record may not be known at the time of sentence.[34] And under such statutes where a previous conviction is charged there must be an allegation and proof of the previous conviction in order to sentence the defendant under the statute, where he does not admit the charge.[35]

In view of the recognized constitutionality of the habitual criminal acts and their undoubted effectiveness as a deterrent force, there appears to be no serious objection, either in law or in policy, against their more widespread adoption and application. Some provision, however, should be made to permit the judge to exercise discretion, within limits, in imposing sentences in exceptional cases. The present provisions providing for the automatic application of the increased punishment on proof of prior crimes have resulted in a few cases in palpably disproportionate punishment for a relatively trivial last offense. Such instances have resulted in severe journalistic criticism and cannot but add to the regrettable disrespect for the laws.

SAM ELSON, '30.

MENTAL INCAPACITY AS AFFECTING CONSENT TO THE MARRIAGE CONTRACT

A voluntary consent to a contract of marriage by both parties is a requisite to its validity.[1] An insane person is not capable of consent, and a marriage in which one of the parties is insane is generally held to be void.[2] By statute, however, in a number of states such marriages are declared to be valid until adjudicated a nullity—in other words, voidable.[3] These statutes are obviously in direct contravention of the common law and have been severely criticized as involving a person in marriage with-

[34] See note, 48 L. R. A. (N. S.) 204, for procedure under habitual criminal statutes.

[35] People v. King (1883), 64 Cal. 338, 30 P. 128.

[1] Wiley v. Wiley (1919), 75 Ind. A. 456, 123 N. E. 252; Rawdon v. Rawdon (1856), 28 Ala. 565; Sims v. Sims (1897), 121 N. C. 297, 28 S. E. 407; Orchard v. Cofield (1897), 171 Ill. 14, 49 N. E. 197; Oswald v. Oswald (Md., 1924), 126 A. 81.

[2] In re Gregorson (1911), 160 Cal. 21, 116 P. 60; Powell v. Powell (1877), 18 Kan. 371, 26 Am. Rep. 774; Orchard v. Cofield, *supra*; Grathering v. Williams (1845), 27 N. C. 487; Williams v. Williams (1928), 83 Col. 180, 263 P. 725.

[3] Mich., Comp. Laws, 1915, sec. 11394; Mass., Gen. Laws, 1921, ch. 207, sec. 6; N. D. Comp. Laws, 1913, 4373; Texas, Complete Stat., 1920, Civil Code, Art. 4630; Vermont, Gen. Laws, 1917, sec. 3547, 3548; Wash., Remington's Comp. Stat., 1922, sec. 8449; W. Va., Hogg's Code, 1913, sec. 3636; Ark., Craw. & Moses Dig., 1921, sec. 2606-9; Ill., Hurd's Rev. Stat. 1921, ch. 89, sec. 2; Ia., Code, 1897, sec. 3182.

out his consent.[4] Some states have been so impressed by the necessity of the existence of voluntary consent in a marriage contract that provisions expressly declaring such consent a requisite to its validity may be found among their statutes;[5] yet a number of these same states have not hesitated to enact laws expressly stipulating that marriages of persons incapable of giving consent are to be regarded as voidable and not void, and thereby have involved themselves in an apparent inconsistency.[6]

A void marriage is invalid for all purposes, except where statutes have imposed limited validity by declaring the children of such marriage legitimate, and may be attacked collaterally by third parties; a voidable marriage, on the other hand, is valid for all purposes until annulled in a direct proceeding for that particular purpose.[7] Whether a marriage by an insane person was valid until annulled was a question not entirely settled at early common law. It was, however, finally accepted and now prevails as a generally-accepted view that such a marriage was void, and needed no court decree to render it so.[8] The thought was persisted in by some, nevertheless, that for good order and as a matter of propriety, a doubtful question of this sort ought to be decided once and for all in a suit for a nullity decree and not be left open for litigation between third parties. This view in a limited sense prevails in North Carolina. It was held there in the case of *Williamson v. Williamson*[9] that where *both parties were living*, the marriage could not be considered void until it was so adjudicated by a competent court. But even this limited application cannot have effect where statutes exist declaring the nullity of a marriage by an insane person independent of a court decree to that effect. In view of the fact that an insane person is incapable of consenting to the marriage contract, and that the

[4] Bishop, MARRIAGE, DIVORCE AND SEPARATION (1891), pp. 272-280.

[5] For example, R. S. Mo., 1919, sec. 7298. "Marriage is considered in law as a civil contract to which the consent of the parties capable in law of contracting is essential."

[6] Minn., Gen. Stat., 1913, sec. 7107 is exemplary.

[7] Keezer, MARRIAGE AND DIVORCE (1923), sec. 165, and cases there cited.

[8] See cases cited in note 2, *supra*. This is the general rule in the absence of statute making such marriages voidable.

[9] (N. C.), 3 Jones Eq. 446. Persons who claimed to be husband and wife brought a bill in equity against the wife's guardian for an account; and among other things they averred that the defendant relied on the fact of a marriage which transpired between the wife and another man previously to that of the plaintiffs, which prior marriage the bill proceeded to allege was void by reason of insanity, making the present marriage valid. The wife was compelled to resort to a direct suit to have the former marriage decreed void.

existence of insanity can be determined by the court in one type of proceeding, either collateral or direct, and furthermore since judges are more capable of arriving at the truth than are juries, it appears to be that the majority doctrine viewing such marriages as void and subject to collateral attack at any time, is much the sounder view and in reason the better conclusion of the two.

Regardless, however, of whether such marriages are void or voidable with their susceptibility to or immunity from collateral attack, the question of the existence of insanity in a person sufficient to render him incapable of consenting must at some time be decided by the court. Insanity is not amenable to direct definition and rigid tests, and what constitutes insanity in rendering a person incapable of a specific act is a perplexing question which has caused the courts much difficulty.[10]

In the case of *Durham v. Durham*,[11] the court expounds the generally recognized test, applicable in cases where a marriage is sought to be annulled by one of the parties on the ground of insanity, as a capacity in the person to understand the nature of the contract and its duties and obligations. Perhaps a better and more explicit statement of the test is found in *Unity v. Belgrade*:[12] "The marriage was void if at the time it was contracted, John had not sufficient mental capacity to understand the nature of the marriage contract and [that] by it he became the husband of Elizabeth and assumed all the duties, obligations and responsibilities and all the rights growing out of the relation. He need not have understood all the duties and responsibilities which the marriage relation imposed upon him, because that rule would probably render void many marriages in this state. But he should have had at the time sufficient mental

[10] Durham v. Durham (1885), L. R. 10 Prob. Div. 80. "It is to be observed, however, that this [test] only conceals for a moment the difficulty of the inquiry, for I have still to determine the meaning to be attached to the word understand. If I were to attempt to analyze this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on review of the whole facts whether the respondent came up to the standard of sanity which I fix in my own mind, though I may not be able to express it."

[11] See note 10, *supra*.

[12] (1884), 76 Me. 419; Schneider v. Rabb, *supra*; Kemmelick v. Kemmelick (1921), 114 Misc. 198, 186 N. Y. S. 3; True v. Ranney (1850), 21 N. H. 52, 53 Am. Dec. 164; Ward v. Dulaney (1852), 23 Miss. 410; Lewis v. Lewis (1890), 44 Minn. 124, 46 N. W. 323; Dunphy v. Dunphy (1911), 161 Cal. 380, 119 P. 512; Waughop v. Waughop (1914), 82 Wash. 69, 143 P. 444; Baffum v. Baffum (1916), 86 N. J. Eq. 119, 97 A. 256; Hempel v. Mempel (1921), 174 Wis. 332, 181 N. W. 749; Wiley v. Wiley, *supra*, note 1.

capacity to enable him to understand the nature of the marriage contract and to understand that upon himself he took with it all the duties, obligations and responsibilities which the law would impose upon him as a result of that contract on his part, whatever they were." This test, like all tests of insanity, whether they be in a criminal case or an ordinary contract or will dispute, is simply an attempt to introduce guides into a problem which is in no way susceptible to definite limitations or categories. This test having been advanced, we still have unsolved the problem of what is insanity sufficient to render a marriage a nullity. There is left for consideration the constituent elements of the marriage contract, the nature of which must be within the understanding of the parties, as well as the difficult definition of the word *understanding* as used in the above test.

It is true that there exist numerous degrees of insanity ranging from complete idiocy and lunacy to weak intellect, and that a person may be incompetent and irresponsible mentally for one act or purpose and yet be perfectly competent and responsible for another act or purpose.[13] Whether such degrees of insanity will be recognized depends upon the particular branch of the law as well as the subdivisions thereunder in which the particular case can be classified. The criminal law, for example, recognizes but one degree of insanity, and it exists as a complete defense or none at all.[14] Thus, ultimately, it may be said that the existence of insanity in a person is dependent upon the particular act, the obligations from which he seeks to escape or for which he is sought to be charged, and upon the intelligence and experience of the courts or body of men upon whom rests the decision.

Courts have sought to introduce the capacity to contract ordinarily as the measure for the capacity necessary for consent in a contract of marriage.[15] There is little doubt that if such capacity exists in the party pleading insanity, that capacity sufficient for consent in a marriage contract likewise exists in him. Some courts, however, have seen fit to proceed beyond that point by requiring for the validity of a marriage a capacity greater than that needed to contract concerning a person's prop-

[13] Handcock v. Peaty (1867), L. R. 1 Prob. Div. 335, 36 L. J. Prob. N. S. 57; Kinne v. Kinne (1831), 9 Conn. 102; Lowder v. Lowder (1877), 58 Ind. 538.

[14] People v. Leong Fook (Cal., 1928), 273 P. 779; People v. Troche (Cal., 1928), 273 P. 676.

[15] Kutch v. Kutch (1910), 88 Neb. 114, 129 N. W. 169. In Middleborough v. Rochester (1815), 12 Mass. 363, it is stated: "One not having sufficient understanding to be able to make a valid contract respecting property, or to deal with discretion in the common affairs of life, cannot contract matrimony."

erty.[16] In support of this view, it is argued that to permit a lesser capacity to suffice for marriage than for a business contract is to refuse a person the privilege of binding his property by contract, and yet to permit this identical thing by allowing him to bind himself in marriage. On the other hand this position, it is claimed, results from a failure to grasp the true nature of a marriage contract, and through the inability to distinguish the contract from the consequences thereof; and that such a contract is simple in its nature, consisting of a mutual understanding that the parties bind themselves in law to live together as husband and wife.[17] It appears that this falls short of answering fully the above contention. Consider the case of an old man of weak intellect who is entirely incompetent to manage his affairs, and who, in contemplation of marriage, enters into an antenuptial agreement whereby he promises, in consideration of marriage and of release of dower, to pay a sum of money. Will he be allowed to evade the obligation of the agreement, and yet be compelled to assume the same liability through the obligation imposed by law? Can it be said that this particular person conceived of the marriage relationship as the simplest kind of contract? It is difficult to see how an obligation, whether expressly stipulated or binding by operation of law, can be regarded as a consequence and not the contract itself. Marriage has been said to be a status, the extent of which is defined by law. Legislatures have found it necessary to impose obligations and duties upon insurance companies in making contracts of insurance.[18] It is recognized everywhere that such statutory terms, as well as the common law, are as much a part of the contract as the expressed terms of the policy.[19] Marriage being an agreement to assume a relationship or status, it must necessarily follow that property obligations, which are as much a part of that status as is the duty of fidelity, cannot be regarded as something distinct from the status itself. While the answer

[16] Handcock v. Peaty, *supra*, note 13. Turner v. Meyers (1808), 151 Eng. Reprints 600; "And it may be added that if any contract more than another is capable of being invalidated on the ground of insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives." See also Atkins v. Medford (1859), 46 Me. 510.

[17] Bishop, MARRIAGE, DIVORCE AND SEPARATION, pp. 258, 259.

[18] De Lancey v. Insurance Co. (1873), 52 N. H. 581; Ritter v. Insurance Co. (1896), 169 U. S. 139; Sulphur Mines Co. v. Phoenix Ins. Co. (1897), 94 Va. 355, 26 S. E. 856.

[19] Pietri v. Sequenat (1902), 96 Mo. A. 258, 69 S. W. 1055; Union Cent. Life Ins. Co. v. Pollard (1896), 94 Va. 146, 26 S. E. 421; N. Y. Life Ins. Co. v. Fletcher (1886), 117 U. S. 519; Brady v. Ins. Co. (1863), 11 Mich. 425; Oshkosh Gaslight Co. v. Germania Fire Ins. Co. (1888), 71 Wis. 454.

to the contention of the minority argument lies in the simplicity of the marriage contract, its nature cannot logically be determined by a separation of some of the obligations from the contract as consequences. The majority holding, which is expressed in a multitude of cases, that a lesser mental capacity than that necessary in the ordinary commercial contract will suffice for a contract of marriage, has for its foundation the acceptance of the nature of a marriage contract as a mutual pledge to live together as man and wife to the exclusion of all others.[20] The nature of the contract cannot logically be said to be so simple, and yet the courts have found that its acceptance as such fits the layman's conception, and as a matter of public expediency is necessary. This view impresses one even more favorably when it is considered that the sane party is competent to have his marriage declared a nullity when the other party can be adjudged insane, where such a marriage is held to be void[21] and, in some states, where such marriages are considered voidable.[22]

While the courts have now generally accepted the contract of marriage as the simplest kind of an agreement, they have yet to arrive at like adjudications as to the existence of sufficient understanding in the parties when confronted with substantially similar facts and circumstances. An Illinois court decided that a want of mental capacity existed sufficient to invalidate the apparent consent in a wealthy man seventy-two years of age who clandestinely married a woman of ill-repute.[23] A Nebraska court found sufficient mental capacity for valid consent in a man seventy years of age who advanced the claim of senile dementia, and who four years after the marriage was unquestionably insane.[24] These cases have, with some minor variations, similar facts, and yet their decisions are in direct opposition. The courts have been moved by a consideration of consequences in a number of cases, and they have felt inclined to protect people of little intellect against those who have obviously taken advantage of their condition,[25] or to recognize the chief

[20] In re Guthery (1920), 205 Mo. A. 664, 226 S. W. 626; Hagenson v. Hagenson (1913), 258 Ill. 197, 101 N. E. 606; Adams v. Scott (1913), 93 Neb. 537, 141 N. W. 148; Montgomery v. U'Nertle (Md., 1923), 122 A. 357; Schneider v. Rabb (Tex., 1906), 100 S. W. 163; Aldrich v. Steen (1904), 71 Neb. 33, 98 N. W. 445; Rawdon v. Rawdon, *supra*; Nonnemacher v. Nonnemacher (1894), 159 Pa. St. 634, 28 A. 439.

[21] See note 2, *supra*.

[22] See note 3, *supra*.

[23] See Pyott v. Pyott (1901), 191 Ill. 280, 61 N. E. 88.

[24] Aldrich v. Steen, note 20, *supra*.

[25] Kutch v. Kutch, note 15, *supra*. "If it should be hard that the issue of such marriages should be deemed bastards, it would be as much so that human beings without reason, or their family should be the victims of artifice of desperate persons who might be willing to speculate on their misfortunes."

purpose of marriage to be that of procreation of healthy children.[26] Whatever may be the considerations of this type, they, from a logical point of view, can have no effect or bearing upon the existence of insanity; a person of weak mind may be imposed upon in contracting marriage, and yet be perfectly capable mentally of being a party to this relatively simple contract where usually the desire to drive a "sharp bargain" is completely lacking.

While this objection seems well-taken, it is equally easy to comprehend the necessity of considering the consequences of a particular decision before rendering one. Perhaps these considerations have found expression where the courts have stated that each case is to be decided upon its own particular facts.

FRANK E. MATHEWS, '30.

[26] See article in 27 COL. L. REV. 845.