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terest, and, if the bargain called for it, rent for the time the grantor remained in possession.<sup>21</sup> If construed as an absolute deed, as usually happens, the grantee has complete title, probably for an inadequate consideration. By using the *creditor* approach, the deed may be declared a nullity and the grantee is defeated in his scheme. And no miscarriage of justice against the grantee can result, for the creditor does have to present clear, cogent, strong, and convincing evidence of the intent to create a security.

JOSEPH C. MOORE, JR.

### Parties—Divorce—Right of Guardian or Committee of Incompetent to Maintain Action

In *Phillips v. Phillips*<sup>1</sup> a guardian brought an action for divorce on behalf of his ward, an insane person, on the ground of adultery committed by the wife of the ward prior to his insanity. The complaint alleged that prior to insanity the ward expressed his intention and desire of getting a divorce from defendant and that at the time of filing the suit and during a lucid interval when the ward was capable of understanding the nature of the action, he again expressed the same intention and desire. It was further alleged that the suit was instituted pursuant to the ward's direction, desire and will at the time of filing same. On demurrer, *held*: the guardian of an insane person cannot prosecute an action for divorce on behalf of his ward.

The court here enunciated what seems to be, in the absence of a governing statutory provision giving a guardian the right to institute a divorce action on behalf of an insane ward, the universal rule in the United States.<sup>2</sup> The theory behind the rule is that the action of divorce is one strictly personal and volitional, and the will of the guardian cannot be substituted for that of the ward who is incapable of exercising any will. The basis of the theory is that there are no offenses, which by law, work of themselves a dissolution of a marriage, and there are no offenses which may not be condoned by the injured spouse.

<sup>21</sup> Note, 16 N. C. L. REV. 416, 418 (1938).

<sup>1</sup> 45 S. E. 2d 621 (Ga. 1947).

<sup>2</sup> *Cohen v. Cohen*, 73 Cal. App. 2d 330, 166 P. 2d 622 (1946); *Worthy v. Worthy*, 36 Ga. 45 (1867); *Bradford v. Abend*, 89 Ill. 78 (1878); *Mohler v. Shank*, 93 Iowa 273, 61 N. W. 981 (1895); *Birdzell v. Birdzell*, 33 Kan. 433, 6 Pac. 651 (1885); *Johnson v. Johnson*, 294 Ky. 77, 170 S. W. 2d 889 (1943); *Stevens v. Stevens*, 266 Mich. 446, 254 N. W. 162 (1934); *Higginbotham v. Higginbotham*, —Mo. App.—, 146 S. W. 2d 856 (1940), *Cert. denied*, 348 Mo. 1073, 156 S. W. 2d 650 (1941); *Mohrmann v. Kobb*, 291 N. Y. 181, 51 N. E. 2d 921 (1943); *Kemmelick v. Kemmelick*, 114 Misc. 198, 186 N. Y. Supp. 3 (1921); *Mainzer v. Mainzer*, 108 Misc. 230, 177 N. Y. Supp. 596 (1919); *Dillion v. Dillion*, —Tex. Civ. App.—, 274 S. W. 217 (1925). See Notes, 70 A. L. R. 964 (1931) and 149 A. L. R. 1284 (1944). Since the commencement of this note the Georgia court has reiterated the rule in *Sternberg v. Sternberg*, 46 S. E. 2d 349 (Ga. 1948); see note 20 *infra* for interesting history of this case.

The rule is an exception to the general rule that a guardian or committee of an insane person is authorized to enforce, in behalf of the ward, any cause of action, whether legal or equitable which ward might enforce if sane.<sup>3</sup> It has been the policy of the legislatures and the courts to confer ample protection to the rights and interests on insane litigants, whether they be a party plaintiff or party defendant.

This exception has arisen due to the history of the action of divorce and the nature of the marital relation. Since marriage and the family represent the foundation of our society, the state favors the continuity of the relationship, and public policy requires that the relationship will not be severed without adequate cause. There is no common law of divorce in the United States; divorce law is governed entirely by legislative enactments.<sup>4</sup> Thus the rule that only if the legislature gives its express sanction can dissolution of a marriage be made dependent upon the pleasure or discretion of a legal representative. Further, most statutes on divorce provide in one fashion or another that the action for divorce can be maintained by the injured "spouse," and provide for verification of the petition by affidavit (that the facts therein stated are true and/or that the action is not brought out of levity and through no collusion between husband and wife).<sup>5</sup> This statutory language is also used to support the rule as indicated in the principal case, since it is said that the legislature limited the action to the spouses, who, if insane, are not qualified to file the petition, or sign the affidavit.<sup>6</sup>

Conceding for a moment the validity of the rule, it seems that the principal case presents a situation where, considering the lucid interval feature, an exception should be made. The principal case is the first one where this feature has been presented in the consideration of

<sup>3</sup> *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. 2d 475 (1940); *Long v. Town of Rockingham*, 187 N. C. 199, 121 S. E. 461 (1924); *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188 (1890); *Shaw v. Burner*, 36 N. C. 148 (1840); N. C. GEN. STAT. §1-64 (1943). For collection of cases see 44 C. J. S.: *Guardian and Ward* §35 (a) (1945). For collection of statutes see 1 VERNIER, *AMERICAN FAMILY LAWS* 480 (1932).

<sup>4</sup> MADDEN, *DOMESTIC RELATIONS* §82 (1931).

<sup>5</sup> *E.g.* N. C. GEN. STAT. §50-8 (1943); by an amendment in 1947 the requirement of affidavit as to bringing the action out of levity and by collusion was omitted, *Public Laws* 1947, c. 165. For collection of statutes see 2 VERNIER, *AMERICAN FAMILY LAWS* 131 (1932).

<sup>6</sup> *E.g.* *Mohler v. Shank*, 93 Iowa 273, 278, 61 N. W. 981, 983 (1895) ("The statute requires that the petition must be verified by the oath of the plaintiff. It is true that this requirement is not jurisdictional [North Carolina disagrees with this statement in *Johnson v. Johnson*, 141 N. C. 91, 53 S. E. 623 (1906) and in *Nichols v. Nichols*, 128 N. C. 108, 38 S. E. 296 (1901)]. But the fact that the statute requires the oath of the plaintiff, and provides for no substituted verification, as in other cases, tends strongly to show that the legislative intent that an action for divorce should be prosecuted by the injured party, in his or her personal capacity.").

this problem, but the court in the first Georgia case<sup>7</sup> deciding the question of the guardian's right to bring this action, and on which the court in the instant case relied, foresaw the possibility in their opinion, and the dissent here (Chief Justice Jenkins) feels that under that opinion an insane ward could, during a lucid interval, instruct his guardian to bring an action for divorce and it would be valid.<sup>8</sup> But a majority of the court felt otherwise, basing this holding on the proposition that a guardian appointed by law cannot depend for his authority on his ward and thereby become accountable as a kind of private agent or attorney in fact, but he must look exclusively to the law for his authority to act on behalf of his ward. They proceed further to say that, even conceding the contention that the direction given during the lucid interval had legal force at the time, the direction or power of attorney would lapse or be suspended by operation of law on the ward's relapse into insanity.

In making the decision on this basis the court is overlooking the reason for the rule prohibiting the action in the first place (which they set out so clearly) and assuming that this is an agency problem, when the first requisite of agency is lacking—a mutual agreement between the principal and the agent.<sup>9</sup> Here the guardian is appointed by the law to act on behalf of the ward in the protection of all his interests. He is given the power to bring any action in the courts on that behalf, but the law has said that due to the nature of the marital relationship he will not be allowed to proceed in an action to sever that relationship since it cannot be known whether the ward wants a divorce or not. Here, when he was capable of determining that question, the ward has clearly indicated his desire for a divorce, and the action was actually instituted at the express direction of the ward during that period of capacity. It seems that any objection to bringing the action is met, and since insanity does not abate an action legally instituted<sup>10</sup> the argument of the court as to revocation of authority, based purely on an agency rule is erroneous. To the added objection

<sup>7</sup> *Worthy v. Worthy*, 36 Ga. 45, 47 (1867) ("It does not appear that, after her affliction, at any time, she had a lucid interval; for if she had, and that had been shown, and that during that interval she had directed suit for divorce to be brought, it should have been in her own name, without appearance by next friend. This suit is an indirect admission that she had no lucid interval, and for the purposes of the decision we will assume that the fact is so." [Note that here suit was not by a general guardian after an adjudication of insanity, but by a next friend.]).

<sup>8</sup> *Phillips v. Phillips*, 45 S. E. 2d 621, 625 (Ga. 1947).

<sup>9</sup> RESTATEMENT, AGENCY §1(1) (1933).

<sup>10</sup> *Pictures Corp. v. Karzin*, —Mo. App.—, 29 S. W. 2d 757 (1930); *Hargraves v. Thornton*, 49 R. I. 302, 142 Atl. 371 (1928). For a most interesting case in North Carolina, which, by using the relation back doctrine in regard to judgments, made the unique and peculiar ruling that even the death of the plaintiff during the actual trial of a divorce action did not abate the action, see *Webber v. Webber*, 83 N. C. 280 (1880).

by the Georgia court that the ward might in a subsequent lucid interval regret the fact that he has been divorced from the bonds of matrimony, it can be answered that many people who get a divorce regret the move afterwards, and there are numerous cases of remarriage of divorcees.

Under the dictum in *Worthy v. Worthy*<sup>11</sup> a problem is raised indirectly as to why the ward did not bring the action himself during the lucid interval. Is the right of an insane person to act with legal effect during a lucid interval affected by an adjudication of insanity and the appointment of a guardian? Any person who has had no inquisition pass on his sanity is presumed sane and can bring any action until his insanity is shown by the other party in the particular case, upon whom all burden on that issue falls.<sup>12</sup> But an adjudication of insanity and appointment of a guardian have a decided effect on all civil acts of the party to the adjudication. For example, it is authoritatively stated that "it may be assumed" that all contracts of a person under guardianship are void, and it seems that no distinction is made in this holding where it appears that the transaction was made during a lucid interval, when he understands its nature.<sup>13</sup> Further the adjudication and appointment of a guardian would have a decided effect on the ward's right to bring an action, even during a lucid interval. Consider the probative effect of evidence of the adjudication when raised by the party opposing the ward. Evidence of the adjudication, at the least, raises a presumption of insanity in all future cases, and though, to rebut the presumption, evidence of an adjudication of restoration to sanity is unnecessary, it requires clear and satisfactory proof to show that person is of sound mind at a time subsequent to the inquisition declaring him insane, and this would have to be done before he could commence the action.<sup>14</sup> In many states now, by force of statute, the finding of insanity is conclusive as to the existence of insanity during the continuance of the adjudication, and in those states, even though an action were brought when the ward was actually lucid, it would have to be brought by the general guardian if one had been appointed.<sup>15</sup>

<sup>11</sup> 36 Ga. 45 (1867) (See quote in Note 7 *supra*.)

<sup>12</sup> *E.g.* *Albertson v. Schmidt*, 128 Cal. App. 344, 17 P. 2d 158 (1932); *Ballew v. Clark*, 24 N. C. 23 (1841).

<sup>13</sup> 1 WILLISTON, CONTRACTS 755 (Rev. ed. 1936). See GA. CODE ANN. §22-206 (1935). For statutes making this the rule see 5 VERNIER, AMERICAN FAMILY LAWS 514 (1932). It seems, however, that the rule applies only to contracts involving the estate; it would not apply to such transactions as making a will, which only the ward could do himself—see *Johnson v. Johnson*, 214 Minn. 462, 8 N. W. 2d 620 (1943); *Wormington v. Wormington*, 226 Mo. App. 195, 47 S. W. 2d 172 (1932); *Weinberg v. Weinberg*, —Misc.—, 8 N. Y. S. 2d. 341 (1938)—in such cases the ordinary voidable rule would apply.

<sup>14</sup> *Akin v. Akin*, 163 Ga. 18, 135 S. E. 402 (1926); *Sutton v. Sutton*, 222 N. C. 277, 22 S. E. 2d 553 (1942); *Johnson v. Ins. Co.*, 217 N. C. 143, 7 S. E. 2d 475 (1940); *Parker v. Davis*, 53 N. C. 460 (1862); *Armstrong v. Short*, 8 N. C. 11 (1820). For extended review of cases see Notes, 7 A. L. R. 584 (1920) and 68 A. L. R. 1315 (1930).

<sup>15</sup> *Obrien v. United Bank*, 100 Cal. App. 325, 279 Pac. 1048 (1929); *Gibson v.*

It is not every "lucid interval" that would entitle the ward to bring an action himself, or that would entitle him to an adjudication of restoration to sanity, even though he might be said to be capable of exercising his will and indicating his desire as to the suit for divorce. "Lucid interval," in the broad medical jurisprudential sense, implies complete return to reason.<sup>16</sup> But when involved in a litigation, lucid interval is defined, not generally, but in connection with the transaction which is under consideration. It is that state of mind in a person during which he is capable of understanding the nature of the act to which he attempts to give legal effect.<sup>17</sup> It is a question of proof in the particular case. It is feasible, therefore, that, although it would be impossible to prove that the ward here was capable of managing his estate or instituting actions on his own behalf, it could be shown that he had mental capacity to exercise his will and indicate his desires as to his matrimonial status. As it is evident, from his return to insanity, that the ward here was not cured, the above paragraphs should be sufficient to answer any question as to why he did not bring the action himself.

Now what of this rule, prohibiting guardians from bringing these divorce actions, in itself? It is inconsistent with the broad powers of a guardian, as given by the statutes of all jurisdictions and by the courts, in connection with the ward and his estate, as will be evidenced by some examples:

(1) It is a well settled rule that a proceeding for divorce can be instituted against an insane spouse for a cause of divorce accruing while he or she was insane.<sup>18</sup> Defense is then had by the guardian if one has been appointed, or, if not, by a guardian *ad litem*, appointed by the court. This seems as objectionable as would the permitting of the insane spouse, through his guardian, to institute the action, since, due to the personal relationship, it is obvious that the insane spouse is the one most likely to know of such defenses to the action as condonation or collusion.<sup>19</sup>

Soper, 72 Mass. 279 (1856); *Hamilton v. Henderson*, 232 Mo. App. 1234, 117 S. W. 2d 379 (1938); *Jacobs v. State*, —Misc.—, 24 N. Y. S. 2d 122 (1940).

<sup>16</sup> 25 WORDS AND PHRASES 722 (1940); BLACK'S LAW DICTIONARY 1135 (3d ed. 1933).

<sup>17</sup> *Dunphy v. Dunphy*, 161 Cal. 380, 119 Pac. 512 (1911); *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620 (1889); *Johnson v. Maine*, 83 Me. 182, 22 Atl. 107 (1891); 1 WILLISTON, CONTRACTS §256 (Rev. ed. 1936).

<sup>18</sup> *Stratford v. Stratford*, 92 N. C. 297 (1885) (N. C. has a procedural limitation in its requirement of a showing that a reasonable time has elapsed since the insanity to allow for recovery and restoration to capacity); the *Stratford* case was cited in a recent case which decided only the question of jurisdiction and did not pass on the merits of such a case, *Smith v. Smith*, 226 N. C. 544, 545, 39 S. E. 2d 458, 459 (1946). See cases in Note, 42 A. L. R. 1532 (1926).

<sup>19</sup> *Baker v. Baker*, L. R. 5 Prob. Div. (Eng.) 142, 149 (1880).

(2) Most jurisdictions allow a guardian to institute an action to annul the marriage of his ward contracted while he was insane.<sup>20</sup> The courts have allowed this action by the guardian on the ground that it is merely seeking a court declaration of something that is already a fact—that the marriage never had any validity due to the incapacity of one of the parties to consent. But it is now evident that marriage made while one of the parties is of unsound mind does have potentially some of the effects of a valid marriage, because in a majority of jurisdictions, such a marriage is not void, but voidable, and even in those jurisdictions that use the term "void" when referring to such a marriage, it is held that the marriage can be ratified by the insane spouse during a lucid interval.<sup>21</sup> Is this action by the guardian not interfering with the personal right of the incompetent to ratify the marriage?

(3) A guardian has been allowed to bring an action for judicial separation or limited divorce, or for alimony, on behalf of his ward.<sup>22</sup> It is said that this is allowed because such an action is based on the continuation of the marriage relationship, but it is evident that this is interfering with the right of the insane spouse to have the continued comfort from the erring spouse's companionship and care if he or she so desires it, despite the offenses. It is to be noted that verification is generally required of petitions for limited divorce, as they are in case of absolute divorce, but this has not been considered as an objection to the guardian's bringing this action, as it was in suits for absolute divorce.<sup>23</sup>

(4) It is the general rule, absent the factor of adjudication of insanity, that a lunatic's ordinary contracts made while insane are voidable only, and may be ratified by him during a lucid interval.<sup>24</sup> But in

<sup>20</sup> Note, 70 A. L. R. 964 (1931) and Note, 149 A. L. R. 1284 (1944). Three of the jurisdictions that have refused to allow this action by the guardian base their decisions on the peculiar wording of their annulment statutes—Langdon v. Hadley, 85 Ind. App. 515, 150 N. E. 793 (1926); Pence v. Aughe, 101 Ind. 317 (1885); Winslow v. Troy, 97 Me. 130, 53 Atl. 1008 (1902); Weinberg v. Weinberg, —Misc.—, 8 N. Y. S. 2d 341 (1938) (N. Y. has the incongruous rule that a general guardian cannot bring the action, but a guardian *ad litem* can.). Georgia has the peculiar rule that equity has no jurisdiction to hear an annulment proceeding at all, since insanity at the time of the marriage is made a ground for divorce in their statute, Johnson v. Johnson, 172 Ga. 273, 157 S. E. 689 (1931). This rule has led to the result that an insane spouse, who was so at the time of the marriage, is bound to the relationship, Sternberg v. Sternberg, 46 S. E. 2d 349 (Ga. 1948).

<sup>21</sup> Watters v. Watters, 168 N. C. 411, 84 S. E. 703 (1915); MADDEN, DOMESTIC RELATIONS p. 27 (1931).

<sup>22</sup> Wray v. Wray, 33 Ala. 187 (1858); Mims v. Mims, 38 Ala. 98 (1858); Kaplan v. Kaplan, 256 N. Y. 366, 176 N. E. 426 (1931).

<sup>23</sup> White v. White, 179 N. C. 592, 103 S. E. 216 (1920); Jones v. Jones, 173 N. C. 279, 91 S. E. 960 (1917); Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876 (1911); Clark v. Clark, 133 N. C. 28, 45 S. E. 342 (1903); Hopkins v. Hopkins, 132 N. C. 22, 43 S. E. 508 (1903); Baker v. Baker, L. R. 5 Prob. Div. (Eng.) 142 (1880); 2 VERNIER, AMERICAN FAMILY LAWS 344 (1932).

<sup>24</sup> 1 WILLISTON, CONTRACTS 741 (Rev. ed. 1936).

England ratification by the guardian of contracts made by his ward while insane is upheld, and in the U. S. it is held that a guardian can disaffirm the ward's contracts so made.<sup>25</sup> This is done despite the language in the cases that the right to affirm or disaffirm such contracts is a "personal" right of the lunatic.<sup>26</sup>

It seems, too, considering the principal purpose of guardianship—the protection of the estate of the incompetent ward—that the rule is objectionable from a public policy standpoint: (1) The estate of an incompetent husband remains liable for the support of the wife, and it has been held that a husband can get allotments from his insane wife's estate under certain circumstances.<sup>27</sup> Should this duty continue when the sane spouse has repudiated the marital obligation by offenses against it? The erring spouse will be left in possession of property settled on him or her by the laws of descent and distribution or by the insane spouse (as by will made prior to the offense and the insanity). (3) Where the wife is the erring spouse, spurious offspring may be foisted on the insane husband and his family by which the devolution of his property might be divested in favor of illegitimate objects.

The above considerations and others led the English courts to allow a guardian to bring the action for divorce on behalf of his ward without express authorization in 1880, only 23 years after the courts were first given jurisdiction to decree absolute divorces.<sup>28</sup> Prior to this date Massachusetts in 1835 and Rhode Island in 1867 had already passed statutes permitting a guardian to bring the action.<sup>29</sup> At least one writer has advocated legislation on the subject, and one court recognized the harshness of the rule in a recent case.<sup>30</sup> Then in 1941 the Alabama court moved into the field of divorce with what appears to be some judicial legislation—it recognized the general rule, but proceeded to allow the action for divorce brought by a guardian on

<sup>25</sup> 1 WILLISTON, *CONTRACTS* 745 (Rev. ed. 1936).

<sup>26</sup> *Langley v. Langley*, 45 Ark. 392 (1885); *Orr v. Equitable Mtge. Co.*, 107 Ga. 499, 33 S. E. 708 (1899); *Downham v. Halloway*, 158 Ind. 626, 64 N. E. 82 (1902); *McLure Realty Co. v. Eubanks*, 151 Ga. 763, 108 S. E. 204 (1921).

<sup>27</sup> *Reynolds v. Reynolds*, 208 N. C. 254, 180 S. E. 70 (1935); *Re Hybard*, 119 N. C. 359, 25 S. E. 963 (1896); *Brooks v. Brooks*, 25 N. C. 389 (1843); N. C. GEN. STAT. §35-13 (1943); Note, 160 A. L. R. 1439 (1946); Note, 59 A. L. R. 654 (1929).

<sup>28</sup> *Baker v. Baker*, L. R. 5 Prob. Div. (Eng.) 142 (1880); 20 and 21 Vict. c. 85 (1857).

<sup>29</sup> *Cowan v. Cowan*, 139 Mass. 377, 1 N. E. 152 (1885); *Garnett v. Garnett* 114 Mass. 379 (1874); *Thayer v. Thayer*, 9 R. I. 377 (1869); MASS. GEN. LAWS c. 208 §7 (1932); R. I. GEN. LAWS c. 416 §9 (1938).

<sup>30</sup> Note, 4 TEXAS L. REV. 255, 256 (1925). See *Johnson v. Johnson*, 294 Ky. 77, 79, 170 S. W. 2d 889, 891 (1943) ("It may be that in some cases a hardship will be reached by the conclusion here, but stability of the marriage relationship is a matter of public concern and, in the absence of specific legislative declaration to the contrary, its continuance or dissolution should not be dependent on the pleasure or discretion of a legal representative.").

behalf of his insane ward on the ground that their general statute authorizing an insane person to sue by guardian was to be construed as in *pari materia* with the statutes authorizing courts of equity grant divorces.<sup>31</sup> They held that this was "express" authorization for the action by the guardian. This is a revolutionary step and could be the impetus for upsetting the rule as emphasized in the principal case. Finally, where a court of a foreign country has construed a statute thereof as authorizing the guardian of an incompetent to maintain the divorce suit, neither such construction nor a divorce so obtained can be assailed in this country.<sup>32</sup> This would seem to indicate that public policy does not *prohibit* such a divorce action.

The question of a guardian suing for divorce on behalf of his ward has never been directly presented in North Carolina, though the Supreme Court recognized the general rule on the problem in *Smith v. Smith*.<sup>33</sup> North Carolina has been cited as one of the minority states allowing the suit for divorce by the guardian,<sup>34</sup> but the case relied on involved an action to annul the marriage contracted by an insane ward.<sup>35</sup> Though, in that case, the court speaks of the action as one for divorce, this is only for certain purposes, and the nature of the two actions are entirely different.<sup>36</sup> Certainly the dictum in that case might lead to the conclusion that this state might allow a guardian to bring the action for divorce,<sup>37</sup> but that case is not authority for such a holding.

It is submitted that, in anticipation of the situation where there is a need for a guardian to bring an action for divorce for the protection of his ward, the legislature would do well to amend the divorce laws to authorize such a suit. Insanity in divorce actions is familiar to our legislative body, for they passed in 1945 an amendment making insanity a ground for divorce in a proceeding brought by the sane spouse.<sup>38</sup> This was clearly a wise move in view of the social and financial implications of a spouse being left alone in the world, despite

<sup>31</sup> *Campbell v. Campbell*, 242 Ala. 141, 5 So. 2d 401 (1941).

<sup>32</sup> *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 64 Pac. 103 (1901), *aff'd*, 188 U. S. 291 (1902).

<sup>33</sup> 226 N. C. 544, 546, 39 S. E. 2d 458, 460 (1946).

<sup>34</sup> *Dillion v. Dillion*, \_\_\_\_\_ Tex. Civ. App. \_\_\_\_\_, 274 S. W. 217, 219 (1925); 19 C. J. 98 §230 n. 42 (1920); 17 AM. JUR.: DIVORCE AND SEPARATION §272 n. 13 (1944); 11 N. C. DIGEST 21, Key no. 93.

<sup>35</sup> *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407 (1897).

<sup>36</sup> *Lea v. Lea*, 104 N. C. 603, 606, 10 S. E. 488, 491 (1899) ("An action to have a marriage declared void because of a pre-existing disqualification to enter into the relation is an action for divorce and *alimony pendente lite* may be allowed").

<sup>37</sup> *Sims v. Sims*, 121 N. C. 297, 299, 28 S. E. 407, 409 (1897) ("Such action [for annulment of a marriage] is for divorce and all actions for a lunatic can be brought either in the name of the guardian or in the name of the lunatic by the guardian").

<sup>38</sup> N. C. GEN. STAT. §50-5(6) (1945 Supp.). For other states having similar statutes see 29 VA. L. REV. 771 (1943).

the fact that this is due to no fault of the insane defendant. In view of the discussion in this note it seems that the suggested legislation is now in order to make the divorce picture complete for the good of the parties and the public as well. It might be suggested that the amendment should embody a limitation such as the courts have put on the right to bring the action against an insane spouse for cause—a requirement of a showing that a reasonable time has elapsed to allow for return to sanity; and in view of the strides in medical approach to insanity, there might be added some such requirement as affidavit by medical authorities as to the permanence of the insanity.

It has not been overlooked that there are statutes that would give some degree of protection to the estate of a husband or wife when one spouse has committed a marital offense, and it is understood that the courts might offer other protection too.<sup>39</sup> But in view of the fact that the statutes and the court relief referred to could not alleviate injustice that might arise from the operation of the rule that binds an insane spouse to his marriage despite any breach of the relationship by the sane spouse, and the fact that public policy seems to demand some relief where the relationship is so debauched, this further legislation is in order at this time. It does not appear that the guardian could possibly use this power arbitrarily since he is in reality an officer of the court and under its surveillance at all times.

R. W. BRADLEY, JR.

### Pleading—Oral Contract to Devise—Recovery on Quantum Meruit

*P* brought action for breach of contract, alleging that deceased promised to devise all of his property to *P* if she and her husband

<sup>39</sup>I. N. C. GEN. STAT. §28-11 (1943) (Elopement and adultery of wife is forfeiture of her right to a distributive share in the husband's personalty); §28-12 (Abandonment and living in adultery at time of death of wife, or if wife gets divorce *a mensa*, husband forfeits his right to distributive share in wife's personalty); §30-4 (Adultery of wife is bar to dower if she is not living with husband at time of his death); §52-21 (Following acts of wife bar right to dower, distributive share in husband's personalty, right to year's provision, right to administer on his estate, and right to all estate in property of the husband settled on her on the sole consideration of the marriage: elopement with adulterer, abandonment, divorce *a mensa* at the instance of the husband); §52-22 (Same provisions as in §52-21 made applicable to the husband and his forfeiture of rights).

II. *Re Miegocki*, 34 Luzerne Leg. Rep. (Pa.) 257 (1940) (At least this one case has been found that indicated that the wife of an incompetent, in order that she may not become a public charge should be allowed her necessary support from his estate, *unless it appears that she is guilty of such conduct as to warrant the conclusion that she has forfeited her right to support.*)

III. There is possibility that illegitimate children may be precluded from sharing in the estate of the insane party, for illegitimacy of child born in wedlock is an issue of fact, resting on proof of husband's impotency or non access to wife during period in which child was begotten. *See State v. Green*, 210 N. C. 162, 185 S. E. 670 (1936).