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established pursuant to statute. A possible alternative theory might have been based on a taking or partial confiscation of the plaintiffs' property without just compensation with suit brought instead in the U. S. Court of Claims.[26]

The North Carolina decision can be supported as a proper and just one in view of both the historical development of the rights of landowners and the current interpretations and conclusions reached by students of that "impenetrable jungle" of the law called nuisance.

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Wills and Contracts—Degree of Mental Capacity Requisite for Each

The problem of whether the degree of mental capacity necessary for making a valid will is in any way related to or measurable by that degree of mental capacity requisite to entering into a valid contractual obligation has been the source of frequent disagreement among courts. In North Carolina, as in most jurisdictions, a person is in law deemed to have sufficient mental capacity to make a will when he has a clear understanding of the nature and extent of his act, the kind and value of the property devised, the persons who are the natural objects of his bounty, and the manner in which he desires to dispose of it.[1] The problem is in determining when these requirements are met. Courts have repeatedly attempted to compare contractual capacity with testamentary capacity, and for the most part the result has been unsatisfactory.

It has been said that a lesser degree of mental capacity is required for a will than for the execution of a valid contract or the transaction of ordinary business.[2] In an Illinois case,[3] the testatrix had been adjudged incapable of managing her business affairs and a conservator was appointed one month before the execution of her will. The court held that this was not enough to invalidate a will,[4] stating:

> "Mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business, while it is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty, and the disposition he desires to make of his property."[5]

[26] See, *e.g.*, United States v. Causby, 328 U. S. 256 (1946); U. S. CONST. amend. V.

[1] *In re* Will of Brown, 194 N. C. 583, 140 S. E. 192 (1927).

[2] Converse v. Converse, 2 Vt. 168 (1849).

[3] *In re* Weedman's Estate, 254 Ill. 504, 98 N. E. 956 (1912).

[4] 86 Ill. Rev. Stat. 14 (1874) provides that an inquest of lunacy once proven will void subsequent contracts. It is significant that no such declaration is made in regard to wills.

[5] *In re* Weedman's Estate, 254 Ill. 504, 508, 98 N. E. 956, 957 (1912). See also:

It has also been held in Illinois that the mental capacity required for making a will is less than that which is required for making a deed.[6]

A number of other courts have held that less mental faculty is required for making a will than for executing any other instrument.[7] A recent Georgia case, holding that the capacity required to contract is greater, declared: "The weak have the same rights as the strong to dispose of their property by will, and anything less than a total absence of mind will not destroy that capacity."[8]

North Carolina recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it has been suggested that, perhaps, the court would scrutinize a deed more closely.[9] In an Alabama case[10] the court held that the same degree of mental capacity is required to make a will as is requisite to entering into a valid contract, that there is no middle ground, and that both must stand as to the question of capacity on precisely the same footing. A Maryland statute in its definition of testamentary capacity adds to the usual "sound and disposing mind and memory" clause the requirement that one must be capable of making a valid deed or contract.[11]

A few courts seem to be of the opinion that the mental capacity should be greater for making a will. In *Aubert v. Augert*[12] a Louisiana court stated:

> "Testaments are more easily avoided than contracts on the ground of unsoundness of mind. . . . The difference has its source in the consideration that laws regulating the capacity to contract are in furtherance of the natural rights of man, and that all restraints upon that capacity are abridgements of his liberty. . . . Society cannot exist without the capacity to contract, but the power to dispose of property by will is not necessary to its well being."

King v. Lawless, 190 Ill. 520, 60 N. E. 881 (1901); Greene v. Maxwell, 251 Ill. 335, 6 N. E. 227, 36 L. R. A. (N. S.) 418 (1911).

[6] Waugh v. Moan, 200 Ill. 298, 65 N. E. 713 (1902).

[7] *In re* Moyer's Will, 97 Misc. Rep. 512, 163 N. Y. S. 296 (Surr. Ct. 1916); see also, *In re* Barney's Will, 187 Mich. 157, 153 N. W. 730 (1915), declaring that it is elementary that less mental capacity is required to make a will than to make a contract.

[8] Beman et al. v. Stembridge, 211 Ga. 274, 85 S. E. 2d 434, 440 (1955).

[9] Gilliken v. Norcom, 197 N. C. 8, 147 S. E. 433 (1929); In McDevitt v. Chandler, 241 N. C. 677, 86 S. E. 2d 438 (1955) the court declared that in order to execute a valid deed, the grantor must have sufficient mental capacity to understand the nature and consequences of his act, what he is disposing of, and to whom.

[10] McElroy v. McElroy, 5 Ala. 81 (1843); see also Coleman v. Robertson's Ex'rs., 17 Ala. 84 (1849), stating that the capacity to make a valid will or contract is precisely the same.

[11] Applied in Lyon v. Townsend, 124 Md. 163, 91 A. 704 (1914); Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282 (1833).

[12] 6 La. Ann. 104, 106 (1851).

The logical inference from this divergence of judicial opinion is that the two are so different in their nature that they cannot be compared. This is the view which has been taken by the majority of the courts. In determining the capacity of a person to execute a will, attention should be given to the character of the instrument.[13] It seems quite possible that one may lack the capacity to transact complicated,[14] important,[15] or ordinary business[16] and still be capable of making a simple disposition of his property by will. Conversely, it would seem than one may have contractual capacity and yet lack testamentary capacity.[17] However, it is generally held that, in the absence of an insane delusion, one who has contractual capacity has the capacity to make a will.[18]

In *Murphy v. Nett*[19] the court refused to charge the jury that a "less degree of mind" is required to execute a will than a contract, saying:

> ". . . [W]e think in such matters comparisons are odious and for purposes of instructing the jury wholly unnecessary. To make a will implies more than merely signing it, and it contravenes human experience to say that the conception, ordering, and comprehension of a will dispensing, with care and precision, extensive property, involving, it may be, charities and trusts of various kinds, requires less capacity than the purchase of a bar of soap; or that the same intellectual capacity is required for the simple holograph 'I leave all of my property to my wife' and for the elaboration of a complex trade agreement designed to accomplish far reaching results. The conclusion of common sense is that it takes more mind to make some wills than to make some contracts, and vice versa. . . ."[20]

A South Carolina decision,[21] however, held that where testamentary capacity was otherwise correctly defined and the court added that it required less mental capacity to execute a will than a contract, it was not sufficiently prejudicial to be reversible error.

[13] *In re* Weber's Estate, 201 Mich. 447, 167 N. W. 937 (1918).
[14] Barnhill v. Miller, 114 Kan. 73, 217 Pac. 274 (1923).
[15] Neimes v. Neimes, 97 Ohio St. 145, 119 N. E. 503 (1917).
[16] Mileham v. Montagne, 148 Iowa 476, 125 N. W. 664 (1910).
[17] American Bible Society v. Price, 115 Ill. 623, 5 N. E. 126 (1886).
[18] *In re* Wax's Estate, 106 Cal. 343, 39 Pac. 624 (1895).
[19] 47 Mont. 38, 57, 130 Pac. 451, 455 (1913).
[20] See also: Turner's Appeal, 72 Conn. 305, 44 A. 310 (1899); Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64 (1895); Segur's Will, 71 Vt. 224, 44 A. 342 (1898); Greene v. Greene, 145 Ill. 264, 33 N. E. 941 (1893), holding that while contractual capacity implies prima facie the capacity to make a will, yet neither is a test for the other and the presence or absence of one does not conclusively establish the presence or absence of the other.
[21] Goble v. Rauch, 50 S. C. 95, 27 S. E. 555 (1897).

While the great weight of authority is against the comparison of business capacity and testamentary capacity, the courts have by no means been unanimous in so holding. It seems that some courts have altered standards set by their own previous decisions. A Missouri court[22] once decided that a person may have testamentary capacity even though he cannot transact complicated business, and in a later case[23] held that it was proper to instruct the jury that a person had testamentary capacity if he had sufficient understanding to transact business affairs.

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[22] Rose v. Rose, 249 S. W. 605 (Mo. 1923).
[23] Rex v. Masonic Home of Missouri, 341 Mo. 589, 108 S. W. 2d 897 (1937).