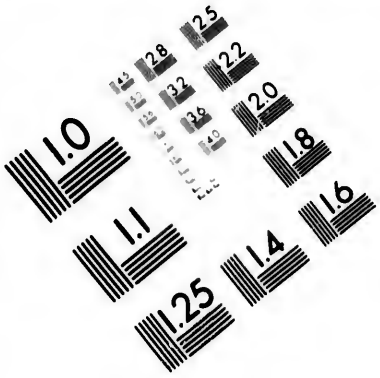

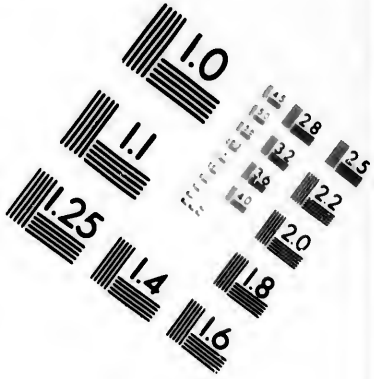

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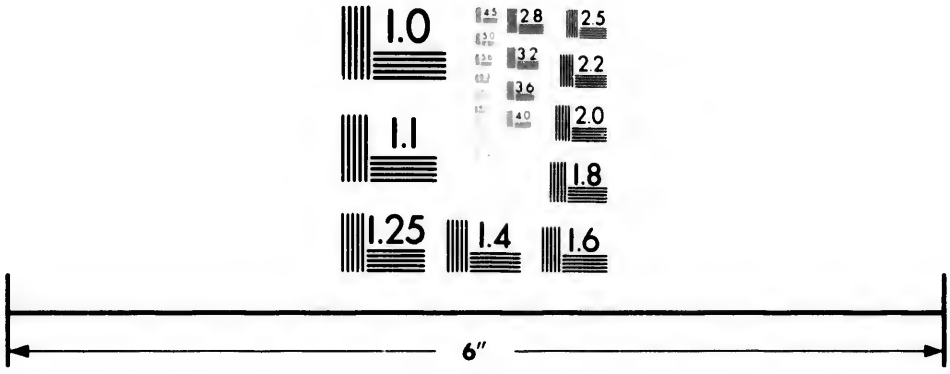

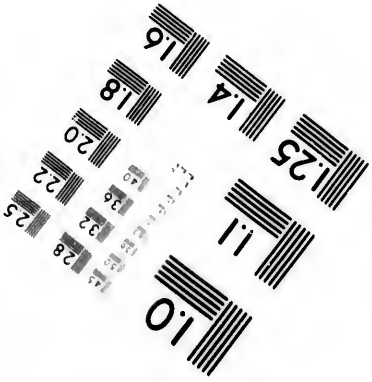

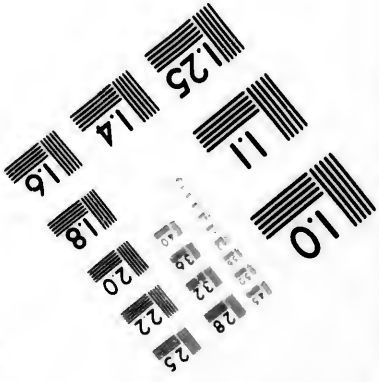

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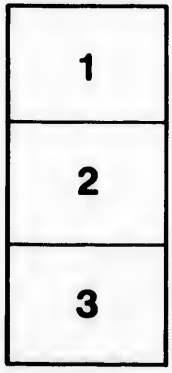

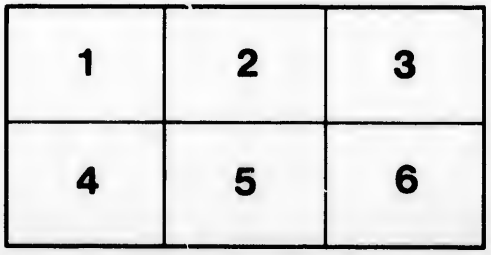

HOW

TO DRAW A SIMPLE WILL:

WITH

SPECIAL INFORMATION FOR CLERGYMEN AND DOCTORS, AND INSTRUCTIONS FOR EXECUTORS IN ORDINARY CASES.

BY

D. A. O'SULLIVAN, M.A., LL.B.,

OF OSGOODE HALL, BARRISTER-AT-LAW, AUTHOR OF PRACTICAL CONVEYANCING, INCLUDING WILLS; GOVERNMENT IN CANADA; ETC.

"A certain Jarndyce in an evil hour made a great fortune and made a great Will."—DICKENS.

"Possis ignarus haberi
Et subiti casus improvidus, ad cœnam si
Intestatus eas."
JUVENAL, *Sat. III.*

TORONTO
MOORE & CO., LAW PRINTERS,
20 ADELAIDE STREET, EAST.
1883.

PRINTED BY
MOORE & CO., LAW PRINTERS,
20 ADELAIDE ST., EAST.
TORONTO.

TO THE READER.

EVERY person should know something about the law respecting Wills, and if possible should know how a simple Will ought to be drawn up.

The first thing to learn is that it is a difficult thing to draw the simplest Will, and that an unskilled person should invariably refuse to do so unless in cases of necessity.

Where a case of necessity arises the plainest forms only should be used—avoiding conditions and restrictions and above all avoiding legal terms. As the intention of the testator governs, his every-day language will ordinarily suffice. If A. wants to leave his farm or his house to his son let that be put down in A's. own words—it will be sufficient if no reference is made to "fee" or "fee simple" or "heirs and assigns" or "give, grant, convey, assign, release, enfeoff and confirm." This is the unknown jargon of the Law.

But it is not in reference to the wording of a Will that difficulties chiefly arise—it is in respect to the surrounding circumstances; a disregard of which has engendered most litigation. An unprofessional man lays great stress on the proper signature of the testator and the attestation of the witnesses—forgetting often that though essential of course they are not the whole thing necessary.

In these pages the mere language of the Will is not to be the subject of greatest consideration; what will be insisted upon is the condition of the testator, his surroundings and his intentions; the structure and language of every Will must always be characteristic of the scholarship of its writer, and will be good or bad in proportion to his thoroughness in that respect.

The capacity of every person to make a Will—what he can leave in it—who and what may be the objects of his bounty—and what influences may be fatal to the exercise of his discretion will be first considered as being

more important; having ascertained what is necessary in this respect the task of committing the man's will to paper will be referred to, and the formality as to execution, witnessing, &c.

The last chapter will contain matters as to codicils, revocation, and probate, and the rights and duties of executors in a concise form; and a chapter in the beginning will be devoted to the law as it now stands in this Province.

A special chapter for the use of the Medical profession has been inserted in the appendix containing the views of the Courts as to evidence in cases of insanity and rules given by a distinguished member of their own profession as to their conduct in the witness-box.

The writer is under obligations to Dr. Wm. A. Hammond, of New York, and to others of eminence in the medical profession for much that is contained in these pages in the medico-legal aspect of insanity as regards testamentary capacity.

The intention was to provide a handy book for the use of Clergymen and Doctors; and so, matters of any special interest to them have been enlarged upon. As full reference as convenient has been made to the Mortmain Acts and to gifts to charities, churches and other kindred matters in which clergymen have been always interested, and a page is devoted to the testimony of clergymen.

If kept to the purposes for which it was written, the writer will feel that he has not been guilty of any professional error in acceding to the request made to him to put together sufficient instructions to enable any one to draw up a short Will; and indeed as to this, his own views have been strengthened by the opinion of one of the leaders of the Toronto Bar.

THE LONG VACATION, 1883. D. A. O'S.

24 Elgin Avenue, Toronto.

TABLE OF CONTENTS.

CHAPTER VI.

CHAPTER VII.

CHAPTER VIII.

CHAPTER IX.

APPENDIX I.

APPENDIX II.

NOTE.—To those who wish to pursue the subjects, here referred to, the following works, among others, may be consulted:—

ANCIENT LAW. —*Maine, Gibbon*, and the text of *Justinian's Institutes*.

EARLY ENGLISH LAW AND WILLS.—*Coote, Reeves, Nicholas*, and the publications of the *Surtees Society*.

MEDICAL JURISPRUDENCE.—*Elwell, Taylor, Brown, Beck*.

INSANITY, ETC.—*Hammond, Pritchard, Maudsley, Bastian*.

INTERNATIONAL LAW.—*Wheaton, Westlake*.

Authorities for the ordinary legal part of these pages are to be found in hundreds of reported cases, and in the text writers on Wills, and are collected in the Writer's *Manual of Conveyancing*.

HOW TO DRAW A SIMPLE WILL.

CHAPTER I.

THE LAW.

"Old Father Antick, the Law."—FALSTAFF.

Changes in the law as to wills—The Roman law—Public wills—Modern codes—Law in England traced—Ecclesiastical Courts—Law of England transferred to this Province.

It has been said that to the proper understanding of an ordinary deed of land, one must go back several hundred years in the history of English law; as regards some of the law respecting Wills we must go further, and dip somewhat into antiquity. Bearing in mind, however, the advice of a French judge to a learned but tiresome advocate—that he might "skip to the deluge"—no disquisition will be offered here on the ancient transmission of property by testamentary disposition. The patriarchal customs as to the Family, the laws of the Twelve Tables, the Imperial Constitutions of Justinian, as well as the early English Law, and the Canon law of the Church might fairly be imported into the most meagre synopsis of any historical review of such a subject.

Traces of many of these old laws and customs are to be found in most modern codes; and it is no small compliment

to the Roman and Greek lawgivers that not a few of their provisions respecting Wills should not only withstand the test of ages, but should commend themselves to the common sense of mankind generally, and in principles of sound policy be found frequently superior to the emendations and restrictions that have been engrafted on them.

For example the principle of publicity in Wills has been unfortunately lost sight of or entirely disregarded in modern legislation.

In very ancient times there could be no disherision of the heirs; and when the laws of the Twelve Tables at Rome gave a limited power of transmitting by Will, it was done by way of a sale, *per æs et libram*. This supposed sale was surrounded by a number of formalities in order to make it as notorious as possible. Five witnesses were necessary and in some cases seven or eight—the Will was propounded in the *Comitia Calata* and ratified by the people if they approved of it.

In Imperial times the number of witnesses was reduced to three, and fewer restrictions imposed on the testator who now assumed that character in reality—the fiction of a sale being dispensed with.

Thus originated *public* Wills before officers of the courts, common yet under the codes of Prussia, France, Quebec, and other places. To our day, both in England and here, the nuncupative Will of the soldier and mariner is substantially the same as under the law of the Twelve Tables.*

On the other hand the codes that permit a *holograph* Will —that is a Will written entirely in the testator's own hand and signed by himself with no witnesses present—have made an innovation resulting often in very serious consequences. Such Wills are permitted in France and in Scotland and also in Quebec; but they never obtained here or in England.

* It is related that Coriolanus found his army on the eve of a battle declaring their Wills to each other.

In England the incorporation of the Feudal system prevented general alienation by Will, though the Saxons in earlier, and the Tudors in later times, permitted certain devises. Since the Conquest only a term of years in land could be devised; but by a subtlety called *Uses* the restraints were evaded. Afterwards, in the reign of Henry VIII., permission was given to devise lands to any person (except a body corporate); and later, in the reign of Charles II., these devises were required to be in writing and signed by three credible witnesses. Personal property could always be bequeathed by Will or testament.

The great break, therefore, in the history of English law as to Wills reduces it roughly to a consideration of these statutes and the subsequent legislation.

By an important act in the reign of Queen Elizabeth certain gifts of money could be made to charities; but as regards a gift of land to either corporations or charities, the restraint lasted until the ninth year of the reign of George II., when the statutes commonly called the Statutes of Mortmain, were passed.* Under this statute of Geo. II., which is law here, devises of land could be made to a corporate body if it had a license to hold in mortmain; but if not so empowered the devise was void.

In 1792 the whole Common and Statute law of England, as far as it affected property and civil rights, was transferred to the old province of Upper Canada, and under this transfer such parts of the law of England relating to Wills and to the practice of administering estates as could properly apply to the altered state of things in a colony came to be in force here. In 1873 the law regarding Wills was amended and consolidated, and is now to be found in the

* A great number of statutes beginning in the reign of Henry III. are to be found in the books on the same restrictions, and are called Mortmain Statutes.

Revised Statutes of Ontario, chap. 106. The law, the courts, and the property, are entirely under the control of the Provincial Legislature.

Concurrently with this glance at the early history of matters testamentary, a brief sketch of the manner in which they were conducted in modern and mediæval times may not be uninteresting.

The frequent mention of Ecclesiastical Courts in matters relating to Wills may raise a query as to the relation between them, and we will detain the reader a moment to assist in its explanation.

Before Christianity had taken a hold on the Roman Empire we are told that the Church had become a governing power, and inflicted private penance and public admonition not only *pro salute animæ*, but for the reformation of offenders.

By the Codex Theodosianus the Bishops were pronounced to be the proper judges in all cases "*quoties de religione agitur;*" and numerous concessions were afterwards granted to the Church by the civil authorities. Accordingly matters connected with marriage, dower, alimony, the validity and invalidity of Wills, the enforcement of legacies, and the administration of a deceased person's property, came under the ecclesiastical laws of the Church.

While this prevailed largely on the Continent the Anglo-Saxons recognized no separate jurisdiction in the Church, but ever since the introduction of Christianity into England the Bishops sat to hear cases in the County Courts with the ealdorman or his sheriff, and introduced the principles of Roman jurisprudence as modified by the Canon Law into their decisions.

William the Conqueror, in an important statute, erected separate courts to be held by the Bishops in their own Sees in the Cathedral Church. Over these Bishops presided the Archbishop of Canterbury in the Court of Arches.*

These Ecclesiastical Courts continued down into recent times. They adopted the practice of the Roman Consistory; and admittedly infused a higher tone into the general judicature of the country. They took cognizance of cases not reached by the Common Law Courts, and in early times the Bishops presided over the Court which owes its origin to them—the Court of Chancery.

One of the chief duties of these Courts was in relation to Wills of personal property, the exclusive control of which was conceded to them under Magna Charta. Afterwards when the statute of Henry VIII. gave the power of disposing lands by Will and in the intervening period when the fiction of *uses* was availed of, the additional work fell to the Ecclesiastical Courts and the Court of Chancery. The manner and history of this could not be intelligently treated in our limited space: suffice to say that in England the Bishops ceased to sit in the Courts of Law or Chancery and that the Ecclesiastical Courts themselves finally merged through some minor devolutions into the Probate Division of the High Court of Justice.

In this Province there is a Surrogate Court established for each County over which the County Judge presides, and it is to this Court in the first instance that all matters testamentary ordinarily come: the jurisdiction of the late Court of Chancery now distributed equally to the three Divisions of our High Court of Justice existing concurrently in some matters and exclusively in others with the Surrogate Court.

* So called from the church *Sancta Maria de Arcubus*, in reference to the position of the place in London.

CHAPTER II.

THE LAW OF WILLS IN THIS PROVINCE.

The old and present law compared—Written Will for all property—no Will by minors—Will speaks from death of testator—Married women can make Wills—so can aliens—Witnesses—revocation—no public or private Wills—definitions—presumptions.

As was said in the last chapter the statute law of Wills is now to be found consolidated in the Revised Statutes of Ontario. Though not containing all that is necessary to be known it is very full in its provisions, and especially particular as to the power and means of disposition by Will, the mode of attestation and signature by the testator, etc.

Many of the old distinctions as to Wills or testaments, land or chattels, minors and adults, written and unwritten dispositions, witnesses credible and otherwise, have passed away and are of little importance under the present law.

There is no difference now between a Will of real property—that is land—and a Will of personal property—that is property other than land, such as money, chattels, stock, etc. Formerly it was usual to speak of a *Will* of lands and a *Testament* of chattels, but that distinction no longer prevails. A

Will or a Will and testament, now mean the same thing. The same formalities are required with one kind of property as with another; and the words "all my property" in a Will pass all the interest of the owner whether in real or personal property.

Every Will must be in writing and must be signed by the party making it in the presence of two witnesses.

The old law as to Wills of soldiers or sailors in active service still obtains. These Wills are called *Nuncupative* Wills—they need not be in writing—it is sufficient if the person declare his Will in the presence of three witnesses.

Every person of the full age of 21 years can make a Will if not rendered incapable in law. The incapacities will be referred to hereafter.

Formerly a male infant of 14 years and a female of 12 could make a Will of personal property. This is not any longer the law.

The Will under the present law speaks from the death of the testator and includes after acquired property: the old rule was generally the other way—a Will was regarded in the light of a *conveyance* of the testator's property at the date of the Will and spoke from that time.

The disability attaching to married women is now almost entirely removed but this is not free from doubt. An alien is under no disability in this Province.

Formerly also the witnesses could sign one after the other if they signed in the presence of the testator—now they must sign altogether.

The witnesses need not now be credible as heretofore, so that an infant or a felon is a good witness. It is doubted

by Mr. Jarman, the great authority on Wills, if a lunatic could be a witness. The present law is curious in regard to the credibility of witnesses. Publication of a Will was formerly necessary—this is no longer the case.

In the old law a gift to a witness made the Will void;—now it does not affect the Will at all but the gift is void. An executor can now be a witness and so can a creditor.

In the old law also the birth of a child after Will made, or certain changes in the testator's circumstances revoked the Will. This is not the case now. Marriage is the only circumstance of that kind that revokes a Will.

A general devise in land now passes the largest interest in it the testator had, unless the contrary appear.

There is no provision in our law as to *public* Wills—that is Wills made before a court or public officer; and a holograph Will would be worthless.

A man can disinherit all his children without giving them or any of them even a shilling. The principle of the "inofficious Will" of the Romans—where the claims of kindred were disregarded—is unknown in our law.

A man can take nothing from his creditors, nor can he deprive his wife of dower if she be entitled to it.

These are the main features of the law in this Province, to which a more particular reference will be made in the succeeding pages.

It is thought advisable here to give some explanation of a few legal terms, and add some leading presumptions respecting Wills.

EXPLANATION OF LEGAL TERMS.

Attestation is where the witness to a Will or other writing signs his name at the time as witness. Where witnessing only is required the name may or may not be signed at the time. Attesting includes witnessing, but witnessing does not necessarily include attesting.

Bequest is properly a gift of money, or other chattel property in a Will.

Codicil—Addition to a Will made after the Will is executed, and intending to affect some of its provisions.

Committee (in lunacy).—A person or persons appointed by the Court to take charge of the person or property (or both) of a lunatic.

Devise is properly a gift of land in a Will.

Executor.—The person named in the Will who is to represent the deceased as to his chattel property—pays his debts and collects in estate, etc.

Guardians.—Persons who have the legal representation of minors or infants. They represent their wards during the lifetime and minority of the wards, much the same as executors and administrators do deceased persons.

Intestacy takes place where any person dies without having made a Will, or a Will of all his property. The distribution of his estate takes place then according to law—the real estate under the law of descent, as set out in the Revised Statutes of Ontario, chap. 105—the personal estate according

to the Statutes of Distributions passed in the reign of the Stuarts as modified by our statutes.

The land goes to the children in equal shares after the share of the wife or husband is deducted. The next of kin is usually appointed administrator of the personal estate—the children in point of age and fitness, (males before females) coming next after the surviving parent. The administrator is always appointed by the Surrogate Court, and has the powers and duties of an ordinary executor. The widow takes one-third of the personal property, and the children the other two-thirds in equal shares.

If there are no children the widow takes one-half the personal estate, and the next of kin of the husband the other half. Where a child is dead, leaving lawful issue, they take the parents' share.

If no children or wife then the father takes, and then the father's family; and if none of these to take then the grandfather's family is considered, and so on back. The nearest family is the next of kin, who divide up with the widow in the event of no children of the person in question.

The same rule applies as to property of the wife when she dies intestate.

Legacy.—A gift of chattels, specific articles, or money.

Letters of Administration.—Where one dies without making a Will the Surrogate Court grants these letters to the next of kin. The administrator represents the deceased in much the same way as the executor.

Lunatic (in law).—A person whose unsoundness of mind is such, that in the opinion of the Court he or she cannot take care of his or her own person or property. No person, though confined in the asylum as an undoubted maniac, can be declared a lunatic in law till the Court passes an opinion on the case.

Minors.—Persons under the age of twenty-one years, of either sex.

Probate.—A copy of a Will proved before the Surrogate Court.

Testator.—Properly, a man who in his lifetime disposed of his property by Will. In the following pages the word "testator" will be applied to mean a person about to draw his Will.

PRESUMPTIONS IN LAW AS TO WILLS.

That the testator meant to dispose of all his property and that he had sufficient for the purposes of his Will.

That he intended the technical words of law used in the Will to be understood in their technical legal sense.

That any gift of an estate in lands is to be the fee simple (if he has such an estate), unless he expressly restricts it or has a less estate.

That his Will is to take effect on his death as to such property as he may then have.

That all alterations, etc., were made after the execution of the Will.

That if his signature be proved, he knew and approved of the contents; if the Will was read over, that is conclusive as to its contents.

That several sheets found as a Will constitute the whole Will.

That if he might see the witnesses sign, then he did see them.

That if the Will be not found after his death, it is destroyed *animo cancellandi*.

That the Will was made on the day of its date.

The Will must be construed as a whole.

The last Will governs.

CHAPTER III.

WHO MAY MAKE A WILL.

"The curate came out and told them that the good Alonzo Quixano was very near his end and certainly in his senses; and therefore that they had best go in so that he might make his will."—CERVANTES.

Everybody can make a Will unless incapacitated by crime, want of discretion or want of free will.—Capacity to make a Will not at all the same as capacity to make a contract.

THE common opinion as to the capacity of making a Will is that all persons capable of dealing with their property in their lifetime, can make a Will directing its destination after their death. This is very far from being the law, and so it will be more satisfactory to point out the exceptions that prevail against the unquestioned right of every person to do what he likes with his own.

It is necessary that a testator have sufficient discretion and be allowed to exercise his own free will, and that he must not be guilty of certain offences.

Every person of full age resident in the Province, man or woman, married or single, subject or foreigner, whether passing through the country as a traveller from a foreign country, or domiciled here and retaining his foreign nation-

ality, can make a Will of his or her property and give it as he or she pleases, subject to certain important limitations to be mentioned presently; provided the person is under no duress or control, has a mind capable of disposing of the property, and has not been guilty of such crimes as the law considers entail the civil death of the party committing them

The exceptions to the general power to make a Will will be considered in the next chapter. *Prima facie*, every one can make a Will the same as every one may appear capable of entering into a contract. But an infant can enter into a contract, and if it be for his benefit it will be ratified after he come of age, unless he promptly repudiate it. The Will of an infant, on the other hand, is void and incapable of ratification. There is a difference also as to the formalities surrounding the contracts of married women, which do not apply to Wills made by them. Under certain circumstances the contract of a drunken man or an absolutely insane man is binding.

It is stated generally in the books that it requires much less capacity to make a Will than to enter into a contract.

CHAPTER IV.

PERSONS WHO CANNOT MAKE A WILL.

Incapacity by reason of crime—Non-age—Old age—Drunkenness—Unsoundness of mind—Deaf and dumb persons—Idiots—Eccentricity in Wills—Moral insanity.

THE general rule as has been seen is that every person is enabled to make his Will unless some disability attaches to him.

The disabilities in law as to Will making are crime, want of mental discretion and want of free will.

Crime.—Very little need be said as to incapacity by reason of crime—indeed very little is known with certainty about it. Any crime short of treason or felony imposes no restraint; and so a man in the jail or penitentiary for offences less than these could make his Will. The idea prevailed that a man being convicted of a capital offence was civilly dead, and everything he had or that came to him went to the Crown as *ultimus hæres* of every subject. In the case of land it is better to make no Will as under the law the land will go to the heirs of the criminal—corrup-

tion of blood being now abolished by statute. It is doubtful if he could devise land or chattels. In such rare cases an opportunity would be open to them to have professional legal advice if they desire it.

Non-age.—No person under the age of twenty-one years can make a Will.

Formerly a male infant of fourteen years and a female of twelve, if of sufficient discretion, could make a Will of personal property. An infant, sailor, or soldier, in active service, can yet make a *Nuncupative* Will, the same as before the Wills Act was passed.

Aged persons.—Extreme old age is not an incapacity, unless the person has become a child again. A man may have outlived his understanding, or may have become imbecile by sickness, or by age; but mere age or weakness of intellect is not of itself sufficient to prevent a man from making his Will. It may however raise a doubt of incapacity. If the mere approach of death, or the imbecility of age, or the tortures of disease and pain, render him incapable of appreciating what his property is, who his relatives are, and what claims they have on his bounty, then any Will he would attempt to make would be no Will. The same difficulty applies here as in dementia, and medical men will appreciate how difficult it is to draw the line between dotage and dementia. Brown in his *Medical Jurisprudence of Insanity* calls one the natural, the other, the unnatural decay of life. In the former, however, only a doubt of capacity is raised—the vigilance of the Court is excited; dementia once established would be fatal to any Will-making capacity.

"A man," says Chancellor Kent, "may freely make his testament how old soever he may be. * * * The Will of

such an aged man ought to be regarded with great tenderness when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of his natural affections dictated." In England it was said that "if a man in his old age becomes a very child again in his understanding, and has become so forgetful that he knows not his own name, then he is no more fit to make a testament than a natural fool, a child or a lunatic." Between the old age which is capable and the old age which is not so, there is often very little externally to found an opinion upon, but in the absence of any suspicion of duress, undue influence, or pressure of any improper sort, it will be safer to draw the Will of a very old person than take the responsibility of saying that such person could not make a Will. The law does not require a very great deal of mental or other ability in a man in order to declare his Will valid—there may be intellectual feebleness—a mind not perfectly balanced—there may have been a great diminution of both bodily or mental vigor within the past years of his life and still, these of themselves would not be sufficient to exclude him from directing the destination of his property. It is not to be expected that his mind would be as vigorous at eighty years as at forty; if he still understands the extent of his property and the nature of the claims of others on his bounty or generosity; that is aware of any discrimination as to the selection he is making in the distribution of it, his disposition will be carried into effect. Physical weakness, however great, is no incapacity.

Drunkards.—Drunkenness is not necessarily an incapacity. A good deal of what has been said with regard to the test of the incapacity arising from old age will be found to apply to all sorts of incapacity. Two questions will arise in every case.

(1) Did the deceased understand what property and relatives he had?

(2) Did he know and appreciate the claims his relatives had on his bounty?

It is not impossible to suppose the case of a drunken man who understood and appreciated these particulars, and if he did one would be justified in drawing his Will. If the intoxication produces oblivion, it will incapacitate—it must disorder the faculties and pervert the judgment. A Will made by a drunken man is not void, and it lies upon the contesting party to shew that the drunkenness was of such a nature as to produce total oblivion and incapacity to make a Will. One case went the length of stating that in habitual intoxication, where a man's senses were besotted and his understanding gone, the person could not make a Will. This is conceived not to be the correct doctrine now, but that a "man addicted to the frequent and injurious use of ardent spirits may execute a perfectly valid Will, if that Will is the result of his free choice influenced only by reason and affection and uninfluenced by poison or disease." Although drunkenness may be a species of insanity the distinction is that in the latter the disease is latent, while in the former it is actual and short lived. There is no presumption of its continuance as in the case of insanity.

Persons of Unsound Mind.—A person of unsound mind cannot make a Will. Unsoundness of mind is an expression used in law meant to include the various mental conditions unsuitable for making a Will. The time-honoured expression of the testator "being of sound mind, memory and understanding," no doubt gave rise to the phrase which is sufficiently comprehensive for the purpose—indeed, misleading, perhaps, as to the extent of the qualification. The expression usually at the beginning of all old Wills is some-

what redundant, as it would be difficult to conceive of a sound mind unless the memory and understanding were included, even if they were not expressly super-added. The *mens disponendi* need not be a well balanced mind, or even such a vigorous mind as the testator once had, but it will be sufficient if it be equal to the thing on hand—the right understanding of the testator's property, and the angle of relationship in which he stands toward his friends and relatives. Now, it is apparent that there may be a partial insanity, not sufficient to deprive the testator of this knowledge even although he be insane on other points; and so it happens frequently that the Will of a lunatic may be upheld. If it could be shewn that delusions influenced his Will, then it could not stand; but it rarely happens except in the violence of acute mania, that a man is deluded as to every subject. Medical opinions, however, differ on these as they do on most points. Many distinguished medical men are of opinion that where the mind is diseased every act done while the mind is in that state is an insane act.

Dr. Gilman, in the Huntington case, said:

"I pronounce Huntington insane. I make no distinction. There is a state of things called *monomania*, but I call him insane. According to Lord Brougham the mind is a *totality*."

Dr. Willard Parker in the same case disagreed with this doctrine so far as "partial" insanity is concerned.

In the year 1800, the question of partial insanity as opposed to the former theory of the mind being a unit came up in England in the celebrated Hadfield case. Hadfield was a soldier, had been wounded, became insane, and imagined that he was a Saviour and had a special mission. His mission was to kill George III., and for that purpose

he procured a pistol and other necessaries, with cool deliberation waited an hour in the Drury Lane Theatre, and fired at the monarch on his entrance to the Royal box.

The great Erskine advanced successfully this new doctrine, and in the most beautiful language described this to be one of those difficult cases "in which reason is not wholly driven from her seat, but distraction sits down upon it along with her, holding her trembling upon it, and frightens her from her propriety."

It was held that Hadfield was insane upon one point, though there was no doubt of his being sane on everything except his mission and its execution.

The English medical authority is also divided, and this opinion of Lord Broughan has been questioned.* The courts cannot be said to have adopted this view, and the test used appears to have been, to quote the language of a writer on the subject, not whether the testator was sane or insane, but whether he had capacity to make the Will in question or was incapable of making it.

It has been all along held that in the *lucid intervals* of insanity a man can make a valid Will, and Wills both here and in England have been upheld where the testator was at the time confined in a mad-house. An insane man, like a drunken man, may be capable in law, therefore, of making a Will, provided that his insanity can be shown not to have affected the dispositions in such Will. Many will suppose that this reads like a contradiction. It is clear that a diversity of opinion will always prevail among the medical profession in that respect, and not a few will always maintain, in opposition to the Courts and some of

* A writer in the current number of the *Popular Science Monthly* adopts the view of partial insanity. See chapter on medico-legal matters in the appendix *post*.

their own brethren, that every act of an insane person is an insane act.

Closely allied to insanity is eccentricity in Wills.

Eccentricity of itself is nothing. Where a testator's mind is at all affected, the fact of any eccentric disposition makes the Will suspicious. There have been some extraordinary Wills made, but where there was no question of mental incapacity the Courts have not interfered. One man made seventy-one codicils to his Will, many of them of the most impossible character, and in his Will made a provision for the support of a professor at the Athenæum in Paris, to lecture on the colors and patterns of dresses. He further directed that his bowels were to be made into fiddlestrings, and other parts of his body into smelling salts. The Will was upheld, the Court remarking that the testator was a vain man, but not insane. A Will of a lady who devoted herself to pet animals, especially pigeons and kept them and a multitude of cats in her drawing-room, was set aside on the ground that her eccentric tastes had taken possession of her to the exclusion of everything else.

What is known as *moral insanity*—that is eccentricity of habits or perversion of feeling and conduct—does not incapacitate a man from making a Will.

Deaf and Dumb Persons.—A deaf mute can make a Will, and of course a blind person can do so also; but a man deaf, blind and dumb from his birth is an idiot, and is incapacitated from making a Will.

CHAPTER V.

UNDUE INFLUENCE.

"No man is so foolish but may give another good counsel sometimes; and no man is so wise but may easily err if he will take no other counsel but his own."
—Ben. Jonson.

Reasons why this and prior chapters precede instructions as to Will—Where testator unduly influenced, Will set aside—All influences are not unlawful—What may be safely done—Influence must not amount to control Will—Wills obtained by fear, force or fraud are void.

The reader may think he is kept a long time from what he is expected to learn in these pages, viz., how to draw a simple Will, but he may take the writer's word for it that the smallest part about most contested Will cases is whether it is executed in the proper way, or whether there is anything wrong about the wording or language of it. When we get to that chapter he will be pleased to see how much will be left to his own ability to use the language, and how little need be said as to the mere writing necessary to constitute a simple Will.

The object here is not to advise any one to attempt drawing a Will in as good or better form than a lawyer could do

it, but to bring out all the difficulties that none but a lawyer sees to exist from the outset in the drawing of the most ordinary Will; and to make the reader give an intelligent and blameless account of himself when the Will he is about to draw is transferred into Court, and some successor of Erskine or Romilly is confounding him with a review of his conduct. A Will that is bad on the face of it never, or rarely, comes into Court at all; and so nearly all the litigation arising out of Wills is engendered by the difficulties referred to in this and the preceding chapters. No one need write such as is aimed at here if it were only the mere formalities that ought to be considered. These can be got at a law-stationer's with instructions on the back ready for immediate and general use.

The matters to be referred to under this chapter need not detain us long. Wills obtained by influence such as the law considers undue, and Wills obtained by fear, force, or fraud, are all void and of no effect. It is clear that in each of these cases, except in some cases of fraud, the person proposing to make his Will is not allowed to act according to his wishes. It is rather the Will of another person than that of him who has been unduly influenced or overawed. As regards undue influence there is no doubt but all the professional advisers of a dying person can potently exercise it. They are present at the time most suitable to make an appeal to him, whether the influence regards his health, his property, or his life in the hereafter. In many countries, therefore, a legacy left by a dying man to medical, legal, or spiritual adviser, was regarded as presumptively bad. No such presumption applies in the English law or here, but it is needless to say that where the relatives have a right to complain such legacies are viewed with extreme suspicion, and unless it clearly appears that the recipient is blameless the gift will be set aside. The most common

difficulty of the legatee is to throw on him the onus of showing the gift to be good, and that it ought to stand.

However where a person living in the home of his professional adviser made a Will in his favour, the Court would not consider the contents of the Will after the capacity to make it was established.

The difficult position for any person to occupy is where a man wants to make a Will which is either very wrong, or very absurd, or both, and where some persuasion ought in charity to be exercised towards him. A wrong-headed man through sudden dislike to a child, or through whim or caprice, will propose to direct his property from its natural channel, and the question is how far he can be safely influenced. In such a case it is not wrong or unlawful to make an appeal to his affections, to press the claims of kindred, and to use such persuasion as may lead to a conviction of the justness of it. The person may be fairly argued into it in certain cases, provided that he is led and not driven. He may say "If it was not for the appeals of So-and-So in his behalf I would not have done this." But the arguments that can be made in favour of offspring, or in their absence, of faithful servants, or tried friends, could not be safely used in another direction, nor at all against such natural claims. It is dangerous to interfere at all, because it is not possible sometimes to say whether the interference did not amount to a *control*, and if so, it is bad, and will vitiate the Will and restore the property to the lawful heirs.

The fear of death, or of bodily hurt, or imprisonment, or loss of one's goods, is such that a Will made under such influence will not stand.

A Will obtained by fraud is no Will. The Courts never have defined what fraud is—no more than doctors have

attempted a definition of insanity. Any misrepresentation, deceit, *suppressio veri*, or *suggestio falsi*, upon which a man acted, and made his Will, may give rise to such a case as would be considered fraudulent. The law has wisely refrained from framing any definition of fraud, as it may happen that if such were made plain, a means would be got by fraudulent persons to evade some of its terms and endeavour to escape the penalties.

It may be well to remember that there is such a thing as an unintentional fraud, and that it is just as fatal and often more mischievous than fraud designed maliciously.

CHAPTER VI.

WHAT PROPERTY CAN BE DEVISED OR BEQUEATHED.

Whatever the testator died possessed of, and which would go to his heirs or next of kin—Contingent interests—rights of entry—Land outside of Ontario must be devised according to "lex loci rei sitæ"—Chattels follow the "lex domicilii."

WHATEVER estate, real or personal, a man dies possessed of or entitled to, he can dispose of by Will; and not only the property itself, but all rights and interest in it capable of transmission can be turned over to his legatee. And so whether he has land, or money, or stock, or other chattels, or a lease for the life of some person still living at his death, or contingent interests or rights of entry, all these or any of them can be bestowed by his Will. Further he may have no property at the time, but may acquire it after his Will was made and before his death, or may acquire it by a legacy from some other person after his death, and the disposing power extends to these cases also. Where the property is all situate in Ontario and the person lives here there is no difficulty; but where he has real estate—land elsewhere, then the *lex loci rei sitæ* governs. As to chattels the law of the domicile of the testator must be followed.

So that if a man is domiciled here, and makes a valid Will, it will dispose of his chattels wherever they may be situate whether here or in Russia, or as they may be. With land it is different. If a man owning land in Chicago desired to make a Will of it in Toronto, and if the local law in Illinois require three witnesses to the execution, a Will with the formalities of our statute would not suffice. It would be different as to chattels. On the other hand if a Canadian were domiciled in California and had money in the Bank here, his Will, if made there, would have to comply with the local law in California, and would be sufficient with such formalities as it requires, even though our law may exact more.

It is often difficult to decide where a man's domicile is or has been. Mere residence is not sufficient nor remaining for a length of time; there must be a change of residence from some other place (unless the person always lived here) and an *intentio manendi* as to Ontario. An alien may be resident here or domiciled only. If domiciled here, his Will made according to our law, would reach his chattel property at any place; if resident, but domiciled elsewhere, the law of the domicile must be followed.

CHAPTER VII.

WHAT BEQUESTS AND DEVISES CAN BE MADE.

"The fact is, I was ruined by having money left me," said the cobbler.—DICKENS.

Gifts to everybody except to witness of Will, or husband, or wife of witness—Aliens—Corporations—Charities—Mortmain Acts—Masses—Not for illegal or immoral purposes—May be conditional—Restraints on land and on chattels.

EVERY person—British subject or foreigner—except the witness to the Will in question, or the husband or wife of such witness, can receive any devise, bequest or legacy.* The disabilities that affect parties in the making of a Will do not apply to their capacity to take a benefit under the Will of another. So an infant (even *en ventre sa mère*), or person of unsound mind is capable and will be deemed to have accepted the provision, unless it be of an injurious character. In these cases, the guardian or committee of the person could act in the matter. A debtor is not disabled from taking a gift, but his creditors could attach it in the hands of the executors. It had better be made to his wife, or in trust for him, in such a way that they could not reach it. They can always reach chattel property however.

* It is usual and correct to speak of a *devise* of land, and a *bequest* of chattel property, such as money, stock, plate, etc. The distinction is sometimes lost sight of and is not ordinarily important.

A wife is capable of taking a gift, but it may be desirable to have it made free from the debts and control of her husband.

An alien can take in the same way as a British subject; but a legacy to an alien enemy may be forfeited to the Crown.

Land cannot be devised to a charity or corporation unless it is empowered to take lands by Will; nor can gifts of money for the purchase of land be made to corporate bodies who are not so licensed.*

Charity in law does not necessarily mean the relief of the poor—it means a gift for a public purpose, local or general.

Bequests of money or other personal estate (pure personalty) can be made to any charitable body, whether incorporated or not. The bequests for any charitable purpose are good, if the persons and objects are sufficiently defined. The law favours such gifts, and will do its best to carry charitable intentions into effect. Institutions of a religious or educational, as well as of a purely eleemosynary character, are included under the term charity. The gift must be definite as to its object, and definite also as to the parties, so that some particular charity is pointed out. A man may leave money to the House of Industry, or House of Providence, or to the St. Vincent of Paul Society in ——, and his intentions will be carried out; or he can leave money for the "good" of a place; for the poor of a parish; for the benefit of ministers of any denomination of Chris-

* In regard to land, it may be mentioned that a Will of it cannot be turned into charitable purposes by devising it to trustees to sell and convert the same into money, and pay over the money to a charity. And if there is a secret trust that the holder will use it for the purposes of a corporation, in evasion of the Mortmain laws, the Courts will set the Will aside. A gift to build a charitable institution is bad, and so is the gift to a charity of money secured on mortgage.

tians, and there is no distinction as to religion unless it be subversive of all religion or all morality; for any public or general benefit of a place; for the benefit, advancement and propagation of education and learning in every part of the world; for schools of learning, free schools, and scholars in universities; for institutions for the cure of diseases; for the education and preferment of orphans; for the repair of churches, etc.; and for many other like objects. On the other hand it seems that for objects of benevolence or liberality, as distinguished from charity, the gift would not be good. And a bequest in private charity, or to one's poor relations, may be bad.

A bequest to a person in religious orders, as a nun, is good, she not being civilly dead under our laws.

A sum of money can be left in order that masses may be said for the soul of the deceased. In this Province, the English doctrine of what has been called superstitious uses has not been followed. A superstitious use has been defined one that has for its object the propagation of the rites of a religion not tolerated by law.* Before the Toleration Act, in England, not only Roman Catholics and Jews but also Protestant Dissenters felt the effects of this doctrine; and so, when Mr. Baxter, who wrote "The Call to the Unconverted," had £600 left him to distribute among sixty ejected ministers, the learned Judge held it to be void, and thought

* Bequests to maintain the burning of lights before altars are very common in old Wills. In 1318 a yearly rent was given to maintain "one taper of three pounds' weight" to burn before a particular altar in St. Paul's Cathedral, London. Books, which had in them the canonical hours, were sometimes left by Will to be fastened to a desk, or reading stand, nigh some altar, that those who wished might say or sing their Matins and Evensong out of them. The Earl of Arundel and the Earl of Warwick each directs in his Wills that Chapels be built and Shrines be enriched out of his estate. The giving of jewels and precious ornaments to decorate statues in Churches is very common also in early English Wills. These and such like bequests came to be considered as "superstitious" in the time of Henry VIII., and the word has been since retained in law.

it had better go to support a chaplain at the Chelsea Hospital

There is no statute here or in England making such uses void, and in these cases the gifts were held invalid in England on the plea of public policy. It is probable these old cases would not now be followed anywhere.

Every form of Christianity is on the same footing. A gift to the Jews, as such, has been upheld. No doubt, any bequest aimed at the destruction or overthrow of any Christian sect, or of Christianity in general, would be contrary to public policy.

A gift cannot be made for an illegal or an immoral purpose, or for a purpose contrary to the public policy of the law.

Gifts can be made with prohibitory or restrictive clauses, or with conditions attached. If the gift be otherwise unobjectionable, the clauses or conditions may be allowed to stand or may be struck out by the Court.

A man may leave his farm to his son, and restrict him from selling it during his natural life except to any of his children; or that he must not sell it without the consent of his mother during her life; but a clause restraining a sale generally is no good; nor one requiring him to sell to one particular man only within a limited time: or that he must live at some specified place.

The wife or husband can impose on the other a condition not to marry again, and by breaking this the legacy would be forfeited; and either may prescribe the other against any particular person, or object to specified religions, nationality or age; or limit as to profession or income. A condition not to marry without the guardian's consent is

valid, and often reasonable and proper. A condition in restraint of marriage generally is void, though not so as against a particular person.

A condition that the property should not be sold out of the family till the third generation is bad.

These restraints and conditions apply to land. Chattel property, when it comes into possession, is untrammelled by restrictions, except in so far as the creditors can reach it. It is a good bequest to say, that if the money or goods given to A. be not disposed of by him in his life-time, they are to go to B.; and A. may be prevented selling chattel property before it falls into his possession.

CHAPTER VIII.

HOW TO DRAW A SIMPLE WILL.

"Be curst and brief."—SIR TOBY BELCH.

"If the deed had simply stated that C. D. had 'bought' the land of A. B., I do not think I should have been satisfied. But this luscious lingering upon the circumstance, ringing it over and over upon all words which had a remote approach to the meaning—conveyed, transferred, made over, disposed of, invested with, deeded to, granted, given, empowered —what fulness and richness, what vitality and certainty, it gave to the act."

—BAYARD TAYLOR.

Law about paper, pen and ink—Date—Executors—Dispositions — Witnesses — Description of property — Debts—Widow's share—Husband's share —Will of married woman —Provisions to continue household—Technical terms—Attestation clause—Signing of all parties—Alterations—Erasures.

THERE is no statutory form for Wills, and any intelligent disposal of a man's property intending to take effect at his death, will be sufficient, if properly executed by him. If its terms are testamentary, it may be in the form of a letter, draft, receipt, note, order, bond, deed, settlement, a power of attorney, or the draft instructions for a Will, or may be made up of several distinct papers. It need contain neither date nor name of the place where it was drawn up —it may be written or printed—or partly both—may be in pencil or ink, in Latin, French, or any other language, or in the language of signs; and may be written on any

material—paper, vellum or parchment. One man was known to use the wall of his room, and another used his bedpost—both inconvenient in proving the Will afterwards. It will be safer, however, to keep to ordinary paper, using the same ink throughout, and the same handwriting, not using pencil and ink in the one Will, keeping the sheets of paper connected, or having the number of them referred to at the end of the Will. It is best also to use the language employed by the testator ordinarily, if he does not know the English language sufficiently well; and lastly to adhere to the usual form of Wills as ordinarily drawn. These contain the name of the place—the date—a statement that the instrument is a Will, and the *last* Will, if that be the intention—the appointment of executors, guardians, or trustees, if they be necessary—a disposal of all the property —an attestation clause shewing that the Will was signed in the presence of two witnesses, all three present and signing at the same time, and before the man died.

This attestation clause is especially useful, as the Probate Court in its absence will require much stricter proof as to the statutory formalities being complied with.

The testator should be questioned as to his wife, children, or other relatives in their absence, and the names of the beneficiaries taken down; then a description of his property, his money, chattels, where deposited, and the situation of his land—though the street or township will be sufficient, if he has only one property in either. The number of the lot, much less the metes and bounds, are not absolutely necessary; any description will be sufficient, so that it could be pointed out without doubt in the map, or identified by the neighbours. But in every case it is desirable to get as accurate a description as possible. Then set opposite each parcel the name or names of the persons who are to

get a benefit under the Will, and their share as he instructs. It is quite proper to procure all the information necessary to draw the Will by interrogation, but such a Will would be closely looked into by the Courts. After being certain that there is no more property, enquire how the testator would devise any after-acquired property—in other words, who would be his *residuary* devisee or legatee. Lastly, get the name of the executors (and guardians in the proper cases), and of any bequests outside the family. If he insists upon conditions or restraints, try and get them reasonable, and not repugnant to the enjoyment of the gift. Have no more than two executors, unless it is the Will of a married man, and that the wife is not considered sufficient. The wife in such cases will be guardian unless some one else be mentioned. It is better to name the wife, however, if you wish her to be guardian. Trustees are needed for large estates only, and in reference to land or other property taken in trust for the beneficiaries. The executors ordinarily have nothing to do with land, and their duties cease about a year after the testator's death. They collect in the outstanding debts due to the deceased, pay the debts due by him, and divide the residue among the legatees or next of kin in the event of an intestacy as to a part or whole of the estate.

Nothing need be said about the testator's debts being paid, as that must be done whether there is a Will or not, or whether any direction be given. But if a testator desires that his debts be paid out of any particular fund, that is important. Ordinarily the debts are paid out of the personal estate—the money, or bank stock, etc.—but the debts can be charged on a particular farm or lot, or directed to be paid by a particular person.

In case the person has a husband or wife living and to be provided for, it is necessary to bring the best judgment possible to the solution of the difficulty.

If the husband owns the land out and out—in fee simple as it is called, then his wife has ordinarily her dower in it. It is true that in some cases the wife is precluded from dower—where there is a marriage settlement, or in some cases as to wild lands, and perhaps in cases of adultery, and where she is disentitled to alimony from the husband; but in the general run of cases she gets from the law one third of the annual rents and profits of the land for her life after the husband's death, or she can have one third of the land measured out to her and live on it till her death. When the husband makes his Will, therefore, he must either give her sufficient to compensate for this, or she may disregard the Will altogether. The endeavour should be, to give an allowance yearly or in gross, so that she would be likely to elect to take under the Will. She can do as she pleases after her husband's death, but once having elected, the step is generally final and cannot be revoked. Provision must therefore be made for the widow either by a sale of the land, or payment by the children, or the devisees as the case may be.

The widow is moreover entitled to one-third of the personal property *absolutely*, and if there be no children to one-half of it—not the interest or annual value of it as in the case of land, but the one-third or one-half of the entire sum. This must also be taken into account, as it may come in before the creditors' claims. Her claim on land comes in on the balance after mortgages; but computed on the whole value unless the mortgages were on the property before her marriage. However, these remarks are made to shew that a wife's dower may be more than the husband supposes, and that it is the best plan to be liberal with her. The law of dower cannot be compressed into a sentence—it is a very difficult branch of the law.

The husband has sometimes an interest in the wife's lands

—an interest called "tenancy by the courtesy" * and where he has, he cannot be cut out by his wife's Will. He may be called upon to elect the same as a widow. He gets nothing unless there was a child born, but if entitled his share is one-third of the lands—not interest on one-third of the wife's lands, but the third absolutely. His third share in land therefore is serious when compared with hers. If married since 1873 it would seem that he is not entitled. He shares in her chattels in the same way as she does on his death.

It is safer for an unprofessional man not to draw the Will of a married woman other than to divide up her property to and among her children after giving her husband a specific sum, or stating that he is to get whatever he can legally claim. It is doubtful under a decision in the Court of Appeal for Ontario, whether a married woman can devise her separate estate away from her children. It is law so far that she cannot favour one to the exclusion of the others. If she has no children then she can give it to her husband or as she pleases.

With these exceptions to be borne carefully in mind, any person can give his or her property in any way he or she chooses—to their friends or to strangers, in charity, or for any purpose not contrary to law.

The case for the exercise of common sense and sound judgment is where a married man wishes to provide for his wife and family. Where the wife is dead, or where there are no children, it is simply a question of fair division; but where the family is to be kept up, and their rights adjusted, that is never a simple task.

* Meaning by this the courtesy of the law of England which allows it where other European laws give the husband nothing.

The first thing is to provide for the widow.

The husband can leave all to his widow, and nothing to the children. In that case nothing need be said about the children, unless the father wishes to appoint some one their guardian. If no appointment be made the mother will be guardian as long as she lives.

Where the property is very small, and the wife is a prudent, careful woman, and will do the best for the children in any event; it is just as well to leave everything to her adding this clause:

"In the event of my wife dying without leaving any children living at her death, then any property remaining is to go to ———"

The use of that clause is this: Suppose she died the next day after he did, then the property would go all right to the children; but if the children died after him, and before her, any property left would go to her or to *her family*, and this may not be his intention.

All the husband's property is not unfrequently given to the wife—1st. When the children are very young, and in that case the clause suggested should be added: or, 2nd. Where the children are grown up, married, with homes for themselves, and with no expectation of sharing in the father's property.

The husband may leave his wife what the law will allow her, a lump sum, or a share in lieu of dower, and divide the remainder among his children.

The clause as to the wife in this respect will be as given before—either a life interest, a lump sum, or a share in the sale of the property; the balance then is to be divided among the children.

The father can divide his property equally or unequally, or give some none at all, which, apparently the wife cannot do with her separate estate. Suppose he has three children he might say, "I devise my farm on the 3rd concession of York to my son John. I give and bequeathe to my son James $200, to be paid out of the sale of my personal property, and my daughter Mary is to receive $500 on her coming of age, or on her marriage, which ever event first happens."

"In the event of any of my said children dying without leaving issue, or having made a Will, then his or her share is to go equally to my other children before mentioned."

If the father has only one child, a provision in the event of his or her death is very necessary.

Where any bequests or legacies are to be given to strangers or others not his own children, it is better in a simple Will to place these first in order, so that the words "all the rest," or "remainder of my property," or like expressions may be used for his own family.

Where one child is to retain the homestead, mention should be made of the personal property in it so as to make a fair division. This may be done in several ways--by a valuation and division—by a sale—by the father's valuing them and directing so much to sons not otherwise benefitted. The simplest way to effect is to give the homestead to the son intended, and charge it with the payment of bequests to the others, as:

"I devise my farm, Lot 4 in the 5th con. of King, to my son James, on condition that he pay his two sisters, Jane and Mary, the sum of $200 each, within one year after my death."

Another very usual clause is charging the homestead with the support of the widow:

"I give my son James the farm on which I am now living on condition that he maintain and support my wife comfortably the remainder of her days;" or, "in the same manner in which we have lived heretofore."

The widow and her son's wife are as likely to disagree as otherwise, and to provide for this is no easy matter for a bench of judges.

If the clause is left as above, it may do where the parties are likely to agree; if not, some of the following may be adopted:

"In the event of my son and his mother not agreeing to live amicably together on the homestead, then she is to live elsewhere, to have every year paid quarterly in advance a sum sufficient to support her as well as she would be supported at home. This sum is to be determined by three neighbors, one chosen by each party, and a third by the two so chosen. If my wife refuses to accept this she must take what the law will allow her; if my son refuse to pay the amount so found, then my wife is to have the entire use of the farm for her life, my said son to have it after her death," or as the husband may direct.

The homestead is often charged with the support of the children as well:

"I devise the homestead to my son Joseph, and I direct that my wife be supported thereout, and that my children get their clothes and education until each one is able to do for himself." This sort of clause is not of much value. There is no legal responsibility to provide for the children as there is for the mother, and the father must trust to the

managing one of the family to see that his own death makes as little change as possible in the household. It is needless to expect a continuance of the same state of things under other management.

If the property is to go absolutely to the wife the clause can be as follows:

"I devise and bequeath all my property both real and personal of whatever nature and kind and wherever situate, and any property to which I may hereafter become entitled to my beloved wife Jane, and I appoint her sole executrix."

The husband should understand that a Will of this kind alters the property to the extent, that after his death it becomes property in *her family* and away from his family and his own children. So if she dies after him, leaving any of the property in question, it will go to her father and mother, or her brothers and sisters. If the husband wishes to keep it in *his family* he must either give her a life estate in it, a lump sum, or give her only a share of it; otherwise he runs the chances of there being some left for her family and away from his own when she dies. If for life there can be added after her name "for her natural life and after her death the property is to go to my brother John," as the case may be. This will not prevent the wife from claiming dower if she fancy her dower would be more than a life interest.

When the husband wishes that one-half or other fraction should go to the wife, instead of saying "all my property &c.," put in "one half my property &c.," and add the clause: "The remaining one-half of my property I devise and bequeath among my brothers and sisters in equal shares," or as in the case of an unmarried man.

Where one-half or other share is given, a power to sell the property should be inserted:

"I empower my said wife to sell and dispose of the said property or any part thereof, and the portion coming to my brothers and sisters is to be paid over to them out of the purchase money, and their receipt or release given to the purchaser."

An unmarried person, a father of children whose wife is dead, a wife having no children but separate estate and having a husband not entitled to any share, can leave their property just as each of them pleases respectively, and any plain direction will be carried into effect.

Having got so far the task of committing the intentions of the testator to paper should be proceeded with, one word of caution to the draughtsman:—never use any technical legal term in the Will, you may understand it fully, but the testator may not, and the courts will assume that the testator used the term in its strict technical sense—a sense in which it may not have been intended or understood.

With the memorandum of the property the beneficiaries, the executors, and guardian proceed as follows or in manner similar:

This is the last Will and Testament of me, A. B., of the of in the county of (occupation).

I, A.B., above named, do hereby declare this to be my last Will and Testament.

I revoke all former Wills at any time heretofore made by me.

I appoint my wife to be the guardian of my children, and I nominate and appoint her and to be the executors of this my Will.

My Will is that my wife is to be provided for as follows :

"I devise and bequeath to my son

"I give to my daughters

"I give $50 in money to the General Hospital at in the county

"All the rest and residue of my estate both real and personal, and any property to which I may at any time hereafter become entitled, I devise and bequeath equally among my children.

"In witness whereof I have hereunto set my hand to this my Will, this day of 18 ."

Signed and delivered by the said A.B., as and for his last Will and Testament in the presence of us present at the same time, who in his presence and at his request and in presence of each other, have hereunto subscribed our names as witnesses. } A.B.

Witnesses. { C. D. (Occupation.)
E. F. (Occupation.)

This being completed except as to the signature of the testator and of the witnesses, read it over carefully, and see if it is suitable ; if not, make the required alterations and copy it over again, if you have leisure. If not, do not forget to attend to the erasures and interlineations when the witnesses come to sign their names. When it is ready for signature get the testator if possible to write his own name, but if he is too weak or otherwise unable, or can't

write, then he can make his mark or direct you to sign for him. The case of a blind person or marksman requires more attention than if the person can read, and in the former cases add after the word "witnesses" in the attestation clause.

"The same having been first read over and explained to the said A.B., and he appearing to understand the same."

It is necessary to shew that the deceased knew what is in the Will, and that he approved of it. He cannot adopt the Will of another person without knowing the contents. The signature of the testator being attended to, the witnesses to the Will must sign their names there and then to the Will, and while the testator is living. Never depart from the rule that all three must sign the Will in presence of each other simultaneously. There are numerous cases where the parties could see each other in separate rooms and out of the window, or in a carriage, and once in a lifetime perhaps this may occur. They are cases not for imitation where the signature can be got in an ordinary way.

If the testator is physically unable to sign, it will be sufficient if he direct any person to sign for him or acknowledge that it is his Will, or if he put his mark or make a gesture to the effect that he considers it his Will. He might use an assumed name or make a mark though he could write. Sealing of itself is not sufficient, and it is not necessary at all. It has been held that passing a dry pen over the paper was not enough.

The signing by the witnesses is somewhat different from that of the Testator. They must attest and subscribe the

Will in the presence of the testator, but there is no authority for one to sign for the other, or for any third person to sign for either, nor can it be done by acknowledgment or gestures. Each one must write his own name or make his own mark to the Will, and do it with his own hand.

The signatures must be physically connected with the Will and should be at the foot or end thereof with no part of the Will following them.

Be sure and see that the witnesses get nothing under the Will, and that the wife or husband of a witness is not named beneficially therein. It does not affect the Will but it invalidates the gift; and it does this although the person is a third or fourth witness and there are enough witnesses left to see to its due execution. The executors may be witnesses and so may creditors.

Nothing must be added *after* the signature unless in the way of a CODICIL. Any new provision or codicil must be witnessed exactly the same way as the Will, and with new attestation clause and new signatures, even if made five minutes after the Will was signed, and while all were present.

The erasures and interlineations must be initialled—not necessarily so—but the witnesses to the Will must be prepared to prove that such and such words were erased, or as the case may be, otherwise they will be inserted again—if they can be made out.

The witnesses are called afterwards to attest to the man's sanity, and in case they have doubts as to this they can add a memorandum to that effect after their signature.

Any person may be a witness; but it is better to get a person who can read and write rather than marksmen; and

adult sensible persons rather than infants or persons of weak mind.

Wills are seldom made in duplicate and need not be registered except Wills of land under the Mortmain laws. After the death of the testator the Probate of Wills relating to land should be registered within a year.

Before the witnesses go away look over the Will and see if you have everything all right—the date—the executors—provisions for the widow and children—bequests to charities in money and not in land or mixed up with land—the attestation clause regular—the signature of the testator or his direction for you to sign for him, or his mark—the witnesses present and signing when his name was signed—that if not present he could see them—that they got no gift in the Will and that the wife or husband of a witness got nothing—that the testator was allowed to use his own free will—that he is neither under age nor enfeebled completely by old age, and that he was neither drunk, nor mad, nor carried away by any insane delusion. It is well to make a memorandum of these matters so that afterwards you could if necessary give a satisfactory account of yourself and of the Will in dispute.

NOTE.—In old English Wills it was the general custom to begin with some pious invocation. "In the first years of Henry VIII. the universal form adopted is to leave the soul to Almighty God, the Blessed Virgin and the saints, and to have dirge and mass for the repose of the soul." The editor of the *Vetusta Testamenta* remarks that as late as the year 1521 the feelings which are manifested in the early testaments are as prominent then as at any previous time. The Wills of Thomas Rotherham, Archbishop of York (1500) or of the sub-dean of the same time and place, or of the famous Bishop of Winchester, William of Wykeham, could be copied by churchmen of the present day in many particulars. King Henry V. directs that three masses be sung every day in the week while the world lasteth. Among remarkable English Wills are given that of Sir Thomas Windham the Earl of Warwick, and Earl Rivers, and Sir Thomas Latimer. Shakspeare's Will is quite a model of legal dryness, it is signed "William Shakspeare" which spelling ought to count for something in determining the proper orthography of his name. The Will of Columbus is remarkable as disposing of a continent and for the extraordinary signature that he insists upon.

CHAPTER IX.

MATTERS SUBSEQUENT TO THE MAKING OF A WILL.

Revocation by subsequent Will—by codicil—by destroying the Will animo revocandi—by the marriage of the person making the Will—No revocation by change of circumstances—Probate—Executors' position and duties—Guardians.

After a Will has been made the testator may change his mind and desire to make a new Will, or to make new dispositions in the old Will, or may wish to cancel his Will altogether. Without any desire or thought thought about it, his Will may be revoked by operation of law. The sole case of this now is marriage. Marriage alone may revoke a Will made prior to such marriage; formerly, in the case of a man it required marriage and the birth of a child to revoke a Will.

Certain Wills made in the exercise of a power of appointment are not affected by marriage.*

No other change of circumstances in the testator will operate as a revocation to his Will; and so the birth of a child after a Will is made does not revoke the Will, nor does a sale of all the testator's property.

* If a man makes his Will, and afterwards *on the same day* marries, his Will is revoked. The law does not regard the parts of a day in such cases.

A Will can be revoked by a subsequent Will, or by a codicil.

A subsequent Will must of course be drawn with the same formalities as an earlier one, not forgetting the clause in it as to revocation. As has been said two Wills not inconsistent with each other can both stand, but the clause of revocation sweeps away all prior Wills.

Codicils must be executed in exactly the same way as Wills.

Reference has been made in the last chapter to erasures and interlineations and the manner in which they must be witnessed and attested. Where some new provision is to be added it is better to make it in the way of a codicil, and to write it on the same paper on which the Will is written. It can begin by saying:

"This is a codicil to the Will of A. B. before mentioned.

"I revoke the legacy to J. S. and I Will that $100 be paid to G. L." or as the case may be.

The codicil should be witnessed in exactly the same way as the Will with the attestation clause *mutatis mutandis*—the two witnesses and the testator signing at the same time in presence of one another. The witnesses should not be beneficially interested under the Will or codicil. Care should be taken about expressions of revocation in a codicil, lest they be of too sweeping a character, and so, unless provision be made for the new state of affairs, an intestacy may arise.

A Will cannot be revoked by a letter or other paper, unless these be signed in the same way as a Will, and a letter written by the testator and found among his papers revok-

ing his Will was of no effect, there being no witnesses attesting it.

A Will may be revoked by burning, cancelling, tearing, or otherwise destroying or obliterating it *animo revocandi*.

The destruction of a Will must be done either by the testator, or by some one at his direction and in his presence; so that it would not avail to take a Will into another room and destroy it there out of the testator's presence or out of the sight of the testator. A mere intention to destroy the Will is not sufficient nor is the destruction without the intention sufficient. Both are necessary to a complete revocation.

Where a Will has been torn up, but not so destroyed as to prevent its being put together again in its original form, there need be nothing further done if the tearing or other destruction was done by accident, and not with the design of destroying the Will; but where done *animo cancellandi* there must be a republication of the Will or as it is called in our statute a revival of the Will. It must be re-executed in the same manner as it was originally, with an intention to *revive* the Will and in presence of two witnesses.

A Will may possibly be revoked by cutting out the name of the testator and the names of the witnesses, or entirely obliterating the signatures; but the safest plan is to burn the Will. And in doing so it is desirable to see that it is completely destroyed, so that no legatee could pluck it from the burning, and present it successfully thereafter for Probate. Such cases have occurred.

A man of unsound mind cannot revoke his Will, nor can any other person incapable of making one originally.

After marriage a person should execute a new Will, or revive the old one by the formalities specified. A codicil

setting out the circumstances is as good a way as any in order to revive a Will. These four ways of revoking, or cancelling a Will, are all the ways recognized by the law for that purpose, and no other should be attempted.

Publication of a Will is no longer necessary.

Registration in the proper registry office of the Will alone is unusual, but after Probate has issued the Will should be registered within a year. Unless land is mentioned in the Will it need not be registered at all.

After the death of the testator the executors should do as little as possible until Probate has issued, unless where the conduct of the funeral devolves upon them, or where perishable property requires to be looked after.

The whole personal property of the testator, whether in the Will or not, passes to the executors; they must accept all, or refuse all, and in acceptance they become responsible for its safety and management. Personal property roughly includes everything that is not land; such as money, bills, notes, stocks, mortgages, chattels, etc. These pass to the executors before Probate, but their legal title is under the Probate. The Probate is a proved copy of the Will issued by the Surrogate Court, and is one of the few instances in our law where the copy, rather than the original, is primary evidence of the matters contained therein. The Probate is the authority under which the executors act, and by it they demand the money and other chattel property due the testator. Where the deceased had money in the bank, therefore, it is no use to take the Will to the manager and ask for payment; you must take the Probate, and you are then legally the representative of the deceased, and succeed to his rights and duties. The Surrogate Court will not issue the Probate until seven days after the death of the

party, and until the necessary proofs to lead to its grant have been filed with the Registrar of the Court. Probate may issue to several Wills of the testator, where the last does not revoke the preceding one, and where both, or all the Wills dispose separately of a portion of the property. This is of course matter for a solicitor--it is mentioned here merely to shew that prior Wills have sometimes to be considered; and of course if the last Will is not properly executed, or if void for any reason, the next prior in point of date is to be considered.

The only safe thing for an executor to do before he acts or renounces is to consult his solicitor.

Simple cases may indeed arise in which the parties may not desire to incur expense, and where there is very little to be done.

Where the papers filed with the Surrogate Court have been sufficient, and Probate issued, the executors should insert an advertisement for creditors in the county or other paper most likely to reach the class among whom the deceased lived. This advertisement should run four or six weeks, and should name a day after which they will proceed to distribute the estate, disposing of such claims against the deceased as they have notice of in the meantime. The allowance and payment of claims are matters for the exercise of common sense on the part of the executors—they must act as prudently as in the management of their own affairs, and in doubtful or difficult cases consult a solicitor.

Everybody knows that in thousands of Wills the greatest care of the Courts is called into requisition, in order to administer the estate properly. The advice given here is for the simplest cases only.

The benefit of an advertisement is very material, as it relieves the executors as to all debts, excepting those of which notice has been received. Before an executor should waive the insertion of an advertisement he should not only be certain that no debts exist—as frequently is the case—but also that he would be secured if any subsequently arose. In this case the advertisement may be shortened to two weeks, as is the practice in the Courts.

After the debts have been disposed of, the different legacies have to be paid. Unless expressly ordered in the Will, these are not payable till a year after the death of the testator.

Where the property is all turned into money, the payment of legacies is ordinarily simple enough; where there is chattel property—especially if perishable—the executors should act promptly, and either get a division among the parties entitled; or, if this is not possible, get the property appraised by a sworn valuator, and, if necessary, put it up for auction. In this case, it will be turned into cash (credit is given at the risk of the executors), and a division made as before.

The executors have a right to enter the house of the deceased in order to get the goods therein, and the deeds and other papers, if they can do so without violence; but they cannot break open doors or locks for that purpose.

The executors must not purchase any of the goods of their testator; they must take care that none of the goods are lost on their account, and it is always desirable for them to make an inventory for their guidance and protection.

Bills and notes payable to the deceased can be endorsed by them, and care must be taken that none of the debts due the testator become outlawed.

It sometimes happens that the executors are called upon to conduct the funeral of the deceased. If the estate is solvent then the funeral should be proportioned to it and to the position held in society by the deceased; if insolvent then it would not be fair to the creditors to go beyond what is necessary and decent.

No person has a right to his legacy whether in money or specific articles of purchase until the executors have assented to it.

If the estate is sufficient to answer all the bequests and legacies, then the parties entitled are paid without abatement—if insufficient, then with certain exceptions as to specific legacies—they abate proportionately. In the latter contingency a solicitor should be consulted.

Under a statute in force in this Province executors are entitled to a commission for their care, pains, and trouble in the management of the estate. They can claim this although the testator may have left them a sum for that purpose. The rate varies—in proportion to the responsibility and work done—from three to six per cent.

The duties of guardians, as the law now stands, are not often called into requisition. The guardian represents the person and estate of his ward—acts in his behalf in prosecuting or defending suits, and has the charge and management of the estate, and the care of the person and his education. Infants under fourteen years, with the approbation of two Justices of the Peace, may be apprenticed to any lawful trade.

The powers of the guardian are largely those of the parent, and do not in any case extend over the age of twenty-one in males, and eighteen or marriage in females. The legis-

lature has appointed a guardian for infants in this Province, but he acts only where the property of the infant is in Court for distribution. He is guardian *ad litem:* the guardians here referred to are testamentary guardians. The Surrogate Court can appoint a guardian and so can any of the Supreme Courts of Law or Equity. The father is the natural guardian of the children, and in his lifetime there is little use of the mother making any appointment in her Will: in the father's Will he can appoint her or a stranger, and in default of appointment, she would be the natural guardian though the Courts would remove her or any other guardian on good cause shewn.

APPENDIX I.

MEDICO-LEGAL MATTERS.

"A doctor who knows nothing of law and a lawyer who knows nothing of medicine, are deficient in essential requisites of their respective professions."—DAVID PAUL BROWN.

Conflict between doctors and lawyers as regards insane persons—Disease in medicine—Conduct in law—Medical experts in lunacy cases—Rule in Law—Maudsley's view—Brown's reply—Value and extent of medical testimony—Application of chapter—Classifications of insanity in law and in medicine.

IT is a well-known fact in medical jurisprudence that a conflict of long standing exists between physicians on the one hand, and lawyers and the courts on the other, as to the manner in which insanity or unsoundness of mind ought to be determined. A lawyer understands madness to mean *conduct* of a certain character; a physician regards it as a certain *disease*, one of the effects of which is to produce such conduct. A learned writer seeks to show that the difference is not real but imaginary—that it is a war of words only. Be that as it may, the conflict continues; though, as might be expected, the Courts have adopted the view of the legal gentlemen. If insanity is to be judged by conduct, then they say, any man with senses about him can give as valuable expert testimony as a doctor. Mr. Justice Bramwell said that although "medical men were often heard in Courts of Justice to define insanity, he thought ordinary men of the world were just as well qualified to form an opinion on these matters as they were." Earl Shaftesbury, who for many years was a commissioner in lunacy, expressed himself to the same effect; and both in England and in the United States vials of wrath were emptied on the heads of medical experts. Lord Campbell said "they came with such a bias on their minds to support the cause in which they are embarked, that hardly any

weight should be given to their evidence." An American judge went further, and expressed himself to the effect "that if there is any kind of testimony that is not only of no value, but even worse than that, it is that of medical experts." It is regarded elsewhere than from the bench as extremely unsatisfactory; and one learned author on Wills puts these experts in the light of hired advocates.

Thecontest carried on in high quarters, with by no means moderate language, originated in England mainly on account of a very celebrated trial known as the *Windham* case. A great amount of medical and other testimony was given, and in a case where manifestly the court and the public expected a declaration of insanity, the jury found the person sane—fifteen for and eight against his sanity. This verdict was due largely to the doctors, or at all events was blamed on them. The conduct of Windham was outrageous; but the majority of the doctors could find no disease of any sort. The judges then appear to have settled the rule firmly, that the facts given by medical and other witnesses should be taken for what they were worth; but that no man should be adjudged insane merely because a doctor was of *opinion* that he was so. The doctors maintained that a judge or jury could no more determine a case of insanity than they could a case of fever: the judges said in effect, we won't listen to your opinion as to whether this man is insane or not, we will hear what facts you may have to offer, and we will use your technical knowledge to instruct us, or the jury, in hypothetical cases; but you are not going to usurp the function of judge and jury and decide the whole question. And indeed it would be a farce if they were to sit and try the fact of insanity, when in reality the whole thing would be determined by the medical testimony. The doctors thought the farce no less that men should sit and try matters of which they knew nothing. *Cuique in sua arte credendum* was ad duced by the medical gentlemen; but the Courts held their own view, and to this day a judge in Chancery will decide the question of insanity as he would any other question, by hearing the facts and coming to a conclusion on them in the best way he can.

The doctors have not allowed their side of the contest to go by default. Henry Maudsley, a well known writer, is perhaps the foremost man in opposition to the view taken

by the Courts. He says that "the ground which medical men should firmly and consistently take, in regard to insanity is, that it is a physical disease; that they alone are competent to decide upon its presence or absence; and that it is quite as absurd for lawyers or the general public to give their opinion in a doubtful case, as it would be for them to do so in a case of fever." Mr. Balfour Brown, replies to this as follows:

"No lawyer wants, so far as we know, to give his opinion either as to insanity or as to fever. He does not profess to be able to do so, but he does assert that he and the public are in a position to judge of conduct, that the proof of the existence of such insanity as incapacitates for civil acts or renders an individual irresponsible in case of the commission of a criminal outrage lies in conduct, and that the fact that in the case of the insane the act is the result of certain changes which medical men have chosen to call disease, and that in the other it is due to certain changes which medical men have with as much arbitrariness chosen to call health has nothing whatever to do with the subject."

Then after referring to "the frowning down of psychological truth" by the bench as complained of by Dr. Maudsley he proceeds:

"Law has nothing to do with the investigation of diseases. If a man has lost a leg, and it is necessary to prove that he could not have walked to a certain place in consequence of that deformity, all the evidence that will be necessary will be such as proves that he was legless; evidence as to the disease under which he labored and the necessity of the surgical operation is beside the point at issue. So it is in the case of loss of mind; whether the cause of the loss be general paralysis, or brain wasting, matters not to the lawyer, although it may to the psychological pathologist; but the question that law has to decide is this: Was the individual at a certain time, and in relation to a certain act in such a relation as to knowledge and will as that which is occupied by the majority of mankind when similarly circumstanced in connection with like acts?"

It is unnecessary to enter into the merits of these arguments *pro* and *con*:—*non nostrum est tantas componere lites.* The law is as fixed as a Medo-Persian statute, but whether

it should be such as it is, is still *sub judice*. It will be hard to convince many lawyers even, that the logic and common sense of the case are not against their side; and cases are not very difficult to find in which the Courts would seem not to be consistent as to what facts are to be left to the jury, or be decided by a judge, on expert medical testimony. It is likely too that no one would seriously argue now, that the experience of a doctor does not qualify him to judge of conduct better than any other unpracticed person could judge of it.

Insanity may not be either a disease of the body or of the mind, but may involve both. The weight of medical authority is in favor of saying that an insane person may or may not be diseased physically, but his changed habits and language are in either case more familiar to doctors than to the majority of other people.

Probably the reason why the Courts have not put implicit confidence in medical testimony is that the knowledge of the physicians is limited; and they confess a mental effect without any physical cause. "Able physicians and metaphysicians agree that insanity always depends upon diseased physical organization, but are wholly unable to show wherein the physical derangement consists."*

The reflections cast upon the evidence of experts can be made to apply to all testimony, and should affect only the particular person charged, and not asperse the kind of testimony he is called upon to give.

No judge or lawyer under-rates the value of medical testimony. "The Bench and the Bar," says Dr. Reese, "have everywhere deferred to medical testimony in all questions of forensic medicine, and especially in the jurisprudence of insanity. The Courts and juries everywhere rely upon physicians for their guidance in all such questions." In the Courts in this Province the medical testimony rather than that of the testator's relatives has been followed in determining testamentary capacity.

The application to be drawn from the foregoing, not only by doctors but by lawyers and the public generally, is that a man supposed to be insane, supposed or known even to be so physically diseased as that insanity must

*In a case in our own Courts, Dr. Hammond, of New York, gave a similar answer to the writer in an examination in a contested Will case.

follow, may yet have a mind sufficiently strong to be able to make a Will of his property; and that it would be unwise even for his doctor to refuse to draw his Will, if the man desired such to be done and acted intelligently in reference to it. It might be proper for the witness, as was suggested by Mr. Justice Hawkins, lately in England in a similar case, to add that he did not think the person had sufficient capacity to make a Will. It is considered a much more serious matter to regard a man as of insane mind, than to take the contrary view. It is no part of the duty of either lawyer or doctor to pronounce a man incapable of making a Will. As the law stands at present that is left to the Courts, and no man should impose on himself more responsibility than his proper duty calls for.

Some very respectable men think that we are all more or less insane; and Carlyle said that mankind are mostly fools. Whatever the proper method may be of determining the question, it is evident that great inconvenience would arise if each man were to judge of his neighbor's sanity. The Court rightly reserves the decision, and in the vast majority of cases it is sufficiently well instructed to judge in the matter.

APPENDIX II.

THE WITNESS BOX.

"'You had better be careful, sir,' said the little judge. * * * You must not tell us what the soldier or any other man said: it is not evidence."—PICKWICK PAPERS.

Medical witnesses—Rules by Dr. Coventry—Privileged communications.

ANY ordinary medical man can be examined as to the mental condition of his patient, grounding his opinion on his own knowledge of the facts. A medical expert on insanity can give his opinion on hearing the facts of the case from others or on a hypothetical case; but no man is allowed to give expert testimony unless he has made a special study of the subject in question.

In the first place, as the question in dispute is the state of the mind of the deceased at the time the Will was *made*, the evidence of the medical attendant then is worth more than that of all experts at other times. The condition of a man's mind after his Will is made is of no account, nor is there any *presumption* of law if he became a raving maniac on the following day; but of course such a circumstance would make the Court more astute in discovering the previous state of mind. The law presumes every man to be sane till the contrary is proved; and similarly it presumes an insane man to be insane till his sanity is established. The law also recognizes a lucid interval in insanity; and so, if the person's Will be made in that interval, it is as valid as if prior insanity never existed. The medical testimony, therefore, at the critical time is largely decisive of the issue, and it is obvious how important it may be.

A medical expert must be prepared in cases of insanity to say whether a person is idiotic, lunatic, or of unsound mind, and to assign intelligible reasons for his opinion.

In doing this, he usually adopts some classification of the various forms of insanity, and assigns the person in question a place under some of these classes; no one will know better than himself how unsatisfactory these classifications are, and how no two of them agree with each other. The legal divisions referred to are somewhat the same as those adopted by Esquirol—Amentia, Dementia, and Mania.

Dr. Hammond refers to the eight divisions of insanity agreed on at the International Congress at Paris in 1867, but his own classification of seven divisions has the approval of legal writers of eminence. Dr. Maudsley has two main divisions; and a number of other writers, more or less known to the Courts, have each ventured upon classifications of their own.

The legal classifications are two, *Dementia naturalis* and *Dementia adventitia;* but it must not be forgotten that these are strictly divisions of "unsoundness of mind," the legal term, and not of "insanity," the medical term. The basis of this division is easily intelligible. The medical divisions of the latest medico-legal writer—Dr. Elwell—are *Mania*, *Monomania*, *Dementia*, and *Idiocy* (Amentia). Nothing will depend in a Court on these classifications, but they are important in this way that some sort of division is necessary and convenient.

The Court has to be informed as to the states of mind and conditions of health of the person in question; and probably also as to the sympathy between and correspondence of such physical and psychical symptoms generally. The Court, as has been said, cares nothing for the disease as a disease; it wants evidences of conduct. But if it was established that certain diseases are incompatible with any Will-making capacity, it would be a point that counsel would be sure to impress on the Court. The medical witness, therefore, will not only have to explain the states of mind and physical condition, but he will be expected to answer how far these were, as far as medical authority goes, inconsistent with the power of making the Will in question. Although it is a matter in dispute, there seems to be no doubt that a doctor can corroborate his own view by reference to authority—but medical works, no more than legal works, are not received in evidence. The gentleman in the stand must be taken on his reputation. The view of a medical man

may be contradicted by reference to standard authorities, or again may be corroborated by them.

Bearing in mind that the opinion of a doctor is not to decide the question of the testator's general incapacity, care should be taken not to offer opinions wider than the case calls for. It is an improper question, to ask if the deceased could make a Will, or if he was insane. The issue before the Court is, could the deceased make the particular Will; not whether he was insane or otherwise, but whether his mind was so unsound that he could not make the Will in question. This can be answered by a reference to the facts and to the kind of Will drawn.

It seems to be a disputed question whether or not the medical witness can be asked to form an opinion of such evidence as he has heard in Court from other witnesses.

The following suggestions to medical witnesses are given by Dr. C. B. Coventry, and are inserted in a work of high authority—Dr. Elwell's Medical Jurisprudence of Insanity.

1. Listen attentively to the testimony as to all the facts in the case.

2. Studiously guard against being biassed—exclude prejudices arising from the newspaper or rumours.

3. Do not take into consideration the influence your testimony will have on the prisoner, or parties affected.

4. The expert is called to testify as to the bearing of the testimony given, and though he may have his own doubts of the truth of the testimony, yet if it stands unimpeached he must receive it as true. It is not proper for him to call in question the testimony of another witness—he is not required to believe him, but can say the testimony of the witness proves so and so, leaving to the judge or jury the question of credibility.

5. A medical witness should not assume the province of a jury, as, for instance, to say that a particular wound was the cause of death; he should only state that the ordinary effect of such a wound, or, in a question of insanity, that the testimony given was an evidence, or was not an evidence, of insanity.

6. The medical witness should have his mind fully prepared before taking the stand as to what he can testify to, and his reasons, if they are required. He should in his testimony avoid as much as possible the use of technical

or professional terms which the jury may not likely be able to understand; but, if unavoidable, explain them. His evidence is deductions or inferences of facts, not facts themselves. It is an opinion, not an oath.*

It is well known that certain communications between a solicitor and his client are privileged—that is, the solicitor is not bound to disclose them in Court. A reason will readily suggest itself for this to the unprofessional mind; but it may not so readily appear why equally important or more important communications made between a doctor and his patient, or a clergyman and his penitent should not be regarded in the same light. Still the fact appears to be so as laid down in authoritative cases, though as regards clergymen with great diversity of opinion and practice.

Clergymen and medical men are said to be bound to disclose any information they get confidentially in their professional character. A clergyman is excused from bringing an offender to justice on information received confidentially in confession; and if this be the law as said to be on high authority, then it is inconsistent with excluding him from the privilege of withholding information got in his professional character.

In the Roman law penitential confessions to the priest are encouraged for the relief of the conscience, and the priest is bound to secrecy by the peril of punishment. "Confessio coram sacerdote in pœnitentia facta non probat in judicio *quia censetur facta coram Deo;* imo si sacerdos eam enunciet incidit in pœnam": 1 Masc. Prob. Concl. 377.

* It is not an unusual thing for a medical witness to be unable to understand the precise meaning of the question to be answered by him; and it is also within the experience of most lawyers that the answer when given is often beyond the comprehension of the bar and bench. There is a legal jargon that is bad enough, but it is mild and commonplace when placed in juxtaposition with the apocalyptic *sesquipedalia* of the Esculapians. A "severe contusion of the integuments under the left orbit, with great extravasation of blood and ecchymosis in the surrounding cellular tissue, which was in a tumefied state, with considerable abrasure of the cuticle." is one way of describing a black eye; but it took all the good humour out of the presiding judge. In another reported case, a doctor was asked to state plainly the cause of death in alleged child-murder, and he replied that it was "owing to atelectasis and a general engorgement of the pulmonary tissue."

As regards the difficulty of not understanding exactly the question, a medical witness must decline to answer till he knows what he is answering.

Questions of privilege not only as regards R. C. priests but as regards ministers of the Church of England have arisen in England, and in looking through the cases it is very doubtful if the law is as solidly settled as some text writers would suggest. The first case apparently deciding that the privilege did not extend to confessions was not a case of confession at all and was an ordinary communication to a parish clergyman. Other cases were left largely to the particular view of the presiding judge. Chief Justice Best said he would never compel a confessor to disclose what his penitent confided to him in confession, and he reprobated the abuse of confidence if these disclosures were made without permission.*

* In all places where the Roman Civil law is in force, as in France and other parts of the Continent of Europe, confessions are privileged, so also in Ireland and Scotland and many States of the American Union. By the 4th section of the Treaty of Paris, signed 10th February, 1763, between England, France, Spain and some other European countries, his Britannic Majesty granted "the liberty of the Catholic religion to the inhabitants of Canada;" and by the 26th section the high contracting parties "promise to observe sincerely and *bona fide* all the articles contained and settled in the present treaty; and they will not suffer the same to be infringed directly or indirectly by their respective subjects; and the said high contracting parties generally and reciprocally guarantee to each other all the stipulations of the present treaty."

THE END.