Dr. Weigall, in seconding the vote of thanks, said that Dr. Brown's paper had opened up a field for possible abortion, on the ground that the moral law depended entirely upon economic conditions. That, at all events, was enlightening. There were cases when it was fair and reasonable that a pregnancy should not be allowed to go on—the result of unions between brothers and sisters, women in the family-way as the result of criminal rape. Before agreeing to terminate a pregnancy medical men should ask themselves the question: "Would I do this for nothing?" The knowledge of what their answer would be to that question would help them to arrive at a fairer judgment. He, too, would like to thank Dr. Brown on behalf of the meeting for his courage in coming to the meeting with such a controversial and far-reaching subject. He had great pleasure in seconding the vote of thanks.

TESTAMENTARY CAPACITY

By Clarence G. Godfrey, M.R.C.S. (Eng.), L.S.T.S. (Edin.)

A Meeting of the Society was held on 27th May, 1933, at the B.M.A. Hall, East Melbourne.

In the absence through indisposition of the President, Dr. C. H. Mollison, Mr. Mark Gardner presided.

The meeting was made the occasion of the reading by Dr. Clarence G. Godfrey, M.R.C.S. (Eng.), of a paper on "Testamentary Capacity."

Dr. Godfrey.—When I was invited to address the Members of this Society on the subject of "Testamentary Capacity"—which title should have been more accurately styled "Testamentary Incapacity"—I accepted that honour without realising that I would necessarily have to refer freely to many legal aspects which, while they might not be very well known to several of the medical members of our Society, are so familiar to the legal members—of whom there are great preponderance—as to be not particularly interesting. I trust, therefore, that I will not be regarded as claiming to have any knowledge of Law, other than what is usually set out in medical text books on this subject. It is obvious that in a paper on this subject, little, if any, new ground can be broken, but possibly it may invite discussion on what may be anomalies or desirable reforms, and may interest some of the members of my own profession who may not have had much individual experience in these matters.

By way of introduction, I will refer to the history of will-making. It may not be generally realized that there is no inherent right to dispose of one's possessions by making a will, whatever views one may have as to the rights of property in other respects. As a fact, at one time in the history of society such a right was regarded as incompatible with the right of property.[1] Research shows that in 1500 B.C. a form of will-making did actually exist in Egypt; but not until the time of Solon was it known in Greece. However, it reached a more definite recognition

in Rome at the time of the Twelve Tables, and it is generally accepted that one must attribute to the Romans the credit of first placing testation of property in the form which has now become the legal instrument known as a Will.

To quote from the monumental work on "Insanity and Law" of Singer and Krohn, originally the last will and testament was not a mode of distributing a dead man's possessions, but was one way of transferring the household representation to a new chief. Contrary to popular belief, the law has never allowed free and unlimited choice to testators in willing their property. Considerations of public policy and rights of family have always operated more or less against the absolute power of a testator to distribute his property just as his fancy dictates. The view of the Courts is that a person does not possess the inherent natural right to make a will, but that that right is created by Statute, and is therefore within legislative control. In fact, it is only by the grace of the law that a man may, by means of a last will and testament, be allowed to project his individual desires beyond the grave, and thus, to this extent only, be enabled to control property after death.

Regarding the development of the law of testamentary capacity as relating to insanity, there are, in its history, three definite stages, both in England and the United States. The first stage dates from the time when the earliest Court decisions were recorded, down to 1848. During this period, every contested will case in which the question of the mental capacity of the testator was involved, was determined on its own merits. The second stage covers the period from 1848 to 1870—the period inaugurated by the famous decree of Lord Brougham. His observations in adjudicating on the Will of Sarah Gibson in Waring v. Waring (1848, 6 Moore's P.C.C. 341) are deserving of careful study. "If the being or essence which we term the mind is unsound on one subject, provided *that* unsoundness is at all times existing on *that* subject, it is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness of mind as manifested by believing in the

suggestions of fancy as if they were realities, would break out; consequently it is just as absurd to speak of this as a really sound mind—a mind sound when the subject of the delusion is not presented—as it would be to say that a person had not the gout because, his attention being diverted from the pain by some other powerful sensation, 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 apparently rational that act may appear to be, or in reality may be." This doctrine remained unchallenged for more than 20 years, and in harmony with this decision it was held in the English Courts that insanity, however slight in degree, was relied on as proof of testamentary incapacity, and would invalidate a will made under its influence. That dictum was to the effect that the mind was *One and Indivisible,* and that unsoundness in one particular involved unsoundness in the whole; in fact, that mental disease was so subtle and intangible that no legal tribunal would be prepared to take the responsibility of defining its degrees, and the only safe measure was to regard any degree of insanity as fatal to civil capacity. In the case of America, however, most of the Courts went to the other extreme during this period. They held that a minimum of understanding was sufficient to establish testamentary capacity, and a decision in the case of Stewart v. Lispenard (26 Wendell N. York, 255) about this time set out that "weak minds differ from strong ones, only in degree; unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound." The circumstances in a will case in the New York Courts some fourteen years later were such that this doctrine was unequivocably repudiated. (Delafield v. Parish.)

The third period dates from the time when Lord Chief Justice Cockburn, in 1870, promulgated what has been described as his epoch-making decision in the well-known case of Banks v. Goodfellow (L.R. 5, Q.B. 549), and which resulted in the Courts reverting to the principles of former

days, when each case was determined on its own merits. Lord Cockburn sets forth in this decree in such clear and expressive language the measure of mental capacity that should be insisted on, that if it is not unduly prolonging the historical references in this address, I will, with your permission, quote it: "It is essential to the exercise of such a power" (testation) "that a testator should understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he sought to give effect; and, with a view to the latter object, that no disorder of the mind should poison his affections, pervert his sense of right, or prevent exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted upon. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicions or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises, nor is calculated to exercise, any influence on this particular disposition, and a rational and proper will is the result; ought we, in such a case, to deny to the testator the capacity of disposing of his property by will? No doubt when the fact that the testator had 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 an insane delusion has once been shown 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 where the will is, to use the terms of civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded. But when the jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect on the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed or guided by a Judge."

The difficulty of laying down legal rules as to testamentary capacity was indicated by Lord Cranworth, who said: "On the first head, the difficulty to be grappled with arises from the circumstances that the question is almost always one of degree. Between the case of a raving madman or a drivelling idiot, 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."

Various attempts have been made by authorities, both in text-books and in Court decisions, to establish arbitrary standards of testamentary capacity, but without success, inasmuch as new combinations of facts and circumstances arise in each new will case involving the mental capacity of

the testator, and we have to get back to the position that in contested will cases the question of testamentary capacity or incapacity becomes a question of *fact,* regardless of the test applied.[1]

It may be said that the competency of a testator at the time of making his will depends on the existence of four necessary elements—

1. A knowledge or an understanding of the nature of the business on which he is engaged when making the will;

2. Ability to remember the nature and extent of his estate or possessions;

3. A remembrance of the persons who by relationship or affection may reasonably have a claim to be the objects of his bounty;

4. Capacity to retain these latter in memory long enough to form a rational judgment in regard to them.

It will be seen, therefore, that mental capacity for testation resolves itself essentially into a question *of degree,* as well as fact. On the extent to which these four essentials are present depends the legal decision on the possession or otherwise of a disposing mind, and where such decisions are apparently inconsistent with others based on seemingly similar facts, such variations may be due to differing conceptions held by the Courts of the degree of these elements.

Regarding the first element—it should at least be conceded that a testator should understand that the document which he is executing purports to direct the disposition of his property on his death.[2] The real test is whether he has sufficient mind and memory to understand it. It has to be recognized that there is a lesser degree of mental capacity required for making a valid will than for transacting business or managing property or enjoying personal liberty. The transaction of ordinary business involves a contest of reason, judgment and experience, and the exercise of mental powers not at all necessary to the testamentary disposition of property.[1] The reason is that most people have at some time or other considered the mat-

ter of disposing of their property or possessions by will, and, therefore, when they put their desires in writing, it becomes easier for them to state those desires than it would if they had to carry out some business transaction which was unfamiliar, and involving a "competition with other minds holding other views in the business matters under consideration."[1]

Regarding the second element—the expression used is hardly sufficiently explanatory. It is not necessary to require details of the exact extent or value of the items of his belongings; only a fair estimate is requisite. It is sufficient that he was mentally capable of doing so.

Regarding the third qualification—remembrance of his relatives, etc. The importance of this is emphasized by the words of Lord Erskine in the case of Harwood v. Baker (1840, 3 Moo. P.C.C., 282): "The protection of the Law is in no case more needed than in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration."

We now come to the subject of insane delusions. While the question of sanity or insanity of a testator is one of fact, insanity and testamentary incapacity are not necessarily equivalent terms. Take the case of a testator suffering from delusional insanity. Can he validly make a will? His delusions may be such as will invalidate any will made by him. The Courts hold, however, that delusions on a given subject may not be incompatible with sanity on other matters. Sometimes this has been difficult for the Courts to determine. Delusions have been variably defined. Perhaps the simplest is "a spontaneous conception and acceptance as a fact of that which has no existence except in the imagination, and an inability to correct it in the face of all evidence to the contrary." Perhaps this definition is not altogether satisfying. But, whatever the definition chosen to express the legal conception of an insane delusion, it is clear that it must be such an aberration as indicated an

unsound state of the mental faculties, as distinguished from a mere belief in the existence or non-existence of certain supposed facts or phenomena based on some sort of evidence.[1] For instance, if a person has some reason for regarding some phenomenon or manifestation which he interprets in a way which may be disputed by others or which may be founded on a misunderstanding, this is not an insane delusion which would upset his will.

The following case, taken from the Indiana (U.S.A.) Law Reports, illustrates this. The testator had experimented with a metal ball suspended from a string which would undergo peculiar vibrations when hung over a silver coin beneath a carpet. From this, he believed he would be able to find buried treasure in the fields, and there was a certain basis for his belief. He had holes dug so extensively everywhere that he became a nuisance and had to be interfered with. But this could not be regarded as an insane delusion, but rather an erroneous belief. The opinion of Mr. Justice Hadley in this case was: "The fact is notorious that many intelligent and conservative people claim the power of locating water in the ground by a forked stick, and thousands of wells have been dug and are still being dug. Many scholars and successful business men sincerely believe in spiritualism and in being able, through a naturally qualified medium, to converse with and be advised by departed spirits, and think they recognize voices and handwriting of the dead. Mental phenomena are as various as the hues of the autumnal forest."

So also with regard to religious beliefs. No creed or religious conviction can be properly regarded as a delusion. Beliefs in such matters as thought-reading, spiritualism, fortune-telling, telepathy, witchcraft, and the like do not affect the soundness of a man's will, because such cannot be regarded as evidence of his mental unsoundness. Although at one time, even a condition of eccentricity was enough to invalidate a will, according to the decrees of both England and America, both countries have long ago discarded this doctrine. Nowadays there is rather an inclination to regard

a person suffering from a delusion as being capable of normally exercising his other mental faculties as if they were entirely unimpaired; but those who have had extensive experience of the insane realize that such delusion is only the predominant feature of a mind damaged in other important aspects. Henry Maudsley, in his well-known work on "Responsibility in Mental Disease," says: "The very fact that an insane delusion does persist in the mind is proof enough that a man cannot reason soundly; he will reason insanely, feel insanely, and sooner or later act insanely. Its foundations are not laid in reason, but in disease; and it holds its ground in the mind just as a cancer or other morbid growth holds its ground in the body, by drawing to its own use and converting to its own nature the nutriment which should support healthy activity, and so render its existence impossible."

Nevertheless, unless it is clear beyond doubt that a delusion held by a testator is an insane one, and the will made by him is the product of that delusion, the Courts will nowadays not be disposed to upset that will. Such a delusion sufficient to void a will must be one which controls the mind of the testator, and destroys his freedom of action. No matter how sound the mind of the testator may have been in other respects, if his disposition of his property was influenced by an insane delusion his will is invalid.[1] The will was no longer under the guidance of reason. It had become the creature of the insane delusion. In the case in which Lord Cockburn gave the decree already quoted, it appeared that the testator had been confined as a person of unsound mind for some months twenty-two years before making his will, and died seven years after making his will. During the whole of that time up to his death, he had delusions that he was molested by a man who had long been dead, and that evil spirits pursued him which he believed he could see. Although the evidence as to testator's general capacity to manage his affairs was contradictory, the Court favoured the opinion that he had sufficient mental power for this work. It was shown that the delusions were

not of a sort to affect his bequest. The man whom he believed molested him had long been dead, and he was not a relative; and his children would not in any event have been the natural objects of testator's bounty. The visual hallucinations and persecution by evil spirits had no direct relation to the matter in dispute. No evidence was given that any of the delusions alienated from his affections any of his relations or friends, or injured his mind so as to prevent due consideration of their claims. The jury found testator was capable of making a valid will. In this case it should be noted that Lord Cockburn ruled that "where 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,* such delusion did not destroy the capability to make the will." This, I take it, recognizes two separate potentialities, a delusion which, while capable of having influence on the disposition, might not exert it, and a delusion which from its very nature was not capable of having such influence. Lawyers have a term, Lucid Interval, by which they imply that a person claimed to have had mental incapacity has had a remission of such a degree as to be temporarily capable of transacting business or performing such acts as making a will. This does not mean the cessation or suppression of the symptoms of the mental disease from which he is suffering, it means only the recovery of *testamentary* judgment, memory and will. In other words, he may have been of unsound mind, and yet of sound disposing mind. And so, the question to be determined is one of *fact.*

Regarding will-making and the question of testamentary capacity, we have to realize that disturbances of the mental functions of the brain are not limited to those comprised under technical insanity. The senile dotard, the apoplectic, the alcoholized individual, and the person confused by fever, or physically weakened from disease and approaching death, or who is so enfeebled that he is made facile and unresisting; all these may need to have their testamentary capacity tested, and the same tests as already described will

apply. The degree of the soundness of mind, and not the condition of his bodily health, decides his capacity as a testator. While on this subject, the difficulties of determining the mental state of a person in a state of serious bodily illness is shown in the following case: "A business woman, possessed of considerable wealth, became ill. Her physician pronounced her physical condition grave; a lawyer was called in for the purpose of assisting the patient in executing her will. He observed that the patient was very weak, but she answered responsively all his questions as to the nature and extent of her property, the disposition of the same, and the natural objects of her bounty. He reduced the will to writing, and it was duly executed. About three months later, during convalescence, the woman stated that she had a faint recollection of signing some document while she was ill, and inquired what it was. She was startled at learning she had signed a will disposing of her property, and, on her recovery, visited her lawyer's office, and, on reading her will, she declared she had no intention of disposing of her property in the manner and to the persons set out in the document, and that the person named as executor was one to whom she had had a distinct aversion for years, and in whom she had no confidence whatever. The will itself was a logical document, and on its face was in every respect a sane will. But it did not express the intention of the maker, a fact which would not have been disclosed had not the patient recovered from her serious illness. The document proved to be but the emanation of a mind made unsound by severe and protracted illness, and was revoked on recovery. This is an illustration of the occasional instance when the context of the will itself is not the best evidence of the testator's sanity."[1] As a contrast, the case is recorded by an eminent alienist. Sir Thomas Clouston, in which he was called to see a man who was dying of bronchitis and heart disease, with his breathing impaired by the non-oxygenated blood supplied to his brain. He had made a will in favour of a former mistress, and was in a great state of remorse, and wanted

to leave his money, which was considerable, to his relatives. But he could not, twice over, remember the provisions—these being a little complicated. The alienist refused on this account, on two occasions, to say that he had testamentary capacity. But, as sometimes happens, he became more clear in mind before death, and the doctor was hurriedly sent for late one night to see him. He clearly went twice over the provisions he wanted made in his will, and told him why he wished these made. His reasons were natural and right. The lawyer was there with the document drawn up, and the testator had just power to make his mark before he died. Yet this will was held good in law in spite of an attempt to upset it.[3] Sometimes one finds a case in which a testator may exhibit an unreasonable prejudice against a relative; but this does not form grounds for upsetting his will unless this aversion is based on an insane delusion. Such delusion is at times difficult to establish. On the assumption that a man would naturally will his property for the benefit of his children, unless good reason existed for his doing otherwise, the law has always been willing to investigate the claims of children or other relatives who have been disinherited for no apparent reason. In the case of Dew v. Clarke (1826, 3 Add., 79), the testator took a persistent dislike to his only child—a girl who, from all evidence, was worthy of all love and esteem, and whom her father regarded hitherto with the warmest affection, but his affection underwent an entire change. He insisted that the child's mind should be entirely subjected to his, and that she should confess her faults to him; and because she did not do so, he treated her as a reprobate and an outcast. He was cruel to her in her youth, beat and punished her in all sorts of extraordinary ways throughout his life, as if she were of the vilest character, instead of which, apparently, she was one of the best of women, and ultimately he disinherited her. Testator was a medical man, and all his life appeared to all outsiders whom he met socially and in business as a rational and normal being; yet on the ground that his conduct towards his daughter could

only be explained as the behaviour of a man with an insane prejudice that could only be the product of an insane delusion, the will was set aside. Here, insane aversion took the place of natural affection.

When the legal adviser of a person about to make a will calls in a medical man to examine into the testamentary capacity of that person, it will be seen how important it is to take full and comprehensive notes at the time of making the examination, and to trust nothing to memory, as it may be months or even years between the examination and the time when such evidence may be required. Also he should insist on seeing the testator alone, or at all events only in the presence of the nurse (although even her presence may be undesirable under some circumstances), for at least a part of the examination; and carefully note whether he appears to be controlled or influenced by any person or persons. An alienist records the case of an old dying man confessing to him, when alone with the doctor who was examining him as to testamentary capacity, that his nurse, who was also his niece and constant companion, was really compelling him against his judgment to make a will in her favour, his own volitional and resistive power being weakened by his illness and his dependence on her. Where certain relations of intimacy and confidence exist between a testator and beneficiary, such as doctor and patient, legal adviser and client, spiritual adviser and penitent, guardian and ward, the Law requires strong evidence of *full* capacity. It is also very important to carefully determine if the testator is free from the influence of alcohol or any other drug. As the question of memory may be an important one, it should be tested thoroughly, both for recent and remote events. That for remote events may be apparently unimpaired, while for recent ones, extremely defective. This condition may be well marked in senile and other forms of mental disorder. One should ascertain from testator whether he has ever previously executed a will, and if so, how it differed from the proposed will and why. If the will has been made just previously, and a possibility of its being

challenged has arisen, have the will produced, and test his memory of it. If the disposition appears unnatural, ascertain the motive therefor. It is a good plan in these examinations to require the testator to go over the disposition he desires to make, and after a reasonably brief interval, to have him repeat them. How important it is that a skilled and experienced medical man should be called in to examine a testator as to testamentary capacity when large estates are to be disposed of by him has been pointed out by Sir Thomas Clouston, who stated he was once told by a distinguished counsel with a large experience in the Probate Court that he had never known a will upset where a reputable doctor had witnessed it, after examining into the testator's state of mind, and an agent of repute had drawn it, neither taking any benefit under its provisions.[3]

It has been suggested that a lawyer calling in a psychiatrist to examine the mental capacity of a testator on the day he is to make his will, would by his very act invite suspicion that there may be something sinister where none exists; but where contention among potential beneficiaries may be apprehended, it is surely a safe measure. As against a routine practice of having a testator so examined, there is of course the liability that he may resent inquiries about his memory, etc., and his reasons for exercising his choice in directions that may appear unnatural to his questioner, and the doctor may lose his patient or the lawyer his client.

Medical men are of course aware that in civil cases medical confidences from patients, and medical information acquired in the course of examination and treatment, are professional secrets and privileged, and cannot be given in evidence. It may not be known, however, that, as in criminal cases, this does not apply in cases involving a question of insanity. It is not difficult, however, to visualize a contested will-case in which this principle is applied, wherein evidence of vital importance may be excluded —evidence which might conclusively establish mental incapacity.

One word further on cases that present great difficulties

to medical examiners for this purpose. Cases of aphasia are at times met with, where the application of tests of mental capacity for making a will may tax the ingenuity of the examiner, as, for instance, where the aphasic may be unable to write, and the difficulty of making out the testator's wishes is obvious.

With regard to opinion witnesses—the mental experts—the difficulty is that they are not consulted at the time of the making of the will, when the actual mental capacity of the testator could be investigated, but they are put in the witness box, perhaps years after he is dead, supplied with mostly one-sided evidence, probably with information that is incomplete, and with every motive operating on the side that consults them to secure from them an opinion favourable to its own case. This tendency of each of the parties to view the testator's condition in the light most satisfactory to his own contention is without conscious dishonesty. The consequence is that criticism on the part of some people often arises as to the alleged bias of medical experts when called as opinion witnesses. This is mostly without foundation, and is due to the peculiar function and nature of expert evidence. Concerning non-medical expert witnesses there appears to be difficulty in conceding that there may be honest difference of opinion. Real estate experts are called by the two sides to testify as to the probable benefits of certain public improvements to adjacent property and to the special assessment. On the same statement of facts as to the nature and character of improvements, two real estate specialists of vast experience may differ widely, perhaps by thousands of pounds, in their conclusions, but little or nothing is heard of bias. Similarly with railway experts testifying to the distance a train of fixed weight and length travelling at a certain speed would go before certain braking would bring it to a stop. Even with the definite facts of weight, momentum, speed, etc., to reason from, we may get many different opinions from highly trained experts, and yet the question of bias or payment is never thought of.[1] Contrast the

position of the medical expert in will cases. He has a set of facts placed before him by the counsel for the side which has engaged him, and which are given in evidence. He then expresses his opinion on these facts, and gives his reasons as to the testamentary capacity disclosed thereby. The opposing counsel produces another mental expert, and places a different set of facts, likewise given in evidence, and secures a different opinion from his specialist. The opinions of each of these experts may honestly differ, without detriment to their integrity or ability, because each opinion is founded on a different set of facts. Apropos of the position of the mental expert in cases of testamentary incapacity tried before a jury, there has been in previous discussions in this Society on medical evidence and subjects, a plea for expert assessors. Sir Maurice Craig, in his work, "Psychological Medicine," put the matter thus: "Would not a Judge assisted by two experts in mental disease, as assessors, form a Board more competent to deal with questions of so difficult a nature? The assessors would supply the knowledge of the special subject, so requisite in any tribunal, and the lawyer would keep the inquiry within bounds and direct its course. It seems strange that our Courts should be granted the assistance of the Elder Brethren of Trinity House when a story of the sea is to be told, while the infinitely more obscure secrets of psychology should be offered to them for their unaided solution. This, however, is a defect due to the Legislature and not the administrative body of the law. Such a change cannot be wrought by Bench or Bar. It must originate with Parliament."

This concludes my address, and in doing so I would like to explain that it is mostly a compilation of the views and opinions of various writers on the subject, and of records. I have quoted freely from Singer and Krohn's works, and from Craig and Beaton, and other authors.

REFERENCES:

(1) "Insanity and Law," Singer & Krohn.
(2) "Psychological Medicine," Craig & Beaton.
(3) "Mental Diseases," Clouston.

DISCUSSION

Mr. Justice Lowe said his first word must be one of appreciation and thanks to Dr. Godfrey for his very interesting paper. Such a treatment could not fail to stimulate the interest of all those present in the various topics raised in the course of the address. It was desirable, as was clearly pointed out, that there should be a close study of the subject with a view to understanding the different views expressed which had puzzled many lawyers from time to time. They had been puzzled, not so much by the decisions of the Court, but by the views of the various Judges who had made pronouncements in giving their decisions on cases. At one time it had been enunciated clearly by Lord Brougham that testamentary capacity was to be judged on the footing that a mind was one and indivisible, that if it was infirm in one capacity, that infirmity was sufficient to impair the whole mind. That view had some vogue for a considerable time, but it was doubtful if it ever expressed the view of the majority of judges. But after the decision in Banks v. Goodfellow, the test which was laid down had become a commonplace one. Medical men frequently had to examine patients to form an opinion as to testamentary capacity, and what they had to ascertain seemed to be quite clearly laid down in the subdivisions to which Dr. Godfrey referred.

He (Mr. Justice Lowe) always asked himself three questions:—

(1) Did the testator understand the nature of the act he was called upon to perform?

(2) Was the recollection of the testator sufficient to recall the natural objects of his bounty and the size, extent and nature of his estate?

(3) If the first two questions were answered yes, then there was a third question: Had he sufficient judgment to weigh the claims of those having natural claims upon his bounty and to discriminate between them?

If he was satisfied on those three points, he concluded that the testator was of sound mind, memory and understanding. The question whether capacity existed throughout life was immaterial, as he understood the law. If the capacity existed and the testator had the necessary recollection and judgment to exercise it when the will was made, that was sufficient. If the testator had capacity, the fact that he had exercised it in a capricious fashion was

not sufficient to set aside the will. The testator, being capable, might exercise that capacity in any manner that pleased him.

Differing decisions in various cases had no doubt appeared confusing to many medical men. But the confusion was not confined to medical men; it extended to lawyers and laymen. The differences would be found to be due to differing views of the facts. Facts that appealed in one way to one judge did not so appeal to another. The confusion was, moreover, generally the result of comparing the facts of different cases as read in the daily press. But it might be wise to recall perhaps that it was not those published facts that decided the case, but the whole of the facts in evidence before the Court. There was always the possibility on the part of a judge, as of every human being, of erring. An interesting illustration of the kind of problem that arose might be given. He recalled a case in which the division of his estate by the testator was the ground of attack on his will. An old man of 94 years of age had over a period of years made many wills, in all of which he had held an even hand in passing the benefits of his estate to two daughters. At 94 he made another will, making a different distribution, giving far greater benefits to one daughter than another. His stated reason was that during his lifetime he had given a greater benefit to the extent of £20,000 to one daughter than to the other. As a matter of fact, on the trial it was proved that the daughter who was said to have been favourably treated had received during the testator's lifetime much less than the other. The learned judge came to to the conclusion that the testator had suffered from a delusion in believing that he had conferred benefit on one daughter to a far greater extent than he actually had, and refused to uphold the will. One of the benefits of such a body as the Medico-Legal Society was that to the lectures and the questions raised by them could be brought the criticism of differently trained minds. There was the question of the treatment of the expert witness. This was one brought prominently under notice at times, and which caused a deal of feeling and surprise in the minds of witnesses. The witness often had submitted to him a copy of the evidence which had been given in the case up to the time of calling him as a witness. On that evidence, the doctor was asked to form his opinion of the testamentary capacity of the testator. The witness was often surprised that he was limited to expressing an opinion on hypotheses

put to him. But at that stage the facts had not been determined. It was not for the witness to determine the facts, but for the judge. What happened when a case came into Court? First, one could be fairly sure if there was no difference of opinion the case would not come before the Court—but if there was a difference of opinion, it was almost certain that witnesses would be called to allege incapacity, and other witnesses to allege capacity. The judge then had to make up his mind which witness to accept and which to reject. That determined, he really would have no difficulty in deciding what question to put to the medical witness to ask his opinion on. But that stage had not been reached when witnesses were called, and consequently counsel could only base their questions on a series of hypotheses. But it might be said: "Had not a medical man a trained professional mind and a keen intellect, and therefore was he not in a position to form a judgment as to where the truth of those conflicting statements lay?" He asked them to consider for a moment how the conflict in opinions or statements came about as to the condition of the person whose will was in dispute. The statements were made by witnesses, *viva voce*, and the medical man was given a written record of the statements. If the medical man were to see the person giving his evidence, he might notice certain hesitancies in manner, for instance, which would not appear so clearly in the typewritten evidence. But it was on that *viva voce* evidence that the judge made up his mind as to what was the true set of facts, and it was on that evidence that he applied the test the law required him to make. Another matter on which he desired to say a few words from his own experience, a matter raised by the lecturer, was the attitude of the Court towards the expert witness. The Court was always ready and anxious to get the views of medical men in any matters which would or might instruct the mind of the Court, for instance, as to the nature of the disease from which the testator or testatrix was suffering; its likely effects on the mind and other matters of that kind were always of great help to the Court, and the Court was always grateful to receive them. But what the Court did not do was to allow the expert to say whether the person was capable of making a will or not. It frequently got great assistance from medical witnesses, who generally gave their evidence with great clearness and great moderation, proving the utmost help in the matter before the Court for determination. He

again expressed his appreciation to the lecturer for his paper.

Dr. J. K. Adey said that the question of testamentary capacity presented many aspects to the medical man called upon to give an opinion. Very often a doctor could only say that at the time of doing a described action the subject was insane, but that at other times and under other circumstances it may well be that he was sane.

Mr. E. G. Coppel directed attention to the fact that persons under twenty-one years were in law denied testamentary capacity, unless they were in actual military service, when, by Statute, testamentary capacity was granted to them. He pointed out that the doctor's opinion in a given case did not settle the question of testamentary capacity, but merely formed part of the evidence before the tribunal whose duty it was to decide the question. In Victoria, juries rarely are called upon to determine questions of testamentary capacity, and greater consistency in verdicts is obtained by reason of the judges sitting alone to decide such questions. When considering whether a man is subject to delusions or the like, it must be borne in mind that social evolution played a most important part, and that beliefs, considered irrational in one age, often came to be accepted without question. Any person in the 12th century who expressed a belief that this world was round would have been held, in the popular view, to be hugging a delusion.

Dr. R. S. Ellery said that a medical man figured in testamentary capacity cases in two capacities. He might be called to give evidence of the actual condition of the testator as known to him by direct observation. His role then is much easier than when he is called upon to express an opinion on facts, or alleged facts, narrated to him or forming part of the evidence. In the second capacity very often he found it difficult to assist the Court. He mentioned the subject of undue influence, and said that the pathological susceptibility of persons suffering from mental aberrations was one worthy of very full consideration.

Mr. R. R. Sholl said that it was only during the last century that the capacity for making wills in regard to property other than land had been reserved to persons of twenty-one years. Until 1837, the law enabled boys of 13 and girls of 12 to make wills. The Greeks had always permitted the making of wills, and Mohammedan law likewise

always permitted it. Hindu law did not, until the accession of the English law in India. Roman lawyers had arrived at much the same conclusions concerning testamentary capacity as English lawyers. Under Roman law, a person *infuriosus* could make a valid will if he made it in a lucid interval. Roman law required, however, civil capacity as well as mental capacity. To make a valid will under our law, a person had to have reason, and hence a person blind, dumb and deaf cannot make a will. Possession of one of those faculties, if the testator were shown to have sufficient knowledge of his estate and those having claims on it, would enable a valid will to be made. He suggested that the law might provide that a person making a will should be examined by two medical examiners, and that each will should be accompanied by a certificate, in the prescribed form, of the result of that examination. Such a provision would lighten the task of the Courts. Another possible reform would be to restrict the testator's bounty to those persons naturally entitled to it.

Mr. H. R. Chomley said that the question of testamentary capacity often depended on the nature of the will. A man might be well enough to make a simple will, but not well enough to give the detailed instructions necessary to enable his lawyer to prepare a complicated will. That difficulty often confronted the practising lawyer when he is told by the medical attendant, "Don't spend more than twenty minutes with the patient." Under such circumstances the lawyer often had an uneasy feeling that the will thus prepared might not represent truly the testator's instructions.

Mr. Justice Dixon said he really had nothing to say which was likely to throw any light on the subject, but he wished to congratulate Dr. Godfrey on the researches he had made in the law, and the very able manner in which he had discussed it. He was quite in sympathy with Dr. Adey's statement that the law seemed to be seeking the unattainable—a clear statement of the unclear. It was true that one of the bases of the present state of society is the power of the law to do justice. But was that going to be found by looking into people's minds to find some hidden intention instead of endeavouring to determine the true nature of external acts? If such investigations into what a man thought were successful, the chances are it would be found that he never thought at all. The fact of the matter was that through a long period of development

society had made for itself a very useful system—a system which passed judgment on external appearances. But to-day little attention is paid to outward objective appearances. The state of mind was considered and usually determined on the information or opinion of somebody who may or may not have seen the testator and who formed his opinion upon what somebody else said the testator said or did, or intended to say or do; incidentally the information of a witness, who was more or less concerned himself in the destination of the property the testator left behind him. With regard to Mr. Chomley's question, he thought that a person making a will under such conditions was fortunate in being able to distribute his estate according to the judgment of a solicitor of repute and not according to his own. The fact of the matter was, as Dr. Godfrey had adequately shown, that the law had adopted an uncertain standard or test. When that test was adopted, medical knowledge was probably less helpful than it is to-day. Even to-day, he doubted whether, in the settlement of these matters, very much significance was attached to modern medical explanations of the deceased's conduct and testamentary eccentricities. But there had been set a standard or test of his capacity. Some might remember the standard of testamentary capacity which, according to Charles Lamb's letters, he applied to himself. In view of his voluntary subjection to restraint, he thought his intended executor might doubt his capacity, and to reassure him, he wrote to him that he had tested his capacity and found that by a good light and with large print he could read the Lord's Prayer without many mistakes. What doctor would like to certify to the testamentary capacity of the author of the Essays of Elia? He suggested that such matters be left to Judges, who, while no doubt they made many mistakes, had the advantage, as one speaker had said, of having trained minds. The real difficulty of the Court was not to determine that the man's intelligence was sufficient to make some sort of disposition in the race, which was often close, between death and the demands of the survivors to enjoy his property, but to decide what pressure was put upon him in either advanced age or at the close of life to make that disposition. The difficulties resulting from that condition described by Dr. Ellery as pathological susceptibility were of the nature of a modern complex, caused nine times out of ten by the

psychology of acquisitive relations bringing pressure to bear on an enfeebled intelligence possessing property.

Dr. Murray Morton described a case he had of a balloonist who was in the habit of dropping out of his balloon with a parachute from a height of 5,000 feet. In one hurried descent he was injured. On examination, an operation was decided to be necessary, but the patient refused to take an anaesthetic until he had made his will. He recovered, but if he had not, nice questions of the testamentary capacity of a parachutist might have arisen.

Dr. W. Ostermeyer said that some provision should be made to meet the case of people who suffered from aphasia, and who by reason of that affliction could understand affairs but were not able to express their thoughts in words.

Dr. L. S. Latham pointed out that many difficulties arose because of the ineradicable superstition that to make a will was to hasten death. Consequently many wills were made when the testators were ill and at death's door. Wills should be made when the testators were in sound health.

Mr. C. H. Eager suggested that much of the difference of opinion between the professions arose from failure to differentiate between acute insanity and testamentary incapacity. Each profession approached the matter from a different angle, and confusion thus arose. The lecture should do much to clear up the confusion.

Mr. Rigby proposed, and Mr. Justice Lowe seconded, a vote of thanks to the lecturer, Dr. Godfrey. The vote was carried by acclamation. In acknowledging the vote of thanks, Dr. Godfrey expressed himself indebted to those speakers who had contributed to the highly interesting and stimulating discussion upon his paper.

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TESTAMENTARY CAPACITY

By Clarence G. Godfrey, M.R.C.S. (Eng.), L.S.T.S. (Edin.)

A Meeting of the Society was held on 27th May, 1933, at the B.M.A. Hall, East Melbourne.

In the absence through indisposition of the President, Dr. C. H. Mollison, Mr. Mark Gardner presided.

The meeting was made the occasion of the reading by Dr. Clarence G. Godfrey, M.R.C.S. (Eng.), of a paper on "Testamentary Capacity."

Dr. Godfrey.—When I was invited to address the Members of this Society on the subject of "Testamentary Capacity"—which title should have been more accurately styled "Testamentary Incapacity"—I accepted that honour without realising that I would necessarily have to refer freely to many legal aspects which, while they might not be very well known to several of the medical members of our Society, are so familiar to the legal members—of whom there are great preponderance—as to be not particularly interesting. I trust, therefore, that I will not be regarded as claiming to have any knowledge of Law, other than what is usually set out in medical text books on this subject. It is obvious that in a paper on this subject, little, if any, new ground can be broken, but possibly it may invite discussion on what may be anomalies or desirable reforms, and may interest some of the members of my own profession who may not have had much individual experience in these matters.

By way of introduction, I will refer to the history of will-making. It may not be generally realized that there is no inherent right to dispose of one's possessions by making a will, whatever views one may have as to the rights of property in other respects. As a fact, at one time in the history of society such a right was regarded as incompatible with the right of property.[1] Research shows that in 1500 B.C. a form of will-making did actually exist in Egypt; but not until the time of Solon was it known in Greece. However, it reached a more definite recognition

in Rome at the time of the Twelve Tables, and it is generally accepted that one must attribute to the Romans the credit of first placing testation of property in the form which has now become the legal instrument known as a Will.

To quote from the monumental work on "Insanity and Law" of Singer and Krohn, originally the last will and testament was not a mode of distributing a dead man's possessions, but was one way of transferring the household representation to a new chief. Contrary to popular belief, the law has never allowed free and unlimited choice to testators in willing their property. Considerations of public policy and rights of family have always operated more or less against the absolute power of a testator to distribute his property just as his fancy dictates. The view of the Courts is that a person does not possess the inherent natural right to make a will, but that that right is created by Statute, and is therefore within legislative control. In fact, it is only by the grace of the law that a man may, by means of a last will and testament, be allowed to project his individual desires beyond the grave, and thus, to this extent only, be enabled to control property after death.

Regarding the development of the law of testamentary capacity as relating to insanity, there are, in its history, three definite stages, both in England and the United States. The first stage dates from the time when the earliest Court decisions were recorded, down to 1848. During this period, every contested will case in which the question of the mental capacity of the testator was involved, was determined on its own merits. The second stage covers the period from 1848 to 1870—the period inaugurated by the famous decree of Lord Brougham. His observations in adjudicating on the Will of Sarah Gibson in Waring v. Waring (1848, 6 Moore's P.C.C. 341) are deserving of careful study. "If the being or essence which we term the mind is unsound on one subject, provided *that* unsoundness is at all times existing on *that* subject, it is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness of mind as manifested by believing in the

suggestions of fancy as if they were realities, would break out; consequently it is just as absurd to speak of this as a really sound mind—a mind sound when the subject of the delusion is not presented—as it would be to say that a person had not the gout because, his attention being diverted from the pain by some other powerful sensation, 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 apparently rational that act may appear to be, or in reality may be." This doctrine remained unchallenged for more than 20 years, and in harmony with this decision it was held in the English Courts that insanity, however slight in degree, was relied on as proof of testamentary incapacity, and would invalidate a will made under its influence. That dictum was to the effect that the mind was *One and Indivisible,* and that unsoundness in one particular involved unsoundness in the whole; in fact, that mental disease was so subtle and intangible that no legal tribunal would be prepared to take the responsibility of defining its degrees, and the only safe measure was to regard any degree of insanity as fatal to civil capacity. In the case of America, however, most of the Courts went to the other extreme during this period. They held that a minimum of understanding was sufficient to establish testamentary capacity, and a decision in the case of Stewart v. Lispenard (26 Wendell N. York, 255) about this time set out that "weak minds differ from strong ones, only in degree; unless they betray a total loss of understanding, or idiocy, or delusion, they cannot properly be considered unsound." The circumstances in a will case in the New York Courts some fourteen years later were such that this doctrine was unequivocably repudiated. (Delafield v. Parish.)

The third period dates from the time when Lord Chief Justice Cockburn, in 1870, promulgated what has been described as his epoch-making decision in the well-known case of Banks v. Goodfellow (L.R. 5, Q.B. 549), and which resulted in the Courts reverting to the principles of former

days, when each case was determined on its own merits. Lord Cockburn sets forth in this decree in such clear and expressive language the measure of mental capacity that should be insisted on, that if it is not unduly prolonging the historical references in this address, I will, with your permission, quote it: "It is essential to the exercise of such a power" (testation) "that a testator should understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he sought to give effect; and, with a view to the latter object, that no disorder of the mind should poison his affections, pervert his sense of right, or prevent exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted upon. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicions or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises, nor is calculated to exercise, any influence on this particular disposition, and a rational and proper will is the result; ought we, in such a case, to deny to the testator the capacity of disposing of his property by will? No doubt when the fact that the testator had 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 an insane delusion has once been shown 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 where the will is, to use the terms of civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded. But when the jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect on the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed or guided by a Judge."

The difficulty of laying down legal rules as to testamentary capacity was indicated by Lord Cranworth, who said: "On the first head, the difficulty to be grappled with arises from the circumstances that the question is almost always one of degree. Between the case of a raving madman or a drivelling idiot, 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."

Various attempts have been made by authorities, both in text-books and in Court decisions, to establish arbitrary standards of testamentary capacity, but without success, inasmuch as new combinations of facts and circumstances arise in each new will case involving the mental capacity of

the testator, and we have to get back to the position that in contested will cases the question of testamentary capacity or incapacity becomes a question of *fact,* regardless of the test applied.[1]

It may be said that the competency of a testator at the time of making his will depends on the existence of four necessary elements—

1. A knowledge or an understanding of the nature of the business on which he is engaged when making the will;

2. Ability to remember the nature and extent of his estate or possessions;

3. A remembrance of the persons who by relationship or affection may reasonably have a claim to be the objects of his bounty;

4. Capacity to retain these latter in memory long enough to form a rational judgment in regard to them.

It will be seen, therefore, that mental capacity for testation resolves itself essentially into a question *of degree,* as well as fact. On the extent to which these four essentials are present depends the legal decision on the possession or otherwise of a disposing mind, and where such decisions are apparently inconsistent with others based on seemingly similar facts, such variations may be due to differing conceptions held by the Courts of the degree of these elements.

Regarding the first element—it should at least be conceded that a testator should understand that the document which he is executing purports to direct the disposition of his property on his death.[2] The real test is whether he has sufficient mind and memory to understand it. It has to be recognized that there is a lesser degree of mental capacity required for making a valid will than for transacting business or managing property or enjoying personal liberty. The transaction of ordinary business involves a contest of reason, judgment and experience, and the exercise of mental powers not at all necessary to the testamentary disposition of property.[1] The reason is that most people have at some time or other considered the mat-

ter of disposing of their property or possessions by will, and, therefore, when they put their desires in writing, it becomes easier for them to state those desires than it would if they had to carry out some business transaction which was unfamiliar, and involving a "competition with other minds holding other views in the business matters under consideration."[1]

Regarding the second element—the expression used is hardly sufficiently explanatory. It is not necessary to require details of the exact extent or value of the items of his belongings; only a fair estimate is requisite. It is sufficient that he was mentally capable of doing so.

Regarding the third qualification—remembrance of his relatives, etc. The importance of this is emphasized by the words of Lord Erskine in the case of Harwood v. Baker (1840, 3 Moo. P.C.C., 282): "The protection of the Law is in no case more needed than in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration."

We now come to the subject of insane delusions. While the question of sanity or insanity of a testator is one of fact, insanity and testamentary incapacity are not necessarily equivalent terms. Take the case of a testator suffering from delusional insanity. Can he validly make a will? His delusions may be such as will invalidate any will made by him. The Courts hold, however, that delusions on a given subject may not be incompatible with sanity on other matters. Sometimes this has been difficult for the Courts to determine. Delusions have been variably defined. Perhaps the simplest is "a spontaneous conception and acceptance as a fact of that which has no existence except in the imagination, and an inability to correct it in the face of all evidence to the contrary." Perhaps this definition is not altogether satisfying. But, whatever the definition chosen to express the legal conception of an insane delusion, it is clear that it must be such an aberration as indicated an

unsound state of the mental faculties, as distinguished from a mere belief in the existence or non-existence of certain supposed facts or phenomena based on some sort of evidence.[1] For instance, if a person has some reason for regarding some phenomenon or manifestation which he interprets in a way which may be disputed by others or which may be founded on a misunderstanding, this is not an insane delusion which would upset his will.

The following case, taken from the Indiana (U.S.A.) Law Reports, illustrates this. The testator had experimented with a metal ball suspended from a string which would undergo peculiar vibrations when hung over a silver coin beneath a carpet. From this, he believed he would be able to find buried treasure in the fields, and there was a certain basis for his belief. He had holes dug so extensively everywhere that he became a nuisance and had to be interfered with. But this could not be regarded as an insane delusion, but rather an erroneous belief. The opinion of Mr. Justice Hadley in this case was: "The fact is notorious that many intelligent and conservative people claim the power of locating water in the ground by a forked stick, and thousands of wells have been dug and are still being dug. Many scholars and successful business men sincerely believe in spiritualism and in being able, through a naturally qualified medium, to converse with and be advised by departed spirits, and think they recognize voices and handwriting of the dead. Mental phenomena are as various as the hues of the autumnal forest."

So also with regard to religious beliefs. No creed or religious conviction can be properly regarded as a delusion. Beliefs in such matters as thought-reading, spiritualism, fortune-telling, telepathy, witchcraft, and the like do not affect the soundness of a man's will, because such cannot be regarded as evidence of his mental unsoundness. Although at one time, even a condition of eccentricity was enough to invalidate a will, according to the decrees of both England and America, both countries have long ago discarded this doctrine. Nowadays there is rather an inclination to regard

a person suffering from a delusion as being capable of normally exercising his other mental faculties as if they were entirely unimpaired; but those who have had extensive experience of the insane realize that such delusion is only the predominant feature of a mind damaged in other important aspects. Henry Maudsley, in his well-known work on "Responsibility in Mental Disease," says: "The very fact that an insane delusion does persist in the mind is proof enough that a man cannot reason soundly; he will reason insanely, feel insanely, and sooner or later act insanely. Its foundations are not laid in reason, but in disease; and it holds its ground in the mind just as a cancer or other morbid growth holds its ground in the body, by drawing to its own use and converting to its own nature the nutriment which should support healthy activity, and so render its existence impossible."

Nevertheless, unless it is clear beyond doubt that a delusion held by a testator is an insane one, and the will made by him is the product of that delusion, the Courts will nowadays not be disposed to upset that will. Such a delusion sufficient to void a will must be one which controls the mind of the testator, and destroys his freedom of action. No matter how sound the mind of the testator may have been in other respects, if his disposition of his property was influenced by an insane delusion his will is invalid.[1] The will was no longer under the guidance of reason. It had become the creature of the insane delusion. In the case in which Lord Cockburn gave the decree already quoted, it appeared that the testator had been confined as a person of unsound mind for some months twenty-two years before making his will, and died seven years after making his will. During the whole of that time up to his death, he had delusions that he was molested by a man who had long been dead, and that evil spirits pursued him which he believed he could see. Although the evidence as to testator's general capacity to manage his affairs was contradictory, the Court favoured the opinion that he had sufficient mental power for this work. It was shown that the delusions were

not of a sort to affect his bequest. The man whom he believed molested him had long been dead, and he was not a relative; and his children would not in any event have been the natural objects of testator's bounty. The visual hallucinations and persecution by evil spirits had no direct relation to the matter in dispute. No evidence was given that any of the delusions alienated from his affections any of his relations or friends, or injured his mind so as to prevent due consideration of their claims. The jury found testator was capable of making a valid will. In this case it should be noted that Lord Cockburn ruled that "where 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,* such delusion did not destroy the capability to make the will." This, I take it, recognizes two separate potentialities, a delusion which, while capable of having influence on the disposition, might not exert it, and a delusion which from its very nature was not capable of having such influence. Lawyers have a term, Lucid Interval, by which they imply that a person claimed to have had mental incapacity has had a remission of such a degree as to be temporarily capable of transacting business or performing such acts as making a will. This does not mean the cessation or suppression of the symptoms of the mental disease from which he is suffering, it means only the recovery of *testamentary* judgment, memory and will. In other words, he may have been of unsound mind, and yet of sound disposing mind. And so, the question to be determined is one of *fact.*

Regarding will-making and the question of testamentary capacity, we have to realize that disturbances of the mental functions of the brain are not limited to those comprised under technical insanity. The senile dotard, the apoplectic, the alcoholized individual, and the person confused by fever, or physically weakened from disease and approaching death, or who is so enfeebled that he is made facile and unresisting; all these may need to have their testamentary capacity tested, and the same tests as already described will

apply. The degree of the soundness of mind, and not the condition of his bodily health, decides his capacity as a testator. While on this subject, the difficulties of determining the mental state of a person in a state of serious bodily illness is shown in the following case: "A business woman, possessed of considerable wealth, became ill. Her physician pronounced her physical condition grave; a lawyer was called in for the purpose of assisting the patient in executing her will. He observed that the patient was very weak, but she answered responsively all his questions as to the nature and extent of her property, the disposition of the same, and the natural objects of her bounty. He reduced the will to writing, and it was duly executed. About three months later, during convalescence, the woman stated that she had a faint recollection of signing some document while she was ill, and inquired what it was. She was startled at learning she had signed a will disposing of her property, and, on her recovery, visited her lawyer's office, and, on reading her will, she declared she had no intention of disposing of her property in the manner and to the persons set out in the document, and that the person named as executor was one to whom she had had a distinct aversion for years, and in whom she had no confidence whatever. The will itself was a logical document, and on its face was in every respect a sane will. But it did not express the intention of the maker, a fact which would not have been disclosed had not the patient recovered from her serious illness. The document proved to be but the emanation of a mind made unsound by severe and protracted illness, and was revoked on recovery. This is an illustration of the occasional instance when the context of the will itself is not the best evidence of the testator's sanity."[1] As a contrast, the case is recorded by an eminent alienist. Sir Thomas Clouston, in which he was called to see a man who was dying of bronchitis and heart disease, with his breathing impaired by the non-oxygenated blood supplied to his brain. He had made a will in favour of a former mistress, and was in a great state of remorse, and wanted

to leave his money, which was considerable, to his relatives. But he could not, twice over, remember the provisions—these being a little complicated. The alienist refused on this account, on two occasions, to say that he had testamentary capacity. But, as sometimes happens, he became more clear in mind before death, and the doctor was hurriedly sent for late one night to see him. He clearly went twice over the provisions he wanted made in his will, and told him why he wished these made. His reasons were natural and right. The lawyer was there with the document drawn up, and the testator had just power to make his mark before he died. Yet this will was held good in law in spite of an attempt to upset it.[3] Sometimes one finds a case in which a testator may exhibit an unreasonable prejudice against a relative; but this does not form grounds for upsetting his will unless this aversion is based on an insane delusion. Such delusion is at times difficult to establish. On the assumption that a man would naturally will his property for the benefit of his children, unless good reason existed for his doing otherwise, the law has always been willing to investigate the claims of children or other relatives who have been disinherited for no apparent reason. In the case of Dew v. Clarke (1826, 3 Add., 79), the testator took a persistent dislike to his only child—a girl who, from all evidence, was worthy of all love and esteem, and whom her father regarded hitherto with the warmest affection, but his affection underwent an entire change. He insisted that the child's mind should be entirely subjected to his, and that she should confess her faults to him; and because she did not do so, he treated her as a reprobate and an outcast. He was cruel to her in her youth, beat and punished her in all sorts of extraordinary ways throughout his life, as if she were of the vilest character, instead of which, apparently, she was one of the best of women, and ultimately he disinherited her. Testator was a medical man, and all his life appeared to all outsiders whom he met socially and in business as a rational and normal being; yet on the ground that his conduct towards his daughter could

only be explained as the behaviour of a man with an insane prejudice that could only be the product of an insane delusion, the will was set aside. Here, insane aversion took the place of natural affection.

When the legal adviser of a person about to make a will calls in a medical man to examine into the testamentary capacity of that person, it will be seen how important it is to take full and comprehensive notes at the time of making the examination, and to trust nothing to memory, as it may be months or even years between the examination and the time when such evidence may be required. Also he should insist on seeing the testator alone, or at all events only in the presence of the nurse (although even her presence may be undesirable under some circumstances), for at least a part of the examination; and carefully note whether he appears to be controlled or influenced by any person or persons. An alienist records the case of an old dying man confessing to him, when alone with the doctor who was examining him as to testamentary capacity, that his nurse, who was also his niece and constant companion, was really compelling him against his judgment to make a will in her favour, his own volitional and resistive power being weakened by his illness and his dependence on her. Where certain relations of intimacy and confidence exist between a testator and beneficiary, such as doctor and patient, legal adviser and client, spiritual adviser and penitent, guardian and ward, the Law requires strong evidence of *full* capacity. It is also very important to carefully determine if the testator is free from the influence of alcohol or any other drug. As the question of memory may be an important one, it should be tested thoroughly, both for recent and remote events. That for remote events may be apparently unimpaired, while for recent ones, extremely defective. This condition may be well marked in senile and other forms of mental disorder. One should ascertain from testator whether he has ever previously executed a will, and if so, how it differed from the proposed will and why. If the will has been made just previously, and a possibility of its being

challenged has arisen, have the will produced, and test his memory of it. If the disposition appears unnatural, ascertain the motive therefor. It is a good plan in these examinations to require the testator to go over the disposition he desires to make, and after a reasonably brief interval, to have him repeat them. How important it is that a skilled and experienced medical man should be called in to examine a testator as to testamentary capacity when large estates are to be disposed of by him has been pointed out by Sir Thomas Clouston, who stated he was once told by a distinguished counsel with a large experience in the Probate Court that he had never known a will upset where a reputable doctor had witnessed it, after examining into the testator's state of mind, and an agent of repute had drawn it, neither taking any benefit under its provisions.[3]

It has been suggested that a lawyer calling in a psychiatrist to examine the mental capacity of a testator on the day he is to make his will, would by his very act invite suspicion that there may be something sinister where none exists; but where contention among potential beneficiaries may be apprehended, it is surely a safe measure. As against a routine practice of having a testator so examined, there is of course the liability that he may resent inquiries about his memory, etc., and his reasons for exercising his choice in directions that may appear unnatural to his questioner, and the doctor may lose his patient or the lawyer his client.

Medical men are of course aware that in civil cases medical confidences from patients, and medical information acquired in the course of examination and treatment, are professional secrets and privileged, and cannot be given in evidence. It may not be known, however, that, as in criminal cases, this does not apply in cases involving a question of insanity. It is not difficult, however, to visualize a contested will-case in which this principle is applied, wherein evidence of vital importance may be excluded —evidence which might conclusively establish mental incapacity.

One word further on cases that present great difficulties

to medical examiners for this purpose. Cases of aphasia are at times met with, where the application of tests of mental capacity for making a will may tax the ingenuity of the examiner, as, for instance, where the aphasic may be unable to write, and the difficulty of making out the testator's wishes is obvious.

With regard to opinion witnesses—the mental experts—the difficulty is that they are not consulted at the time of the making of the will, when the actual mental capacity of the testator could be investigated, but they are put in the witness box, perhaps years after he is dead, supplied with mostly one-sided evidence, probably with information that is incomplete, and with every motive operating on the side that consults them to secure from them an opinion favourable to its own case. This tendency of each of the parties to view the testator's condition in the light most satisfactory to his own contention is without conscious dishonesty. The consequence is that criticism on the part of some people often arises as to the alleged bias of medical experts when called as opinion witnesses. This is mostly without foundation, and is due to the peculiar function and nature of expert evidence. Concerning non-medical expert witnesses there appears to be difficulty in conceding that there may be honest difference of opinion. Real estate experts are called by the two sides to testify as to the probable benefits of certain public improvements to adjacent property and to the special assessment. On the same statement of facts as to the nature and character of improvements, two real estate specialists of vast experience may differ widely, perhaps by thousands of pounds, in their conclusions, but little or nothing is heard of bias. Similarly with railway experts testifying to the distance a train of fixed weight and length travelling at a certain speed would go before certain braking would bring it to a stop. Even with the definite facts of weight, momentum, speed, etc., to reason from, we may get many different opinions from highly trained experts, and yet the question of bias or payment is never thought of.[1] Contrast the

position of the medical expert in will cases. He has a set of facts placed before him by the counsel for the side which has engaged him, and which are given in evidence. He then expresses his opinion on these facts, and gives his reasons as to the testamentary capacity disclosed thereby. The opposing counsel produces another mental expert, and places a different set of facts, likewise given in evidence, and secures a different opinion from his specialist. The opinions of each of these experts may honestly differ, without detriment to their integrity or ability, because each opinion is founded on a different set of facts. Apropos of the position of the mental expert in cases of testamentary incapacity tried before a jury, there has been in previous discussions in this Society on medical evidence and subjects, a plea for expert assessors. Sir Maurice Craig, in his work, "Psychological Medicine," put the matter thus: "Would not a Judge assisted by two experts in mental disease, as assessors, form a Board more competent to deal with questions of so difficult a nature? The assessors would supply the knowledge of the special subject, so requisite in any tribunal, and the lawyer would keep the inquiry within bounds and direct its course. It seems strange that our Courts should be granted the assistance of the Elder Brethren of Trinity House when a story of the sea is to be told, while the infinitely more obscure secrets of psychology should be offered to them for their unaided solution. This, however, is a defect due to the Legislature and not the administrative body of the law. Such a change cannot be wrought by Bench or Bar. It must originate with Parliament."

This concludes my address, and in doing so I would like to explain that it is mostly a compilation of the views and opinions of various writers on the subject, and of records. I have quoted freely from Singer and Krohn's works, and from Craig and Beaton, and other authors.

REFERENCES:

(1) "Insanity and Law," Singer & Krohn.
(2) "Psychological Medicine," Craig & Beaton.
(3) "Mental Diseases," Clouston.

DISCUSSION

Mr. Justice Lowe said his first word must be one of appreciation and thanks to Dr. Godfrey for his very interesting paper. Such a treatment could not fail to stimulate the interest of all those present in the various topics raised in the course of the address. It was desirable, as was clearly pointed out, that there should be a close study of the subject with a view to understanding the different views expressed which had puzzled many lawyers from time to time. They had been puzzled, not so much by the decisions of the Court, but by the views of the various Judges who had made pronouncements in giving their decisions on cases. At one time it had been enunciated clearly by Lord Brougham that testamentary capacity was to be judged on the footing that a mind was one and indivisible, that if it was infirm in one capacity, that infirmity was sufficient to impair the whole mind. That view had some vogue for a considerable time, but it was doubtful if it ever expressed the view of the majority of judges. But after the decision in Banks v. Goodfellow, the test which was laid down had become a commonplace one. Medical men frequently had to examine patients to form an opinion as to testamentary capacity, and what they had to ascertain seemed to be quite clearly laid down in the subdivisions to which Dr. Godfrey referred.

He (Mr. Justice Lowe) always asked himself three questions:—

(1) Did the testator understand the nature of the act he was called upon to perform?

(2) Was the recollection of the testator sufficient to recall the natural objects of his bounty and the size, extent and nature of his estate?

(3) If the first two questions were answered yes, then there was a third question: Had he sufficient judgment to weigh the claims of those having natural claims upon his bounty and to discriminate between them?

If he was satisfied on those three points, he concluded that the testator was of sound mind, memory and understanding. The question whether capacity existed throughout life was immaterial, as he understood the law. If the capacity existed and the testator had the necessary recollection and judgment to exercise it when the will was made, that was sufficient. If the testator had capacity, the fact that he had exercised it in a capricious fashion was

not sufficient to set aside the will. The testator, being capable, might exercise that capacity in any manner that pleased him.

Differing decisions in various cases had no doubt appeared confusing to many medical men. But the confusion was not confined to medical men; it extended to lawyers and laymen. The differences would be found to be due to differing views of the facts. Facts that appealed in one way to one judge did not so appeal to another. The confusion was, moreover, generally the result of comparing the facts of different cases as read in the daily press. But it might be wise to recall perhaps that it was not those published facts that decided the case, but the whole of the facts in evidence before the Court. There was always the possibility on the part of a judge, as of every human being, of erring. An interesting illustration of the kind of problem that arose might be given. He recalled a case in which the division of his estate by the testator was the ground of attack on his will. An old man of 94 years of age had over a period of years made many wills, in all of which he had held an even hand in passing the benefits of his estate to two daughters. At 94 he made another will, making a different distribution, giving far greater benefits to one daughter than another. His stated reason was that during his lifetime he had given a greater benefit to the extent of £20,000 to one daughter than to the other. As a matter of fact, on the trial it was proved that the daughter who was said to have been favourably treated had received during the testator's lifetime much less than the other. The learned judge came to to the conclusion that the testator had suffered from a delusion in believing that he had conferred benefit on one daughter to a far greater extent than he actually had, and refused to uphold the will. One of the benefits of such a body as the Medico-Legal Society was that to the lectures and the questions raised by them could be brought the criticism of differently trained minds. There was the question of the treatment of the expert witness. This was one brought prominently under notice at times, and which caused a deal of feeling and surprise in the minds of witnesses. The witness often had submitted to him a copy of the evidence which had been given in the case up to the time of calling him as a witness. On that evidence, the doctor was asked to form his opinion of the testamentary capacity of the testator. The witness was often surprised that he was limited to expressing an opinion on hypotheses

put to him. But at that stage the facts had not been determined. It was not for the witness to determine the facts, but for the judge. What happened when a case came into Court? First, one could be fairly sure if there was no difference of opinion the case would not come before the Court—but if there was a difference of opinion, it was almost certain that witnesses would be called to allege incapacity, and other witnesses to allege capacity. The judge then had to make up his mind which witness to accept and which to reject. That determined, he really would have no difficulty in deciding what question to put to the medical witness to ask his opinion on. But that stage had not been reached when witnesses were called, and consequently counsel could only base their questions on a series of hypotheses. But it might be said: "Had not a medical man a trained professional mind and a keen intellect, and therefore was he not in a position to form a judgment as to where the truth of those conflicting statements lay?" He asked them to consider for a moment how the conflict in opinions or statements came about as to the condition of the person whose will was in dispute. The statements were made by witnesses, *viva voce*, and the medical man was given a written record of the statements. If the medical man were to see the person giving his evidence, he might notice certain hesitancies in manner, for instance, which would not appear so clearly in the typewritten evidence. But it was on that *viva voce* evidence that the judge made up his mind as to what was the true set of facts, and it was on that evidence that he applied the test the law required him to make. Another matter on which he desired to say a few words from his own experience, a matter raised by the lecturer, was the attitude of the Court towards the expert witness. The Court was always ready and anxious to get the views of medical men in any matters which would or might instruct the mind of the Court, for instance, as to the nature of the disease from which the testator or testatrix was suffering; its likely effects on the mind and other matters of that kind were always of great help to the Court, and the Court was always grateful to receive them. But what the Court did not do was to allow the expert to say whether the person was capable of making a will or not. It frequently got great assistance from medical witnesses, who generally gave their evidence with great clearness and great moderation, proving the utmost help in the matter before the Court for determination. He

again expressed his appreciation to the lecturer for his paper.

Dr. J. K. Adey said that the question of testamentary capacity presented many aspects to the medical man called upon to give an opinion. Very often a doctor could only say that at the time of doing a described action the subject was insane, but that at other times and under other circumstances it may well be that he was sane.

Mr. E. G. Coppel directed attention to the fact that persons under twenty-one years were in law denied testamentary capacity, unless they were in actual military service, when, by Statute, testamentary capacity was granted to them. He pointed out that the doctor's opinion in a given case did not settle the question of testamentary capacity, but merely formed part of the evidence before the tribunal whose duty it was to decide the question. In Victoria, juries rarely are called upon to determine questions of testamentary capacity, and greater consistency in verdicts is obtained by reason of the judges sitting alone to decide such questions. When considering whether a man is subject to delusions or the like, it must be borne in mind that social evolution played a most important part, and that beliefs, considered irrational in one age, often came to be accepted without question. Any person in the 12th century who expressed a belief that this world was round would have been held, in the popular view, to be hugging a delusion.

Dr. R. S. Ellery said that a medical man figured in testamentary capacity cases in two capacities. He might be called to give evidence of the actual condition of the testator as known to him by direct observation. His role then is much easier than when he is called upon to express an opinion on facts, or alleged facts, narrated to him or forming part of the evidence. In the second capacity very often he found it difficult to assist the Court. He mentioned the subject of undue influence, and said that the pathological susceptibility of persons suffering from mental aberrations was one worthy of very full consideration.

Mr. R. R. Sholl said that it was only during the last century that the capacity for making wills in regard to property other than land had been reserved to persons of twenty-one years. Until 1837, the law enabled boys of 13 and girls of 12 to make wills. The Greeks had always permitted the making of wills, and Mohammedan law likewise

always permitted it. Hindu law did not, until the accession of the English law in India. Roman lawyers had arrived at much the same conclusions concerning testamentary capacity as English lawyers. Under Roman law, a person *infuriosus* could make a valid will if he made it in a lucid interval. Roman law required, however, civil capacity as well as mental capacity. To make a valid will under our law, a person had to have reason, and hence a person blind, dumb and deaf cannot make a will. Possession of one of those faculties, if the testator were shown to have sufficient knowledge of his estate and those having claims on it, would enable a valid will to be made. He suggested that the law might provide that a person making a will should be examined by two medical examiners, and that each will should be accompanied by a certificate, in the prescribed form, of the result of that examination. Such a provision would lighten the task of the Courts. Another possible reform would be to restrict the testator's bounty to those persons naturally entitled to it.

Mr. H. R. Chomley said that the question of testamentary capacity often depended on the nature of the will. A man might be well enough to make a simple will, but not well enough to give the detailed instructions necessary to enable his lawyer to prepare a complicated will. That difficulty often confronted the practising lawyer when he is told by the medical attendant, "Don't spend more than twenty minutes with the patient." Under such circumstances the lawyer often had an uneasy feeling that the will thus prepared might not represent truly the testator's instructions.

Mr. Justice Dixon said he really had nothing to say which was likely to throw any light on the subject, but he wished to congratulate Dr. Godfrey on the researches he had made in the law, and the very able manner in which he had discussed it. He was quite in sympathy with Dr. Adey's statement that the law seemed to be seeking the unattainable—a clear statement of the unclear. It was true that one of the bases of the present state of society is the power of the law to do justice. But was that going to be found by looking into people's minds to find some hidden intention instead of endeavouring to determine the true nature of external acts? If such investigations into what a man thought were successful, the chances are it would be found that he never thought at all. The fact of the matter was that through a long period of development

society had made for itself a very useful system—a system which passed judgment on external appearances. But to-day little attention is paid to outward objective appearances. The state of mind was considered and usually determined on the information or opinion of somebody who may or may not have seen the testator and who formed his opinion upon what somebody else said the testator said or did, or intended to say or do; incidentally the information of a witness, who was more or less concerned himself in the destination of the property the testator left behind him. With regard to Mr. Chomley's question, he thought that a person making a will under such conditions was fortunate in being able to distribute his estate according to the judgment of a solicitor of repute and not according to his own. The fact of the matter was, as Dr. Godfrey had adequately shown, that the law had adopted an uncertain standard or test. When that test was adopted, medical knowledge was probably less helpful than it is to-day. Even to-day, he doubted whether, in the settlement of these matters, very much significance was attached to modern medical explanations of the deceased's conduct and testamentary eccentricities. But there had been set a standard or test of his capacity. Some might remember the standard of testamentary capacity which, according to Charles Lamb's letters, he applied to himself. In view of his voluntary subjection to restraint, he thought his intended executor might doubt his capacity, and to reassure him, he wrote to him that he had tested his capacity and found that by a good light and with large print he could read the Lord's Prayer without many mistakes. What doctor would like to certify to the testamentary capacity of the author of the Essays of Elia? He suggested that such matters be left to Judges, who, while no doubt they made many mistakes, had the advantage, as one speaker had said, of having trained minds. The real difficulty of the Court was not to determine that the man's intelligence was sufficient to make some sort of disposition in the race, which was often close, between death and the demands of the survivors to enjoy his property, but to decide what pressure was put upon him in either advanced age or at the close of life to make that disposition. The difficulties resulting from that condition described by Dr. Ellery as pathological susceptibility were of the nature of a modern complex, caused nine times out of ten by the

psychology of acquisitive relations bringing pressure to bear on an enfeebled intelligence possessing property.

Dr. Murray Morton described a case he had of a balloonist who was in the habit of dropping out of his balloon with a parachute from a height of 5,000 feet. In one hurried descent he was injured. On examination, an operation was decided to be necessary, but the patient refused to take an anaesthetic until he had made his will. He recovered, but if he had not, nice questions of the testamentary capacity of a parachutist might have arisen.

Dr. W. Ostermeyer said that some provision should be made to meet the case of people who suffered from aphasia, and who by reason of that affliction could understand affairs but were not able to express their thoughts in words.

Dr. L. S. Latham pointed out that many difficulties arose because of the ineradicable superstition that to make a will was to hasten death. Consequently many wills were made when the testators were ill and at death's door. Wills should be made when the testators were in sound health.

Mr. C. H. Eager suggested that much of the difference of opinion between the professions arose from failure to differentiate between acute insanity and testamentary incapacity. Each profession approached the matter from a different angle, and confusion thus arose. The lecture should do much to clear up the confusion.

Mr. Rigby proposed, and Mr. Justice Lowe seconded, a vote of thanks to the lecturer, Dr. Godfrey. The vote was carried by acclamation. In acknowledging the vote of thanks, Dr. Godfrey expressed himself indebted to those speakers who had contributed to the highly interesting and stimulating discussion upon his paper.

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