[HIGH COURT OF AUSTRALIA.]

TIPPER . . . . . APPELLANT;
CAVEATOR,

AND

MOORE AND ANOTHER . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *Sept.* 14, 15.

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

Appeal to High Court from Supreme Court of State—Appealable amount—Order nisi for probate—Interest of caveator less than £300—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 35—*Will—Testamentary capacity—Delusions.*

On a rule *nisi* for probate of a will in respect of property amounting in value to over £1,000 it appeared that the interest of the caveator, one of three sons of the testatrix, none of whom took any benefit under the will, would on an intestacy have amounted to less than £300. The Supreme Court having decided in favour of the validity of the will,

Held, that, under sec. 35 (1) of the *Judiciary Act* 1903, the judgment was one for or in respect of a matter at issue of the value of over £300 and that an appeal by the caveator to the High Court would lie without special leave.

Delusions are only material to the question of testamentary capacity if they are connected with the dispositions made by the will.

Judgment of the Supreme Court of Victoria (*Hood* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Catherine Elizabeth Moore, wife of Francis Naughton Moore, died on 10th November 1910 having made a will by which, with the exception of a small annuity and certain clothing and furniture to one Agnes Bishop, she devised and bequeathed the whole of her real and personal property to her husband absolutely. She

appointed her husband and William Arthur Jones to be her executors. The executors having applied for probate a caveat was lodged by Thomas Tipper, and on an order *nisi* being made calling upon the caveator to show cause why probate should not be granted, the caveator stated as the grounds upon which he objected to the will want of testamentary capacity and undue influence exercised by F. N. Moore.

On the hearing of the order *nisi* before *Hood* J. it appeared that the testatrix had on 25th June 1865 married one Thomas Tipper by whom she had three sons, of whom Thomas Tipper, the caveator, was the eldest, and all of whom were at different times up to 1876 committed to the care of the Department for Neglected Children. The testatrix lived with one John Carrodus as his wife from about 1876 until about the end of 1902 when Carrodus died.

In support of the allegation of want of testamentary capacity it was alleged that the testatrix suffered from delusions, the nature of which is stated in the judgment of *Griffith* C.J. hereunder.

Hood J. held that the testatrix had no delusions on the matters referred to and that there had been no undue influence. He therefore made the order absolute with costs.

From this decision the caveator now appealed to the High Court.

In the affidavit of appealable amount it was stated that the total value of the estate of the testatrix was £1034 1s. 9d.

H. I. Cohen, for the appellant.

McArthur and *Lowe*, for the respondents. The appeal is not competent. In the event of an intestacy the three children would take two-thirds of the £1,034 1s. 9d. between them, so that the appellant's share would only amount to £229 15s. 11d., and he is only prejudiced to that extent by the judgment.

GRIFFITH C.J.—The judgment is one pronounced for or in respect of a matter at issue of the value of over £300, the matter at issue being the estate of the testatrix—whether it is to be divided amongst the next of kin or under the will—and the

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appellant is a competent suitor. An appeal therefore lies as of right under sec. 35 of the *Judiciary Act* 1903.

Cohen, on the merits, referred to *Watson* v. *Kerridge* (1); *In re Key* (2); *Sutton* v. *Sadler* (3); *Dufaur* v. *Croft* (4); *Hendy* v. *Jenkins* (5); *In re Millar* (6).

[BARTON J. referred to *Banks* v. *Goodfellow* (7).]

McArthur was not called on.

GRIFFITH C.J. The rule as to the way in which an appeal based on the argument that the Judge below has come to an erroneous decision on a matter of fact has been so often laid down that it is not necessary to repeat it. It is not necessary to say whether we should have arrived at the same conclusions as the learned Judge. It is sufficient to say that the conclusions to which he came were obviously warranted by the evidence. It is suggested that the execution of the will was obtained by undue influence. The only ground for that suggestion is, in short, that the principal beneficiary is the husband. Then it is said that the testatrix was not of testamentary capacity because she suffered from delusions. But, as was said in *Banks* v. *Goodfellow* (7), referred to by my brother *Barton*, delusions are only material to the question of testamentary capacity if they are connected with the dispositions of the will. A number of matters have been referred to in this case which are said to have been delusions of the testatrix. At one time she thought that she was pregnant when she was not. At some considerable time before she made her will she sometimes used to believe that men were trying to poison her in order to get her property. She also said that she had visions, in one of which she saw a procession of men passing before the Virgin Mary. She used to consult fortune tellers and believed what they told her. When she was a widow she used to imagine that a number of men wanted to marry her, All those things are irrelevant to the question of testamentary capacity.

(1) 8 N.S.W.L.R. (Eq.), 25.
(2) 18 V.L.R., 640, at p. 642.
(3) 26 L.J.C.P., 284.
(4) 3 Moo. P.C.C., 136.
(5) 21 N.S.W.L.R. (B. & P.), 43.
(6) (1908) V.L.R., 682; 30 A.L.T., 106.
(7) L.R. 5 Q.B., 549.

The only remaining matter is that the testatrix said she had never been married before her marriage to the husband who survived her, and that she had never had any children. If her identity is established she had been married before and had had children. But there appear to have been circumstances in her earlier life which she would have been very glad to have entirely forgotten. The learned Judge below came to the conclusion that in saying she had not been married before and had no children she was purposely not telling the truth. I think it is more probable that she did remember that she had been married and had had children, but that she had determined to assert that she had not been married and had had no children, hoping that the falsehood would not be found out. The other alternative is that she had forgotten that she had been married and had had children. That however is very improbable. Even if she had forgotten it would not be a delusion. For these reasons I entirely concur with the conclusions of the learned Judge below, and I think that the positive evidence of testamentary capacity was quite sufficient.

BARTON J. I am entirely of the same opinion. The whole of the evidence so far as it is material was before the learned Judge below and he had the witnesses before him. The ordinary tests were applied to their credibility and their memory, and he came to conclusions upon all the questions of fact raised in favour of the respondents. Every one of his conclusions was warranted by the evidence, and it is not necessary for us to say that we agree with every one of them. If I were asked for my own opinion upon them, I should unhesitatingly say that I thoroughly agree with every one of those conclusions.

As to the question of testamentary capacity the evidence called for the respondents was enough in the absence of any clear evidence to the contrary.

As to the alleged delusions, the case of *Banks* v. *Goodfellow* (1) entirely disposes of all of them except that in regard to her previous marriage and the children born of that marriage.

The conclusion to which the learned Judge below came is that

(1) L.R. 5 Q.B., 549.

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the testatrix had resolved to renounce all connection with that period of her life during which she was the wife of Tipper and that she did not stick at falsehood in cutting off that period of her life from that during which she was the wife of Moore, and I think there is abundant ground of inference upon which he might come to that conclusion. [His Honor dealt with the evidence on that question and continued.] Apart from that alleged delusion, there remained, when it had been disposed of, no evidence of delusions which could have affected the mind of the testatrix as to the disposal of her property and, that being so, the evidence of capacity *aliunde* stands where it was, and there is no reason to disturb the finding of mental capacity.

As to undue influence the case resembles *Parfitt* v. *Lawless* (1) where Lord *Penzance* said :—"Again it was argued that there were certain facts in this case calculated to give rise to serious suspicions, and it seemed to be contended that any conclusions which might suggest themselves by way of suspicion merely, however vague, might properly, if the jury pleased to indulge in them, form the basis of a verdict; and consequently that if facts were proved calculated to generate such suspicions, enough had been done to make a case fit to go to the jury. If the proposition were correct, it would follow that the defendant had nothing more to do in a case like the present than to prove that the plaintiff was a Catholic priest, that he was the confessor of the testatrix, and that she had made him her residuary legatee." *Mutatis mutandis* that quotation exactly applies to the present case, There seems to me to be absolutely no evidence of any kind to support the allegation of undue influence. On every ground then I think the appeal should be dismissed.

O'CONNOR J. I concur. No ground whatever has, in my opinion, been shown for disturbing the conclusion at which the learned Judge below arrived.

Appeal dismissed with costs.

Solicitors, for the appellant, *Abbott & Beckett.*
Solicitor, for the respondents, *J. Moloney.*

B. L.

(1) L.R. 2 P. & M., 462, at p. 471.