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TESTAMENTARY CAPACITY AS AFFECTED BY INSANE DELUSIONS

The right to dispose of property by will is neither absolute nor immune from challenge. Appellate cases in large numbers bear witness to the eagerness and frequency with which grasping or aggrieved heirs question the validity of a testamentary disposition. Together with fraud and undue influence, one of the most frequently used grounds for contest is mental

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30. See MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 57 (1949).

31. The *Neirbo* doctrine has received unqualified acceptance from many writers. See Notes, 53 HARV. L. REV. 660 (1940); 49 YALE L.J. 724 (1940); Comment, 15 TEMPLE L.Q. 92 (1940).

32. In Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945), the court reasoned: "The precise question is whether by his use of the Maryland highways, in accordance with the Maryland statute, the defendant has consented to be sued in the State court by the form of service prescribed by the Act. No point has been made here that personal service on a defendant in this state is less effective as bearing on consent than if the less direct form of service authorized by the act had been had. I think it logically follows from the principle of the *Neirbo* and *Schollenberger* cases that the defendant's consent to be sued in the federal court is implied from his voluntary use of the Maryland highways."

For cases allowing suit in the federal courts see Urso v. Scales, 90 F. Supp. 653 (E.D. Pa. 1950); Morris v. Sun Oil Co., 88 F. Supp. 529 (D. Md. 1950); Blunda v. Craig, 74 F. Supp. 9 (E.D. Mo. 1947); Krueger v. Hider, 48 F. Supp. 708 (E.D. S.C. 1943); Andrews v. Joseph Cohen & Sons, 45 F. Supp. 732 (S.D. Tex. 1941); Malkin v. Arundel Corp., 36 F. Supp. 948 (1941); Williams v. James, 34 F. Supp. 61 (W.D. La. 1940). *Contra*: Waters v. Plyborn, 93 F. Supp. 651 (E.D. Tenn. 1950). In the *Waters* case an unsuccessful argument of waiver was based on subjection to the Tennessee non-resident motorist statute. The court reasoned that one has a right to pass freely from state to state, Edwards v. California, 314 U.S. 160 (1941), that this right is curtailed by non-resident motorist statutes, Hess v. Pawloski, 274 U.S. 352 (1927), and that in the curtailing of a right the citizen assumes a burden. There is in the non-resident motorist statutes an element of compulsion. But a corporation does not have the rights of a natural person, cannot move freely from one state to another to transact business. It gives up no right when it takes on its burden. There is, therefore, no compulsion on the corporation. Waiver and compulsion being inharmonious, the court refused to extend the *Neirbo* doctrine.

The vulnerability of the reasoning in the *Waters* case is apparent. It is assumed that a corporation could be kept out of a state. As to corporations doing interstate business that assumption is probably fallacious. See Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917). See also Southern Pac. R.R. v. Arizona, 325 U.S. 761 (1945) (excluding the railroad totally would have been greater interference with interstate commerce than regulating the length of its trains—a regulation struck down). A better assumption would be that corporations engaging in interstate commerce have a right similar to that of individuals to go from state to state. And corporations doing interstate business have been held to have "waived" venue (see *Neirbo*). Thus, the distinction between the abridgment of a right of an individual and the assumption of a burden by a corporation in exchange for a privilege seems invalid.

incompetency; for it is necessary that all persons meet certain mental qualifications when making a bequest.[1]

Mental tests are designed in accordance with a norm of community mores termed an "inarticulate standard."[2] Correlatively, these mores impose a moral responsibility on the testator to provide for the natural objects of his bounty.[3] In interpreting the wills statutes, which usually require no more than a "sound mind,"[4] it is natural for the courts to look to the average, the common, the typical—the standard imposed by the community—to test

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1. "The first Wills Act of Henry VIII, [32 Hen. VIII, Ch. 1 (1540)], used the words 'all and every person' without any qualification as to sanity. Two years later, [34 and 35 Hen. VIII, ch. 5, § 14 (1542-43)], it was provided expressly that wills or testaments of lands, tenements, or hereditaments by an idiot or any person de non sane memory should not be taken to be good or effected in the law. It is quite likely that the courts would have implied this exception if parliament had not made it in express language; but the amendment, whether declaratory or not, followed the original act so promptly, and has been copied so generally in modern legislation, that the courts have not been called upon to decide the question." 1 PAGE, WILLS 256 (3d ed. 1941).

2. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise,* 53 YALE L.J. 271 (1944).

This has also been explained in terms of "herd instinct":

"For the average man herd instinct is the force which determines his ethical code and all those beliefs and opinions which are not the result of a special knowledge. He carries out certain rules of life because his fellow men carry out the same rules; he believes certain things because he lives in an environment where those things are believed by everyone around him.

"The beliefs of the sane, whether true or false, are generally supported by the opinion of a class, and are the result of the operation of herd instinct. The delusions of the lunatic, on the other hand, are not so supported, but are individual aberrations dependent upon factors working in direct opposition to herd instinct. . . . The beliefs of the sane, again, are often incompatible with the facts, but no belief can be held for long which is very obviously contradicted by experience. . . . The opposing forces exert a slow erosive effect which in process of time produces a gradual alteration in the belief, and perhaps ultimately destroys it." HART, THE PSYCHOLOGY OF INSANITY 134, 142 (1912).

3. Green, *Public Policies Underlying the Law of Mental Incompetency,* 38 MICH. L. REV. 1189, 1218-1219 (1940).

". . . [A] moral responsibility of no ordinary importance attaches to the exercise of the right thus given." Cockburn, Ch. J., in Banks v. Goodfellow, L.R. 5 Q.B. 549, 563 (1870).

An important indication of the desire of the courts to protect the testator's family is the use of the will itself as evidence of the rationality of the testator. See Patterson, *Insanity,* 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 68, 70 (1932).

4. "Modern legislation generally provides that a testator must have a sound mind, or sound mind and memory, or sound and disposing mind and memory." 1 PAGE, WILLS 256 (3d ed. 1941). For example, "All persons, except infants and persons of unsound mind, may devise, by last will and testament. . . ." Ind. Ann. Stat. § 7-101 (Burns 1933). *But cf.* GA. CODE ANN. § 113-204 (1933): "An insane person generally may not make a will. A lunatic may, during a lucid interval. A monomaniac may make a will, if the will is in no way the result of or connected with his monomania. In all such cases it must appear that the will speaks the wishes of the testator, unbiased by the mental disease with which he is affected." Of further interest is the Georgia statute generally defining testamentary capacity: ". . . rational, as distinguished from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard." GA. CODE ANN. § 113-202 (1933).

the variance from mental normality[5] and to justify interference with testamentary freedom.[6] Is a person afflicted with an insane delusion possessed of the "unsound mind" of the wills statutes?

A delusion is defined as an unwavering, non-religious belief without any evidence to support it.[7] Prior to the 19th century, students of mental illness were committed to the idea that the mind was but a single unit—a person was either totally insane or completely sane.[8] Consequently, the courts adopted this approach in determining whether a decedent was capable of making a will.[9] A delusion, under this theory, could be considered only as part of the totality of evidence used to prove general insanity.[10]

However, with the turn of the 19th century there arose a school of faculty psychology which contended that the mind was not entire, but was divisible, and that it was possible for a person to be insane on one subject but sane as to others.[11] This phenomenon of "compartmentalization" was given several la-

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5. "One is of sound mind for testamentary purposes only when he can understand and carry in his mind in a general way:
(1) The nature and extent of his property,
(2) The persons who are the natural objects of his bounty,
(3) The disposition which he is making of his property. He must also be capable of:
(4) Appreciating these elements in relation to each other, and
(5) Forming an orderly desire as to the disposition of his property."
ATKINSON, HANDBOOK OF THE LAW OF WILLS 186 (1937).

6. "There are social considerations that favor *free testamentary disposition,* among them being the desire to provide for those friends and relatives in special circumstances, and the use of the testamentary power as a means of securing the respect and favor of younger people who are hopeful of testamentary disposition." Cockburn Ch. J., in Banks v. Goodfellow, L.R. 5 Q.B. 549, 563-564 (1870). It would accordingly seem that the social consideration favoring protection of the testator's family and the imposition on him of a moral responsibility to his family are the motivating factors behind the restrictions on free testamentary disposition. Statutes giving the testator's widow the right to elect to take under the laws of descent are also probably similarly motivated. See, *e.g.,* IND. STAT. ANN., § 6-2332 (Burns 1933).

7. HART, THE PSYCHOLOGY OF INSANITY 30-31 (1912). It is necessary to differentiate between delusion and certain other terms: an hallucination is not a false belief, but a false sense impression. *Ibid.* The distinction between an eccentricity and a delusion exists but is most difficult to apply. The former is a unique behavioristic pattern, and the difficulty lies in that extreme eccentricities may be symptomatic of insanity. The same holds true for a prejudice. SINGER AND KROHN, INSANITY AND LAW 218-219 (1924). See Florey's Executors v. Florey, 24 Ala. 241, 249 (1854). Delirium is a species of temporary insanity that often accomplishes a high fever. The distinction from delusion lies in the delirium's concurrent disappearance with the fever or shock. See *In re* Kendrick's Estate, 130 Cal. 36, 42, 62 Pac. 605, 608 (1900).

8. See Wetmore, *Mental Unsoundness as Affecting Testamentary Capacity,* 3 AM. L. REG. (N.S.) 1 (1863); Parigot, *Mental Unsoundness as Affecting Testamentary Capacity,* 3 AM. L. REG. 385 (1864); Wood Renton, *Chapters in the English Law of Lunacy, Part IV,* 9 GREEN BAG 527 (1897).

9. See, *e.g.,* Greenwood v. Greenwood, 3 Curt (App.) 1, 30, 163 Eng. Rep. 930, 943 (1790); White v. Wilson, 13 Ves. Jun. 87, 33 Eng. Rep. 227 (1806).

10. See Waring v. Waring, 6 Moo. P.C. 341, 13 Eng. Rep. 715 (1848).

11. See SINGER AND KROHN, INSANITY AND LAW 216-217 (1924); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 77 (1933); Dean, *Unsolved Problems of the Law, as Embraced in Mental Alienation,* 1 AM. L. REG. (N.S.) 513 (1862); Wood Renton, *Loyal Test of Lunacy,* 6 L. Q. REV. 317 (1890).

bels: insane delusions, monomania, paranoia and partial insanity. (These terms vary slightly in meaning but for the purposes of this discussion all are equivalent).[12]

Under the divisibility doctrine, a delusion, operating upon the disposing mind, would of itself invalidate a will and general insanity would no longer be in question.[13] An irrelevant delusion, of course, would have no such effect, but could still be used as evidence of a general unsoundness.

With the unitary mind concept entrenched in the law of wills, and the divisibility doctrine clamoring for recognition, a large part of the 19th century was spent by the courts of both England and America in an attempt to determine which of the two was to be used to decide questions of testamentary capacity.

Dew v. Clark,[14] decided in 1826, is the first English case to discuss delusions with relation to partial insanity as vitiating a will made under its influence. The testator had thought his daughter a "moral monster of unequalled depravity," although her deportment had actually been virtuous and exemplary. Except upon this subject he was not irrational. The will was set aside as "the direct unqualified offspring" of a "morbid delusion."[15] Of importance is the court's statement that ". . . a man who is very sober, and of a right understanding in all other things, may in one particular be as frantic as any man in Bedlam. . . ."[16]

The opinion of the court in *Dew v. Clark* is not clear cut, mostly because of the novelty of the notion of partial insanity. An attempt to get under the wing of precedent was unsuccessful, for no case had previously gone so far in emphasizing the importance of an insane delusion as *per se* vitiating a will (as opposed to use of a delusion as merely some evidence of general insanity).[17] Yet, the opinion does have significance; at least it holds that an insane delusion operating clearly upon the testamentary disposition precludes testamentary

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12. SELLING, SYNOPSIS OF NEROPSYCHIATRY 379 (1944).

"In one group of court decisions, the term partial insanity is applied to cases in which the mind, as a whole, is clouded or weakened, but not entirely incapable or remembering, reasoning, and judging. In another and larger group of cases partial insanity refers to monomania in which a person is regarded as insane on one particular subject, but apparently sane on all other matters." SINGER AND KROHN, INSANITY AND LAW 216 (1924).

13. See, *e.g.*, the collection of cases cited in Annotation, 175 A.L.R. 882, 953 (1948).

14. 3 Add. 79, 162 Eng. Rep. 410 (1826).

15. *Id.* at 208, 162 Eng. Rep. at 455.

16. *Id.* at 92, 162 Eng. Rep. at 415.

17. The court relied heavily on Greenwood v. Greenwood, 3 Curt. (App.) 1, 30, 163 Eng. Rep. 930, 943 (1790), where Lord Kenyon instructed the jury that the will in question, disinheriting the testator's brother, was to be voided only if the jury should find that the testator's "fit[s] of delirium" evidenced a "derangement of mind." Lord Kenyon did not speak of partial insanity or monomania, but of the healthy mind as "entire."

The court in Dew v. Clark also cited Lord Hale as to the existence of partial insanity, with an apology regarding the latter's authority which bore heavily on criminal rather than civil law.

capacity. At most it is a judicial expression of faith in the idea of the compartmentalized mind, as epitomized in phrenology and faculty psychology.[18]

However, in 1848 the idea of the divisible mind was rejected by the Queen's bench in *Waring v. Waring*.[19] The testatrix had delusions that she was being persecuted by those about her, including her brother. The brother contested the probate of the will purporting to cut him off, successfully arguing that there was a lack of testamentary capacity at the time of the execution of the instrument because of the insane delusions of the testatrix. The proponents contended that the delusions were not relevant to the testamentary disposition. But it was not necessary for the court to discuss the question of relevancy since it reasoned that if there were any delusion or insanity whatsoever, the testatrix lacked testamentary capacity, because the mind is indivisible and not compartmentalized. Thus:

> . . . it is quite erroneous to suppose such a mind really sound on other subjects. It is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness which is manifested . . . would break out; consequently, it is 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 more powerful sensation by which the person was afflicted, he, for the moment, was unconscious of his visitation. . . . We are wrong in speaking of partial unsoundness. . . .[20]

The court in *Waring* tried to reconcile its decision with *Dew v. Clark*,[21] but the philosophical differences as to divisibility foreclosed this,—the *Waring* case saying, in effect, that it is all or nothing; there is no divisibility of the mind. If the testator is insane as to one subject, he must be insane as to all. Yet, it has been objected that since *Waring* presented an insane delusion, *distinctly operating on the disposing mind of the testator,* this metaphysical analysis of the case is "reduced to the propositions of an *obiter dictum*."[22]

Nevertheless, in England, from 1848 to 1870, *Waring v. Waring* was followed. In *Smith v. Tebbitt*,[23] decided in 1867, it was said, ". . . if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, then the testator must be pronounced incapable."[24]

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18. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 77 (1933).
19. 6 Moo. P.C. 341, 13 Eng. Rep. 715 (1849).
20. *Id.* at 350, 351, 13 Eng. Rep. at 719.
21. *Id.* at 353, 354, 13 Eng. Rep. at 719, 720.
22. Wood-Renton, *Testamentary Capacity in Mental Disease,* 4 L. Q. REV. 442, 446 (1888).
23. L.R. 1 P. & D. 398 (1867).
24. *Id.* at 401.

In 1870 the dictum of the *Waring* case was finally abandoned. In *Banks v. Goodfellow*,[25] the testator had made his will in favor of his niece. At the time the will was executed, he was under a delusion that a man who had died was still alive and tormenting him. This delusion could have had no effect on the testator's depository scheme, so the court was face to face with *Waring v. Waring*. The will was upheld,[26] the court being of the opinion that the *Smith* and *Waring* cases were correctly decided because of the relevancy of the delusion to the testamentary mind, but that the doctrine of "all or nothing" found in the previous opinions was so much dictum. The *Banks* case has been consistently adhered to and the English law today is generally committed to the divisibility doctrine.[27]

The development of the divisibility doctrine in the United States[28] is also of considerable interest, particularly as to the treatment of the English decisions. A line of New York cases is typical. In *Stewart v. Lispenard*,[29] decided in 1841, seven years before the English case of *Waring v. Waring*, the testatrix was an imbecile and had been recognized as such in her father's will. Yet, even her father thought she had some capacity, for he left her an annuity over which she could exercise some discretion. Her will was admitted to probate,[30] the court saying that in order for one *not* to have testamentary capacity, there must be total insanity.[31]

Here is an approach similar to that of the *Waring* case's "all or nothing" proposition; but whereas the *Waring* dictum said, "If a little then all," the

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25. L.R. 5 Q.B. 549 (1870).

26. The contestants sought reversal on the ground that the trial judge refused to instruct the jury that: ". . . though the delusions, under which the testator had undoubtedly before laboured, might not have been present to his mind at the time of making the will, yet if they were latent in his mind, so that, if the subject had been touched upon, the delusions would have recurred, he was of unsound mind and therefore incapable of making a will." *Id.* at 554.

27. In the Estate of Bohrman [1938], 1 All E.R. 271 (1937); Murfett v. Smith, L.R. 12 P.D. 116 (1887); Smee v. Smee, L.R. 5 P.D. 84 (1879); Boughton v. Knight, L.R. 1 P.D. 64 (1873).

28. Dew v. Clark, 3 Add. 79, 162 Eng. Rep. 410 (1826), is ordinarily considered the first case to have discussed delusions with relation to partial insanity as vitiating a will made under its influence; but the case of Johnson v. Moore's Heirs, 11 Ky. (1 Littell) 371 (1882), decided four years prior to Dew v. Clark, contains pertinent language. In this case the testator had delusions that his brothers, the beneficiaries of a previous will, had tried to seize his property. In setting aside the will, the Kentucky court, at page 374, spoke of ". . . the derangement in one department in his mind, unaccountable indeed, but directly influencing and operating upon the act which is now claimed as the final disposition of his estate."

29. 26 Wend. 255 (N.Y. 1841).

30. The court's desire to uphold a "natural" disposition is of interest: "The will under consideration appears to be just such a one as Alice Lispenard would naturally have made, in favor of those whom she had for years looked to with respect and gratitude. . . . Had the will been otherwise . . . this . . . would alone, in one of her rate of intellect, have a presumption of fraud, or want of proper disposing understanding, requiring other testimony to explain it and establish the will." *Id.* at 314.

31. *Id.* at 304.

Lispenard dictum said, "If a little then none."[32] Both cases, of course, reject the notions of divisibility and partial insanity, although there was no delusion involved in the *Lispenard* case.

In *Stanton v. Wetherwax*,[33] decided in 1853, the testator was moderately wealthy but he feared being sent to the poor-house. He suffered from several delusions about his property and the efforts of certain people to obtain it. The New York court reversed the surrogate's admission of the will to probate because the latter ". . . applied to the testator the rule provided for idiots and imbeciles, as stated and illustrated in the *Lispenard* case."[34] The court cited *Dew v. Clark* and said:

> The testator was partially insane, and something more than a monomaniac; for he was under a strong delusion on more than one subject. A monomaniac may make a valid will, where the provisions of the will are entirely unconnected with, and of course uninfluenced by, the particular delusion. Again, perhaps the unsoundness of the testator's mind extended to so many subjects . . . as to . . . amount to a general unsoundness of mind that would entirely incapacitate him from making a rational or valid disposition of his property. Those questions . . . should . . . have been passed upon by the surrogate. He did not pass upon them, but confined his attention to the general question of imbecility of mind.[35]

This case, decided five years later, did not mention *Waring* but followed *Dew v. Clark* and the divisibility and partial insanity ideas.[36]

Other American jurisdictions either ignored or discredited the "indivisible" utterances of *Waring v. Waring* or expressly accepted the theory of *Dew v. Clark*. In the early Pennsylvania case of *Leech v. Leech*,[37] an instruction to the jury adhering to the idea of partial insanity was approved. And the Alabama court said, in *Florey's Executors v. Florey*:[38] "If . . . partial insanity, or monomania, is established, and the will is the result of such insanity, the act is vitiated."[39] The doctrine of *Dew v. Clark*, favoring divisibility, is also found in an early New Jersey case.[40] And the dictum

32. Wood-Renton, *Chapters in the English Law of Lunacy*, 9 GREEN BAG 527, 539 (1897).

33. 16 Barb. 259 (N.Y. 1853).

34. *Id.* at 261, 262.

35. *Id.* at 263, 264.

36. In Delafield v. Parish, 25 N.E. 9 (1862), the New York court felt that it was necessary to discredit the disturbing *Lispenard* dictum, and it did so chiefly by attacking the authority of the earlier case on the basis that the only supreme court justice present at the *Lispenard* decision had not had time to digest the voluminous evidence or to read the many cited authorities. This is substantiated in the reports. To cast even more suspicion on the whole proceedings, there are suggestions of intrigue and jealousy among the New York reporters of those days.

37. 1 Phila. Rep. 244 (Pa. 1851).

38. 24 Ala 241 (1854).

39. *Id.* at 249.

40. Stackhouse v. Horton, 2 McCarter (15 N.J. Eq.) 202, 227-230 (1854).

against divisibility in the Waring case is discussed and rejected in a Connecticut case.[41] Thus, some American jurisdictions, even ahead of England, accepted the idea of divisibility of the mind, and this position has been prevalent up to the present.[42] An insane delusion bearing on the will is enough to upset it; while a delusion not relevant to the testamentary scheme will have no effect on the will except as to its value as evidence of a general unsoundness of mind.[43]

Psychiatrists have bitterly attacked the validity of the divisibility doctrine. Many of them feel that the assumption of judges "that a person may be suffering from a delusion and yet have his mental faculties otherwise intact" is based "on a medical fad of their time, the now exploded doctrine of phrenology—[a] half-scientific, half-fanciful theory" which "proceeded on the assumption that the mind was a bundle of faculties, each having its own location in the brain, and each functioning independently of the others."[44] They point out that "[i]n 1843, this theory was being hailed as the long-looked-for key to unlock the mystery of the mind, and with its concomitant, faculty psychology, it continued in favor almost to the end of the century."[45] Thus to these critics it seems "only natural that its fundamental tenets should, consciously or unconsciously, have been accepted by the judges when they formulated a rule of responsibility for persons 'laboring under partial delusions only' and 'not in other respects insane.'"[46] And they conclude that "today phrenology has been relegated to the gypsy fortune-tellers of the ghettos, but the rule of law which it engendered still holds the respect of jurists,"[47] although to a medical man the idea of partial insanity is as senseless as that of "slight pregnancy."[48]

Much of this criticism has been leveled against the use of the terms "partial insanity" and "delusions" in criminal law;[49] and the first impulse, because the purpose of imposing moral responsibility in criminal law is different from the purpose involved in the law of wills, is to distinguish the criticism of partial insanity in the criminal sphere from the criticism of it in the law of

41. Dunham's Appeal, 27 Conn. 192, 205 (1858).

42. The courts no longer speak of divisibility, but they do speak of the requirements of relevancy and influence of the delusion on the disposition. To the effect that these requirements support the divisibility notion, see discussion *infra* p. 302. For a collection of cases on this point, see Annotation, 175 A.L.R. 882, 956 (1948).

43. See, in general, Guadnola, *Insane Delusions—Phenomena Affecting Testamentary Capacity in the Execution of Wills,* 5 NOTRE DAME LAW. 393 (1930).

44. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 77 (1933).

45. *Ibid.*

46. *Id.* at 77, 78.

47. *Id.* at 78.

48. SINGER AND KROHN, INSANITY AND LAW 216 (1924).

49. WEIHOFEN, *op. cit. supra* note 44, at 77.

wills.[50] Yet, it appears that any criticism *validly* directed against partial insanity as a criminal defense would be just as validly applied to partial insanity as affecting testamentary capacity. The relevancy of the delusion to the act in question, be it criminal or testamentary, is still the vital issue in both types of cases,[51] for if it were true that the monomaniac were not of sound mind generally, every portion of his will, or his every criminal act should be considered the product of the same unsound mind.

It seems apparent that the psychiatrists and the courts at least consider themselves at opposite poles.[52] However, it is possible that the situation is one in which the psychiatrists may be correct in what they say and do and the courts, though abusing psychiatric terminology, are also equally correct in what they do. The difference lies between the purposes of the psychiatrists and the courts.

The psychiatrist—concerned with therapy—is primarily interested in making a live man well; he is looking for new modes of treatment and will discard theories that have not proved helpful. He is not apt to feel it incumbent upon himself to have to conform to traditional expression and doctrine. But, at the same time, few psychiatrists would say that a man with only a slight neurosis would necessarily be incapable of making a rational disposition of his property.

The judge on the other hand is required to protect the testator's heirs, and at the same time to safeguard testamentary freedom.[53] He is *not* dealing with a situation having even the plasticity of a deranged mind; the testator is always dead—he cannot be questioned as to his vagaries. So the judge declares the law, fully aware of the cases which have discarded the theory of the indivisible mind as judicially unworkable (quaere whether

50. "Criminal capacity involves primarily the ability to distinguish right from wrong; while testamentary capacity involves ability to understand the estate to be disposed of, the proper objects of bounty, and the nature of the testamentary act. No test can reduce these to a common standard. For instance, a person may be afflicted with an insane delusion which suggests a certain state of facts to him. In reliance upon this belief he may perform an act, which if committed by one in full possession of his senses, would be a crime. Yet this same person may be fully competent to make a will. The insane delusion under which he suffers may not in any way affect his knowledge of his estate, those having natural claims upon him, and the nature of the testamentary act which he is about to perform." 1 PAGE, LAW OF WILLS 262 (1941).

51. The general view of the courts toward partial insanity as a defense to a criminal act is stated in an early Pennsylvania case: "Partial insanity is confined to a particular subject, the man being sane on every other. In that species of madness, it is plain that he is a reasonable agent, if he were not instigated by his madness to perpetrate the act. . . . A man whose mind squints, unless compelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Commonwealth v. Mosler, 4 Pa. (4 Barr) 264, 266 (1846).

52. "Medical men of great learning maintain that a mind diseasesd on one subject must be classed as unsound, but the law of this state is too well settled to be gainsaid that a man's mind may be impaired in one faculty and practically unimpaired in all others." Sayre v. Trustees of Princeton University, 192 Mo. 95, 90 S.W. 787, 797 (1905).

53. See Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271, 272 (1944).

it is not too complicated to be judicially applied with competence even yet?). Faced with the task of determining what "degree of insanity" will vitiate a will, he couches his opinion in convenient but unnecessary psychiatric lingo. And thus, though a psychiatrist might decide that exactly the same people which the court has singled out should not be permitted the privilege of testamentary disposition, the judge is criticized by the psychiatrist.[54]

It is not always clear whether the criticism is of the judicial method or of the result, but a tirade against a court which has rendered a proper decision always manages to look absurd. Medical men are apt to overlook the fact that courts are able, through the use of the partial insanity idea, to reach approximately correct results in disposing of testamentary questions.

The "unitary mind" approach to testamentary capacity of the 18th century was not without defect. There existed a natural reluctance on the part of juries to declare a testator insane;[55] and they would seldom do so where the testamentary disposition was natural, although the evidence of insanity was plentiful.[56] On the other hand, the jury would usually find an unsound mind from a minimum of evidence, if the disposition were unnatural.[57] These inclinations, although possibly contrary to theory, were unobjectionable since in harmony with the policy insisting upon "provision for the natural objects of the testator's bounty"—spouse, children, and other dependents.[58] However, where a testator was without dependents, his disposition could easily be neither natural nor unnatural, as in choosing one line of distant cousins over another. Faced with the latter type of disposition a jury would be inclined to overlook abundant evidence of lack of testamentary capacity in order to avoid attaching the stigma of complete insanity. Here was threat to theory not called for by the mores of the community.[59]

The divisibility doctrine offered a rational means of invalidating a will without a finding of total insanity; for as shown, proof of a delusion, operating

54. This is not meant to be an apology for the courts; one would think that they should not write so much that is not only doubtful but also unnecessary. But a pragmatic approach to the problem, looking more to what is being done than to what is being said, does to some extent sweep aside the cobwebs.

55. In spite of recent attempts through books and movies to popularize the notion that it is no more of a disgrace to be afflicted with a mental than with a physical illness, prejudices and suspicions of taint have not been completely removed. There is every reason to believe that a most reasonable jury, aware of such prejudices, even if not subject to them, would balk at terming a testator "insane" and thereby putting a stigma on the testator's living descendants. Such reluctance is likely to be overcome only where the testamentary disposition is very "unnatural" and repugnant to the jury's mind. One can only guess as to the efficacy of a judge's instructions in such a case.

56. See, *e.g.*, Stewart v. Lispenard, 26 Wend. 255 (N.Y. 1841).

57. See *e.g.*, Drum v. Capps, 240 Ill. 524, 88 N.E. 652 (1901).

58. See Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271, 272 (1944).

59. See note 2 *supra*.

upon the disposing mind would of itself suffice to overturn a disposition.[60] The psychiatrist should not forget that he did not abandon the divisibility doctrine until he discovered that it failed to serve his purpose. It does not follow that it cannot serve the purpose of delineating between valid and invalid wills. Psychiatric criticism of the divisibility doctrine will continue to be ignored by the law until judges acquire the expertness of psychiatrists or it is proved to society and to the courts that the results achieved under it are improper.

Although the courts may not be subject to psychiatric censure for their acceptance and continuous utilization of the divisibility doctrine, it is still both possible and appropriate to offer constructive criticism concerning the manner in which the doctrine has been developed and applied.

For example, how useful is the definition of an insane delusion? Courts continue to say that a delusion must be without rational foundation—absolutely unsupported by facts.[61] Yet, these same courts have considered as "no facts," fairly positive evidence of "some facts." In *Bohrmann's Estate*[62] it was specifically found that the decendent had been suffering from an insane delusion that the London City Council was persecuting him. But it was also a fact that the Council *was* trying to acquire part of the decedent's land for hospital purposes.[63] Surely it should not be said that the decedent had absolutely no evidence to support his belief. Even in *Dew v. Clark*[64] there was at least a shred of evidence that might be said to have been some foundation for the father's opinion of his daughter.

Of course, "if every iota of information concerning the person's observations and thought processes were obtained, then the basis of fact for the delusion would be readily seen, even though microscopic in extent."[65] And it is obvious that the courts refuse to search for the "iota" because they are zealous to avoid an abnormal disposition of property.[66] Thus, the courts should

60. See note 13 *supra*.

61. See Note, 18 ORE. L. REV. 45 (1938). There has been some confusion as to whether one of the requirements of a delusion is that it be the "product of no reasoning process." The cases have said as much: "a belief which results from a process of reasoning from evidence, however imperfect the process may be or illogical the conclusion, is not an insane delusion." Snell v. Weldon, 243 Ill. 496, 520, 90 N.E. 1061, 1070 (1910). Yet the same court also said "a person who believes supposed facts which have no existence except in his perverted imagination and which are against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, is under an insane delusion." If the delusion be based on logic, surely it is also based on reasoning. See *In re* Trich's Will, 165 Pa. 586, 601, 30 A. 1053, 1056 (1895): "The mental processes of such a person may be orderly and logical but they rest on false assumptions."

62. [1938] 1 All E.R. 271 (1937).

63. *Id.* at 272, 273.

64. 3 Add. 79, 162 Eng. Rep. 410, discussed *supra* p. 294.

65. Note, 18 ORE. L. REV. 45 (1938).

66. Green, *Public Policies Underlying the Law of Mental Incompetency* 38 MICH. L. REV. 1189, 1218, 1219 (1940); *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271 (1944).

recognize that here is a problem of many shadings, calling for a determination not of whether there was any evidence supporting the belief, but whether the conclusion from the facts was rational (one that a reasonable man could make).[67] The definition adopted by the Washington Supreme Court may be a better one:

> . . . an insane delusion denotes a false belief which would be incredible in the same circumstances to the victim thereof were he of a sound mind, and from which he cannot be dissuaded by any evidence or argument.[68]

What are the effects of an insane delusion on the purported will? The delusion, in order to void the probate of a will, must be such as would have influenced the making of the will.[69] This is but to say that the delusion must be *relevant* to the testamentary disposition.[70] Yet many instances are found in which the court, anxious to uphold a disposition, attempted to show that no delusion existed (in the face of almost unsurmountable evidence to the contrary) rather than go straight to the problem of relevancy, which properly offered the desired solution.[71] Also, clearly irrelevant delusions have been allowed to void a will.[72]

The approach is unfortunate. The doctrine of divisibility is closely allied with—indeed is supported by—the concept of relevancy; for, again, if it were true that a monomaniac were not of a sound mind generally, every portion of his will should be considered the product of the same source. In the latter instance, no question of relevancy would exist. However, it is that element of "divisibility" proclaiming that a person's mind may be unsound on one subject, but sound as to others, which has appealed to the courts. Thus the utility of the divisibility doctrine in disposing of testamentary questions rests squarely upon the proper use of "relevancy." To say that an irrelevant delusion (without a finding of general insanity) will void a will is to abandon the compartmentalized mind approach.[73] To construe unnecessarily an irrelevant delusion into "no delusion" is to invite confusion.

Finally, partial invalidity of a will because of mental incapacity (an insane delusion) is apparently unknown to American law, although when only a part of a will is affected by undue influence, fraud, or mistake, many

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67. Note, 18 ORE. L. REV. 45, 48, 49, 50 (1938).

68. *In re* Klein's Estate, 28 Wash.2d 456, 183 P.2d 518 (1947).

69. Gallmeier v. Kaiser, 88 Ind. App. 161, 163 N.E. 533 (1928).

70. Relevancy of evidence is usually a question of law. But the dual question of logical relevancy and influence of the purported delusion on the will is a jury question. Wait v. Westfall, 161 Ind. 648, 68 N.E. 271 (1903).

71. Wait v. Westfall, 161 Ind. 648, 68 N.E. 271 (1903).

72. See, for example, Bohrmann's Estate, [1938] 1 All E.R. 271 (1937).

73. The "unified, undivided mind concept" requires the conclusion that *any* product of such a mind, if the mind be at all deranged, must be regarded as an irresponsible assertion, a nullity in the eye of the law.

courts will uphold unaffected portions, if severable.[74] The problem was met in England in 1937 in the *Bohrmann*[75] case, where the court admitted lack of precedent, but nevertheless upheld parts of the will unaffected by the testator's delusion.[76] American courts should follow this lead;[77] for if the delusion is found to be irrelevant to any part of the testamentary scheme, it is not different from a delusion not affecting the whole of the will, and no valid reason exists for not severing, when possible, the unaffected portion.

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74. ATKINSON, HANDBOOK OF THE LAW OF WILLS 244 (1937).

75. [1938] 1 All E.R. 271 (1937).

76. "As a matter of law, I feel that this is, perhaps, going a step beyond what has yet been decided, but I cannot see that it is in conflict with the well-known decisions. I do not think that I am here taking it upon myself to transgress upon what is really the field of the legislature. It has been the practice in this court for many years to delete from instruments of testamentary disposition anything which the court is satisfied is not brought to knowledge and approval of the testator." *Id.* at 282.

77. There is a pertinent dictum in an early American case: "It may be, that where the derangement is partial, and its results are confined to but one portion of the will, the provisions which are not at all affected by such derangement would be valid." Florey's Executors v. Florey, 24 Ala. 241, 249, 250 (1854).