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— On —

The Power of Granting and Testing Deeds so far as dependent on Mental Capacity.

Wm. Moir Bryce,
9 Gladstone Place.

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— " — — Where not in general use, the designation is given. —

2. English Authorities have in all cases been fully designated.

On the Power of Testing and Granting Deeds so far as Dependant on Mental Capacity.

To constitute a proper written Conveyance, it is essential, primâ facie, that such a deed be the offspring of the free and full consent of the party or parties whose subscriptions it bears. Consent is the foundation upon which every deed must rest. Without the consent of the granter of a deed, can that deed be said, in any manner of way, to be the actual deed of that party? It is impossible; the general theory of the law is, that there must exist a rational and full consent in order to bind parties; and where that essential quality is non-existant, its absence invalidates the deed.

J. 03

"To a perfect obligation", remarks Professor Bell,[a] "it is necessary that there shall be a deliberate and voluntary consent and purpose to engage"

Consent, however, is dependant upon reason; there must exist a sufficient degree of reason and judgment as will enable the granter to comprehend the object for which the deed has been executed. The learned American Commentator, Story,[b] defines consent to be "an act of reason, accompanied with deliberation, the mind weighing as in a balance, the good and evil on each side"; and the English authority, Chitty[c] lays it down that "a man cannot be said to assent that he will be bound, unless he is endowed with a degree of reason and judgment as will enable him to comprehend the subject of negociation" In order to execute a deed, therefore, the granter must be endowed a sufficiency of reason equal to the nature of the transaction in which he may be engaged. Hence it is that the assent which is thus requisite to give validity to a civil act, necessarily presupposes a free, fair, and deliberate exercise of the reasoning faculty.

"Ratio quasi quædam lux lumenque vitæ" - Cicero,
Reason is, as it were, the guide and light of life.

And again:-

"Ratio et oratio conciliant inter se homines"
Reason and speach unite men to each other.

It is observed by Puffendorf that every profest consent implies

(a) Bells Principles §10.

Pothier observes " the essence of a Contract consisting in consent, it follows that a person must be capable of giving his consent, and, consequently, must have the use of reason in order to be able to contract."

Evan's "Pothier on Contract" Pt. 1, C. 1, s. 1, art: 4.

(b) Story's Equity Jurisprudence Vol: I. §222; 1 Fonblanque's Treatise on Equity, B. I, ch: 2, §3; Grotius de Jure Belli Lib: II, Ch: 11, §5.

(c) Chitty on Contracts 8th Edit: by Russell, p: 133.

implies three things :- first, a physical power; secondly a moral power; and thirdly, a serious and free use of these powers. In other words, a person must be physically and intellectually capable of giving a proper consent; he may possess a constitution which may, by sympathy, so weaken the mind as to invalidate the power of consent; or his reason may be so overcast, so clouded, as to

"Leave but a wreck behind"

Consequently, there must exist, in order to possess the legal power of executing a deed, a sufficient capacity to do so, - an aggregatio mentium.

Capacity.

The legal presumption in regard to all questions of capacity is, that every person who has arrived at the age of consent, is possessed of perfect mental capacity. In this country, the "age of consent" is the period when majority, or twenty years of age, is attained.

In the French Civil Code, the same doctrine is maintained; thus, - "Toute personne peut contracter, si elle n'est pas déclarée incapable par loi." Upon this, it is observed by Rognon that "Le principe général est, que tout le monde est capable; les incapacités sont consequement des exceptions, qui ne doivent jamais s'entendre aux cas non prévus".

Consequently,

Addison Contracts

Code Civil. Lib: 3, tit. 3, sec. 2, art. 1123.

Incapacity. Consequently, from what has been said, it will be seen that, à la Rognon, the incapables are the exceptions to the general rule; and, therefore, wherever incapacity is alleged, clear and distinct proof that such is actually the case, must be made.

The leading cause of mental incapacity is that great and as yet almost unexplored enigma, insanity. There can, of course, be no legal consent where insanity is proved to be dwelling. Grotius[a] insists that this is a part of the law of nature, for (says he) the use of reason is the first requisite to constitute the obligation of a promise, which idiots, madmen, and infants are consequently incapable of making, — primum requiritur usus rationis, ideo, et furiosi et amentis et infantis, nulla est promissio. This is the principle which was adopted by the old Civil Law[b]: — "Furiosus nullum negotium gerere potest, quia non intellegit, quod agit." — and adopted by all succeeding generations. Indeed the insane have, even in the civil law[c], been compared to infants nam infans, et qui infantiæ proximus est, non multum a furioso distant; quia hujus modi ætatis pupilli nullum habent intellectum.

In other writers, such as Bracton we find the same doctrines inculcated; thus: — Furiosus autem stipulari non potest, nec aliquod negotium agere, quia non intelligit, quid agit. Eodem modo, nec infans, vel qui infanti proximus est, et

(a) De Jure Belli, Grotius, B. II, ch: 11, 5.

(b) Inst: Lib: 3, tit. 20, § 8; Digest, Lib. 50, tit: 17, 1, 5, 1, 40.

(c) Inst: Lib: 3, tit. 20, § 10; 1 Domat's Civil Law, B 1, 2, 1, 11, 12.

et qui multum a furioso non distat, nisi hoc fiat ad commodum sum et cum tutoris auc: toritate.

Before examining those who form the excep: tion to the general rule in favor of the presumption of sanity, it will be necessary to consider the question as to the amount of capacity possessed by those who have not yet arrived at the "age of consent". This period of life will be considered under the head of (1) Pupillarity, where there is immaturity of intellect, and (2) Minority, where there is partial maturity of intellect.

These points considered, the great question of the amount of capacity possessed by those who form, as we have seen, the great exception to our general rule, falls to be examined. This is naturally a very great subject; and it will be necessary to proceed with the examination of the various causes of mental incapacity seriatim.

The order in which these subjects will fall to be examined, is as follows:-

Part II, Insanity, Defect of Intellect,
" III, Physical Defect
" IV, Weakness of Mind, Facility
" V, Drunkenness
" VI, Perversion of the Power of Consent. Force and Fear.

Immaturity of Intellect

Part I.-Chap: I

Immaturity of Intellect

According to the law of Scotland the whole period of life under the age of twenty one, though generically known by by the name of minority in contradistinction to majority, is sub-divided into the two classes of pupillarity, and puberty or minority.

Pupillarity occupies the period, in males, extending from birth till the age of fourteen is attained, and in females from birth till the age of twelve.

Puberty or minority is the period extending from the age of fourteen in males and twelve in females, till the age of twenty one or majority is attained.

These divisions of life were borrowed by us from the Roman law, modified and adapted to our customs. Before proceeding to examine, the amount of capacity accorded to minors to grant testamentary and other deeds, we will first glance at the aspect which the Roman law presented on such questions.

Roman Law.

According to that law, persons were either majores or minores XXV annis. Full age or perfecta ætas, was fixed apparently for the first time at twenty years by the lex plætoria, a law which was passed before the time of Plautus; and which, according to Cicero (a), allowed a criminal accusation (a judicium publicum rei privatæ) against an individual who took an unjust advantage of the inexperience of a minor

under 3

(a) De Natura Deorum, III, 30.

Immaturity of Intellect — Roman Law

Roman Law.

under that age. The Tabula Heracleensis[a] excluded a man who had been convicted under the lex Plætoria from all municipal offices; and the Prætorian law provided another means of protection by allowing a restitutio in integrum, in all cases where a minor has been defrauded, — a principal which we have partially incorporated into our own law. In the early stages of Roman law, the distinctions as to age were confined to two phenomena of physical nature, — the faculty of speech, and the power of generation. These distinctions, however, were afterwards abolished, and the divisions of life were based upon the rational development, and not upon corporeal development.

Infancy

The first period was that of infancy, which originally comprehended only those, as Ulpian declares, qui fari non possunt.[b] It was afterwards extended to the age of seven.[c] The infants could not of course utter the sacramental words requisite for the validity of certain acts, such as emancipation or stipulation, and no one else could utter them in his stead.

Infanti proximus

The next period was sub-divided into two parts, in the first of which the minor was said to be infanti proximus; that is, he had the faculty of speech and could utter the sacramental words, but he had little or no intellectus, and the auctoritas of a tutor was requisite to complete the persona necessary for the accomplishment of the acts of civil law.

Pubertati proximus

In the second, he was nearer puberty than infancy, and was called pubertati proximus. In this period — extending from seven to, in males, the age

(a) Ortolan, Histoire de la Législation Romain et Généralization du Droit, p. 312.

(b) 1 §, 1, D. 26, 6.

(c) Const. 18, C. 6, 30.

Immaturity of Intellect — Roman Law

Roman Law.

age of fourteen, and in females, to the age of twelve — the minor was considered to have acquired a certain degree of intelligence (aliquem intellectum habet), but not the animi judicium.[a] This deficiency was, however, supplied by the appointment of a tutor; but then, both tutor and pupil were required to act jointly. The pubertati proximus was liable to criminal punishment, and he might even be made a slave for ingratitude towards his patron.

Puberty

The third stage was that of puberty, which was fixed by Justinian[b] to be in males, the age of fourteen, and, in females, the age of twelve. Prior to this age, the minor was termed impubes; but he was now styled pubes and was considered to possess both intelligence and judgment. An impubes above the age of seven could bind others without the intervention of a tutor, but not himself; for the general rule was, that the impubes could make his condition better but not worse, without the authorization of his tutor.[c] When they reached the age of puberty, they were then freed from tutelage, and were competent to contract justæ nuptiæ.

Ætas legitima

The fourth period was termed ætas legitima and was fixed by the lex plætoria at twenty five years of age. But majority was also granted by the state, (venia ætatis), provided, in the case of males, they had attained the age of twenty, and, in females, the age of eighteen.[d]

Senectus

Old age, which carried with it exemption from public

(a) Gaius Commen: III s: 109.

(b) Fr: 1, 1, 22.

(c) Gaius Commen: III, 107; 108.

Fr: 2, fr: D. 27, 1; Fr: 3, D. 50, 6

public office began at the completion of the seventh year.

We now proceed to examine the amount of capacity to grant testamentary and other writs by (1). pupils, and (2) minors, by the law of Scotland.

Powers of Pupils. — Immaturity of Consent

"At first, the infant,
Mewling and puking in the nurse's arms;
And then the whining school-boy with his satchel,
And shining morning face, creeping like snail
Unwillingly to school." — As You Like It.

Scotch Law

According to our law, a pupil is considered to have no persona; he does not possess that maturity of judgment which is necessary to transact the business of life, and, consequently is unable to give that rational consent which as we have seen, is so requisite to the validity of all deeds. Erskine (a) says that "a pupil has no person in the legal sense of the word. He is incapable of acting, or even consenting." It therefore follows, that all deeds by a pupil - whether testamentary or inter vivos - are null. We have an example of this so far back as 24 January 1547, in the case of Bruce

Nullity of Deeds by Pupil.

(a) Erskine I, 7, 14.

Bruce[a], where a Renunciation was reduced as null from the beginning, having been granted by a pupil seven years of age, even although the pupil tacuit per utile quadrienium. And again, in the case of Agnew v. Earl of Stair, a sale of entailed lands was reduced, though authorized by an Act of Parliament. Here the act required the heirs of the entail to be made parties to the application for having the sale carried through; and as the next heir was a pupil to whom no tutors had been appointed, and therefore was unable to give his legal consent to the transaction, the sale was pronounced invalid. The law was very tersely laid down by the Court in the case of Dalgleish v. Hamilton;- "A tutor acts for the pupil who is himself nobody". Infans et qui infantia proximus est, non multum a furioso distant. Lord Stair, in various parts of his Institutions, states the same doctrine; and the rule is adopted by all the succeeding text-writers.

Defect of consent supplied by appointment of Tutor

To supply the want of consent which is inherent in the pupil, the law interposes tutors, who, in deeds inter vivos, act entirely for the pupil.

Even with or without consent, Pupil does not possess Testamentary capacity

and

In Deeds inter vivos Tutor acts alone on behalf of Pupil.

But then no pupil, either with or without consent of his tutors, can make any mortis causa disposition of his property, heritable or moveable; and as, in deeds inter vivos, the tutor acts alone, we will not further inquire into the powers allowed to tutors as not being within the compass of this Essay.

All

(a) M. 8979.

M. 2,184.

Stair I, 6, 4; I, 6, 35, and I, 6, 44.

Immaturity of Intellect – Pupillarity

Restitution

All deeds by pupils can be reduced on the ground of pupillarity within forty years after their attaining majority. But if any consideration was given for the deed sought to be reduced, the restitution extends only so far as not *in rem versum* of the pupil.(a)

Adoption

On attaining majority, however, a pupil can adopt a deed granted by him while a pupil. In such a case, the validity of the deed only dates from the period of adoption, it has no effect retrospectively.

Ch. 2. Powers of Minors. – Partial Maturity of Consent.

Powers of Minors

The term minor we here employ to express that period of life extending from the age of fourteen in males and twelve in females, till the age of twenty one, or majority, is attained.

General Transactions

Minors puberes are held by the law of Scotland to be possessed of sufficient capacity to transact the ordinary business of life, but not possessed of that mature understanding and experience necessary to render their deeds unchallengeable under all circumstances. Unlike pupillarity, deeds inter vivos or obligations made during minority and without the consent of any Curator, are valid though, as the law regards minors as not possessed of that matured judgment or discretion sufficient to protect,

[a] Erskine I, 4, 33; Bankton Vol: III, p: 48; IV, 45, 15.

Fraser on Guardian & Ward p. 336.

Powers of Minors

General Transactions

protect themselves from the machinations of those of full capacity, if it can be shewn that in granting such deeds, advantage has been taken of their inexperien such deeds would be subject to reduction. The posi tion of a minor is therefore one of inferior judgment an discretion requiring the protection of the law. The pre sent able and learned Lord President when Lord Justic Clerk reviewed the status of those in minority, th "In puberty, legal incapacity has come to an end; an though the law places minor impubes under guardian ship, they can themselves legally act, in all cases with the advice and consent of their guardians, and in some cases without their aid or consent. That they are considered legally capable to a certain extent of exercisin their own unaided judgment, cannot be better illustrated than by the consideration, that after the de of the father a minor impubes is entitled to choose his own curators at the sight of the Court; that this right before th statute 1696 could not be interfered with, or exercised by anticipation, by the father; that even under the statute the father can name Curators to the child only in liege poustie; and that, whether the Curators be named by the minors himself or by his father, he is entitled to choose his own place of residence without their consent, or even against their advice."

Powers in Testamentary Writs.

§1. Powers of Minors to Grant Testamentary Writs.— The law accords to a minor impubes, complete power to test upon his moveables, however valuable, etiam in extremis. Lord Kilkerran was of the opinion that it was ultra vires of

(a) Cunynghame v. Whitefoord ut supra.

Powers of Minors in Testamentary Writs

Powers of Minors in Testamentary Writs

of a minor gratuitously to dispose of his moveables in prejudice of the relief of his moveable debts competent to his heir from his moveable subjects.(a)

Where their is an implied prohibition to alter moveable succession — as where debts have been conveyed to a minor with a substitution after him to near relations of the granter, — it is, of course, beyond the power of the minor to divert the succession from the course so implied.(b) In the case of Mc Culloch v. Mc Culloch 29 Jan: 1731, it was held that a minor, though he might uplift a sum secured by his father's marriage Contract to his children, whom failing, to the father's nearest heirs, could not, in minority, gratuitously defeat the substitution.(c)

Where their is an implied prohibition - cannot alter succession of moveables.

Even with consent minor cannot settle his Heritable Succession.

A minor, however, is unable, even with the consent of his Curators, to settle his heritable succession(d); because he is not, in a legal point of view, possessed of that mature judgment equal to the transaction of so important an act. Fraser says "he cannot gratuitously convey his heritage away to any other but his heir at-law.(e) He adds "As to the power of testing, this has probably arisen from the small value of moveables in the early period of the law when the rule was settled. It is different with regard to heritage. A gratuitous alienation is ipso jure null, according to a rule derived from a different source, or at least one regulated by different principles from that which allows him to reduce deeds to his loss. The succession by law being settled, there can be no necessity for its being altered; and, generally, there is no expediency in the alteration. And if it be altered by any

(a) Craig v. Lindsay, M. 8956, interlocutor of Lord Ordinary. The Court, however, decided the case upon other grounds.

(b) Yorkston v. Burn, M. 8950; McCulloch, M. 8965; Waddell, M. 8965.

(c) McCulloch ut supra

(d) Clydesdale v. Dimdonald, 26 Jan: 1726, M. 8964; Cumyngham v. Whiteford 8 March 1797, M. 8966; Hunter v. —— M. 8,964; Stewart's Answers v. Minor, Bankt. I, 7, 54; Erskine I, 7, 33.

(e) Fraser on Par. & Ch: Guard: & Ward, p: 340.

any deed to take effect after the death of the granter there is no party who can pretend any onerous right or can allege any injustice, where the deed fails of effect. On the other hand, the general rule of succession fixed by law must be presumed to be the best, and ought not to be allowed to be altered but with deliberation, and at a time when the proprietor is every way capable of judging of the grounds on which such an alteration should take place. Farther as it is only by ~~such~~ own will that the law will permit the ~~ordinary~~ the ordinary course of succession to be changed, it is plain that in this point he can have no assistance, either from a Curator or from any other person. This rule of law seems to originate in the doctrine concerning the deliberation and judgment necessary for changing the legal course of succession, though it is confirmed and extended by feudal notions."

Reduction of Conveyances of heritage depends on the proper animus disponendi of the Minor at the time.

Reduction of conveyances of heritage ~~mort~~ causa by a minor is thus not on the ground of minority and lesion, but on the ground of the want of sufficient understanding or the proper animus disponendi, even though he is provided with a Curator who concurs in the settlement. So, where an estate by an ancient destination, was settled to a particular series of heirs; and this succession was altered and deviated in another direction by an heir of the age of seventeen who died before attaining majority, the Court held the law to be perfectly fixed and reduced the deed.(a) Such deed does not

not require to be mortis causa; it is sufficient, if its effect be to alter the succession.

§ 2. Powers of Minors to Grant Deeds Inter Vivos.—

In Deeds inter vivos by Minors no restriction placed on their capacity.

1. In regard to deeds inter vivos, the law places no restriction on the capacity of minors pubes to grant such deeds. Thus, a minor can grant bills, bonds or other personal obligations; borrow money and dispone his property in security; can even sell his property heritable and moveable by his own deed without the authority of the Court or the consent of friends. As, however, the deeds of a minor are under the protection of the law, where advantage has been taken of him, the Court will set aside such deeds. In particular, where a purchaser of minor's heritage makes payment to him of the purchase money, or where a debtor repays his debt, those paying the money must show that the minor, after receiving it, employed it profitably to his own use. The practice therefore would be, to delay payment until under the authority of the court.

But where advantage has been taken of his Deeds they will be set aside.

If no lesion proved conveyances will be effectual against minor.

In the case of Thomson v. Stevenson [a], a conveyance of land by a minor without Curators, was held effectual, if no lesion was proved; and in the case of Clerk's Creditors v. Gordon [b], it was held that the disposition of a wadset by a minor wanting Curators, or with consent of Curators if he has them was effectual, without the authority of a judge, subject to restitution on proof of lesion.

(a) 13 Dec: 1866, M. 8982.

(b) 6 Dec: 1699, M. 3668.

Powers of Minors - in Deeds inter vivos

Minors right of Restitution

It is plain, therefore, that though a minor without Curators, may enter into obligations and other transactions inter vivos, there is this qualification, — they are subject to reduction on proof being given of lesion. The period within which minors have a right of restitution against deeds granted to their prejudice, is called the quadriennium utile; and comprises the period when majority is reached until four years thereafter. Any slight act of approval immediately on attaining majority and without due opportunity of learning the state of his affairs, will not be held as an act of homologation. Accordingly in a defence on minority and lesion, homologation by signing, fourteen days after attaining majority, a statement certifying the correctness of an account with the minor's father, was pleaded; but the Court held the salutory principle of restitutio in integrum was not to be barred by so slight a homologation, and so recently after majority. In the same way, where a minor having been secretly supplied with money on an engagement to sell two farms; and where immediately on his attaining majority and while in ignorance of his affairs, he executed a Conveyance in implement of his previous engagement, the Court reduced the transaction on the ground of circumvention and lesion.

Period

The restitution, however, extends only so far as the consideration has not been in rem versum of the minor.

In an action of Reduction good

It is a fatal objection to an action of reduc

by

Powers of Minors in Deeds inter vivos

good objection that period of Restitution has expired.

by a party of deeds executed during minority, if the quadriennium utile has expired, - if the person reached the full age of twenty five. It is then presumed (presumptione juris et de jure) that the minors has not been in any manner been hurt by the deed.

also

If after majority Minor ratified or Homologated his Deed.

Another good objection against such an action, is that the minor, on reaching majority ratified or homologated his deed. This homologation must neither be executed at the time of the original contract, or subsequently during minor and, as we have seen, it must not take place shortly after the minor has attained majority and before he has had a fair opportunity of learning the condition in which his affairs are.

Powers of Minors with consent.

2. Having now examined the powers allowed to minors when acting by themselves, the powers of minors when provided with curators now require to be considered.

Father legal Curator while alive

If alive, the father is the legal curator of his child. The father can, however, appoint curators and such appointment would be perfectly valid. In the case of the death of the father without appointing guardians to his children, it is in the option of a minor to appoint his own curators under the authority of the Court.

Minor with & without consent has much the same powers.

With consent of his curators, a minor has much the same powers as in the case of the minor who has no curators. The Curator acts merely as Consenter

Powers of Minors - in Deeds with & without Consent of Curator

Minor principal party Curator only Consenter

consenter; the minor himself is the principal party to any transaction in which he may engage. A minor, with Curator's Consent, can lease property not merely during his minority, but for the whole period of nineteen years.

Even with consent cannot alter succession or test on his heritage

A minor, however, even with consent of his Curators, cannot test on his heritage or alter the succession thereto; though, in the case of moveables, he has full discretion, provided there is no prohibition to alter the succession.

With Curator has also right of Restitution.

The minor has also the same remedy for restitution during the quadriennium utile on proof of lesion, as is possessed by a minor who is unprovided with curators; and can homologate deeds granted during minority, on attaining majority.

Except Deeds are pro tanto in rem versum of the Minor - they are null & void without consent.

3. Without the consent of Curator, a minor cannot, as a general rule, execute any deed inter vivos or enter into any transaction relating to his estate heritable or moveable; and all such deeds are null and void except where they are pro tanto, in rem versum of the minor. Fountainhall[a] lays down the law as applicable in his time;- "A deed done by a minor having curators, without their consent, is an act absolutely null of the law, needs no revocation, no reduction, may be quarrelled with at any time thereafter, etiam quadriennio elapso; imports lesion without any other probation; may be objected at any part of the process via exceptionis vel replicæ, the party only proving they had

(a) 2 Sup: 626.

had curators at the time of the said deed; yea, to sum up all, it is so far null, that an oath ties him not to the observance of any contract mad by him without consent of his said curators, but restores him against the same; because the said deed being ipso jure null, there is no act whereto the the oath can be accessory."

Accordingly, in Bell v. Sutherland [a] Jan: 17 where a minor living in familia with his father having attested a deed as cautioner without h father's consent, the deed was found, after the quadriennium utile had elapsed, ipso jure null without reduction. And in the case of Robertson v. Oswald Jan: 1584 [b], where a minor without con sent of his Curators, had alienated his heritage, it was held that the deed could be reduced eve although there had been silence for twenty years. In the same manner, there are various illustra tions of this principle being upheld by the law of Scotland; such as tacks [c], bonds, dispositions or sales [d], contracts [e], factories, commissions or mandates [f], and all deeds inferring any kind of obligation against the minor's property &c., - all reduced owing to the want of the Curators' consent All our institutional writers, with the exception o Lord Kames, maintain the same principle.

The nullity can be pleaded even during the 40 years prescription -

This nullity can be pleaded not only during the quad riennium utile, but during the forty years' prescrip tion, as we saw in the case of Robertson v. Oswal After the forty years' prescription has elapsed, th plea

(a) M. 8985.

(b) M. 8980.

(c) Seton v. Cashieben M. 8939; Cardross v. Hamilton M. 8951; reversed, Rob: App: 37; Kincaid, M. 8979.

(d) McKenzie v. Fairholm, M. 8961; Hamilton v. Hamilton, M. 8981; Campbell v. Lovat M. 9035; Robertson v. Oswald, supra; 1 Ch 11

(e) Thomson v. Pagan, M. 8985; Bruce v. Bruce, M. 16231.

(f) Nisbet v. Dickson, Elchies, v. Minor 5.

(g) supra; Maxwell v. Kithsdale M. 8942; Hamilton v. Hamilton, supra; Bell v. Sutherland. supra; Manuel v. Manuel, 15 Jan: 1853, 15 D. 284.

Powers of Minors - in Deeds with & without consent of Curators

Plea of Nullity however irrelevant after 40 years but if minor choose to abide other party cannot plead the nullity -

plea is met by Contrary presumption which renders it irrelevant.(a) If, however, says Fraser, the minor choose to go on with the contract, it is incompetent for the other party to plead the nullity.

Minor's Curator should discharge Debts.

Discharges of debts ought to be by both the minor and his Curator.

Speculating Transactions with or without consent void.

Transactions which partake of the nature of Speculation cannot, even with the consent of his Curators, be entered into by a minor; and neither can the minor even with such consent, make donations or gratuitously discharge debts.

Minor at majority can homologate Deeds.

As before, all deeds by a minor even with his Curators' consent, can be reduced on the ground of minority and lesion within the quadriennium utile; but he can, on reaching majority homologate any such deed.

Insanity 3

Part II

Ch: 1. Insanity.-Defect of Intellect.

"Now see that noble and most sovereign reason,
Like sweet bells jangled, out of tune and harsh".-
Hamlet.

The elucidation of disputes arising from defect of reason forms one of the most interesting and delic as well as difficult, questions which can fall to the lot of the juridical mind to solve. Human minds are so differently constituted, their excellencies and defects are so often, and so strangely, blended; and contrasts so striking present themselves in the men tal features of the same individual; that it is not surprising to find the gradations of mental defec so varied and so difficult to classify. Insanity again, is a subject, which, until lately, has not received that amount of attention and inquiry which has been accorded to physical disease, and we often find the most diversive views taken of the same case by medical men even of high standing. As Sir I. Stalford said in 1816, "We have much to learn on the subject of mental de- rangement; our knowledge of insanity has not kept pace with our knowledge of other distempers Indeed the whole subject has been wrapped up in such contrariety of opinion, that our recor of

Number of the Insane in Scotland.

Note. The importance of the subject of insanity will be seen from the following extract from the last Report of Commissioners of the Board of Lunacy for Scotland as to the number of the insane in Scotland at the date of that report (24 February 1873).

"Number of insane known officially on 1 January 1872, exclusive of unreported lunatics maintained in private dwellings from private sources":-

	Males	Females	Total
In Royal District Asylums	2,269	2,310	4,579
In Private Asylums	133	225	358
" Parochial "	221	340	561
" Lunatic Wards of Poorhouses	271	344	615
" General Prison	33	18	51
" Training Schools for Imbeciles	86	45	131
" Private Dwellings	643	881	1,554
	3,616	4,163	7,849

"Number maintained by Friends in private dwellings and not reported on by the Commissioners estimated at 2,000."

The number of the insane in Scotland is therefore about 10,000.

The number of the insane in England at the date of the latest Report was stated to be 58,640.

of reported cases, until within the last few years — thanks to our present accomplished Lord President as well as to that acute and accurate lawyer, the present Lord Chief Justice, Sir Alexander Cockburn — have pointed out no way in which to extricate a reasonable and just method of escape from the amount of metaphysics which some of our most able judges have thrown round questions of insanity. The judgments, until recently, have assumed the form of most beautiful and instructive discussions as to the metaphysical structure of the mind, leaving out of view, the whole point at issue, — the capacity of the mind quoad the particular deed. No doubt as McLaren says in his work on Wills the physiological conception does not furnish any precise rule for the determination of questions of mental capacity; he goes on to add "we think that it renders the attainment of any such rule or criterion impossible; but it may, at least, be of service in correcting the tendency to theorize on the subject. It appears to us to have an important bearing on the phenomena of monomania and of those intermissions of the disease which are termed lucid intervals. If it be admitted that the various phenomena of insanity result from a diseased or abnormal action of the mind, we do not see how it is possible to maintain that a person may be insane as to the subject of his delusion and yet have disposing capacity. The delusion may be so trifling as not to constitute a clearly marked manifestation of disease; but if the delusion is such as no rational person

person could entertain, and such as, in the opinion of competent judges, proved the existence of cerebral disease, then we think that the affected person should be deemed incapable of making a will, because it is impossible to say that the disease may not have interfered with the first exercise of the disposing faculty, and the right of the heir ought not to be taken away except by the testamentary act of a person in the full possession of mental capacity.

This opinion of Mr McLaren, it is perfectly obvious is founded on the judgment of Sir P. J. Wilde in the case of Smith v. Tibbet following the learned exposition of the 'indivisibility of the mind" by Lord Brougham in the case of Waring v. Waring. But here, as Sir Alexander Cockburn observed, the doctrine embraced in these judgments were wholly unnecessary to their decision; and such a doctrine as enunciated by Mr McLaren, - that any degree of mental unsoundness however slight, and however unconnected with the testamentary act, must be held fatal to the capacity of a testator — will not now stand in the face of the decision of the English Court of Queen's Bench in the case of Banks v. Goodfellow, and of the decision of the Scotch Court in the case of Nisbet's Trustees v. Nisbet. We have in these cases the Key by which to unravel the most intricate questions of the kind. Mr McLaren himself admits that the judges "do not seem, unless in some recent cases, to have risen to the general conception of insanity as a disease of the brain, admitting of gradations

3

In Banks v. Goodfellow 13 Aug: 1870, Law Times XXII N. S. 813.

Supra

gradations in like manner with other bodily infirm
And yet, holding this opinion as to the "gradation of
the mind", he immediately thereafter proceeds to acce
the English doctrine of the "individibility of the mind

It must not also be forgot, that it is due
to Lord President Mc Neil, to give the honour of first
pointing out the road by which such a difficulty
has at length been solved. In the case of Morrison
v. McLean, he observed that no test of mental capa
city could be stated without reference to the deed, the questi
being, whether the granter understood or was capable
of understanding what he was doing. This point
had, to a great extent, been overlooked both by Lord
Brougham and Sir Wilde in giving their de
cisions; and the omission was no doubt the cau
of their laying down the very strict view of
insanity which we find given in those cases.

All these points will, however, fall to be discusse
seriatim in their places.

Before proceeding to analyse the question of
capacity, as well as of incapacity, of those whose
minds have become diseased, it will be, I appre
hend, of considerable importance, to give a short
sketch of the medical aspect of insanity.

Section II^nd

Medical View of Insanity.

In discussing such a subject as this, it is necessary to premise, that it is not possible to frame a single definition, nor to present a just view in one description, of that form of disease which is popularly known as insanity. Many attempts have been made by psychologists to define insanity; but it is extremely difficult, indeed as yet, impossible to find a definition, which will include all the varied forms of that phenomenon. The terms insanity, lunacy, unsoundness of mind, mental derangement, madness, and mental alienation or aberration have been applied indifferently to those conditions of disordered mind in which a person loses the power of regulating his actions and conduct according to the ordinary rules of Society.

It has farther to be kept in mind, that insanity is not a simple disease like pneumonia or hepatitis; but that it is the indication of a disturbed or abnormal action of the brain, which may have its origin in a hundred different conditions. Accordingly, the insanity of a large town represents a very different aspect from that of a rural district. There can be little doubt but active and acquired insanity,- of which that fatal scourge, paralysis, is the type,- is more prevalent among the former, and idiocy or imbecility, among the latter; and, while acquired insanity may be cured, idiocy, which depends on imperfect

Medical Works consulted :-

Taylor's Medical Jurisprudence
Guy's Do
Ray's Jurisprudence of insanity
Beck's Medical Jurisprudence

imperfect development and training and is no
incompatible with long life, when once establishe
remains for ever. Then, especially in the earl
stages of insanity, the symptoms are liable to
great variation, according to the sex, age, and
social position of the person. Again, though
in some cases, as in confirmed insanity, th
is no evidence of the intellectual faculties; y
in most cases, these faculties and the mo
feelings are partially diseased, or partially de
stroyed, in every possible variety and degree.
Thus we meet with cases in which the facul
of attention, comparison, and volition are m
or less impaired, or absent, or, if present, t
are never perfect, although each may not be
equally affected. Where no two cases are pre
cisely similar, no definition can include all
varieties of the disorder. It must be admitted
by every one, that the faculty of distinguishi
the manifestations of health from those of
disease, requires tact, judgment, and experi
and the same rule must apply to disease
of the mind as well as those of the body. Insa
ity, from the often obscure nature, and the ev
varying phenomena of its functions, requires
the closest attention in analysing its charact
In no school of logic, in no assembly of the
just can we listen to closer or shrewder
argument, to warmer exhortations to duty
to more glowing descriptions of the beauty o
virtue,

virtue, or more indignant denunciations of evil doings, than in the asylums and hospitals for the insane. And yet many of these very people may make no secret of entertaining notions subversive of all moral propriety and, perhaps, are only waiting a favourable opportunity to execute some project of wild and cruel violence. The purest minds cannot express greater horror and loathing of various crimes, than madmen often do. Their abstract conceptions of crime not being perverted by the influence of disease, presents its outline as strongly defined as ever they were in the healthiest condition; and the disapprobation they express, arises from sincere and honest convictions. The particular criminal act however, becomes divorced in their mind from its relation to crime in the abstract; and being regarded only in connection with some favourite object, which it may help to obtain and which they see no reason to refrain from pursuing, is regarded, in fact, as of a highly laudable and meritorious nature. Herein then, consists their insanity, not in preferring vice to virtue, in applauding crime and ridiculing justice, but in being unable to discern between a particular crime, and all other crimes, whereby they are led to approve what, in general terms, they have already condemned. These are some of the difficulties incident to an enquiry

inquiry into so difficult a subject as insanity has proved to be.

I. Evidences of Incipient Insanity

The early stages of insanity are liable to great variation, according, as we have already seen, to the sex, age, social position and education of person so affected. "There is great irritability at the most trifling circumstances, – impatient of contradiction, loquacity, great difficulty in directing attention to, and steadily occupying the mind with, any train of thought, neglect of usual employment, sleeplessness, depression of spirits without reasonable cause, a disposition to seclusion, doubts about personal identity, followed by hallucinations and illusions." Sooner or later, these symptoms are followed up by perverted taste or smell, – by illusions of hearing or sight; voices are heard, and objects are seen, which at first please, and then confuse the patient, until he becomes mentally overpowered, and suffers all sorts of delusions regarding himself, his friends, and all his wordly affairs.

Cases of this kind afford a considerable percentage of the litigations caused by questions as to the mental capacity of the parties concerned.

Medical View of Insanity

II. Delusions, Illusions & Hallucinations

These phenomena have a close connection with, and a direct bearing on, mental unsoundness. Indeed, in cases of confirmed insanity, they are the most striking symptoms.

Considerable difference of opinion has hitherto existed as to the exact meaning of these terms. We shall, however, take the definitions of them as given by Dr Guy, in preference to those of Dr Taylor or any other medical jurist, as being, in our opinion, the result of the best reasoning yet adduced on the subject. A sensation, he says, without corresponding external object, is called an illusion, when it occurs involuntarily. When called into existence by an act of the will it is known as a vivid perception. When the eye is, or seems to be, the seat of the sensation, it is called a spectral illusion, phantom or phantasm. Errors have occurred through a misapplied use of the word hallucination, which has exactly the same meaning as illusion. The difference is best shown by adding three words to each :- an illusion of the senses, a delusion of the mind. An illusion means a mockery, a false show, or counterfeit appearance; a delusion, a chimerical thought. It may be well to add that an illusion of the senses, if believed to be a reality, becomes a delusion of the mind

Medical View of Insanity

"Whatever terms, however, we elect to use, these four distinct conditions we ought not to confound the one with the other; a voluntary representation of an idea on an organ of sense, which is a vivid conception; an involuntary sensation without corresponding object, which is an illusion; an equally involuntary transformation of a real object, which is also an illusion and an actual vision (e.g. a mirage), simply misunderstood and misinterpreted. It is to this last that the word hallucination if used at all, should, in accordance with the usage of the best writers, be applied."

Illusions occur as early as four years of age; in young, and middle aged, adults; and in octogenarians; some in perfect health, others suffering from trivial and transient indispositions; others in the first onset of more serious diseases, inflammatory and febrile, or during the stage of convalescence. Delusions are the main features of those forms of insanity which are known as mania and monomania. They are rarely met with in cases of idiocy and imbecility, sometimes in dementia but they are most common in paroxysms of mania. The acts of the insane are generally connected with their delusions, although it is not easy to trace that connection.

Again

Medical View of Insanity

Again, it is important to observe, that although some who labour under insanity a aware of their condition and lament it, th is chiefly confined to incipient and con descent cases. In general, they are not in the least conscious of their situation, but affirm that they are in better health and spirits than usual, and in the possessio of a perfect mind. Their special delus is no delusion to them, but an intense reality.

Lucid Intervals.

According to Taylor, by a lucid interval we are to understand, in a legal sense, a temporary cessation of the insanity, or a perfect restoration to reason. This state differs entirely from a remission, in whi there is a mere abatement of the symptom A lucid interval has been said to be mer a more perfect remission; that the disea is still lurking in the brain, though the patient may, for the time, talk coherent and act rationally. He undoubtedly is pre disposed to an attack to a much greater extent than one who had always been sane. The law, however, does not require proof

proof that the cure is so complete that even the predisposition to a recurrence of the disease is entirely extirpated." If a man acts rationally and talks coherently, we can have no better proof of a restoration to reason. If no delusion affecting his conduct remain in his mind, we need not concern ourselves about the degree of latent predisposition to a fresh attack which may still exist."

Lucid intervals sometimes appear suddenly in the insane. No limit can be assigned to their duration; it may last for only a few minutes, or it may be protracted for days, months or even years. These intervals are never met with in cases of idiocy and imbecility; occasionally in cases of dementia when this state is not chronic; but has succeeded a fit of intermittent or periodical mania; and most frequently in cases of mania and monomania.

Classification

The latest classification of the various forms of insanity is that of the learned and able late Dr Skae of Morningside [illegible] has

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has furnished and trained superintendants to lunatic asylums in almost every quarter of the globe), as finished and extended by Dr. Clouston, Dr. Skae's successor. This classification was given by Dr. Clouston in a series of "Morrisonian Lectures" which he gave last June. These lectures, however are not yet in print; and I am obliged to fall back upon the classification of Dr. Guy of London. He divides the different varieties of insanity into three classes, amentia or idiocy, dementia, and mania, thus:-

I. Amentia
- 1. Idiocy.
- 2. Imbecility.
- 3. Cretinism.

II. Dementia
- 1. Acute or primary.
- 2. Chronic or secundary.
- 3. Senile Dementia.
- 4. General Paralysis of the Insane.

III. Mania
- 1. General (Raving Incoherence).
- 2. Intellectual
  - General
  - Partial
    - Monomania.
    - Melancholia.
- 3. Moral
  - General
  - Partial
    - Homicidal.
    - Suicidal.
    - &c. &c.

Medical View of Insanity

I. Amentia.

There are two forms, closely allied, comprised under this heading, idiocy and imbecility. The third form, cretinism, is that form of disease common in some parts of Europe, tho' unknown here, chiefly distinguishable by that horrid enlargement of the throat called goître or bronchocele. It does not fall within the scope of our inquiry.

1. Idiocy

The term idiot is applied to one who never had mental power. It is therefore a congenital disease, but admits of degrees of defect, and like other forms of unsoundness, does not allow of strict definition. Indeed, there is more diversity in the characters of the idiotic and imbecile, than in those of the sound; and the truth must not be forgotten, if we would avoid the flagrant error of regulating judicial decisions by rules, which, though perfectly correct in regard to one case or set of cases, may be wholly incorrect in regard to others.

Idiocy, in its lowest form, combines the extreme of bodily deformity with an existence purely vegetable. Such idiots seem devoid of sensation altogether, and would perish if not closely attended to. Some, however, partake of a higher degree of intelligence than this. They can make known their commonest wants by signs.

signs; recognise familiar persons and objects become susceptible of attachment, and of a certain limited improvement of their bodily and mental condition under careful, assiduous and skilful teachers. Idiocy commences with life and continues through it, and those afflicted with it, are said rarely to live beyond the age of twenty five or thirty years.

As a rule, idiots are deformed in body, as well as stunted in intellect. They have small mis-shapen heads, and features ill formed and distorted. Their limbs and trunks are also imperfectly developed; and their gait is awkward and unsteady. Some of their senses are altogether wanting, and others very important. As we have elsewhere remarked, there is no cure for this form of disease.

2. Imbecility.

This is the same form of disease as that of idiocy, only imbecility is not congenital, but occurs early in life, and is capable of greater intellectual capacity. It is nothing more than idiocy in a minor degree. In common parlance, imbeciles are often termed idiots. They have a limited power of acquiring or retaining knowledge and cannot understand or appreciate the customs of society or laws, human and divine. A small portion, however, have intellectual deficiency without seriously

Medical View of Insanity

seriously offending against morality; and a larger portion ~~which~~ combine the highest intellectual endowments with utter incapacity in the conduct of life. Classification of the various degrees of imbecility have been attempted; but, owing to the varied forms of imbecility, each depending on the respective individual cases, all such classifications are practically useless. The difficulty mainly met with, exist in those phases where sanity is nearly reached; and here no rule can be laid down. Each case must be decided according to its own merits. Persons differ so much in their mental power to receive instruction, to retain what they have been taught, and to make use of it for their own advancement in life, that it becomes no easy matter, in many cases, to decide between insanity and sanity.

Dr. Taylor remarks that "idiocy and imbecility must not be confounded with mania and monomania. In idiots and imbeciles, ideas are wanting, and the power of thought is absent or defective; in maniacs and monomaniacs the ideas flow freely, but they are perverted, and the power of thought is irregular and uncontrolled. In idiocy and imbecility we do not meet with the hallucinations and illusions which constitute the main features of mania and monomania. Idiocy is much more likely to be confounded with dementia and

and, indeed, when dementia is confirmed and complete (fatuity), there is no appreciable difference, for in neither state is there any exercise of the mental power. In idiocy no ideas have ever been formed; in imbecility they have been partially formed, but arrested; in dementia, they have been more or less completely formed, but have subsequently become entirely obliterated. It is important to remember, that in idiocy and imbecility, there is no gradual loss or impairment of faculties as is generally observed in dementia; the person is what he has always been, — mentally weak and insusceptible of any great degree of improvement by instruction."

"From these remarks, it will be perceived that imbecility is a state from birth or from childhood — for it is possible it may supervene from disease after birth in a child in whom there is no reason to suspect its existence — but it is more common to find the deficiency congenital. Still, the term is often applied to that weakness of the mental powers which takes place in the aged at the close of life, even when the mind has been well developed in maturity. Thus, we speak of the imbecility of age; this is truly nothing more than a state of senile dementia, and to apply to it the term "imbecility" tends to create confusion."

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II. Dementia.

"Dementia", says Taylor, "when confirmed, consists in a total absence of all reasoning power, and an incapacity to perceive the true relations of things; the language is incoherent, and the actions are inconsistent; the patient speaks without being conscious of the meaning of what he is saying, memory is lost, and sometimes the same word or phrase is repeated for many hours together; words are no longer connected in meaning, as they have in mania and monomania. This state is often called fatuity; it is not an unfrequent consequence of mania or monomania."

Dementia seldom commences till after puberty, and generally increases with time, from the slightest possible impairment of mental energy to the most complete fatuity. It developes itself suddenly, and consists in exhaustion and torpor of the faculties, and not, as in mania in violent and sustained excitement. Indeed the whole conduct betrays the existence, not of physicial imperfection but of physical weakness, and many of the bodily functions are frequently enfeebled.

Dementia is divided into three classes;- acute or primary, chronic or secondary, and senile dementia, as well as a form of dementia associated with general paralysis. As we have seen, there are also various degrees of dementia from a want of memory, loss of reasoning power, inability

Medical View of Insanity

inability to comprehend; and lastly, an abol
tion of the common instincts, and of volitio

1. Acute Dementia. Sudden mental shocks produ
this form of disease. In consequence, in mau
cases, we find the attention of the patient entire
arrested
and fixed for the remainder of life, on a sad
contemplation of the one event which has ove
balanced the mind. In other cases, the
shocks destroys the power of the mind, and bri
on a state somewhat similar to that of the
imbecile or idiot.

2. Chronic Dementia. This form may also be
traced to some antecedent cause, such as
grief, or anxiety, to an attack of fever, mania
melancholia, apoplexy, paralysis, or repeat
attacks of epilepsy. In all these cases, it may
depend on softening or other chronic disease
of the brain.

3. Senile Dementia. This is the slow and gradual
extinction or partial extinction of the mental
powers of aged persons, particularly when their
constitutions have been weakened by disease
or dissipation. The first symptom is loss
of memory, dulness of perception and an
inability to fix their attention or thoughts on any
one direction. Things heard a few minutes before
are forgotten, and the question has to be
repeated

repeated again and again. Hence, the tr
action of business requiring close and confined a
tention, becomes impossible. Scarcely are
premises laid down, than they are forgot
so that the act of comparison by which co
clusion is arrived at, cannot be performed
And then, if some interjectory remark has b
made, the current of thought becomes entir
changed, and obstinately refuses to return
its original channel. They have sufficient
capacity to know those whom they are fa
iliar, but they display little or no enjoy
on seeing them; and they can still emp
themselves in mechanical pursuits such a
knitting, sewing or writing. The last pha
is that of complete fatuity, though the
muscular force may still, to a certain
extent, retain its vitality. But even that
becomes extinct; and there is neither sensa
tion, memory, thought, nor reason, but
bare physical existence, with occasionally
at distant intervals, a short resuscitation
of the mental powers.

4. General Paralysis. This phase of mental weakne
is caused by dissipation, the anxieties and
undue mental labours of the active and stir
period of life, and hereditary taint. The m
tal defect shows itself in most cases by delu
of unlimited power and boundless wealth. Th

effect is by a general and gradual decay of both mental and physical powers. It commonly attacks men of education and position varying in age from thirty to sixty. It rarely occurs in women. Its duration is said to be from a few months to three years. Sometimes the decay of the mind precedes that of the bodily powers. "But," as stated by Dr. Guy," the mental characteristics remain the same, and the last muttered words are about "gold, and carriages, and millions of money'".

too precise

III. Mania.

"In this form of disease there is a general derangement or perversion of the mental faculties, accompanied by greater or less excitement, sometimes amounting to violent fury. Ideas flow through the mind without order or connection, the person losing all control over his thoughts, and believing and acting upon them however absurd and inconsistent they may be. Rapidity of utterance and incessant agitation accompany this state; there is also great irritability, so that not the least contradiction can be borne.

In whatever form it appears, unless it be

Medical View of Insanity

be the immediate consequences of injuries, mo
shocks, intoxication, poisoning, or acute di
ease, it is preceded by important bodily and
mental changes, which take place gradually
and occupy a period varying from a few da
to even 15 or 20 years. This period is known
as the period of incubation. During it, the patient
tries to conceal his malady and continues at h
usual occupations as long as he can. His whol
character is changed: if quiet and retiring, he
becomes bold and forward, even violent; if orderly
and economical, he becomes confused and
prodigal; if gay and communicative he
becomes sad, morose, and averse to Society.
Sooner or later, the disorder of the cerebral
functions become of a more obvious and
positive character. The struggle between the
convictions of his sounder reason, and the
impulses of his new condition, ceases, and
the patient, instead of contending any longer
against the approaches of disease, or of concealing
his thoughts, now believes in their reality, and
openly and strenuously avows them, except when
induced by powerful reasons to pursue a con
trary course.

Intellectual Mania. Intellectual Mania is charac
terized by certain hallucinations, in which the
patient is oppressed with the reality of facts or
events that have never occurred, and acts ma
or

or less in accordance with that belief; or, having ad
some notion not altogether unfound, carries it
to an extravagant and absurd length. It may be
general, involving all or most of the operations
the understanding; or partial, being confined to a pa
:cular idea, or train of ideas.

General Intellectual Mania. This phase of mental di
turbance exhibits, perhaps, the most chaotic c
:fusion into which it is possible the mind can b
thrown; and it is also attended by greater
changes of the physical functions, than any o
Wild excesses of merriment, with immoderate bu
of laughter are exhibited by some; while oth
as if nature delighted in contrasts, are gloomy
and taciturn, and shed tears involuntarily. It
must not be misunderstood, however, that no
glimpse of rationality can be decerned amid
all this mental disorder. Questions on indifferent
subjects are answered appropriately. The difficult
is, to fix the maniac's attention on any partic
:cular point, - the mind constantly changing fr
one idea to another, according as each fired
:inate for the moment.

In some, their delusion partake of a plea
:ant character; while, in some, they fancy th
hear the voices of devils. This state is calle
demonomania. They are continually haunted
and their appearance and language betoken
dispair. When in this state, patients becom
exceedingly

exceedingly dangerous, and require incessant watchi

Partial Intellectual Mania, or Monomania.

The commonest form of this disorder is that in which the patient has imbibed some single notion contrary to common sense and his own experience. In many such cases, the hallucination is excited and maintained by impressions propagated by physical disease, a cause which in most cases, cannot be discovered till after death.

In another class of cases, the monomania takes a little wider range, involving a train of morbid ideas, instead of being limited to a single point. And these hallucinations will sometimes continue for years together, unaffected by time, and proceeding parallel, as it were, with the most sound and healthy operations of the mind. Though more often, the predominant idea instead of enduring in this manner, is frequently changing, - one insane notion disappearing to give place to another.

The operations of the understanding, even on subjects connected with the insane belief, are sometimes not impaired in an appreciable degree; on the contrary, we are occasionally struck with the acuteness of the reasoning power they display.

In the simplest form of monomania the understanding appears to be, and probably is, perfectly sound on all subjects, but those connected with the delusion; and even, in some

instances

instances, there may be such a control over this delusion, that it would be difficult to discover whether or not there was any just ground for imputing mental unsoundness. When, however, the disorder is more complicated, involving a longer train of morbid ideas, the patient loses all self-control. "His character is changed, and his habits are such as to render him unfit for social intercourse; he becomes incoherent; his ideas are perverted on all subjects, and he gradually lapses into mania or dementia. The last condition happens when the monomania is of long standing. Monomania may be remittent or intermittent, and it is sometimes accompanied by lucid intervals. Its progress is rapid, and its termination often unexpected; in some cases the disease suddenly ceases without any previous warning, owing to the effects of a strong moral shock or impression." (a)

In its early stage, monomania is liable to be confounded with eccentricity; but in the former, the patient is different from what he was, while that is not the case with the eccentric man; he is, and has always been, singular in his ideas and actions. Again, the eccentric man knows or can be convinced, that what he does is contrary to the ordinary rules of society, but he chooses to set them at defiance. This, as we have seen, is not the case with the true monomaniac: he cannot be convinced of the unreality of his delusions, and thinks he speaks and acts according to the general conduct;

(a) Taylor, page 1036.

conduct of mankind. Suddenly acquired habits of eccentricity are, however, presumptive of insan

Monomania frequently assumes one of two shapes; either the patients are gay and lively, o they are oppressed with melancholy. In the form state, they fancy themselves kings and queens, &c., in the latter, they are gloomy and oppressed wi the most heart-rending sorrow. This latter conditi is called melancholia (mania with depressi or hypermania (θύμη, sorrow). They do not sle and sometimes will neither eat, speak nor mov force must be used to make them take food and exercise. One patient thus affected did n speak for four years! Suicide or murder are often the effects of this form of disorder; and the patients require close watching. Often they are able to conceal their infirmity that no suspi cion exists until some horrid act causes imp

Suicidal monomania or suicidal mania, is th name for that form of disorder which predisp to self-destruction. Its approach is insidious, is often sudden in its outbreak. The only manner in which suicidal monomania affects the matt under discussion in this Essay, is whether it implies previous insanity or not. The law does not treat the act of suicide as a necessary proof of insanity.

Note. There are various other forms into which mental disease have been divided, but we do not propose to continue the inquiry any further than what is here given.

Section III

Law of Insanity - Roman Law.

Having now glanced at the medical aspect insanity we now proceed to consider insanity in its relationship to the question at issue, viz^z., i effect on the mental capacity to test and grant deeds.

Persons of weak mind entitled to protection of law.

From the earliest times and in all civiliz countries, those afflicted with cerebral disease and unable therefore to cope with the ordinary transactions of life, have been justly considered as entitled to the special protection of the law. The ordinary legislative rules, are, it is too obvious, inadequate to ensure to them the peaceable enj ment of their civil and social rights. To place th therefore, on a footing of more equality with those who possess the average measure of intellectual capacity, it becomes incumbent on the state to adopt such provisions as will attain that object. No doubt, it is not in the power of the legislature to supply that deficiency of mental calibre which Providence has denied to lunatic but it is in the power of the law to ameliorate to a considerable extent, the effects of their unhappy condition. Thus, the law can place the guardianship of such a persion in the hands of those who will do whatever human means can be employed to secure, at least, those comforts of life which are so necessary to one in that condition. The law, therefore, insists that the proper

proper person to exercise the duties of guardian: ship should the nearest male agnate, and that the father is the proper guardian for a lunatic son, and the husband is naturally the legal guardian of his wife, if she should become in: capacitated from the proper management of her own affairs. Again, the law preserves inviolate the property of those who are insane not only against force or fraud, but against the operation of any circumstance by which it may be deteriorated, except from those natural or accidental causes from which no property is exempt.

To arrive at a due understanding of the rules which guide our law which thus interposes to pro: tect the property of those who, from mental incapa: city are unable to protect themselves, it will be necessary to glance at that great storehouse of juris: cal science — the Roman Law — upon which our system is founded.

Roman Law.

Among the Romans, incapacity could be created by physical as well as mental defects. We find that among the former (vitium[a]) were included surdi (deaf) muti (dumb), and surdi et muti (deaf and dumb). Persons who laboured under some incurable disease[b] — qui perpetuo morbo laborant[c] — were equally incapacitated.

Furiosi.

In regard to mental incapacity, the Romans made similar distinctions. Thus the furiosi[d] were those who were raging mad and had entirely lost their intellectual faculties; mente capti were those in whom those faculties were wanting and who were in a state

Menti Capti.

of 3

(a) This word is defined by Modestinus as perpetuum corporis impedimentum Fr: 100, s.2, D. 50, 16.

(b) Morbus is defined by Modestinus as temporalem corporem imbecillitatem, Fr: 101, I. 2, D. 50, 16. But morbus sonticus was a sickness, rendering a person incapable of attending to business, Fr: 113, D. 50, 16. A person so afflicted was excused from attending at a court of justice by the law of the Twelves Tables, Fr: 2, s: 3, D. 2, 11. A judgment pronounced against him was null & void, Fr: 60, D. 42, 1.

(c) 4 I. 1, 23.

(d) "Furorem esse rati sunt," says Cicero in speaking of the Decemviri, "mentis ad omnia cæcitatem! Quod, cum majis esse videatur quam insania, tamen ejusmodi est ut furor in sapientem cadere possit, non possit insania". —— Tusc. Quæst. 3, 5.

Roman Law of Insanity.

of perpetual imbecility or very nearly so[a]; dementes were those who suffered from an unnatural depression of spirits and from feebleness of intellect; simplices et stupidi, those who were merely silly or stupid, and prodigi, or prodigals, who, on being judicially interdicted, were placed in exactly the same position as furiosi so far as their property was concerned.[b]

Simplices et stupidi.

Prodigi.

Lucid Intervals.

The furiosi were those who were supposed to have intervals of reason, and during that period he possessed the same capacity as any sane person. To remove any doubt which had formerly existed Justinian settled the law upon this point: sed per intervalla quæ perfectissima sunt, nihil curatorem agere, sed ipsum posse furiosum, dum sapit, et hereditatem adire, et omnia alia facere quæ sanis hominibus competunt.

Interdiction.

The mente capti, dementes, and simplices were not under any general interdict, but their capacity to bind themselves depended upon whether they were capable of understanding the effects of their own acts.

The prodigus could better his condition, but not make it worse. He was reduced to the same position of a minor pubes.[c]

As regards the testamentary capacity, the furiosi, muti, prodigi, and others were interdicted from the power of making wills[d], though they were still said to have the testamenti factio[e], because, as Pomponius explains in a passage afterwards incorporated by Justinian in his Institutes, licet enim

(a) Demangeat, Cours Eléméntaire de Droit Romain, Vol: I, p. 244 (1870 Ed:); Ortolan, Généralisation du Droit, s. 94; Mackeldy, Compendium of Modern Civil Law, s. 124.

(b) Fr: D. 27, 10; 3 J. 1, 23

(c) Fr: 6 D. 45, 1; Demangeat, Cours Eléméntaire de Droit Romain, Vol: II, p. 386.

(d) Fr: 16, D. 28, 1; 4 J. 1, 2, 19; 1. 2 J. 2, 12.

(e) 6 J. 2, 10.

enim testamentum facere non possunt, attamen ex testamento vel sibi vel aliis adquirere possunt.[a] An Exception, however, was made in favor of a soldier who, though deaf and dumb, was competent to make a will, provided it was ante causariam missionem; that is, before his discharge from an accidental reason. Justinian maintained this exception to the general rule in his Institutes.[b]

During a lucid interval, a furiosus could make a testament.[c]

If a person be non compos at the time of making his will, and afterwards recovered his understanding, yet nevertheless, his testament was void. "Sancimus tale testamentum hominis qui in ipso acto testamenti adversa valetudine tentus est, pro nihilo esse. Si vero voluerit in dilucidis intervallis aliquod condere testamentum, vel ultimam voluntatem, et hoc sanâ mente inceperit facere, et consummaverit, nullo tali morbo interveniente, stare testamentum sive quamcunque ultimam voluntatem censemus."[a]

a) Justinian's Inst. C. 6, 22, 9.

Section IV.

Scotch Law of Mental Incapacity.

From the earliest times, the law of Scotl has justly regarded as entitled to its special pro tection all those, who, from defect of understand are incapable of protecting themselves. Ancient the King as pater patriæ, was recognised as t proper legal guardian of the insane, and, special that, as he alone had the right of coer by chains, he had a curatory right over the furious madmen:- Quia furiosi vinculis sunt coercendi: It was the Sovereign's privilege and right to name protectors at pleasure to persons visited by furiosity or imbecility of intellect, till that right was abolished by the Statute 1585 c. 18 which enac "That the nearest agnate and Kinsman of natura fools, idiots, and furios persons, shall be served received and presented, according to the disposi of the common law, to their tutory and curat

Legal provisions for protection of insane.

The leading provisions of the law for affording relief to those who labour under men unsoundness, are based upon the important and obvious distinction which subsists between those where, from a greater amount of incapacity, protection to the person, as well as to the property of the individual is required, - and those instan where, the deficiency being only partial, personal protection is not called for, and the applic tion of a less stringent remedy will suffi to protect the property of the individual fro

the

the craft of others, or the prodigal waste of his property by the person himself.

In what does insanity consist?

What amounts to insanity is a question difficult of solution, and dependent upon each particular case. Formerly, the brieve defined the nature and indiciæ of the disease; and the question put to the jury was not whether the person was insane but whether he was labouring under the particular species of insanity mentioned in the brieve. Thus, according to Erskine, parties could be cognosced as "Fatuous persons called also idiots in our law, who are entirely deprived of the faculty of reason, and have a uniform stupidity and inattention in their manner, and childishness in their speech." "Furious persons, who may be ranked in the second class, cannot be said to be deprived of judgment; for they are frequently known to reason with acuteness; but an excess of spirits, and an overheated imagination, obstruct the application of their reason to the ordinary purposes of life." This classification, however, did not comprehend one half of the varied forms of mental abberration; and in the case of Yoolow, the jury were kept strictly to the description as given by Erskine, and as he was neither "entirely deprived of the faculty of reason", nor was "furious", the jury brought in a verdict of "not proven". And in the case of Mr Lockhart of Cammethan, we find the same law prevailing.

In consequence of these decisions, a proper

proper statutory definition of insanity was furnished by the 101st section of the Court of Session Act of 1868. It is there declared that, "such person shall be deemed insane if he be furious or fatuous or labouring under such unsoundness of mind as to render him incapable of managing his affairs." This enactment comprises all classes of insane, and puts the question on its proper footing, viz:- that of capacity as to the management of a persons affairs. This is the only manner in which the question ought to be considered by the law as to civil transactions; and there is now no necessity for examining the particular species of insanity with which a person may be afflicted, the sine qua non being, the amount of capacity possessed to transact the ordinary business of life.

Following the description of insanity as given above, we will now examine its effect quoad the power of testing and of granting deeds.

Sec: V.

Effect of Insanity on the Power of Testing.

Testamentary Capacity.

§ 1. In what does testamentary capacity consist?

The general capacity of doing acts, says the brilliant Avocat-Général D'Aguesseau, is founded upon a natural law, that of making a testament is the effect of a civil law which affords to mankind a kind of consolation for their mortality, by permitting them to revive, as it were, in the persons of their successors, and procure themselves an image and a shade of immortality in a long succession of heirs, who may be a lasting monument of the wisdom and bounty of the testator. Being the production of one person and there being only the consideration of love, favor and affection, the law regards a will with much greater respect than what it views other deeds. In testamenti plenius voluntates testantium interpretantur. A will is the embodiment of one person, and therefore the understanding, experience and capacity belong to the testator who makes it. It is necessary, therefore, that when the law invests a man with the character of a real legislature, by permitting him to abrogate as far as lies in his power, the natural and favorable order of succession, it requires a capacity suitable ~~suitable~~ to the importance of the function, an animus testandi, in the absence of which a testament can have no

Wills regarded with peculiar favor.

Phillimore's Principles & Maxims of Jurisp.

no force. A testator must have perfect ability and capacity in point of discretion and understanding, as a rational man, at the time of executing his will: he must be possessed of a "sound mind, memory and understanding" No doubt the word "sound" comprises the whole subject, but emphasis is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making of a will:- there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty; and, above all there must be understanding to comprehend the relations of these beneficiaries and the respective claim which each has upon his affection or good will. This doctrine as to understanding the deed is exemplified in the case of Watson v. Noble's Trustees, where a deed, by a person who was found by a jury capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revocation or alteration, was found not effectual solely on that ground. And equally so in the recent case of White v. Ballantine[b], where a deed was held reducible owing to the non-understanding by the testator of the terms of the deed. The leading English Case is that of Mountain v. Bennet[c], where it was decided by the judicial committee of the Privy Council, that, in order to constitute

Memory and Understanding of deed necessary.

(a) 18 Nov: 1825, 4 S. 200 (A. E. 202); Aff?. 29 June 1827, 2 Wilson & Shaw Reports 648.

(b) 20 June 1823 1 Shaw's App: 472.

(c) 1 Cox's Reports, Chancery 353-354

constitute a sound disposing mind, a testator must not only be able to understand that he is by 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 where the mind has been too much enfeebled to comprehend more objects than one; and, more especially, where the one object may be so forced upon the attention of the testator as to shut out all others that might require consideration. And therefore, the question which their Lordships undertook to decide in the case was, not whether the testator knew, when he executed the will, that he was giving all his property to one person (ie his wife in this case) and excluding all his other relations from any share of 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 or intention of excluding them from any share of his property. If he had not the capacity regard the propriety of the disposition made by the will is of no importance: If he had it, the injustice of the exclusion would not affect the validity of the testament, though the justice or injustice might

Must be capable of recollecting who testators relations are, of understanding their respective claims, and of forming a deliberate opinion as to such claims.

might cast some light upon the question as
his capacity. Our learned and able Lord Presid
laid it down in the case of Morrison v. McLe
Trustees that a person executing a settlement m
be held to have sufficient capacity to do so,
he is capable of distinctly understanding wha
he is doing, - of expressing that purpose in
intelligible language, - and of understandin
the consequence and effects of what he
He also laid down the key to the solution
the whole question, viz:- That no test of
capacity could be stated without refer
to the nature of the deed. This decision
was followed in 1871 by the English case of Ba
v. Goodfellow[b], where the Lord Chief Justice Cockbur
collected the various opinions as to testamentar
capacity. In a passage in that case where he
describes with singular perspicuity and accu
racy what is essential to the constitution of
mental capacity, his lordship says "It is
essential to the exercise of such a power (of maki
a will) that a testator shall understand th
nature of the act and its effects; shall un
derstand the extent of the property of which he
disposing; shall be able to comprehend and
appreciate the claims to which he ought
give effect, and with a view to the latter
object that no disorder of the mind shall
poison the affections, pervert his sense of
right, or prevent the exercise of his natural
faculties.

No test of insanity can be stated without reference to the deed.

Lord Chief Justice Cockburn's definition of testamentary Capacity.

(a) 24 D. 635.

(b) 22 Law Times Reports, N. S. 813.

faculties, that no insane delusion shall influe
his will in disposing of his property, and
bring about a disposal of it, which, if the
mind had been sound, would not have be
made. Here, then, we have the measure o
the degree of mental power which should
insisted on. If the human instincts and a
tions, or the moral sense, become perverted
mental disease, if insane suspicion or aver
take the place of natural affection, if reaso
and judgment are lost, and the mind becom
a prey to insane delusions calculated to in
fere with and disturb its functions, and to
to a testamentary disposition, due only to th
baneful influence, in such a case it is obv
that the condition of testamentary power
and a will made under such circums
ought not to stand." This, then, is the rule
which will now regulate the decision of all
question as to mental Capacity; and I will only add
remarks of Sir J. Hannen in the recent ca
of Boughton v. Knight[a]:- "But, gentlemen, w
ever degree of mental soundness is required
any of these things,- responsibility for crim
capacity to marry, capacity to contract, c
acity to give evidence as a witness - I must
tell you, without fear of contradiction, tha
the highest degree of all, if degrees there
is required in order to constitute capacity
make a testamenty disposition. And you
easily

Highest degree of Capacity essential to execute a testament.

(a) Law Reports

Note. This doctrine as laid down by Sir J. Hannen is quite the reverse of what has, previous to the decision in this case, been maintained by all our text-writers. The latter have always concurred in maintaining that a lower degree of capacity is require to make a will than what is required to transact a deed inter vivos. In England the same doctrine has been maintained with the exception of Colinson in his "Law of Idiots, where he proves the correctness of his theory by stating the fact that while a man can authorize another to perform any transaction inter vivos, he cannot authorize him to make a will for him. D'Aguesseau maintains the same doctrine as Colinson (Evan's Pothier Vol. II)

easily see why. "Because it involves a larger and wider survey of facts and things than any one of those matters to which I have drawn your attention". In a case[a] which was decided by the same judge a few months after the decision of the last case (but which is not yet reported), Sir J. Hannen explained his views still more explicitly. He observed "The question is whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action in making a will. I have been misunderstood by some persons who have commented on what I said on this subject in a recent case, and who appear not to have been sufficiently careful in examining the accurate meaning of the language used by me. It has been erroneously supposed that I said that it requires a greater degree of soundness of mind to make a will than to do any other act. (~~I never meant and never have said~~) I never said, and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between various degrees of soundness of mind, then, whatever is the highest degree of soundness of mind is required to make a will. That is very different from the proposition that it requires a higher degree of soundness of mind to make a will than to do any thing else. From the character of the act, it requires the consideration of a larger variety of circumstances than is required

in

(a) Burdett A. Thomson

in other acts, for it involves reflection upon the cla
of the several persons who, by nature or throug
other circumstances, may be supposed to have
claims on the testator's bounty, and the power
of considering these several claims, and of determ
ing in what proportions the property shall be di
vided amongst the claimants; and, therefore,
whatever degrees there may be of soundness of
mind, the highest degree must be required for
making a will."

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§ 2. In What Does Testamentary Incapacity Consist?

Testamentary Incapacity.

This is a question which has occupied the at
tention of many eminent men; and though, from
the dicta which have been enunciated within the
last few years, many of the difficulties inherent
in the subject have been successfully grappled wit
there still exists great divergence of opinion as to
what amount of unsoundness will incapacitate
a man from making a will. It becomes en
A question of degree. tirely a question of degree, to be decided by the
facts of the case as adduced by the evidence.
Sir J. Stamen in the previous mentioned case
Burdett and another v. Thompson, observed",
question of unsoundness of mind is one of
degree

degree, and it is impossible to lay down any abstract propositions of law which will guide you in determining it. Probably the mind of no person can be said to be said to be perfectly sound, just as the body of no person can be said to be perfectly sound. The question is whether there was such a degree of unsoundness of mind as to interfere with those faculties which ought to be brought into action."

Difficulty in laying down abstract rules.

In the celebrated case of Attorney-General v. Parnther(a), Lord Thurlow stated, "There is an infinite, nay, almost insurmountable difficulty in laying down abstract propositions upon a subject which depends so much upon such a variety of subjects as the present must necessarily do. General rules are easily framed; but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance, which may enter into and materially affect the particular case. There can be no difficulty in saying that if a mind be possessed of itself ~~it ought to act~~ and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject; for though it is true, that a mind, in such possession of itself ought, when acting to act efficiently, yet it is extremely difficult to lay down, with tolerable precision, the rules by which such state of mind can be tried. The course of procedure, for the purpose of trying the

(a) 3 Brown's Chancery Cases 440.

the state of any party's mind, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it, to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competency at the period when the act was done and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case, applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of the mind which is deemed necessary in general to the disposition and management of affairs, it were extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others." —

From these remarks it is obvious, that the subject is one of great difficulty, that each case is

Each case dependent on its own evidence.

is dependent on the respect amount of evidence adduced; and that the question then resolves itself into an inquiry (1) as to the amount of incapacity under which the testator laboured at the time of execution, and (2) if it is sufficient to invalidate his deed.

Measure of Incapacity.

To solve these questions, the law as laid down by Lord Chief Justice Cockburn in the case of Banks v. Goodfellow as already referred to, as to testamentary capacity, affords a good foundation on which to base rules for ascertaining a testator's incapacity. It is obvious that it is in the lesser degree of mental imbecility, that the main difficulty lies. Where the incapacity is perfectly apparent, the reduction of a testament is the necessary consequence. Lord Cranworth in Boyse v. Rossborough remarked, in discussing this question, "On the first head, the difficulty to be grappled with arises from the circumstance that the question is always one of degree. There is no difficulty (~~to be grappled with that arises~~) in the case of a raving madman, or a driveling idiot in saying that he is not a person capable of disposing of property; but, between such an extreme case, and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but, at what precise moment twilight becomes darkness, is hard to determine."

In considering, therefore, the degree of

mental

(a) 22 Law Times N.S. 813.

Note. This definition of the Lord Chief Justice's appears to have been founded on the judgment given by the celebrated Lord Erskine in Harwood v. Baker, 3 Moore P.C. 282, where his Lordship de:livered the judgment of the judicial committee of the Privy Council. He said:-

"Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must be able not only 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 pro:perty, 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 their consideration. And therefore the question which their Lordships proceed to decide in this case is not whether Mr. Baker knew when he executed his will that he was giving a 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 w of understanding their respective claims upon his regard & bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

Incapacity a question of degree.

mental incapacity requisite to invalidate, due attention must be paid to the individual character of the party making the will. Thus, where a man has not contracted ties of natural affection, or where, unhappily, they have become severed; who from his own peculiar whim, even amounting to eccentricity, he differs from ordinary mortals in dress, manner, habits of life &c. In these cases

And

Large allowance is necessary for the difference of human individuality.

large allowance must be made for the difference of individuality existing among mankind. It must not be readily assumed, that, because a man indulges in these vagaries, that he is necessarily unsound of mind.

§ 3. Time of execution.

Incapacity must be proved to exist at time of execution

To invalidate a testamentary act, the incapacity must be clearly proved to have existed at the date of execution.(a) Neither previous, nor subsequent incapacity will, if the testator was sane at the date of execution, at all affect the validity of the deed. So, where a mandate or procuration was granted by a father to his son, it was held that the subsequent insanity of the father did not necessarily vacate the procuration.(b)

Previous testament by person of sound mind must prevail.

It is to be observed, that a previous testament made by a person when sound in mind, must, of course, prevail against any subsequent will made while labouring under unsoundness of mind.

(a) Lord Eldon remarked in Sowart v. Sellars, 5 Dow's Repts 242,:-
"If he (i.e. the testator) was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them".

(b) Pollock v. Paterson, 10 Dec. 1811, F.C.; and Buchanan's Reports p: 220.

§4. As to the Evidence on which Testamentary capacity or Incapacity is Founded.

Proof of incapacity must be clear and distinct.

In order to deprive a person of the capacity to test, the law demands clear and undoubted proof of the testator's incapacity. The existence of the imbecility of mind is a question consisting partly of fact, and partly of law. No general allegation will be held sufficient to prove a person incompetent to test. There must be distinct proof[a] of the incapacity of the testator at the time of execution. In 1728, in the reduction of a deed ex capite furiosi brought about twenty years after the granter's death, the Court of Session held that a general allegation of idiotry was not relevant; and this judgment was affirmed by the House of Lords.[b] And in the case of Thomson v. Tate, the Court held that the facts were irrelevant and too vague.

General Allegation insufficient.

Delay in challenging a material circumstance.

When the reduction is sought after considerable delay has occurred in challenging a deed, a presumption is raised in favour of the validity of the testator's act. Lord Eldon remarked in the case of Towart v. Sellars,[c] "When the case comes to this, supposing Maitland to be a weak or insane man, if he was sane at the time he executed these deeds, his sanity at these moments is sufficient to sustain them. ---- But the question is not whether this man was weak or whether he was mad when in liquor, or insane at other times; but whether in 1817, when the

(a) It was observed by Lord Chancellor Eldon in the case of White v. Wilson 13 Vesey's Reports, 89, that "where insanity had not previously existed, proof of insanity is not to be made out by rambling through the whole life of a party, but must be applied to the particular date of any act impeached on the ground of his insanity." See also Hall v. Warren, 9 Vesey's Reports 610.

(b) Moodie v. Stewart 6 Feb: 1730 Craigie and Stewart's Rep^ts (Ho: of Lords) I, 20.

(c) 5 Dow's Reports 231.

the deeds challenged are rational in themselves, and are not quarrelled with till the witnesses to them are in their graves, except those to the deed of 1798, who can give testimony which would support that deed in any case, whether you can say that those deeds ought to be entirely set aside (for they cannot stand as securities unless they can stand as titles) at such a distance of time, and under such circumstances. In my opinion that would not be safe, and I cannot consent that this judgment (the judgment of the Court of Session) should be affirmed." This judgment has received the approbation of all subsequent jurists. It would, indeed, be a very serious matter, if a person's incapacity were to be determined only after the lapse of years after a testator's death (a), when a decision can only be arrived at on a "ground so fallible as human memory as to the state of the person making that disposition at other moments, without at all applying to the moment when he executed the deed sought to be impeached." (b) This must necessarily follow; the whole point under consideration would be lost sight of at such a distance of time, — that the incapacity must be proved to have existed at the time when the deed was signed — and merely a general allegation of insanity would be given as the grounds on which reduction would be sought. This, we have already seen is considered by the law as insufficient to found that amount of evidence as to a person's incapacity which is

Human Memory fallible.

(a) See D'Aguesseau's remark that "nothing is in general more difficult than to prove the fact of insanity, particularly in a man whom death has put beyond the circle of accusing or justifying himself in the sight of justice" Evan's Pothier on Contract Vol: II, p: 590.

(b) Lord Eldon in Jowart v. Sellars, 5 Dow's Reports 231.

which could render a testament null and void.

Witnesses and parties to deed, held to testify to the sanity of the Testator

The presumption is, that those who prepared and witnessed a deed, necessarily testify by the act to the sanity of the testator: and this rule holds *a fortiori*, where these parties are dead. In the case of Sowart v. Sellars previously referred to, it was observed by Lord Redesdale that "the parties who prepared these deeds, and who were parties and witnesses to them, were dead when this process commenced; and we must take it that they would have sworn that he was competent, for we have no right on this general testimony to assume the contrary. The same observation applies to the deed of 28th August 1784. The parties to it must be taken to have sworn that he was of sane mind when the deed was executed, and no deed would be safe if that were not a principle of law." And his lordship adds, that written evidence is worth a host of parole testimony."

Conflicting nature of the evidence.

Considerable difficulty is often experienced in ascertaining the proper value of the testimony of witnesses in cases of alleged mental incapacity. Frequently it happens that, where evidence is led as to the condition of a person's mind at some former period, while those on one side describe the person as being as mad as possible, those on the other side represent him as possessing the strongest and soundest intellect!! This, of course, forms a question for the consideration of the jury; and the rationality of the deed, and other circumstances connected

connected with the individual case, must all be taken as forming the basis on which their verdict is founded.

Value of Medical testimony.

The value of the evidence of medical witnesses in cases of insanity, has been the occasion of much diversity of opinion[a]. In Scotland, however, it has always been held that the more eminent a man was as a physician, the better witness he would make. This was the case in Nisbet's Trustees v. Nisbet[b] where the Court laid great stress upon the evidence of Dr. Warburton Begbie, — and more especially as that successful physician evinced his belief in the perfect sanity of the testator by attesting the deed when it was executed.

However the evidence of members of the medical profession merely forms part of the proof submitted to the consideration of the jury and is not accepted by our law as sufficient, per se, to decide any question of mental debility, especially in doubtful cases. This was particularly pointed out by Lord President Inglis in the case of Morrison v. Maclean's Trustees.[b] In a question, said his Lordship, of insanity, the inferences to be derived from general peculiarities in manner, speech, behaviour, and letters of the alleged lunatic, should be drawn by the jury themselves; and they should not be guided by the opinions formed by medical witnesses.

Evidence

(a) Lovatt v. Tube, 3 Foster & Finlayson's Reports 9

(a) 43 Scott. Jurist 530.

(b) 24 D. 625.

Testamentary Incapacity.

Hereditary Insanity, is it admissible as evidence?

Evidence of insanity being hereditary, althou not madmissible in England, is not permitted the law of Scotland. This was laid down the Court in Walker v. Mc Adam[a]; and in t subsequent cases has always been acted on. In the case of Gibson[b], evidence of the insanity a maternal aunt, and in the case of Jame George Brown[c], of the insanity of a paternal a was held inadmissible in support of a plea insanity. Although there is no doubt but tha to a certain extent, insanity is acknowledged to be a disease capable of being transmitted from gene tion to generation; yet it would become a great hardship if the deed of any perso would be liable to reduction because h aunt, uncle, or any relative, had been afflicted with disease of the brain. Insa can be traced to so many different causes that it is quite unnecessary to trace its orig to hereditary defect, at least, in legal mat At the best, it would form a case of mere inferential deduction; and our law will not accept any evidence but what directly affec the question as to the capacity of the testator him self. Hereditary insanity, therefore, does not, by the law of Scotland, form a presumption ev of a person's incapacity.

Legal favor shewn by Law to wills.

We must here, before analysing the whole question of incapacity to test, premise, that law

(a) 8 March 1806, 13 J. C. 548; Mor: No 3 Appen: Proof, see 1 Dow, 177.

(b) 23 Decr. 1844, 2 Brown's Suppt. 332.

(c) 25 April 1855, 2 Irvine's Reports 154.

law extends its favor to all deeds partaking of a testamentary character. The reason is obvious. A testament is the exponent of the good feeling and the desire of shewing such, by one person to those, whom, on departing this life, he leaves behind. In it, there is no question as to "consideration" being given, as in deeds inter vivos; it is a gratuitous act, the offspring of the testator's affection to his relatives and friends. Tonblanque in his learned Treastise on Equity, remarks, "For in testaments it is only one person who speaks, and his will ought to serve as a law, of which every part shall stand together, if it may. For a will is for the benefit of the testator, and at most implies only a consideration of love and affection; and therefore, shall not be taken strongest against the Testator or most beneficial for the divisee, but equally."

Favor shewn by law to heir.

While the law thus favors the act of a testator, it is to be observed that it throws the same favor to the person who stands in the position of heir, who naturally expects to receive benefit on the death of the testator. The claim of those who are related to the testator by ties of blood the law considers of great importance. This is seen in the fact that, following the Roman law, our law has fixed to the relatives of a deceased, according to a graduated ascending and descending scale, a certain fixed portion of the inheritance. In England, the law leaves everything to the unfettered discretion

(a) Fonblanque on Equity Vol: I, p: 451.

discretion of the testator. On this question of favor towards relatives, Lord Chief-Justice Cockburn observed in the case of Banks v. Goodfellow: "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

would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favor 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 some of its chief consolations.

Testaments in favor of strangers viewed with suspicion.

Where the testator is of weak mental capacity the law views with great disfavour any transmission of his property to a stranger, and especially where there was no visible rational motive that could be adduced for the act. So in the case of Tulloch v. Arbuthnot,(a) it was held by the Court that a testament made in favor of a stranger by a person of a wavering and infirm state of mind, without any rational motive, will be reduced, although not where made in favor of a near relation.

Presumptions

(a) 26 January 1759, M. 11,642.

§ 5. Presumptions.

Presumption in favor of sanity.

When a testament is ex facie regular, the presumption is in favor of the sanity of the testator: "The question in this case", said Sir N. Jenner Just in the case of Grimani v. Draper[a]," is simply thus:- was the gentleman of sound mind, memory, and understanding at the time he executed the will? Prima facie, he was; for here is a will, duly executed by him, attested by two witnesses; and if there were nothing else but that, the Court must presume that the deceased was of sound mind."

Consequently, the competence of a testator is always to assumed, where a deed is ex facie regular until his capacity is impeached by evidence[b].

As to date.

Accordingly where the granter of a holograph deed bearing a certain date[c], was proved to have become insane at a period subsequent thereto, and died insane, it was held that there was no legal presumption that the deed was executed during insanity; but that the party founding on the document was bound to support or adminicle its date.

If, therefore, a person has never been subject to a brieve of insanity, nor has had an unsound state of mind imputed to him by his friends or relations the burden of proof is then cast upon those who impeach his understanding[d]. Ordinarily, the leading rule, is that the party alleging the affirmative, must prove it: but this rule is reversed in the case of insanity. The presumption being in favor of sanity, the

Chitty on Contracts, p: 134,
Lindsay & Watson 5 D. 1194.

(a) III Notes of Cases, p: 480.

(b) Williams on Executors Vol: I. p: 19; Groom & Thomas, 2 Hag: Gord's Reports 434.

(c) Waddell & Waddell's Trustees 13, 16 May 1845, 7 D. 605; 17 Jurist 542.

(d) Sutton & Saddler 3 Common Bench Reports, N.S. 87; 3 Jurist N.S. 1150; 26 Law Journal, C. P. 284

the party maintaining the opposite of one who has never been cognosced, must prove it.[a]

Where the party's sanity is impeached, and the evidence is conflicting, the question is not, whether the facts adduced in support of it are not in general indications of sanity; but whether they are inconsistent with, or sufficiently explanatory of, the indications of insanity produced on the other side, on which undoubtedly the onus lies. This necessarily follows from the doctrine stated previously, - that the presumption of law is in favor of the sanity of the testator, and that the burden of proof lies on the person impeaching the sanity of the testator.

Where party cognosced presumption becomes reversed.

Where a person has been cognosced insane, or been confined in a lunatic asylum, the presumption becomes then reversed, and the onus probandi falls on the party alleging the sanity of the testator or seeking to establish a lucid interval. Lord Nottingham observed "Semel furibundus, semper furibundus præsumitur; and, therefore, where the question is of a fact done lucido intervallo, which may be either by remission or intermission, it is not enough to shew the act was sapienti conveniens, for that may happen many ways; but it must be proved to be actus sapientis, and to proceed from judgment and deliberation, or else the presumption continues."

As to Lucid interval.

The presumption of sanity, when once rebutted by proof of insanity, the law presumes no lucid interval.

(a) Bell's Principles 2103; Towart v. Sellar 5 Dow's Reports 231; Skelton's Edition of Dickson on Evidence p: 4, § 5.

Nisbet v. Nisbet's Jr., 43 Scott. Jurist 530, see Lord Ormony's remarks
Snook v Watts, 11 Beaven's Reports, Rolls Court 105; 12
Jurist 444.

Nottingham's Manuscript.
See also Colmson's Law of Idiots p: 52.

interval or restoration to sanity[a]; and such interval or restoration must always be established by evidence.[b] Wherever there are circumstances in evidence which counterbalance the presumption of sanity, the Court will pronounce against the deed, if on the whole, the evidence is sufficient to establish affirmatively that the testator was possessed of sufficient capacity to execute the deed called in question.

The onus of proof falls on party alleging the lucid interval.[c]

Deed must contain real intentions of testator.

Where a person is in the full possession of his intellects, the mere act of execution would lead to the inference that he knew the contents of the instrument he signed. Where, however, the person has a lower grade of capacity, through insanity, or other cause, a very different degree of proof is required to satisfy the Court that the instrument contained the real intentions of the testator. Sir Herbert Jenner Fust observed in the Case of Darling v. Loveland "I do not think there is evidence of more than a bare execution, which is not sufficient where the testator is of a weak and impaired capacity, to put it no higher than that." It was also remarked by Lord Ardmillan in the recent case of Nisbet's Trustees v. Nisbet that where a will has been framed by agents and afterwards been approved by the testator after reading it or hearing it read, then the rational, equitable, and becoming character of the will cannot of itself be of great importance in considering the sanity or insanity of the

Mere execution, rule as to.

(a) Att: Gen: v. Parnther 3 Brown's Chancery Cases 443; Hall & Warren 9 Vesey's Reports 611. See also Swinburn on Wills, Pt. 2, s. 3, pl. 7; Barnatype v. Barnatype 2 Robinsons Ec: Rep: 49

(b) If a party relies on a deed, on the ground that it was exe:cuted during a lucid interval, he must clearly shew that this was the case. Creag v. Blood, 2 J. & L. 509; Hall v. Warren 9 Vesey Junior's Reports 605, 610. See also Lord Langdale in Snook v. Watts 11 Beavens Reports, 107; Sir J. Nichole in Groom v. Thomas 2 Haggard's Ec. Reports 434, and White v. Driver, 1 Phillimore's Ec: Rep: ,88; Sir H. Jenner Just in Grimani v. Draper 6 Notes of Cases 422, and in Johnson v. Blane, 6 Notes of Cases, 444.

(c)

2 Curtis' Reports 229.

43 Scott: Jurist, 530.

the testator, since his own mind had not been much applied to the subject, and he may only have accepted and subscribed what was presented to him. But where distinct and intelligible instructions for the preparation of the will have been written and framed by the testator himself, then the character of the deed itself, assumes a considerable prominent position in determining the question as to the capacity of the testator.

Onus probandi.

The onus probandi that a testator knew and approved of the contents of his will, necessarily lies upon the party propounding it.

Testamentary

Atter v. Atkinson 1 Law Reports, P., 665; 20 Law Times, N.S. 404.

Cleare v. Cleare, 38 Law Journal, P. 81; 1 Law Reports, 655; 20 Law Times N.S. 494.

Chapter II.

Testamentary Incapacity.

I Insanity - General.

General Insanity.

The first class which falls to be considered are those described in the 101st section of the Court of Session Act, 1868, as being "furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs."

Definition.

By this definition of insanity, all shades of mental alienation are included where protection or guardianship of the person is necessary. Consequently there can be little difficulty in deciding questions as to capacity to test by persons who fall under this classification. By the furious is meant those who are maniacs, persons who, says Erskine, "may be ranked in the second class, cannot be said to be deprived of judgment; for they (are) frequently know to reason with acuteness: but an excess of spirits, and an overheated imagination, obstruct the application of their reason to the ordinary purposes of life; and their infirmity is generally brought on by sickness, disappointment or other external accidents, and frequently interrupted by lucid intervals. Under these may be included madmen; though their madness should not discover itself by acts of fury; but by a certain wildness of behaviour." This class comprises those known in England as lunatics, a word derived from the Latin word Luna, in respect of lucid intervals which

Court of Session Act 1868 c: 101.

they are usually in the enjoyment of, quia lucidis intervallis gaudent; or in consequence of a notion formerly prevalent, that the moon has an influence upon mental disorders.

The fatuous are those who according to Erskine "are called also idiots in our law, who are entirely deprived of the faculty of reason, and have a uniform stupidity and inattention in their manner and childishness in their speech which generally distinguish them from other men; and this distemper is commonly from birth, and incurable." Idiot is a word derived from the Greek ἰδιος, sui generis aut privatus; and originally conveyed the idea of a private man, one not employed in any public office. The Romans made use of the term for the illiterate or foolish; and hence, in Cicero and other authors, idiota commonly signifies an unlearned or ignorant person. In Herodian, a man is said to be Ἰδιώτης, qui rei alicujus est imperitus, ut Ἰδιώτης τῆς ἰατρικῆς. With us, however, idiot is a legal term signifying a person who has been without understanding since his nativity, and whom the law presumes never able to attain to any.

As these two classes were, as we have previously seen, insufficient to contain all the grades of mental defect which require the protection of the law, a third was added by the Court of Session Act of 1868, viz:- those labouring under such unsoundness of mind as to render them ~~person~~ incapable of managing their own affairs. All

cases, not included under the head of fatuous or furious, where cognition is sought, fall under this class.

No testament, therefore, can be sustained when executed by

"The frantic madman, too,
In whose confused brain reason had lost
Her way, long driven at random to and fro"
("Course of Time", by Pollock B VIII)

Lord Cranworth observed in Boyse v. Rossborough, that "there is no difficulty in the case of a raving madman or driveling idiot in saying that he is not a person capable of disposing of his property; but between such an extreme case and that of a man of perfect sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine."

Deed null by party who has been cognosced.

Where a person has been cognosced as insane his persona standi in judicio is at an end, and as the verdict is declaratory, all deeds or acts of whatever kind – whether relating to moveable or heritage – which may affect the property of the person of the granter are null, if granted at any time after the period from which the insanity is found by the verdict to have commenced. Stair in his work on Guardian and Ward states that such

such deeds are null and may be set aside by exception, without any other proof of insanity than the production of the verdict. In several early cases[a] however, it was found that a deed within the term in the verdict is not null by exception, but only reducible by action; and this in order to give room for the requisite inquiry relative to the particular deed, as perhaps made during a lucid interval. We must also remember, that the whole proceedings in regard to an inquest, are naturally ex parte, and it is always open to those interested under a will to prove a lucid interval. We may therefore infer, that a verdict of insanity proceeds entirely upon ex parte evidence, and though strongly presumptive against the validity of a deed executed within the time comprised in the verdict, it is still in the power of the beneficiaries under a deed to prove a lucid interval at the time when the deed was actually signed. No doubt, as Mr Fraser[b] points out, there is a case[c] where a deed of alienation of land by a cognosced idiot was brought under reduction, as being granted during the time when he was found to have been insane. In this case, the Court held that the production of the verdict of the jury was a sufficient ground for the reduction of the deed; and that it could not be founded on at all till the verdict of the jury was set aside. This case, however, is only an example of the different views which have been

Proceedings in inquest ex parte

regarding

(a) Crawford (1583), M. 6275; Loch & Dick (1638) M. 6278.

(b) Parent & Child, Guardian & Ward p: 552.

(c) Cunningham and Craig his Curator &. Bart, 4 March 1791, Hume Session Papers, Adv: Lib: "Feb:-March 1791, No 92"

regarding this very difficult subject, and is founded on the exact letter of the act of 14th c: 66, which says that "fra it be knowin be the inquest that the persones be fules or furious, the time thereof, the alienation maid be him, afor the time that the inquest findis that he wes ony fule or furious, sall be of nane avail, bot retreated and brocht againe til him, alsweil as the alienation, maid after the serving of the said brieve."

Trial by brieve ex parte.

And

Is only presumptive evidence of insanity.

On the whole, however, it is perfectly evident, that the course of modern legislation tends to regard the trial by brieve as being entirely ex parte, and, at most, only presumptive evidence of a testator's insanity; though, no doubt it throws the burden of proving the sanity of the party at the moment of execution, upon those propounding the will. We find it stated by Professor Bell thus:(a) "If a lucid interval can be proved at the point of time when a deed was made, or a Contract entered into, the retrospect of the verdict will not be held to preclude the inquiry in the shape of a reduction and declarator of lucid interval, or as a plea in a reduction of a deed."

Deed by party who has never been cognosced can be reduced on proof of incapacity.

But, though a party was never cognosced, any testament executed by him while labouring under mental alienation, can be reduced by action, on his condition at the time(c) being distinctly proved. We find a case where this occurred even

[a] Bell's Prin: 2, 111.

[c] Alexander v. Kinnier, M. 6278; Loch v. Dick, M. 6278; Christie v. Gib M. 6283; Sulloch v. Albuthnott, M. 11672; Murrnaw v. French 2 Brown's Sup: 168; Gillespie v. Gillespie 11 Feb: 1817 F.C.; Watson v. Noble's Trs, affd 2 Wilson & Shaw's Rep. 648; Mc Diarmid v. McDiarmid 4 S. 583; affd 3 Fr. Vs. 37; Bankton I. 4. 10; Erskine I. 4. 51.

even after a lapse of thirty years from the execution of the deed.(a) The observations previously made as to delay in challenging a deed must however, be borne in mind. Delay is extremely dangerous(b); and the cause of delay will naturally form a material point for consideration.

Proof of Insanity.

D'Aguesseau(c), in his pleadings before the Parliament of Paris in the case of the Prince De Conty, observed that "nothing is in general more difficult than to prove the fact of insanity, particularly in a man whom death has put beyond the circle of accusing or justifying himself in the sight of justice. It is not only to combat a natural presumption; it is also to render an invisible and anterior quality sensible and visible; the eyes cannot be the first judges of it. It refuses, as it were, the judgment of the senses. We do not contemplate it in itself, we see nothing but copies, portraits frequently obscure and imperfect which are traced in the visible actions. The judges themselves do not see these actions, they learn them from the recital of witnesses; and who can be assured of the fidelity of those? Perchance, they work after copies, which they frequently disfigure in endeavouring to imitate."

"We have been considering the question of incapacity as applied to those persons affected with entire defect of mind; and who are thereby unable to manage their own affairs. In these cases, as we

(a) Lindsay v. Trent, M. 6,280

(b) Towart v. Sellars, 5 Dow's Repts. in Parl. 132.

(c) Evans' Pothier on Contract Vol: II, p: 590.

we have seen, there is necessarily little difficulty in arriving at a proper decision. The general incapacity once proved, the testament accordingly becomes invalid. It is where the mental disease assumes a mildest form, that the great difficulties inherent in such a subject are principally met with. No man can discover the exact place where eccentricity ends, and insanity commences, and the ascertaining what constitutes insanity sufficient to invalidate a deed, has proved one of the most difficult questions which the law has had to decide. Accordingly, attempts have been made to discover whether there existed a test by which unsoundness of mind could be determined. This test is now generally admitted to be what is known as insane "delusion".

Section II

Delusion, the test of Insanity.

Delusion the Test of Insanity.

Madness, said D'Aguesseau, is an invisible quality; but it discovers itself, it presents its picture, it betrays and accuses itself by the most ordinary actions. The habits, the exterior appearance, the gait, and, in particular the beliefs of the insane, give the most public and striking testimony we have, of their secret and interior individual dispositions. To discover a test by which madness may be defined, became for

Taylor's Med: Jurisprudence

Evans' Pothier on Contract Vol: II, p: 640.

for the first time, the subject of consideration by Sir John Nichol in the celebrated case of Dew v. Clark & Clark. Sir John observed that "the true criterion the true test, of the presence or absence of insan I take to be the absence or presence of what in certain sense of it, is comprisible in a single ter namely, delusion. Wherever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated ima :gination, and wherever, at the same time, havi once so conceived, he is incapable of being, or at least of being permanently reasoned out of that co :ception, such a patient is said to be under delusion in a peculiar half technical sense of the term; and the absence or presence of delu so understood forms, in my judgment, the tru and only test or criterion, of absent or present in :ity. In short, I look upon delusion, in the sense of it, and insanity, to be almost, if altogether, convertible terms, so that a patient und a delusion, so understood, on any subject or sub in any degree is, for that reason, essentially m or insane on such subject or subjects in that de Sir John then adopted the definition of delusio as given by one of the Counsel (Dr Lushington) - "It is the belief of facts which no rational perso would have believed that is insane delusion." Lord Brougham in the case of Waring v. Wari said that a more accurate definition would be "the belief of things as realities which exist only

[a] 1 Addam's Ecclesiastical Repts 279; 3 Add: Ec: Repts 79. See also Dr. Haggard's Report (from the Judge's Notes) of this case.

[b] 6 Moore's Common Pleas Reports 349.

only in the imagination of the patient;" and another judge, Sir J. P. Wilde, in the succeeding case of Smith v. Tibbetts[a], in commenting on his Lordship's observations, remarked that "surely, same people often imagine things to exist which have no existence in reality, both in the physical and moral world. What else gives rise to unfounded fears, unjust suspicions, baseless hopes, or romantic dreams?" He, however, added, "In what form of words could a "delusion" be defined, which would be a positive test of insanity, in such cases as these? In none, I conceive, but "insane delusion" or words of the like import, which carry with them the whole breadth of the general inquiry."

Though, no doubt, this criterion of insanity, as given by Sir John Nichol, is open to various objections, yet we would conjoin with Sir J. Stamen, in the recent case of Boughton v. Knight[b], when he observed that "I believe you will find that that test applied will solve most, if not all the difficulties which arise in investigations of this kind".

Where, therefore, a delusion partakes of a gross, extravagant kind, very little difficulty can be experienced in arriving at a proper solution of the question in dispute. Take, for example, the case of Mrs Thwaites in Smith v. Tebbitt[c]. If a woman believes that she is one of the persons of the Trinity and that the person to whom she leaves the bulk of her property

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(a) 1 Law Reports, Prob: & Div:, 398.

(b) Law Reports

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(c) Supra

is another person of the Trinity, what more need be said? But it is in cases where the delusons are founded on a totally false, imformed unreasonable (because unreasoning) estimate, and the deed may – or may not according to evidence have been the natural result of such estimate, that the main difficulties lie. We will now proceed to analyse this lesser form of insanity.

Section III

Partial Insanity or Monomania.

Partial Insanity.

When delusion exists in the mind of a person on one or more subjects, it is termed in law partial insanity. In common parlance, it is known by the name invented by the celebrated modern authority on mental disease, Esquirol, as monomania though delusion may exist on more than one subject.

In this sense, the term partial insanity is used by Lord Hale (a), who says there is a partial insanity of mind, and a total insanity. The former is either in respect to things quoad hoc vel illud insanire; some persons, that have a competent use of reason in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholly persons, who for the most part, discover their defect in excessive fears and griefs, and yet are not

(a) Hale's Pleas of the Crown Vol: I, p: 30.

not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capi:tal; for doubtless, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances, duly to be weighed and considered both by judge and jury, lest on the one side, there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes: and the same learned judge adds "that the best measure is this — such a person as labouring much melancholly distempers hath ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."

Our inquiry into the effect of partial insanity on the testamentary capacity will fall to be con:sidered under the following two heads:-

1st. Partial Insanity affecting the general faculties, and operating on the mind of the testator in regard to his testamentary disposition; and

2nd. Partial Insanity not affecting the general faculti:ties and not operating on the mind of the testator in regard to his testamentary dis:position.

1st

Partial Insanity.- Direct Bearing on Will.

1st Partial Insanity affecting the general faculties and operating on the mind of the testator in regard to his testamentary disposition.

Partial Insanity affecting the general faculties.

And

Having direct bearing on the deed.

Fatal to that deed.

Until recently there has been no fixed law as to the regulation of questions in relation to partial insanity. Where, however, the insanity, though only what is known as partial, has distinctly affected the mind of the testator, and especially, where it has also had a direct bearing on the deed[a], there has always been little doubt but that it would necessarily on distinct proof to that effect being led, invalidate such deed. Mr. Evans, the translator of Pothier's Treatise on Obligations expresses a decided opinion[a] on this subject "I cannot but think," he says, "that a mental disorder operating on partial subjects, should, with regard to those subjects, be attended with the same effects as a total deprivation of reason; and that, on the other hand, such a partial disorder operating only upon particular subjects, should not in its legal effects, have an influence more extensive than the subjects to which it applies; and that every question should be reduced to the point, which the act under consideration proceeded from a mind fully capable, in respect of that act, of exercising free, sound, and discriminating judgment; but in case the infirmity is established to exist, the tendency of it to direct or fetter the operations of the mind should be in general regarded as sufficient evidence, without requiring

(a) Fraser v. Fraser's Ex. 13 S. 704;

(a) Evans' Pothier on Contract vol: II p: 27.

a direct and positive proof of its actual existence." A good example of the last point mentioned by Mr. Evans is seen in the case of Tulloch v. Arbuthnot, 26 January 1759,[a] where a deed in favor of a stranger was reduced at the instance of the brother next in kin of the testatrix. It appeared in proof that sometime previous to the execution of the will she had been in a state of madness and had been confined; and that after making her testament, she had again lapsed into a state of madness and was, until her death, confined. It also appeared, that at the time of execution, though not confined, she sometimes talked rationally, and sometimes foolishly or weakly; and that, when in her better state of health, she always expressed a sisterly affection for her brother, - but the contrary on a recurrence of her mental disorder. Under these circumstances, the Court reduced the deed as presumptive of insanity on the part of the Testator.

The leading cases on this point are those of Dew v. Clark and Clark,[a] Fraser v. Fraser,[b] Waring v. Waring,[c] Morrison v. MacLean's Trustees,[d] Smith v. Tebbitt,[e] and Banks v. Goodfellow.[f]

In the case of Dew v. Clark and Clark, the whole subject received a full investigation by the learned Judge Sir John Nichol. The point at issue was the validity of the will of one Stott (who left personal property to the value of £40,000), bequeathing the complainant, who was his daughter and only child,

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(a) M. 11, 672.

(a) 1 Addam's Eccles: Reports 279; 3 Addam's 79.
(b) 13 S. 703.
(c) 6 Moore Com: Pleas Reports 349.
(d) 24 D. 625; 34 Jurist 311.
(e) Ut supra
(f) 22 Law Times Reports N.S. 813

a life interest in a small portion of his estate, the most of which was devised to his nephews, whom he had seldom ever seen. The object of the inquiry was whether the extraordinary conduct and feelings of the deceased towards his daughter had any real cause or was solely the offspring of delusion in a diseased mind. Sir John Nichol reduced the deed on the ground that the testator had an insane aversion to his daughter, and was solely actuated by that delu-sion to dispose of his property in the manner in which it was purported to be conveyed by the contested deed.(a)

As perversion of the natural feelings of kindred and relationship is a frequent ground on which reduction of a testament is sought, I append the valu-able remarks of Sir John Nichol as to that particu-lar point. The learned judge proceeded to observe, with respect to the daughter, "She must be apprised, however as well that the burthen of proof rests with her; as that this burden is, in my judgment, from the very nature of the case, a pretty heavy one. The present case may be less difficult to make out than Greenwood's case, in one respect, as the delusion under which the deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particu-lars, especially on the subject of religion; although here, as in Greenwood's Case, the general capacity is, in sub-stance, unimpeached. But she must understand that no course of harsh treatment — no sudden bursts of violence — no display of mutinid, or even unnatural, feelings merely, can avail in proof of her allegation — she

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(a) As Mr. McLaren remarks, this question of perversion of the natural affections closely resembles the querela inofficiosi testamenti of the Civil Law. Mr. Main in his work on Ancient Law defines this as a "remedy very anomalous in character and of uncertain origin called the querela inofficiosi testamenti, "the Plaint of an undutiful will", directed to the re-instatement of the issue in inheritances from which they have been unjustifyably excluded by a father's testament." Chap: VII. p: 215.

(b) In Dew v. Clark & Clark see preceding page.

(c) 3 Curteis' Appp. 20.

can only prove it by making out a case of antipathy clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity."

This judgment of Sir John Nichol was followed in Scotland by the decision of Lord Justice-Clerk Boyle in the case of Fraser v. Fraser's Trustees.(a) This was a reduction of a Deed of Settlement by a father, excluding his eldest son from participation on the idea that he had conspired to murder him. Lord Justice Clerk observed:- "This, you will observe, is a case of what is called monomania, that is to say, not an allegation of what is called perfect lunacy or insanity upon every subject generally, but pointing only to the particular subject, or in other words, to mental delusion applicable to one object; and in this case, it appears to have been directed towards suspicions of conspiracy amongst the party's nearest relatives". The deed was accordingly reduced.

These doctrines and the subject of "partial insanity" came subsequently to be examined and commented on by Lord Brougham in the case of Waring v. Waring,(b) and Lord Penzance in the case of Smith v. Tebbitt.(c) These learned judges, while maintaining the same principles as previously expressed as to the effect of partial insanity directly bearing on the testament itself, laid down the law as to the effect of partial insanity in a testator but which had no connection whatever with the deed of that party. We will consider this in the chapter succeeding

(a) 4 Nov: 1834, 13 S. 703.

(b) 6 Moore's Com: Pleas Repts 349.
(c) 1 Law Reports P. & D. 398.

ceding this.

Rule laid down by Lord President Inglis.

The next case was that of Morrison v. McLean's Trustees[a], where our learned Lord President la it down that a deed disclosing no trace of incapacity or insanity may nevertheless spr from an insane belief or delusion — in establishin which there must be proved not merely the groun lessness of the belief, but also the impossibility of its being entertained by any sane mind". —

This leads us to the great case of Bank v. Goodfellow[b], where the whole subject was thoro ly investigated by Sir Alexander Cockburn, the able an learned Lord Chief Justice of the Queen's Bench. Her his lordship laid down the dictum that "where a mental delusion has had, or is calculated to have an influence on the testamentary disposition, its exis tence invalidates the will". This, then, is the law which will now prevail in Scotland, as well as England. It has been followed by (1) the case of Boughton and Marston v. Knight[c] and oth where the will was reduced in accordance with the deliverance of the Lord Chief Justice; and (2 the case of Davis v. Gregory[d], where the complain ants failed to prove insanity, and the action accordingly fell, though the costs were granted to them out of the estate on the ground that the conduct of the testator justified the action of the complainants.

Before closing this chapter, it would be as well perhaps, to add part of the Lord Chief Justice's remarks,

(a) 24 Feb: 1862, 24 D. 625; 34 Jur: 311.

(b) 22 Law Times Reports N. S. 813

(c) Law Reports

Not reported (See Taylor's Med: Juris: p:)

remarks in the case of Banks & Goodfellow. He observed, "No doubt, when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have 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 when the will is, to use the term of the Civilians, an inofficious one — that is to say, one in which natural affection and the claims of near relationship have been disregarded".

Perversion of the Natural affections.

In regard to the subject of perversion of the natural affections, Sir J. Harmen remarked in the case of Boughton & Marston & Knight and others, that "It is unfortunately not a thing unknown, that parents — and, I should say in justice to women, it is particularly the case rather with fathers than with mothers — that they may take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which you can feel that it ceases to be a question of harsh unreasonable judgment of character; and that the repulsion which a father exhibits

exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children; but that he should put that into practice so as to do them mischief, or to deprive them of advantages which most men desire, above all things, to confer upon their children — I say, there is a point at which taken by itself such repulsion and aversion becomes evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion consisting solely of aversion to children is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point."

These observations of Sir J. Stannen are useful especially when the party deprived of the expected inheritance is the proper heir, who, as we have seen, is particularly favored by the law.

2nd Partial Insanity not affecting the general faculties and not operating on the mind of a Testator in regard to his testamentary disposition.

Partial insanity, when is its existence not fatal?

Thus is the form of insanity, about which there has until recently, been, perhaps, the greatest diversity of opinion. At an early period, considerably greater latitude,

latitude was allowed that what has subsequently prevailed.

No definite decision however, on the subject, seems to have been given until we come to the case of Waring & Waring[a]. The previous case of Dew v. Clark and Clark was one where the testament was the direct offspring of the delusion of the testator, afford no means of solving the question now before us.

Lord Brougham's decision.

In Waring v. Waring, Lord Brougham laid down the doctrine of the "indivisibility of the mind" in opposition to the doctrine of the "gradation of the mind" which to some extent had been laid down by Sir J. Nichol in his division of insanity and partial insanity. His lordship in giving judgment, said "Nothing is more certain than the existence of mental disease of this description. Nay; by far the greater number of morbid cases belong to this class. They have acquired a name called familiarly, as well as by physicians, "monomania", on the supposition of its being confined, which it rarely is, to a single faculty or exercise of the mind: a person shall be of sound mind to all appearance, upon all subjects save one or two, and on these he shall be subject to delusions, mistaking for realities the suggestions of his imagination. The disease, here, is said to be in the imagination; that is, the patient's mind is morbid or unsound when it imagines; healthy and sound when it remembers. Nay; he may be of unsound mind when his imagination is employed in some subjects, in making some combinations; and sound, when making others or making one single kind of combination. Thus

6 Moore P. C. 349.

Thus, he may not believe all his fancies to be realities, but only some, or one; of such a person we usually predicate that he is of unsound mind only upon certain points. I have qualified the proposition thus on purpose, because, if the being, or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested by believing in the suggestions of fancy as if they were realities, would break out; consequently, it is as absurd to speak of this as a really sound mind (a mind sound when the subject of delusion is not presented to it); as it would be to say that a person had not the gout, because his attention being diverted from the pain by some more power powerful sensation by which the person was affected, he, for the moment, was unconscious of his visitation."

"It follows, from hence, that no confidence can be placed in the acts, or in any act, of a diseased mind, however rational that act act may appear to be, or may in reality be. The act in question may be exactly such as a person without mental infirmity might well do. But there is this difference between the two cases; the person uniformly and always of sound mind, could not, at the moment of the act done, be the prey of morbid delusion, whatever subject was presented to his mind; whereas

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the person called partially insane — that is to say, sometimes appearing to be of sound mind, sometimes of unsound mind — would inevitably shew his subjection to the disease, the instant its topic was suggested. Therefore we can with perfect confidence, rely on the act done by the former, because we are sure no lurking insanity, no particular or partial, or occasional delusion, does mingle itself with the person's act, and materially affect it. But we never can rely on the act, however rational in appearance, done by the latter, because we have no security that the lurking delusion, the real unsoundness does not mingle itself with, or occasion, the act. We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it lurk and appear not. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound, and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind."

His Lordship then added that "where the existence of delusions being proved, and their continuance proved or assumed at the date of the factum, so that the Court is satisfied of the testatrix then labouring under their influence, it is wholly immaterial that they do not appear in the will itself."

The law was accordingly laid down thus; "If the mind is unsound on one subject, provided that

that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for, if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy as if they were realities: any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind."

This judgment was maintained in the succeeding cases of Fowlis & Davidson[a], and Smith & Tebbitt.

In the case of Fowlis & Davidson, the testator executed a Codicil to his Will by which he greatly reduced the interest given to a niece, under an impression that she had wilfully occasioned the death of his sister during the interval, and made an attempt upon his own life. The Codicil was reduced on the ground before stated, — that the testator laboured under an insane delusion quoad his niece. The learned judge, Sir Jenner Fust, observed "The first principle is, that to shew unsoundness of mind, it is not required that it should be general: it is sufficient if proved to exist on one or more points, though in all other respects the individual may conduct himself with the utmost propriety. The second is, that, provided the delusion or unsound-

Sir Jenner Fust's decision.

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(a) 6 Notes of Cases 361

:ness of mind is once proved, it is presumed to exist, although not at all times and under all circumstances equally apparent and manifest itself. Thirdly, where it is proved to have existed as well before as after a certain period, it will be presumed to have existed at that period unless satisfactory proof should be adduced that the mind of the individual had entirely recovered its former state, and has afterwards suffered a relapse. Again, in the fourth and last place, it is not necessary that the insanity should be apparent on the face of the instrument itself."

Lord Penzance's decision.

The next case - that of Smith v. Tebbitt [a] - was decided on precisely the same principles. The argument of the judge, Lord Penzance, in giving judgment, was of a decided and positive character as to the total incapacity of testators who labour under insane delusions, even though the delusion has no reference whatever to the testament. His Lordship said:- "For I conceive the decided cases to have established this proposition; that if disease be once shewn to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Farther, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever;

(a) 1 Law Report P. & D. 398.

whatever with the testamentary disposition before the Court." In the rubric of the case, he also laid it down that "A diseased mind once proved to have established itself, will be presumed to continue, and the burthen of shewing that health has been restored, falls upon those who assert it."

Such was the state of the law in England as to the subject we are investigating up to the year 1871. In Scotland, this dictum as to the indivisibility of the mind naturally extended, seeing the high authority which established such a doctrine. Accordingly, we find Mr. MacLaren in his valuable Work on Wills[a] re-echoing, to a considerable extent, the opinions of the English judges, and in especial, those of Lord Penzance in the case of Smith v. Tebbit. "It is true", says Mr. MacLaren[b], "that the physiological conception does not furnish any precise rule for the determination of questions of capacity; we think that it renders the attainment of any such rule or criterion impossible; but it may, at least, be of service in correcting the tendency to theorize on the subject. It appears to us to have an important bearing on the phenomena of monomania and of those intermissions of the disease which are termed lucid intervals. If it be admitted that the various phenomena of insanity result from a diseased or abnormal action of the mind, we do not see how it is possible to maintain

Mr. Mc. Laren's opinion of the law of monomania.

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maintain that a person may be insane as to the subject of his delusion, and yet have disposing capacity. The delusion may be so trifling as not to constitute a clearly marked manifestation of disease; but, if the delusion is such as no rational person could entertain, and such as, in the opinion of competent judges, proved the existence of cerebral disease then we think that the affected person should be deemed incapable of making a will; because, it is impossible to say that the disease may not have interfered with the just exercise of the disposing faculty; and the right of the heir ought not to be taken away except by the testamentary act of a person who is in the full possession of mental capacity." (Mc Laren on Wills Vol: I, ch: 536).

Curious to remark, Mr MacLaren, in the chapter preceding the one containing these principles has entirely shaken himself from the Frammels of Lords Penzance and Brougham, and accepted a doctrine the very inverse of the "indivisibility of the mind", namely, the 'gradation of the mind'. In Chapter 535, he observes "But in the determination of questions of incapacity as affecting the validity of wills, a court of law has to deal with the milder types of mental disease – with cases of dyspeptic hypochondriasis – with cases of religious melancholy accompanied by insane delusions – in cases where some severe or unexpected strain has disturbed the springs of that delicate mechanism by which the mind communicates with external nature. The investigation of such cases has

has led to the tardy recognition of partial in
:sanity. But the existing judicial expositions of
the subject, while evincing a just perception of
the criteria of disposing capacity, and containing
many just observations on the weight due to
the different symptoms and indicia of proof, ap
pear to be somewhat defective of breadth of view;
and particularly in this respect, that the judges do
not seem, unless in some of the latest cases, to
have risen to the general conception of insanity
as a disease of the brain, admitting of grada
:tions in like manner with other bodily infirmi

This view of partial insanity, we have seen, the
Lords Brougham and Penzance and Sir James
Hust, had completely ignored. They forgot,
that while the law as laid down by themselves, was
no doubt simple and easy of application, there could
exist a class of persons, who, while affected with
mental disease on one or more subjects, were perfect
able to transact the ordinary business of life, and it
would indeed be a very great hardship if such
doctrines as they laid down were to become the perma
:nent law of the country.

Lord President Inglis decision overthrowing that of Lord Brougham.

The first effort to overthrow this doctrine was
made by our learned Lord President in the case of
Morrison v. McLean's Trustees, 27 Feb: 1862.(a) His
Lordship laid it down that no test of capacity
to execute a deed could be stated without reference
to the nature of the deed; and that a person
executing a settlement must be held to have sufficient capa

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24 D. 625; 34 Inv: 311

to do so, if he is capable of distinctly understanding what he is doing — of expressing that purpose in intelligible language — and of understanding the consequences and effects of what he does. His Lordship then added the great doctrine which has now received full sanction, that "the existence, however, of a disordered belief upon some extraneous point, having no connection with the subject of settlement, is not necessarily fatal to the deed."

This doctrine forms the key to the solution of all questions of partial insanity not affecting the general faculties and not having any influence with the subject of the testament. It was accepted by the Lord Chief-Justice Cockburn in the great leading case of Banks v. Goodfellow(a), And here Sir Alexander pointed out that the doctrines laid down by Lords Brougham and Penzance were not in any degree necessary to the decision of their respective cases. In both, the delusions were multifarious and of the most irrational character, abundantly indicating that they were not cases of mere partial insanity, but of general insanity directly affecting the disposition of the testator's property. There (as) existed, therefore, ample grounds for their reduction. The Chief-Justice thoroughly investigated the whole subject, and gave the deliverance of the Court with singularly lucid and beautiful language. Remarking on the doctrine of the indivisibility of the mind, he said that "It is not given to man to fathom the mystery of the human intelligence

Lord Chief Justice Cockburn's decision.

(a) 22 Law Times Reports N.S. 813.

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 powers and functions of our physical organization. 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 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 one 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

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? - - - - - - - - - But in this case, the delusion 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 held to have had the effect of destroying the capacity to make one?" His Lordship (and Justices Blackburn, Mellor, and Shannon concurring) decided that such a delusion is not sufficient to invalidate a

Rule as to partial insanity

testator's capacity; - that "partial unsoundness, not affecting the general faculties and not operating on the mind of the testator in regard to the particular testamentary disposition, is not sufficient to deprive him of the capacity to make a valid will". He adds, however, the inverse of the question, - that "where a mental delusion has had or is calculated to have, an influence on the testamentary disposition, its existence invalidates the

the will."

Delusion in the deed itself.

Another point to be considered is, where the deed itself bears, ex facie, evidence of the insanity of the testator. Sir E. V. Williams[a] in his Treatise on Executors, says "Although in the case of a person who is sometimes sane, and sometimes insane, if there is no direct proof of his state when he wrote his will, and there be in it a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's phrensy, even if there be but one word "sounding to folly"; yet the Court of Probate will not at once reject an allegation propounding a will, which even strongly "sounds to folly" when facts are pleaded, shewing that the deceased up to his death conducted himself in the ordinary course of life as a sane man." But it is to be remembered that, as laid down by Lord Chief Baron Eyre in Mountain v. Bennet[b], a man may perhaps, not be insane, and yet not equal to the important act of disposing of his property by will. The question to be solved is whether the delusion in the deed is an insane one. It is necessary then to show, in the words of the Lord President in the case of Morrison v. MacLean's Trustees, "not merely the groundlessness of the belief, but also the impossibility of its being entertained by any sane mind".

6th Edtn 35.

(b) 1 Cox's Reports, Chancery, p: 356.

Section IV.

Effect of Eccentricity on Testamentary Capacity

Eccentricity.

Closely allied to, and even trenching on the borders of, partial insanity, is that phase of mental vagary which is known as eccentricity. Indeed it is not in human power to trace the exact point where the two unite. Consequently it becomes a very delicate point to decide where great eccentricity exists. In the case of Dew v. Clarke and Clarke[a] it was said by Sir John Nicholl that persons partially insane are usually, not to say always, in a high degree eccentric in their general conduct. Hence it is, that great general eccentricity, as the common coincident, being proved, assists materially in the proof of partial insanity, where such is suspected to exist. For, as persons actually insane in some particulars are commonly highly eccentric in many or most; so persons highly eccentric in many or most particulars, are at least not unfrequently, actually insane in some. People who dwell on the confines of two empires, are likely enough to be found sometimes in the one and sometimes in the other — and they are the more likely to be so found when the line of demarcation between the two is under an indefinite and uncertain something, a sort of mist, which renders a transition from the one to the other side of it.

(a) 1 Hagg. E. R. 284; 3 Hagg. E. R. 86; 3 Add: 79, 182, 208.
~~1 Moore P. C.~~

it easy and almost imperceptible - which must always be the case in respect of that actual (though invisible) line of demarcation (for some such there must needs be), between mere eccentricity, situate on the one side, and downright insanity, being upon the other; in short, it is next to impossible, in such a case, to be constantly touching upon the line, without ever going beyond it.

The great leading case on this subject is that of Mudway & Croft,(a) where it was necessary to determine whether eccentricity amounted to unsoundness of mind. Here Sir H. Jenner Fust observed, "It is impossible for Courts of justice to lay down any general rules: but, in the investigation of such cases, they will be often much assisted by the observation and the recorded experience of medical men, who have devoted much time and attention to this disease and its concomitant symptoms." In the earlier case of Morgan & Boys, the same judge held that the facts proved did not amount to insanity, but only to eccentricity, and on this ground he pronounced for the will. It appears, that, after bequeathing a large fortune to his housekeeper, a stranger, the testator directed that his executors should "cause some parts of his bowels to be converted into fiddle-strings - and others should be sublimed into smelling salts, and that the remainder of his body should be vitrified into lenses for optical purposes"!! The judge remarked that the best rule to guide

Impossibility of laying down general rules.

(a) 3 Curteis' Eccles: Reports 641; 7 Jurist 979.

guide the Court was the conduct of persons, and especially of his relatives, towards the testator, whether they treated him as sane or insane.

The case in Scotland relating to this subject, is that often quoted case of Morrision & MacLean's Trustees [a], which has wrought, as we have seen, such a change in opinion as to question of partial insanity and eccentricity. The great point to be observed, as laid down in that case, is that no question of capacity can be stated without reference to the deed. The great object of inquiry is, the capacity of the mind quoad the deed; hence, any vagary or disordered belief upon some extraneous point, has no effect whatever upon the deed, if the general faculties are not affected. This is the opinion maintained in the great case of Banks & Goodfellow.

In the recent case of Boughton & Knight [b], Sir J. Hannen observed that in considering the question of the degree of incapacity necessary to invalidate a deed, "large allowance must be made for the difference of individual character." Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress, and so on, must be disregarded. If a man has not contracted ties of domestic life, or, if unhappily, they have been severed, a wide deviation from the ordinary type must be expected; and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours a still wider divergence from the

Allowance must be made for individuality of character.

(a) 24 D. 625.

(b) Law Reports

the ordinary type must be expected; we must not readily assume, that because a man indu his humours in unaccustomed ways, that he therefore of unsound mind." The incapacity in this case was held to amount to insanity quo the testament, and it was accordingly reduc There is another recent case, which, however, seems to be unreported, - that of Davis v. Gregory[a], wher though the testator was perfectly able to manag his own affairs, yet in addition to alleged delusions, he exhibited another indication of unsoundness of mind, and one which ought according to the law just laid down, to have a considerable effect towards reduction, viz:- perversion of the natural feelings.

Eccentricity not sufficient, per se, to reduce.

Eccentricity, therefore, is not of itself sufficient to destroy testamentary capacity. Dr Taylor says that it must be remembered that people who have been eccentric through the whole course of their lives, and have voluntarily set at defiance all the customary rules which govern mankind, are not likely to make any other than eccentric wills, which may however be the real expression of their minds."(6)

Taylor's Med. Jurip. 558

Measure of Capacity.

Measure of Capacity. - To estimate the amount of incapacity in minds of those who are classed as "partial insane" or "eccentric", it is necessary to consider the amount of capacity requisite by law to make a settlement of one's

Stewart" of Lochnagar"s case

(b) Taylor's Med: Juris: 558 of Vol: II

one's effects to take place after death. This measure of capacity we find given in the case of Banks v. Goodfellow[a], by Lord Chief Justice Cockburn. It is thus:-

"That the testator shall understand the nature of the act and its effects; the extent of the property of which he is disposing; shall be able to comprehend and 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."

Rule as to capricious or whimsical dispositions.

In concluding the subject of partial insanity, I think it necessary that the rubric of the case of Boughton v. Knight should be borne in view:-

A man, moved by capricious, frivolous, mean or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children; but there is a limit beyond which it will cease to be a question of harsh unreasonable conduct, and then the repulsion which a parent exhibits to his child must be held to proceed from

some

(a) 22 Law Times Reports N.S. 813.

some mental defect. If such repulsion, amount:ing to a delusion as to character, is shewn to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made; and the jury, in determin:ing whether or not the delusion was opera:tive, will have regard to the contents of the will and the circumstances surround:ing the execution of it."

Section V

Lucid Interval

Lucid Intervals.

It is well known that many forms of cere:bral disease observe a law of periodicity; presenting, at one time, an evident intermission of the outward manifestations of the disease so complete as to beat the appearance of a perfect cure; while, at another time, the patient relapses to his previous state of mental incapacity.

This question of "lucid interval", has exercised the legal mind from a very early period — from the time when the Romans decreed that if a madman had

had a lucid interval he might make a valid contract — Is, cui bonis interdictum est, stipulando sibi acquirit; tradere vero non potest, vel promittendo obligari. — down to the present time).

D'Agueseau's opinion.

D'Agueseau,(a) in his pleadings before the Parliament of Paris in the year 1693, has aptly described what is necessary to constitute a lucid interval. It must not be a superficial tranquillity, a shadow of repose, but on the contrary a profound tranquillity, a real repose; it must be, not a mere ray of reason, which only makes its absence more apparent when it is gone — not a flash of lightning which pierces through the darkness only to render it more gloomy and dismal, not a glimmering which joins the night to the day; but a perfect light, a lively and continued lustre, a full and entire day interposed between the two separate nights of the fury which precedes and follows it; and to use another image, it is not a deceitful and faithless stillness which follows or forebodes a storm, but a sure and steadfast tranquility for a time, a real calm, a perfect serenity; in fine, without looking for so many metaphors to represent our idea, it must be not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health."

Manor

(a) Evans' Pothier on Contracts vol: II

Lucid Intervals.

What is necessary to constitute lucid interval?

Many years after, Lord Thurlow, in the ca
case of Attorney-General v. Parnther,[a] thus stated
his views of the condition of mind necessary
to constitute a lucid interval :- "By a perfec
interval, I do not mean a cooler moment, an abs
:ment of pain or violence, or of a higher state of torto
— a mind relieved from excessive pressure; bu
an interval in which the mind, having thrown of
the disease, had recovered its general habit."

Medical opinion as to the existence of a lucid interval.

Here, then, is the lucid interval as clearl
and minutely defined as a profusion of word
and metaphors could do it; and the question th
becomes,- How far does the investigations of mod
medical science support the doctrine of lucid
intervals? Into this large question we cannot
venture; it will be quite sufficient for our
purpose, to enquire into the <u>law on the
subject</u> as given in the latest decisions. We
find the medical profession differing very much as t
the proper quality to be attached to what is calle
a lucid interval. Mr. Haslam[b] states that "the luna
with whom I have had daily intercourse, have
manifested alternations of insanity and reason. They
may at intervals become more tranquil and
less disposed to obtrude their distempered fancies
into notice. For a time their minds may be
less active, and the succession of their thoughts
consequently more deliberate; they may endea
:vour to effect some desirable purpose and
artfully conceal their real opinions; but
they

(a) 3 Brown's Chancery Reports 444.

(b) Haslam's Med: Jurisprudence of Insanity p: 224.

they have not abandoned, not renounced their distempered notions. It is as unnecessary to repeat that a few coherent sentences do not constitute the sanity of the intellect; as that the sounding of one or two notes of a keyed instrument could ascertain it to be in tune."

Georget[a], while he speaks of lucid intervals "as returning to reason" is careful to add that "in this state, patients frequently experience some degree of malaise, of some disturbance in their ideas, and weakness of mind, which prevents them from fixing their attention, for any length of time, on a particular subject; from engaging in reading, writing, or attending to their affairs."

Dr. Reid says[b] "There are few cases of mania or melancholy, where the light of reason does not now and then shine out between the clouds. In fevers of the mind, as well as those of the body, there occur frequent intermissions. But the mere interruption of a disorder is not to be mistaken for its cure, or its ultimate conclusion. Little stress ought to be laid upon those occasional and uncertain disenchantments of intellect, in which the patient is for a time only extricated from the labyrinths of his morbid hallucinations. Madmen may show, at starts, more sense than ordinary men."

Dr. Combe, in his philosophical treatise on "Mental Derangement[c]" expresses similar views in the most forcible language:- "But, however calm and rational the patient may appear to be during the lucid

(a) Des Maladies Mentales p: 46.

(b) Essays on Hypocondriacal & other Nervous Affections 21st Essay.

(c) p: 241.

lucid intervals, as they are called, and while enjoying the quietude of domestic society, or the limited range of a well-regulated asylum, it must never be supposed, that he is in as perfect possession of his senses, as if he had never been ill."

Dr. Taylor in his "Principles & Practice of Medical Jurisprudence" admits that "it cannot be denied that lunatics do occasionally recover for a longer or a shorter period to such a degree as to render them perfectly conscious of, and legally responsible for, their actions like other people."

Scotch law as to lucid intervals.

In Scotland, it has always been held by our Institutional Writers that a deed may be executed during a lucid interval; and it is only in recent years that any doubt has been thrown on the subject. This arose from the doctrine first laid down by Lord Brougham in the case of Waring v. Waring, - by Sir H. Jenner Fust in the case of Fowlis v. Davidson, - and in particular by Lord Penzance in the case of Smith v. Tebbitt. Previous to the decision of Lord Brougham, the law had been very favorable in questions of testamentary capacity during a lucid interval. Thus, we find Sir Wm. Wynne in the well known case of Cartwright v. Cartwright "lay down the proposition that the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the

Taylor's Med: Juris:

(a) 1 Phillimore's Reports 100.

the will. That, he properly observed is 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"; and, in such support of his opinion, he cited the law as stated by Swinburne, viz^t:- "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 phrensy 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."

Accordingly, Sir John Nicholl, in Scruby v. Fordham [a], lays it down as a general rule, that where a will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the will there is no direct evidence, the agent is to be inferred rational, on the contrary, from the character, broadly taken, of his act. Other decisions followed much in the same strain;

(a) 1 Addams Eccles: Reports 90.

strain (and which we shall afterwards inquire into), until we come to the Case of Waring v. Waring, where Lord Brougham laid it down that, if delusion existed," any act done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind. To this his Lordship added :- "To constitute a lucid interval, the party must freely and voluntarily, and without any design at the time of pretending sanity and freedom from delusion, confess his delusion." This doctrine was supported by Sir H. Jenner Fust in Fowlis v. Davidson[a], and by Lord Penzance in the Case of Smith v. Tebbitt. The latter observed "that if disease be once shewn to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Farther, that the same result follows, tho' the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court".

Lord Brougham's dictum as to what is necessary to constitute a lucid interval.

A perfect recovery only said to be necessary.

According to these decisions, nothing short of a perfect recovery from cerebral disease is essential to testamentary capacity, and we are not surprised to find Mr. McLaren remark[b] that "The physiological view of insanity

Mr. Mc. Laren's opinion.

(a) 6 Notes of Cases, 461.

insanity is also adverse to the practice of allowing testimentary efficacy to wills made during those intermissions of the malady which, from their transient nature are evidently more intermissions of the phenomena of insanity and which cannot reasonably be attributed to a restoration healthy action in the brain. To affirm that a mad man, in such an interval of repose, should be allowed to dispose of his property, appears to us as illogical as the supposition that a patient, during an intermission of a dangerous fever, should be allowed to get up to dinner, and drink a bottle of port. The proof of a genuine lucid interval is extremely difficult, and when its duration has to be computed in hours, we should be strongly inclined, on that ground alone, to disbelieve in the restoration of the patient to a state of disposing capacity.

Mr MacLaren is evidently here following out the principles as laid down by Lords Brougham and Penzance. Since the publication of Mr McLaren's excellent work on Wills, there has been a case, bearing on the subject of lucid interval decided in the Court of Session, — that of Nisbet v. Nisbet's Trustees[a], and where the whole subject was reviewed by the Court. The will in this case was that of Major Nisbet, who had been for many years preceding his death an inmate of a lunatic asylum. Two months before death he executed his will, and the Court sustained it.

Case of Nisbet & Nisbet's trustees.

(a) 33 Scott: Invest 530.

Lucid Intervals.

it as being the act of a competent testator, - of one capable of exercising a "sound disposing mind". The Lord Ordinary (Gifford) pointed out that the whole circumstances of the case must, in considering all such questions, be taken into view, and "that the testamentary capacity of a testator must be judged of with very special reference to the nature and character of the deed which he executes, and to the circumstances in which he made it." His Lordship also pointed out, what Lord Eldon in the case of Hollyland had emphatically explained, that it was not necessary, of course, that the recovery should be to the extent of the restoration of the testator to the same degree of mental health or strength as he enjoyed before the disease attacked him. That the recovery might leave the weak mind much weaker than what it had been originally, and yet sufficient to enable the party to dispose of his property either inter vivos or mortis causa. The fact of a lucid interval occurring admitting of perfect testamentary capacity is now therefore fully recognised, without requiring to prove a complete restoration. The leading cases upon which this doctrine was founded (& upsetting the law as laid down by Lords Brougham and Penzance) are

1. Morrison v. McLean's Trustees.[a] This case was, of course, decided several years previous to that of Smith v. Tebbitt;[a] the propositions here laid down[a] that no test

Testamentary capacity can only be judged with special reference to the deed.

Recovery not necessary to be to extent of perfect restoration.

Provided the testator had capacity equal to the nature of the act.

See supra

test of capacity to execute a deed could be stated without reference to the nature of the deed", and (2) that the existence of a disordered belief upon some extraneous point, having no connection with the subject of the Settlement is not necessarily fatal to the deed.

2nd Banks v. Goodfellow,
3rd Nisbet v. Nisbet's Trustees
4th Maitland's Trustees v. Maitland & another.

Duration of lucid interval.

Our next inquiry is directed to the period necessary to constitute a proper lucid interval. In continuing the remarks of D'Aguesseau[b], we find him remark that "as it is impossible to judge in a moment of the quality of an interval, it is requisite that there should be a sufficient length of time for giving a perfect assurance for the re-establishment of reason, which it is not possible to define in general, and which depends upon the different Kinds of fury, but it is certain there must be a time and a considerable time." Lord Thurlow, also, on the same occasion which elicited his views of the nature of the lucid interval, says, that the evidence in support of the allegation of a lucid interval, after derangement of any period has been established, should be as strong and demonstrative of such fact as where the object of the proof is to establish derangement. The evidence in such a case, applying to lucid intervals, ought to go

Evidence must be strong as to testators capacity.

to

22 Law Times Reports N.S. 813

~~13~~ 13 Scott. Jurist 530

(a) Scott. Reporter IX, 51.

(b) Evans Pothier on Contracts

to the state and habit of the person, and not the accidental interview of any individual, or to the degree of self possession in any particular act." How we find Lord Kinloch objecting in the case of Maitland's Trs v. Maitland to a statement brought forward in support of the deed - that the deed is said to have been so rational as to prove "that during its execution the granter was sane. We are asked in short", says his Lordship "to believe that a lucid interval intervened, having precisely the endurance of the execution of the execution of the writing, neither longer nor shorter. I cannot adopt this view." Mr Mc Larew (a) also expresses his disbelief in the existence of a lucid interval when its computation has to be computed by hours. We thus see that, though naturally a very difficult subject to prove, there must be a proper interval of duration of mental repose in order to raise the presumption of sanity. There is however, the well known case of Cartwright v. Cartwright, where a will was upheld as being of itself so rational as to imply the existence of of a lucid interval; but, I do not think, such a doctrine would now receive judicial sanction.

Proper interval of mental repose must be proved.

Though, no doubt, it is very difficult to distinguish a lucid interval from a non-manifestation of the symptoms of disease, still, it is now admitted that some remission, at least, occurs in many cases which permit the patients to attain sufficient mental capacity

"In "Wills and Succession"

to the ordinary affairs of life.

Nature of Malady first thing to be considered.

To ascertain whether a lucid interval has occurred or not, the first question which arises as a matter of course, is an inquiry as to the nature of the incapacity. We have it laid down by Sir John Nichol in Brog: den v. Brown,[a] that they are much easier to be proved in cases of delirium than in insanity proper; and the Lord Ordinary in the case of Nisbet v. Nisbet's Trustees mentioned such cases as dipsomania, religious delusions and others. Each case depends on its own individual merits.

Of more frequent occrence in cases of delirium.

The great rule was laid down many years ago in the case of Towart v. Sellars by Lord Eldon[b]:- "For the question is not whether a man has been insane, but whether he has recovered that quantum of disposing mind at the time he executes the deed which ought to give it effect."

Quantum of disposing mind is what is necessary to constitute a lucid interval.

Section VI.

Proof of a Lucid Interval.

Difficulty of proof.

The proof necessary to constitute a lucid interval is always a matter of considerable difficulty.[c] In the case of Towart v. Sellars[d] it was remarked by Lord Eldon that a lucid interval "is highly difficult of proof, for the following reason. Insanity will often be, though latent; so that a person may, in effect, be completely mad or insane, however, on some

3 Addams Eccles: Reports 441.

(b) 5 Dow's Reports, 231

(c) Att.-Gen: v. Parnther, 3 Brown's Chancery Reports, 440.

(d) Ut supra.

some objects, and in some parts of his conduct apparently rational."

To solve the question whether a testator has actually recovered so far as to admit of testamentary capacity, it is necessary, in the first place to subject the deed itself to a searching investigation.

Necessary to examine the deed itself.

When we examine the deed itself, there are three points which naturally fall to be considered, viz:—

1st. The rational character of the deed;
2nd. The just and equitable character of the deed; and
3rd. How far the disposition of the inheritance is in accordance with the testator's known previous intentions.

1st. The Rational Character of the Deed.

Rationality of deed proof of capacity.

It was in the case of Cartwright v. Cartwright that we first find (the) great prominence allotted to the question of the rationality of the deed itself:— "I think", said Sir Wm. Wynne in giving his decision in that case,(a) "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 shew the party did that which appears

Sir Wm. Wynne's decision.

(a) 23 Feb: 1793 1 Phillimore's Reports p: 90.

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 opinion, where you are able completely to establish that, the law does not require you to go farther." Without going the length of adopting to its full extent the doctrine here laid down, it is obvious, that the rational character of a deed, where written by himself, himself, raises a strong presumption in favor of his testamentary capacity.

D'Aguesseau's opinion.

"But", says D'Aguesseau[a], "however favorable this presumption may be, it has not those characters which are necessary to form an invincible presumption, capable of excluding all proof to the contrary; there is no law which precisely authorizes it, and besides, it is founded upon a fact which has not an essential and necessary connection with the sanity of the testator. Upon what is it founded? Upon this single reasoning, the testament is wise, therefore the person that made it is so likewise." It is not every act rationally done, which, under all circumstances, is sufficient to establish a lucid interval.

Rationality of deed not sufficient per se to establish a lucid interval.

Nor will propriety of expression alone suffice to establish a testament if other circumstances in proof combined with the nature of the bequests, should raise a presumption that it originated in delusion. Thus, in the case of Clark v. Lear and Scarwell[b], the testator, a middle aged man, being a lunatic, escaped from his keeper, and at a watering place fell

Deed may be ex facie rational, but nevertheless spring from delusion.

(a) Evan's Pothier Vol: II, p: 526.

(b) Cited 1 Phillimore's Ecclesiastical Reports 119; see 2 Curteis 446.

fell in love with a young lady to whom he afterwards sent in very polite terms a present of a lottery ticket. He afterwards made a will, rational on the face of it, leaving her a legacy of £1000: and, though it was argued that all this had the appearance of reason, the will was set aside as founded in insanity. And, in the case of Morrison & M'Lean's Trustees (a), the present Lord President laid it down that a deed disclosing no trace of incapacity or insanity may nevertheless spring from an insane belief or delusion. He also declared that where such was the case, it would be necessary to prove not merely the groundlessness of the belief, but also the impossibility of its being entertained by any sane person; and "that the existence of a disordered belief upon some extraneous point, having no connection with the subject of settlement is not necessarily fatal to the deed". His Lordship observed: "It is quite impossible, I should think, for anybody to doubt that the man who wrote that (i.e. his will) with his own hand, if it were not dictated by somebody else, knew what he meant — — — — — The writing of it also proves in the first place, that he is capable of expressing his purpose in intelligible language. There is no difficulty in understanding that at all. The last question comes to be, Did he understand the consequences and effects of what he was doing?"

Lord President Inglis' decision.

2nd M.

(a) 24 Feb: 1862, 24 D. 625.

Lucid Interval — Proof.

2nd h^rr. The Just and Equitable Character of the Deed.

The just, equitable, and becoming character of the deed forms a strong presumption in favor of testators capacity.

Another great presumption in favour of the sanity of the testator, arises from the just, equitable and becoming character of the deed. It is a natural and resonable expectation that those who are related to a testator by ties of Kindred or friendship should look forward to being participants in the bounty of that testator when he departs this life. According where there is evidence furnished by the deed itself, that the testator has understood the claims of those who naturally expect to receive some marks of his Kindly feeling towards them, that he has understood the nature and effects of his testamentary act — the extent of his property, and the claims of those whom he has wholly or partially excluded from any participation in the expected inheritance —— then we may expect such a deed to be most favorably regarded by the Court, who will also insist on strong proof of incapacity to upset such a rational and equitable settlement.

Lord Chief Justice Cockburn's decision, as to Perversion of the natural affections.

"If," says the Lord Chief Justice Cockburn,[a] "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

See M^c Adam v. Walker, 1 Dow's Reports, 148; Coghlan v. Coghlan 1 Phillimore's Reports, 120 (cited); Williams v. Goude 1 Haggard's Reports 577: Borlase v. Borlase, 4 Notes of Cases 66.

In Clarke v. Lear and Scarwell 1 Phillimore's Reports 119, though the deed was written by the testator himself with great accuracy, yet, as it was in favour of a total stranger to whom he had no cause whatever to give a benefit, it was held that the act of framing such a deed furnished no proof of the existence of a lucid interval

(a) Banks v. Goodfellow XXII N. S. Law Times 817

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."

Rational character &c of deed depends on the deed being framed by the testator himself.

Lastly, as was observed by Lord Ardmillan,(a) the weight justly due to the rational and equitable character of the deed, in the question of its validity may vary much according to circumstances. Where a will has been framed by agents and afterwards been approved by the testator after reading it or hearing it read, then the rational, equitable, and becoming character of the will cannot of itself be of great importance in considering the sanity or insanity of the testator, since his own mind had not been much applied to the subject, and he may only have accepted and subscribed what was presented to him.

3rd How far the Disposition of the Inheritance is in accordance with the testator's known previous intentions.

How far deed is in accordance with testator's known previous intentions.

Then we find another circumstance which greatly tends to sustain belief in the proper mental capacity of a person, viz:- where a deed is exactly

(a) Scott. Jurist XLIII. p. 533. (Nisbet v. Nisbet's Trs).

in accordance with his previously expressed intentions,- intentions expressed when there existed no doubt as to his capacity. Lord Eldon in Lowat v. Sellars,(a) mentioned the case of a Gentleman who was confined for some years in a house for the reception and care of insane persons. He had a lucid interval, and made a settlement of his property which was exactly that which he ought to have made, having regard to the fact that he had before made provision for some, and not for others, of his family; and which, previous to his insanity, he had communicated to a friend. This will he made under deep sense of his situation and the impression that no time was to be lost, and to protect himself for fear a relapse. In this case, the validity of the deed was maintained

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Deportment of testator at time of execution.

Having examined the deed itself, it is next of great importance to weigh the evidence as to the deportment of the testator at the time when he executed the deed, and as to the amount of his knowledge and approval of its contents.—

Mental condition of testator at time of execution.

Our attention is then directed to the actual state of the testator's mind at the time of execution and here it must be observed, that the same rules applicable to cases of partial insanity will

(a) 5 Dow's Reports 231.

(a) ~~See Cleft v. Schwabe 3 Common Bench Reports 434~~

(b) ~~Burrows v. Burrows 1 Haggard's Rep. E.R. 109; Ray's Medical Juris. 287; Mc Adam v. Walker 1 Dow 149. See Hale's P.C. 30~~

(c) ~~1 Dow Parl. Cas. 187.~~

(d) ~~Mc Adam v. Walker. 1 Dow 149.~~

(e) ~~1 Haggs. E.R. 109.~~

(f) ~~Chambers v Yatman v. Lewis Proctor 2 Curteis' Reports 415.~~

will of course apply equally in cases of alleged lucid intervals. In the latter, however, there exists the strong presumption against the sanity of the testator in respect of his previous unsoundness of mind, and which increases the difficulty of proof;- but otherwise, the case just becomes a question of partial insanity

Evidence from letters &c.

The letters and other documents written by the testator, may materially contribute to prove his mental condition. It is said that "the pen of the insane sometimes brings to light their incoherency and inconsecutiveness of thought which have been far less apparent in their conversations." (a)

Interlineations in will by person who had been previously insane.

It was observed by Sir John Nicholl (b) that interlineations in an autograph will coupled with the fact that the testator was previously insane, are circumstances carrying symptoms of disorder into the act itself.

Section VII

Suicide as Evidence of Insanity

"With groans that made no pause, lamenting there,
Were seen the duellist and suicide.
This thought, but thought amiss, that of himself
He was entire proprietor; and so
When he was tired of time, with his own hand
He opened the gates of eternity,

And 3

(a) Mayo on Med. Test. in Lunacy
(b) In Groom v. Thomas, 2 Haggards Reports E. R. 433

Suicide as Evidence of Insanity.

And sooner than the Devil's hoped, arrived
In Hell."

Pollock's "Course of Time"

Suicide not sufficient per se to establish unsoundness of mind.

Suicide[a] is not, per se, sufficient to establish that the person committing the act was ipso facto of unsound, and, a fortiori, not conclusive as to the mental condition of the person previous to the commission of the suicidal act.[b]

Lord Chancellor Redesdale expressed an opinion that insanity is not to be inferred from the mere act of suicide: it was not inferred by law, and required proof.[c] But Lord Eldon admitted that it was a fair question to be considered, whether the party did not intend to commit suicide; and if it were proved that he was, at the moment, under the influence of that morbid feeling, it might be a circumstance of considerable weight in leading to the inference of insanity.[d] In the case of Burrows v. Burrows, it was held by Sir John Nicholl that where there was no evidence of insanity at the time of giving instructions for a will the commission of suicide three days afterwards, did not invalidate it by raising an inference of previous derangement.[e] Another will dated & executed on 15th Nov. 1839[f], was upheld as valid, though the testator laboured for the three days previous to its execution under certain delusions, and on the day after, he destroyed

(a) See Cliff v. Schwabe, 3 Com: Bench Reports 1434.

(b) Burrows v. Burrows, 1 Haggard's Repts., E. 109; Ray's Med. Juris. 287; Mc Adam v. Walker, 1 Dow 179. See Hale's P. C. 30

(c) 1 Dow Parl: Cas: 187.

(d) Mc Adam v. Walker 1 Dow 179

(e) 1 Hagg. Ec. Repts 109

(f) Chambers v Yatman v. Queen's Proctor, 2 Curtis, 415.

Roman Law as to suicide.

destroyed himself!

By the early jurisdiction of Rome, a will was not only not invalidated by the suicide of the testator; but it was not uncommon for persons to prevent the confiscation of their proper which would otherwise follow upon capital punish: ment by killing themselves; and the validation of their wills under such circumstances acco: ing to Tacitus[a] was the pretium festinandi. Bu this pretium festinandi was taken away alto: gether by the later emperors; and the wills of persons committing suicide were only al: lowed to have effect where the act of self dest: tion was occasioned by impatience of pain or loss of reason.[b]

Section VIII.

Revocation, Mutilation or Destruction of Wills by Persons of Unsound Mind.

Onus probandi of revocation.

After the execution of a will has been prov the burden of proving that it was revoked lies upon those who set up the revocation[c], and in the absen of evidence, revocation will not be presumed.[d] It does not matter how the revocation was done, - whether by codicil to, or destruction of, the deed. If such is alleged, the burden of proof[e] falls upon those setting up the

(a) Amal: lib: VI, s. 29.

(b) Cod: lib: VI, tit. 22, s. 2.

(c) Harris & Berrall, see below
(d) Benson & Benson Law Reports vol: II, P & D. 172.

(e) Harris V. Berrall 1 Swabey & Tristam's Reports, P & D. 153.

the revocation.

Equal capacity to revoke as is required to test.

The revocation of a deed previously made is necessarily equivalent to the making of a new will; either reviving a former will by the party himself, or reviving that will made for him by law. Consequently, it requires the same capacity of mind to revoke a subsisting will, which it would do to execute any deed in regard to the disposal of a party's affairs.(a) After a party becomes insane or unsound of mind, his hands must be held to be tied up from any interference with his affairs; and until he convalesce, his affairs must continue to stand as they were when he was overtaken by the malady. Destruction or mutilation of a testament by a testator while of unsound mind, would, therefore, not be a revocatory act;(b) he would require to be possessed of capacity similar to that which would constitute testamentary capacity.

Would a testator, after destroying his will require to continue till death insane?

In Scotland, there has occurred only one case calling for judicial interference, owing to the destruction of a will by the testatrix while of unsound mind(c); but here the evidence failed to prove mental incapacity at the time of destruction, and the revocation was upheld as the act of a competent testator. It was considered by the Court whether the alleged insanity would not only require to be proved as existing at the moment of destruction, but also to do exist

(a) See Laing v. Bruce 20 Nov: 1838. 1 D. 59; 14 J. 40.

(b) Scruby v. Fordham, 1 Addam's Ec. Reports 74.; in re Braid, 3 Hagg. 754.

(c) Laing v. Bruce; ut supra

exist until the testator's death. No other case has since occurred to settle the point.

In England, however, there have been several decisions on this point. In the case of Fowlis v. Davidson,[a] several codicils were reduced on the ground of the testator's incapacity. The testator, in this case, considerably altered the succession to his property, in consequence of an insane belief that one of the beneficiaries, a niece, was the cause of his sister's death, and had attempted to murder him.

Then it is laid down by Williams[b] that if a will be executed by a testator of sound mind at the time of execution, and be afterwards wholly or partially defaced by him while of unsound mind such will is to be pronounced for as it existed in its integral state. We find the state of the law thus laid down by Sir Jennet Furst[c]:

"It appeared that the deceased was at the time in a state of mental excitement and insane and not master of his actions, and consequently was not responsible for the act, as if it had been the act of a competent person; and consequently the attempt at destruction of the Codicil by a person in such a state of mind had no effect. The pieces of paper (i.e. the will) were saved and sealed up in an envelope with a memorandum setting forth the fact of the tearing by the deceased, and delivered by Miss Mary Bolitho to her brother. This attempted destruction, therefore, cannot have the effect of a revocatory act. The deceased is said to have

(a) 4 Aug.t 1848

(b) Williams on Executors p. 40 (6th Ed.)

(c) Borlase v. Borlase 14 May 1845, 4 Notes of Cases 106.

Destruction of Will

have immediately after recovered his faculties, and to have expressed regret at the act; and I think this not improbable, looking to the nature of the attacks he was subject to. But whether or not this be so — whether he did recover immediately after or not, if at the time of the attempted destruction, he was not of sound mind, the act can have no effect upon the instrument he attempted to destroy; and, therefore, nothing, it appears to me, can in any way affect the disposition contained in the Codicil." In the latest reported case[a], however, the judge Sir J. Hannen doubted whether the testator's omission, after his recovery, to make another will, was not confirmatory of the act of destruction; and he laid it down in the rubric thus:- "The court granted probate, but doubted whether, if the testator after his recovery had confirmed the destruction, the act would not have amounted to revocation". The same difficulties to be overcome have therefore been experienced by the English Court as was mooted by the Court of Session in the case of Laing v. Bruce,[b] and some doubt therefore exists as to whether an act of destruction by a testator while of unsound mind, and which, after his recovery, he declines to confirm, amounts to revocation or not.

Law still doubtful where a testator recovers after he has destroyed his will and declares to confirm.

Where no evidence exists that the act of destruction was done before or after the testator became insane, according to the decision in Benson v. Benson[c] the Court holds the party alleging the act to amount to a

Presumption where no evidence of testator's mind exists.

revocation

(a) Brunt v. Brunt 13 & 20 Feb: 1873, Law Times Reports Vol: XXVIII p: 368.

(b) 1 D. 59; 14 J. 40.

(c) Law Reports II, P. & D. 172

Law of revocation as laid down by Lord Penzance.

revocation must prove it, and in the absence of proof, the revocation falls. The judgment of Lord Penzance, in that case, is most instructive, and it is therefore appended. "There is a principle," says his Lordship, "with regard to questions of revocation upon which the Court always acts, and which is, I think, strongly applicable to this case. It is this, that when a will has been once proved to have been duly executed, the Court must be satisfied it has been revoked before pronouncing against it. In many cases it has happened that a will in the testator's custody, has been found after his death obliterated in such a way as to amount to a revocation, if he was of sane mind when he did it; and there has been no evidence whether it was done before or after he became insane. Does the Court, in the absence of proof presume that it was done before he became insane, when it would amount to a revocation, or when he became insane, when it would not amount to a revocation? The answer is, that the Court always refuses to presume one way or the other but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, and, in the absence of proof, the revocation falls to the ground.

Section VIIII.

Physical Disease.

"'Tis the mind that makes the body rich."
Taming of the Shrew.

Effect of physical disease on the mind.

Physical disease has no bearing upon the subject of our essay, further than considering the effect it has upon the mind. As Lord Eldon remarked[a]:- "there was no doubt but an unsound state of mind might manifest itself by an accompanying ill state of bodily health not as in itself an evidence of mental derangement, but with a view to ascertain what effect it had on the state of the mind." The same rules then require to be considered as are essential to the investigation of mental incapacity. (~~Where the bodily affection has, through sympathy, had such an effect on the capacity of the mind~~). Many diseases, such as those which affect the brain or nervous system, are likely to produce a dulness or confusion of intellect, under which the disposing power becomes lost.[b] Each case will therefore depend on its own particular merits for solution. In the case of Simpson v. Gardner's Trustees[c], a Deed of Settlement was attempted to be reduced on the ground that it had been executed by a person labouring under palsy and whose speech was visibly affected. There was not sufficient evidence to prove mental incapacity and the deed was upheld.

The rule is integritas mente, non corporis, sanitas exigenda est.

(a) Mc Adam v. Walker 1 Dow 179

(b) Taylor's Med: Juris. p: 559; Gillespie v. Gillespie 19 J.C. 280

(c) 11 S. 1049.

Testamentary Incapacity – Disease

Incapacity caused by the use of drugs.

Mental incapacity may occur in cases where the mind may not be diseased, but incapacitated by medical treatment – through the use of opiates or other drugs. In a recent case – Laidlaw v. Laidlaw[a], 17 June 1870 – a Settlement was reduced on the ground that the testator, a man of 70 years of age and labouring under a disease from which he died 4 days after the execution of his deed, was, from the influence of opiates, unable to understand the nature and effect of the deed.

Old age.

Generally speaking, old age forms, per se, no ground on which to allege mental deficiency. An old man may be perfectly sound in mind though not physically strong. He is, however, often subject to the control of others[b]. This point we shall afterwards consider.

Senile dementia.

When incipient dementia arising from old age (senile imbecility), occurs, there is less difficulty in judging the case, than in most cases of mere weakness of mind. The great point to be considered is the amount of Knowledge which the testator has of the contents of the instrument. It was observed by Lord Penzance in the case of Nest v. Sylvester[c] (Nov. 1864) in granting reduction of the will of an old lady:- "At the time she executed the will of October 1863, although for many purposes she might be said to be in her right senses, she was nevertheless suffering from that failure and decrepitude of memory which prevented her from having present to her mind the proper objects of her bounty, and selecting those whom she wishes to partake of it."

(a) Mc. VIII p. 882.

(b) Cairns v. Marianski 30 march 1850, 12 D. 919 and 1286;
22 Scott: Jurist 586.

(c) Taylor's Med: Jur: p. 558.

Testamentary Incapacity - In Extremis

Approach of Death.

Approach of Death.— Wills have been often reduced when granted by persons at the point of death. No doubt it often happens in certain cases that the mind has cleared up and the person has unexpectedly shewn a disposing capacity; but as a rule, wills so obtained require great proof that the testator understood the nature and effects of his testamentary act. So in the case of Williamson v. Tyffe, 3 Decr 1793 (a) we find a will reduced which had been obtained from a person while in extremis by a party a total stranger. Here, six days before death, the testator had executed another will leaving his whole fortune to his relatives. This will was burnt by the former party when he obtained his deed, without receiving any instructions from the testator to do so. It was held that the will not burnt had been fraudulently impetrated from the testator when incapable of attending to his own affairs. In the case of Winstone v. Owen (b) the will was executed within ten minutes of the time at which the testator was known to have lost consciousness, and considerable dubiety existed as to his mental condition. Lord Penzance said the law required notonly that a man should be conscious, but that he should have a sound and disposing. The party propounding the will was bound to establish this, and having failed to do so, he pronounced against it. The deceased when he signed the deed had nothing and made no movement whatever to indicate that he was distinctly aware of the nature of the deed. Another suspicious circumstance

Stancer

(a) In Jarman's Treatise on Wills we find it stated that "In cases of weakness of mind arising from the near approach of death, strong proof is required that the Contents of the will were known to the testator and that it was his spontaneous act." (Page 30 of Jarman)

(a) 3 Pat: Appeals 478.

(b) Taylors Med: Jurisprudence 539.

: stance was the fact that this will bequeathed the property to a stranger. ———————

Chapter III

I Insanity – Deeds Inter Vivos.

"The mind is the proper judge of the man".
Seneca — Happy Life. Ch: I

"Mens cujusque is est quisque".
The mind of the man is the man himself.

In deeds inter vivos,

Second party

is the natural censor of granter.

The solution of questions of the capacity of the granters of deeds inter vivos is, generally speaking, less difficult than in considering the capacity of testators. In a deed inter vivos, there is necessarily some reliance to be placed on the integrity of the second party, who acts, as D'Aguesseau aptly terms it, as "an inspector or rather a "censor" over the acts of the other party.

Good faith demanded where mental weakness exists.

In all transactions with persons who are insane or who labour under weakness of mind, the Court will demand that entire good faith (uberrimæ fidei) should exist between the parties;

and 3

Evans Pothier on Contract Vol: II.

and where the deed bears evidence of being unjust or not for the benefit of the person of unsound mind, the court will set aside the deed

Proof of insanity.

The proof of insanity is more a question of fact than of law, and is therefore principally a mere question of evidence. The point at issue is, Whether the person is of sufficient mind and capacity to understand the nature and effects of the deed in question? Each case necessarily depends on its own evidence for solution; and it is with the milder forms of mental incapacity that the great difficulties inherent to such subjects, are found. "No one", says the celebrated orator, Burke, "can say where twilight begins or ends; but there is ample distinction between day and night." There is no difficulty in deciding questions of unsoundness of mind which are patent to everyone; it is where sanity and insanity intermingle, like the shades of the rainbow, that we experience the great difficulties which are naturally inherent to such a subject.

Amount of capacity requisite to execute deeds inter vivos.

According to our Institutional Writers, there is greater capacity required for deeds inter vivos, than is required to make a will or settlement. But here, I think, the judgment of Sir J. Hannen in the recent case of Boughton v. Knight; ought to receive attention; and it is to be remembered, that while one person may authorize another by mandate to enter into Contract for him, the law will not permit such a thing to be done in regard to wills. No man can sign a will

Law Reports

on behalf of another; and this is the law of all countries. Does this not point to testaments requiring greater capacity than deeds inter vivos?

Manner in which deeds inter vivos can be reduced.

To reduce a deed by a person of unsound mind, there are, as we have previously seen, two methods by which such can be effected. The first is by way of cognition, and the second by a regular action of reduction. When Cognition is sought, the person sought to be cognosced must be "furious, fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs." This act of Cognition however, is principally intended to furnish guardians to the non compos; though the act is declaratory and declares all deeds or acts of every kind which may infer an obligation against the person insane or hurt his interest, executed by him at any time subsequent to the date fixed by the verdict as the commencement of the insanity, are null, and can be set aside by exception, without any other proof of the incapacity than the mere production of the verdict of the jury. Such a person is in fact treated as a pupil. The Civil Law placed in the same position as mad men. "Nam Infans, et qui infantiæ proximus est, non multum a furioso distant; quia hujus modi ætatis pupilli nullum habent intellectum." Any deed, therefore, executed within the period comprised in the verdict is null.

By cognition.

We come, however, to notice an exception to this law which holds good in England but, according to Mr. Fraser in his valuable work on Guardian and Ward

Insanity — Deeds Inter Vivos

Ward, is not in accordance with our Scotch law. The point is, that the deed of a person cognosced insane within the term fixed by the verdict, is null by exception, even, according to Mr. Fraser, "although the party dealing with him (which is contrary to the English law) knew not of the verdict, and believed him sane. Laying aside the words of the act (1475, c. 67), and the references to our Institutional authorities, he cites the case of Moncrieff v. Maxwell [a], which, however, so far as I can see, has little or no bearing on the subject; and I think that there is not a single Scotch case which throws any light on the subject, the one way or the other. Consequently I would venture to hold that this is a point which has still to be decided. When we examine the act, we find that it declares all alienations made after the finding of the verdict are null, and there is no mention made of a deed being valid through being granted during a lucid interval; and yet, as is well known, such are perfectly valid. The act again, only refers to alienations; and we may therefore take it that this act has no bearing on the question we are discussing — at least in modern times. The section of the Court of Session Act relating to insanity just leaves matters — in this respect — as they were previous to its passing. Professor Bell meets the question half way by stating that there is a just and natural limitation, that where the transaction is in the course of business — in the course of a person's trade, Courts of law will be more averse to give relief. In looking to the value of the verdict itself, it must be remembered,

Does cognition per se reduce all deeds?

Even where transaction is bona fide, and grantee ignorant of granters incapacity?

(a) M. 6280.

Insanity — Deeds Inter Vivos.

:bered that the main object of cognition is guardi:
:anship; that it is entirely exparte; and that it
may be instituted not for the purpose of guardian:
:ship, but in order to reduce by a side shift, a
deed which had been granted by a person of
whose state of mind it would be difficult to judge,
unless by an act of cognition where the proceedings
are all ex parte and the party to the deed
has little chance of knowing about the matter,
far less than of leading counter evidence. A
case of this kind occurred lately in Ireland.
The alleged lunatic, a Mr. Hassard, had granted
a lease of his subjects to a person who believed him
to be of perfect sanity of mind. The transaction was
fair and bonâ fide and completely executed in the belief
of the Lessor's sanity. To reduce the deed, the widow
of Mr. H. instituted proceedings to find her husband
to have been insane at a date preceding the date
of the lease, In the words of the Vice-Chancellor,
"To aid this object (i.e. the reduction) the special direc:
:tion to enquire as to the commencement of the lunacy
was obtained, and there was, of course, little difficul
in such a proceeding (which was entirely in the hands
of the party interested in resisting it) in obtaining
a finding that ~~the~~ Mr. Hassard was a lunatic from
a date anterior to the making lease." The deed
was, however, upheld; and I append the rubric
of the judgement as containing an admirable précis
of the subject:-

Proceedings of cognition entirely ex parte.

Haesard v. Smith 6 Irish Reports, Equity 429

Insanity - Deeds Inter Vivos.

1. "The rule both of law and of equity as to a contract entered into by a person apparently of sound mind, and not known by the other contracting party to be insane, is, that such a contract, if fair, bonâ fide, and completely executed is valid; and even though such a contract might be void at law, it will only be set aside in equity for fraud."
2. "The ordinary presumption of sanity is removed by an inquisition finding a person to be of unsound mind; and, in the case of a contract subsequently entered into by him, the burthen of proof is shifted; but the finding being usually ex parte, is not conclusive and the Court has jurisdiction (which it will be slow in exercising) to arrive at a contrary conclusion without the aid of another party."
3. "To vitiate a contract, the knowledge of the lunacy or incapacity must not be merely actual but presumably sufficient - from circumstances known to the other contracting party — to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind".

The leading English cases on the subject are Molton A. Camroux[a], which was affirmed by the Court of Exchequer Chamber; Beavan A. Mc Donell[b], where

the

(a) 2 Exch: 487, 503, affd in Cam: Scac: 4 Exch: 17: Rubric is as follows:-
"Unsoundness of mind will not vocate a contract if, unknown to the other contracting party, and no advantage taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position"

(b) 9 Ex: 305.

the contract was for the purchase of a piece of land, and on which the grantee, who, it afterwards appeared, was a lunatic at the time of the contract, had paid a deposit according to the conditions of the sale. It was then attempted to withdraw from the bargain and obtain a return of the deposit money. The Court, however held that the transaction had been perfectly fair, honest and bonâ-fide, and that the grantee had been quite ignorant of the incapacity of the other; it was therefore held that the plaintiff could not recover back his money. Then, in the case of Neill v. Morley[a], Sir Wm Grant, the Master of the Rolls would not interfere in the case of an executed contract. He remarked:- "Assuming it to be the legal consequence that every act of the lunatic subsequent to the time found by the jury, is absolutely void, nothing can be more inconvenient than for this Court to give effect to that legal consequence, setting aside every dealing in the course of his trade, giving an account of all he has lost &c. If the plaintiff is right in saying all this is void at law let him resort to law and recover if he can!"
In Price v. Berrington, Lord Truro acted upon the same principle and dismissed a bill to set aside a conveyance, although a jury, on an issue directed by Lord Langdale, been found that the grantor was not of sound mind when he executed it, he having already been found a lunatic by "inquisition" from a date anterior to

(a) 9 Vesey's Reports, Chancery, 478, 479

3 Macnaughton & Gordon's Reports, Chancery, 496.

to the Conveyance and without lucid intervals. In the case of Elliot v. Ince[a], Lord Cranworth considered the law upon this subject and referred with approbation to the case of Molton v. Camroux, stating the principle of that case to be very sound - namely, that an executed contract, where parties have been dealing fairly and in ignorance of the lunacy, shall not afterwards be set aside. He adds "that was a doctrine of necessity, and a contrary doctrine would render all ordinary dealings been mere and mere". He states that the result of the authorities seems to be, that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding. In the succeeding case of Campbell v. Hooper, the same principle was maintained.

In considering, therefore, the whole subject, we would observe:-

1. That there has occurred no modern case in Scotland where such a subject has been made the subject of judicial decision;
2. That the verdict of the jury in Cognition is only presumptive evidence of insanity, as it cannot shut out the possibility of a lucid interval or a recovery;
3. That the natural presumption is in favor of sanity;
4. That the main object of Cognition is Guardianship;
5. That the whole transaction of cognition is entirely ex parte;

That

(a) 4 De Grey, Macnaghten & Gordon's Reports, 475; see also Beavan v. McDonnell, 9 Exchequer Reports 305.

6. That the act, 1475, c. 64, only refers to alienations at the most; and though, as Mr. Fraser observes it declares all deeds null from the date of the finding of the inquest, modern practice has always admitted of proof of a lucid interval or a recovery;

7 That therefore a deed ought to be reducible only by action and not as being within the terms of the verdict by exception. There are several early cases where this was held as the law on the proper ground that the transaction may have taken place during a lucid interval and

8. That there is, so far as I am aware, only one case where the verdict of the jury was held as a sufficient ground for reduction - Cunninghame & Craig & his Curator ~~v.~~ Barr - a case which occurred upwards of 80 years ago.

I would therefore, venture to hold, that where a deed has been granted by a person who is apparently at the time of the transaction, perfectly sane, and where everything has been fair, honest and bonâ fide, and no undue advantage has been taken of the lunatic, — is a question which still needs judicial sanction, whether the lunatic be cognosced or not; and that considerable weight will be attached to the views taken by the English judges.

hold what ?

But

Insanity - Deeds Inter Vivos

Deed null if insanity proved at time of execution.

But a Contract is invalid whether the granter be cognosced or not, if insanity at the time of the transaction be clearly proved. There is a case on record where reduction took place thirty years after the execution of the deed. It is to be remembered, however, that delay in challenging, forms a very material consideration, and that mere allegation, or ambiguous opinion, as to the state of a person's mind, will not bar the natural presumption that exists as to the sanity of every one of the age of maturity. The insanity must be clearly proved; and the proper mode of doing so is by an action of reduction. Such an action can be raised by the lunatic himself, his heir at his death, or by any one having interest. We have never had the curious, if not absurd, doctrine prevailing in Scotland which formerly prevailed in England — that no man could "stultify himself" by raising an action of reduction at his own instance.

Delay in challenging.

Mere Allegation.

Deeds entered into, but not completed, through granter's supervening incapacity, - valid.

Where transactions have been entered into, but not completed through insanity overtaking the granter, the deed will not, in consequence of the supervening disease, become invalid. So, where a mandate had been granted by a father in favor of his son to permit him to carry on his business, and thereby debt was incurred, on which sequestration had been awarded; it was held no reason for recalling the sequestration that the father had, after granting

the

the mandate, become insane. If the person is sane at the time of agreement, subsequent insan has no effect on the validity of the deed.

Section II

Partial Insanity. It is impossible, of course, to lay down any abstract rules which can guide us altogether in deciding questions of partial insanity. There has been case decided in which the means by which such a subject can, to a certain extent, be guaged and an equitable solution arrived at, as has been done in the case of testaments by the Lord Chief Justice Cockburn in Banks v. Goodfellow and Lord President Inglis in the case of Morrison v. McLean's Trustees. The main rule to be kept in view is, that where there is weakness of mi the granter must be shewn to have fully und stood the nature and effect of the deed. Thus a man may be able to judge of an ordinary deed, though not of one partaking o a technical nature. The person, again, mu be unable to "manage the ordinary affairs o life. We have seen the opinion of Sir J. Stamm as to the quantum of capacity requisite for the execution of wills — that the highest capaci is necessary; and this, to my mind, seems perfectly just, as we find persons able to discharge the ordinary duties of life, neverth less unable to perform the functions of testat Though considerable capacity is requisite to chaffer and bargain, it must be remem bered

Understanding deed essential.

And

Granter must be able to man: age the ordinary affairs of life.

: bered that there a natural "censor" (as D'Agues: :seau terms it) in the person of the grantee.

Section III

Lucid Interval.– To prove that a lucid interval has happened, the greatest caution is necessary in demanding the clearest and most incontestible proofs. It is impossible to be too circumspect. The greatest difficulty will naturally occur where the person of unsound mind has been cognoseed insane. Even where the verdict was in favor of a lucid interval on a certain day, it was not held sufficiently conclusive to bar reduction on the ground of insanity on the day in question.

It is observed by Mr. Fraser that "there is a very close and just analogy between the case of a person cognoseed insane and a pupil; and it has therefore been thought by most lawyers that they are entitled to all the privileges of minors, not absolutely peculiar to the latter. 1. It is thought that they are entitled to the privilege of restetutio in integrum against deeds done to their lesion while under tutory. 2. They are also entitled to the privi: :lege of intus habet in a question of account: ing between them and their tutor."

Physical

Part III

Physical Defect.

Formerly our law regarded those who were deaf and dumb from birth in the same light as idiots, and, therefore, debarred from either executing testaments or entering into contracts This was the law as laid down by Stair, and mentioned as such by Erskine, though the latter adds that there "are instances of such now alive who not only are indued with strong natural parts, but can apply them to all the affairs of life." It has also been held by some that the act 1585 c. 18 applied not only to lunatics, but also to those who cannot, from corporeal defect, such as deaf-mutes, properly discharge the duties of life; and accordingly there have been cases where they have been cognosced deaf and dumb, and their estates put under the management of a tutor.

Presumptions.

Williams lays it down that one who is from his nativity deaf and dumb is in presumption of law, an idiot and therefore incapable of making a will; but that such presumption may be rebutted, and the contrary proved. Through the investigations of modern science, it has been discovered that deaf-mutes are capable of attaining to a considerable high degree of cultivation; and, as Mr. McLaren observes "where proper precautions are

Testing Capacity.

taken

taken (if such be necessary), and there is no sus-
:picion of undue influence, there can be no doubt
that the will of a deaf-mute will be effectual".
To this we may add the remarks of Sir E. V. Williams:-
"One who is not deaf and dumb by nature, but being once able
to hear and speak, if by some accident he loses both his hearing
and the use of his tongue, then in case he shall be able to
write, he may with his own hand write his last Will and
Testament. But if he be not able to write, then he is in the
same case as those which be both deaf and dumb by nature,
i.e. if he have understanding he may make his testament
by signs, otherwise not at all. Such as can speak and
cannot hear, they may make their testaments, as if
they could both speak and hear, whether that defect
came by nature or otherwise. Such as be speechless
only and not void of hearing, if they can write,
may very well make their testaments themselves by
writing: if they cannot write, they may also make
their testaments by signs, so that the same signs
be sufficiently known to such as then be present."

Deeds inter vivos.

Then we find Lord Stair give his opinion as to
the power of contracting thus:- "Those who are deaf and
dumb may contract, if they have the use of reason,
and if appear they understood what was done, and
expressed their consent by their ordinary knowing signs".
This, as Prof. Menzies observes, is undoubtedly the correct
doctrine.

Deaf, Dumb and Blind.

Where, however, a person is born deaf, dumb and
blind, the presumption against the validity of his
act is stronger. We find the following passage in
Blackstone's

Physical Defect – Blind, Deaf & Dumb.

Blind, Deaf, & Dumb.

Blackstone's Commentaries:- "A man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas." This doctrine would not, in the present days of scientific attainments, be held as correct law. Difficulties, such as present themselves in attempting to educate blind deaf-mutes, have been most successfully surmounted, and numerous cases exist in which a fine intelligence has been discovered and brought into active exercise.

In concluding this chapter, I think it advisable to quote from the remarks of Lord Colonsay in the case of Kirkpatrick. Here strong allegations had been adduced of the necessity of the Court to interfere on the ground that the party was nearly deaf and dumb and incapable of granting a discharge. The Court, however, acting on a report from medical men, refused to appoint a Curator. The Lord President stated that while "it is very important that persons who are labouring under physical defects that disable them from managing their own affairs, should have the protection of the Court; on the other hand it is equally important that the Court should not give effect to every objection founded upon the physical defects of parties, and not take upon themselves to supersede them in the management of their affairs, without being satisfied of the necessity for interference".

Part IV

Weakness of Mind - Facility

Having completed our examination of the question of how far mental defect, however caused, can, per se, invalidate a deed, it still remains to pursue the inquiry into the mildest forms of cerebral disease — weakness of mind and facility.

As regards Wills.

Mere weakness of mind, whether from natural infirmity or from imbecility caused by disease or age, is not of itself sufficient to invalidate any deed. Williams says that mere weakness of mind is no objection to a man's disposing of his estate by will; because Courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom or prudence of men in disposing of their estates. Swinburne defines the case thus:- If a man be of a mean understanding (neither of the wise sort or the foolish), but indifferent, as it were betwixt a wise man and a fool, yea, although he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed grossum caput, a dull pate, or a dunce, such a one is not prohibited from making his testament.

The same rule holds as regards deeds inter vivos. Thus in the case of Morrison v. Morrison, a Discharge by a person, who, a few months' previous had been insane and who, at the date of execution, was not,

In Parson's Law of Contract p: 384, we find it stated that Courts "endeavour to draw a line between sanity and insanity, but cannot so well distinguish between degrees of intelligence, against the consequences of mere imprudence, folly, or that deficiency of intellect which makes mistakes easy, but does not amount to unsound or disordered intellect, even Equity gives no relief, unless the other party has made use of this want of intelligence to do a certainly wrongful act."

20 Dec: 1841, 4 D. 334.

not insane but of weak mind, was upheld as effectual.

Understanding of Deed necessary.

But though mere weakness is insufficient of itself, to reduce a deed, the Court will naturally scrutinize closely the acts of those dealing with such persons. It will insist, especially in the case of wills, on a proper understanding existing in the mind of the granter ~~(that he)~~ as to the nature of the act to which his execution gives effect. Thus, a person may be unable to comprehend the nature and effect of a deed of a technical nature, though perfectly able to understand one of a simpler character. Where a deed is merely executed by a person of defective intelligence, the Court will exact still closer vigilance as to the measure of understand which such person had of the nature and effect of the deed.

Especially Deed merely executed by testator.

Weakness a material consideration in inferring fraud.

However, though such mental weakness forms of itself no ground of incapacity, and affords no sufficient ground for setting aside any deed, it nevertheless constitutes a material consideration in inferring fraud and unfair practice when the deed is entirely to the disadvantage of the weaker party. If the contract be open to the imputation of fraud, it will necessarily be void, whatever be the character and comparative intelligence of the parties. Hence, as Mr. McLaren observes in regard to wills, in all questions of weakness or facility, the question is invariably put "Whether the Defender,

Deeds reduced on account of the fraud practised.
Not on the ground of weakness.

taking advantage of the person's facility, procured the deed by circumvention?" Here, it will be noticed, the reduction would be not so much on the ground of mental incompetence[a], as on account of the fraud which had been practised. If no such deception existed, the Court would refuse to grant relief, as it "cannot undertake to graduate intellectual differences on a nicely adjusted scale, nor to reduce sagacity and talent to the level of weakness and folly." Therefore, as remarked by the learned Mr. Fonblanque[c], let a man be wise or unwise, if he be legally compos mentis, he is a disposer of his property, and his will stands "instead of a reason"; and he adds "that although there is no direct proof that a man is non compos or delirious, yet, if he is of a weak understanding and is harassed and uneasy at the time; or if the deed be executed in extremis, or by a paralytic, it cannot be supposed he had a mind adequate to the business he was about and might more easily be imposed on".

To reduce a will executed by a person, who, although of weak mind, is legally capable[d] of granting such a deed, there must be alleged what is known in Scotland as "fraud and circumvention". In an action where fraud and circumvention are averred, the pursuer is only bound to put in issue fraud or circumvention and not, fraud and circumvention.

The amount of pressure which will constitute

(a) See below (Scott v. Wilson).

(b) Morrison v. Morrison 20 Dec: 1841, 4 D. 337.

(c) Fonblanque on Equity Vol: I.

(d) "In the absence of fraud the execution of a will by a person competent testator is conclusive evidence that he approved the contents thereof, if at the time of execution they were brought to his notice". Guardhouse Tr: v. Blackburn Tr: 35. Law Journal Reports.

In Scott v. Wilson, 15 July 1825, Murray's Jury Reports 526, it was held that facility to a great extent and lesion to the greatest amount are not sufficient to reduce without fraud and circumvention.

Buchan v. Heugh's Tr: 19 May 1858, 20 D. 947; Mann v. Smith 2 Feb: 1871, 23 D. 435, 23 Jurist 231.

:tute circumvention is a question of fact, or more pro
:perly, perhaps, of opinion, and is a matter which
the Court leaves entirely for the decision of the
jury. It forms entirely a question of evidence whet
the will or other deed is the direct personal act of
the granter; and the Court will not readily inter
:fere with the verdict of the jury.

As stated by Lord President Inglis,[a] there are
various kinds of weakness and facility. A man
may be weak and facile for want of judg
:ment or reason; another man may be weak
and facile from mere nervousness and incapa
:city to resist solicitation, from age, sickness,
approach of death &c".

In considering therefore the question of fraud
and circumvention as applied to wills, there will
necessarily be, owing to the gratuitous nature of the
transaction and the weakness of the testators, a close
scrutiny[b] of the means by which the beneficiaries
obtained the execution of the deed. And here we
must point out the great doctrine as laid down
by Lord President Inglis[c] that "in every question of
this kind where you are asked if there is facility and
if somebody has taken advantage of that facility
to procure a deed, you must endeavour to see whet
there is any correspondence between the kind of facili
that is proved, and the kind of arts that are em
:ployed against him". Thus, as remarked in an ear
case by Lord Colonsay,[d] "a man may have capac
when aided, and no capacity without aid; and
the

(a) In Morrison v. McLean's Ex., 24 D. 625; 34 Jur: 311.

(b) Story's Equity Jurisp: Vol: I, Ch: 6, § 228.

(c) In Morrison v. McLean's Ex., ut supra.

(d) In Mc Kellar v. Mc Kellar 6 Dec: 1861, 24 D. 144.

the withholding of such aid as may be necessary to give the capacity to execute a deed may amount to fraud . . . . . For instance a Defender may have prevented a professional person from having access to the person granting the deed, and thus have prevented him having that aid which was necessary to give him capacity for understanding." But the greater number of cases occur where intimidation or undue influence have been the means employed to obtain execution of the deed, as in the case of Cairns v. Marianski [a], where the signatures had been obtained by intimidation from an old man incapable from age and timidity of character of resisting intimidation. This case forms the leading case on the part of the subject.

Intimidation.

Undue influence.

To invalidate a testament executed by a party labouring under <u>great mental weakness</u>, it is not necessary to prove intimidation or control; a lesser degree of interference with the direction of the testator's bounty, will suffice to reduce. There must be always considered in such questions, <u>first</u> the degree of mental weakness, and, <u>second</u>, the amount of pressure which has been brought to bear on the testator. As given in the rubric of Morris v. McLean's Trustees [b]: - "there must be correspondence between the facility, and the kind of arts employed against the granter."

Persuasion sufficient in certain cases to reduce.

Accordingly in certain cases, <u>persuasion</u> [c] has been held sufficient to infer <u>fraud</u>. This doctrine was propounded by Lord Justice Clerk Hope in

(a) 12 D. 919, 1286.

(b) 24 D. 625.

(c) Mc Laren on Wills p: 274

in the case of Clunie v. Stirling[a]. In his Charge to the Jury, his Lordship remarked:- "The actual mode or particular acts of circumvention may not be discoverable or easily proved. But the result may demonstrate that the party was really circumvented in the sense of the issue, when he was led into the transaction under challenge and then the nature of that transaction; the mode in which, and the party by whom, it was carried through, and the object apparent on the face of it for which, if palpably disadvantageous it was huddled up without proper inquiry, and without the individual receiving the aid he ought to have received, all bear on the jury question, whether the party had been circumvented. Under this issue you cannot separate, as distinct and really distinguishable matters, the state of the man's mind and nerves from the way the transaction was managed. This is peculiarly the case, either in extreme old age, in which, though the mind be entire, firmness to resist even persuasion and to feel himself in opposition to those on whom the old man feels himself dependant for comfort in his daily life may be awanting to such a degree as to make undue influence amount to all the circumvention which in that case is required.

Acts of kindness and attention do not constitute undue influence.

It is to be observed, however, that it is not sufficient to set aside a will that it was made under the influence of acts of kindness and attention

(a) It is laid down in the rubric thus:- "Where there is evidence of lesion and facility, it is not necessary that anything amounting to moral fraud should be proved, or that any specific acts of circumvention should be established: it is enough, if, in the whole circumstances of the party granting the deed, there be used persuasion which he was not in a condition to resist."
11 March 1854; 14 D. 15.

attention do not constitute undue influence. Undue influence, to defeat a will, must not be such as arises from the influence of grati affection, or esteem. Such grounds on which to found a will are perfectly legitimate and proper. As was truly said by Kent, in Van Alst v. Hunter in reference to the infirmity of old age "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 whic he has in protracted life to command the attention du to his infirmities". "Friendship and tried attachment," says Lord Chief Justice Cockburn, "or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, parental authority finds a useful auxiliary; age secures the respect and attention which are one of its chief consolations.

Part only of a Deed may be reduced.

Part of a will may be reduced on the ground of facility fraud and circumvention as in the case of Syme v. Henderson, where a Codicil was reduced on those grounds.

Deeds Inter Vivos. Chap: II.

Deeds Inter Vivos.

Mere weakness of mind not sufficient to reduce.

The degree of mental weakness such as we have been describing, is neither, per se, sufficient to reduce in the case of deeds inter vivos.

5 Johnson New York Chancery Reports 159.

In Banks & Goodfellow, 22 Law Times Reports N. S. 813.

15 July 1835, 13 S. 1132.: 10 J. 57

Weakness – Fraud & Circumvention.

Where mental weakness exists, good faith on part of second party will be demanded.

However, as the parties to contract do not meet upon equal terms – as there is weakness on the one hand to combat full capacity of mind on the other – the law demands that good faith (ubei rimæ fidei) shall be exercised towards the weak party.(a)

Where there is facility and lesion, fraud will be inferred.

Accordingly, where is evidence of lesion on the part of the weaker person – where a bargain is unconscionable – fraud will be inferred. It was observed by Lord Hardwick in the great leading English Case of Chesterfield v. Janssen,(b) that "there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting – weakness on the one side, usury on the other or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain". There have been various decisions supporting this doctrine. Thus, we find, in the case of Mc Neil v. Moir,(c) a deed set aside which had been obtained from a facile person nearly 80 years of age, whereby he discharged a debt of £3,000, heritably secured, for a bill of £230 and an annuity of 4½ per cent during his life, for which no security was given;- and, in Mc Diarmid v. Mc Diarmid,(d) a deed by an old, facile man of intemperate habits by which, without any onerous, he conveyed to his daughter and her husband, funds of the value of about £4,000, was reduced.

Inadequacy of consideration not sufficient, per se, to reduce.

It must be observed, however, that mere inadequacy

(a) Story's Equity Jurisp: Vol I, Ch: VI, § 228.

(b) 4 February 1750, 2 Vesey's Reports 125

(c) 21 May 1824, 2 S. (Npp.) 206.

(d) 14 May 1826, 4 S. 491; Aff: March 28, 1828; 3 H. S. 37

inadequacy of consideration forms no ground per se, on which to found reduction. It is only where the situation of the contracting parties is unequal - where there is mental weakness on the part of one or other of them. The policy of this doctrine was thus commented on by Vice Chancellor Sir T. Leach:- "At law and at equity also, generally speaking, a man who has a power of disposition over his property, whether he sells to relieve his necessities, or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price." (a)

As to what constitutes inadequacy of consideration, lesion or damage to the interest of the grantor, - that is a question which is always left to the decision of the jury. It may not be amiss, however, to quote from the remarks of Lord Nottingham's opinion in the Case of Nott v. Hill (b): "By the Civil Law", (c) says his Lordship, "a bargain of double the value shall be avoided", and he wished it were so in England. There is no rule in our law by which the difference between the real value of property and the consideration paid, constitutes lesion. It is entirely a question of evidence of opinion, and rests with the jury for decision.

Another question for consideration is the degree of mental weakness of the grantor a deed (so far as can be ascertained), which, taken with the

(a) 3 Maddock's Reports, Chancery, 235.

(b) 2 Chancery Cases, 121.
(c) C. Lib: IV, tit XLIX, 1, 2.

the amount of lesion he has suffered, will assist in determining the question of implied fraud. There must, as has been previously observed "correspondence between the facility and the kind of arts practised against the granter". The slightest circumstance will infer fraud in cases of facility and where lesion has been sustained.

Fraud proved, reduction would necessarily follow.

Where undoubted fraud has been practised reduction would naturally follow.

Previous knowledge of granters imbecility and advantage taken, strong evidence of fraud.

Where the imbecility of the granter has been known to the grantee previous to the execution of the deed, and advantage has been taken of that imbecility, it would constitute a powerful ingredient of evidence in a case of fraud, especially where the beneficiaries occupy fiduciary or other relationship to the insane.

Chapter III
Interdiction - Deeds Inter Vivos.

To protect those weak-minded persons who are of a lavish or prodigal nature, the law has provided the remedy of interdiction. Mr. Fraser says "One who cannot be treated as an idiot or a madman, may yet be very unfit for the discharge of the duties of life. Weak without being fatuous, extravagant without being furious, facile without wanting reason, he may be able to be imposed on by every shorfer, and manage his affairs without judgment or discretion. Silly or imbecile, or of facility of disposition, are the generic

Horne v. Hardy 30 & 31 March 1842, 4 D. 1142; 14 Jur: 545.

Examples where deeds in favor of fiduciary or other beneficiaries have been reduced:-

By Father in favor of Children — Mc Diarmid v. Mc Diarmid 4 S. 583

" Patient in favor of Surgeon — Dant v. Bennet, 4 Mylne & Rep^s 269.

" Ward in favor of Guardian — Wright v. Proud, 13 Vesey's Rep^s 138.

When in favor of "parties interested — Gillespie v. Gillespie, 19 J.C. 280.

For Roman Law as to prodigals see p:

Fraser on Parent & Child, Ward & Guardian p: 554.

generic terms for the class in whose favour the law has provided the remedy of interdiction; and the mode in which their defect is exhibited, must be in a lavish or improvident or careless management of their property.

The law of Scotland recognises two differ forms of Interdiction:- 1. Judicial Interdiction, a 2. Voluntary Interdiction.

1. Judicial Interdiction is, according to Stair, "the genuine way of interdictions",(a) and is the result of a Decree of the Court of Session after proof of the facility and weakness of the prodigus has been led. The inquiry in this kind of interdiction is at the instance of the friends(b) of the prodigus, as the mental weakness is not of such a character as to justify the appointment of a Curator bonis, or to protect him by cognition. The application for judicial interdiction is confined to the relatives of the prodigus(c)

2. Voluntary interdiction is the act of a man himself, who is conscious of his own imbecili and adopts this procedure to protect himself This form of interdiction dates only from the beginning of the seventeenth century. The mo in which it is imposed is by what is termed a Bond of Interdiction, which requires to be registere in the appropriate Registers. To procure this form of interdiction, there must be cause(d) for the intended restraint: a man seeking such mus not

(a) Stair I, 6, 38.

(b) See Erskine I, 4, 54

(c) Bryce v. Graham 25 Jan: 1828

(d) Stair I, 6, 38 & 39; Bankt: I, 4, 122; Erskine I, 4, 53; the cases which decide this point are all of very late:- Wilkie, M. 4160; Hunter v. Hunter M. 4, 161 &c &c

not only be lavish or wasteful in the manage-ment of his property; but he must be labouring under weakness of mind and facility of disposition.. The interdictors appointed by the Decree or Bond may consist of a number of persons, who may be appointed without any qualification, or jointly, or as a quorum or sine quibus non.

Effect of Interdiction

Generally speaking, the effect of either form of interdiction may be stated to be reduction of any deed by a prodigus without his interdictor's consent, which may be hurtful to his heritable property only.

Formerly, by an early law, interdiction struck at deeds affecting moveables; and this form of interdiction has been continued to the present time, and the deed bears ex facie, to relate both to heritage and moveables. Nevertheless, it has long been settled that it can only affect heritage. The meaning of word "heritage" is held as equivalent to that used in contradistinction to moveables in questions between heir and executor.

Effect - Want of Consent of Interdictors.

This want of consent of the interdictors to a deed affecting heritage by the interdicted, does not render the deed ipso jure null; the deed can only be reduced on proof of lesion. We have seen that facility and lesion are not sufficient of themselves

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Erskine I, 4, 54.

Erskine I, 4, 54.

Erskine ut supra; Wal: p. 449

Bankton I, 4, 130; Stair IV, 4, 20, 30; Erskine, I, 4, 58; Stewart v. Hay, M. 4, 1827; 3049; Rae v. Maxwell, M. 4150; A. v. B. M. 4149 & 1 Brown's Sup: 655; More's Notes p: XIV.

Weakness of Mind - Interdiction.

themselves sufficient to invalidate a deed, they require, to be able to do so, to be conjoined with fraud or circumvention. Interdiction, however, is the public acknowledgement of the mental weakness of the prodigus, and where lesion is proved, reduction will necessarily follow. Where lesion is not proved, the deed will be sustained. Wherever a deed is rational and onerous; or wherever it is in rem versum of the prodigus, it will be sustained. Thus, in the case of Stewart v. Hay, it was found that the interdicted person and "his heirs could not question any disposition or other deed done by him upon the naked head of interdiction, unless they allege and qualify lesion" and that the opposite party "may prove that the bargain was profitably made, and that the price was in rem versum". Even where the deed is in favor of one of the interdictors it will be sustained if onerous and for full value. Where this is not the case, - where full value has not been given, the deed will be subject to reduction. Any obligation directly alienating heritage or indirectly through the operation of legal diligence, threatening to do so, will receive effect so far as the money or price has been profitably employed for behoof of the prodigus. Indeed, wherever it can be shewn that there is a good rational cause for the action, interdiction will have no effect whatever in barring attachment of his heritage.

Deeds rational and for full value will be sustained, although executed without interdictors consent.

There

See authorities on 2nd preceding page.

M. 4, 132.

Stewart v. Stays ut supra

Rae v. Maxwell, M. 4/150.

Weakness of Mind – Interdiction.

Interdiction does not affect Testamentary Writs, either of Heritage or Moveables.

There is, however, one great exception to the general rule as to the restraint which interdiction possesses over deeds relating to heritage: it does not affect testamentary writs disposing of the heritable property of the prodigus. He can test in the same manner as any uninterdicted person. This was finally settled by the Court in the case of Mansfield v. Stuart, where it was laid that the interdicted person could, without consent of his interdictors execute any mortis causa deed relative to his heritage. Erskine held a different doctrine.

Only Deed of Heritage inter vivos.

Interdiction, therefore, can only affect deeds inter vivos relating to heritage. It has no effect whatever on moveables, and the prodigus has perfect freedom, unless fraud or circumvention is averred, to deal with the latter as he pleases. If, upon such personal obligations, legal diligence is raised against him, he can be arrested and imprisoned, when it will then become futile to apply to the Court for protection, as the Court will not interfere even tho' it will become necessary for the prodigus to sell or burden his heritage. The Creditors can, of course, poind his moveables for non-payment of his debt.

Personal obligations – Prodigus can be imprisoned for such.

With consent of his interdictors, the Prodigus can execute any deed – heritable or moveable – which those of perfect capacity are able to execute. Whether the rule as to reductions on

proof

proof of lesion applies in regards which are executed with the consent of the interdictors, is a point which, according to Mr Fraser, is not yet settled. Erskine, Bankton and Bell adopt the doctrine that the only remedy where lesion has been suffered, is to raise an action of damages against the interdictors for improperly giving their consent to the transaction.

Mode of Termination of Interdiction.

Judicial interdiction requires to be terminated in the same manner in which it was first imposed — by decree of the Court. The death of the interdictors does not abolish the restraint of interdictors; the prodigus must then apply to the Court for new interdiction.

On the other hand, voluntary interdiction falls by the death of the interdictors.

Appointment of Curator Bonis

There is another means of protection which the law affords to those who are not cognosced as insane (and, therefore, in the eyes of the law, are presumed to be sane) viz:- the appointment of a Curator bonis. This remedy is also applicable in all the milder forms of mental incapacity where cognition would not be granted, - incapacity caused by old age and infirmity, or from benign

being deaf dumb and blind, or from physical disease or defect.[a] It does not extend to mere prodigality as interdiction.

The Court has even appointed a Curator bonis to a person labouring under mental incapacity and whose affairs were placed under trust.[b] Where cognition has taken place but no one willing to undertake the office of guardian to the insane, in that event the Court will appoint a Curator; and, in general, where there is no guardian for the insane, it is in the power of the Court to appoint a Curator bonis.

The object of appointing a Curator-bonis is to protect the property of the weak-minded person. He has the same power of management of the whole estate as the factor loco-tutoris of a pupil (which we have already described); but, as such an appointment does not, like the verdict of a jury, annihilate the person's status,-the Curator has no power over the person; and, where the lunatic has funds, it has been found incompetent to pursue the Curator without calling the principal party, for payment of a debt due by the latter. The Curator fixes the aliment of the lunatic.

Drunkenness

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(a) Erskine I, 4, 48; Howie, 5 S. 42; Dewar v. Dewar 12 S. 315; Netherbyres 5 March 1777, N.R.; Jardine 14 Jan: 1784, N.R; & others not reported; Sinclair 14 F.C. 1058, note; Mark, 14 Jurist 450; Simpson v. Gardiner's Trs, 11 S. 1049. Kirkpatrick 15 D. 735;

(b) Lindsay v. Watson 5 D. 1194.

Part V.

Drunkenness.

Besides insanity properly so called, there is a species of insanity, the mere effect of drunkenness and excitement from spirituous and other intoxicating liquors, which has often been the ground on which reduction of deeds, testamentary and inter vivos, has been sought. There is, however, some difference with which the Court views this class of cases from those in which insanity itself is alleged. The whole subject is viewed with considerable suspicion; and the Court will demand the fullest evidence to be given, and subject the case to the closest scrutiny. Indeed, as a matter of public policy, the Court does not incline, on the one hand, to lend its assistance to a party who has obtained a deed from another in a state of inebriety; neither, on the other hand, will they assist the intoxicated party to get rid of his deed or agreement. Again, intoxication is but temporary insanity; the reason suffers; the brain becomes incapable of performing its functions; and there is temporary mania. When the cause of excitement, however, is removed, there is a return of reason, and perfect capacity.

Difference between proper Insanity and excitement produced by spirituous and other intoxicating liquors.

It must, however, be observed, that the drunkenness, when alleged as the ground of reduction, must

To be reducible must prove Drunkenness at execution of Deed.

Drunkenness.

must be distinctly proved to have existed at the time of execution.

General Allegation insufficient

The evidence must be distinct, & no general allegation as to the intoxication of the Granter prior, or subsequent, to the execution of the writ will at all affect its validity. The

Onus probandi.

onus probandi will, in all cases, naturally fall on the party alleging the incapacity.

Delay in challenging.

Delay in challenging a deed is a material circumstance. Lord Eldon held, in Jowart v. Sellars, 16 May 1817, that if a deed is not quarrelled with as speedily as possible, but only challenged when those best acquainted with the whole circumstances of the transaction are dead and gone, it would be dangerous to set aside that deed at a distance of several years, upon a ground so fallible as human memory.

We shall now proceed to examine the various phases of drunkenness in its relation to the disposing capacity. The first point to be considered, is where

I Intoxication per se

intoxication itself forms the ground of reduction: we shall then examine the various aspects it assumes when

II When combined with Fraud and Circumvention.

combined with fraud and circumvention.

The inquiry thus falls to be divided into the following heads:-

I. The insanity of drunkenness:-
   1. Absolute Drunkenness,
   2. Habitual Drunkenness,
   3. Delirium Tremens,
   4. Dipsomania.

II. Partial Drunkenness.

5 Dow's Appeals p: 231.

III. Drunkenness when combined with Fraud or Circumvention.

IV. Destruction or Mutilation of Testamentary Writs while under the Influence of Spirituous or other Intoxicating Liquors.

Ch: I Insanity of Drunkenness.

§1. Absolute Drunkenness.

The Law of Scotland has always shewn but little disposition to afford relief from any of the immediate consequences of intoxication either in civil or criminal cases. It has never recognised mere drunkenness alone as a sufficient reason to invalidate a deed, except when carried to that excessive degree, which, for the time, deprives the party of the use of his reason and understanding. In such a case, the essential requisite to the validity of all writs — the serious and rational consent of the granter — is wanting; and therefore, where this is proved distinctly to be actually the case, the deed can in no manner be said to be the deed of the granter.

Consent necessary to validity.

Roman Law.

So the Roman Law held that temporary madness caused by drunkenness, excluded, so long as it lasted, the exercise of the will, and with it, consequently, the power to act: L. 17 D. qui test: fac: poss: (28.1.)

Law prevailing on the Continent.

This is the law which prevails in Austria, Prussia, and France. The Prussian Law indeed, classes the mental condition of excessive drunkenness in the same

L. 17 D. qui test: fac: poss: (28 I.)

Code Prus: Part I tit: IV. § 28.

same category with insanity: "Persons who are deprived of their reason by drunkenness are, so long as this drunkenness lasts, to be regarded as insane." (a)

The Netherlands Code (b) does not expressly mention drunkenness as a cause of incapacity to act; but it seems to render void (at least in the matter of testaments and agreements) all acts performed under its influence, and under the conditions we have above described.

Coke's Classification.

Lord Coke has mentioned four different classes of persons who are deemed in law non compotes mentis; (c) - the fourth and last being "He who by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken."

Authorities on National and Public Law.

When we refer to the Writers upon natural and public law, we find the same opinion maintained. "Either", says the celebrated Heineccius, "the drunkenness of the party entering into a contract is excessive or moderate. If moderate and it did not quite so much obscure his understanding, as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But, if his drunkenness was excessive that could not fail to be perceived, and therefore the party dealing with him must have been engaged in a manifest fraud; or, at least, he ought to impute it to his own fault, that he has dealt with a person in such a situation." Puffendorf (d) adopts the same view; and Pothier, one of the purest of jurists, in his "Traité des Obligations" (5) states the case thus: "It is evident that drunkenness when it goes so far as absolutely to destroy the reason, renders a person

(a) Prues: Code, Part I, tit: IV, § 28.
(b) Arts. 942 and 1356 Code Neth:

(c) Coke on Littleton 247 a.

(d) Heinec: Elem: Jur: Natur:, Lib: I, ch: 14, § 392, and Note ibid:

(e) Puffendorf's Law of Nat. and Nat. B I, ch: 4, § 8.

(f) Pothier's Traité des Obligations, Part I, c. 1, s. 1, art. 4.

person, in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent."

Former practice in England.

Formerly in England,[a] drunkenness was considered no reasonable ground for reduction, unless seduction to drink, or some positive fraud had been practised on the granter. Lord Coke[b] says that a drunkard, who is voluntarius daemon, shall have no privilege thereby, for omne crimen ebrietas et incendit et detegit; and Lord Hardwick sustained an agreement made by a party when drunk, because the agreement was reasonable, and no unfair advantage had been taken. So we find Sir Joseph Jekell reported to have intimated an opinion, that "the having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in these circumstances, for this were to encourage drunkenness: secus, if, through the management or contrivance of him who gained the deed, and the party from whom such deed had been gained, was drawn in to drink".[c] But this doctrine seems wholly unnecessary; for in such a case it is the fraud of the party who obtained the deed or agreement which constitutes the ground of declaring it invalid; and the fraud is in morals and common sense the same, whether the drunken party has been enticed into drunkenness or becomes the victim of the cunning of another who takes advantage of his imbecility.

Partially echoed in Scotland.

In Scotland we find an echo of this state of

[a] Coke on Littleton 247; Cory v. Cory 3 Vesy R. 19; Stockley v. Stockley 1 Vesy & Beames Reports 30; 3 P. Williams, 130 & note A; Chitty on Contract 8th Ed. 133.

[b] Coke on Little. 246 b.

[c] Johnson v. Medlicot 3 P. Williams 130 Note A

~~state~~ of opinion in England, in the case of A. & B. 9th February, 1682, 2 Br: Sup: 19;[a] where the plea of extreme drunkenness and incapacity to consider or consent at subscribing a Bond, was not held a sufficient qualification of circumvention to reduce, unless it were alleged that the grantee had deceitfully seduced the granter to drink. But this seems a solitary case; and the doctrine has never obtained a proper footing in Scotland. Indeed, in England, in the case of Cooke & Clayworth[b], the Master of the Rolls, Sir William Grant, observed;-"as to that extreme state of intoxication, that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from one in that Condition."

Having reviewed the opinions of the authorities on this subject, we now come to examine in what manner our own law decides questions where total incapacity by drink is alleged. The same strictness of scrutiny will be exercised by the Court in testamentary writs as in deeds inter vivos. In either case, such an objection clearly proved, will subject a writ to reduction.

Scrutiny of Scotch Courts.

As to Testamentary Writs. We find, therefore, from what has been said, that absolute drunkenness at the time of execution on the part of the Testator, would form a fatal objection. But then his total incapacity must be proved. Lord Stair in his Institutions[c] B. IV. tit. 20, § 49, says, that the "seventh reason of reduction is the incapacity of

Absolute drunkenness at time of execution fatal.

[a] Ad. B. 9 Feb: 1682, 2 Brown's Sup: 19.

[b] 18 Vesy's Reports, 12; see also Cole v. Robins, Buller N.P. 172; Wigglesworth v. Steers 1 Hen: & Munf. 70.

[c] Stair's Inst: B IV. tit. 20, § 49.

Drunkenness.

of the grantor of the right by drunk, disease or otherwise, when he granted the same." Then we find it still more broadly stated by Erskine that "persons, while in a state of absolute drunkenness, and consequently deprived of the exercise of reason, cannot oblige (bind) themselves."[a] Lord Ellenborough held that a deed signed by a party in a state of complete intoxication, is void, because "such a person has no agreeing mind": vide Pitt v. Smith 3 Campbell 33.[b] This decision his lordship adhered to in a subsequent case.[c] It is just the same as remarked by another English judge[d] as if the party wrote his name in a state of somnambulism

Swinburne lays the rule down thus:- "He that is overcome by drink, during the time of his drunkenness is compared to a madman; and therefore, if he make his testament at that time, it is void in law: which is to be understood,- when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case."[e]

We may therefore deduce from what we have shewn above, that, to use the words of Bell,[f] "it cannot, indeed, be said that there is consent, where the mind is, for the time, destroyed by intoxication; and, standing alone, it will be a good ground of reduction that the party was so drunk as not to know what he did."

The law will not inquire into the cause,

No inquiry as to cause if total incapacity proved

if 3

(a) Ersk B 3, 1, 16; see also IV, 4, 5.

(b) Pitt v. Smith, 3 Campbell's Reports, Nisi Prius, 33.
(c) Fenton v. Halloway, 1 Starkie's Rep: 126.
(d) Mr. Baron Alderson in Gore v. Gibson, 13 Meeson & Welsby's Rep: Ex. 623.

(e) Swinburne on Wills Pt 2, sec: 6.; Godolph. Pt 1, c. 8. s.5.

(f) Bell's Com: I, 137, 140, 297, 8.

if satisfaction be given, that, at the time execution, the Testator was totally incapacitated from exercising his judgment.(a) Seduction to drink or any act of circumvention, will only strengthen the case. Such drunkenness, however, must be so excessive and absolute, as to suspend the reason for a time and create impotence of mind; for "the merriment of the cheerful cup which rather revives the spirits than stupifies the reason"(b) forms no bar to the testamentary capacity. But, if a person be reduced to such extreme debility by intoxication as to be unable to rise, or sit up without help, or to hold a pen and make a mark, unless the pen and hand are held for him, his written deed will be subject to reduction.(c)

Effect of Seduction to drink.

— and —
Drunkenness wilful & voluntary.

Not does it make any difference that the drunkenness was wilful and voluntary, for the legal theory is, that without the capacity to give a consent, no deed can be made.

Where mere execution is proved Knowledge of Deed must be shewn.

Where a testamentary writ is not holograph but merely executed by the testator, the Court will, if inbecility by drunkenness is proved, demand proof that the party was aware of the contents of the deed. In the case of Durling v. Loveland, March 19, 1839, where a will was reduced on the ground of the incapacity of the testator by drink, Sir Herbert Jenner in delivering judgment, observed,- "Where a person is in the full possession of his intellects, the mere act of execution would lead to the inference that he knew the contents of the instrument he signed; where

(a) Pothier on Ob: Pt. 1, art. 4 §49; Fenton v. Galloway 1 Starkie 126; Jerners v. Howard, 6 Blackf. R. 240.

(b) Puffendorf, B. 3, ch: 6, §4; 16 Bull N. P. citing opinion of Chief Justice Holt; Fenton v. Galloway, ut sup.;

(c) Wilson v. Biggar, 7 Watts & Serg: 111; See also Burroughs v. Richman 1 Green 233; Story (W. W) on Contract, 43.

where the person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained the real intentions of the deceased".

Drunkenness either before or after the execution will not affect the validity of the Testament, provided the testator was not in that state when he signed the deed.

As to Deeds Inter Vivos. Though, no doubt, the expressed wills of testators receive, in our Courts, considerable favor, yet in cases founded on drunkenness also the Court will require the clearest evidence of total incapacity on the part also of Granters of deeds inter vivos, as well as of Testaments. No distinction is made between the two classes of writs so far as evidence as to drunkenness is concerned. As we have seen, the Court views the whole subject with disfavor.

Evidence of incapacity must be clear in Deeds inter vivos as in Testaments.

Reduction of Deeds inter vivos on ground of total incapacity.

Stair, in Institutes says that "those who through fear and drunkenness or disease, have not for a time, the use of reason, do not legately contract". Accordingly, in the case of Jardine v. Elliot, 9 June 1803, the sale of an entire set of sheep was reduced, even though there was no proof of inadequacy of consideration, owing to the incapacity by drunkenness of both parties. In the case of Gore v. Gibson, in an action on a bill by indorsee against indorser (who pleaded drunkenness), Mr. Baron Parke remarked that as regards the state of the drunken man where he enters

Mackay, March 25, 1831, 5 W.S. 210.

Hume 684

enters into a Contract in "such a state of drunken-
:ness as not to Know what he is doing, and particularly
when it appears that this was known to the other
party, the Contract is altogether void. A person
who takes an obligation from another under
such circumstances is guilty of actual fraud.

Evidence must be clear & distinct.

But then, when this plea is put forward
and more especially when adduced by the intoxi-
:cated party himself, the law demands that
the evidence of incapacity must be clear and
decided: vide, Lord Haltoun & Earl of Southesk (a)

Especially when adduced by drunkard himself.

In this case, the pursuer sought reduction on
account of his own drunkenness. It was, however,
inferred that he had been sufficiently collected
to know what he was about, seeing he had
inserted the date and witnesses with his
own hand, and made such averments
afterwards, as shewed he had a recollection
of what had transpired. The Court, therefore
found that "he was not so drunk as not to
have the use of reason", and refused to
reduce the deed.

Deeds inter vivos reducible even though wilful & voluntary.

Deeds granted by persons who, at the time
of execution, are wholly incapacitated by drink,
will therefore be subject to reduction on such
proof being given, even tho the drunkenness be
wilful and voluntary.

Deeds only rendered voidable by intoxication: can be adopted.

Intoxication, however, only renders deeds
voidable, and not void; so that the intoxicated
party may, upon recovering his understanding
still

(a) 29 July 1672, M. 13,384.

still adhere to his deed. There has, so far as I am aware, been no decision in Scotland, on this point our law contenting itself with rendering void any deed granted while totally incapacitated by intoxication. But a party may, when he returns to consciousness adopt or ratify a deed, and then repudiate it, alleging his incapacity as the ground of reduction. A case of this kind occurred lately in England — the case of Matthews v. Baxter 24 Jan: 1873 — where a party entered into a Contract of Sale while incapacitated by drink, and which he ratified and confirmed on returning to sobriety. He after that attempted to reduce his deed on the ground of his previous incapacity. The Court, however, upheld the deed as he had ratified the Sale when he was aware of what he was doing. The law as laid down in this case was:-

> "A contract entered into when one of the parties to it is so drunk as to be incapable of transacting business or knowing what he is about, is <u>not void</u>, but <u>voidable only</u>, and may be <u>enforced against him if ratified after he becomes sober</u>; and this, though his condition was known to the other party to the contract at the time of making it."

As I consider this judgment perfectly equitable and just, and, on the occurrence of a similar case in Scotland, the same views would be entertained,

[a] Law Journal Reports XLII P. C. 73.

Drunkenness.

I append the opinion of the Court in this case. Chief Baron Kelly observed :- "For could a person, who has made a contract when in that state, be prevented, when he comes to his senses, from saying to the other contracting party, "It is true I was drunk and did not know what I was doing when I made this contract, but now I am sober and I mean to hold you to it"? And if he would have the right to say that, must there not be a reciprocal right in the other party? I think, therefore, that such a contract is not absolutely void, for if it were, the party who was intoxicated would not have the right to call on the other to fulfil the contract. Then, if as regards one of the parties to the contract it is only voidable, not void, it must be so as to the other; and if it be only voidable, then if the person who was intoxicated recovers afterwards, and deliberately declares himself to be bound, in principle and in common sense the contract must be held binding on him." Baron Martin added "Therefore I decide this case on the principle that it is competent for the drunken man when he becomes sensible to insist on the fulfilment of the bargain and that the contract is voidable only, not void".

The same doctrine is maintained by Story (Ed. 10.) in his work on "Contracts," chapter II §. 45.

On the whole, it is a question worth considering, even though there is no Scotch decision on the subject.

Habitual

So, in Hawkins v. Bone, 4 Foster & Finlayson's Reports, 311, Justice Pollock held that if the purchaser was, at the time he signed the Contract, so drunk as not to know the nature of the acts he was doing, the contract was void, whether or not the seller knew his condition at the time, though his knowledge of it may be material in regard to damages.—

~~(adopt any deed he may have granted while in that condition.)~~

§. 2. Habitual Drunkenness.

In all questions founded on incapacity caused by habitual drunkenness, the rules which we have seen apply in the case of "absolute drunkenness" (to use Erskine's phrase), are the rules which must regulate and guide the Court in arriving at a proper decision. There is this difficulty, however, which presents itself in all such cases, - that though a person may become noted as an inebriate, it does not at all preclude the possibility of his testing or contracting, provided his excitement be, for the time, sufficiently allayed to admit of his understanding the nature of the act he is performing. The matter then becomes a mere question of evidence, and here there is always considerable difficulty in ascertaining the real condition of the granter's mind, especially where he has become addicted to habits of drinking. The incapacity to invalidate a deed, must have occurred at the time of execution, and must amount to total incapacity.

Difficulty in questions founded on habitual drunkenness.

Incapacity must be at time of execution.

— and —

Must amount to total incapacity.

The leading case on the subject is that of Ayrey v. Still 2 Addam, 20 Oct. (1824). Here a testator

testator was proved to have been not properly a madman, but a habitual drunkard, who, under the excitement of liquor, acted in all respects like a madman. The testator, Peter Newman alias Effon was held not to have been under the excitement of liquor, and, consequently, not insane, at the time of making his will. The will was therefore upheld. In pronouncing judgment, the judge, Sir John Nicholl, made the following observations:—

"In other words, the deceased appears to the Court, not in the light of a madman, but in that of a person habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted, in most respects very like a madman."

"Now, viewed as with reference to the point at issue, the cases in question, notwithstanding their apparent similarity, are subject, in my judgment, to very different considerations. Where actual (proper) insanity is proved to have shewn itself, either perfect recovery, or, at least, a lucid interval, must be clearly proved at the time of the making to entitle any alleged testamentary instrument to be pronounced for as a valid will. Either of these, however, the last especially, is of highest difficult of proof for the following reason. Insanity will often be, though latent; so that a person may, in effect, be completely insane, however,

however, on some subjects, and in some parts of his conduct, apparently rational. But the effects of drunkenness or inebriety only subsist, whilst the cause, the excitement, lasts: there can scarcely be such a thing as latent ebriety: so that the case of a person in a state of incapacity from mere drunkenness or inebriety, and yet capable, to all outward appearance, can hardly be supposed. Consequently, in the last, which in my judgment is this, description of case, all which requires to be shewn is the absence of the excitement at the time of the act done; at least, the absence of the excitement in any such degree as would vitiate the act done; for I suppose it will readily be conceded that, under a mere slight degree of that excitement, the memory and understanding may be in substance as correct as in the total absence of any exciting cause. Whether, when the excitement in some degree is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend in each case, upon a due consideration of all the circumstances of that case itself, in particular; it belonging to a description of cases that admits of no more definite rule, applicable to the determination of them, than the one now suggested, that I am aware of."

"In this view of the question before the Court, it must be obvious, that the result will depend upon the deceased's state

and 3

and condition at the time (to be collected, principally, from what passed at the time) of his giving instructions for, and signing, the instrument now propounded as, and for, his last will."

Degree of Incapacity.

The whole question thus resolves itself into a consideration as to the degree of the alleged incapacity of the granter of any writ, testamentary or otherwise. Total incapacity must be proved at the time of execution, in order to invalidate.

How the measure of capacity of a Habitual Drunkard may be inferred:-

To ascertain the amount of capacity of a testator stated to have been a habitual drunkard, it is necessary in the first place, to examine the deed itself. If ex facie regular, the presumption is in favor of the Testator's ability to perform. Proof to the contrary must then be led by those seeking the reduction of a deed.

1. If ex facie regular, presumption in favor of Testator's capacity.

Another point to be considered is the amount of conformity the testament bears to the granter's known intentions.

2. Conformity to Testator's known intentions.

Then the testator's own conduct at the execution will fall to be considered; and the question of degree of incapacity settled from the evidence adduced.

3. Testator's Deportment at time of execution.

And lastly, the time of the day when the execution took place, will assist in maintaining the presumption of sanity; if, for example, in the morning, when the testator would probably be free to a considerable extent from the effects of his debauchery. "It is surely not immaterial that

4. Time of Execution.

that the Court should advert to the time of day at which this transaction takes. This transaction does not take place in the evening, when the deceased's habits were likely to be in operation (a circumstance, this again, which tends to negative the charge of fraud and conspiracy in the parties to the transaction), but at eleven or twelve o'clock at noon; when, if ever, it is to be presumed the deceased was, and it was, à priori, that he would be free, almost or altogether, from the effects of intoxication." So observes Sir John Nicholl in the foresaid case of Ayrey v. Hill.

It will be necessary also, to prove the knowledge of the Testator of the contents of the will, especially where he has merely signed a deed.

Questions relating to deeds inter vivos require, as we have seen, the same degree of incapacity to render them liable to reduction, unless fraud or circumvention be alleged, - a point which we will consider after; and the evidence of incapacity must be as distinct as in the case of tamentary writs.

Part of Deed maintained and part reduced. Part of a deed may be established, and part reduced, if actual incapacity be shown at the time of the execution of the latter part, such as a Codicil to a will.

In the case of Bellinghurst v. Vickers, part of a will was sustained though the testament of a habitual drunkard, and the part not in

testator's handwriting, reduced.

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§ 3. Delirium Tremens.

This is a disordered state of the mind which proceeds from an abuse of intoxicating liquors. Habitual drunkenness appears to be the predisposing, while abstinence from drink is the immediately exciting, cause.

NO

Delirium tremens fatal to Deed if executed during an attack.

As this is a recognised disease, with mental unsoundness as one of its symptoms, the patient is, while the fit lasts, wholly incapacitated from either testing or granting any deed whatever.

Only temporary form of insanity

But then, as this form of insanity, only lasts for a short time, great caution must be observed in weighing the evidence as to the capacity of the granter. A lucid interval, or a recovery, may present itself at any moment; and strong evidence must be adduced in order to reduce any deed.

frequent occurrence of lucid interval.

Accordingly, in the case of Handley v. Stacey 1 Foster & Finlayson, 574, Lord Chancellor Campbell held, that though a testator's mind had become impaired by habits of drunkenness, and even though he had, a few days before the execution of his will, an attack of delirium tremens, these facts were immaterial; provided he was "sane and sensible and able to understand the nature

Lord Chancellor Campbell's dictum.

nature and contents at the time when it was executed".

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§ 4. Dipsomania.

This is another of the recognised phases of insanity, and consists of an intense craving after spirituous liquors, even in whatever other ingredient they may be mixed! In some cases, it is merely a leading system of a more general disorder, while, in others, it partakes of a simple Character. The whole case thus becomes a question of degree. Again, it is often intermittent in its attacks; and thus there is comparative facility in proving a lucid interval. A variety of questions may thus arise both as to testaments and deeds inter vivos, each question being determined according to its own relative merits.

Degrees of Capacity.

Thus in the simple form of dipsomania there may be perfect capacity. Thus in the case of Nisbet's Trustees v. Nisbet, 30 June 1871, the Lord Ordinary observed:- "Take the pure case known as dipsomania or oinomania, the intense craving for ardent spirit or other stimulants. Most modern writers recognise this as a form of insanity;- a disease requiring treatment. But it may occur uncomplicated by any other sign of

or indication of mental disorder; and it would be very startling to hold, that merely because a man has an insane craving for stimulants, he is therefore incapable of either making bargains inter vivos, or of disposing of his property by will. If the will can be shewn to have resulted from his disease; for example, to have been given in gratitude for past, or as a consideration for future indulgence of his insane appetite, of course it would not stand; but a dipsomaniac, it is thought, may validly make a reasonable settlement, where it can be shewn that he had complete understanding of his affairs and circumstances, and where his morbid propensity had nothing to do with the distribution of his means".

Where deed granted to continue indulgence of dissipation.

An example of the point which his Lordship here raises in reference to deeds given in gratitude for past or as a consideration for future indulgence of dissipation, occurred in the case of Mackie v. Maxwell, 24 November, 1752. Here an abandoned drunkard had disponed her estates to her sister, on condition of paying her debts and an annuity to herself. Previous to this, however, the former had disponed parts of her lands to innkeepers and others. The sister then brought an action of reduction of those conveyances; and, though no deception or circumvention was proved, the Court held the facts relevant to infer circumvention, and reduced the dispositions.

where

Dipsomania.

Delusion in the Deed fatal.

Where a deed, testamentary or otherwise, is the offspring of a dipsomanic's morbid state of mind, there would be good grounds for reduction.

Then, as we have seen, there is considerable probability, à priori, in favor of a lucid interval in all cases of insanity resulting from drunkenness, more especially where proof is given of a cessation, at the time, of the habits of drinking.

So, in the preceding case of Nisbet's Trustees v. Nisbet, the testator, Major Nisbet, was held to have had perfect capacity at the execution of his will, even though he had been an inmate of a lunatic asylum for years, executed his testament in the asylum, and died in it two months afterwards! This case is worth perusal, as it is the leading case in Scotland on that most difficult subject, partial insanity or monomania, and, therefore, of lucid intervals.

Confinement in Lunatic Asylum not conclusive of party's incapacity.

From the decision given in this case we learn, that residence in a lunatic asylum is not conclusive evidence of a man's incapacity to test or grant, - still, as the Lord Ordinary observed in Nisbet's case :- "It is indisputable that a deed executed under such circumstances is open to the gravest suspicion, and, in any view, as soon as these circumstances are disclosed, a very heavy onus is laid upon the party supporting the deed to shew, beyond all reasonable doubt, that it is the proper act and

But it subjects the case to the gravest suspicion.

And lays heavy onus probandi on party founding on Will.

and deed of Major Nisbet himself, and that, at the time of executing it, he was possessed of and was exercising a sound disposing mind."

The recovery, however, does not require to be thorough and complete; the mind need not have recovered its pristine strength and vigour. It is sufficient, if the party thoroughly understands the nature and effect of the deed to which, by his execution, he gives effect. The soul of a Newton may descend many steps and yet be superior to the lowest point at which the law allows a person the disposition of his property.

Partial

Ch: II. Partial Drunkenness.

Partial drunkenness per se insufficient to reduce.

Partial drunkenness, as it does not destroy or totally obscure the reason and understanding, in no way affects the capacity to test.

Neither does it affect deeds inter vivos. "A lesser degree of drunkenness, which only darkens reason," says Erskine, "has not the effect of annulling the contract;" and this state of the law has always been maintained in Scotland.

Even where party is a well known drunkard.

It does not matter that the party – testator or granter – was a well known drunkard, the question to be decided is the capacity of the party at the date of execution; and unless, as we have seen, there exists such a degree of intoxication as to prevent a man from knowing what he was doing, the Court will decline to interfere, and leave the parties to their ordinary remedies at law, – if any.

So, in the Case of Wheeler and Batsford v. Alderson, though the testatrix was a woman who had become so addicted to the use of ardent spirits that she was hooted at by the boys in the streets, Sir John Nicholl upheld the will, considering that, at the time when she executed the deed, she was possessed of a sound disposing mind.

Each case thus becomes a question of evidence as to the degree of the intoxication of the party executing the deed; and, as the Court regards the

the whole subject with considerable dubiety, mere drunkenness will not, per se, afford any relief.

Ch: III Drunkenness - Fraud & circumvention.

From what we have already advanced, it will be seen that the Court does not view the subject of drunkenness with much favor, deeming that the drunkard has less ground than any other non compos, to seek protection from the effects of his own acts. Nevertheless, the Court will afford protection where deeds have been procured from him by fraud or circumvention; "for", says Story, "whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct."

Court will afford protection where fraud or circumvention have been exercised.

Wherever, therefore, there exists imbecility or weakness of mind caused by drunkenness; and there is evidence that improper advantage or undue influence has been used, the Court is very prompt to imply fraud.

Court prompt to imply fraud where imbecility exists.

In the first place, however, it is to be observed that in deeds inter vivos, lesion, or inequality or inadequacy of price is not of itself sufficient to reduce, but, when combined with fraud and weakness of

Inadequacy of price insufficient of itself to reduce.

of mind, it would afford a good ground for the reduction of the deed.

Fraud may be inferred where imbecility exists.

Fraud, again, may be inferred, as observed by Bell, from the advantage taken of the granter's imbecility. In the case of Mackie v. Maxwell, the pursuer sought a reduction of certain dispositions granted by her sister, an abandoned drunkard, to innkeepers and others; and though no specific acts of fraud or circumvention were proved, the Court held the facts relevant to infer circumvention, and reduced the deeds. The court will even raise a presumption of fraud, where, if the case were one of a person in full exercise of his faculties, no such presumption could be raised.

Deeds granted to continue indulgence of dissipation.

If a deed, whether testamentary or otherwise, has been granted as a consideration for the indulgence of dissipation, the Court will, therefore, infer fraud, and grant reduction of the deed. On this point, the Lord Ordinary remarked in the case of Nisbet's Trustees v. Nisbet, if a will can be shewn to have been given in gratitude for past or as a consideration for future indulgence of his insane appetite, of course it would not stand.

Seduction to drink.

The most objectionable form of circumvention is where the granter of a deed has been seduced to drink; and though, in the case of Gardner v. Tennant, 7 July 1677, this objection was held not relevant, strong reasons of dissent stated, as "this is considered the worst kind of circumvention."

:vention".

Seduction to drink and lesion proved fatal.

Where, however, there is inadequacy of considera:tion combined with seduction to drink, fraud would undoubtedly be implied

Seduction to drink coupled with undue influence in Testamentary Writs.

In testamentary writs, where the testator has been seduced to drink, the Court would inquire very narrowly into the amount of control which has been exercised against him, and into the benefit which the granter, who had seduced him to drink, derived through the will. Sir William Grant, in the English case of Cooke v. Clayworth, where there was no proof either of seduction to drink, or of unfairness or undue advantage taken, laid down the law thus:-

1. That a Court of Equity ought not to give its aid to one who has obtained an agreement from another in a state of intoxication; not
2. To relieve one from a Contract merely because he was drunk when he made it; but
3. That if there be inducement and seduction to drink, or advantage unfairly taken of the imbecility of drunkenness, judicial interference may be justified; and
4. That a state of absolute deprivation of reason by intoxication invalidates a deed as null and void.

Lastly, if a testator grants a testament, while through intoxication, he is under the influence or control of

of another, the writ will be liable to reduction.

Effect in Deeds inter vivos where undue influence is alleged.—

Where this occurs in deeds inter vivos, if the writ is unreasonable and lesion proved, reduction will, as a matter of course, follow. Thus, a contract, unreasonable in itself, entered into by a habitual drunkard when in a state of excitement, from excessive drinking, almost amounting to madness, with a person who, at the time, held him in complete subjection, was set aside. It was held to be unnecessary in such a case to establish actual madness.

The cause of reduction in such cases is the coercion used by the grantee over the grantor while the latter was in a state of imbecility.

Review of leading Scotch Case.

In the decision of the Lord Justice Clerk — in the case of Duncan v. Martin, we find the whole subject of drunkenness very ably reviewed. This case is now the "leading case" which must guide in Scotland, the decision of all questions arising under this important head. We therefore append a report of his Lordship's remarks.

The issues in the case were as follows:—

1. Whether the Missive Offer and Acceptance No. 3 of Process, dated 14 June 1838 is not the deed of the pursuer?
2. Whether the said Missives were obtained by the Defender, through fraud and circumvention?

Or

or

3. Whether the Pursuer is indebted and resting owing to the Defender, the sum of £5,500, or any part thereof, with interest thereon, as the price of the lands mentioned in said Missive Offer and Acceptance.

His Lordship observed:- "Under the first issue, total incapacity must be proved. There is an obvious difference between total and partial drunkenness. If the jury were convinced that the mind was not gone, the circumstance of being under the influence of liquor will not do. But if there is a certain state of drunkenness, and fraud is alleged, it will be all taken into account,- the whole circumstances must be considered. . . . . I cordially agree with the Master of the Rolls that he cannot relieve a party merely because intoxicated; but if there is plying of liquor, this comes within the case; and here you have this proved. Look at the condition of the Pursuer when he landed at Martin's house. He was so drunk that he was not able to walk even with the aid of Rew. He was therefore unfit to transact business. He was not fit to buy for another and not fit to buy for himself. Then you have the evidence of the untimely hour; and that, during all the time the negociation was going on, drink was furnished to the Pursuer.

Lake

"Take all these circumstances along with you as ingredients of the case. You must look to the evidence of facility and lesion".

Accordingly, in the latest reported case – Taylor v. Provan, 10 June 1864 – where an action was raised for Implement of a Contract of Sale, and the Defender pleaded that he had been in a state of intoxication when the alleged Contract was entered into, – the Court held, that there being no evidence that the Defender was incapacitated by intoxication from entering into the bargain (although he was partially drunk) and that there being no averment of fraud or undue influence on the part of the Pursuer, the Contract was valid.

Ch: IV. Destruction or Mutilation of Testamentary Writs by Drunkards. Implied Revocation.

This is a question which has not yet, so far as I am aware, been the subject of judicial decision in Scotland; and our Institutional Writers are silent on the whole subject.

In looking over the means by which such a question could be solved, it would be necessary to consider the light in which the destruction of will by a lunatic viewed. The decisions which

which the English Courts have given in the latter class of questions, ruled in the judgment of Sir J. Harmen in the case of Brunt v. Brunt, dated so recent as February 1873. Here the testator, J. Brunt, after duly executing his will, contracted habits of drinking, and, before his death, he had several fits of delirium tremens. In one of these he tore his will, which was kept in an iron safe upstairs. On his recovery, he was told what he had done; and, though he expressed regret for it, he never made another will. The Judge, after taking time to consider, was of opinion that the case came within the principle of Borlase v. Borlase (4 Notes of Case 106). But he expressed a doubt whether the testator might not have confirmed after his recovery; and thus brought about an intestacy.

Force

Part VI

Perversion of the Power of Consent. Force and Fear.

The subject which falls to be considered is that technically known in Scotland as incapacity caused by "force and fear". The class of cases comprised under this heading do not require to allege weakness of mind as forming part of the grounds on which reduction is based. The persons whose deeds are sought to be reduced, may be of perfect mental capacity: but, as these deeds may have been granted under the effect of direct violence, or through fear, either of bodily injury or other cause, they cannot be said to be the deeds of the persons whose subscriptions they bear. There has been a direct or indirect (as the case may be) perversion of the power of Consent of the granters, and that want of the essential requisite of all deeds — consent — must of necessity invalidate the deed. Thus a deed was reduced which a wife had been concussed into granting through the use of great personal violence used towards her by her husband.(a) Where violence has been used, the proof of threats of such being repeated, has been found sufficient to reduce.

Direct or Indirect perversion of the power of consent.

The force, or the fear of it, which is necessary to invalidate a deed, depends greatly on the situation and temperament of the granter, particularly in the case of women.

(a) Cassie, 10, 279.

Force and Fear

Imprisonment

Imprisonment is one of the most useful instruments of intimidation in modern times. The general rule of law, however, is that imprisonment, under regular and formal legal process, does not constitute force necessary to reduce a deed granted either under the threat or the employment of confinement in order to induce payment. To constitute sufficient restraint to invalidate a deed, the arrest must have been illegal, or become so by the subsequent abuse of it. Thus, an arrest may be obtained for an improper purpose without just cause, or with just cause but without lawful authority,(a) or even with just cause and proper authority, but for an improper purpose.(b) In all such cases where a deed has been granted, it will be liable to reduction, as was seen in the case of Lutwidge v. Murray, where a Decree of the Sheriff of Dumfries was reduced as irregular and oppressive against a stranger who had been arrested on a border warrant and in that state had acknowledged a bargain.

Where the imprisonment is in the regular course of legal diligence, it will not amount to force and fear sufficient to invalidate a deed. This was explained by the Lord Ordinary in the case of Craig v. Paton.(c) His Lordship observed that it had been stated that the deed under dispute had been granted under the "immediate" incarceration of her husband. So far, however, as the Lord Ordinary can discover, there was no illegality in Craig (the grantee)

(a) Murray v. Spalding, M. 16,487.

(b) Farquharson v. McIntosh, 2 Brown's Sup: 634.

2 Fountainhall 345

(c) 13 Dec: 1865, 4 McFarlane 192: 38 Jurist 85.

grantee) stating that he would incarcerate his proper debtor. No doubt it is said that this statement was made to Mr. Paton in a police office, and that an officer of police was present, and aided in obtaining the Assignation. But it is not averred that anything was done or said by way of threat or otherwise to induce Mrs. Paton to grant the Assignation except the threat of incarceration of her husband, an act the legality of which in itself cannot be disputed."

A threat, therefore, to do a legal act or to subject the party to the legal consequences of a refusal to fulfil an engagement, does not constitute such a kind of intimidation as will invalidate any deed granted under its influence.

The deed thus extorted must, however be confined to the amount of the debt due[1a]; and it is not unlawful for the debtor to grant a Bond of Corroboration[b], but it must be strictly limited to the exact amount of the debt. So a Bond, in the case of Herriot v. Bird[c], was reduced. It had been granted by a tenant in prison on caption for bygone rent, but it contained not only a conveyance of moveables, but an obligation to find new caution for future rents. This was held as going beyond the ground of the caption and therefore extorted vi aut metu. And again, in the case of

(a) Arrat, Robertson's Appeals, 234; Bell, Dr. 16,515; Fraser, 13 Dec: 1810, J.C.

(b) Thomson v. Drowbray Dr. 12,371.

(c) Dr. 16,496.

of Nisbet v. Stewart[a], it was held that "to extort a discharge of any deed extraneous to the caption without any onerous cause for it, was utterly unwarrantable and reducible ob vim et metum".

When in favor of Third Parties.

But where a deed has been granted in prison or under the fear of it, if in favor of a third person with whome there is no collusion, the objection metu carceris, will have no effect whatever.

Threats of divulging some crime.

There is also a sort of terror, the operation of which may have the effect of taking away the entire consent of the party. The threat of divulging some crime, or even, where no crime has actually taken place, the mere imputation of such a thing, may be sufficient to create such a fear in the mind of the person, as to make him grant deeds to his prejudice. Such deeds will of course be set aside. For instance, where one party has acquired an undue influence over another by operating on his fears by threatening to bring ruin and disgrace on his son by inditing him for forgery[a], any agreement executed by the father while under such influence will be set aside with costs. Then where an aged man was in danger of violence, a Bond which his son granted in order to procure his father's release, was reduced.

The plea of "vis et metus" operates not only against the grantee, but against all third parties.

(a) M. 16, 512.

Pringle, 2 Brown's Sup: 27.

Carrison v. Marshale Pat: App: 659.

Farquharson v. Mc Intosh 2 Br: Sup: 634.

Willocks M. 1519; Wightman, M. 1521; Fraser 13 Decr. 1810, F.C.