[HIGH COURT OF AUSTRALIA.]

CHARLES ABRAHAM WILSON . . . APPELLANT;
DEFENDANT,

AND

FREDERICK CHARLES JONES AND GEORGE HUBERT STANFIELD HOLLIDAY . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *May* 8, 9, 10.

Griffith C.J., Barton and O'Connor JJ.

Will — Suit for probate — Costs — Testamentary capacity — Caveat — Reasonable grounds for opposing grant of probate.

The appellant filed a caveat against the grant of probate of a will and three codicils to the respondents, upon the ground that their testatrix was not possessed of testamentary capacity.

In a suit brought by the respondents for probate, *Street* J. found that the testatrix was of testamentary capacity, and ordered the appellant to pay the costs of the suit.

Held, that the finding as to testamentary capacity was fully justified by the evidence, that the appellant could not have reasonably entertained any doubt as to the testatrix's capacity up to the date of the second codicil, and even if he had a doubt as to her capacity to make the third codicil, as substantially the whole of the costs were incurred in establishing the validity of the second codicil, he was properly ordered to pay the costs of the suit.

Decision of *Street* J., 5th September 1910, affirmed.

APPEAL by the defendant from the decision of *Street* J.

The plaintiffs were the executors of the will and three codicils of Sarah Wilson who died on 28th December 1909. The suit was brought for probate of the will and codicils, against which

the defendant, who was a son of the testatrix, had filed a caveat. A similar suit was also brought by the same plaintiffs against Francis Hannah Hawker, and Lucy Rose Adelaide Mastin, who had also filed a caveat subsequently to the institution of the first-mentioned suit. Both suits were heard together, probate of the will and codicils was granted to the plaintiffs, and the defendants were ordered to pay the costs of their respective suits. The defendants in the second suit did not appeal. The appellant appealed from the decision in the first-mentioned suit upon the grounds:—(1) that his Honor was in error in holding that the testatrix at the time of the execution of the will and codicils was possessed of testamentary capacity. (2) That his Honor should have directed the appellant's costs to be paid out of the estate, or should have made no order as to costs.

It is unnecessary to refer to the evidence in detail, but there was ample evidence, if believed by the learned Judge, to prove that the testatrix at the relevant times, was possessed of testamentary capacity. His Honor was also of opinion, upon the evidence, that the defendants had no reasonable grounds for believing the truth of the case which they set up, and that there were good grounds for doubting whether they did in fact so believe it.

Bignold, for the appellant, contended that the finding of *Street* J. as to the testatrix's testamentary capacity was against evidence, and that the evidence at the disposal of the appellant justified his opposition to the grant of probate.

Langer Owen K.C., and *Whitfeld*, for the respondents, were not called upon.

GRIFFITH C.J. This is a hopeless appeal. The questions involved are questions of fact, depending almost entirely upon the oral evidence of witnesses examined before the learned Judge from whom the appeal is brought. Their credit, and the weight to be given to their evidence was preëminently a matter for him. He has in a very full and careful judgment discussed the evidence, and stated his reasons for accepting the evidence of

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some witnesses and rejecting that of others. I do not propose to refer to the evidence in detail, but I will say this for myself that, from the account that he gives of these witnesses, he could hardly have come to any other conclusion than that at which he arrived.

The suit was for probate of a will and three codicils, made by a very old lady who was born in 1819. The appellant was the defendant in one of two actions brought by the same plaintiffs to establish the will. The procedure which allows two actions to be brought for the purpose, is, as far as I know, peculiar to New South Wales.

The ground of the appeal is that at the time of making the second and third codicils the testatrix was not of sound mind memory and understanding. It is not necessary to say anything with respect to the original will or the first codicil. The second codicil was executed on 14th April 1903. By the will the testator had given the residue of her property to be divided between her son (the appellant), and her daughter Dinah Jones. By the codicil of 14th April 1903 she reduced the interest given to the appellant to a life interest, and gave the remainder after his death to her daughter Dinah Jones.

As to her sanity at that date there is abundant and conclusive evidence—the testimony of the solicitor to whom she gave the instructions, and other contemporaneous evidence—that she was then in full possession of her faculties.

The third codicil, which was dated 8th December 1906, merely changed the executors, and made no change in the beneficial disposition of the property. With respect to her mental condition at that time it is proved that, in consequence of some disparaging remarks which the appellant had made, the testatrix caused herself to be medically examined by two medical men on 7th December, the day before the codicil was executed, and they were perfectly satisfied that she was then of perfectly sound mind. On that evidence, the learned Judge, disregarding, for the reasons he has given, some circumstantial evidence to the contrary, could come to no other conclusion than that the will and codicils were established.

But another question is raised as to the costs. The learned

Judge ordered the appellant to pay the costs of the suit in which he was defendant. The defendants in the other suit have not appealed. *Street* J. referred to the rule laid down by *Sir James Hannen* in *Davies* v. *Gregory* (1): "Where the facts show that neither the testator nor the persons interested in the residue have been to blame, but where the opponents of the will have been led reasonably to the *bonâ fide* belief that there was good ground for impeaching the will, there will be no order as to costs. Of course the opponents must have taken all proper steps to inform themselves as to the facts of the case, but if, having done so, they *bonâ fide* believe in the existence of a state of things which, if it did exist, would justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs." The learned Judge then said:—"I think there are good grounds for doubting whether the defendants really believed, at all events I do not think that they had any reasonable grounds for believing, the truth of the case which they set up. Mr. Charles Wilson's own evidence and other evidence in the case renders it very difficult to believe that he can have really entertained any serious doubt as to the testator's capacity prior to 1907 at the earliest."

So far as regards the codicil of 1903, which is really the only one affecting the substance of the case, a letter was put in evidence written by the appellant to his mother three months afterwards. I will not read it, but it is sufficient to say that it is inconceivable that any man could have written such a letter to his mother, relating to numerous family details, unless he believed that she was then in full possession of her faculties. For myself I should be prepared to go further than the learned Judge, who said it was difficult to believe that the appellant entertained any doubt as to the capacity of the testatrix in 1903, and say that it is established upon the evidence that he was fully aware that at that date she was in full possession of her faculties.

With regard to the third codicil, the evidence suggesting that she was then incapable of understanding what she did is of a shadowy character, and I do not find anything to show that the appellant really had any doubt about it. But, if he had, still, as

(1) L.R. 3 P. & M., 28, at p. 33.

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substantially the whole of the costs were incurred in establishing the validity of the codicil of 14th April 1903, I do not think that, even in that case, there would be any sufficient reason for altering the order made by *Street* J. as to the costs. For these reasons I think that the appeal should be dismissed.

BARTON J. I agree. It is only a weak form of expression to say that I share the doubt that *Street* J. expressed as to whether the appellant really believed the truth of the case he set up.

O'CONNOR J. I agree.

Appeal dismissed.

Solicitor, for appellant, *A. D. Oliver.*
Solicitor, for respondents, *A. C. Ebsworth.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED . . . } RESPONDENTS,

H. C. OF A. 1911.

MELBOURNE, *May* 29, 30, 31; *June* 1, 2.

SYDNEY, *June* 27.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Industrial Conciliation and Arbitration—"Industry," meaning of—Registration of organization—Association of employés—Certificate of registration, effect of—Evidence of existence of dispute—Municipal corporation, exemption of, from federal legislation—Municipal trading—Commonwealth Conciliation and Arbitration Act 1904-1910 (*No.* 13 *of* 1904 *and No.* 7 *of* 1910), *secs.* 4, 21, 40A, 55, 57.