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THE LATE LORD CHIEF JUSTICE OF ENGLAND ON LUNACY.

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ONE has recently passed from among us in the full ripeness of years and of honours, who has left a deep impression upon our memories, of the force and versatility of his character, and of the decided and sometimes original opinions which he had formed and maintained upon many of the subjects which fell within the scope of his wide influence. For in many of the most interesting dramas which for many years past have been presented on the political or the forensic stage Sir Alexander Cockburn played one of the leading parts, and it especially fell to his lot to be engaged in contentions whose issues, if they have not greatly promoted the science of psychology, have at least gone far to shape and determine the practical question of the relations of the insane with society and its laws, both with regard to their exemptions and their disabilities.

Among the former, the most remarkable and memorable was his defence of McNaughten for shooting Mr. Drummond, on the plea that he was not guilty on the ground of insanity. This *cause célèbre* has been worn threadbare by discussion, but in looking over Cockburn's very able advocacy we cannot fail to notice his generous recognition of the great value of medical knowledge and experience in determining such difficult questions as the one before the Court; a fixed state of feeling and belief which, to the last days of his long life, he rarely

failed to express whenever the opportunity offered, in observations which form a notable contrast to such remarks disparaging to medical science as are even now sometimes heard in Courts; remarks which tend to show, if they mean anything, that great lawyers sometimes have not the wit, or will not take the pains, to distinguish real science from false pretensions to it. In McNaughten's defence Mr. Cockburn said: "It was now placed beyond doubt that madness was a disease of the body, the result of morbid organization, and that its nature was to be precisely and accurately ascertained by those only who had made this disease and its pathology the object of long reflection and diligent investigation. The discoveries of modern science had thrown much light upon this subject, and many of the positions laid down by Lord Hale and the other authorities of former times were left liable to very great objection and doubt."[1]

In addition to the stress which he laid upon the value of scientific knowledge, a remarkable feature in his defence of McNaughten is apparent in his early recognition of the element of loss of self-control. He undertook to prove to the jury that the prisoner "was the creature of delusion and uncontrollable impulse, which took away from him the character of a responsible being." This term "uncontrollable impulse" has since been very greatly misused and abused, inasmuch as it has been attributed to offenders who had no other characteristics of insanity; and, as we shall see, Cockburn subsequently adopted the better term of "absence of the power of self-control." While we must repudiate the overstrained doctrine that uncontrollable impulse is in itself and by itself, a form of insanity, we must recognise the fact that the quality is essential to the commission of an offence by a madman. Whether we say that the man is impelled to do a thing by his madness, or whether we say he did that which his mad thoughts led him to do in "the absence of self-control," or as another great judge has put it, that he did that in his madness which he could not help doing, we have the same thought with some little variety of expression. If we could know that a person having a delusion could so have controlled himself as not to

[1] The 'Times,' March 6th, 1843.

have indulged or acted upon it, our view of his responsibility would be very different to that which we must take in regard to "a creature of delusion" deprived of all self-control. The practical difficulty, of course, is that of deciding when, in consequence of disease of the organism, a man is deprived of self-control or has an uncontrollable impulse, a difficulty certainly not less than that of deciding when a person of unsound mind does or does not retain the knowledge of right and wrong with regard to his actions; but why the difficulty should be thought by our legal authorities to be insurmountable in the one case but not in the other, it is not easy to understand. We must briefly refer to Cockburn's opinion on this important point, and also to that of his compeers who were not able to concur in it.

Thirty-one years after the McNaughten trial, the counsel for the defence, now become Lord Chief Justice of England, repeated the opinions maintained in that trial, in all the maturity of his judgment and with all the weight of his authority, in his Memorandum to the Chairman of the Select Committee of the House of Commons on the Homicide Law Amendment Bill. In this important document he says:

"As the law, as expounded by the Judges in the House of Lords, now stands, it is only when mental disease produces incapacity to distinguish between right and wrong, that immunity from the penal consequences of crime is admitted. The present Bill introduces a new element, the absence of the power of self-control. I concur most cordially in the proposed alteration of the law, having been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse, the power of self-control, when destroyed or suspended by mental disease, becomes (I think) an essential element of responsibility."

There would seem to be a clerical or printer's error in this last sentence, the context clearly showing that the writer intended to say that the suspension of the power of self-control was an element of irresponsibility. And no doubt it is; the difficult question remaining to be solved as to what are the forms

or degrees of mental disease in which the power of self-control is suspended or destroyed. For instance, in general mania, with or without delusion, the power of self-control is thus suspended; but is this the case also in what is called homicidal mania, as it is described without the group of symptoms which usually accompany diseases affecting the mind? It is much to be wished that the Chief Justice had expressed his opinion more fully and clearly on this most important point. In a subsequent passage, however, towards the end of his memorandum he does connect other symptoms of insanity, that is to say delusions, with the loss of self-control in such a manner that it must be inferred that in the passage already quoted, he did not intend to endorse the dangerous and illogical theory of so-called moral insanity. In this later paragraph he says:

"I have already expressed my concurrence in the proposed provisions as to the effect of insanity, except so far as the proposed legislation is partial, as limited to the case of homicide. But there is one general provision on this subject to which I must strenuously object; it is that, 'if a person is proved to have been labouring under any insane delusion at the time when he committed homicide, it shall be presumed, unless the contrary appears to be proved, that he did not possess the degree of knowledge or self-control hereinbefore specified.' The pathology of insanity shows that the mind may be subject to delusions, which do not in any degree affect the moral sense or the will as regards the power of self-control. The mere existence of mental delusion ought not to affect the decision as to the power of self-control, unless the nature of the delusion be such as would legitimately lead to the inference that the power of self-control was wanting. The question is one which should be decided by all the circumstances, independently of any presumption one way or the other."

It will be seen, when we come to comment upon this Chief's most important judgment in a civil cause, how consistent he was in his views of what we may perhaps be permitted to call the autonomy of delusion. It may be that his views were extreme in this regard both in criminal and civil law. Correct in his fact that insane delusion may exist without the loss of self-control, he scarcely seems to have given weight enough

to the importance of delusion as evidence of insanity more or less general; and we venture to assert that where a man who has committed a homicide is proved to have been labouring under any insane delusion at the time, the inference will inevitably present itself that with the loss of the power of reasoning the man has also lost the power of self-control. Whether in such cases the legal burden of proof should be shifted, as proposed by the framers of the Bill of 1874, is quite another and an important question. It is possible that an insane delusion may not affect a particular action; but seeing that an insane delusion indicates grave mental disease, and that it is impossible to say how far its influence extends and where it stops, there must always exist great doubt as to any action being free from its influence. It must at least be extremely difficult to prove that any deliberately wrong, and especially any penal action, was not done under the influence of the delusion. Therefore this shifting of the burden of proof proposed would be tantamount to making the proof of delusion exonerate the crime. One cannot get on without presumptions, and many of them, in deciding such difficult and often recondite questions as those depending upon the influence of diseased mind upon conduct; and if the presumption of the wide-extending influence of insane delusion be admitted, it would surely be more wise in conception and simple in practice to extend its exonerating influence than to change the burden of proof in the manner proposed. The recent Royal Commission of four pre-eminent lawyers employed to draw up the Criminal Code decided against the section of the Criminal Code Indictable Offences Bill of 1878 which recognised as an excuse the existence of an [insane] impulse to commit a crime, on the ground that the test proposed [namely the supposed inefficiency of the greatest and most immediate punishment] for distinguishing between such a state of [insane] mind and a criminal motive would not be practicable or safe. In the draft Criminal Code drawn up by the Royal Commissioners, Blackburn, Barry, Lush, and Stephen, all reference to loss of control is omitted, and the existing law with regard to the pertinence of delusion to the crime is left as it was; only it is proposed newly to provide that any insane

delusions, including, of course, such as are not pertinent to the crime, may be given as evidence that the offender was in such a condition of mind as to enable him to be acquitted on the ground of insanity; that is to say, that he was labouring from natural imbecility or disease affecting the mind to such an extent as to be incapable of appreciating the nature and quality of the act, or that the act was wrong. Without doubt it is extremely difficult to formulate such a legal doctrine as that of the loss of self-control as an excuse for crime, so that it shall not be dangerous to society; but seeing that the knowledge of right and wrong can have no effect on the commission or omission of crime, unless the agent has the power to control himself so as to commit or omit the action which constitutes a crime, and seeing that madness does enormously affect this power, we cannot but think that the late Chief Justice came far nearer to a right and satisfactory solution of this difficult problem in the objections and suggestions of his memorandum than the Royal Commissioners.

In the letter which in June 1879 the Chief Justice addressed to the Attorney-General on the Criminal Code Bill, he has criticised the law as it exists, and its proposed alterations, in a manner which must increase the difficulties which judges cannot fail to experience in charging juries whenever the plea of "not guilty, on the ground of insanity," is put forward. His own opinions, however, are not so clearly expressed as to leave it without doubt what he really meant, especially on the extremely important question of homicidal insanity, or of moral insanity generally. In a recent work on insanity ('The Factors of Unsound Mind,' by Dr. Guy), his authority is quoted from this letter in support of the theory of "instinctive or impulsive homicidal monomania," and his language is certainly open to the interpretation which this author puts upon it. Thus he says:—"Among the functions of the human mind liable to be perverted by disease is, as all scientific writers on insanity are agreed, the human will, which sometimes becomes the slave of maniacal impulses, which it is unable to resist. Among the different forms of madness by which the will is liable to be thus affected, is that which is known by the term of homicidal mania, or, when it impels a person to self-destruc-

tion, suicidal mania. That the will is liable to be thus maniacally affected, and so to be swayed by impulses which it is unable to resist, is a point on which writers on mental pathology are agreed." "The question whether, under the influence of mental disease, the human will may become subject to impulses which it is unable to resist, and upon which even the fear of death will not operate as a restraint, is not one for lawyers to dispose of dogmatically, as they too often do, but one which, as a question of pathological science, it is for men conversant with that science to decide." "The question whether *mania, accompanied by insane impulse*, might afford a defence, was not submitted to the Judges [in the McNaughten case], or involved in their answers."

Now it may be argued that these passages, with the context, affirm the doctrine of insanity of the will, or at least that they affirm the existence of homicidal and suicidal monomania, as dependent upon insane impulse alone. But it is to be noted that the Chief Justice invariably speaks of these affections as *maniacal;* thus, "the will becomes the slave of maniacal impulses," and "the will is liable to be maniacally affected," and "the question is whether mania accompanied by insane impulses," &c. Nowhere does he say that the will swayed by impulses unaccompanied by the symptoms of mania, is a form of insanity, or might afford a defence. But those writers who maintain the existence of homicidal and suicidal, or of the stealing, or ravishing, or house-burning forms of so-called moral insanities, do describe them as unaccompanied by the general symptoms of mania, mental and physical. Of such forms of insanity a considerable number of "writers on mental pathology" utterly deny the existence, although all such writers will, and do, undoubtedly admit that such conduct accompanies real mania. Seeing therefore that the Chief Justice asserts that his statement of facts is a "point on which writers on mental pathology are agreed," it may fairly be argued that by the impulsive affections of the will which he describes, he meant the headstrong conduct of the real maniac, which no one denies, and therefore that he was not a convert to the new doctrine of moral insanity, which never yet has withstood the trial of experience or the test of argument.

That will-o'-the-wisp, the human will, has misled metaphysicians and moralists often enough, to make us heartily desire that at least grave and reverend Judges should be blind to its glamour. And by omitting such speculations as that "the human will becomes the slave of maniacal impulses;" "which it is unable to resist," &c., we may gather that the Chief Justice intended to express his conviction that a man having no delusions might be in a maniacal condition, accompanied by insane impulses to the commission of offences against the law, and that the proof of such a condition ought to be a valid defence. This "is a point on which writers on pathology are agreed," it being understood that the maniacal condition connotes a well-known group of symptoms called mania, in persons who are properly said to be "maniacally affected."

This is "the question which was not submitted to the Judges, nor involved in their answer," and upon which the late Chief Justice expressed his opinion in such metaphysical arguments, as leave his meaning needlessly obscured, but which lead to the conclusion, as entertained by him, that a maniac, even without delusion and with knowledge of right and wrong, is nevertheless irresponsible.

This great Judge has left the mark of original thought and decision still more deeply impressed upon the civil than on the criminal side of lunacy in the Courts. As an advocate, one of his most brilliant efforts was made in his successful opposition to his distinguished opponent Sir Frederick Thesiger, in the cause of Sefton *v.* Hopwood, tried before Mr. Justice Cresswell at the Lancashire Assizes in 1855. The Earl of Sefton propounded the will on behalf of the younger children of the testator, his father-in-law, and Mr. Cockburn opposed it on behalf of the elder son, who had been disinherited. Cockburn admitted that in this case there was no evidence of delusion, which in McNaughten's case he had followed Erskine in declaring to be the essential feature of lunacy. But he reasoned, and he proved that there was abundant evidence of loss of memory and of confusion of thought extending, as by his masterful eloquence he persuaded the jury to believe, to complete testamentary incapacity. In this trial, as in McNaughten's, he gave the full meed of commenda-

tion to the medical evidence, and justly so, for the medical attendant of the great county family whose dearest interests were involved had behaved with resolution under trying circumstances in refusing to witness the will, and had given his evidence with a judgment and temper which could not fail to influence the jury towards his honest and well-considered opinion.

In the following year Sir Alexander Cockburn led in maintaining the validity of the will in the great Swynfen case. But the arguments or the statements of opinion expressed by advocates have perhaps their greatest permanent value as preparations or training of the judicial mind, upon which the determination of the law eventually depends. It may be interesting and not unprofitable in such a man to trace the arguments of the barrister in the judgments of the Judge, but the more important duty of endeavouring to estimate the full nature of the more important of these judgments must check diffuseness on such matter as does not bear the stamp of authority.

In Banks *v.* Goodfellow, the matured opinions of the Chief Justice are expressed on insanity in its relation to testamentary capacity, and this judgment is remarkable on account of its forming one of the rare instances in which all accepted precedents of legal authority have been reversed. The "doctrine" of the Courts had been that "any degree of mental unsoundness, however slight and however unconnected with the testamentary disposition in question, must be held fatal to the testamentary capacity of a testator," and this doctrine, Chief Justice Cockburn said, had been very emphatically declared by Lord Chancellor Brougham, presiding over the Judicial Committee of the Privy Council in Waring *v.* Waring. The head-note to this remarkable case, 6 Moore, P. C. Rep., thus explains the purport of the judgment:—

"This exposition of the doctrine of monomania and partial insanity, as applied to wills, was that if the mind is unsound on one subject, providing that unsoundness is at all times existing on that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusions be presented to it,

the unsoundness would be manifested by such a person believing in the suggestions of fancy as if they were realities, any act therefore done by such a person, however apparently rational that act may be, is void, as it is the act of a morbid or unsound mind."

"This doctrine," said Cockburn, "was, perhaps, more fully expressed by Lord Penzance in Smith *v.* Tebbitt." Thus: "A person who is affected by monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will. . . . For I conceive the decided cases to have established this proposition, that if disease be once shown to exist in the mind of a testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject to the exclusion of all others; the testator must be pronounced incapable. Further, the same result follows, though the particular subject upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court."

This legal doctrine was abolished as wrong, and a contrary rule substituted in its stead by the judgment of Chief Justice Cockburn, presiding in Banco of Queen's Bench, Justices Blackburn, Mellor, and Hannen concurring therein, upon the motion for a new trial in Banks *v.* Goodfellow, July 6, 1870. The testator John Banks was admitted to have been of unsound mind; he had been confined in an asylum and remained subject to certain fixed delusions. He had conceived a violent aversion to a man long since dead, whom he believed still to pursue and molest him, and the mention of this man's name threw him into violent excitement. He frequently believed that he was pursued and molested by devils or spirits, whom he believed to be visibly present. There was conflicting evidence as to his general insanity, but "from September [the will being made on December 2 following] 1863, he had a succession of epileptic fits, and a blister was applied to his head, and the medical man who attended him throughout this period deposed that his mental power, such as it was, suffered from these fits, and that he considered the testator insane and incapable of transacting business during the whole time." On

the other hand, it appeared that he managed his limited affairs and was careful of his money. The Westmoreland jury found for the validity of the will, which in-so-far as it bequeathed his property to his niece who lived with him was a natural disposition of his property; but, inasmuch as his niece was his heir-at-law and would have inherited without the will, it was a vain and unnecessary one. The niece died shortly after the testator, and her heir, being no kin to the testator, claimed under the will, thus disinheriting the testator's nephew, the plaintiff, who strove to cancel the will on the ground of the incapacity of the testator.

From this statement, somewhat abbreviated from that made by the Chief Justice himself, it will appear to any practical psychologist, that in order to reduce the issue to a question of principle, extremely large assumptions were made in the judgment, in that it assumed the absence of general insanity, and also that "the delusions must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any." Thus trimmed to the most convenient condition for argument, of course the question became "whether a delusion, thus wholly innocuous in its results as regards the disposition of the will, is to be held to have had the effect of destroying the capacity to make one." The simple dogma of the older jurists that an insane person was incapable of making a testament "*quia mente caret*" is obviously unsatisfactory in the opinion of the Chief Justice, "when the fact becomes recognised that a man may labour under *harmless delusions which leave the other faculties of his mind unaffected*, and leave him free to make a disposition of his property uninfluenced by their existence." The judgment, therefore, with regard to direction was that "a jury should be told in such a case that *the existence of a delusion compatible with the retention of the powers and faculties of the mind will not be sufficient to overthrow the will, unless it were such as was calculated* to influence the testator in making it;" and, looking at the evidence by the light of this doctrine, the Court refused a new trial, on the ground that "in our judgment the only proper or possible result must be a second verdict establishing the will."

In order that we may the better appreciate Chief Justice Cockburn's argument and the judgment founded upon it, the judgment in Waring *v.* Waring delivered by Lord Chancellor Brougham, with the concurrence of Lords Langdale, Lushington and Pemberton Leigh, of the Judicial Committee of the Privy Council, ought to be considered; seeing that it is the faultiness of this opposite view, of which this decision is the most remarkable and authoritative expression which is believed to have justified its reversal. Lord Brougham said that, in speaking of disease or decay affecting the mental faculties being more or less general, or of affecting more or fewer of these faculties, "we must always keep in view that which the inaccuracy of ordinary language induces us to forget, that *the mind is one and indivisible*, and that when we speak of its different powers or faculties, as memory, imagination, consciousness, we speak metaphorically, likening the mind to the body, as if it had members or compartments, whereas, in all accuracy of speech, we mean to speak of the mind acting variously, that is remembering, fancying, reflecting, the same mind in all these operations being the agent."

A man's mind being one, Lord Brougham says that cases of monomania are incorrectly called partial insanity. "We are wrong in speaking of partial unsoundness, we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it lurks and appears not. But this malady is there, and the mind is one and the same; it is really diseased while apparently sound, and really its acts, whatever appearances they may put on, are only the acts of a morbid and unsound mind." "We never can rely on such acts, however rational in appearance, because we have no security that the lurking delusion, the real unsoundness, does not mingle itself with or occasion the act." This latter point, not in any way dependent upon metaphysical opinions or doctrines, will be most readily admitted by those who have the largest experience of the insane. One can never tell when their insanity will not crop out; so that their testamentary and other acts, which may appear to be quite reasonable, may have an insane motive, and indeed are rarely altogether

free from some admixture of such motive; and Brougham's observation is perfectly justified that "it is hardly possible that any will can be so framed as to rebut all presumptions of insanity arising from proved facts," for all the conduct of the insane is tainted with at least suspicion of insane motive; nay, the presumption is and always must be that there is some degree of insane motive in all their conduct, or, in other words, that the motive of an insane man never is quite what it would have been had he been of sound mind. Not that the motive is altogether perverted and different, but that, looking to the full composition of motive in memory, fancy, feeling and desire, and all the other faculties which go to influence conduct, the motive of the most typical monomaniac, whether it be determined to call him insane as to parts of his mind, or insane as to occasions of thought, or insane as to a limited range of things or affairs, cannot be relied upon as a sane motive, even if the act be apparently that of a sane man.

On this point Lord Brougham's opinion is inexpugnable, but not so in regard to his objection to the term "partial insanity," on the ground that there is no such thing, seeing that the mind being one, all insanity must be held to affect the whole mind. It is much more true that all insanity is partial insanity, and that there is no such thing as insanity which is not partial. As the existence of bodily disease implies the continuance of life, so the existence of insanity implies the continuance of mind. Therefore coma, and perhaps the extreme of amentia, can scarcely be called insanity, which is perversion or defect of mental activity, not its abrogation. But partial insanity, as it was understood and objected to by Brougham, was not this kind of partiality. It was the partiality with which we speak of local disease of the body in contradistinction to constitutional or general disease, and his objection to it on the ground that mind is one and indivisible, and therefore that its affections cannot be limited to a part or parts, although an argument of the metaphysical kind, is still one which can scarcely be avoided in thorough discussion of such a question. Indeed it would seem that we are somewhat less metaphysical, and more in accordance with the common sense and opinion of

mankind, when we say with Brougham that mind is one thing, and that this habit of speaking of its various activities as if they were distinct things is but a metaphorical mode of expression due to the imperfection of language, than if we were to adopt Cockburn's view of the independence of the faculties.

In the Banks *v.* Goodfellow judgment, Chief Justice Cockburn "did not think it necessary to consider the position assumed in Waring *v.* Waring, that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being." And yet he immediately proceeded to discuss the question in a metaphysical or rather psychological manner as follows:—"Whatever the essence of it may be, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organisation. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of insanity and the experience of its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though

all its other members may be healthy and their powers or functions unimpaired. But the question still remains whether such partial unsoundness of the mind, if it leaves the affections, the moral sense, and the general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, should have the effect of taking away the testamentary capacity."

Further on he declares that the fact must be recognised that "a man may labour under harmless delusions, which leave the other faculties of his mind unaffected, and leave him free to make a disposition of his property, uninfluenced by their existence." Surely the above quotation will justify us, not only in declaring that it is impossible to discuss such subjects except as matters of psychological inquiry, but that the Chief Justice did so discuss them, and did not discuss them well, in consequence of his abortive attempt to assimilate mind more closely than in the nature of things will bear to be done to the functions and even to the parts of the body. There is no real resemblance or community of nature between a delusion and a part of the body affected by local disease; neither is it true that a delusion is a faculty of the mind, as Cockburn appears to think when he speaks of delusions and other faculties of the mind. The argument which compares a delusion to an injured hand, or an eye which a man can pluck out and cast from him, needs no refuting; but to consider a delusion one of the mental faculties is a serious error, inasmuch as it seems to vitiate the whole of an argument in many respects acute, able, and learned. It is, in his own forcible language, "a position obviously unsatisfactory when the fact becomes recognised" that a delusion is a state of mind in which all the mental faculties or activities are affected. Sense, perception, judgment, feeling, and whatever else goes to constitute mind are, and must be, each and all affected in such a fundamental perversion of the reason. In the concrete instance discussed, John Banks, the testator, who had conceived a violent aversion to Featherstone Alexander, and, notwithstanding the death of the latter, believed that he still pursued and molested him, and the mention of whose name threw him into violent excitement, and who believed that he was pursued and molested by devils who were visibly present to

him, must have had perversion of the sense and perception, constituting hallucination; must have had the faculty of comparison perverted, or he would have recognised the false sense, as Nicholai and others have done; must have had his feeling perverted, or he would not have been thrown into violent excitement by the chimera of persecution by a man long since dead, but whose death he could not remember. The mental activities implicated in these beliefs were as little partial, as regards the field of mind which they implicated, as the mental activities of the Chief Justice himself, in the judgment which he delivered upon them, or as those of the Judges whose opposite judgments he superseded. It is a marvellous thing that a man can be stark staring mad upon one train of ideas, and that you can start the manifestation of his madness by a word, while upon all other topics and trains of thought he is comparatively rational and seemingly of sound mind. But it is of the first importance to discussions on the influence of delusions, either on responsibility or on testamentary capacity, to be assured that not part of the mind but the whole of a man's mind, whatever we may think of its unity or its composition, is affected by such a delusion, which absorbs the man while he is excited by it; not one of his faculties to the exclusion of others, but the whole of his faculties on the particular subject or subjects respecting which he entertains insane delusions. We cannot but think that Chief Justice Cockburn misapprehended and therefore misstated the argument of Lord Brougham in Waring *v.* Waring, and that of Lord Penzance in Smith *v.* Tebbitt, since he says that the doctrine for the first time laid down by them "may be shortly stated thus. To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of those faculties, if it labours under any delusion arising from any such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence." The doctrine referred to really appears to have been so much opposite of this, that it would be far more correct to state it thus. The mind being one and

indivisible cannot be disordered in any one of its faculties; and mental disease implies disorder of all. Insane delusion affects all the mental faculties, although such affection may be latent when the subject of delusion is not before the mind. Such a mind is unsound, and testamentary incapacity is the necessary consequence. It was not argued by Lords Brougham and Penzance that insane delusions on a limited subject of belief and feeling must necessarily affect the motives of a man making a will, but it was argued that insane delusions would cast such a doubt on those motives, and would moreover throw such a taint of suspicion upon the soundness of the understanding of the person so affected as to amount to testamentary incapacity. Chief Justice Cockburn, on the other hand, assumed as the foundation of his argument that insane delusions might exist, and in the case under consideration did exist, "delusions which had, in point of fact, no influence whatever on the testamentary disposition in question," "delusions which had not, nor were calculated to have any influence on him in the disposal of his property;" "and the question is whether a delusion thus innocuous in its results as regards the disposition of the will, is to be held to have the effect of destroying the capacity to make one."

If this line of argument is not begging the question it is very like that common fallacy, for if it be admitted that the delusion must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any, *cadit quæstio.* But if such admission be not made, as "in this case we are dealing with," it certainly ought not to have been made, it is the argument which fails. "In this case we are dealing with," the delusions, as described by the Chief Justice, might have influenced the testator's disposition of his property in an infinite variety of ways. Take one of the most probable, namely that he was so preoccupied by his delusions that he did not recollect the existence or the claims of the nephew, who was not present, but only those of the niece, who was present, for it is a frequent effect of delusion to exclude reflection upon subjects not within its range. And again, in considering "this case we are dealing with," what is more probable, nay, almost certain, than that the only relative

living with a person labouring under such delusions of persecution by a dead man, and by devils and evil spirits, would become intimately related with those delusions, although they did not directly include or refer to herself? Would she not have had to comfort him under his fanciful terrors, to assume the *rôle* of protector against his persecutors, and would such a position have no effect upon the dispositions of the lunatic? Clearly this reasonable probability was quite opposite to that which the Chief Justice so resolutely assumed as the certainty, for he did not put it as a probability but as a certainty, that the delusions could have had no influence whatever on the testamentary disposition.

We venture therefore to think that the argument of Chief Justice Cockburn did not quite meet, and that certainly it did not entirely answer, the argument of Lords Brougham and Penzance with regard to the influence of delusion on testamentary capacity. At the same time we cannot fully concur in the conclusions of Lords Brougham and Penzance. They may follow the psychological premises, but they are too formal and definite to adapt themselves to the infinite varieties of Nature, even as she is seen in the aberrations of the human mind. Perhaps less injustice would be done under their rule of exclusion than by Chief Justice Cockburn's rule of admitting the wills of lunatics with delusion, for without doubt a great and increasing amount of injustice is done every year by the probate of the wills of lunatics which ought never to have been made. It is a great social privilege, that of bequeathing one's property to whomsoever or for whatsoever one thinks fit, possessed in its unfettered condition by the English race almost alone among the nations, and no one can peruse the eloquent remarks which the Chief Justice made in this judgment upon the moral responsibility of exercising this privilege, or rather of discharging this duty aright, without an increased feeling that its abuse ought to be strictly guarded. At the present time the legal doctrine as to testamentary capacity and incapacity does not appear to be in a satisfactory state; seeing that the old doctrine, accepted for a long period and reaffirmed perhaps upon insufficient argument, has been upset, and an opposite doctrine substituted upon argument far from satisfying and

conclusive. It may at least be objected to all the argument on both sides that far too much stress has been laid upon delusion, as if it were the main element of insanity, and as if it were always very much the same kind of thing in nature and degree, only applied to different kinds of subjects. With all of those great Judges a delusion is a very definite and positive state of belief. It is wrong belief; but it is so strong that a man who entertains it is sure to act upon it. But, we will not say with Cockburn, "those who are most conversant with the pathology of mental disease," but use the better term with which he follows up that too flattering phrase, "those who have most experience of insanity in its various forms," well know that insane beliefs are like sane beliefs, in all their infinite variety of strength or weakness, clearness or obscurity, persistency or changeableness, activity or latency, power or incapacity to influence action; and that they have, in almost as great a variety as sane beliefs, connection with or independence of an infinite variety of passions or emotions, and of intellectual conditions other than beliefs. A man may possibly have a delusion which would seem extremely likely to influence his will, and yet from some quality in the nature of his belief in his delusion, it shall not influence his will or seriously affect his conduct in life. On the other hand, another man may well have a delusion which Chief Justice Cockburn would have been too ready to say "was wholly innocuous as regards the disposition of his will," and yet, through one of those cross-cuts of perversity so rife in the insane mind, the will shall be nothing but the expression of the delusion. These facts, which will be in agreement with the experience of all competent observers, point to the conclusion that testamentary incapacity ought to be decided upon, not by the existence of delusions or their supposed interference or non-interference with the reasonings or feelings of the testator, but upon all the circumstances of each individual case, which is the identical doctrine advocated by Cockburn himself with regard to the influence of delusion in determining irresponsibility for criminal acts.

But in this judgment the Chief Justice went beyond this reasonable doctrine, when he so far depreciated the importance of delusion as to declare that the opinion must be looked upon as

merely speculative, and unsupported by proof, which assumed the probability that where insane delusion has shown itself, a greater degree of mental unsoundness exists than has actually become manifest. It surely is not a matter of merely speculative opinion, but one rather of pretty constant experience, that where fixed delusions exist the mind is profoundly affected. In this very case "the mere mention of Featherstone Alexander's name [the dead man who still pursued and molested him] was sufficient to throw him into a state of violent excitement." "But as the delusion was not manifested at the time of making the will, it is a question whether the delusion was not latent in the mind of the testator." Just so. There was a greater degree of mental unsoundness than was actually manifest. There was delusion and a morbid state of temper and feeling which a word could at any hour explode into violent excitement.

But it must be admitted that some delusions do not indicate any greater degree of mental unsoundness than that which is always manifest, and that there are some delusions which may be predicated as unlikely, though not incapable, of having any effect upon a will. The varying delusions of hypochondriasis are quite different from the fixed delusions of persecutions such as were entertained by Thomas Banks; and while these would not necessarily indicate any mental unsoundness beyond the unfounded and extravagant opinions they represent, the others would necessarily indicate profound mental lesions which would be almost certain to manifest themselves in aberrations and defects of the understanding, and in perversions of the affections on other subjects than those immediately referable to or connected with the delusions themselves. Mr. Justice Stephen, than whom no one has investigated this difficult corner of law with more philosophical and diligent study, made the following remark as to the unexpected and incalculable influence of insane delusion, in his evidence before the Select Committee on the Homicide Law Amendment Bill:

"Where you have a specific delusion of that kind it shows that the mind itself is so deeply disordered in all kinds of ways, you cannot draw the inference that there was an intention to kill or to do grievous bodily harm from the fact of killing as you

could in other cases:—when you get a man under any definite delusion whatever, for aught you can tell the workings of his mind may be such that the act which to you appears to be murder, appears to him in quite another light; and if you read books which give accounts of the workings of the minds of mad people, you will find that directly you get a definite delusion set up, the process of the mind is vitiated as well as the mere result. The delusion runs through everything."

This undoubtedly is true of most delusions, and would especially be true of fixed delusions of persecution accompanied by hallucinations of sense and associated with epilepsy, such delusions, in fact, as those of Thomas Banks, which, in the opinion of the Court of Queen's Bench, left the intelligence and the emotions so free and unaffected. But there are delusions and delusions; delusions in the nascent and others in convalescing conditions of mental disease; delusions which indicate "deep disorder of the mind in all kinds of ways," so that "the process of the mind is vitiated as well as the result;" and contrasted with them there are delusions which scarcely affect the mind beyond their own range, and which, weak and changeable, cannot have the import attached to them in the above quotation. And it is worthy of remark that the Judges sometimes employ this term "delusion" to indicate disturbance of thought arising from insanity, without any particular belief in imaginary facts: thus Lord Penzance, in his judgment, Smith *v.* Tebbitt: "It is no doubt true that mental disease is always accompanied by the exhibition of thoughts and ideas that are false and unfounded, and may properly be called 'delusive.' But the question of insanity and the question of 'delusions' is really one and the same. The *only* delusions which prove insanity are *insane delusions*—and the broad inquiry into mental health or disease cannot in all cases be either narrowed or determined by any previous or substituted inquiry into the existence of what are called delusions."

Chief Justice Cockburn, however, did not adopt this loose interpretation of a term, whose definite meaning it is of the utmost importance to fix with all possible exactness. We have seen that in his attack on the Hopwood will he admitted that there was no evidence of delusion, although there was abun-

dant evidence of loss of memory and of confusion of thought, extending to complete testamentary incapacity. Yet Mr. Hopwood had ideas respecting his eldest son, whom he had disinherited, which were "false and unfounded," and might therefore, according to Lord Penzance, be called "delusive." If Lord Penzance had turned his dictum the other way first, and said that the only delusions of value as evidence being insane delusions, to prove the existence of such delusions it is needful first to prove the existence of insanity, it would have been more logical, although such delusions might have included those beliefs of the insane, which may by possibility be entertained by ignorant, flighty, and fanciful people who are not insane. Insane delusions, however, are recognised by their accompaniments,—insane history, insane conduct, insane feeling, insane physical symptoms,—and by their character, exhibited by comparing them with like beliefs, with like accompaniments, in other persons who are unquestionably insane, that is to say, sufficiently like to convince a candid and instructed mind that they are essentially alike.

But these reflections, if they are well-founded, tend greatly to weaken the position of the Lord Chief Justice with regard to the possibility of such delusions as those of Thomas Banks existing without "the mind becoming deeply disordered in all kinds of ways, so that you cannot draw any inference as to intention," even so simple an inference as to whether he intended to kill a man or not; more so as to an intention even more complex regarding testamentary dispositions. For, observe, these delusions had all the accompaniments of insanity which we have indicated. There was an insane history, residence in the county lunatic asylum; insane conduct, violent excitement; insane feeling, violent aversion; insane physical symptoms, epileptic fits; and it will be scarcely denied by any candid person conversant with lunatics that these beliefs and their accompaniments resemble the insane beliefs and the other marks of insanity in thousands of persons suffering from general insanity so closely that there could be no possibility of doubting that they were of the same kind and nature.

The Lord Chief Justice proceeds in his judgment to comment with admirable precision and elegance of diction upon the great

moral responsibility involved in the discharge of that duty so largely committed to the individual in this country of disposing of his property after death to whom he will. He recognises the power of mental disease to poison the affections and to pervert the sense of right, and thus to abolish the responsibility which this duty involves; but here again he intervenes to assert the possibility of delusion neither exercising, nor being calculated to exercise, any influence upon the particular disposition of the testator. The great moral responsibility attached to the duty of making a just and righteous will appears to us to increase rather than to weaken the argument in favour of the old rule of law which denied the exercise of so responsible a privilege to any one proved to be of unsound mind.

From this aspect of the question the Chief Justice proceeds to discuss the effect of enfeeblement of memory and defect of mind upon testamentary capacity. On this question the most important judgment he quotes is that delivered by Erskine, for the Judicial Committee of the Privy Council, in Harwood *v.* Baker [3 Moore, P.C.], viz.: "Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have the capacity to comprehend the extent of his property, and the nature of the claims of others whom by his will he is excluding from participation in that property," &c., and the Chief Justice asks, "why should not this standard be also applicable to mental unsoundness produced by mental disease? It may be said that the analogy between the two cases is imperfect; that there is an essential difference between unsoundness of mind arising from congenital defect or supervening infirmity, and the perversion of thought and feeling produced by mental disease, the latter being far more likely to give rise to an inofficious will than mere deficiency of mental power. This is no doubt true, but it becomes immaterial on the *hypothesis* that the disorder of the mind has left the faculties, on which the proper exercise of the testamentary power depends, unaffected; and that a rational will, uninfluenced by the mental disorder, has been the result."

It is indeed an hypothesis that disorder of the mind as distinguished from "congenital defect or supervening infirmity can leave those faculties unaffected upon which the proper exercise of the testamentary power depends." What are these important and efficient mental faculties which can thus be left unaffected by insanity? The supposition, even as an hypothesis, is that which we conceive to be the fundamental error of the whole judgment, namely the metaphysical or psychological conception that a man's mind is merely a bundle of diverse faculties more or less independent of each other, some of which may be affected by insanity, while others upon which the proper exercise of the testamentary power depends, remain unaffected. The Chief Justice does not adduce any evidence in support of his conviction upon which the judgment and the new law depends, namely that a man's mind is thus constructed; but while disclaiming metaphysical inquiry with great emphasis, he adduces the most metaphysical of arguments, namely that of consciousness, in support of his views. "Every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organisation." Our only possible reply is that we have no such consciousness, but that on the contrary we are conscious that mind in us is one thing or power with various modes or directions of activity, but with one indecomposite individuality. And we think that the neurological science already acquired and even that which we may aspire to, from the pursuit of the same methods which have won all recent discovery, indicate the oneness of mind as contradistinguished from the localisation and diversity of brain function. In neurology we cannot get beyond or behind impressions, reflections, and recollections of sense, and as often as we venture to distinguish a bit of mind apart from a man's whole mind, it will be found to be merely a bit of sense felt, reflected or recollected. But a man's whole mind, that is to say, in the words of this judgment, "the senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory," these are not "so many distinct faculties or functions of the mind," but the tissue of sense-impressions, inherited and acquired,

inextricably woven into one whole state of consciousness which attains to new powers or activities, catalogued under the impressive but often misleading terms above quoted. In conclusion, we are of opinion that the late Chief Justice of the Queen's Bench and the great Judges over whom he presided were right in challenging the extremely narrow legal rule with regard to testamentary incapacity, which they reversed, but that the grounds upon which they acted were fallacious, the argument wrong and misleading, the new rule dangerously lax and wide, and the result in the particular instance to which it was first applied a miscarriage of justice. In the early days of the old rule, when an insane man was said to be unable to make a will simply *quia mente caret*, insanity covered but a very moderate portion of the wide field over which it has since been extended. An insane man then almost invariably indicated a person about whose testamentary incapacity there could be no question. But when the same strict rule came to be applied to new forms and degrees of insanity, it was inapplicable, and indeed it then became that very fallacy which we have indicated as the error of those who argue that every insane man ought to be exempt from responsibility for crime; the fallacy of arguing *a dicto secundum quid ad dictum simpliciter*.

There being in all forms of insanity infinite degrees of mildness and severity, it became obviously unjust to apply that rule to the mild and slight degrees of mental disease and defect which was only applicable to degrees of greater intensity. The question of course was always essentially one of motive, that is to say ethical, or, if you like, psychological; but concurrently there was one, we will not say for the medical man, but for any man who diligently studies all the mental qualities and conditions of the human being. This the authors of the old legal rule could not do, because degrees of insanity were scarcely recognised in those days. This also the authors of the new rule have failed to do, because they adopted a metaphysical conception which misled them. What legal rule may eventually be devised and upheld, which shall delineate fairly and fully the characters and degrees of mental diseases which shall, and those which shall not, carry with them testamentary incapacity, must depend upon the attainment

of a better knowledge both legal and mental, and of a more intimate concurrence between equity and science. Whatever the rule may be, however, its application must not unfrequently "involve considerable difficulty and require much nicety of discrimination," as the Chief Justice admitted of inquiries under his own rule. The manner, however, in which such difficulties may be overcome will surely not be by metaphysical or psychological discussion, but by the painstaking method of comparison described by Lord Penzance [Smith *v.* Tebbitt], first, by the comparison which common men make of the words and deeds, as indicating the thoughts of the testator, with the standard of sanity they bear in their own minds; and secondly, the more instructive comparison which those who are conversant with the insane can make between the sayings and doings of the testator with the sayings and doings of those who are undoubtedly insane to an intestamentary degree. And it is, as Lord Penzance argues, by this double comparison of the mind of the testator with the sane mind of the Court, and with the insane mind as it is known and described by competent observers, by which that nicety of discrimination which these inquiries demand may be attained.

We have been led into a longer criticism of this famous judgment than we had intended or expected. Its intrinsic importance, which cannot easily be overestimated, conjoined with the profound respect we entertain for the memory of its author, has forbidden us from expressing our objections with less consideration and amplitude. This judgment in Banks *v.* Goodfellow, full of learning and research as it is, covers much of the ground of insanity in its civil relations, and indeed the Chief Justice himself informed the writer of these pages that he considered this judgment as the full expression of his opinions upon the whole subject. That these opinions are original, and constitute an entirely new law upon the subject, is a sufficient justification, if one were necessary, for subjecting them to a free criticism, which, so far as we know, has not before been done.