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LEGAL CAPACITY OF ADJUDGED INCOMPETENTS

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The Colorado statute defines an "incompetent" as any person who is "incapable, unassisted, to properly manage—his property—," [1] and provides for the appointment of a conservator when a person has a "real or personal estate," whereupon he is to be committed to the "care of some person or institution" as an incompetent as previously defined.[2]

Shapter v. Pillar [3] was decided under the statute of 1893, but the definition of an incompetent therein was substantially the same as the above. There, the court said:

> The main object of the statute is the protection of the property of those mentally afflicted; inquiry must be made as to the extent of such mental infirmity. If it causes the person to be "unable to act intelligently with respect to his business affairs" or prevents him from acting in a "provident manner in the management of his property interests, the statute is satisfied." However, although the mind may be unsound, "if there be capacity to manage, as the result of consecutive reasoning, although the management might not be such as intellectual vigor and skill might approve," the person doesn't come within the purview of the statute.

In a later case,[4] the court adopted substantially the same definition, saying the legal test of insanity is whether the person is "incapable of understanding and appreciating the extent and effect of business transactions in which he is engaged." This is in accord with the general rule on capacity to contract and execute legal instruments.

THE CAPACITY TO CONTRACT

1935 C.S.A., Ch. 105, sec. 20, provides:

> All contracts, agreements, and credits with or to any such lunatic, shall be absolutely void as against such persons, his or her heirs, or personal representatives; but persons making such contracts or agreements with any such lunatic shall be bound thereby at the election of his or her conservators.

The statute seems to be too clear to admit comment, and there are no Colorado cases interpreting it.

THE CAPACITY TO MAKE A WILL

The Colorado court has said that contractual capacity and testamentary capacity are the same,[5] and further, that an adjudi-

[1] COLO. STAT. ANN., c. 105, § 1 (1935).
[2] *Ibid.*, § 9.
[3] 28 Colo. 209, 63 P. 302 (1900).
[4] Hanks v. McNeil Corp., 114 Colo. 578, 168 P. 2d 256 (1946).
[5] *Ibid.*

cation of incompetency does not operate as "a conclusive bar to the making of a valid will" by the decedent so long as it remains in effect, since the "effect of a guardianship may be overcome by proof that the testator was mentally competent at the time the will was executed." [6]

THE CAPACITY TO COMMIT A TORT

There are no Colorado cases on this question. However, the general rule appears to be that an insane person is liable for his own torts,[7] unless the particular tort involves a specific intention which he is incapable of entertaining.[8] Further, the liability is not affected by the fact that the defendant was under guardianship at the time.[9] However, compensatory damages only can be recovered against him.[10]

THE CAPACITY TO MARRY

Williams v. Williams [11] held that a marriage "to a lunatic" is "absolutely void." A later case [12] applied the same rule.

THE CAPACITY TO BRING AN ACTION FOR DIVORCE

The one Colorado case with dictum on the subject [13] indicates that an insane person cannot bring an action for divorce, since such an action is based on a "voluntary decision" to terminate the marriage, which decision "an incompetent person cannot make." The court states the general rule as being that "an insane person has a legal capacity to sue, . . . provided he has not been divested of the power to act for himself by having been adjudicated incompetent and having been placed under guardianship." [14] However, the particular action was not for divorce, but rather concerned the right of a conservator to bring an action to annul the marriage of his ward on the ground of the latter's insanity. This, it was held, the conservator could do under the decision in *Williams v. Williams, supra.*

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[6] Martin v. Reid, 106 Colo. 69, 101 P. 2d 25 (1940).

[7] Roberts v. Hayes, 284 Ill. App. 275, 1 N. E. 2d 711 (1936); Shedrick v. Lathrop, 106 Vt. 311, 172 A. 630 (1934).

[8] Chaddock v. Chaddock, 130 Misc. 900, 226 N. Y. S. 152 (1927); Sweeney v. Carter, 24 Tenn. App. 6, 137 S. W. 2d 892 (1939).

[9] Morain v. Devlin, 132 Mass. 87, 42 Am. R. 423 (1882).

[10] Ullrich v. N. Y. Press Co., 23 Misc. 168, 50 N. Y. S. 788 (1898); McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239 (1887).

[11] 83 Colo. 180, 263 P. 725 (1927).

[12] Cox v. Armstrong, 122 Colo. 227, 221 P. 2d 371 (1950).

[13] *Ibid.*

[14] See, also: COLO. RULES OF CIV. PROC., 17C(c) providing that the appointed representative of an incompetent may sue on behalf of the latter; that if the representative fails to act, the incompetent may sue by his next friend or guardian *ad litem*, and further, that the Court shall appoint a representative for an incompetent not otherwise represented in an action.

See, also: 1935 C.S.A. Ch. 176, sec. 136, providing that conservators shall be allowed to prosecute actions on behalf of their wards.