Banks v Goodfellow

[1861-73] All ER Rep 47

Also reported LR 5 QB 549; 39 LJQB 237; 22 LT 813

COURT OF QUEEN'S BENCH

SIR ALEXANDER COCKBURN CJ, BLACKBURN, MELLOR AND HANNEN JJ

11 JANUARY, 13 MAY, 06 JULY 1870

06 July 1870

Will - Validity - Capacity of testator - Mental illness - Partial illness - Effect on testamentary capacity - Presumption against validity.

For a testator to be capable of making a valid will he must be able to under. stand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which be ought to give effect and the manner in which his property is to be distributed between them. The fact that the testator suffers from mental illness which does not interfere with the general powers and faculties of his mind, and, in particular, does not prevent his possessing the faculties mentioned above, so that there is no connexion between the illness and the will, will not render the will liable to be overthrown on the ground of the testator's incapacity. But when the fact that a testator has been subject to some form of mental illness is established a will executed by him must be regarded with great distrust and every presumption should in the first instance be made against it. The presumption against such a will becomes additionally strong where the will is an "inofficious" one, ie, one in which natural affection and the ties of near relationship have been disregarded.

Notes

Explained: *Boughton v Knight* [1861-73] All ER Rep 40. Considered: *Jenkins v Morris* (1880) 14 Ch D 674. Applied: *Re Belliss*, *Polson v Parrott* (1929) 141 LT 245. Considered: In the *Estate of Bohrman*, [1938] 1 All ER 271; *Battan Singh v Armichaud*, [1948] 1 All ER 152. Referred to: *Murphett v Smith* (1887) 12 PD 116; *Birkin v Wing* (1890) 63 LT 80; *Roe v Nix* (1892) 9 TLR 128.

As to testamentary capacity, see, 39 HALSBURY'S LAWS (3rd Edn) 854-859; and for cases see 33 DIGEST (Repl) 603 et seq.

Cases referred to:

(1) *Waring v Waring* (1848) 6 MooPCC 341; 6 Notes of Cases, 388; 12 Jur 947; 13 ER 715, PC; 33 Digest (Repl) 586, 11.

(2) *Smith v Tebbitt* (1867) LR 1 P & D 398; 36 LJP & M 97; 16 LT 841; 16 WR 18; 33 Digest (Repl) 605, 212.

(3) *Combe's Case* (1604) Moore KB 759; Noy 101; 72 ER 888; 33 Digest (Repl) 603, 204.

(4) *Marquess of Winchester's Case* (1598) 6 Co Rep 23a; 77 ER 287; 33 Digest (Repl) 603, 194.

(5) *Greenwood v Greenwood* (1790) 3 Curt App 1; 1 Add 283, n; cited in 3 Bro CC at p 444; 13 Ves at p 89; 163 ER 930; 33 Digest (Repl) 603, 206.

(6) *Dew v Clark and Clark* (1826) 3 Add 79; 162 ER 410; 33 Digest (Repl) 586, 8.

(7) *A-G v Parnther* (1792) 3 Bro CC 441; 29 ER 632, LC; 33 Digest (Repl) 621, 430.

(8) *Cartwright v Cartwright* (1793) 1 Phillim 90; 161 ER 923; 33 Digest (Repl) 620, 405.

(9) *Van Alst v Hunter*, 5 Johnson, NY Chan Rep 159.

(10) *Harrison v Rowan*, 3 Washington, 585.

(11) *Sloan v Maxwell*, 2 HW Green (New Jersey) Ch Rep 570.

(12) *Den v Vancleve*, 2 Southard, 660.

[1861-73] All ER Rep 47 at 48

(13) *Harwood v Baker* (1840) 3 MooPCC 282; 13 ER 117, PC; 33 Digest (Repl) 614, 349.

Rule Nisi for a new trial of an action of ejectment to recover houses at Keswick in Cumberland brought pursuant to an order of LORD ROMILLY, MR, in a suit to set aside a will of J Goodfellow on the ground of the insanity of the testator.

Holker, QC, and Crompton Hutton showed cause against the rule.

Manisty, QC, and Kemplay in support of the rule.

Cur adv vult 6 July 1870

SIR ALEXANDER COCKBURN CJ:

(read the following judgment of the court)

This is an action brought by the plaintiff, as heir-at-law of John Banks, to try the validity of a will made by the latter in favour of one Margaret Goodfellow, of whom, she having died since the decease of the testator, the

defendant is the heir. The question in issue at the trial was the capacity of the testator to make a will. Instructions for the will taken by the attorney who prepared it were signed by the testator and attested by witnesses in his presence on 2 December 1863. The will formally prepared from such instructions was duly executed on the 27th of the same month. The question is whether on both or either of those days the testator was of sound mind so as to be capable of making a will.

It is a fact beyond dispute that the testator John Banks had at former times been of unsound mind. He had been confined as far back as the year 1841 in the county lunatic asylum. Discharged after a time from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he believed to be visibly present. Besides these delusions, which were spoken to by two witnesses whose evidence was above suspicion, the one a medical man who attended him to the end of 1862, and the other the clergyman of the parish in which the testator resided, there was a body of evidence which, if believed, was strong to establish a case of general insanity. The jury, however, found in favour of the will, and, therefore, must have believed this evidence to be greatly exaggerated, or must have come to the conclusion that the will was made during a lucid interval.

From September 1863, the testator had a succession of epileptic fits a blister was applied to his head, and the medical man who attended him throughout this period deposed that his mental power, such as it was, suffered from the fits, and that he considered him insane and incapable of transacting business during the whole time. On the other hand, it appeared that the testator managed his own money affairs, which, however, were on a limited scale, and was careful of his money. According to the evidence of a witness named Tolson, who had acted as his agent in receiving the rents of some cottage property at Keswick, amounting to about 80 pounds a year, the testator had not only always showed himself capable of transacting business with him, but had, on the last occasion of Tolson's coming to pay the rents, suggested to him to take a lease of the cottages in question so as to relieve him (the testator) from all risk or trouble in the matter. he had also desired Tolson, when he came to pay over the next half-year's rents, to bring with him a Mr Ansdell, an attorney of Keswick, as he wanted to see him about making a will.

On 2 December 1863, Tolson went to Arkleby, where the testator lived, taking Ansdell with him. On their arrival the testator, according to the statement of Ansdell

and Tolson, told Ansdell he wished to make his will. He fetched from his room a will which he had made in 1838 in favour of his sister who had since died, and said he wished to give his property to his niece, Margaret Goodfellow, in the same way. On Mr Ansdell asking who should be the executors, the testator turned to his niece, who was present, and asked who she thought should be executors, whereupon, she desired that Tolson should be one, and asked who should be the other, when the other executor, Milwall, was named by a person present, and assented to by the testator. The instructions thus received by Ansdell were put down by him on paper, and, having been read over to the testator, were, by the desire of Ansdell, signed by him, and his signature was formally attested by two witnesses, so as to make the paper a sufficient and valid will, although it was intended that a more formal document should afterwards be prepared and executed. The reason given by Ansdell for such signing and attestation of the instructions was that he always pursued that course when his clients lived at a distance from him, and time would be required between the taking the instructions and the final completion of the will. The distance between Keswick and Arkleby is about twenty miles, and the road was said to be bad.

After the matter of the will had been disposed of, a conversation took place concerning the proposed lease to Tolson. The testator calculated the amount of the rents, and, finding that they came to 8 poundso, offered a lease of the cottages for seven years at a rent of 76 pounds a year. This being agreed to by Tolson, Ansdell

was instructed to prepare a lease on these terms, and the instructions having been reduced to writing, were signed by the testator and Tolson. After this Tolson proceeded to settle with the testator for the rents received by him, which amounted to 40 pounds 7s 4d. Of this Tolson produced 29 pounds in cash, and offered his cheque for the remainder, but the testator observed that a cheque would be of no use to him as there was no bank near, and desired Tolson to pay the balance into a bank at Keswick, at which Tolson had an account. After this a conversation ensued with a Mrs Routledge, at whose house the testator lodged, as to the amount which he should pay her weekly for his board and lodging combined, which, if truly reported, tended strongly to show that he was certainly then capable of managing his affairs.

On December 27 Tolson took over the will and lease, which had been prepared by Ansdell, to the testator, who, having read them two or three times, said they were all right, after which both instruments were executed by the testator, and the will was duly attested. The testator lived till July 1865. His niece, Margaret Goodfellow, survived him, but died in 1867 under age and unmarried. She was his heir-at-law. He had other nephews and nieces to whom he is said to have been much attached. The effect of the will, if valid, is that the property goes to the defendant, who is no relation in blood to the testator, as the heir-at-law of Margaret Goodfellow, instead of to any relative of the testator. This possible consequence of Margaret Goodfellow dying without issue and intestate does not, however, appear to have presented itself to the mind of any of the parties at the time of making the will.

Upon this evidence the learned judge left it to the jury to say "whether on 2 December 1863, or on 27 December 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions and free from delusions as would enable him to have a will of his own in the disposition of his property, and act upon it." The learned judge told the jury that

> "the mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business would not be sufficient to show he was sane, while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to show he was insane,"

with the further direction that "the whole burden of showing that the testator

was fit at the time was on the defendant." The jury returned a verdict for the defendant, saying that they found that the will "was a good and valid will." The present rule was applied for and obtained on two grounds - first, that the judge misdirected the jury; secondly, that the verdict was against the weight of the evidence. The alleged misdirection is that the learned judge, in leaving to the jury the question whether at the time of making he will the testator was free from delusions, did not proceed to tell them that, though the delusions under which the testator had undoubtedly before laboured might not have been present to his mind at the time of making the will, yet, if they were latent in his mind, so that, if the subject had been touched, upon the delusions would have recurred, the testator was of unsound mind, and, therefore, incapable of making a will.

We must take it for the present purpose as a fact that the testator, though generally of weak intellect, was able to manage his own affairs, and, apart from the delusions under which he laboured, was, at all events, at the time of executing one or both of the testamentary instruments in question, of sufficient testamentary capacity. We must also take it that no delusion manifested itself at the time of making the will. On the other hand, there is ample proof that the delusions existed in the interval between the making of the will and the death of the testator, as they had done before, and it is, therefore, quite possible that these delusions may have remained at the time of making the will uncured and latent in the testator's mind, and capable of being evoked and reproduced at any moment if anything had occurred to lead his thoughts to the subject. The inquiry not having been directed to this point, it is quite possible that all that the jury meant in finding in the affirmative of the question whether the testator was "free from delusion" at the time of making his will, was

that the delusions were not present to his consciousness, not that they were eradicated from his mind; and that if the question had been specifically put to them whether the delusions still remained latent in the testator's mind, and his mind was to the extent of these delusions unsound, they would have found in the affirmative.

It, therefore, becomes necessary to consider how far such a degree of unsoundness of mind as is involved in the delusions under which this testator laboured, would be fatal to the testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and invalidate a will. We must assume for the present purpose that the testator laboured under the insane delusions ascribed to him, but, on the other hand, that these delusions had not, nor were calculated to have, any influence on him in the disposal of his property, and that irrespective of these delusions the state of his mental faculties was such as to render him capable of making a will. Whatever may have been the evidence as to general insanity, the verdict of the jury, which there is ample evidence to support, and in which the learned judge who presided at the trial states that he concurs, establishes that at the time of making the will, irrespective of the delusions referred to, the testator was sufficiently in possession of his faculties.

The question whether partial unsoundness not affecting the general faculties, and not operating on the mind of a testator in regard to the particular testamentary disposition will be sufficient to deprive a person of the power of disposing of his property, presents itself in the present case for judicial decision, so far as we are aware, for the first time. It is true that in *Waring v Waring* (1) the Judicial Committee of the Privy Council, and in the more recent case of *Smith v Tebbitt* (2) LORD PENZANCE, in the Court of Probate, have laid down a doctrine according to which any degree of mental unsoundness, however slight,

and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. But in both those cases, as we shall presently show, the wide doctrine embraced in the judgments was wholly unnecessary to the decision, and we, therefore, feel ourselves warranted, and, indeed, bound, to consider the question as one not concluded by authority on which we are called upon to form our own judgment. The question is one of equal importance and difficulty, and we have given it our best attention. The text writers throw no light upon the point. They content themselves with stating in general terms that to be capable of making a will a man must be of sound disposing mind and memory, and that persons non compotes, cannot make a will; but they are silent as to the degree of mental disturbance which will amount to a want of disposing mind and memory.

The cases prior to *Waring v Waring* (1) in which the law on the subject of mental unsoundness as affecting the capacity to make a will is considered, are by no means numerous. It may be as well to pass them in review. In *Combo's Case* (3) it is said to have been agreed by the judges "that same memory for the making a will is not at all times, when the party can answer to anything with sense, but he might to have judgment to discern, and to be of perfect memory, otherwise the will is void."

So, again, in the *Marquis of Winchester's Case* (4) (6 Co Rep at p 23a):

> "By the law it is not sufficient that the testator be of memory when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason."

In *Greenwood v Greenwood* (,5) an action brought to recover estates under a will the validity of which was disputed, the principal indication of insanity relied on being a strange aversion on the part of the testator

towards his only brother, his heir-at-law, and a groundless suspicion of the latter having attempted to poison him, LORD KENYON, in charging the jury, said (3 Curt App at p 30):

> "I take it a mind and memory competent to dispose of his property, when it is a little explained perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

In other cases, such as the welt known case of *Deer v Clark and Clark* (6) the insane delusion had a direct bearing on the provision of the will. In such cases, the delusion being once proved, and its connection with the will being manifest there could be no difficulty in setting aside the will. Cases of this description afford little or no assistance towards the solution of the question before us.

Again, other cases occurring prior to *Waning v blaring* (1) such as *A-G v Parnther* (7) and *Cartwright v Cartwright* (8) had reference to the effect to be given to a lucid interval at the time of making the will rather than to the degree of mental unsoundness, which would constitute testamentary incapacity. The judgment in the latter case is, however, not unworthy of attention. The case was a remarkable one from the fact that the will had been made by a person actually confined in a lunatic asylum who was undoubtedly insane both before and after the making of the will, nevertheless it was upheld. SIR WILLIAM WYNNE, then judge of the Prerogative Court of Canterbury, in giving judgment uses language tending strongly to show that, in his opinion, the rationality of the

act done affords an effectual test of the mental capacity of the party doing it. He says (1 Phillim at pp 100, 101):

> "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from SWINBURNE states it to be so. The manner he has laid it down is (it is in the part in which be treats of what persons may make as will, SWINBURNE, part 2, s 3) says he, the last observation is, 'If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phreney or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good. Yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament. Unquestionably, there must be a complete and absolute proof that the party who had so framed it did it without any assistance. If the fact be so that he had done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentlemen could prove by any authority or law what the length of the lucid interval is to be, whether an hour, or a day, or a month. I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Without going the length of adopting to its full extent what is here said as to the effect of the rational character, or at all saying that effect can be given to the rationality of the disposition beyond that which is due to it as evidence of the sanity of the testator, we advert to this case and the judgment of SIR WILLIAM WYNNE, as showing that a more indulgent view of insanity as affecting testamentary incapacity was then taken than has latterly prevailed.

We come to *Waring v Waring* (1) since followed by that of *Smith v Tebbitt* (2) in which the doctrine now contended for on behalf of the plaintiff was for the first time laid down. It may be shortly stated thus. To constitute testamentary capacity, soundness of mind is indispensably necessary; but the mind, though it has various faculties, is one and indivisible; if it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound; such a mind is unsound, and testamentary incapacity is the necessary consequence. 3s has already been observed, neither in *Waring v Waring* (1) nor in *Smith v Tebbitt* (2) was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial insanity; in both the delusions were multifarious and of the widest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection, and, what is still more

important, in both it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question.

Unable to concur in it, we have felt ourselves at liberty to consider for ourselves the principle properly applicable to such a case as the present. We do not think it necessary to consider the position assumed in *Waring v Waring* (1) that the mind is one and indivisible. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of man's sentient and intellectual being. But whatever may be its essence, everyone must be conscious that the faculties and functions of the mind are various and distinct, as are the power: and functions of our physical organisation. The instincts, the affections, the passions, the moral sense, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralise and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which - though the offspring of mental disease, and so far constituting insanity leave the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt, when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound, just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired.

But the question still remains, whether such partial unsoundness, if it leaves the affections, the moral sense, and general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, must have the effect of taking away the testamentary capacity. We readily concede that where a delusion has had, as in the well- known case of *Dew v Clark and Clark* (6) or is calculated to have, an influence on the testamentary disposition, it must be held fatal to its validity. Thus if, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided, though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the unsound condition had

influenced him in the disposal of his property. But in the case we are dealing with the delusions must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any; and the question is whether a delusion thus wholly innocuous in its results, as regards the dispositions of the will, is to be held to have had the effect of destroying the capacity to make one.

The state of our own authorities being such as we have shown, we have turned to the jurisprudence of other countries, as on a matter of common judicial interest, to see whether we could there find any assistance towards the solution of the question. We have, however, derived but little advantage from the inquiry. The Roman law, the great storehouse of juridical science, is as vague and general on the subject as our own. The madman (furiosus) and the person of deficient intelligence (mente captus) are declared incapable of making a testament; but as to what shall constitute madness or defectiveness of intelligence sufficient

to prevent the exercise of the testamentary right the authorities are silent. The continental codes are equally general in their terms, providing simply either that persons must be of sound mind to make a will, or that persons of unsound mind sball be disabled from doing so.

The older writers appear not to have been alive to the distinction between total and partial unsoundness as affecting testamentary capacity. In recent times, however, the question has been mooted by eminent and distinguished jurists, but, unfortunately with a marked discordance of opinion. M TROPLONG, in his great work, Ls DROIT CIVIL EXPLIQUE (Commentarie Sur lea donations entre et testaments) vol 2, ss 451-7, and M SACAZE, in a remarkable treatise, entitled La FOLIE CONSIDEREE seas DES RAPPORTS AVEC LA CAPACITE CIVILE (p 16) have adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole if insane delusion anywhere exists, while writers equally entitled to respect have maintained the contrary view. LEGRAND Du SAULLE, in a remarkable work entitled LA FOLIE DEVANT LES TRIBUNAUX (p 146) contends that

> "hallucinations are not a sufficient obstacle to the power of making a will if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if be has disinherited his family without cause, or looked on his relations as enemies, has accused them of seeking to poison him, or the like; in all such cases where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails, the will of the party is no longer under the guidance of the reason, it becomes the creature of the insane delusion."

M DEMOLOMBE, in his admirable work, the COURS DR Cons NAPOLEON (Traité des donations entrevifs et testaments) liv 3, tit 2, s 339, M CASTLENAU, in his treatise, SUR L'INTERDICTION DRS ALIENES, and HOFFBAUER, in his celebrated work on medical jurisprudence, relating to insanity, have maintained the doctrine that monomaniac, or partial, insanity, not affecting the testamentary disposition, does not take away the testamentary capacity. MAZZONI, in his recent work entitled ISTITUZIONI DI DIRITTO CIVILE ITALIANO (lib 3, tit 2, s 3) lays it down that

> "monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of his partial derangement."

None of these writers, however, has gone very deeply into the subject, or considered it with reference to the principle on which mental alienation should be held to form a ground for taking away the capacity of testamentary disposition. The older jurists were content to say that an insane person was incapable of making a will because he had no mind "quia mente caret," as it is said in the INSTITUTES, lib 2, tit 12, s 1, or

because he could not have a will, and, therefore, was incapable of declaring his ultimate will as to the disposal of his property, positions obviously unsatisfactory when the fact becomes recognised that a man may labour under harmless delusions which leave the other faculties of his mind unaffected, and leave him free to make a disposition of his property uninfluenced by their existence. In our day the doctrine has sprung up of the unity and indivisibility of the mind; but the ground on which insanity should cause incapacity appears to have become overlooked in the reasoning on which it is founded. It may be important to recall it.

The law of every civilised people concedes to the owner of property the right

of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposition of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances will lead men to make provision for those who are the nearest to them in kindred, and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right which the law secures to him. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created, and to disregard the claims of kindred to the inheritance, is to shock the common sentiment of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that in giving the power of testamentary disposition the law has been framed in disregard of these considerations. On the contrary, had they stood alone it is probable that the power of testamentary disposition would have been withheld, and that the disposition of property after the owner's death would have been uniformly regulated by the law itself. [But see now the Inheritance (Family Provision) Act, 1938: 32 HALSBURY'S STATUTES (2nd Edn) 139]

There are other considerations which turn the scale in favour of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind, some may be better provided for than others; some may be more deserving than others; some from age, sex, or physical infirmity may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attention which are one of its chief consolations. As was truly said by KENT, C, in *Van Alst v Hunter* (9)

> "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which be has in protracted life to command the attention due to his infirmities."

For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, and there can be no doubt that it operates as a useful incentive of industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has, therefore, conceded to the owner of property Clio right of disposing by will either of the whole, or at all events of a portion of that which he possesses. The Roman law, and that of the continental nations which hove followed it, have secured to the relations of a deceased person, in the ascending and descending line, a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the principle that though in some instances caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence may lead to the neglect of claims that ought to be attended to, yet the instincts, affections, and common sentiments of mankind may he safely trusted to secure on the whole a better disposition of the property of the deed, and one more accurately adjusted to the

requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a

[1861-73] All ER Rep 47 at 56

general law. (But see now Inheritance (Family Provision) Act, 1938: 32 HALSBURY'S STATUTES (2nd Edn) 139].

It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious in either case that to the due exercise of a power involving a moral responsibility thus grave the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend end appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise.

But we have here the measure of the degree of mental power which should be insisted on. If the human instincts and affections or the moral sense be perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to its baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power undisturbed by frenzy or delusion to take into account all the considerations necessary to the proper making of a will and producing a rational and proper will, should be subject to some delusions, but a delusion which neither exercises nor is calculated to exercise any influence on the particular disposition? Ought we in such case to deny to the testator the capacity to dispose of his property by will? It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposition of property, why, it may well be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affection in itself so great by the deprivation of a right, the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind, is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will and influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will or place a person so circumstanced in a less advantageous position than others with regard to his rights.

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence arising from defective organisation, or from supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defeat of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that, though the mental power may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of SIR EDWARD WILLIAMS in his work on EXECUTORS, if "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done." In his COMMENTARY OF THE PANDECTS,

[1861-73] All ER Rep 47 at 57

lib 28, tit 1, s 36, founding himself on CODE, book 6, tit 23, 1 15, VOET says:

> "Non sani tantum, sed et in agone mortis positi, seminece so balbutiente lingua voluntatem promentes, recto testaments condant si mode mente adhuc valeant."

This part of the law has been extremely well treated in more than one case in the American courts. In *Harrison v Rowan* (10) referred to in *Sloan v Maxwell* (11) the law was thus laid down by the presiding judge:

> "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men at different periods of their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new."

In a subsequent case of *Den v Vancleve* (12) the law was thus stated:

> "By the terms 'a sound and disposing mind and memory,' it has not been understood that a testator must possess these qualities of the mind in the highest degree, otherwise very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things, and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

In the same case it is said:

> "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect: it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the faculties of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength

> of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be

> competent to direct the distribution of his property by will. This is a subject which he may possibly leave often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was be capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

This view of the law is fully adopted by the court in *Sloan v Maxwell* (11) and is there stated to have been approved by VROOM, C, in a case as to the will of Tace Wallace which, however, is not reported. It appears to have had the sanction of KENT, C, in *Van Alst v Hunter* (9) already referred to. In *Harwood v Baker* (13) in which a will had been executed by a testator on his deathbed in favour of a ascend wife to the exclusion of the other members of his family he being in a state of weakness and impaired capacity from disease, producing torpor of the brain and rendering his mind incapable of exertion unless roused, ERSKINE, J, delivered the judgment of the Judicial Committee of the Privy Council in these terms (3 Moo PCC at p 291):

> "Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others, whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those cases where the mind has been too much enfeebled to comprehend more objects than one; and more especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. And therefore the question which their Lordships propose to decide in this case is not whether Mr Baker knew when he executed his will that he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast some light upon the question as to his capacity."

From this language it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding. Why should not this standard also be applicable to cases of mental unsoundness produced by mental disease? It may be said that the analogy between the two cases is imperfect; that there is an essential difference between unsoundness of mind arising from congenital defect or supervening infirmity, and the perversion of thought and feeling produced by disease of the mind itself, the latter being far more likely to give rise to an inofficious will thin the mere deficiency of mental power. This is no doubt true; but it becomes immaterial on the hypothesis that the disorder of the mind has left the faculties

on which the proper exercise of the testamentary power depends unaffected, and that a rational will, uninfluenced by the mental disorder, has been the result.

No doubt, when the fact that a testator has been subject to any insane delusion is established, a will must be regarded with great distrust, and every presumption should in the first instance be made against it. In the case at Bar this was pointed out to the jury, and there is no objection to the summing-up on this ground.

When insane delusion has once been shown to have existed, it is difficult to say how much further the mental disorder extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property, and the presumption against a will, made under such circumstances, becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the ties of near relationship have been disregarded. But where a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect on the testator's will, we can see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we sec no reason to think that such a question is beyond the power of judicial inquiry and determination, or may not be disposed of by a jury, directed and guided by a judge.

In the case before us, two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man, long since dead, came personally to molest him. Neither of these delusions - the dead man not having been in any way connected with him - had, or could have, any influence upon him in disposing of his property. The will, though, in one sense, an idle one, inasmuch as the object of his bounty was his Heir-at-law who would have taken the property without its being devised to her, was yet rational in this, that it was made in favuur of his niece, who lived with him, and who was the object of his affection and regard. We must take it, on the finding of the jury, that, irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed. Under these circumstances, we see no reason for holding the will to be invalid. If, indeed, it had been possible in this case to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given in the course of this judgment, we are of opinion that a jury should be told in such a case that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it. This effectually disposes of the question of misdirection.

As, for the reasons we have given, we are of opinion that, if the testator was, at the time of making the will, of capacity to make a will, as defined by the learned judge, the existence of such a disease, if latent, so as to leave him free from the consciousness and influence of delusion, would not overthrow the will, it follows that, there having been here a total absence of all connection between the delusion and the will, there can have been, practically speaking, no misdirection. If the delusion had been of such a nature as was calculated to influence the testator in making the particular disposition, as was the case in *Waring v Haring* (1) and in *Smith v Tebbitt* (2) a jury would not in general be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising

from it; but in the case at Bar, the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically, at all affected the verdict. Looking to the evidence given on the trial, and to the verdict of the jury, it appears to us that if this case were submitted to another jury, whatever they might find on the first point, their decision must be in favour of the will on the second. It would consequently be worse than useless to put the parties to the expense of a new trial, when, in cur judgment, the only proper or possible result must be a second verdict establishing the will.

Rule discharged.