DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

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TAYLOR *v.* TRICH.[1] SUPREME COURT OF PENNSYLVANIA. JANUARY 7, 1895.

Where it was claimed that the testator was subject to delusions, but was otherwise sane, it is not improper for the court to say to the jury that they were to decide "not whether the peculiar views of the testator were scriptural or otherwise, sensible or absurd, but simply whether or not they so impressed his mind, became, as it were, so incorporated into his mental constitution as to control his judgment in regard to the use and disposition of his property, so as to prevent his perceiving or appreciating the ordinary duty he owes to his family, or their claims upon him as a father in that respect." The court also saying that if the evidence did not fairly lead to the conclusion that the testator's mind was overpowered and controlled by his peculiar views so as to prevent him from exercising a reasonable or rational judgment in relation to the disposition of his property, their verdict should be in favor of the will, however, absurd, ridiculous or unfounded they might individually or collectively believe his peculiar views on faith and its effects to have been.

UNJUST AND UNNATURAL WILLS.

The view of a will, which regards it as conferring the power of diverting property from the family of the testator or of distributing such property unequally, is modern. Early custom did not look with favor upon the disinherison of the heir; the connection was too close between the succession to property after death and the performance of the sacrificial rites in honor of the deceased that probably had their origin in ancestor worship (Maine's Early Law and Custom, 78). At the Roman law what actually passed from the testator to

[1] Reported in 165 Pa. 586; 30 A. 1053.

the heir was the *family*, that is the aggregate of rights and duties contained in the *patria potestas*. It was possible by the law of the twelve tables for the testator to exhaust his entire patrimony in legacies, leaving his instituted heir nothing but the bare title (Gaius L. II., tit. xxiii. Nasmith's Outline, 270). Historical writers have occasionally fallen into the error of assuming an injurious license of disinherison indulged in by heads of families (Montesquien Lib. XXVII., ch. i). The indications, however, are that a will was not customarily regarded by the Romans as a means of disinheriting a family or of effecting the unequal distribution of a patrimony. The rules of law preventing such action increase in stringency as the system of jurisprudence is perfected. The testamentary power had become valued for the assistance it gave in enabling the testator to make an even and fair provision for his real family, emancipated as well as unemancipated, cognati as well as agnati (Maine's Ancient Law, 211).

A will, in which the testator unreasonably passed over his nearest relations in order to make over his property to strangers, was thought to argue a lack of natural affection and was called an "undutiful will." The relations passed over were entitled to have the testament declared null and void, on the ground that the testator was of unsound mind when the testament was made, on bringing an action *de inofficioso testamento*. The action could be brought by the children, if there were none by the ascendants, and, failing these by the brothers and sisters, but in the last case only when the person instituted was of bad character (*turpis*). (Morey's Outline of Roman Law, 327; Campbell's Compendium, 85.) In the words of the code this does not mean that the testator was really insane, but that the testament, though regularly made, is inconsistent with the duty of affection the parent owes, for if the testator is really insane at the time, the testament is null (Code of Justinian, Lib. II., tit. xviii. Saunder's Ed). The fiction insanity (*color insaniae*) declares Sohm "is probably due to the reception of the Greek law. In the early Attic law we find precisely the same form for impeaching an unduteous will as in Rome, the testator being accused by his

relatives of *μανία*" (c. p. Schulin l. c. p. 16). There is reason for believing that the Greeks went further in their recognition of claims to a statutory share than the Roman centumviral court (Sohm Institutes Lib. III., ch. ii, § 100, iii).

The statutory share to which an heir succeeded by necessity called the *portio legitima* was fixed by the 18th Novel of Justinian at one-third of the intestacy share when the number of heirs was four or less, and at one-half the intestacy share when the number of heirs was greater than four. Where the heir received something under the will but not enough he was required to proceed by *actio in supplementum legitimae*. Justinian's most important reform, however, was accomplished by the 115th novel. By this ascendants are required to institute as heirs such of their descendants as would succeed on intestacy and *vice versa*. Disinherison was permitted only for certain definite statutory reasons to be expressly stated in the testament (Salkowski's Roman Law Lib. III., pt. iv., § 170; Sohm Inst. 466). These reasons are described by the term "ingratitude." Examples are an attempt on the life of the testator, cruelty to him or refusal of subsistence: (Mackeldey's Roman Law, § 738; Code Napoleon, §§ 955, 1046, 1047; Civil Code of Louisiana, §§ 1559–1562). In *Bosworth* v. *Beiller*, 2 La. Ann., 293, it was held that a parent could disinherit a child for marrying without his consent.

"The law of England," declares Blackstone, "makes no such constrained suppositions of insanity or forgetfulness, and, therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi* to set aside such a testament": Bl. Comm., Bk. II., p. 503. While, perhaps, no person was bound by the general law of the kingdom to leave anything by will to any particular person, local customs did lay restrictions upon the testamentary power. One of these commonly was to remember his lord with his best chattel, then the church and after these he might dispose of the remainder at pleasure (Glanville Lib. VII, c. 5., Bracton, 60). Another division, in accordance with the custom of gavelkind, is cited by Finalson. Says the costumal of Kent: "Let the goods of gavelkind persons be divided into three parts after the funeral

and debts paid. So that the dead shall have one part and the lawful sons and daughters another and the wife the third, and, if there be no lawful issue, let the dead have one-half and the wife the other" (Finalson's Reeves' History of English Law, Vol. 1, p. 329). The share of the wife and children were called their *reasonable* parts and the writ *de rationabili parte bononum* was given to recover them. The right to the reasonable part was expressly reserved in *magna charta*, and Blackstone is of the opinion that this was the common law of the land in the reign of Edward III. (Bl. Comm. II., p. 492). Sir Henry S. Maine attributes the growth of freedom in testamentary power to the influence of primogeniture "as the Feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property, which might have been equally divided ceased to be viewed as a duty" (Maine's Ancient Law, 218).

It is interesting to note that in the reign of Edward VI, a commission was appointed to reform the ecclesiastical law. This commission met in 1552, carried on and completed its work, but before it received the royal confirmation the young king died, and the project died with him. In the report it was provided among other reforms, that no son should be passed over in his father's will unless expressly disinherited, and such disinherison would not be good unless for just cause. So also with wives and daughters. These causes were enumerated and follow closely the civil law; one cause is significant of the times, wives and children who became heretics might be passed over (Reeves' History of English Law, Vol. III, p. 50). The customs referred to above and the influence of the civil law are probably the cause of that erroneous but widespread impression of the necessity of leaving the heir a shilling or some other express legacy, in order to effectually disinherit him (Bl. Comm. II., p. 503). A statute of the State of Washington provides, that if children are not mentioned or provided for in the parent's will, the parent will be presumed to have died intestate, as far as such children are concerned (Gen. Stat. Wash., § 1965). The object of the statute is not to compel a substantial provision for children, but to prevent

disinheriting through inadvertence: *Bower* v. *Bower*, 5 Wash. 225; *Hill* v. *Hill*, 7 Wash. 409.

Feeling and opinion both in England and America have been so influenced by the practice of freedom in testamentary dispositions, that an interference with this practice would be regarded as an interference with the rights of the individual. "It is as much the duty of the courts to uphold the right of the owner of property to dispose of it by will, according to his pleasure, as to see that he is not imposed upon in the exercise of that right:" *Dumont* v. *Dumont*, 46 N. J. Eq. 223. Nor does it make any difference from what source testator inherited or derived his property: *In re Fricke's Will*, 19 N. Y. S. 315. The unreasonableness of predjudices or the unfairness of dispositions, however much they may be the subject of criticism, however much the product of bad advice and resentment, cannot alone avail to invalidate a will: *Finn's Estate*, 1 Misc. Rep. 280; *In re Gleespin's Will*, 26 N. J. Eq. 523; *Winternute* v. *Wilson*, 27 N. J. Eq. 447, 28 N. J. Eq. 437; *Dale* v. *Dale*, 36 N. J. Eq. 269; *Salisbury* v. *Aldrich*, 118 Ill. 199; *Trezevant* v. *Rains*, 25 S. W. (Tex.), 1092; *Bennett* v. *Bennett*, 26 A. (N. J.), 573; *Loeser's Estate*, 3 Pa. D. 817.

No matter how flagrantly the testator has violated the obligations of affection: *In re Blair's Will*, 16 N. Y. S. 874. No matter how sudden the change of testamentary disposition: *In re Clark's Will*, 23 N. Y. S. 712. The omission or disinheritance of a child is entitled to no weight other than as a circumstance to be considered with other evidence tending to show undue influence or want of mental capacity: *Smith* v. *Harrison*, 2 Heisk. 230; *Bluoit* v. *Murrin*, 58 Mo. 307. Where force, fraud or undue influence is used the free agency of the testator is destroyed and the instrument obviously is not his will. Want of sufficient mental capacity is the usual ground for contest in the hundreds of will cases tried every year in the courts of this country.

To the medical profession insanity is simply "a condition due to disease of the brain, expressed by impairment of feeling thought and volition:" Hamilton's System of Legal Medicine,

Vol. II, p. 39. Confusion and misunderstanding result from the fact that "insanity" as defined above does not necessarily deprive the testator of testamentary power. The question in every case is not whether the testator was or was not suffering from disease of the brain, but whether at the time of executing his will he had sufficient intelligence to understand the business in which he was engaged, and to know what property he had and who had claims upon it: *Harrison* v. *Rowan*, 3 Wash. C.C. 580; *Delafield* v. *Parrish*, 25 N. Y. 9; *Bulger* v. *Ross*, 98 Ala. 267; *Craig* v. *Southard*, 35 N. E. (Ill.) 36. "It would be unjust," said Judge Cooley, "to deprive a man of the control of his property as soon as the indications of mental disease appear. . . . It is with mental health as with physical. A physician discovers evidence of actual or incipient unsoundness in numerous cases of those who pass with their fellows as persons in perfect health. For the purpose of treatment this is useful, but for the ordinary purposes of life the physician must adopt the same standard with the rest of the community, and those persons will be considered in health who pursue their ordinary avocations and discharge the ordinary duties of life without being incommoded or inconvenienced by physical disorders:" *Fraser* v. *Jennison*, 42 Mich. 207. So in the matter of *Fricke's Will* it appeared on autopsy that deceased had tumors on his brain, but they were not shown to have affected his understanding: 19 N. Y. S. 315.

Eccentricity of habits, moral depravity, or dissipation, do not establish want of capacity: *Prentiss* v. *Bates*, 88 Mich. 567; *Hutchinson* v. *Hutchinson*, 38 N. E. (Ill.) 926; *Boardman* v. *Woodman*, 47 N. H. 120. Nor the weakness of old age: *Pike's Estate*, 31 N. Y. S. 689; *In re Boger's Estate*, 31 A., 359; *Leeper* v. *Taylor*, 47 Ala., 221. But see *Bever* v. *Spangler*, 61 N. W. (Ia.) 1072. Nor the excessive use of intoxicating liquors, unless it is shown that the will was made during a period when the reason was actually dethroned from that cause: *In re Jones' Will*, 25 N. Y. S. 109; *Peck* v. *Cary*, 77 N. Y. 9; *Lewis' Estate*, 140 Pa. 179; *Dimonds' Estate*, 3 Pa. Dist. 554. So also with the morphine habit: *In re Coles' Will*, 49 Wis. 179. It is not necessary to prove that testator

actually recollected all his property; it is sufficient if he was mentally capable of doing so: *Kerr* v. *Lunsford*, 31 W. Va. 659. Nor can it be said, as a matter of law, that because a person is incapable of transacting ordinary business he is incapable of making a testamentary disposition of his estate: *Sinnet* v. *Bowman*, 37 N. E. (Ill.) 885; *Taylor* v. *Cox*, 38 N. E. (Ill.) 656; *May* v. *Biddle*, 127 Mass. 414; *Whitney* v. *Twombly*, 136 Mass. 145.

The theory of partial insanity or delusion is of comparatively modern origin and growth. The term "partial insanity," although frequently used, is unscientific and it is safer to speak of monomania or paranoia; In the words of Hamilton: "It is no more possible for a partial disease of the mind to exist than for a partial variola or a partial phthisis. It is true that certain insanities have limited forms of expression, but I have never seen a case even of paranoia or some of its allied psychoses, or moral imbecility, where, sooner or later, there were not, more or less, decided indications of general and profound intellectual disturbance:" Hamilton, Vol. II, p, 114; Williams on Executors, Ed. of 1895, p. 30. Monomania or paranoia is an insanity in which the mental aberration consists in the existence of limited delusions that are of a grandiose or depressed or persecutory nature. In *Drew* v. *Clark*, 3 Add. 79, the leading case on this subject, it was held by Sir John Nicholl that a will, the direct offspring of insane delusion was void. In that case a prominent doctor had treated his only daughter from her earliest childhood in a manner truly fiendish and finally disinherited her, although there was no reason for such conduct on his part, his daughter being dutiful and highly regarded by all who knew her.

Some of the English cases carried this doctrine to an extreme, holding, that if the testator's mind was unsound in one particular it was altogether unsound, and, therefore, incapable of performing a rational act, such as the making of a will: *Waring* v. *Waring*, 6 Moo. P. C. 341. A different doctrine subsequently prevailed, and it is now held that to render it invalid the will must be the direct product of the delusion: *Boughton* v. *Knight*, L. R. 3 P. & D. 64; *Smee* v.

Smee, L. R. 5 P. Div. 84. For example, a monomania on the subject of eating was held not to affect testator's capacity to make a will: *Jenckes* v. *Smithfield*, 2 R. I. 255. Where, however, a testator believed that he was a son of George IV, and under that delusion, made a will leaving his property to a library at Brighton, a favorite resort of that king, the will was set aside as the offspring of delusion: *Smee* v. *Smee*, L. R. 5 P. Div. 84. So, also, where testator had delusions of persecution: *Society* v. *Hopper*, 43 Barb. 625; *Ballantine* v. *Proudfoot*, 62 Wis. 216; *Edwards* v. *Davis*, 30 W. L. B. (O.) 283. That his family were trying to poison or injure him: *Riggs* v. *The Society*, 95 N. Y. 503. That his wife was unfaithful: *In re Gannons' Will*, 2 Misc. Rep. 339; *Barbo* v. *Rider*, 67 Wis. 398. Or his child illegitimate: *Haines* v. *Hayden*, 54 N. W. (Mich.) 911. And where deceased had suddenly conceived an intense and unreasoning hatred of a member of the family: *Miller* v. *White*, 5 Redf. 320; *Merrit* v. *Rolston*, 5 Redf. 220.

In the matter of *Lockwood's Will*, testator executed an instrument giving all his property to charity, except a sum to his executor, "as high as one quarter of the estate, large enough to be above any bribe that may be offered by my brothers and sisters for the redemption of this will and the heirship to my estate." The court said, "I am persuaded that the alleged will must be rejected, that it is unnatural, unreasonable and strange on its face." 8 N.Y.S. 345. In *Carter's Estate*, 11 Pa. C. C. 140, testator, an accomplished man, fell into a hypochondriacal condition and excluded from participation in his estate two daughters, one because of her marriage to a man against whom he had conceived a sudden, groundless and unreasoning antipathy, and the other because of her presence at the ceremony, at the same time reducing the shares of other children present to life estates. An issue *devisavit vel non* was granted on the ground that the evidence, if believed, was sufficient to establish an insane delusion.

On the other hand, if there are facts, however, insufficient, from which a prejudiced narrow or bigoted mind might derive a particular idea or belief, it cannot be said that the mind is unsound in this respect. The belief may be illogical or pre-

posterous, but it is not, therefore, evidence of insanity. *In re White's Will*, 121 N. Y. 406; *Coit* v. *Patcher*, 77 N. Y. 533; *Estate of Carpenter*, 94 Cal. 406. In *Martin* v. *Thayer*, 37 W. Va. 38, it was developed that testator missing his will from his papers and unjustly suspecting his grandchild of taking it excluded her from a later will. The original will was subsequently founded enclosed in a deed in his box. A verdict for the contestants was set aside, the court saying, that if the testator had testamentary capacity, it was none the less his will, although he may have been influenced to exclude parties from sharing in his bounty under a mistaken apprehension of facts. This question frequently arises where it is alleged that deceased was subject to a delusion as to the illegitimacy of his children. "It is conceded," said the court in *Potter* v. *Jones*, " that the conclusions he (the testator) drew from the facts are wholly unwarrantable and without any justification, indicating at least an unrelenting jealous disposition, but unjust and absurd, as they may be, they were not the pure creation of a perverted imagination without any foundation in reality:" 20 Ore. 245; *In re Smith's Will*, 24 N. Y. S. 928; *Clapp* v. *Fullerton*, 34 N. Y. 196; *Coit* v. *Patcher*, 77 N. Y. 533; *Cole's Will*, 49 Wis. 179; *Philips* v. *Chater*, 1 Dem. 533. The speculative belief of an individual concerning things natural or supernatural, no matter how irregular, is not to be regarded as insanity: *Smith's Will*, 543; *Chafin's Will*, 32 Wis. 557; *Bonard's Will*, 16 Abb. Pr. 128; *Hartwell* v. *McMaster*, 4 Redf. 389. It is within very narrow limits that any such belief can be confidently pronounced a delusion. "The question," it was remarked in *Taylor* v. *Trich*, "is not so much what he believed on these subjects as what effect had his beliefs on his mental condition:" (165 Pa. 586 at p. 600.) If such beliefs unsettle the judgment and leave the subject under the influence of a delusion that usurps the reason and controlls the will, then such person has not a sound, disposing mind and memory: *Robinson* v. *Adams*, 62 Me. 369.

As already stated, injustice and inequality in the distribution of property may be considered in connection with other facts showing incapacity, as a circumstance tending to show

unsoundness of mind: *Pooler* v. *Christman*, 34 N. E. 57; *Tawney* v. *Long*, 76 Pa. 106; *Bitner* v. *Bitner*, 65 Pa. 347; *Knox* v. *Knox*, 11 S. 125; *McFadden* v. *Catron*, 25 S. W. (Mo.) 506. To take the question of alleged unreasonableness from the jury is reversible error: *Simms* v. *Russel*, 57 N. W. (Ia.) 601; *Sherley* v. *Sherley*, 81 Ky. 240. At the same time it is improper to single it out from the other facts of a case and instruct specially as to it, thus giving it undue prominence and tending to mislead the minds of the jury from the real issue of capacity: *Blesdoe* v. *Blesdoe*, 1 S. W. 10; *Burney* v. *Torrey*, 14 S. W. (Ala.) 685. It is only a circumstance and never regarded as sufficient alone to invalidate a will: *Gamble* v. *Gamble*, 39 Barb. 373. This is particularly true where the facts suggest a reason for such discrimination as from motives of gratitude or personal attachment: *In re Snelling*, 136 N. Y. 515; *In re Mondorf*, 110 N. Y. 450; or to secure peace at home, *Peery* v. *Peery*, 29 S. W. (Tenn.) 1. Or a preference for children who formed part of the household, or for the younger children: *In re Murray's Estate*, 11 Pa. C. C. 263; *Nicewander* v. *Nicewander*, 37 N. W. (Ill.) 698. Or a statement that a child has already been provided for: *King* v. *Holmes*, 84 Me. 819. Family discord, unfilial conduct of children, the separation of husband and wife, are all circumstances to be carefully considered: *Chandler* v. *Jost*, 11 S. 636; *In re Suydam's Will*, 32 N. Y. S. 449. "A person will be influenced in the formation of his attachments and prejudices by his associations, relationship, benefits or injuries. This is natural and he may, in the exercise of his discretion, dispose of his property according to his predilections thus formed:" *Mitchell* v. *Mitchell*, 43 Minn. 73; *Trumbull* v. *Gibbons*, 2 Zab. 117; *Lee* v. *Lee*, 4 McCord, 183; *McDonaldson's Estate*, 130 Pa. 480; *Blair* v. *Cline*, 33 P. (Ore.) 542; *Barnes* v. *Barnes*, 66 Me. 286; *Collins* v. *Brazil*, 63 Ia. 432; *Austen* v. *Graham*, 8 Moo. P. C. 493; *White* v. *Driver*, 1 Phill. 84; *Foster's Estate*, 142 Pa. 62. A will cannot be termed inofficious, which disregards the claims of collaterals in favor of a wife: *McCann's Estate*, 2 Pa. Dist. 181; *Barlow* v. *Waters*, 28 S. W. (Ky.) 785; *Harwood* v. *Baker*, 6 Moo. P. C. 282. Nor the passing