudicated “of unsound mind”); In re Johnson’s Estate, 222 Iowa 787, 269 N. W. 792 (1936) (senile dementia); Nowlen v. Nowlen, 122 Iowa 541, 98 N. W. 383 (1904) (mental weakness in man over 75); Ellwood v. O’Brien, 105 Iowa 239, 74 N. W. 740 (1898) (adjudicated “insane” one week after
disorder must be such as to destroy the capacity of the party to understand the questioned transaction in particular.\textsuperscript{20}

**Symptomatic Conduct of the Alleged Incompetent**

The only way that mental disorder can manifest itself is through the behavior of the individual: conduct, speech, gestures, attitudes, and activities. Evidence of conduct should be, therefore, the most persuasive type of evidence. Following the distinction made by many courts, a subdivision may be made into (a) psychopathic behavior, and (b) conduct evincing capacity or incapacity to carry on the ordinary affairs of life. It is upon the former that the medical expert commonly bases his opinion of incompetency, while the layman commonly bases his opinion chiefly upon the latter.

*Psychopathic behavior.* Dean Wigmore has said: “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.”\textsuperscript{21} This statement should be qualified to the extent that the conduct must have occurred at or near the time of the transaction in question. If a person was actually mentally competent when he executed the instrument, it is immaterial what his mental condition may have been before or afterward. However, since mental condition is established chiefly by means of circumstantial evidence, and since a mental condition (of health or disorder) is usually a more or less continuous one, evidence of psychopathic conduct both before and after the event is unquestionably admissible, subject to reasonable limits which are largely in the discretion of the trial judge.\textsuperscript{22}

\textsuperscript{20} Green, *supra* note 16.

\textsuperscript{21} 2 Wigmore, *Evidence*, § 228.

\textsuperscript{22} In re Huston’s Estate, 163 Cal. 166, 124 Pac. 852 (1912) (“shortly” before and “a few weeks” after); In re Sandman’s Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932)
Although mere proof of a few acts of eccentric conduct is not entitled to much weight, the cumulative effect of many acts of eccentric conduct may be strong evidence of incompetency. In Lehman v. Lindenmeyer, the court, affirming a judgment for the contestants in a will contest, averted to this fact. The acts of eccentric conduct, the cumulative effect of which was to be strongly persuasive of incompetency, were that the testator, being a man of means, left his comfortable home, went without necessities, cooked his own scanty meals, went to live in a squalid mission, and although an uneducated man, became an exhorter. This evidence does indicate psychopathic behavior which may have resulted in a diminution of testator’s capacity for understanding. But another important factor in the case, according to the court, was that the testator has passed over the natural objects of his bounty and bestowed his property upon others. In McDonald’s Executors v. McDonald, another case in which the appellate court upheld a judgment for the contestants in a will contest, the evidence showed that the testator was miserly, mean, and hard to his children. His will divided the estate into equal parts and gave each child only a life estate in his part. They contested. The appellate court said the testator “unquestionably” had the mind to know his estate and the nature and value of it, but also said, “It is . . . 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.”

On the basis of the usual “understanding” test the case is wrong. The decision can be explained only by the theory that the court felt the jury justified in knocking out the will if it was unfair to the children under all the circumstances of the case. At the other extreme is In re Wright’s Estate, in which the lower court denied probate to a will and the appellate court reversed on the ground there was not sufficient evidence to prove incompetency, in spite of the facts that the scrivener and both attesting witnesses testified that the testator was, in their opinion, of unsound mind and that the evidence was replete with symptoms of senile dementia: it showed a personality change after the testator had received a head injury, that he took paper out of garbage cans, pinned it on bushes in the yard, and said they were roses, etc. The case is certainly out of line if ordinary standards of testamentary capacity are used. And if the court was

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25. 48 Colo. 305, 109 Pac. 956 (1910).
26. 120 Ky. 211, 85 S. W. 1084 (1905).
27. Id. at 217, 85 S. W. at 1085.
28. 7 Cal. (2d) 348, 60 P. (2d) 434 (1936).
basing its decision on some inarticulate standard, it remained completely inarticulate.

Personality change, a definite psychopathic symptom, is generally regarded as significant evidence by the courts;\(^ 29\) as are failure of memory,\(^ 30\) symptoms of paranoia,\(^ 31\) and symptoms of psychoses resulting from the use of alcohol and drugs.\(^ 32\) In many of the cases, the evidence disclosed also marked symptoms of senile dementia, such as loss of memory, confusion, deterioration of perception, delusions, hallucinations, and personality change.\(^ 33\) Certainly, these symptoms should be relevant upon the issue of impairment of capacity to understand. Many of the courts said that they were significant, in upholding findings of mental incompetency; but they also adverted to the fact that the will was an unnatural one under the circumstances of the case\(^ 34\) or to the fact that the agreement was unfair to the incompetent.\(^ 35\) Conversely, in many of the cases the evidence of

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29. See In re Hansen's Estate, 38 Cal. App. (2d) 99, 100 P. (2d) 776 (1940); Caldwell v. Danforth, 124 Conn. 468, 200 Atl. 577 (1938); In re Johnson's Estate, 162 Ore. 97, 91 P. (2d) 330 (1939); cf. In re Wright's Estate, 7 Cal. (2d) 348, 60 P. (2d) 434 (1936).


33. See Milton v. Jeffers, 154 Ark. 516, 243 S. W. 60 (1922) (will case, in which decision for contestant was reversed for new trial because of errors in instructions); In re Hansen's Estate, 38 Cal. App. (2d) 99, 100 P. (2d) 776 (1940) (will case, probate denied); In re Alexander's Estate, 111 Cal. App. 1, 295 Pac. 53 (1931) (will case, probate denied); Crescio v. Crescio, 365 Ill. 393, 6 N. E. (2d) 628 (1937) (will case, probate denied); Bordner v. Kelso, 293 Ill. 175, 127 N. E. 337 (1920) (contract case, lower court rescinded, but appellate court reversed with instructions to dismiss); Sutherland State Bank v. Ferguson, 192 Iowa 1295, 186 N. W. 200 (1922) (contract case, lower court cancelled, but upper court reversed); Callis v. Thomas, 154 Md. 229, 140 Atl. 59 (1928) (contract case, lower court set aside deed of trust, but appellate court reversed with instructions to dismiss); Clement v. Smith, 293 Mich. 393, 292 N. W. 343 (1940) (contract case, deed and contract set aside); Trimbo v. Trimbo, 47 Minn. 389, 50 N. W. 350 (1891) (contract case, contract upheld); Proffer v. Proffer, 342 Mo. 184, 114 S. W. (2d) 1035 (1938) (will case, probate denied); In re Cissel's Estate, 104 Mont. 306, 66 P. (2d) 779 (1937) (will case, probate denied); Edge v. edge, 38 N. J. Eq. 211 (1884) (will case, probate denied); Collins v. Long, 95 Ore. 63, 186 Pac. 1038 (1920) (will case, will sustained); Wigley v. Buzzard, 124 S. W. (2d) 898 (Tex. Civ. App. 1939) (contract case, contract set aside); Kaleb v. Modern Woodmen of America, 51 Wyo. 116, 64 P. (2d) 605 (1937) (contract case, contract upheld).

34. See In re Hansen's Estate, 38 Cal. App. (2d) 99, 100 P. (2d) 776 (1940); In re Alexander's Estate, 111 Cal. App. 1, 295 Pac. 53 (1931); Proffer v. Proffer, 342 Mo. 184, 114 S. W. (2d) 1035 (1938); In re Cissel's Estate, 104 Mont. 306, 66 P. (2d) 779 (1937); Edge v. Edge, 38 N. J. Eq. 211 (1884).

senile psychosis was strong, but the court, nevertheless, upheld the transaction because it seemed to be a fair and reasonable one under the circumstances. In *Bordner v. Kelso*, the lower court set aside a contract and deed; the appellate court reversed, holding that there was not sufficient evidence of mental incompetency. The evidence showed: that the grantor was ninety-three years old; his sight and hearing were almost gone; his memory was defective; he had delusions that his family were taking his money; he was confused, frequently arising and dressing at midnight, thinking it was morning; he depended on others to read, write, and exchange money for him; at times he did not understand what was said to him and could not carry on a connected conversation. The court held that this evidence was insufficient to sustain the finding of the lower court. It mentions the fact that the bargain was a fair one, that it was explained to the grantor by the cashier in the bank, and that the grantor made no objection to it in his lifetime. If the bargain had been an unfair one, and if the grantor had not had independent advice concerning it, it is possible that the court might have arrived at a different conclusion.

In *Collins v. Long*, the lower court refused probate to a will, but the appellate court reversed, holding the testator competent. The testator had two children, Ada and John, by a first marriage, and six by a second marriage. Ada was driven away from home when she was seventeen. About thirty-five years later the testator relented and became friendly with her again. His will gave most of his property to Ada and John. The second wife and her children were the contestants. The evidence on behalf of the contestants showed that the testator was ninety-four years old when he made the will, that three years previously he had been adjudicated an incompetent and a guardian appointed for him, that he was very forgetful, his memory was bad, he would fail to recognize old acquaintances or familiar places, that he was confused, that he tapped on the walls with his cane to “drive out the ghosts,” and that his conduct was otherwise peculiar. There was, of course, opinion evidence introduced by the proponents that he was competent, and to the effect that he favored Ada in the will because he wanted to right the wrong he had done her. The appellate court held him competent. Although it did not expressly say so, it apparently approved of his “natural” instinct to atone for his past wrong by rewarding Ada. If the testator had given the bulk of his property to a stranger or to one with whom he had been having illicit relations, it is doubtful if the decision of the appellate court would have been the same.

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36. 293 Ill. 175, 127 N. E. 337 (1920).
37. 95 Ore. 63, 186 Pac. 1038 (1920); see also Trimbo v. Trimbo, 47 Minn. 359, 50 N. W. 350 (1891).
Mental incompetency can never be proved without introducing some evidence of psychopathic behavior. It is unsafe, however, to assume that the case is won, merely because there is in the record strong evidence of psychotic conduct. Even if a jury brings in a verdict on the basis of such evidence, appellate courts will find a way to set it aside if they feel other circumstances warrant it. Sometimes their action is explainable on the theory that they are following an inarticulate standard; sometimes it is not; but, in any case, it is apparent that the understanding test is not rigidly applied.

Delusions are symptomatic of many type of mental disorder and, together with other evidence of psychopathic conduct, may lead the fact trier to find that the person involved lacks the necessary capacity for understanding requisite to competency. Psychiatrists would agree with this analysis. They would not agree, however, with the well-established legal doctrine of the so-called insane delusion, the theory that a person may be perfectly normal except on one subject as to which he entertains a so-called "insane delusion." If the insane delusion motivated the transaction, it invalidates it. This may be regarded as a special application of the understanding test, namely, that the person is incapable of understanding the transaction because of his insane delusion affecting it. Or it may be regarded as a case of improper motivation, in which case it is supplementary to the understanding test. The will cases offer the best examples of insane delusions. Many of the delusions in these cases are delusions of marital infidelity (common in senile dementia). Some take the form of an irrational dislike for some member of the family, while others are delusions regarding spiritual directions as to the disposition of the testator's property. Where the delusion is one of marital infidelity resulting in virtual disinheritance of the surviving spouse, courts frequently fortify a finding of incompetency by regarding the disposition made by the will as unnatural. The same technique is employed where the delusion manifests itself in an irrational antagonism toward a son

39. See In re Sandman's Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932); Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75 (1898); Riggs v. Am. Tract Soc., 95 N. Y. 503 (1884); Irwin v. Lattin, 29 S. D. 1, 135 N. W. 759 (1912); 1 Williston, Contracts, 754; 1 Page, Wills, 289 et seq.

40. See Green, Fraud, Undue Influence and Mental Incompetency—a Study in Related Concepts (1943) 43 Col. L. Rev. 176.

41. See Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118 (1890); In re Kaven's Estate, 279 Mich. 334, 272 N. W. 696 (1937).

42. See In re Huston's Estate, 163 Cal. 166, 124 Pac. 852 (1912); Davis v. Davis, 64 Colo. 62, 170 Pac. 208 (1918); Edge v. Edge, 38 N. J. Eq. 211 (1884).

43. In re Willits' Estate, 175 Cal. 173, 165 Pac. 537 (1917); 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); Irwin v. Lattin, 29 S. D. 1, 135 N. W. 759 (1912).

44. See cases cited supra note 41.
or daughter.\textsuperscript{45} Deeds and contracts are sometimes set aside on the ground that they were motivated by an insane delusion;\textsuperscript{46} and here, also, there is a tendency for the court to add by way of justification that the contract was an unnatural one under the circumstances.\textsuperscript{47}

\textit{Conduct evincing capacity or incapacity to carry on the ordinary affairs of life.} A few courts have framed their standards for determining mental incompetency upon the basis of one's ability to carry on the ordinary affairs of life.\textsuperscript{48} Such courts would be bound by their own definitions of incompetency to give weight to evidence tending to show ability or inability to transact ordinary business.\textsuperscript{49} Most courts construct their standards along different lines.\textsuperscript{50} Under any type of standard, however, evidence of the capacity or incapacity of the individual to transact the ordinary business of life is admissible and has evidentiary value.

Thus courts upholding agreements attacked upon the ground of the mental incompetency of one of the parties have frequently stressed the fact that the alleged incompetent had capacity to transact the ordinary business of life,\textsuperscript{51} sometimes giving more weight to this element than to any other.\textsuperscript{52} Contrariwise, in holding that an agreement was invalid be-

\textsuperscript{45} See Davis v. Davis, 64 Colo. 62, 170 Pac. 208 (1918); Edge v. Edge, 38 N. J. Eq. 211 (1884).

\textsuperscript{46} Eubanks v. Eubanks, 360 Ill. 101, 195 N. E. 521 (1935); Riggs v. Am. Tract Soc., 95 N. Y. 503 (1894).

\textsuperscript{47} See Eubanks v. Eubanks, 360 Ill. 101, 195 N. E. 521 (1935).

\textsuperscript{48} See Perry v. Pearson, 135 Ill. 218, 224, 25 N. E. 636, 637 (1890); Titcomb v. VanTyle, 84 Ill. 371, 374 (1877); Baldwin v. Dunton, 40 Ill. 188, 193 (1866); Green, supra note 16, at 146-57.

\textsuperscript{49} See \textit{In re Arnold's Estate}, 16 Cal. (2d) 573, 107 P. (2d) 25 (1940); Titcomb v. VanTyle, 84 Ill. 371 (1877).

\textsuperscript{50} The usual standard is framed in terms of the capacity of the party to understand the transaction in question. See Green, supra note 16.


\textsuperscript{52} In Pledger v. Birkhead, 156 Ark. 443, 450, 246 S. W. 510, 513 (1923), where the evidence on competency was sharply conflicting and three doctors had testified that the grantor of the deeds was incompetent, the supreme court reversed the lower court, which had cancelled the deeds. In so doing it relied upon the fact that witnesses who knew the grantor well over long periods of time testified that he "had judgment and business capacity to attend to the ordinary affairs of a small farmer such as he was," that he took an active interest in local public affairs, voted at elections, displayed partisan preferences, took an active interest in church life, was often called upon to lead in prayer, was an elder of the church, a member of a lodge and held an office therein, had memorized the ritual of the lodge, served on the regular panel of the petit jury, etc. In Somers v. Pumphrey, 24 Ind. 231 (1865), the supreme court reversed the lower court's finding of incompetency, relying largely upon the fact that grantor could cook, sew, keep house, write her name, and perform the usual duties of a daughter and a wife. See also Jackson v. King, 4 Cow. 207 (N. Y. Sup. Ct. 1825) (capacity to manage a farm).
cause of mental incompetency, courts have frequently relied upon the inability of the party involved to carry on the ordinary business affairs of life. A similar generalization can be made in will contests. Evidence that the testator had capacity to carry on the ordinary business of life has been considered strongly persuasive of testamentary capacity; and evidence that the testator was incapable of carrying on the ordinary business of life, strongly persuasive of lack of testamentary capacity.

The relevancy and probative effect of this particular element is much more clearly appreciated when mental disorder is viewed from the psychiatric approach, that is, the non-integration or disorganization of an individual with his social environment. And, in a broad sense, incapacity to transact ordinary business might be subsumed under the first heading of psychopathic behavior. It is given separate treatment here because courts seem to give it an added significance. They seem to feel that it is unjust to hold a person bound by his transactions when he has demonstrated a pronounced inability to stand upon a plane of comparative equality with his fellow members of society, especially when the transaction in question is so contrary to the institutional pattern of similar transactions that the court views it as one grossly unfair to the alleged incompetent or his dependents. This evidentiary fact standing alone is, however, inconclusive; it must be found in conjunction with other evidentiary facts of incompetency to become strongly persuasive.

**Opinion Testimony of Incompetency**

Opinion testimony of incompetency is of three types: lay opinion, expert opinion, and official opinion, the latter being found in a court's adjudication of incompetency. Since all opinion evidence of incompetency is based upon the conduct of the alleged incompetent, it is in a very real sense secondary evidence; hence, its probative value should not be as great

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53. See Thatcher v. Kramer, 347 Ill. 601, 180 N. E. 434 (1932) (here the evidence showed that the grantor had been shamefully imposed upon in other transactions); Schultz v. Oldenburg, 202 Minn. 237, 277 N. W. 918 (1938); Henderson v. McGregor, 30 Wis. 78 (1872).


55. See Stubbs v. Houston, 33 Ala. 555 (1859); Milton v. Jeffers, 154 Ark. 516, 243 S. W. 60 (1922); Proffer v. Proffer, 342 Mo. 184, 197, 114 S. W. (2d) 1035, 1042 (1938), wherein the court upholding a verdict for the contestant refers to some of the facts, that "Testator was unable to understand that he had paid for a load of wood; that he sold corn on credit for 50 cents a bushel, and for 60 cents cash; that he, without trying to collect, traded an $18 note for a $2 pig; and that he paid $95 for a $15 mule."

as the evidence discussed under the first heading. Expert opinion should possess a very high degree of probative value, however, since conduct without interpretation is meaningless, and since medical experts are in a position to furnish the most valid interpretations.

Lay opinion of incompetency. The attesting witnesses to a will always have been permitted to testify as to their opinion regarding the mental competency of the testator. Part of their function as attesting witnesses is to satisfy themselves that he is competent. Most attesting witnesses do no such thing, but their opinion is nevertheless received in evidence. Also, the rules of evidence in all jurisdictions permit any lay witness to give his opinion of a person's mental competency. The ordinary lay witness must also divulge the facts upon which he bases his opinion. If he does not lay the foundation for his opinion on direct examination by detailing the facts upon which it is based, they may be ferreted out of him on cross-examination. Granting that lay opinion of mental incompetency is admissible in evidence, the question remains: how potent is it? In answering this question, it should be borne in mind that we are dealing with lay opinion. Courts assume that anyone is capable of forming an opinion as to the mental competency of another and that no special qualifications are needed, provided that the opinion is based upon facts observed. Hence, the more data that a witness details as the basis for his opinion and the better is his opportunity for observation, the more convincing should be his opinion. Nevertheless, because it is simply a lay opinion, courts assume that a judge should be able to form his own opinion on the same evidence; and if it is at variance with the opinion of the witness, to place little reliance upon the latter. There is one flaw in this logic. The whole is sometimes greater than the sum of its parts. A Rembrandt painting may consist of a wooden frame, a piece of canvas, and certain pigments in oil; yet, it is more than the sum of these; it is the intangible which distinguishes it from any other picture. A witness may try to detail all of the facts upon which he bases his opinion, but these facts do not represent the whole picture. The general impression of incompetency may be produced by the facts detailed plus intangibles which the witness is unable to put into words. Courts, nevertheless, frequently say that such an opinion can rise no higher than the facts upon

57. 3 Wigmore, Evidence, § 689; 7 id., § 1936.
58. “Of the state of the law in the various jurisdictions, it is enough to note in general that laymen’s opinions are today everywhere conceded to be admissible, subject to local qualifications and quibbles.” 7 id., § 1938. However, for his opinion to be admissible the witness must have fulfilled the requirement of knowledge, that is, it must be shown that he had an opportunity by observation to learn enough about the person to form an opinion as to his mental condition. 3 id., § 689.
59. 7 Id., §§ 1922, 1935.
60. The only requisite is opportunity for observation. See note 58 supra.
which it is based. And while courts sometimes rely upon such opinion evidence, they often brush it aside. One technique is to say that the facts did not justify the opinion; another is to say that the incompetency must exist at the exact moment when the instrument was executed and that the opinions of the witnesses related to another time. Lower courts in both will and contract cases often make findings of incompetency which appellate courts set aside on the ground that they are unsupported by the evidence, in spite of the presence of quantities of lay opinion of incompetency.

Expert opinion of incompetency. The expert opinion is similar to the lay opinion in that both must be based upon facts. It differs from the lay opinion in two respects. The expert need not obtain his data by direct observation (although he often does); it may be furnished to him by others, usually through the device of the hypothetical question. He is supposed to be possessed of special qualifications which enable him to give an expert opinion. One might suppose that, because he is an expert in mental disorders, his opinion on incompetency should be entitled to more weight than the opinion of the man in the street or the man on the farm. However, the courts seem to feel otherwise. While there are courts which treat such expert opinion with deference, by and large the courts have been notoriously discourteous to the medical expert who gives an opinion on incompetency. Case after case can be found where an appellate court reversed a lower court's finding of incompetency on the ground it was unsupported by the evidence in spite of the fact that the record contained expert opinion evidence of incompetency. It has been held error to in-

63. See cases cited supra note 61.
64. See In re McGhee's Estate, 188 Wash. 550, 62 P. (2d) 1336 (1936).
65. See In re Wright's Estate, 7 Cal. (2d) 348, 60 P. (2d) 434 (1935); Jackson's Ex'r v. Semons, 266 Ky. 352, 98 S. W. (2d) 505 (1936); Greer's Ex'tr v. Bishop, 265 Ky. 352, 96 S. W. (2d) 851 (1936); Smith v. Biggs, 171 Md. 528, 169 Atl. 256 (1937); In re Potter's Will, 246 App. Div. 808, 289 N. Y. Supp. 770 (4th Dep't 1936).
66. See Johnson v. Lane, 369 Ill. 135, 15 N. E. (2d) 710 (1938); Bordner v. Kelso, 293 Ill. 175, 127 N. E. 337 (1920); Des Moines Nat. Bank v. Chisholm, 71 Iowa 675, 33 N. W. 234 (1887).
67. 2 Wigmore, EVIDENCE, § 672 et seq.
68. See In re Behrend's Will, 227 Iowa 1099, 290 N. W. 78 (1940); In re Frazier's Estate, 131 Neb. 61, 267 N. W. 181 (1936); Matter of Forsyth, 169 Misc. 1042, 9 N. Y. S. (2d) 642 (Surr. Ct. 1938); Oglesby v. Harris, 130 S. W. (2d) 449 (Tex. Civ. App. 1939).
69. See Puryear v. Puryear, 192 Ark. 692, 94 S. W. (2d) 695 (1936); In re Arnold's Estate, 16 Cal. (2d) 573, 107 P. (2d) 25 (1940); In re Collins' Estate, 174 Cal. 653, 164 Pac. 1110 (1917); Des Moines Nat. Bank v. Chisholm, 71 Iowa 675, 33 N. W. 234
struct a jury that it might give more weight to expert testimony than to lay. Courts have occasionally stigmatized expert testimony of incompetence as the "weakest and most unsatisfactory" kind of evidence or as "valueless." It has been said judicially that expert opinion, like lay opinion, can rise no higher than the facts upon which it is based; and courts have not hesitated to substitute their opinions for those of the medical expert, especially where they considered the transaction to be a normal and natural one under the circumstances. This is really an extraordinary situation if the real inquiry is into the capacity of the individual to understand. Who better than an expert in mental disorders is qualified to give an answer to this inquiry? What possible explanation can be found for this judicial attitude? Surely it is not a carry-over of the college rivalry between the laws and the medics.

The reputation of psychiatry as a science has suffered because of its connection with the criminal courts. In an important murder trial, where the defense is insanity, it is a more or less common spectacle for a group of psychiatrists of equal eminence to be lined up on each side of the case. This creates a tendency in the judicial mind to view their opinions with suspicion. This suspicion is not removed by the fact that a case happens to fall on the civil rather than the criminal side of the docket. It is, likewise, not uncommon for groups of equally eminent psychiatrists to be lined up on either side of an important will contest. This tends to con-

(1887); Greer's Ex'r v. Bishop, 265 Ky. 352, 95 S. W. (2d) 851 (1936); Callis v. Thomas, 154 Md. 229, 140 Atl. 59 (1928); Stevens v. Meadows, 340 Mo. 252, 100 S. W. (2d) 281 (1936); Guarantee Trust Co. v. Heidenreich, 250 Pa. 249, 138 Atl. 764 (1927).

70. In re Cookson's Estate, 325 Pa. 81, 189 Atl. 904 (1937).
71. In re Collins' Estate, 174 Cal. 663, 670, 164 Pac. 1110, 1113 (1917).
74. See In re Arnold's Estate, 16 Cal. (2d) 573, 107 P. (2d) 25 (1940); In re Collins' Estate, 174 Cal. 663, 164 Pac. 1110 (1917); In re Mason's Estate, 185 Okla. 278, 91 P. (2d) 657 (1939).
75. Professor Folsom, Professor Emeritus, University of Colorado Law School, suggests that the conflict in opinions of psychiatrists in such cases may not be as great as it appears because of the possibility that the hypothetical questions propounded to them may differ: that is, precisely the same question is not propounded to the experts on each side; hence, they are giving opinions on different sets of facts. However, this does not account for the fact that their opinions are seldom shaken on cross-examination. Even if the explanation is valid, it is not sufficiently apparent to dissolve the suspicion generated by such battles of the experts. Some have suggested that the problem could be solved in the criminal law field by having the mental condition of the accused determined by an impartial expert or board of experts appointed by the court, for example, a state psychiatrist. Whatever merit such a system would have in criminal law, it is submitted that it would not solve the problem in suits between private litigants. In will contests the testator is dead at the time of the trial and, therefore, not subject
firm the suspicion. Possibly this is the explanation of judicial disregard for expert opinion, but in the light of a similar judicial disregard for other evidentiary facts of mental incompetency, the possibility of an inarticulate standard cannot be ignored.

Official opinion of incompetency (prior or subsequent adjudications). Proceedings for the adjudication of a person as an incompetent are of two types. The more common type, which stems from the common law writ, de lunatico inquirendo, has for its primary purpose the appointment of a guardian to care for and preserve the incompetent's estate. The second type, summary in nature, has for its purpose the protection of the person of the incompetent by confining him in an asylum or hospital. In some jurisdictions a decree of adjudication of the first type will render subsequent contracts void. With this exception the decree of adjudication, whether made prior or subsequent to the transaction, is merely an evidentiary fact of incompetency to be considered with all others. An as evidentiary fact, it is highly inconclusive. This is not surprising in regard to subsequent adjudications, as they are not retroactive in their operation. But it is mildly disturbing to find courts upholding and enforcing agreements and wills made at a time when the author of the instrument was under guardianship or in a hospital for the insane. Nevertheless, the

to examination by the state psychiatrist. The same situation prevails in many contract cases. The state, moreover, is a party to a criminal trial and may require a state psychiatrist to present its side of the case, but the state is not a party to private litigation. For other suggested methods as to the solution of the problem, see note 132 infra.

76. 5 Wytmore, Evidence, § 1671; (1914) 14 Col. L. Rev. 674.
77. The cases are collected in an excellent annotation in (1920) 7 A. L. R. 568, supplemented by (1930) 68 A. L. R. 1309. See also 5 Wytmore, loc. cit. supra note 76.
78. See Green, The Operative Effect of Mental Incompetency on Agreements and Wills (1943) 21 Tex. L. Rev. 554.
79. Agreements: Mason v. Graves, 265 S. W. 667 (Ark. 1924) (under guardianship); Ramsdell v. Ramsdell, 128 Mich. 110, 87 N. W. 81 (1901) (prior commitment to asylum—deed made during lucid interval when grantor was 87); Finch v. Goldstein, 245 N. Y. 300, 157 N. E. 146 (1927) (conveyance made while in hospital for insane pursuant to commitment). Wills: In re Johnson's Estate, 57 Cal. 529 (1881) (under guardianship; lower court sustained will and appellate court affirmed); In re Johnson's Estate, 222 Iowa 787, 269 N. W. 792 (1936) (testator, aged 74, filed voluntary petition to have his brother appointed his guardian one year prior to execution of will; lower court denied probate, but appellate court reversed); McLoughlin v. Sheehan, 250 Mass. 132, 145 N. E. 259 (1924) (under conservatorship; lower court sustained will and appellate court affirmed); Rice v. Rice, 50 Mich. 448, 15 N. W. 545 (1883) (guardianship proceedings pending when will executed, and guardian actually appointed a few hours after will was signed; lower court denied probate, but appellate court reversed holding lower court
decree of adjudication seems to stand upon the same plane, as far as probative value is concerned, as psychopathic behavior and both lay and expert opinions of incompetency.

**Organic Condition and Habits of the Alleged Incompetent**

Under this heading are subsumed four evidentiary facts: age, bodily infirmity and disease, the use of drugs and alcohol, and illiteracy. The first three may be considered circumstantial evidence of incompetency; standing alone they are equivocal, but coupled with other facts they may give rise to an inference of incompetency. The fourth is even more equivocal; per se it proves nothing, but it may be one of a number of facts tending to prove mental deficiency. In relation to the articulate standard the probative value of the facts in this group should be less than that of the facts in the two preceding groups.

**Age.** "As human beings pass into the old-age decades, there occurs a failure of the mental powers which, in general is commensurate with the physical deteriorations of senility . . . . When we speak of senility and senile psychoses, we refer to those mental disturbances which occur, as a general rule, after sixty-five. . . ." 80

80. **SABLES, op. cit. supra** note 1, at 909.
Mental deterioration is not a matter of mere chronological age. There are wide individual variations. Some men are old at forty, while others retain a great deal of their physical and mental vigor after they have passed their allotted three score and ten. The late Mr. Justice Holmes is a striking illustration of the fact that mere old age does not necessarily result in loss of mental power. A recognition of this fact has led to numerous statements that extreme old age does not of itself disqualify a person from making a valid agreement or will. Many cases can be found upholding agreements and wills made by persons in advanced years. However, old age becomes an important evidentiary fact when found in connection with other evidentiary facts of incompetency.

81. Henderson and Gillespie, op. cit. supra note 5, at 343 et seq.
82. 3 Page, Contracts, 2807; 1 Shouler, Wills (6th ed. 1923) 180; Thompson, Wills (2d ed. 1936) 88.
84. 2 Page, Wills, 565.
85. Whitsett v. Belue, 172 Ala. 256, 54 So. 677 (1911); Rutland v. Gleaves and Thompson, 31 Tenn. 198 (1851).
86. See Floyd v. Green, 238 Ala. 42, 188 So. 867 (1939) (age, 87); Hawkins v. Randolph, 149 Ark. 124, 231 S. W. 566 (1921) (age, over 80); Campbell v. Lux, 146 Ark. 397, 225 S. W. 653 (1920) (age, 77); Saliba v. James, 143 Fla. 404, 196 So. 832 (1940) (age, 70); Willemin v. Dunn, 93 Ill. 511 (1879) (age, 75); Layne v. Layne, 277 Ky. 295, 126 S. W. (2d) 416 (1939) (age, 83); Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1938) (age, past 90); Wigley v. Buzzard, 124 S. W. (2d) 985 (Tex. Civ. App. 1939) (age, over 80). Where the issue of mental incompetency is combined with undue influence, age is likewise treated as significant. See Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148 (1910) (age, over 79); Merritt v. Easterly, 226 Iowa 514, 284 N. W. 397 (1939) (age, 87); Clement v. Smith, 293 Mich. 393, 292 N. W. 343 (1940) (age, over 70). And, similarly, where the issue of mental incompetency is combined with fraud. See Sunseri v. Katz, 53 Ariz. 234, 87 P. (2d) 797 (1939) (age, over 80); Richen v. Crabtree, 198 Ark. 25, 127 S. W. (2d) 269 (1939) ("quite old"); Douglas v. Ogle, 80 Fla. 42, 85 So. 243 (1920) ("old" and "aged"); Mettetal v. Hall, 288 Mich. 200, 284 N. W. 698 (1939) (age, 77).
87. See Whitsett v. Belue, 172 Ala. 256, 54 So. 677 (1911) (approving instruction to jury allowing them to consider "old age" on the issue of mental incompetency); Mil-
age of the party as one of the considerations moving them to hold the contract or will invalid. Age as an evidentiary fact is satisfactory in that it is definite, certain, concrete, and objective. While standing alone it is utterly equivocal as to its implications, as one of a group of evidentiary facts it has a tendency to lend color to the others.

**Bodily infirmity and disease.** Medical science no longer regards the mind as an entity, independent of the corporeal body. It is at least physiologically conditioned. Some mental disorders, such as general paresis and the psychoses of senility, are definitely traceable to lesions in the central nervous system. Others, it is believed, are due to bacterial toxins. In all general infections, especially if accompanied by a high fever, symptoms of delirium, stupor, and even mania may be present. Severe trauma may produce shock and hysteria. All of these have a tendency to diminish or extinguish, at least temporarily, capacity for understanding. Of course, not every disease or infirmity will have mental sequelae; and it is generally agreed, therefore, that mere illness or bodily infirmity will not disqualify a person from making a valid agreement or will. But they may be potent evidentiary facts. In the leading case, *Allore v. Jewell,* the heir

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89. Henderson and Gillespie, *op. cit. supra* note 5, 61

90. Id. at 66.

91. See Borovansky v. Para, 306 Ill. App. 60, 28 N. E. (2d) 174 (1940) (here the grantor had diabetes, arteriosclerosis, and myocarditis); Calward v. Reynolds, 281 Ky. 518, 136 S. W. (2d) 795 (1940); Murphy v. Lester, 280 Ky. 51, 132 S. W. (2d) 542 (1939); Rutland v. Gheaves and Thompson, 31 Tenn. 198 (1851) (evidence conflicting on age, ranging from 60 to 73); Oglesby v. Harris, 130 S. W. (2d) 449 (Tex. Civ. App. 1939) (age, 71); In re McCoy's Estate, 91 Utah 212, 63 P. (2d) 125 (1938) (age, 92); In re Landgren's Estate, 189 Wash. 33, 63 P. (2d) 438 (1936) (age, 79).


93. Cases involving agreements: Allore v. Jewell, 94 U. S. 506 (1877); Richey v. Crabtree, 198 Ark. 25, 127 S. W. (2d) 269 (1919) (grantor had pellagra and was "quite feeble"); Campbell v. Lux, 146 Ark. 397, 225 S. W. 653 (1920) (chronic diarrhea and bladder trouble, which impaired health to a great extent); Boyd v. Boyd, 123 Ark. 134, 184 S. W. 838 (1916) (in extremis, dying from cancer); Willemly v. Dunn, 93 Ill. 511 (1879) (great grief and sickness after losing his wife); Allen v. Francis, 277 Ky. 20, 125 S. W. (2d) 211 (1939) (paralytic stroke); Layne v. Layne, 277 Ky. 295, 126 S. W. (2d) 416 (1939) ("feeble and infirm both in body and mind"); Beattie v. Bower, 290 Mich. 517, 287 N. W. 900 (1939) (epilepsy and arteriosclerosis); Taylor v. Martin, 125 N. J. Eq. 156, 4 A. (2d) 690 (1939) (in hospital, ill with pneumonia); Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1938) (bedfast from paralytic stroke, also senile
at law of the deceased grantor sued to set aside a conveyance made when the grantor was extremely ill. The lower court dismissed the bill. The United States Supreme Court reversed with directions to enter a decree for the plaintiff. In an opinion by Mr. Justice Field, the Court, after detailing considerable evidence tending to prove incompetency, stated:

"In view of the circumstances stated, we are not satisfied that the deceased was, at the time she executed the conveyance, capable of comprehending fully the nature and effect of the transaction. She was in a state of physical prostration; and from that cause, and her previous infirmities, aggravated by her sickness, her intellect was greatly enfeebled; and, if not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, and the securing of an annuity for life. Certain it is, that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities, on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance."

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94. 94 U. S. 506 (1877).
95. Id. at 510.
The evidentiary value of bodily infirmity and disease is well recog-
nized by the courts. Expert opinion should give them added significance.
Although there is some danger of simulation, they have the advantage of
being comparatively objective; and the courts seem to like this quality.
A few examples will illustrate the judicial tendency to rely upon this type
of evidence. Courts have recognized that a paralytic stroke frequently
produces mental derangement;2o that the same is true of arteriosclerosis;
t that psychotic conditions frequently follow certain diseases which produce
toxic conditions in the blood stream, such as uremia,6 Bright's Disease,93
and toxic goiter;100 that any disease or injury, if severe enough, can cause
at least temporary mental incompetency.101 The problem is primarily one
of interpretation for the expert medical witness, but courts sometimes
furnish their own interpretations when medical evidence is lacking.102

The use of alcohol and drugs. There is authority for the proposition
that intoxication is an independent ground for avoiding an agreement
or invalidating a will.104 Such statements are too broad. Intoxication per
se does not extinguish contractual capacity105 or testamentary capacity.106
The degree of intoxication, however, may have an important bearing upon
the question of mental incompetency.107 Likewise, the fact that a person

96. See Allen v. Francis, 277 Ky. 20, 125 S. W. (2d) 211 (1939).
97. See In re Behrend's Will, 227 Iowa 1099, 290 N. W. 78 (1940); Oglesby v. Har-
particular emphasis is laid on Bright's Disease as one disease "which, if its course runs
for any length of time, has a great tendency to weaken the mental faculties."
100. See In re Behrend's Will, 227 Iowa 1099, 290 N. W. 78 (1940).
101. Shell shock, for example, Beane v. Stroope, 200 Ark. 922, 141 S. W. (2d) 537
(1940); or severe fractures resulting from an accident, In re Patti's Estate, 133 Pa.
Super. 81, 1 A. (2d) 791 (1938); or traumatic hysteria, Carr v. Sacramento Clay Pro-
102. See Beane v. Stroope, 200 Ark. 922, 141 S. W. (2d) 537 (1940); In re McCoy's
Estate, 91 Utah 212, 63 P. (2d) 620 (1937).
103. For comprehensive annotations, see Notes (1920) 6 A. L. R. 331, (1925) 36 A.
L. R. 619.
104. For a comprehensive annotation, see Note (1930) 67 A. L. R. 857.
105. See Johnson v. Lane, 369 Ill. 135, 15 N. E. (2d) 710 (1938).
106. See Pierce v. Pierce, 38 Mich. 412 (1878); Kish v. Bakaysa, 330 Pa. 533, 199
Atl. 321 (1938).
107. See In re Gharley's Estate, 57 Cal. 274 (1881) (will case); Saliba v. James,
143 Fla. 404, 196 So. 832 (1940) (contract case); Swygart v. Willard, 166 Ind. 25, 76
N. E. 755 (1906) (will case); Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118 (1850)
(will case); Howe v. Richards, 112 Iowa 220, 83 N. W. 509 (1900) (will case); Pierce
v. Pierce, 38 Mich. 412 (1878) (will case); Edge v. Edge, 38 N. J. Eq. 211 (1884) (will
case). Chronic alcoholism is considered a very prominent etiological factor in producing
mental disorder. A recent survey indicated that it is present in one-fifth of all patients
admitted to mental hospitals in Massachusetts. _Dayton, op. cit. supra_ note 93, c. 4.
was under the influence of narcotic or hypnotic drugs possesses evidentiary value on the issue of mental incompetency. The evidentiary value of this element does not depend upon whether the drugs were administered under the direction of a physician to alleviate pain and suffering during an illness, or whether they were self-administered by the party for his own indulgence. The use of alcohol and drugs may have a direct bearing upon capacity to understand in two ways. In the first place, the immediate physiological effect in large doses is to produce temporary but pronounced mental disturbances, chiefly diminution of perception and understanding, confusion, stupor, or delirium. In the second place, chronic use of alcohol or drugs may produce definite psychoses.

**Illiteracy.** The fact that the person executing the will or entering into the agreement was illiterate or had a poor understanding of the English language is sometimes relied upon by the courts as one of several facts to fortify a finding of mental incompetency. By itself illiteracy, like old


110. See Kellett v. Cochran, 239 Ala. 313, 194 So. 805 (1940) (will case, "liquor and drugs"); In re Gharky's Estate, 57 Cal. 274 (1881) (drunkenness); In re D'Avignon's Will, 12 Colo. App. 489, 55 Pac. 936 (1899); Rutland v. Geaves and Thompson, 31 Tenn. 198 (1851) (will case, "opium and ardent spirits").

111. For symptoms, see pages 272-73 supra.

112. For a statistical study showing the relationship between illiteracy, education, and mental disorder, see DAYTON, op. cit. supra note 93, at 372-75. His figures show that in Massachusetts the illiterate group in the population is 4 per cent, and in first admissions to hospitals for mental disorders, it comprises 7.6 per cent of the cases. His figures also show that in the illiterate group the psychoses occupying the first six positions are mental deficiency, senile dementia, alcoholic psychoses, psychoses with cerebral arteriosclerosis, epileptic psychoses, and psychoses with cerebral syphilis.

113. Cases involving agreements: Allore v. Jewell, 94 U. S. 506 (1877); Hawkins v. Randolph, 149 Ark. 124, 231 S. W. 556 (1921). Will Cases: In re Alexander's Estate, 111 Cal. App. 1, 295 Pac. 53 (1931); Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956 (1910). It is also considered a material evidentiary fact on the issue of fraud:
PROOF OF MENTAL INCOMPETENCY

age, has no probative value, for it does not necessarily indicate incapacity for understanding. Yet it may be evidence that the intellectual capacity of the individual was so low that he could not learn to read or write. At least, it is often a concomitant of mental deficiency; and, certainly, it does place an individual under a handicap when dealing with his fellow members of society.

MORAL ASPECTS OF THE TRANSACTION AND ITS CONSEQUENCES

The six facts comprising this group have probative value regarding the moral aspects of the transaction, that is, whether it is a fair one and should be supported, but they have only a negligible probative value upon the articulate issue, capacity for understanding. The first five in this group are the presence or absence of independent advice, a confidential or fiduciary relationship, undue influence, fraud, and secrecy. The sixth, the abnormality of the transaction, is of controlling importance.

Presence or absence of independent advice. The presence or absence of independent advice is usually treated as relevant only to the question of undue influence. The typical situation is one in which a dominant party in a confidential relation deals with the other; and here the absence of independent advice on the part of the subservient party raises a presumption of undue influence. In those cases where the issues of mental incompetency and undue influence are both present, it would be perfectly natural to expect this element to emerge into a place of some importance. But it is also sometimes relied upon in cases where the court is considering only the issue of mental incompetency. That it should be an element in these cases seems justifiable. If it is the law's protective policy which prompts courts to interfere in behalf of a mental incompetent, this impulse should be quickened by the absence of any independent advice to the incompetent. On the other hand, if the incompetent's interests are guarded by a person who is able to give him protection and advice, the law should be slower to intervene. A sampling of the cases indicates that courts are placing considerable reliance upon this element when dealing


114. In some jurisdictions this presumption is held to be conclusive: Liles v. Terry, [1895] 2 Q. B. 679; Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466 (1904); but in the majority, it is held to be rebuttable: Brown v. Canadian Co., 209 Cal. 595, 289 Pac. 613 (1930); Zimmerman v. Frushour, 108 Md. 115, 69 Atl. 796 (1903).

115. See Green, supra note 56, at 1205 et seq.
with the single or combined issues of fraud, undue influence, and mental incompetency.\footnote{116}

A glance at the cases which stressed, or at least mentioned, the element of lack of independent advice as a reason for granting relief to the incompetent or his representatives is suggestive. Two are will cases in which the chief legatee selected the attorney to draw the will.\footnote{117} In another case the court set aside a deed from an elderly woman to her daughter-in-law, stressing the fact that a confidential relation existed and that the elderly woman had no independent advice. The court considered this element evidence both of mental incompetency and of undue influence.\footnote{118} In one case where the issue involved was mental incompetency (from which the court inferred fraud) and where no confidential relationship existed, the court still stressed the fact of no independent advice as an element in justifying the setting aside of a contract for the sale of land.\footnote{119} In another case involving only mental incompetency, the court, setting aside a deed, emphasized the fact that the grantee's lawyer was present and drew the deed, and that the grantor had no independent advice.\footnote{120} In four of the cases courts granting relief evidently considered this element persuasive on the issue of mental incompetency, but rested their decision on the idea of a "presumptive fraud" perpetrated upon the incompetent.\footnote{121} In the remaining case the element, although influential, remained implicit.\footnote{122}

In the cases in which the presence of independent advice was regarded as an important element in sustaining the validity of the transaction, two involved the three issues of mental incompetency, undue influence and fraud;\footnote{123} four involved the two issues of mental incompetency and undue influence;\footnote{124} and five involved the single issue of mental incompetency.\footnote{125}

\footnote{116. The sample consisted of a group of twenty-four cases from fifteen jurisdictions. In thirteen cases, where relief was granted, the courts stressed the absence of independent advice; in eleven cases, where relief was denied, the courts stressed the presence of independent advice.}
\footnote{117. In re Gallo's Estate, 61 Cal. App. 163, 214 Pac. 496 (1923) (mental incompetency and undue influence); James v. James, 64 Colo. 133, 170 Pac. 285 (1918) (mental incompetency and undue influence).}
\footnote{118. Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148 (1910); accord, Merritt v. Easterly, 226 Iowa 314, 284 N. W. 397 (1939).}
\footnote{119. Wilkie v. Sassen, 123 Iowa 421, 99 N. W. 124 (1904).}
\footnote{120. Allore v. Jewell, 94 U. S. 506 (1877) (although there was no fiduciary or confidential relationship here, the court intimates that imposition or undue influence might be inferred); accord, Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1938).}
\footnote{121. Klose v. Hillenbrand, 88 Cal. 473, 26 Pac. 352 (1891); Wells v. Wells, 197 Ind. 236, 150 N. E. 361 (1926); Mettetal v. Hall, 288 Mich. 200, 284 N. W. 698 (1939); Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773 (1939).}
\footnote{122. Jones v. Travers, 116 Ark. 95, 172 S. W. 828 (1915).}
\footnote{123. Perry v. Pearson, 135 Ill. 218, 25 N. E. 636 (1890); Travis v. McCully, 186 Okla. 378, 98 P. (2d) 595 (1940).}
In five of the cases the independent advice was given by a lawyer of the party's own selection; in one, by the cashier of a bank; in one, by the party's wife. In another case the party was himself a lawyer, but had also consulted lifelong friends. In still another the advice was given by a person who had been attending to the party's business affairs for fifteen years; in another case, by a notary public; and in the last, the grantee took the precaution of having the grantor examined by two doctors and had him consult a lawyer.

Cases involving the single issue of mental incompetency in which the element of independent advice has been considered are relatively rare. In most of the opinions, it is impossible to tell from the court's statement of the facts whether or not there was anything in the evidence concerning the presence or absence of independent advice. That the record was silent is probable in view of the fact that this element seems to be potent when it is definitely present in a case. Perhaps if its importance were realized by trial counsel, it would appear more frequently.


132. Ramsdell v. Ramsdell, 128 Mich. 110, 87 N. W. 81 (1901). This case suggests the question of what measures can be taken at the time of the transaction to forestall future litigation. A psychiatric examination at the time of the transaction with a pronouncement of competency should be strong evidence in any later contest. Judicial distrust for such expert opinion might, however, still remain. In the case of deeds and contracts a declaratory judgment is a possibility. In the case of wills, ante mortem probate has been suggested, although this is not possible under the usual probate machinery. The problem is discussed in 7 WIGMORE, EVIDENCE, § 1933; Cavers, Ante Mortem Probate: an Essay in Preventive Law (1934) 1 U. of Chi. L. Rev. 440; Stephens, Probate Psychiatry—Examination of Testamentary Capacity by a Psychiatrist as a Subscribing Witness (1930) 25 Ill. L. Rev. 276; Sulbert, Probate Psychiatry—a Neuro-Psychiatric Examination of Testator from the Psychiatric Viewpoint (1930) 25 Ill. L. Rev. 283.

133. If the "understanding test" required for competency a full understanding of the particular transaction under the particular circumstances of the case—an understanding, not merely that a deed transferred title, but also of the relative economic advantages involved—then the pertinence of the presence or absence of independent advice would be clear. A weak minded grantor might understand a transaction, if all of its ramifications were explained to him by an unbiased independent advisor, but not be able to understand it without such help. See Mettetal v. Hall, 288 Mich. 200, 284 N. W. 698 (1939). There
Presence or absence of a confidential or fiduciary relationship. A large percentage of cases which set aside transactions on the ground of undue influence hold a confidential or fiduciary relationship to be a prerequisite to invalidation. Hence, in those cases, the presence of a confidential or fiduciary relationship is not only pertinent but essential. It may also be important on the issue of fraud. Actually, a confidential or fiduciary relationship as such has no logical relevance to the issue of mental incompetency.

When a court is considering the issue of mental incompetency coupled with the issue of fraud or undue influence, and when it attaches evidential importance to the presence or absence of a confidential or fiduciary relationship, it is easy to explain this element as bearing only upon the issue to which it is logically relevant. However, there still remain a number of cases which attach importance to it as relevant to the single issue of mental incompetency.

is no uniform understanding test, however. Some courts require a very low degree of understanding, merely an appreciation of the fact that this paper is a deed, while others require also an understanding of consequences. Even within the same jurisdiction the standard is very apt to be subject to constant change. See Green, supra note 16.

134. Under the Restatement definition of undue influence, it can exist only when one party is under the domination of the other. RESTATEMENT, CONTRACTS (1932) § 497. This usually occurs when there is a confidential or fiduciary relation between the parties. See 5 WILLISTON, CONTRACTS, 4539; 1 PAGE, WILLS, 348 et seq.; 1 SHOULER, WILLS (6th ed.) 319; 1 PAGE, CONTRACTS, 739; (1941) 41 Col. L. Rev. 707-23.

135. The following cases which stress the presence or absence of a confidential relation as an important circumstance may be explained upon this basis. Cases involving agreements: Floyd v. Green, 238 Ala. 42, 188 So. 867 (1939) (mental incompetency and undue influence); Sunseri v. Katz, 53 Ariz. 234, 87 P. (2d) 797 (1939) (mental incompetency and fraud); Wells v. Wells, 197 Ind. 236, 150 N. E. 361 (1926) (mental incompetency and fraud); Merritt v. Easterly, 226 Iowa 514, 284 N. W. 397 (1939) (mental incompetency and undue influence); Rounds v. Rounds, 220 Ky. 98, 294 S. W. 785 (1927) (mental incompetency and undue influence); Mead v. Gilbert, 170 Md. 592, 185 Atl. 668 (1936) (mental incompetency and fraud); Clement v. Smith, 293 Mich. 393, 292 N. W. 343 (1940) (mental incompetency and undue influence); Raynett v. Baluss, 54 Mich. 469 (1884) (mental incompetency and fraud); Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773 (1939) (mental incompetency and fraud); Parker v. Parker, 75 Okla. 234, 182 Pac. 697 (1919) (mental incompetency and undue influence); Bliss v. Bahr, 161 Ore. 79, 87 P. (2d) 219 (1939) (mental incompetency and undue influence). Will cases: In re Johnson’s Estate, 31 Cal. App. (2d) 251, 87 P. (2d) 900 (1939) (mental incompetency and undue influence); In re Gallo’s Estate, 61 Cal. App. 163, 214 Pac. 496 (1923) (mental incompetency and undue influence); James v. James, 64 Colo. 133, 170 Pac. 285 (1918) (mental incompetency and undue influence); Gorman v. Hickey, 145 Kan. 54, 64 P. (2d) 587 (1937) (mental incompetency and undue influence); In re Patti’s Estate, 133 Pa. Super. 81, 1 A. (2d) 791 (1938) (mental incompetency, fraud, and undue influence); Moore v. Horne, 136 S. W. (2d) 638 (Tex. Civ. App. 1940) (mental incompetency and undue influence); Dean v. Jordan, 194 Wash. 661, 79 P. (2d) 331 (1938) (mental incompetency, fraud, and undue influence).

136. The following are typical. Cases involving agreements: Hawkins v. Randolph, 149 Ark. 124, 231 S. W. 556 (1921); Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148
If we accept the articulate standard of the courts and the test is merely the capacity of the individual to understand, these cases are wrong. Only on the assumption that the court is employing an inarticulate standard and is judging the transaction and not the individual alone, can the cases be supported.

**Presence or absence of undue influence.** Undue influence and mental incompetency are so frequently associated as joint grounds for attacking a transaction, especially in will contests, that they have been called the Gold Dust Twins. They are customarily considered separate invalidating agencies. Mental weakness may, however, be an important evidentiary fact in the proof of undue influence; and some courts have held that undue influence may be an evidentiary fact in the proof of mental incompetency. In support of this position it may be argued that all behavior has some bearing on the issue of mental incompetency. All abnormal or irrational conduct is some evidence of incompetency. It may be argued that it is not abnormal to succumb to permissible influence, but that it is abnormal to succumb to undue influence, which overpowers the will and substitutes therefor the will of another.

**Presence or absence of fraud.** What has been said of undue influence may, with slight modification, also be said of fraud. Mental weakness has bearing upon the reliance aspect of fraud. One of imperfect understanding is more likely to be deceived by misrepresentations. Likewise, reliance in a particular case may be an abnormal act and as such is some evidence of mental incompetency.

**Presence or absence of secrecy.** A donee may keep secret the fact that a gift has been made to him. Or if a testator has advised him that he is making a will in his favor, the putative legatee may keep the fact a secret from other natural objects of the testator's bounty. Similarly, a party to a business transaction may keep its existence secret. Does such secrecy have any evidentiary value upon the question of the mental competency of the donor, testator, or other party to the business transaction? Secrecy is a badge of fraud. It may also be a badge of undue influence, which some courts regard as a species of fraud. From a medical viewpoint secrecy together with other symptoms may indicate certain

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137. The cases supporting this proposition are collected and analyzed in Green, supra note 40.
138. Ibid.
139. For an early statement to this effect, see Twyne's Case (1602), 3 Coke, 80 b; see also Sharon v. Hill, 26 Fed. 337, 398 (C. C. D. Cal. 1885).
mental disorders, but they are not typically those which constitute mental incompetency. From a legal standpoint, it is difficult to see how secrecy surrounding the transaction could have probative value to show mental incompetency.1

But because of the frequency with which this issue is combined with the issues of fraud and undue influence, and because of the tendency of courts to lump fractional grounds to spell out a whole ground of invalidity,141 we sometimes find courts apparently regarding the secrecy of the transaction as significant evidence of mental incompetency. “Enfeebled mentality, secrecy and self-interest,” the Oregon Supreme Court has said, “are three dangerous guests to be present together at the making of a will.”142 Both in regard to agreements and wills a few scattered cases seem to regard the secrecy of the transaction or the absence of secrecy, as relevant to the issue of mental incompetency.

Abnormality of the transaction in question. When the validity of a particular transaction has been challenged and is being scrutinized by a court, one of the first things to be noted is whether or not the transaction

140. There is a line of authority holding that where a contract is executed, wholly or partially, it may not be avoided on the ground of mental incompetency unless the other party knew of the mental disorder. For the leading English case, see Molton v. Camroux, 2 Ex. 487, 154 Eng. Rep. R. 584 (1848), 4 Ex. 17, 154 Eng. Rep. R. 1107 (1849). For representative American cases adopting this position, see Beale v. Gibaud, 15 F. Supp. 1020 (W. D. N. Y. 1936); First Nat. Bank v. Sarvey, 198 Iowa 1067, 198 N. W. 496 (1924); Shoulters v. Allen, 51 Mich. 529, 16 N. W. 888 (1883); Groff v. Stitzer, 77 N. J. Eq. 250, 77 Atl. (1910); Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 (1889); Scarcy v. Hammett, 202 N. C. 42, 161 S. E. 733 (1932). In such jurisdictions secrecy surrounding the transaction might give rise to an inference that the other party knew of the mental disorder.

141. The process by which courts permit a partial showing of fraud or undue influence to be added to a partial showing of mental incompetency, so as to result in a composite ground for avoiding the transaction is discussed in Green, supra note 40. For representative cases in which this process is manifest, see Allore v. Jewell, 94 U. S. 506 (1877) (partial undue influence plus partial mental incompetency); Sunseri v. Katz, 53 Ariz. 234, 87 P. (2d) 797 (1939) (partial fraud plus partial mental incompetency); Beane v. Stroope, 200 Ark. 922, 141 S. W. (2d) 537 (1940) (partial fraud plus partial mental incompetency); Sulzberger v. Sulzberger, 372 Ill. 240, 23 N. E. (2d) 46 (1939) (partial undue influence plus partial mental incompetency); Herzog v. Gipson, 170 Ky. 325, 185 S. W. 1119 (1916) (partial undue influence plus partial mental incompetency).

142. In re Johnson’s Estate, 162 Ore. 97, 132, 91 P. (2d) 330, 343 (1939), [quoting from the earlier case of King v. Tonsing, 87 Ore. 236, 238, 170 Pac. 319, 320 (1918)]. In the principal case a will was disallowed because of lack of testamentary capacity and undue influence. The appellate court affirmed on the ground of incapacity alone. On that issue, however, it did appear to attach significance to the secrecy of the transaction.


144. See In re Hansen’s Estate, 38 Cal. App. (2d) 99, 100 P. (2d) 776 (1940); In re Gallo’s Estate, 61 Cal. App. 163, 214 Pac. 496 (1923); In re Johnson’s Estate, 162 Ore. 97, 91 P. (2d) 330 (1939).
conforms to the normal pattern of similar transactions. If it does conform to the normal and usual pattern, this fact in and of itself is evidence of no small value that the challenge is without merit. If it does not conform, a suspicion immediately is aroused that there may be something wrong with the transaction and that the challenge may have merit. If the nonconformity is sufficiently pronounced, this fact, in and of itself, is evidence of substantial value that the challenge is meritorious. While these observations may be overly broad as applied to law in general, they are accurate statements when applied to the law of mental incompetency.

Before the cases are examined it is necessary to define what is meant by the "normal pattern" of similar transactions and to indicate the source of the standard for determining what is normal. The mores of the community furnish much of the raw material from which rules of law are made. They are the source of the institutional patterns of normal transactions. The mores of the community are to be found in the customs, folkways, established collective habits, and the collective value judgments of persons of good character in the community. There are certain rather well-defined attitudes upon the part of people generally in the United States in regard to the way in which a person should dispose of his property by gift and the way in which he should deal with his fellow men in a business transaction. These are general, not universal attitudes; and while there will be room for individual differences of opinion in concrete cases, these broad attitudes may be used as a norm in a general way, although, like general "rules of law," they will not serve to decide cases automatically.

In examining the abnormality of the transaction as an evidentiary fact it will be convenient to lump together inter vivos and testamentary gifts and consider them separately from business transactions. "Freedom of gift is one of the incidents of property in English law, yet it has not been won without a struggle and its extension has been criticized." The mores of the United States approve of work, condemn idleness, and look askance at unearned gain; they believe that the first duty of the head of a house is to provide for his family, that "charity begins at home." While they approve of voluntary gifts for public purposes where the donor is in a position to make them, improvidence is something to be condemned. Gratitude is one of the virtues, and a reward based upon merit is always commendable. These, by and large, are the public attitudes by which the judge on the bench, in common with the jurors in the box.

146. Tufts, The Moral Life and the Construction of Values and Standards in Creative Intelligence—Essays in the Pragmatic Attitude (1917) 382.
147. Patterson, Insurable Interest in Life (1918) 18 Col. L. Rev. 381, 387.
148. Tufts, America's Social Morality (1933) 38; Patterson, supra note 147, at 386 et seq.
and the layman in the world outside, judge the normality or abnormality of the transaction.

When a parent desires to make a gift to one or more of his children, there is no law which requires him to treat them equally, and there are dicta to the effect that an unequal distribution is not evidence of mental incompetency. But the public mores regard equality in the treatment of children as desirable unless reasons exist for unequal treatment. They would not condemn a father for having a favorite child, but in the absence of some apparent reason, they would brand a gross discrimination as unnatural. Thus, where a decedent deeded all of his property to one son to the exclusion of his wife and other children, and there was no apparent reason for the discrimination, the unnaturalness of the gift fortified the court's conclusion that the act was the product of an insane delusion. This gift ran counter to a general belief in equality of treatment and a belief that the first duty of the head of the house is to provide for the entire family. In another case, a father gave practically all of his property to one son to the exclusion of his other children, who sued to set aside the transfers after their father's death. The lower court dismissed the bill. The appellate court was "more or less astonished" at the action of the trial court and reversed with instructions to award relief to the plaintiffs. There was other evidence of mental incompetency, and it was further shown that the defendant was in a much better financial position than the plaintiff. The court remarked:

"The record is absolutely barren of any fact upon which either of the transactions could be logically based, as supported by reason therefor, much less with fairness to the other heirs."

While the fact that the gift was an extremely improvident one will be considered important evidence upon the issue of mental incompetency, an apparently unnatural transaction may, however, be explained. In one case a mother had deeded all of her property to one son to the exclusion of her other children, and the deed was attacked upon the ground of the grantor's mental incompetency. The court said the "unnaturalness" of the transaction had weight, but that, in view of the small value of the mother's property and the fact that the defendant had supported her, the gift "may with as much reason indicate that she [the deceased grantor]

149. See, e.g., Johnson v. Lane, 369 Ill. 135, 15 N. E. (2d) 710 (1938).
152. Id. at 22, 125 S. W. (2d) at 212.
153. See Taylor v. Martin, 125 N. J. Eq. 156, 4 A. (2d) 690 (1939) (aged and ill mother making gift to daughter, resulting in impoverishment of former); Wigley v. Buzzard, 124 S. W. (2d) 898 (Tex. Civ. App. 1939) (aged and infirm mother, discriminating against other children, gave valuable oil land to one son).
154. Travis v. Travis, 81 Fla. 309, 87 So. 762 (1921).
was grateful for what had been done."

Similar observations apply to gifts made from a husband to his wife, or from a son to his father, or to a total stranger.

It is true that courts often say that there is no duty upon the part of a testator to make an equal division of his estate among the natural objects of his bounty, and that no inference of mental incompetency can be drawn from the fact of unnatural testamentary dispositions. It is also true that the circumstances may show that an unequal distribution is not an unnatural distribution. Nevertheless, whether or not the will was an unnatural one under the circumstances is important in causing the court to sustain it: Field v. Shorb, 99 (2d)

The naturalness of the transaction under the circumstances was important in causing the court to reverse with directions to set aside the conveyances; Travis v. McCully, pet 75 (1899); In re

The following cases on combined grounds of mental incompetency and undue influence)

In the following cases on combined grounds of mental incompetency and undue influence). In the following cases on combined grounds of mental incompetency and undue influence. Beattie v. Bower, 134 Neb. 759, 279 (1938); McFarland v. Ellingsworth, 159 Ore. 446, 59 P. (2d) 899 (1938).

Where a testator passes over the natural objects of his bounty and gives his property to others, courts very frequently characterize such conduct as "unnatural," "harsh," "unjust," or "irrational" and treat it as strong corroborative evidence of lack of testamentary capacity.

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155. Id. at 318, 87 So. at 765.

156. See Revlett v. Revlett, 274 Ky. 176, 118 S. W. (2d) 150 (1938) (gifts held natural under the circumstances) ; Beattie v. Bower, 290 Mich. 317, 287 N. W. 910 (1939) (improvident and unnatural character of the gift, with other evidence of mental incompetency, caused appellate court to reverse with directions to set aside the conveyances); Travis v. McCully, 186 Okla. 378, 98 P. (2d) 595 (1940) (conveyance held natural under the circumstances).

157. See Parker v. Parker, 75 Okla. 234, 182 Pac. 697 (1919) (holding deed invalid on combined grounds of mental incompetency and undue influence).

158. In Rondous v. Erb, 176 Md. 694, 4 A. (2d) 408 (1939), the unnaturalness of the transaction constituted an additional reason for invalidating it. In the following cases the naturalness of the transaction under the circumstances was important in causing the court to sustain it: Field v. Shorb, 99 Cal. 661, 34 Pac. 504 (1893); Kirk v. Tackett, 134 Neb. 759, 279 N. W. 468 (1938); McFarland v. Ellingsworth, 159 Ore. 446, 59 P. (2d) 899 (1938).

159. See In re McCabe's Will, 75 Misc. 35, 134 N. Y. Supp. 682 (Surr. Ct. 1911); In re Lawrence's Estate, 286 Pa. 58, 12 Atl. 786 (1926).


161. See Council v. Mayhew, 172 Ala. 295, 55 So. 314 (1911); In re Sexton's Estate, 199 Cal. 759, 251 Pac. 778 (1926).


163. See In re Wasserman's Estate, 170 Cal. 101, 148 Pac. 931 (1915); In re Alexander's Estate, 111 Cal. App. 1, 295 Pac. 53 (1931); Lehman v. Lindenmeyer, 48 Colo. 305, 109 Pac. 956 (1910); Swygart v. Willard, 105 Ind. 25, 76 N. E. 755 (1905); Howe v. Richards, 112 Iowa 230, 88 N. W. 909 (1900); Osborn v. Paul, 272 Ky. 694, 114 S. W. (2d) 1134 (1938); Proffer v. Proffer, 342 Mo. 184, 114 S. W. (2d) 1035 (1938); In re Cissel's Estate, 104 Mont. 305, 116 P. (2d) 779 (1937); Edge v. Edge, 33 N. J. Eq. 211 (1884); In re Morey's Will, 254 App. Div. 713, 4 N. Y. S. (2d) 125 (3d Dept' 1938); In re Kenney's Will, 179 App. Div. 258, 166 N. Y. Supp. 478 (2d Dept' 1917); In re Redding's Will, 216 N. C. 497, 5 S. E. (2d) 544 (1939).
the other hand, if a testator does properly provide for the natural objects of his bounty, or if his will is "reasonable" and "just" under the circumstances of the particular case, courts often regard this as strong evidence of testamentary capacity.164

There is a strong public policy to protect the family as a social institution.165 It is reflected in the common law institutions of dower and curtesy, and in legislative limitations upon the portion of his estate which a testator may bequeath to strangers. It is also reflected in statutes of descent and distribution prescribing how a person's property shall be distributed if he dies intestate. But a testator is given considerable leeway. The "natural objects of his bounty" are not synonymous with his heirs in case he dies intestate. He is comparatively free, but the same mores which would condemn an inter vivos gift as unnatural apply to a testamentary gift. The terms of the will itself are evidence of competency or incompetency, as the case may be. If they accord with the mores, they are evidence of competency; if they run counter to the mores, they are some evidence of incompetency.166 But to be really significant, the terms

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164. See In re Arnold's Estate, 16 Cal. (2d) 573, 107 P. (2d) 25 (1940); In re Bacidgalupi's Estate, 202 Cal. 450, 261 Pac. 470 (1927); In re Sexton's Estate, 199 Cal. 759, 251 Pac. 778 (1926); In re Hayes' Estate, 55 Colo. 340, 135 Pac. 449 (1913); In re Shapter's Estate, 33 Colo. 578, 85 Pac. 688 (1906); Jackson's Ex'r v. Semones, 266 Ky. 352, 98 S. W. (2d) 505 (1936); Trimbo v. Trimbo, 47 Minn. 389, 50 N. W. 350 (1891) (case involving a deed, made in lieu of a will, which the court said took the place of a will and should, therefore, be judged according to testamentary standards); In re Mason's Estate, 185 Okla. 278, 91 P. (2d) 657 (1939).

165. See Green, supra note 56.

166. See In re Arnold's Estate, 16 Cal. (2d) 573, 589, 107 P. (2d) 25, 33 (1940), in which the court quoting from the superior court's opinion stated: "The will is a perfectly natural will and bears no evidence upon its face of any mental weakness of the testator, much less anything amounting to mental incapacity in the legal sense. On the contrary, it is convincing evidence of his testamentary capacity. . . ."; Davis v. Davis, 64 Colo. 62, 170 Pac. 208 (1918) (holding that the unnaturalness of the will may be considered by the jury as evidence of incompetency and undue influence, although the jury must not substitute its judgment of fairness for that of testator); Appeal of Cran dall, 63 Conn. 365, 28 Atl. 531 (1893) (on appeal by proponents, court affirmed the denial of the proponents' requested instruction that jury might not consider the equity or inequity of the terms of the will); Whitehead v. Malcom, 161 Ga. 55, 129 S. E. 769 (1925) (holding that the court may properly instruct jury that the reasonableness or unreasonableness of the disposition made by the will is relevant evidence on the question of incompetency); Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118 (1890); Berryman v. Sidwell, 278 Ky. 713, 129 S. W. (2d) 154 (1939) (holding that it was proper to read the will in evidence on the issues of mental incompetency and undue influence); Jackson's Ex'r v. Semones, 266 Ky. 352, 98 S. W. (2d) 505 (1936) (stating that if a will is rational on its face, it is often the best evidence of competency); In re Cissel's Estate, 104 Mont. 306, 66 P. (2d) 779 (1937) (stating that unjustness of the will is one of the controlling considerations); In re Bose's Estate, 136 Neb. 156, 285 N. W. 319 (1939) (holding that the terms of the will are evidence on the question of testamentary capacity); In re Wood's Will, 253 App. Div. 78, 300 N. Y. Supp. 1268 (3d Depr't 1937) (the terms of the will are
of the will must be viewed in relation to the position which the testator occupied toward the natural objects of his bounty and the devisees and legatees in the will. The will should be read in the light of his whole social environment, and thus it is proper to introduce evidence to show the friendly or unfriendly relations between him and the devisees and legatees and between him and the natural objects of his bounty, the relative pecuniary condition of all parties concerned, the size, value, and source of the estate, favors bestowed and services rendered by legatees, etc.\textsuperscript{167}

The mores of the business transaction are simpler than the mores of the gift. They are merely this, that one should not try to overreach his neighbours, friends, and business associates.\textsuperscript{168} Making allowances for speculative ventures, a bargain should represent a fair exchange. But this idea has not become crystallized into a rule of law requiring equivalent considerations. On the contrary, if any rule of Anglo-American contract law can be considered settled, it is that the law will not inquire into the adequacy of consideration.\textsuperscript{169} The basis of this rule may be the fact

"important evidence" on the issue of testamentary capacity); \textit{In re} Mason's Estate, 185 Okla. 278, 91 P. (2d) 657 (1939) (a "rational" will is evidence of testamentary capacity); Melody v. Hamblin, 21 Tenn. App. 687, 115 S. W. (2d) 237 (1937) (the will itself may be looked to as evidence of sanity or insanity).

167. See Fountain v. Brown, 38 Ala. 72 (1861) (the state of testator's family relations, the pecuniary condition of legatees, etc.); Stubbs v. Houston, 33 Ala. 555 (1859) (pecuniary condition of testator's heirs at law). In \textit{In re} Sexton's Estate, 199 Cal. 759, 773, 251 Pac. 778, 783 (1926), the testatrix willed her property to her six children, share and share alike. The husband contested. The court noted that the will was just and equitable "in the light of the fact that contestant . . . [was] a man of affluence." See also \textit{In re} Gallo's Estate, 61 Cal. App. 163, 214 Pac. 496 (1923) (poverty of son and daughter who contest will); \textit{In re} Shapter's Estate, 35 Colo. 578, 85 Pac. 688 (1905) (testator's situation in life); Barbour v. Moore, 10 App. D. C. 30 (1897) (the situation in life and pecuniary condition of the natural objects of testator's bounty, poverty-stricken grandchildren); Galloway v. Hogg, 167 Ga. 502, 146 S. E. 156 (1928) (the family relations of testatrix); Maher v. Maher, 338 Ill. 102, 170 N. E. 221 (1930) (family relations, facts to explain inequalities of distribution, source and extent of estate, financial conditions of relatives, and advancements made to them); Ramseyer v. Dennis, 187 Ind. 420, 116 N. E. 417 (1917), 119 N. E. 716 (1918) (the amount, situation, condition, and value of testator's property; the number and names of the natural objects of his bounty; the conduct of such persons toward testator, and his treatment of them, and the relations existing between them); Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118 (1890) (evidence of the kind and quality of labor performed for testator by contestants and their conduct toward him); Howe v. Richards, 112 Iowa 220, 83 N. W. 909 (1900) (evidence of friendly relations between testator and contestants); \textit{In re} Bose's Estate, 136 Neb. 156, 285 N. W. 319 (1939) ("contemporaneous circumstances and conditions"); Guarantee Trust Co. v. Heidenreich, 290 Pa. 249, 138 Atl. 764 (1927) (advancements made to contestants during testator's lifetime); \textit{In re} Lawrence's Estate, 286 Pa. 58, 132 Atl. 786 (1926) (that court should put itself in testator's shoes and environment); cf. Laube, \textit{The Right of a Testator to Pauperize His Helpless Dependents} (1928) 13 Cornell L. Q. 559, 569.

168. Tufts, America's Social Morality (1933) 349.

169. 2 Street, Foundations of Legal Liability (1906) 69; Restatement, Contracts (1932) § 81.
that, while in normal situations the parties are exchanging equivalent considerations, the law is not very well equipped to measure exact equivalents in each case; and it, therefore, abandons the task and allows the parties to determine for themselves what is a fair exchange. In the normal situation there is a rough equivalency of exchange in the contract obligations of the parties. It is only in the abnormal or atypical case that there is a gross inadequacy of consideration. But such inadequacy is per se legally inconsequential. However, when it is coupled with a charge of fraud, undue influence, or mental incompetency, the picture immediately changes. Inadequacy of consideration, then, takes on significance: it becomes an important element to be considered.

Where only the issue of mental incompetency is presented in the case, inadequacy of consideration may have effect in three ways. The court may consider it as evidence of incompetency. The court may say that neither mere mental weakness nor mere inadequacy of consideration is by itself sufficient to avoid the contract, but together they constitute constructive fraud and ground relief. Or the court may say that, granting mental incompetency existed, inadequacy of consideration is the factor which moves the court to grant relief. Where the issue of mental incompetency is coupled with fraud, or with undue influence, or with both fraud and undue influence, inadequacy of consideration is also a potent element tending toward the granting of relief. And, conversely, where it is a debatable question whether or not the mental weakness of a party is sufficient to produce legal incompetency, a showing that the con-


173. McEvoy v. Tucker, 115 Ark. 430, 437, 171 S. W. 888, 891 (1914), in which the court said, " . . . if, in addition to mental incapacity, there is also inadequacy of consideration, equity will the more readily intervene to set aside a conveyance." To the effect that mere mental incompetency, even though clearly proved, will not justify equitable relief where the contract is fair and the consideration is adequate, see the rather remarkable case of Clay v. Clay's Committee, 179 Ky. 494, 200 S. W. 934 (1918).


tract was fair and the consideration adequate often will result in the con-
tract being upheld.177

The abnormality of the transaction is a proper element to be considered
in determining the issue of mental incompetency for two reasons. In the
first place, it accords with the basic policy of the law to protect the mental
incompetent and his dependents.178 And in the second place, if the trans-
action in itself is irrational, it is evidence of a disordered mind, as is any
other item of irrational behavior.

A possible objection may be raised in respect to the latter of these two
reasons. It may be argued that to judge the rationality of the person who
makes the contract or will by the rationality of the instrument he draws
may overlook the fact that the person making the contract or will may have secret reasons which would justify his act, such as providing in his
will for an unacknowledged illegitimate child, or that he may have dif-
ferent standards of value from the court or jury which is subsequently
passing judgment upon him. While it is true that an external standard
is being imposed, in such a way as to restrict individual freedom, this
is no innovation in law. Instances of the same process could no doubt
be multiplied; but confining ourselves to the field of contracts and
wills, we find ample authority for imposing such external standards.
The objective theory of contracts no doubt restricts individual free-
dom, but it finds its social justification in protecting the reasonably
aroused expectations of the promisee. The indirect sanction of illegality
which courts apply in refusing to enforce certain contracts obviously re-
stricts individual freedom. So does the disability of infancy. In the field
of wills we find individual freedom restricted by the common law devices
d of dower and curtesy and the statutory provisions which forbid a testator
to leave less than a specified percentage of his estate to his surviving
spouse179 In large measure, men are judged by law and by society ac-
cording to society’s standards, by their observable behavior and not by
their secret mental processes and motives, no matter how noble or how
base. It should be borne in mind that the abnormality of the transaction
is viewed in the light of the social environment of the party making the

Ariz. 461, 198 Pac. 712 (1921); First Nat. Bank v. Sarvey, 198 Iowa 1067, 198 N. W.
496 (1924); Ellwood v. O’Brien, 105 Iowa 239, 74 N. W. 740 (1898); Murphy v. Lester,
280 Ky. 51, 132 S. W. (2d) 542 (1939); Byrd v. McKoy, 183 Ohio 209, 81 P. (2d)
315 (1938).

178. Green, supra note 56, at 1212 et seq.

179. As examples of this type of statute, see Colo. Stat. Ann. (Michie 1935) c. 176,
§ 37; N. Y. DECEDENTS ESTATE LAW § 18. Also in point are the community property laws
found in some of the western states, which provide that one spouse cannot by will deprive
the other spouse of the surviving spouse’s share in the community property. See, e.g.,
CAL. PROB. CODE (Deering, 1937) § 201; WASH. REV. STAT. ANN. (Remington, 1932)
§ 1342.
contract or the will. This is the same technique employed by the psychiatrist in diagnosing mental disorder.180

**CONCLUSIONS—THE INARTICULATE STANDARD**

Evidentiary facts occur in constellations.181 It is their combined effect which persuades the trier of fact. Hence, it is difficult to single out any one evidentiary fact and state positively that it has more persuasive potency than the others. Yet certain conclusions can be drawn from judicial behavior. Evidence of psychopathic behavior is often ignored. Expert as well as lay opinions of incompetency are frequently brushed aside. And so we could continue down the list of other evidentiary facts. There is one evidentiary fact, however, which is seldom ignored, and that is the abnormality of the transaction. Its probative force may be weakened by the presence of independent advice or a dearth of evidence of psychopathic behavior, but it is always an important factor. And herein, if anywhere, lies the key to an inarticulate standard.

It is submitted that in determining the issue of mental incompetency, more frequently than otherwise, courts are passing upon the abnormality of the transaction rather than on the ability of the alleged incompetent

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180. **Landis and Page, op. cit. supra** note 8, at 8-11. **Green, supra** note 56, at 1200.

181. There is always present some evidence of psychopathic behavior, and nearly always both lay and expert opinion of incompetency. In addition to these, the other evidentiary facts occur in constellations of from two to seven. For some of the larger groupings, see: **Cases involving agreements:** Allore v. Jewell, 94 U. S. 506 (1877) (old age, bodily infirmity, inadequacy of consideration, illiteracy, no independent advice, undue influence); Floyd v. Green, 238 Ala. 42, 188 So. 867 (1939) (age, bodily infirmity, confidential relation, inadequate consideration, undue influence); Wells v. Wells, 197 Ind. 236, 150 N. E. 361 (1926) (age, bodily infirmity, confidential relation, no independent advice, fraud); Merritt v. Easterly, 226 Iowa 514, 284 N. W. 397 (1939) (age, bodily infirmity, secrecy, no independent advice, confidential relation, undue influence); Mettetal v. Hall, 288 Mich. 200, 284 N. W. 698 (1939) (age, bodily infirmity, no independent advice, inadequacy of consideration, fraud); Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773 (1939) (age, confidential relation, bodily infirmity, no independent advice, fraud); Griffin v. Mays, 183 Okla. 350, 82 P. (2d) 836 (1938) (age, bodily infirmity, confidential relation, no independent advice); Bliss v. Bahr, 161 Ore. 79, 87 P. (2d) 219 (1939) (bodily infirmity, age, use of drugs, confidential relation, an abnormal transaction, undue influence). **Will cases:** In re Hansen’s Estate, 38 Cal. App. (2d) 99, 100 P. (2d) 776 (1940) (fraud, undue influence, age, bodily infirmity, an unnatural will, secrecy); In re Gallo’s Estate, 61 Cal. App. 163, 214 Pac. 496 (1923) (undue influence, bodily infirmity, an unnatural will, secrecy, no independent advice, confidential relation); Proffer v. Proffer, 342 Mo. 184, 114 S. W. (2d) 1035 (1938) (age, bodily infirmity, incapacity to transact ordinary business, an unnatural will); Edge v. Edge, 38 N. J. Eq. 211 (1884) (age, bodily infirmity, intemperance, an unnatural will); In re Patti’s Estate, 133 Pa. Super. 81, 1 A. (2d) 791 (1938) (fraud, undue influence, bodily infirmity, drugs, illiteracy, an unnatural will, confidential relation); Moore v. Horne, 136 S. W. (2d) 638 (Tex. Civ. App. 1940). (undue influence, age, illiteracy, confidential relation, secrecy, an unnatural will).
PROOF OF MENTAL INCOMPETENCY

to understand the transaction. To rephrase this thought in terms of legal doctrine, we might say that since, both in unconscious desire and in articulate effort, the court is seeking evidence on whether mental incompetency has affected the particular transaction, the dominant factor in the evidence is whether the court sees the particular transaction in its result as that which a reasonably competent man might have made.182

When one states that an articulate standard often is being ignored, and an inarticulate one followed, the burden of proof rests upon him to prove his statement. As in any other situation where one has the burden of proof, he must bring forth his evidentiary facts in support of his proposition.

The first of such facts is to be found in two rules of law relating to the operative effect of mental incompetency. According to one line of authority, mere mental incompetency has no effect upon an inter vivos transaction unless it is accompanied by other equitable grounds for relief, such as fraud or gross inadequacy of consideration.183 According to another line of authority, which has wide support, if wholly or partially executed, a contract may not be rescinded for mental incompetency unless (a) the other party knew of the mental condition, and (b) the bargain was an unfair one.184 Under either of these rules, it is the abnormality of the transaction which is crucial and not the mental condition of the party.

A second of such facts is to be found in the extremely intimate relationship between the concepts of fraud, undue influence, and mental incompetency.185 They are in a sense complementary and aid each other; so much so, in fact, that courts frequently engage in the apparently anomalous expedient of lumping fractional grounds to spell out a composite whole. In such a situation it is the abnormality of the transaction which is the dominant factor. In this connection it should be noted, in passing, that every evidentiary fact which tends to prove mental incompetency has been held to be relevant also upon the issues of fraud and undue influence.186

A third such fact is to be found in the practice of allowing the jury to bring to bear upon the determination of the issue of mental incompetency.

182. For this phraseology, the author is indebted to Professor K. N. Llewellyn of Columbia University.
183. This rule of law is discussed in Green, supra note 78. See Saliba v. James, 143 Fla. 404, 196 So. 832 (1940); Clay v. Clay’s Committee, 179 Ky. 494, 200 S. W. 933 (1918).
184. 1 Williston, Contracts, 748; Green, supra note 78.
185. See note 141 supra.
186. The logic behind the proposition is this: The core of the concept of fraud is deception. One who is of weak understanding is more easily deceived. Hence, evidence tending to prove incapacity for understanding is always admissible on the issue of fraud. Similarly one of weak understanding, or one suffering from mental disorder which produces emotional instability is more likely to succumb to the pressure of undue influence.
incompetency the community mores concerning the normality of the transaction in question. In a Massachusetts case, Mr. Justice Holmes said that incompetency “deals with a question which is mainly one of fact and one upon which courts have been increasingly unwilling to lay down sweeping rules. Whether Mrs. Wright was competent to make the assignment was a question of degree, to be determined by the jury on all the facts and circumstances of the case.” 187 The scope of the evidence on the issue of mental incompetency is wide; and among other things, both in contract cases and will cases, the jury is permitted to take into consideration the normality or abnormality of the transaction as evidence. The rule of law which they are given to guide them is a vague one, capacity to understand. Fact-pressures 188 are apt to be more telling with a jury than vague rules of law, and it is to be expected that a jury will apply the community standard of fairness in passing on the validity of the transaction. 189 Upon review the appellate court is apt to do likewise. Thus, while lip service is paid to the articulate standard, the real decision springs from the community mores concerning the abnormality of the transaction. Much the same process is seen in other areas of the law. 190 In a personal injury suit the jury is given as its norms for decision abstract definitions of negligence, contributory negligence, and proximate cause; under cover of these, and usually without much likelihood of reversal, it can apply its own ideas of the social function of automobile liability insurance. Likewise, in certain types of murder cases, the court may define the crime of murder for the jury, but the jury draws upon the mores of the community and applies the “unwritten law” as the real norm for the decision.

The last evidentiary fact in support of the thesis is the degree of reliance which courts place upon the abnormality of the transaction in sustaining a finding of mental incompetency, or, conversely, the degree of reliance they place upon the normality of the transaction in reversing a finding of mental incompetency.

It may be argued that such an inarticulate standard is too indefinite to be serviceable, that there is no point in substituting for one vague standard another equally vague, that it runs counter to the idea of freedom of contract and the idea of testatorial absolutism. Let us examine these criticisms.

188. For exposition of the theory that fact-pressures will produce a fair quantum of wise case-results despite poor doctrine, see Llewellyn, The First Struggle to Unhorsel Sales (1939) 52 Harv. L. Rev. 873, 876.
189. Professor Powell, of Columbia University, has suggested that this process represents, in a limited degree, a return to the original function of the jury. Originally the jury was a body of witnesses, and it only gradually developed into a body of triers. 1 Holdsworth, History of English Law (3d ed. 1922) 317-19.
190. See Holmes, Collected Legal Papers (1920) 181, 184, 237.
Even if the inarticulate standard is just as vague as the articulate one, that is no reason for denying its existence if its presence can be proved. If it really exists, no matter what its merits or demerits, a service is done for legal science if it is recognized. The province of a science is to discover and acknowledge facts, not to cover them up. If they turn out to be unpleasant facts, or socially deleterious ones, their discovery is the first step in the corrective process.

The author does not concede, however, that the inarticulate standard is equally as vague as the articulate one. Its frank recognition might well result in greater certainty and predictability in this beclouded area of the law. An abnormal transaction is an unfair transaction. Whether or not a transaction is unfair depends upon the type of transaction and the circumstances. A gift is unfair to the donor if it strips him of all of his property and leaves him and his family at the mercy of charity, public or private. A gift is an unfair one to the other "natural objects of the donor's bounty" if, without reason, it excludes them from the gift. This is especially true when testamentary dispositions are involved. A bargain is an unfair one to the alleged incompetent or his dependents, if the consideration he received is grossly inadequate. The standards of unfairness, in each instance, will be furnished by the mores of the community. To be actionable the unfairness must manifest itself in a transaction which is obviously out of line with the institutional pattern of similar transactions. To make such a determination all of the circumstances must be taken into account. The dominant factor in the evidence is whether the court sees the particular transaction in its result as that which a reasonably competent man might have made. This is both rational and reasonable and true to the essence of a case-law system. Such an inarticulate standard does run counter to the ideas of freedom of contract and testatorial absolutism, but the net effect of applying such a standard would result in no greater curtailment of these two freedoms than the application of the orthodox rule—perhaps not as great.

If the existence of this inarticulate standard is recognized, it will help to explain the close relationship between fraud, undue influence, and mental incompetency as invalidating agencies; to explain that the same set of facts may make out a case of fraud or undue influence or mental incompetency; to explain the judicial amalgamation of fractions of these grounds. The abnormality of the transaction is the dominant factor in each.

It is not suggested that courts always disregard the articulate standard of mental incompetency which they have formulated and deliberately employ an inarticulate one. Perhaps, in a large percentage of the cases, the courts are trying earnestly to apply the rule or doctrine of the "under-

191. See note 141 supra.
standing” test, and in the obvious cases this is not too difficult. If the evidence of mental incompetency is very weak, and if there are no circumstances indicating the presence of fraud or undue influence, the orthodox test will serve to uphold the transaction. Likewise, if the evidence of mental incompetency is overwhelming, the orthodox test will serve to invalidate the transaction. But most cases are not obvious. Most cases dealing with mental incompetency are debatable cases, where there is evidence pro and con. It is here that the orthodox “understanding” tests fail. How can a court or jury tell whether or not a deceased grantor or a testator was capable of understanding the transaction? Obviously it can not. There are no guide posts marking the boundaries of “understanding,” no outside limits. It is in this situation that courts fall back upon the inarticulate standard. No doubt many courts still feel that they are trying to apply doctrine and are unaware that they are reaching elsewhere to find strength. The process is instinctive. But not a few courts have intimated in their opinions that they were aware of the broader ground upon which they were resting their decisions. A few cases hint at it; some almost give it verbal formulation. In a late Alabama case the court cancelled a deed, relying upon age, bodily infirmity, impaired mental condition, a confidential relation, undue influence, and inadequate consideration. The court was “impressed that the transaction was unjust and should not be supported.” An Arizona case also seems to lean heavily upon the element of “unfairness.” And in a California case, the court, affirming a judgment setting aside the deed of a mental incompetent, stated:

“It seems that the current of authority, English and American, is unvarying in its adherence to the same beneficent remedies in favor of the weak and ignorant, as against the wiles of the crafty and the greed of the avaricious, and although judges have differed in reasons given for the application of the rule, and the phases under which it has been applied are numerous and diverse, yet the conclusion reached is quite uniformly the same, whether the donee act in good or bad faith.”

192. Floyd v. Green, 238 Ala. 42, 188 So. 867 (1939).
193. Id. at 49, 188 So. at 872.
196. Richards v. Donner, 72 Cal. 207, 211, 13 Pac. 584, 586 (1887). See also Mettetal v. Hall, 288 Mich. 200, 216, 284 N. W. 698, 704 (1939), in which the court affirming the action of the trial court in setting aside a transaction on the grounds of mental incompetency and fraud, stated: “the equitable rule is of universal application, that where a person is not equal to protecting himself in the particular case, the court will protect him”; In re Patti’s Estate, 133 Pa. Super. 81, 95, 1 A. (2d) 791, 798 (1938), in which the court said: “. . . the law is rigid in insisting that one of weak mind, whether from inherent causes or by reason of illness, shall not be imposed upon by the art and craft of designing persons.”
Law has been described as nothing more pretentious than a prophecy of what the courts will do in fact. If this definition is accepted, the real standard of mental incompetence will not be found in the judicial tests announced by the courts. Another standard, although for the most part inarticulate, is the standard of the fairness or the unfairness of the transaction. It is a standard which is calibrated to measure not only mental incompetency but also fraud and undue influence. It is implemented to measure and synthesize fractions of these grounds. In order to predict the outcome of any future case, one needs to know the inarticulate standard by which the case may be judged.