[HIGH COURT OF AUSTRALIA.]

TIMBURY AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

COFFEE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 23, 24.

SYDNEY, *July* 28.

Rich A.C.J., Dixon, McTiernan and Williams JJ.

Will—Testamentary capacity—Soundness of mind, memory and understanding—Insane delusions—Testator liable to drinking bouts—Will made in interval between bouts—Suspicions of and antagonism towards wife—Finding against validity of will—Appeal by executors—Costs.

A suit for probate in solemn form by the executors of the last will of a testator was contested by the testator's wife on the ground that the testator was not of sound mind, memory and understanding at the time of making the will. The testator made four wills after his marriage; by the earliest he made his wife sole executrix and beneficiary, by the second he gave the wife the income of his estate during widowhood and the corpus to his sister, by the third he again appointed his wife sole executrix and gave her the whole estate, and by the last he gave the income of the estate to the wife during widowhood and the corpus to his sister. It appeared from the evidence that the testator was liable to drinking bouts which reduced him to a state of physical exhaustion and mental disturbance. In the intervals between the bouts he behaved in most respects in a reasonable manner, but he developed an intermittent distrust of and antagonism to his wife, and, even when apparently free from alcoholism, he sometimes recounted incidents relating to her bearing every stamp of improbability and, in some cases, inconsistent with proved facts. All four wills were made during intervals between bouts. The suit was tried with a jury, which found that the testator was not of sound mind, memory and understanding at the time when he executed his last will, but that he was of sound mind, memory and understanding at the time when he executed the preceding will. An appeal to the Full Court of the Supreme Court was dismissed, but the executors were allowed their costs of the appeal out of the estate. On appeal to the High Court,

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Held that the finding of the jury was justified on the evidence.

Held, further, by *Rich* A.C.J., *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting) that the allowance of the executor's costs of appeal to the Full Court out of the estate was a wrong exercise of the discretion of the Court.

Decision of the Supreme Court of Queensland (Full Court): *Re Coffee*; *Timbury* v. *Coffee*, (1941) Q.W.N. 28, affirmed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court of Queensland by Frederick Richard Vaughan Timbury and William Norman Fowles, as executors of the will of Angus Coffee, deceased, executed on 22nd October 1938, against Grace Caroline Urry Coffee, the widow of Angus Coffee deceased, and Sylvia Beatrice Maher, his sister, claiming probate of the will in solemn form. The defendant Coffee by her defence alleged that the testator was not of sound mind, memory and understanding at the time of making the will, and by way of counterclaim propounded a will made by the testator on 20th August 1938, of which she claimed probate in solemn form as sole executrix. The defendant Maher by her defence neither admitted nor denied that the testator was of sound mind, memory or understanding on the 22nd October 1938 and did not wish to dispute the plaintiff's claim for probate of the will.

The material facts are stated in the judgments herein.

The action was heard before *Philp* J. and a jury at the Circuit Court, Roma. The jury found that the testator was not of sound disposing mind when he executed the will of the 22nd October 1938, but found that he was of sound disposing mind when he executed the will dated 20th August 1938. On these findings judgment was entered for the defendant Coffee and a grant of probate of the will of the 20th August 1938 was ordered to be made to her as sole executrix thereof. Timbury and Fowles appealed to the Full Court of Queensland, which dismissed the appeal, but allowed them their costs of the appeal, as between solicitor and client, out of the estate of the testator: *Re Coffee*; *Timbury* v. *Coffee* (1).

From this decision Timbury and Fowles appealed to the High Court and the defendant Coffee cross-appealed against the order of the Full Court allowing the executors their cost of the appeal.

Real (with him *Lynam*), for the appellants. The jury could not reasonably find on the evidence that the testator was suffering from insane delusions when he executed the last will. The trial judge

(1) (1941) Q.W.N. 28.

directed the jury in terms of *Boughton* v. *Knight* (1), but the principles appearing from that case were not properly applied by the judge. The evidence shows that the testator was perfectly rational and acted with full knowledge when he signed his last will. There was no evidence that he was suffering from an insane delusion. Suspicion does not amount to an insane delusion (*Landers* v. *Landers* (2); *Ditchburn* v. *Fearn* (3)). An insane delusion is a fixed and permanent delusion that a person cannot be reasoned out of, and is a belief in facts which do not exist (*Brown* v. *M'Encroe* (4)). The trial judge summed up in terms of *Boughton* v. *Knight* (5) on the assumption that reason and judgment had been lost by the testator. Evidence shows that that was not so. Something more than a suspicion or an obsession is required to constitute a delusion. There must be incapacity to struggle against an erroneous belief (*Dew* v. *Clark* (6); *Waring* v. *Waring* (7); *Wheeler* v. *Alderson* (8)). On the evidence the jury could not reasonably have found that the testator suffered from insane delusions.

McGill K.C. (with him *McLaughlin*), for the respondent Coffee. The direction of the trial judge on the law was in strict conformity with *Boughton* v. *Knight* (9). No objection was taken at the trial to any misdirection. The findings of the jury are supported by the evidence. The evidence showed that the testator could not struggle against suspicions (*Banks* v. *Goodfellow* (10); *Westminster Corporation* v. *St. George, Hanover Square* (*Rector and Churchwardens*) (11)). The costs of the appeal should not have been allowed to the executors. They are unsuccessful appellants and in the absence of exceptional circumstances not entitled to costs. Any discretion which may have been exercised by the Full Court in allowing costs was exercised on wrong principles.

Power, for the respondent Maher, submitted to any order that the Court should make.

Real, in reply. This Court will not interfere with the discretion of the Full Court in allowing the executors their costs of the unsuccessful appeal. The onus of proof was on the respondent. A prima-facie case of sanity was made out by the executors thus placing

(1) (1873) L.R. 3 P. & D. 64.
(2) (1914) 19 C.L.R. 222.
(3) (1842) 6 Jur. 201.
(4) (1890) 11 L.R. (N.S.W.) Eq. 134.
(5) (1873) L.R. 3 P. & D. 64.
(6) (1826) 3 Add. 79 [162 E.R. 410].
(7) (1848) 6 Møo. P.C. 341 [13 E.R. 715].
(8) (1831) 3 Hagg. 574, at pp. 598, 599 [162 E.R. 1268, at p. 1278].
(9) (1873) L.R. 3 P. & D., at p. 68.
(10) (1870) L.R. 5 Q.B. 549.
(11) (1909) 1 Ch. 592.

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the onus of proof on the respondent (*Bailey* v. *Bailey* (1)). This Court will pay some regard to the opinion of the trial judge (*Wilkie* v. *Wilkie* (2) ; *Aitken* v. *McMeckan* (3)).

Cur. adv. vult.

The following written judgments were delivered :—

RICH A.C.J. The facts in this case have been fully stated in the judgments of the other members of the Court and I need not recapitulate them. The issue of capacity is one of fact (*Sutton* v. *Saddler* (4) ; *Earl of Longford* v. *Purdon* (5)). The question for the jury was : " Whether the testator was of sound and disposing mind and understanding when he made his will. That is the question which the wisdom of ages has framed, and, which as often as the question arises in courts of justice, and is put into form, in those words it is put into form." The factors of competency are that the party must know what he is about, have sense and knowledge of what he is doing, and the effect his disposition will have, knowledge of what his property was, and who those persons were that then were the objects of his bounty (*Frere* v. *Peacocke* (6)).

No medical evidence was led by either side but the undisputed facts show that the testator was a dipsomaniac. Alcoholism and attendant maladies brought about mental impairment and induced suspicion and distrust of his wife and resulted in subjective hallucinations based on a perverted imagination for which so far as the evidence goes there was no foundation in fact. Was then the evidence such as to justify the jury in finding, as in effect they did, that the delusions overmastered his judgment at the time of executing the will to such an extent as to render him incapable of making a reasonable and proper disposition of his property or of taking a rational view of the matters to be considered in making a will (*Banks* v. *Goodfellow* (7) ; *Hope* v. *Campbell* (8)) ? In my opinion the facts warrant this conclusion and the appeal should be dismissed.

I also agree with *Dixon* J. and *Williams* J. that the cross-appeal should be allowed.

DIXON J. The suit out of which this appeal arises was brought for the purpose of establishing the last will of a testator who died, at about the age of forty-three, on 7th November 1939. The will in

(1) (1924) 34 C.L.R. 558.
(2) (1915) 17 W.A.L.R. 156.
(3) (1895) A.C. 310.
(4) (1857) 3 C.B. (N.S.) 87 [140 E.R. 671] ; 5 W.R. 880.
(5) (1877) 1 L.R. Ir. 75, at p. 79.
(6) (1846) 1 Rob. Eccl. 442, at pp. 452-454 [163 E.R. 1095, at p. 1099], citing Lord *Kenyon* in 3 Curt. Appendix.
(7) (1870) L.R. 5 Q.B. 549.
(8) (1899) A.C. 1.

question was dated 22nd October 1938. He had made an earlier will on 20th August 1938. Before that he had made a will on 3rd February 1938, and a still earlier will on 4th October 1937. He had married on 31st October 1936. His wife survived him. When she married him she was a widow with four children. There was no issue of her marriage with the testator.

By the earliest of the four wills the testator made his wife sole executrix and legatee. His next gave her the income of the testator's estate during widowhood and disposed of the corpus in favour of his sister. By the third will the testator again appointed his wife his sole executrix and he devised and bequeathed his estate to her absolutely. In the fourth and last will he reverted substantially to the provisions of the second and he disposed of the income of his estate in favour of his wife during her widowhood and the corpus, in effect, in favour of his sister.

The suit was tried with a jury, which found that the testator, at the time when he executed his last will, namely that of 22nd October 1938, was not of sound mind, memory and understanding, but that he was of sound mind, memory and understanding when he executed the preceding will, that of 20th August 1938. The result of these findings would be that the widow would take the income and corpus of the estate.

It appears from the evidence that the testator was liable to drinking bouts which reduced him to a state of physical exhaustion and mental disturbance. Doubtless the recurring fits of alcoholism eventually brought about his death. The pathological conditions contributing to his death included myocarditis, cirrhosis of the liver, chronic gastric ulcers and toxaemia. He seems to have been a typical dipsomaniac. At some time anterior to his marriage he had gone through a long period of sobriety during which he had not touched alcohol; but this period had probably ended before his marriage. At all events, not long after his marriage a prolonged drinking bout commenced. It took place in December 1936 and January 1937. At intervals afterwards such bouts repeatedly occurred. Usually they resulted in his being taken to hospital, more often than not with delirium tremens and delusions. In the intervals between the end of one bout and the beginning of another he seems to have been active and intelligent and in most respects to have behaved in a perfectly reasonable manner and to have transacted business with every appearance of reason and acumen. He developed, however, an intermittent distrust of and antagonism to his wife, and, even when apparently free from alcoholism, he sometimes recounted incidents bearing every stamp of improbability and, in some cases, inconsistent with proved facts.

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The second will was made by him under the influence of some suspicion of and hostility towards his wife, but at a time when he displayed in other respects every appearance of rationality and when he seemed perfectly free from alcohol. The will was the outcome of a confidential letter of instructions which he wrote to his usual solicitor, a letter in clear and firm handwriting and well expressed, accompanied by a brief but explicit statement of the testamentary dispositions he wished to make.

The third will, that which the jury upheld, was made after he had undergone a drinking bout and had been discharged from hospital suffering a recovery. He and his wife attended at the office of another solicitor for the purpose. The solicitor consulted the medical man attending the testator before making the will.

It may be supposed that the testator was at the time in a state of contrition and remorse and, in that mood, his suspicions and antagonistic feelings in relation to his wife were subordinated.

His last will, that of 22nd October 1938, was the result of a revival of such feelings. Again the will was preceded by a letter of instructions to his usual solicitor. Again the letter was written clearly and intelligently and betrayed not the slightest irrationality, unless it be in the expression of his suspicions and distrust of his wife. Again there can be no doubt that at the time of the execution of the will the testator had not been drinking and that he was perfectly normal and rational in his demeanour.

The difficulty in the case lies in the fact that, except for his attitude towards and statements about his wife and except for the fact of his liability to frequent bouts of alcoholism, no ground would exist for impeaching the will. Under the conditions in which the last will was made, a stranger unacquainted with his history would perceive no ground for suspecting that he was not of testamentary capacity or for doubting the wisdom or justice of the dispositions he was making or for refusing to accept as rational the grounds he assigned for the provisions of his will.

The difficulty of the case is not lessened by the circumstance that no medical evidence was called by either party, not even the evidence of the practitioner who had been the testator's medical attendant throughout the material period. Moreover, the parties treated the case as turning simply on the question whether the testator's expressed views about his wife and the reasons he gave for them had so little rational foundation in fact that they must be insane delusions. The question whether they were insane delusions was dealt with very much as if it depended upon the degree to which his wife's associations and course of conduct had provided grounds

from which in a sane mind such suspicions might grow, however mistakenly. His antagonism to her and his preoccupation with the possibility of her infidelity and the construction which he placed upon occurrences were not recognized as in themselves characteristic *sequelae* of alcoholism betokening mental impairment and deterioration of faculties, particularly that of judgment. I think, however, that the jury's finding in relation to the will of 22nd October 1938 should be upheld upon the simple ground that the jury was right in not being reasonably satisfied, upon the proofs offered, that at the time when the testator made the will he was of testamentary capacity. "Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects; that he was able to realize the extent and character of the property he was dealing with, and to weigh the claims which naturally ought to press upon him. In order that a man should rightly understand these various matters it is essential that his mind should be free to act in a natural, regular, and ordinary manner" (per *Hood* J., *In the Will of Wilson* (1)). "If a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it" (per *Cresswell* J., *Symes* v. *Green* (2))—Cf. per *Holroyd* J., *In the Will of Key* (3). "In the end the tribunal—the court or jury—must be able, affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will (*Smith* v. *Tebbitt* (4); *Sutton* v. *Sadler* (5))" (per *Rich* J., *Landers* v. *Landers* (6)).

A difficulty doubtless exists in reconciling a finding of incapacity as on 22nd October with a finding on 20th August (when the last preceding will was made) that the testator was of sound mind, memory and understanding. But the difficulty is not insuperable. How far a court should go in treating the consequences of acute alcoholism as common general knowledge it is not easy to say, but in the present case the evidence makes it clear enough that the

(1) (1897) 23 V.L.R. 197, at p. 199.
(2) (1859) 1 Sw. & Tr. 401, at p. 402 [164 E.R. 785].
(3) (1892) 18 V.L.R. 640.
(4) (1867) L.R. 1 P. & D. 398, at p. 436.
(5) (1857) 3 C.B. (N.S.) 87, at p. 97 [140 E.R. 671, at p. 675].
(6) (1914) 19 C.L.R. 222, at pp. 235, 236.

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testator was an alcoholic paranoiac. With the withdrawal of alcohol from such a patient, physical signs of his condition disappear. He may be perfectly normal in his perceptions and sensations, his train of thought may be rational and strong and his memory good. But at the same time his judgment may continue in a state of disorder for a considerable length of time. We are not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions. In *Stoddart's* work, on *Mind and its Disorders*, 5th ed. (1926), p. 415, the case of such a patient as the testator was is described in terms which almost fit the present case: "Disturbance of judgment is the essential feature of the disease, the patient seeing hidden meanings in the most commonplace incidents. As a rule, the erroneous judgments have reference to his wife's fidelity. He sees evidence of her infidelity in the fact that she bows to an old acquaintance in the street, that some man unknown to him hurries past the window, that his wife is not prepared for his return from the office an hour earlier than usual or that the cushions on the sofa are not in their usual positions."

Although the case is not an easy one, the balance of probability appears to me to be that the testator's suspicions, distrust, resentment and tendency to hostility in relation to his wife were the characteristic consequences of his alcoholism. It is not a question of how far a rational man, suspicious by nature, might have formed the same views by a misconstruction placed upon his wife's actions and associations. It is a question of the proper deduction from the history of the man and from the appearance of characteristic symptoms, the kind of antagonism and suspicion that might be expected as a consequence of his dipsomania. A conclusion that such feelings and beliefs are indications of a judgment too disturbed to allow of a finding in favour of capacity when the will of 22nd October was made is not necessarily inconsistent with the view that not long before he might for an interval have gained a temporary freedom from his obsessions and that an intermission, like that occurring on 20th August, might give the testator sufficient judgment and sanity to enable him to make a valid will.

As the burden of proof of testamentary capacity lies finally upon the executors where the evidence leaves the matter doubtful, I think the finding against the will of 22nd October 1938 ought to be supported.

In my opinion the appeal should be dismissed with costs.

Upon the cross-appeal I concur in the opinion that the Full Court went too far in the order for costs in favour of the appellants. In

dismissing the appeal to the Full Court the order ought not to have given them costs out of the estate. That appeal should have been dismissed without costs.

McTIERNAN J. In my opinion the appeal should be dismissed.

The onus of satisfying the jury that upon the whole of the evidence it was proved that the deceased had testamentary capacity when he executed the will of 22nd October 1938 for which the appellants claimed probate rested upon them. There was indeed substantial evidence to prove the affirmative of the issue (*Landers* v. *Landers* (1)). Such evidence consisted of the deceased's instructions for the preparation of the will and that relating to his general ability in the conduct of his affairs. It follows that the validity of the jury's finding negativing testamentary capacity on the above-mentioned occasion turns upon the question whether there was sufficient evidence at least to counterbalance this admittedly strong proof of testamentary capacity. In my opinion there was sufficient evidence. It consists of the evidence relating to the deceased's drunkenness and his suspicions that his wife was unfaithful. The deceased's drinking habits did not destroy his capacity for business and it must also be admitted that there was some foundation of fact—opinions might differ as to its adequacy—to suspect that his wife's conduct was not as regular as it ought to have been. Mr. *Real* in clear and forcible argument made the most of these points. The evidence relating to the deceased's drinking habits, however, proved such a degree of indulgence and persistence that it was open to the jury to find that on 22nd October 1938 his mental and bodily health had become seriously impaired by drunkenness. Drinking bouts and delirium tremens had become a common feature of his life. And it was open to the jury to say that the deceased's suspicions about his wife's conduct so far exceeded any that could conceivably be attributed to her possible or assumed indiscretions as to amount to pure fantasy. He suspected her of promiscuous intercourse and on one occasion he had an hallucination that he saw one of her lovers running into a shed on their property. In this state of facts which it was open to the jury to find, it was clearly reasonable for the jury to conclude that the malady of drunkenness had more probably than not caused mental disorder and that the suspicion or conviction about the wife's conduct was indicative of that disorder and was an insane delusion. There could be no doubt that this insane delusion influenced the dispositions of the will of 22nd October 1938. But the jury found that the deceased had testamentary capacity on

(1) (1914) 19 C.L.R. 222, at pp. 235, 236.

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20th August 1938 although at that time his drinking debauches had begun to run their course, and his delusion about his wife's conduct had already manifested itself. But the will made on the earlier date shows no sign that in making it the deceased was influenced by the delusion. The jury could consistently with their finding that the deceased was devoid of testamentary capacity on 22nd October 1938 find that the earlier will was made in a lucid interval.

In my opinion the cross-appeal should be dismissed.

The Full Court's order provided that the present appellants should be reimbursed out of the estate for the costs incurred in bringing the appeal to that Court. The order was made on the ground that they had been appointed executors of the will of 22nd October 1938 and the Court considered it reasonable for them to appeal because the opinion of the learned trial judge was that the jury should have found in their favour. It seems to me that the order was justified if it was reasonable for them to appeal. I think that it was reasonable and that there is no ground for determining that it was not a proper exercise of the discretion of the Full Court to provide that the present appellants should be reimbursed out of the estate for the costs which they expended in bringing their appeal. But in the case of the present appeal to this Court there is no ground for making any other order than that the appeal be dismissed with costs.

WILLIAMS J. This is an appeal by the plaintiffs against an order of the Full Court of Queensland dismissing a motion asking for judgment or in the alternative for a new trial in an action brought by them against the respondents Grace Caroline Urry Coffee and Sylvia Beatrice Maher claiming probate in solemn form of the alleged last will of the testator Angus Coffee dated 22nd October 1938. The respondent G. C. U. Coffee, the widow of the testator, counterclaimed for probate in solemn form of an earlier will dated 20th August 1938.

As a result of the answers given by the jury to certain questions the learned trial judge refused probate of the will of 22nd October, but granted probate of the will of 20th August. It was not contested before the State Full Court, or on this appeal, that, if the later will was invalid, probate should not have been granted of the earlier one.

The substantial ground on which the appeal to the State Full Court and to this Court was based was that there was no evidence to support the answer of the jury in the negative to the following

question: "Was Angus Coffee of sound mind, memory and understanding at the time the said will" (i.e. of 22nd October) "was executed?"

The respondent S. B. Maher was represented but took no active part in the proceedings in the Court below or on this appeal. The testator's soundness of mind was not attacked on the ground that he was suffering from general dementia, but on the ground that his capacity to estimate the claims his wife had upon his testamentary bounty had been poisoned and perverted by the insane belief that she was unchaste.

It is evident that the jury accepted Mrs. Coffee and Mrs. Gunthorpe as witnesses of truth, so that the short résumé of the evidence which I am about to make, to the extent to which it depends upon their testimony, is based on this assumption.

The testator died on 7th November 1939 at his home on his grazing property Hollyburn near Roma, Queensland, aged nearly forty-three years. His death was caused by myocarditis, chronic hepatitis (cirrhosis), toxaemia, and gastric ulcers, two chronic, one acute. He had inherited the property, which consisted of about 7,000 acres, under the will of his mother, who died in 1919. His father had died in 1910. He had no brothers and only one sister, namely the respondent S. B. Maher, to whom he gave a half share in the property in 1920, after which they carried on the grazing business in partnership. The sister married Maher about 1923, and her husband was admitted as a partner, and given a one-third share of the profits for managing the station. The partnership continued until about 1932, when disputes took place which ended in its dissolution. On 2nd September 1919 the testator had made a will leaving his sister a life estate in all his property with a general power of appointment by will over the capital; but after the quarrel he revoked this will and (on 28th March 1934) made a fresh one in favour of two friends. Subsequently to the quarrel the testator does not appear to have ever seen or corresponded with his sister.

On 31st October 1936 the testator married Grace Caroline Urry Pearn, a widow with four children, whose first husband had died on 5th June 1931. Since his death she had maintained herself and her children on a poultry farm at Clevedon. She was slightly younger than the testator. Prior to the date of her marriage, Mrs. Pearn and her family had a male friend named H. E. White, a returned soldier who had lost an arm and an eye in the last war and whose sole source of income appears to have been a war pension. After the marriage the testator and his wife lived at Hollyburn. The widow soon discovered that the testator indulged in periodical

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drunken orgies, his favourite beverage being overproof rum; but, when this was unprocurable, brandy was a palatable substitute. He was of a jealous, suspicious, and credulous disposition. Soon after the marriage a busybody told him that his wife's first husband was still alive. Instead of asking her if this was true he made secret inquiries and only told her after he had ascertained that the information was false. White came to stay at Hollyburn on 19th December 1936, at the joint invitation of Mr. and Mrs. Coffee, and stayed for three weeks. During this time the testator had his first real bout of heavy drinking since the marriage. He became jealous of White and accused his wife of infidelity with him. At this stage, though he made the accusation when he was sober as well as when he was drunk, he probably did not believe in it except in his cups.

About June 1937 Mrs. Gunthorpe, a friend of Mrs. Coffee, stayed at Hollyburn for six weeks. During that time the testator was drinking heavily. To Mrs. Gunthorpe he expressed hostility to his sister and her husband. He asked her if she thought his wife was unfaithful with White and she said "no." In August Mrs. Coffee went to Rosewood with Mrs. Gunthorpe for a holiday; but, after a few days, she received a wire and returned to Roma to find the testator in hospital with acute alcoholism. He was there for two days. When he was discharged they returned to Hollyburn, accompanied by Mrs. Gunthorpe. Mrs. Coffee and Mrs. Gunthorpe said that when the testator came out of hospital "he was talking all sorts of silly nonsense, that he said they were holding rodeos in the hospital with his horses and a man named Dewar was there and had his horses, and his wife was firing revolvers in the hospital and the doctors were visiting the nurses. He said he could see all this from his bed, that it was no hospital, and was not a decent respectable place." These statements were made when he was sober. He had evidently had a severe fright and forsook the drink for some time. White returned to stay at Hollyburn, at the testator's invitation, and remained from September 1937 to January 1938. For two months of this time the testator and his wife were away on holidays, the testator having placed either White or her eldest son or both in charge of the station. During this holiday he was not drinking. On 4th October he made a will leaving everything to his wife. They then returned to the station. The testator cut his foot and commenced to drink again and this continued over Christmas and until the New Year. He was in hospital with alcoholism and a gastric ulcer from 1st to 9th January 1938. Mrs. Coffee stayed at the hospital, but she could not manage him and had to get a wardsman to look after him. He told her on one occasion that she had come

up there at 2 o'clock in the morning and was shooting up the nurses' ward. He said he could see the holes she was making through the side window. When he left the hospital, he accused her of hiding his revolver, which was true, and of " carrying on " with a station hand named Dewar while he was away, which was untrue. On 19th January 1938 he wrote to his solicitors giving them instructions for a new will which was to be kept secret from his wife and under which she was to get no more than she could legally claim. He saw Mr. Timbury, his then solicitor, on 3rd February 1938, and told him that he wanted to leave her as little as possible, because " he had been having a hell of a time with her and had grave doubts about her fidelity to him." He explained he wished to benefit his sister because she had spent her life on the property and had kept house for him from the time of his mother's death until her marriage (apparently a period of about three years). He said that she had done far more than his wife, but that he was still bitter against her husband. On this day the testator executed a will by which, in the event of his death without issue, he directed his trustees to apply so much as they should in their discretion think fit of the annual income of the trust fund for the maintenance, support and benefit of his wife during widowhood and accumulate the balance, and after her death, to stand possessed of his trust fund upon trust for his sister, provided she should survive her husband, and, if she did not do so, upon trust for a charitable purpose. White arrived on his third visit in May 1938, according to Mrs. Coffee at the testator's invitation, and during this month the testator ran away leaving a letter suggesting he had discovered that she had never cared for him. She followed him to Roma and found him at the home of a man named Shambrook. He said he would not come home, and asked her to drive him to Brisbane, which she did. He told her about the February will, said it was not fair to her and that he would alter it when he returned. They were away for about six weeks. When they got back to Hollyburn, about the middle of July, White was still there but left the following day. The testator got a bad cold and started to drink again. He was in hospital with alcoholism and gastric ulcers from 10th to 17th August. On 20th August the testator and Mrs. Coffee went to Mr. Pack, another Roma solicitor, and he made a will leaving her all his property. He had told his wife that he had wanted to alter his will and that he would not go to Messrs. Timbury & Taylor but would go to Mr. Pack. She pointed out that Pack did not do his work but he said Pack did some of it, namely, the Rabbit Board business. At the time he was sober but he was very weak. The evidence of Mr. Pack and Dr. Dodson shows that he knew what

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he was doing. In fact he subsequently said he knew he had made such a will, although he added that he had been taken there by his wife and some "cove," whom he evidently believed to be one of her many lovers, and that his wife thought that he did not know what he was doing, the suggestion being that his wife and her then "fancy man" had taken him to a strange solicitor to make a will in her favour hoping he would not realize what he was doing. He continued to drink and was again in hospital from 6th to 14th September suffering from myocarditis and alcoholism. He returned to Hollyburn, and, when he was quite sober, accused his wife of going to the pictures with one Gleeson whilst he was in hospital. He said that a man named Farmer had told him this and that Farmer had also told him that he wanted him to steal cattle and hide them on Hollyburn. Farmer, who was called, denied that any such conversation had ever taken place. Coffee got influenza, which he tried to cure with a mixture of aspirin and rum. On 28th September 1938 the testator wrote to Messrs. Timbury & Taylor requesting them to prepare a fresh will similar, so far as his wife was concerned, to that of 3rd February 1938, but with some alterations in favour of his sister. On receipt of this letter Mr. Taylor, not knowing of the will of 20th August, prepared a codicil to the will of 3rd February. The testator saw Mr. Taylor on 22nd October. He was quite sober and appeared to be quite normal. He informed Mr. Taylor that his wife was not satisfied with the February will and that she had got Mr. Pack to prepare a fresh will which he had signed a few days after he had come out of hospital. It was plain that he remembered the contents of the February and August wills. As the codicil was not sufficient, in view of the August will, Mr. Taylor prepared a fresh will. The testator remained in the office while it was being engrossed. He then executed it and left the office. He did not mention his wife's infidelity to Mr. Taylor. Between the date of the will and his death the testator continued to live at Hollyburn with his wife. His health was failing, but, generally speaking, he was not drinking. He was in hospital from 20th to 24th August 1939 suffering from influenza. After leaving hospital they went to Brisbane. He was in ill health and drinking at times. She took him to several doctors. He continued to charge her with seeing White when she went to visit her daughter Gwen, who was then living in Brisbane, although he was not in the locality. He died soon afterwards from the plethora of diseases already mentioned. I have not yet referred to the evidence of Mr. Jeffery, the manager of the Commonwealth Bank at Roma, where the testator kept his account. It is clear that, like Mr. Timbury, he had the complete confidence of the testator. He gave

evidence of the testator's attitude to his wife on 10th and 28th October 1938 and 17th January 1939, and, therefore, immediately before and after the will of 22nd October. The testator told Mr. Jeffery that he did not want his wife to know anything about his business, that he knew she was after his money and, to use his own words, said : " I am not such a big fool as they think I am," " she does not play the game with me, she is not faithful to me, she plays up with other men," " her family are a plague to me," " I do not trust her." He told Mr. Jeffery that while he was on the spree his wife and a cove had trotted him into Pack's office and made a will, " they think I do not know what was in that will, but I remember." " The worst of it is that she has not been faithful to me, and I can prove it." He said : " You know, one afternoon I started out to come into town, and I rode up the road, and just at dusk I doubled back through the leasehold, and as I came to the house I saw a cove leave and rush into the shed. I put the horse away, went over to the shed and barred the door. I then went to the verandah and pretended to go to sleep, after a while the missus sneaked over and opened the door. That was all the evidence that I wanted that she was playing up. I have got proof that she is unfaithful to me, and I do not think I am hard in leaving the property in such a way that it cannot be sold." Mr. Jeffery said he related this episode, which contains inherent evidence of its utter improbability, in a most emphatic way. Mrs. Coffee denies it ever took place. In cross-examination Mr. Jeffery said that the testator told him on 28th October that he was firmly convinced his wife was committing adultery with several men and that he repeated the charge on 17th January. In answer to a question : " You understood that this man had it fixed in his mind, that she was conducting herself in that way " (i.e. committing adultery) " at the time he was speaking to you ? " Mr. Jeffery said, " Yes." The evidence shows that on the dates the testator gave the instructions for and executed the will of 22nd October he was convinced that his wife was a woman of loose character and had committed adultery with several men ; that she had married him for his money and was prying into his affairs to find out what he was worth ; and that, having procured the will of 6th August in her favour, at a moment when she believed he was incapable of understanding what he was doing, she was waiting for his early demise to obtain possession of his fortune and squander his estate.

In my opinion the jury were plainly entitled to form a view that this estimate of Mrs. Coffee's character was so irrational as to be due to some aberration of his intellect. It was far more than the

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natural outcome of an intensely jealous and suspicious mind whose underlying judgment was still sound. Jealous and suspicious men no doubt do object to their wives enjoying male society and are apt to attribute undue familiarity to ordinary acts of social courtesy. But it is surely a strong indication that the mind has become unhinged when even a jealous and suspicious husband commences to believe his wife has been committing promiscuous adultery, although he has never discovered her in any compromising position and has to invent imaginary happenings to justify his belief. The most that Mrs. Coffee appears to have done was to maintain quite openly and in a harmless manner a friendship with a disabled soldier whom she knew before her marriage. She was not a friend of Dewar and did not know Gleeson. Except for one short absence, when the testator said he had her shadowed by a detective whose report was entirely favourable, Mrs. Coffee appears to have lived continually with the testator. During White's second and third visits she was away with the testator on holidays for most of the time. White appears to have been a man who was badly off, and therefore spent a lot of time accepting any available hospitality. His role on the last two visits was to run or assist in running the station while the testator and his wife were away. If Mrs. Coffee was a money grabber, she would have been most unlikely to have compromised her position with such a man. It was suggested that she should have seen that he left Hollyburn and did not return. But she probably did not realize the hold the obsession had obtained on the testator's mind. In any event the testator would have soon discovered a substitute "fancy man." She told Mr. Jeffery in September 1938 that when the testator was sober he was quite fair to her, but when he was drunk he was most unfair. It would therefore appear that he made the charges to her mostly when inebriated and that she did not realize that a belief in their truth persisted when he was sober. It must be remembered that she was not aware of the will of 22nd October. She never showed any desire to obtain possession of his fortune. Indeed, they had been married for twelve months before he made a will in her favour. She appears to have been a dutiful wife, although she had often to live under loathsome and intolerable conditions. She took the view she must be loyal to her marriage vows and must care for him drunk or sober. She laboured continually on the outdoor work of the station, and made the necessary financial and other arrangements to carry it on when he was incapacitated by drink and suffering from delirium tremens. The bank manager's evidence shows how persistent and fixed the testator's

belief in his wife's infidelity had become after his visit to the hospital in September even when he was quite sober. The mind of a dipsomaniac, suffering from toxaemia and cirrhosis of the liver, not to mention several gastric ulcers, must have been a congenial ground for the rapid growth of the obsession. There was ample evidence that on 28th September and 22nd October 1938 he was suffering from an insane disorder of the mind which within the language of *Cockburn* C.J. in *Banks* v. *Goodfellow* (1) poisoned his affections, perverted his sense of right, and prevented the exercise of his natural faculties. There is no doubt the will was due to its baneful influence. The definitions of an insane delusion have been summarized in *Mortimer* on *Probate Law and Practice*, 2nd ed. (1927), p. 50, note (*r*). It is well known that a person may be quite normal except on one particular subject, so that there would be nothing unusual if the testator's mental condition was such that he was able to transact his ordinary business but his mind had become a hopeless prey to insane delusions in the case of his wife. It was necessary for the plaintiffs to establish as a fact the testator's competence to make the will of the 22nd October. The answer of the jury shows that they failed to do so (*Landers* v. *Landers* (2)).

The appeal should be dismissed with costs.

There remains the question of the cross-appeal. The State Full Court in dismissing the appeal ordered that the costs of the appellants as between solicitor and client should be paid out of the estate. The general rule is that, in the absence of special circumstances, trustees who appeal unsuccessfully must suffer the usual consequences and pay the costs (*Westminster Corporation* v. *St. George Hanover Square* (*Rector and Churchwardens*) (3)). There were no special circumstances in the present case. There was no uncertainty as to the law and the appeal was purely against the finding of the jury on a question of fact. Mrs. Maher, who benefited substantially under the will of 22nd October 1938, was a party and could have appealed if she had desired to do so. The order complained of was therefore a wrong exercise of the Court's discretion. Since, however, the appellants may have been partly induced to appeal because the learned trial judge appeared to have taken a different view of the facts from that of the jury (*Aitken* v. *McMeckan* (4)) it would have been proper to leave the appellants to pay their own costs and not make them pay the costs of the respondents. That part of the order already mentioned should therefore be discharged.

(1) (1870) L.R. 5 Q.B. 549, at p. 565.
(2) (1914) 19 C.L.R. 222, at pp. 235, 236.
(3) (1909) 1 Ch. 592.
(4) (1895) A.C. 310, at p. 316.

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Appeal dismissed. Cross-appeal allowed. Order of the Full Supreme Court of Queensland varied by discharging that part thereof which directed the costs of the appeal of the plaintiffs the appellants as between solicitor and client be taxed and allowed out of the estate. Appellants to pay the costs of the respondents of this appeal those of the respondent Sylvia Beatrice Maher to be as of a submitting respondent.

Solicitors for the appellants, *Timbury & Taylor*, Roma, by *Bouchard & Holland.*

Solicitors for the respondent Coffee, *Dyball & Pack*, Roma, by *Chambers, McNab & Co.*

Solicitor for the respondent Maher, *Virgil L. Power.*

B. J. J.