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SENILE DEMENTIA.[1]

1. The most important and difficult subject connected with testamentary capacity.
2. The mind begins to decay very soon after its full maturity.
3. Loss of memory, one of the earliest symptoms of mental decay, very unequal.
4. Correct opinions upon this subject require familiarity with the particular case.
5 and n. 3. Dr. Taylor's test. Reasons why witnesses should be watchful not to be deceived.
6. Old age should excite our watchfulness, but is not presumptive of want of capacity.
7. Extreme old age does not incapacitate where the act is rational and free.
8. Surrrogate BRADFORD'S rule in regard to wills executed by persons in extreme old age.
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11. The commentary of Dr. Ray upon *senile dementia.*
12. His strictures upon the practice of courts in leaving too much to juries.
13. The rule of Mr. Justice WASHINGTON quoted with approbation.
14. Experts do not remove all doubts in a case, more than other witnesses.
15 and n. 16. Where imbecility of mind and injustice concur in a will, it generally fails.
16. Great watchfulness against imposition in such cases, proper.

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1 From a Treatise on Wills, by Hon. Isaac F. Redfield, about to be published.

1. There is probably no form of mental unsoundness which has to be considered so often, in connection with testamentary cases, or which has so important a bearing upon, or the thorough comprehension of which is so much to be desired, as an aid toward the correct understanding of such cases as that of the imbecility of old age, or *senile dementia*. There is nothing which more strikingly illustrates the incomprehensible nature of the connection and true relations between the mind and the body, the spirit and the flesh, than the wonderful inequality in which different persons suffer abatement of the full vigor of their youthful and mature mind, at the approach of advanced life. While some persons suffer no apparent diminution of mental power, even to advanced old age, and after great loss of physical energy, and in some cases the occurrence of extreme feebleness, others become decidedly imbecile in mind long before they cease to have full strength and ability to perform the most difficult and laborious offices of their usual occupations, except as they become embarrassed therein by the loss of mental capacity.[1]

2. It is not our purpose to attempt any analysis of these surprising phenomena. In the majority of cases, probably the mind begins to lose something of its elasticity and activity very soon after the period of its full maturity. This is confessedly so in regard to our physical powers. There is more uncertainty in the estimate of the powers of the mind, since the increase of experience and knowledge, which time produces at all stages of advancing life, in a measure compensates for the decline of the mental faculties and powers.

[1] Ray, Med. Jur., § 336, ed. 1860. This experienced writer says: "The great point to be determined is, not whether he was apt to forget the names of people in whom he felt no particular interest, nor the dates of events which concerned him little, but whether, in conversation about his affairs, his friends and relatives, he evinced sufficient knowledge of both to be able to dispose of the former with a sound and untrammelled judgment. It is a fact, that many of those old men who appear so stupid, and who astonish the stranger by the singularity of their conduct, need only to have their attention fairly fixed on their property, their business, or their family, to understand them perfectly well, and to display their sagacity in the remarks they make."

3. The loss of memory is one of the earliest and surest indications of the approach of mental infirmity. This approaches with very unequal steps in different persons. While in some it is scarcely perceptible, even at fourscore, in others it becomes a marked and serious infirmity, long before they reach the ordinary period of human life.

4. Casual observers, those but slightly acquainted with the person, are liable to very great misapprehension in regard to the mental capacity of aged persons. To a correct estimate upon this subject, it seems to be requisite that one should possess not only general skill and experience upon the question, but that he should either have had long and familiar acquaintance with the particular person, or at least an ample opportunity to observe the precise state of the mental powers, or that he should learn these facts accurately from others.

5. The rule for testing the mental capacity of a person to do an act requiring mental comprehension and disposing judgment, given by Dr. Taylor,[1] is as reliable as any one, perhaps. "If a medical man be present when the will is made," says this learned writer, "he may easily satisfy himself of the state of mind of the testator, by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances, without first assuring themselves of the actual mental condition of the testator. It would always be a good ground of justification, if, at the request of the witness, the testator had been made to repeat substantially the leading provisions of his will from memory. If a dying or sick person [or any other one] cannot do this without prompting or suggestion, there is reason to believe that he has not a sane and disposing mind."[2]

[1] Med. Jur. 658, ed. 1861. See also *Hathorn* vs. *King*, 8 Mass. 371, where it was held, that being able to recall the particulars of the directions given the scrivener is evidence of testamentary capacity: *Marks* vs. *Bryant*, 4 Hen. & Munf. 91.

[2] We apprehend that what is here said in regard to the compromise of profes-

6. Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court. (*Kinleside* vs. *Harrison*, 2 Phillim. 449.) But no just inference could be made upon

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sional character, by becoming the witness to a will, where the testator is not in a proper condition to execute it, will be somewhat unintelligible to the American mind. The impression in England is, both in the legal and medical profession, that one is bound to give directions, on such occasions, in regard to what the testator is competent to do, and that the medical attendant is responsible that he do not countenance the act of attempting to execute a will after the patient is incompetent to comprehend its import. That by consenting to become a witness of the act he virtually certifies that the testator is of sound disposing mind and memory. That if such proves not to have been the fact, the character of the medical witness is seriously compromised, inasmuch as he is subjected to one or other of the alternatives resulting from the dilemma in which he is thus placed, either that he was incompetent to detect such incapacity, or else that, knowing of its existence, he voluntarily connived at the creation of an instrument of great importance and solemnity, while the supposed actor was in a state of mental unsoundness which incapacitated him for its valid execution. Under such circumstances, the connivance may, with some show of reason, be regarded as implicating the medical witness in a virtual fraud upon the legal disposition of the property which would otherwise follow, since the attempt to execute a will at such a time is getting up the shadow of a legal instrument, the effect of which will be, if successfully carried through, to defeat legal rights which have already practically taken effect and become vested, when the simulated agent no longer possesses the capacity for voluntary action. It has always seemed to us there was great justice and propriety in the English view of the subject. We think any gentleman, whether professional or not, would feel delicacy and hesitation in regard to becoming a witness to such a transaction. But with us the public opinion, which is the sovereign arbiter of duty, presumes sometimes to override the dogmas of written law. It is thus, no doubt, that it has come to be understood here, by some at least, that the witnesses to a will are not to be regarded as having expressed any opinion in regard to the sanity of the testator. It seems to be supposed that they are only witnesses to the act of signing. But when it is considered that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different aspect. One who puts his name as a witness to the execution of a will, while he was conscious the testator was not in the possession of his mental faculties, places himself very much in the same attitude as if he had subscribed as witness to a will which he knew to be a forgery, which every honorable man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a

the question of capacity, from age merely, short of some extreme period; but, as is well said, "if a man in his old age becomes a very child again in his understanding, and is become so forgetful

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will by one confessedly incompetent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood. We are certainly gratified to be able to give so charitable an explanation of what has always seemed to us a great, if not an inexplicable, inconsistency or obtuseness in the public sentiment upon this subject among the American people, in some sections of the country at least. We should surely be glad to do all in our power to correct what we regard as a discredit to the public sentiment, whether it be attributable to ignorance or to insensibility. We mean, for a professional man, who is supposed to understand the subject fully and to be in a position in life where he may act independently, to nevertheless consent to become a witness to a will executed by one wholly incapable of comprehending its import. The language of Lord CAMDEN, in his most able and elaborate judgment in the celebrated case of *Hindson* vs. *Kersey*, 4 Burn's Eccl. Law 85, 88, is of great significance upon this point: "And that the statute had a main view to the quality of the witnesses will appear from this consideration, namely: that a will is the only instrument in it (the Statute of Frauds) required to be attested by subscribing witnesses at the time of execution. It was enough for leases and all other conveyances to be in writing: these were all transactions of health, and protected by valuable considerations and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced to writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death. And the only question that can be asked in this case is, Was the testator in his senses when he made it? And consequently, the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads; who have still strength enough to write a name or make a mark, though the capacity of disposing is dead. What is the condition of such an object, in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease? *Put to the laborious task of recollecting the full estate of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all and forgetting none.* . . . . Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all

that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or a lunatic."[1]

7. The American cases take a similar view of the effect of old age upon testamentary capacity. One eighty-six years old, and afflicted with disease, was held competent to execute a will.[2] So also one of eighty years of age, with energies greatly impaired.[3] And in a case seriously contested,[4] where the testatrix was ninety years old, it being shown that the deceased was of sound mind, that the will was in conformity to one executed six years before, when there was no question of her mental capacity, and also with her repeatedly declared intentions, both before and after the date of the last will; and that the provisions of the instrument were reasonable, and were carefully read and explained to the testatrix at the time she executed the will; and it appearing that no concealment, deception, or influence had been used to procure the will, it was established. The surrogate, in giving his opinion, which was very minutely and carefully considered, thus concludes:—

8. "Great age alone does not constitute testamentary disqualification; but, on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials, are shown to have existed, and the last will is in consonance with definite and long-settled inten-

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other cases the witnesses are passive, but here they are active, and in truth the principal parties to the transaction; the testator is intrusted to their care. Sanity is the great fact the witness is to speak to when he comes to prove the attestation, and that is the true reason why a will can never be proved as an exhibit, *viva voce*, in chancery, though a deed may; for there must be liberty to cross-examine to the fact of sanity." "From the same consideration, it is become the invariable practice of that court never to establish a will unless all the witnesses are examined, because the heir has a right to the proof of sanity from every one of them whom the statute has placed about the testator."

[1] 1 Wms. Exrs. 36; *Griffiths* vs. *Robins*, 3 Mad. 191; *Mackenzie* vs. *Handasyde*, 2 Hagg. 211; *Potts* vs. *House*, 6 Ga. 324.

[2] *Watson* vs. *Watson*, 2 B. Monr. 74.

[3] *Reed's Will*, Id. 79.

[4] *Maverick* vs. *Reynolds*, 2 Bradf. Sur. Rep. 360.

tions, is not unreasonable in its provisions and has been executed with fairness."

9. And in another important case,[1] the same learned judge held that defect of memory, unless it be total or appertain to things essential, is not sufficient to establish incapacity, and that advanced age, of itself, raises no presumption against the capacity of the testator; and quotes, as the basis of his judgment, the eloquent words of Chancellor KENT, in regard to the will of a person between ninety and one hundred years of age.[2]

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1 *Bleecker* vs. *Lynch*, 1 Bradf. Sur. Rep. 458.

2 *Van Alst* vs. *Hunter*, 5 Johns. Ch. 148. The remarks of Judge BRADFORD, in *Bleecher* vs. *Lynch*, *supra*, in regard to the effect of old age, are worthy of repetition here: "The effect of age upon the vigor of the mind varies so much according to individual constitution, that it is difficult to form a sound general conclusion on the mere fact of advanced age. In an intellectual sense, there is nothing in the mind, abstractly speaking, tending to decay; its loss of tone and power is consequent upon the ravages of time and disease upon the body, and especially the brain, upon which the understanding is dependent for manifestation. It is said that not more than seventy-eight in one thousand die of old age; and it is scarcely possible to define the natural period of life, or its more frequent and regular limit, independent of disease and accident. Blumenbach observes, that, by an accurate examination of numerous bills of mortality, he had ascertained the remarkable fact, "that a pretty large proportion of Europeans reach their eighty-fourth year." Haller gave a list of two hundred and twenty-one persons who lived from one hundred to one hundred and sixty-nine years; Easton, a list of one thousand seven hundred and twelve who attained a century and upwards. The condition of the mind, in these cases, of course varied. In Madden's six tables of the ages of the most distinguished modern philosophers, jurists, artists, and authors, and in D'Israeli's Notes on "the progress of old age in new studies," there are the names of many men whose genius shone in full splendor to the close of an advanced life. I do not mean to gauge all cases by such remarkable instances, but advert to them to show that each individual must be judged by himself. The power and brilliancy of the mind in old age is an exception, but so is longevity itself. It may be observed, in this connection, that the system frequently makes an effort at renovation in extreme old age, which is evinced in the cutting of teeth, the recovery of the original color of the hair, and of perfect vision and hearing. This is said to occur more frequently in females, and indicates tone and strength in the nervous system, great vital power, and recuperative energy. A fact of this kind occurred to the decedent, who, about the time the will was made, recovered her vision, was able to read without spectacles, and to thread the finest needle.

10. "A man may freely make his testament, how old soever he may be. . . . It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated."[1]

11. One of the ablest and most experienced writers upon the jurisprudence of insanity, Dr. Ray, has made some strictures upon the mode of conducting jury trials, where questions affecting mental capacity are to be determined, which we deem not unworthy of being repeated here. They have particular reference to a cause tried in the state of Maine.[1] "No one," says this writer, "at all acquainted with the habits of old age, and with the effect of *senile dementia* on the mind, can entertain a doubt of the testator's competency to make his will. True, he was more forgetful of the present than of the past; he frequently forgot what he had just before said or done; and he sometimes disregarded the common observances of life. All this, however, may be said of multitudes of old men whose competency for any business is never questioned by those who know them best. However weak may have been the mind of this old man, he was still acquainted with the value of property, especially of his own; he recognised his relatives and friends, was always aware of the exact nature of their relations toward him, and of their respective claims on his bounty; he still was capable of feeling the sting of filial ingratitude, and of being actuated by motives of ordinary prudence and discretion. If his mind were not sufficiently vigorous to engage in contracts and speculations of large magnitude, it was none the less able to bequeath his pro-

[1] Ray, Med. Jur., § 342, 343, 344.

perty, the kind and amount of which he perfectly understood, to relatives and friends whom he still recognised and loved. The will was a rational act, rationally done, and there was not a tittle of evidence to show that the testator was under improper influences.

12. "The court, at each trial, refrained from any comments on the evidence relating to the testator's mental condition, and the jury were left to their own unenlightened and unassisted deliberations. There were peculiar reasons, perhaps, for taking this course in the present case, but we may be allowed to question its propriety as a general rule of practice. In cases like these, which are characterized by the abundance and discrepancy of the evidence, it needs a cool, tenacious, and intelligent mind to recapitulate this evidence; to sift, to analyze, weigh, and, finally, stamp it with its proper value. The jury, it is true, are sole judges of the facts, and if the question here were whether certain facts offered in evidence were true or false, not a remark might be required of the court. But since they have to do with a very different question, that is, whether these facts warrant certain inferences relative to mental capacity, they are unable to answer it correctly, we apprehend, without the light that is derived from superior penetration and attainments. The knowledge necessary for this purpose is of a technical kind, which a jury cannot be expected to possess, and the very abundance of the evidence is calculated to fill their minds with uncertainty and confusion. If they can hear the opinions of experts—of persons who have given especial attention to this branch of knowledge—respecting the precise value of all these facts, considered in relation to the point they are designed to establish, then, indeed, they would be in a condition to form conclusions of their own. But since this is not always practicable, are they to be left to float about on a sea of conjecture, without star or compass to guide their course? Must a jury, not one of whom, perhaps, ever observed a case of insanity, or even studied the operations of the sane mind, take upon themselves to say that certain facts do or do not prove the presence of testamentary capacity; in other words, to decide upon professional questions of acknowledged difficulty? The really

intelligent and conscientious juror, distracted by an appalling mass of evidence, much of which is irrelevant and contradictory, which he may try in vain to unravel and arrange, and puzzled by questions he never considered before, will and ought to look to the court for assistance.

13. "The principle laid down by the court, at the first trial, that a *disposing mind* means 'so much mind and memory as would enable him to transact common business with that intelligence which belongs to the weakest class of sound minds,' may be theoretically correct, but it seems to be of too abstract a nature to be practically applied by jurors. To compare one mind with another of different calibre is a task for which they are altogether unfitted by their previous tastes, habits, and studies. Justice merely requires that the strength of the mind should be equal to the purpose to which it is applied. If this simple principle be distinctly presented to the minds of the jury, there are few so dull as to be unable to give it a practical application. It is not only reasonable, but it has the merit of having been repeatedly recognised in courts of law, until it has now obtained all the force of established authority. 'He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will.'[1] 'A man may be capable of making a will, and yet incapable of making a contract, or to manage his estate.' "[2]

14. We do not suppose medical experts would be able to instruct jurors in the law of insanity, much more understandingly than it is commonly done by courts. The great uncertainty in the result of such trials depends more upon the contradictory

[1] *Stevens* vs. *Vancleve*, 4 Wash. C. C. 262.

[2] *Harrison* v. *Rowan*, 3 Wash. C. C. 580. In regard to these commentaries, contained in the charges of Mr. Justice WASHINGTON, upon the subject of testamentary capacity, this learned writer says: "Nowhere has the subject of testamentary capacity been treated with so much good sense and regard to scientific truth as in the charges of the court from which the above quotations are made. With the progress of sound views on this subject, the correctness of the principles there laid down will only be the more firmly established."

nature of the evidence than this learned writer is probably aware of. And it is impossible often for any one to say, with much certainty, upon which side the testimony is really entitled to the most credit. And unfortunately for the regrets here expressed in regard to the absence of medical experts who could place all doubts and uncertainties upon this perplexing subject in such a light as to remove all difficulty, experience has shown, both here and in England, that they differ quite as widely in their inferences and opinions as do the other witnesses. That has become so uniform a result with medical experts of late, that they are beginning to be regarded much in the light of hired advocates, and their testimony as nothing more than a studied argument in favor of the side for which they have been called. So uniformly has this proved true, in our limited experience, that it would excite scarcely less surprise to find an *expert*, called by one side, testifying in any particular in favor of the other side, than to find the counsel upon either side arguing against their clients,[1] and in favor of their antagonists.

[1] We do not intend by this to cast the slightest reflection upon the integrity of medical or other experts. There is little doubt they are as upright and independent as any other class of men. But they are mortal, and being so, they are liable to see all subjects through the refracting lens of interest and partiality. They are applied to and employed the same as the counsel, and paid, or should be, for their time in examining the case, at professional prices, and all with a view to find good reason for bringing the cause to the result desired by those who employ them. It is not wonderful, therefore, that upon subjects of so much uncertainty, they should fall into the line of opinion most favorable to that side whose case has been so often urged upon their favorable consideration. In addition to this, there will always be such marked conflict in the testimony as to facts, that it is commonly next to impossible to know which is right, and the expert is always expected, of course, to assume the theory of the facts maintained by the side calling him. This, of itself, is enough to throw the experts world-wide apart in the results of their opinions and speculations. We recollect a case tried before us, not many years back, which is of no great interest, except as illustratiug the point to which we have just been alluding. The case was one where the son had subscribed his father's name, as surety, to his own note, as he claimed, by his father's consent. It was claimed in defence, that the father had been, for years before the date of the note, a mere imbecile, and wholly incapable of comprehending any such transaction, as he confessedly was for some years before his death. The testimony

15. It seems to be the result of all the cases, English and American, that intellectual feebleness alone will not disqualify one for making a will.[1] But there is a large class of cases where the testaments of aged people come in controversy, in which the element of undue influence, imposition, and fraud is mixed up with the weakness and imbecility of mind of the testator. In such cases, courts and juries should be reasonably watchful to see that no improper influence has been exercised, in the production of an unjust or unequal distribution of the testator's property. In other words, that if the will was executed at a time when the testator was in a condition of mind susceptible of being easily

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was very voluminous, and strangely conflicting. It was proved, on the part of the plaintiff, that the old man understood that his name was to be subscribed to the note, and also that it had been done; that he repeatedly cautioned his son not to let his father be injured by it; and that he told the creditor he was secure, since he had his name, and that he was, at the time of the execution of the note, abundantly capable of comprehending this and other similar business transactions.

On the other hand, it was proved by multitudes of the most unimpeachable witnesses, that for a long time before the date of this note, the old man was in the daily habit of doing and saying things which it was not easy to reconcile with any such remaining mental capacity as was requisite to make a binding contract. As, that he could not feed himself, did not recognise his own children whom he met daily, would turn his tea into his plate at table, would get lost in his own house, sit down on the floor, follow his wife from room to room, holding on to her dress like an infant child, exhibiting the most boisterous grief upon the slightest occasion, or none at all, and not unfrequently attempting to build a fire in the middle of the room, with some other things too disgusting to be named, but strikingly indicative of imbecility. We submitted the case to the jury upon the mere question of fact, whether the deceased had capacity at the time to understand the nature of the transaction, and consented to have his name attached to the note, and a verdict was given for the plaintiff. It was a mere question of fact upon the credibility of the testimony upon the different sides, and no rule of medical law could aid the jury. It was impossible to believe the testimony on both sides. The inquiry was, which is the most probable? The testimony made a case free from all question for both sides. Our own experience convinces us that this is a not uncommon result.

[1] *Elliot's Will*, 2 J. J. Marshall 340; *Dornick* vs. *Reichenback*, 10 S.·& R. 84; *Blanchard* vs. *Nestle*, 3 Denio 37. It is here said, there must be a total want of understanding to render one intestable, and that the expression "of unsound mind" in the New York statute means the same as *non compos mentis*.

controlled, and the will itself is one giving unequal advantages towards parties in a position to have brought their influences to bear upon the testator, the triers of its validity have a right to require those thus exposed to suspicion, to prove, with reasonable certainty, that the will was the offspring of the free agency of the testator. Hence it is very properly said, that where a will is just and equal, and displays reason, memory, and benevolence [and we should add justice], and the same was made without advice or dictation, it may be regarded as satisfactory evidence that it was the product of a disposing mind.[1]

16. We shall here give a short but pertinent extract from the able work of Dr. Taylor ;[2] "I am indebted to a learned judge for the following note: Another case may be noticed which often occurs in the experience of lawyers, and to which, in attendance on aged persons, medical gentlemen do not sufficiently attend. A person's mind in extreme old age may be quite intelligent, his understanding of business clear, and his competency to converse upon and transact such, undoubted, and his bodily strength good; but there may grow upon him such a fear and dread of relatives who may have surrounded him, and on whom he may have become perfectly dependent, that his nervous system is wholly overcome, and he becomes a mere child and tool in the hands of those about him, so that he has no power to exert his mind in opposition to their wishes or to resist their importunities. His mind is enslaved by his fears and feeling of helplessness, so that to that extent, and in matters in which he may be moved by them, he really is facile and imbecile. This state of things seems, in great old age,

[1] *McDaniell's Will*, 2 J. J. Marshall 331. Our own experiences, after having had knowledge of a considerable number of this class of cases, would induce the conclusion that juries are generally inclined to sustain the wills of very aged and very infirm persons; and often, of those in extreme sickness, almost *in articulo mortis*, where the deed itself is rational and just. But that where this is not the fact, juries are very willing to be convinced of some good reason to set the will aside, and more commonly succeed in finding some excuse satisfactory to themselves for doing so; and we have never felt that this tendency among juries was either unnatural or unjust.

[2] Med. Jur. 659.