

[HIGH COURT OF AUSTRALIA.]

BULL AND OTHERS APPELLANTS ;
AND
FULTON RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

*Will—Testamentary capacity—Soundness of mind, memory and understanding—
Insane delusions—Aged testatrix—Tendency to affect dispositions—Onus of proof.*

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A testatrix, who died a spinster aged ninety-one years and was a prolific will-maker, held a belief that, *inter alia*, certain documents bearing her name as a signature and used in connection with her business transactions were not signed by her and that her nephews, who had acted as her solicitors, were guilty of deceit or of forgery in the matter, and there were grounds for concluding that for this reason she had excluded these nephews from the dispositions in her will. The belief of the testatrix was unfounded and irrational but it was persistently held by her in spite of overwhelming proof of its falsity.

MELBOURNE,
May 12-15 ;
18-20.
—
SYDNEY,
July 20.

Latham C.J.,
McTiernan and
Williams JJ.

Held, by Latham C.J. and Williams J. (McTiernan J. dissenting), that, as the belief amounted to a delusion which, whether due to failure of memory or to paranoia, was of such a character as to have a direct bearing on the provisions of the will, and the propounder had failed to show, either by direct evidence or reasonable inference from the facts, that it did not affect those provisions, the will was invalid.

Decision of the Supreme Court of Victoria (*Martin J.*), by majority, reversed.

APPEAL from the Supreme Court of Victoria.

Elizabeth Bull of Albert Street, East Malvern, Victoria, died on 1st July 1941, aged ninety-one years and a spinster. During the years 1922 to 1940 inclusive she executed about twenty-six testamentary documents, the last being a will dated 24th July 1940 and a codicil thereto dated 23rd August 1940. By this will, after appointing a niece, Martha Bull, and a solicitor, Frederick Brooke

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Boothby, as “executors and trustees” thereof, she bequeathed a legacy of £100 to the Royal Victorian Institute for the Blind and devised and bequeathed the residue of her estate to Martha Bull, if living, but if Martha Bull predeceased the testatrix the residue was to be held by the trustees of the will upon trust for James McRae Fulton and Robert Beauchamp Fulton, grandnephews of the testatrix. Martha Bull predeceased the testatrix. By the codicil Robert Beauchamp Fulton was appointed as an additional executor and trustee of the will, and he, being the only surviving executor, applied for probate of the will and codicil.

A caveat was lodged by Henry Alexander Bull, Alice Bull, William Guy Sewell, Cedric Whilton Sewell and Elizabeth Graham, nephews or nieces as the case might be of the testatrix.

An order nisi having been made particulars of objection were delivered which included the following:—3. The deceased did not have testamentary capacity at the times of the execution of the alleged will and the alleged codicil and for a considerable period prior thereto due to insanity or imbecility or senile decay of which the symptoms first manifested themselves about the year 1929. 4. The deceased was subject to and affected by the following insane delusions:—(a) That the caveators W. G. Sewell and C. W. Sewell had purchased shares in testatrix’s name in Graham Campbell Pty. Ltd. with the money of H. A. Bull (a brother of the deceased) without his knowledge and were dishonest in so doing. (b) That an application for 1,000 shares in the said company had not been signed by her. (c) That original letters written by the said H. A. Bull with reference to those shares and which had been shown to her were not written by H. A. Bull. (d) That a transfer of cottages at Bairnsdale to H. A. Bull (the caveator) signed by the deceased had been neither signed nor seen by her. (e) That a declaration as to the value of those cottages signed by the deceased had not been signed by her. (f) That an amount of £3,000 in the estate of the said H. A. Bull (brother of the deceased) had not been accounted for. (g) That the caveators W. G. Sewell and C. W. Sewell had not accounted for the share of Edward Bull deceased in money received from one Salter for the sale of Bairnsdale property. (h) That the caveators W. G. Sewell and C. W. Sewell had not accounted to her for her full rents and income. (i) That the caveatrix Elizabeth Graham had stolen a pillow from her.

Martin J. found that the testatrix was not suffering from any insane delusion affecting her testamentary capacity and made absolute the order nisi for a grant of probate in respect of the will and codicil propounded.

From this decision the caveatrices and the caveators, other than William Guy Sewell who, in the meantime, had died, appealed to the High Court.

Other material facts appear in the judgments hereunder.

Menzies K.C. and *Moore*, for the appellants.

Hudson K.C. and *Stafford*, for the respondent.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Supreme Court of Victoria granting probate to a will and codicil made by Elizabeth Bull on 24th July 1940 and 23rd August 1940 respectively. The propounder is a grand-nephew of the deceased, and the caveators are two nephews and a niece of the deceased.

The testatrix was ninety-one years of age when she died, and was active and intelligent up to the time of her death. The codicil propounded relates to the appointment of an additional executor. The will, after giving a legacy to the Victorian Institute for the Blind, leaves all her property to her niece Martha Bull absolutely if the said niece shall be living at her death, and if she shall not be so living to James McRae Fulton and Robert Beauchamp Fulton the propounder (if living at her death) in equal shares. The will contains provisions for the event of one or both of these grand-nephews predeceasing the testatrix. Martha Bull died before the testatrix, so that the two grand-nephews became the beneficiaries in respect of practically the whole estate, which is worth about £12,000.

The will is in every respect rational. The niece Martha had been living with the testatrix for some years before her death and they were on terms of great affection. The brothers Fulton had been very attentive to the testatrix in the closing years of her life.

The attack upon the will and codicil was not based on any allegation of general testamentary incapacity (though this ground was formally taken) or upon any irrationality in the provisions of the documents. The opposition of the caveators rested upon allegations of specific delusions with respect to the caveators Guy and Cedric Sewell. These caveators were solicitors, carrying on their profession as partners in the firm of Sewell and Sewell at Colac. For at least twenty years and up to the death of their aunt the testatrix they had looked after her affairs without charge. They made many wills for her. They were for many years on terms of evidently genuine mutual affection with her. They were executors and beneficiaries in all the known wills until December 1933 when they were

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excluded, and they never reappeared in either capacity. It is contended for the caveators that their original exclusion should be held to have been due to insane delusions with respect to them which existed in December 1933 and which continued to exist up to the time of the making of the will and codicil propounded.

The facts are fully stated and closely analysed in the reasons for judgment of my brother *Williams*. I agree with his view of the facts and of the law, and do not think it necessary to state in another form what he has said. But, as this Court is differing from the view of the learned trial judge, I think it proper to state my reasons shortly.

1. In the first place, the evidence establishes, in my opinion, the existence in the mind of the testatrix of insane delusions with respect to the conduct of Guy and Cedric Sewell. She believed that her signatures upon an application for certain shares, upon a transfer of land, and upon a declaration of the value of the land transferred were not her signatures. The Sewells (or one of them) had arranged the transactions to which these documents related. These beliefs were false in fact and were, in the circumstances, completely irrational. There is no doubt that she did sign the documents in question, and the evidence produced to her that she did so was overwhelming. She had a similar persistent unfounded false belief with respect to letters signed by her brother Henry Bull. She believed that these letters, produced by the Sewells, were not authentic. These beliefs were so firm that no evidence, no persuasion, could affect them. They involved most serious accusations of deceit, indeed of forgery, against the Sewells, and would necessarily affect the mind of the testatrix in relation to her testamentary dispositions.

The learned trial judge was of opinion that the testatrix did not really hold these beliefs, but, being an obstinate old lady, declined to admit within the family circle that she had made mistakes or forgotten events, and so persisted in her allegations though she knew that they were false. Many people will tell a lot of lies to save their face when they are in a situation of embarrassment. But in this case the testatrix herself again and again gratuitously made the allegations against her nephews. The evidence is not that she refused to admit the authenticity of documents when some other person raised the subject and challenged her upon it. She herself went out of her way to make these damaging statements both to members of the family and to other persons such as Mr. Thomson, a solicitor, and Mr. Croft, a handwriting expert. This is one reason why I find it difficult to take the view that the testatrix did not

really believe what she said and wrote but that, in slandering her nephews, she was protecting her infallibility and her dignity.

Another reason for my opinion is to be found in the practice of the testatrix of adding comments to documents and attaching memoranda to documents relating to the transactions as to which she made the false statements in question. Several of the memoranda became known to other persons only after her death and the language of these memoranda is emphatic. If the memoranda did not express beliefs really entertained by the testatrix they show that she was a malicious liar. But the whole of the rest of the evidence is inconsistent with such a view of the character of the testatrix. Thus I conclude that she really did hold, and did not merely pretend to hold, the beliefs in question.

2. In the second place, these delusions existed in and before December 1933, when the first will excluding the Sewells was made. On this matter I refer to the detailed consideration of the evidence by my brother *Williams*.

3. In the third place, the delusions were plainly of such a character as to have "a direct bearing on the provisions of the will": Cf. *Banks v. Goodfellow* (1). Where an insane delusion "has had, . . . or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity" (*Banks v. Goodfellow* (2)). The onus in such a case is on those supporting the will to show that the delusion did not influence the will (*Boughton v. Knight* (3); *Smee v. Smee* (4); *Barley v. Barley* (5)). This does not mean that a propounder must absolutely demonstrate this negative proposition. He must establish it according to the standard of proof required in civil cases. It will be sufficient for him to satisfy the Court that it is a reasonable inference from the facts that a delusion proved to exist did not affect the disposition in question.

4. Thus it was for the propounder to show that the delusions did not affect the provisions of the will propounded. That will was made on 24th July 1940. At that time the delusions with respect to the Sewells were most firmly and incorrigibly held by the testatrix. It is argued for the propounder, however, that there were reasons, perhaps not just or fair reasons, but still not irrational reasons, for excluding the Sewells which reasons were in existence in December 1933, so that subsequent delusions would be irrelevant. The evidence shows that there were such reasons which might have so operated and which probably did so operate. But it is not established that

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(1) (1870) L.R. 5 Q.B. 549, at p. 557.

(2) (1870) L.R. 5 Q.B., at p. 561.

(3) (1873) L.R. 3 P. & D. 64.

(4) (1879) 5 P.D. 84, at p. 91.

(5) (1924) 34 C.L.R. 558, at pp. 570,

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the delusions, as well as these reasons, did not also influence both the original and the continued exclusion of the Sewells. If these delusions existed—and, as I have said, in my opinion they did exist in 1933 as well as later—they were of such a character as inevitably to affect the provisions of the wills made in December 1933 and in subsequent years, including the will and codicil of 1940 which are propounded. It is, however, sufficient to say that the propounder has, in my opinion, not shown that this was not the case.

The result is that, in my opinion, probate should have been refused to the documents propounded. The appeal should be allowed, the order absolute set aside, except as to costs, and the order nisi discharged. The appellants should have their costs of the appeal out of the estate, and, as the respondent was entitled to defend the judgment which he had obtained in proving the documents under which he held the office of executor, he also should have his costs out of the estate.

The testatrix made a large number of wills and codicils. She made five wills and a codicil after November 1933. The decision in this case relates only to the last will and codicil of July and August 1940. It is to be hoped that the parties will not insist upon litigation with respect to all of these testamentary dispositions. No charges of improper conduct are made against any of the parties. With the concurrence of my colleagues I suggest that this is eminently a case in which, in the interests of all concerned, an agreement should be made to prevent further litigation.

McTIERNAN J. Elizabeth Bull, a spinster, died on 1st July 1941 leaving an estate valued at about £12,000. She was ninety-one years of age. On 24th July 1940 she made a will and on 23rd August 1940 a codicil. The due execution of these documents was conclusively established by the evidence of the attesting witnesses. Besides the question of testamentary capacity the caveating parties put in issue the questions whether this will and codicil were executed in conformity with the *Wills Act*, and whether Miss Bull did in fact execute them. The appellants now raise only the question of testamentary capacity.

By the will she appointed Martha Bull, one of her nieces, and Mr. Boothby, the solicitor who drew the will, her executrix and executor, and, save £100 given to a charity for the blind, she gave the whole of her estate to Martha and, if she died before the testatrix, in equal shares to J. N. Fulton and R. B. Fulton, grand-nephews of the testatrix, and upon contingencies wholly to one of them or

to their children. By the codicil the testatrix appointed R. B. Fulton as an executor and in other respects confirmed the will.

Mr. Boothby and Martha predeceased the testatrix. The latter died on 1st June 1941. The testatrix survived all her brothers and sisters, and was survived by nephews, nieces, grand-nephews and grand-nieces.

The caveating parties are nephews and nieces. They are limited to two families. C. W. Sewell, W. G. Sewell and their sister Elizabeth Graham the wife of George Stuart Graham are three members of one family, and Alice and H. A. Bull two members of another family. The respondent who propounded the will and J. M. Fulton are two members of one family. The substantial question put in issue by the caveat was whether the testatrix had testamentary capacity. It was alleged in the caveat that her capacity to make the will and codicil propounded was destroyed by "insanity or imbecility or senile decay" and that she was "subject to the following insane delusions" which were then set out.

The case was heard by *Martin J.* There was lengthy oral evidence covering a period of over twenty years and a large volume of documentary evidence. His Honour found that "apart from the question of the specific delusions alleged, *she was a keen, alert old lady of extraordinary physical and mental fitness for one of her advanced years.*" The italics are mine. The evidence, in my opinion, conclusively proved that the testatrix had not lost her testamentary capacity in consequence of "insanity or imbecility or senile decay" as alleged. The finding of his Honour on this branch of the case is unassailable.

Particulars were given in the caveat of nine alleged insane delusions. The substance of them was that the Sewells were cheats and frauds.

According to the caveators' particulars of the alleged delusions they would be chronic and systematized.

Martin J. said that the evidence about three of the alleged delusions was scanty, and they were not pressed. The others were that an application for 1,000 preference shares in Graham Ferrum Pty. Ltd. which were issued to the testatrix was not signed by her, and that the Sewells had bought them with the money of her late brother, Henry, without his knowledge and thus dishonestly; that letters written by him with reference to the shares and produced by the Sewells were not genuine; and a transfer of cottages at Bairnsdale signed by her in favour of her nephew, H. A. Bull, and a declaration of their value had not been signed by her. The alleged insane delusion centering on the shares was said to have been manifested

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in 1929, that on the cottages in 1933, and both alleged delusions were said to have persisted until her death. These are the alleged insane delusions relied upon by the appellants to upset the will and codicil. Less strongly relied upon is another alleged insane delusion that Elizabeth Graham had stolen a pillow; but this allegation may be set aside at once as it depends upon the evidence of Alice Bull, against whose credibility the trial judge expressed an opinion with which there is no possible ground for disagreement.

His Honour found that the testatrix was not labouring under any insane delusion, and that there were a number of grounds unconnected with any morbid fancies why the testatrix would not make a testamentary disposition in favour of the Sewells. In the result *Martin J.* found that it was established that the testatrix had testamentary capacity when she executed the will and codicil propounded by the respondent.

The onus was on the respondent to satisfy the Court below that the testatrix was of sound and disposing mind, memory and understanding when she made the will and codicil, and that she was not impelled to make either by an insane delusion. *Martin J.* explicitly adopted and applied this rule as to the onus of proof. The appeal is on law and fact. There is no complaint that his Honour fell into any error of law. The appeal is a rehearing on the transcript of the oral evidence and documentary evidence. It is not a new trial of the case.

A very substantial part of the oral evidence adduced at the hearing by the caveating parties to prove the alleged delusions was given by the appellants. *Martin J.* said specifically of two of the caveating parties, H. A. Bull and Alice Bull, that they were unsatisfactory witnesses, and in criticizing Alice Bull as a witness made some comment directed against all the appellants. He used these words: "Her evidence in this matter points to the necessity of scrutinizing with great care the testimony of those who are, or may be, interested in an intestacy or in the propounding of a prior will." The appellants strongly rely on their own evidence and that of witnesses within their family circles to prove the existence and persistence of the alleged insane delusions in the mind of the testatrix. This Court is unable to give their evidence any greater value than that to which his Honour's comment reduces it. But the Court is not trammelled in that way in considering the documentary evidence. It is obviously important evidence. The Court should not, however, upset any finding of the learned judge on questions of fact unless it is convinced upon the whole of the evidence that the finding should not stand. The onus is now

on the appellants to show that his Honour was in error in holding that the respondent had discharged the onus of proving that the will was not made under the influence of the alleged delusion centering on the shares, or the cottages, or the pillow, and that Miss Bull had a sound and disposing mind, memory and understanding.

The transcript covers the last twenty years of the life of the testatrix. It deals with her relations with her numerous relatives and neighbours, with the Sewells in their capacity as solicitors, with two other solicitors who made wills for her and gave her advice, with her only medical adviser, with her bank manager, with her chemist, and with others. The documentary evidence includes correspondence with the solicitors and her relatives and some memoranda of her own. It appears from the evidence of C. W. Sewell and particularly of H. A. Bull that all her letters had not been produced. A detailed review of all this evidence including the documents would necessarily be of inordinate length. A summary could hardly be an adequate substitute for this detailed transcript.

As the argument has centred on the alleged insane delusions of the testatrix about the shares and the cottages, it is necessary to guard against giving to her beliefs on these subjects an unduly large influence in the life of the testatrix. A true estimate of her beliefs on these subjects can be made only upon reading the whole of the oral and documentary evidence. I am content to regard the three large volumes of evidence as though they were an appendix to my reasons for judgment.

The time at which it has to be decided whether an insane delusion supplied the motive for her will is July 1940. The case for the appellants appeared to be argued on the assumption that if it were shown that insane delusions impelled the testatrix to omit W. G. Sewell and C. W. Sewell from her will of 5th December 1933, they having been included among the executors and residuary beneficiaries in every previous will, it would follow that she was labouring under these insane delusions seven years afterwards and they then impelled her to disinherit all the caveating parties. Two of them, H. A. Bull and Alice Bull, were however appointed executors by this will of 5th December 1933 which is alleged to have been made under these baleful influences. Moreover they, their brother, Robert, and Martha Bull were the residuary beneficiaries in that will. Neither Elizabeth Graham nor Alice Bull received anything under it nor under that of 25th May 1933, the last will of the testatrix appointing the Sewells as executors. By this will the caveator, H. A. Bull, was also appointed an executor, and all the caveating parties except Elizabeth Graham and Alice Bull were made residuary beneficiaries. The other residuary beneficiary was Robert Bull.

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Martin J. found that the testatrix did not ever labour under an insane delusion. The appellants have to show, having regard to the case they make, that this finding is wrong as to her mental condition in December 1933. If they succeed, they must also show that it was wrong as to July 1940. If they fail as to December 1933, they cannot possibly succeed as to July 1940. For that reason it often appeared from the appellants' argument that the case was about the will of December 1933 and not the will of July 1940. The hypothesis of the appellants, that the testatrix was afflicted in December 1933 with insane delusions, which beset her for the remaining eight years of her life, must be reconciled with the evidence given about her life generally during those years. To labour under insane delusions is to be mad. The evidence proves that not one of the persons who ever met her in her lifetime suspected her sanity. Such persons included a doctor, solicitors, a banker, the matron of a hospital, a nurse, and the manager of a trustee company. Their evidence shows that her speech and habits were, since 1933, as before, rational, and that no change occurred in her except that made gently and almost imperceptibly by advancing age.

The testatrix made oral and written statements substantially on the lines of the particulars of the alleged insane delusions about the shares and the cottages. These statements were all quite false. She asserted that she did not sign the application form for the shares nor the transfer nor the declaration of value, and made accusations of malpractice about these documents, that the letters of her late brother put forward by the Sewells were not his letters, and that they used his money without his consent to purchase the shares. She repeated these assertions after she had convincing proof of their falsity.

The last letter in which she made any such assertion was written on 5th April 1935. But altogether there are not a half-dozen letters in which she ventilates her false ideas about the shares. Two are produced by H. A. Bull, who said he had "swags of letters" from the testatrix. It is significant that these are two of the very few letters produced. Oral assertions were made before 1935 to the same effect as the written statements. Both kinds of statements were only intermittent. They were not being continually made.

The testatrix was once provoked to return to her charges when she learned that C. W. Sewell had attributed her troubles to loss of memory. He made this statement in a letter to Mr. Thomson, a solicitor whom the testatrix consulted chiefly about the shrinkage in her receipts of income from the Sewells who were, as solicitors, managing her interests. The statement which they had made to

her some years before about the amount of income she would receive was not realized owing to the depression. Mr. Thomson, who had known the testatrix for many years, in a letter of 12th December 1933 to the Sewells agreed with them that her memory was failing. But he did not suggest that she was suffering from any insane delusion. Indeed, he made a will for her in December 1933. The loss of memory to which he and the Sewells referred was an inability to remember some transactions in which she took part. The testatrix was always intent on her property, knew and remembered its nature and existence; and there can be no doubt that she always remembered her nephews and nieces and their children.

The testatrix wrote many letters after 1935, but, as has been stated, she did not express her feelings about the shares or the transfers. Some of the witnesses said that after 1935 she talked about the shares and the cottages in a way that indicated she still had her false ideas about these matters. Much of this evidence is sketchy and uncertain, but the evidence as a whole disproves that she had any such emotional attachment to the ideas as would indicate that her mind was deranged.

The evidence of her banker, Mr. Baragwanath, a disinterested witness, impressed the trial judge and affords very cogent proof that she had no insane delusions. She knew Mr. Baragwanath for many years and had very often interviewed him about her affairs. She sought his advice, and it is obvious that she both trusted and liked him. Their business relations ceased in 1939, when he left the bank, and he visited her subsequently. She had many opportunities to reveal her grievances to him. She revealed some, but they did not include her grievance about the purchase of the 1,000 shares in 1924. Nothing was ever said by her to him to suggest that she had any delusive beliefs on that subject. And this is very significant, because she ventilated her anxieties about the transfer of the cottages. She asked him where that document was. He told her that she could see it at the Land Titles Office. In the course of the conversation she said that one of her difficulties was that the transfer included vacant land as well as the cottages. There is evidence that she said that she did not intend to give H. A. Bull, the transferee, the land as well as the cottages. Mr. Baragwanath said she expressed doubt about the transaction, but he was clear that she did not suggest that her signature had been forged or that there had been any corrupt work. Subsequently she told him she had inspected the documents, as was the fact, and asked for the name of a handwriting expert. This interview occurred somewhere about the end of 1938.

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The expert who was recommended made an inspection of the transfer. Mr. Baragwanath said that the testatrix did not remember signing the document and wanted to make sure that she had signed it. The handwriting expert told the witness that her signature was on the transfer and she informed Mr. Baragwanath of this fact. In evidence he was asked this question: "Did she ever say anything after that on the subject of whether, in view of her interview with Mr. Crofts" (the handwriting expert) "she was still dissatisfied or she was satisfied?" Mr. Baragwanath's answer was: "No, she was satisfied that she had signed it." *Martin J.*, who formed a favourable opinion of this witness, gives this answer its plain meaning. His Honour said: "After that she let Baragwanath know she was satisfied she had signed it." This is powerful evidence that at least twelve months before the will and codicil were made the testatrix was free from any insane delusion about the transfer. Her troubles about the declaration of value appeared to have faded away, because she did not refer to that document at all in these conversations with Baragwanath.

There is evidence that in 1940 she had more than once expressed gratification that H. A. Bull had the cottages and land, although she said she did not at first intend to give him the land. This evidence affords cogent proof that in July and August 1940, when the will and codicil respectively were made, the testatrix was not affected with an insane delusion that her signature was forged.

It is revealed in the evidence of Elizabeth Graham that she and her two sisters spent Christmas night of 1940 at her home with the testatrix and her niece, Martha. There is no suggestion that on this occasion the testatrix brought up any of her troubles about the shares, the transfer or anything else. This witness was called to prove, among other things, the persistence of the alleged delusions. It is also revealed that she and the testatrix, while not on visiting terms, often conversed over the fence—they were neighbours from 1936 onwards. These occasions passed away without any reference to the shares and the transfer.

The Sewells, Elizabeth Graham's brothers, did not visit the testatrix after 1936. Alice Bull, who visited the testatrix down almost until the end of her life, said that the testatrix showed regret that the Sewells did not visit her.

Martin J. adopted the right view in saying that the testatrix was not afflicted with the delusions alleged. All these facts show that she was able to detach herself from any unfavourable ideas which she had of the conduct of the Sewells in respect of the matters about which it is alleged she entertained the insane delusions. In his *History of the Criminal Law of England*, (1883), vol. 2, p.

142, Sir *James Fitzjames Stephen* makes these observations about the nature of an insane delusion : “ The condition in which a person is the victim for a time or permanently of fixed delusions is called monomania. The word has been objected to on the ground that it suggests that the disease is much more limited in its extent than it really is, involving nothing more than isolated mistaken beliefs not capable of being dispelled by reason. It appears that this view of the disease is incorrect. Such fixed delusions proceed from a profound disturbance of all the mental powers and processes.”

The circumstances in which the ideas which the testatrix had about the shares and the transfer of the cottages arose were :—Her brother Henry died in 1926. Before that time the testatrix had no experience of business. She never even paid an account. Her brother managed her affairs and her only function was to sign what he put before her. She was seventy-six years of age when her brother died. In 1924 she signed the application form for the shares about which the trouble arose in 1929. It was signed to carry out a transaction arranged between her late brother and C. W. Sewell, who gave unconvincing evidence suggesting that the testatrix, who was about at the time, knew what was arranged and could not have forgotten it. If she was aware of what she signed, there can be no doubt that in September 1929, when the first dividend was paid on the shares for which she nominally applied, she had completely forgotten about the transaction. She was then nearly eighty years of age. She did not receive the scrip for the shares from C. W. Sewell until 3rd December 1929, and was not shown the application bearing her signature until August 1933. The evidence shows her ignorance of the technique of a purchase of shares by one person in another’s name. Besides, there is no doubt that for a considerable period after 1929 she got conflicting accounts of the way in which she became the owner of the 1,000 preference shares. She held 250 ordinary shares which her brother bought for her early in 1924, and had custody of 500 which he bought for himself and in which she had a life interest. She described the certificates for these 750 shares as the receipts, and she was naturally puzzled that she did not have a “ receipt ” for the additional shares. Having no recollection of the transaction, the testatrix was more anxious about how so much money came to be invested in this company—she had shares which had not been paying a dividend—than pleased at the receipt of this windfall. Elizabeth Graham’s husband was its managing director, and the testatrix knew that the Sewells had applied to her late brother to lend £100 to the company, and that he obliged reluctantly, but said he would not put any more money

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into it. She thought erroneously that her brother lent the money before he bought the additional 1,000 shares. In fact he lent the money afterwards.

In 1932, when the testatrix signed the transfer conveying the cottages to H. A. Bull, she was eighty-three years of age. Again she showed her deficient knowledge by saying that she expected she would need to make "a deed of gift." She presumably meant something more solemn than the signing of an instrument of transfer. There can be no doubt that twelve months afterwards, when she wrote to C. W. Sewell about taking steps to complete the gift to H. A. Bull, she forgot that while at Colac she signed the transfer and the declaration of value. It was done at her nephew's home. And when she was told that she signed it before the Clerk of the Courts at Colac, it would not be surprising that this conveyed to her the idea that she had done so at the court-house. It would be a bold assumption to make that either the signing of the application form or the transfer of the cottages and the declaration of value were facts that stayed in her mind.

The testatrix had her own preconceived ideas about "receipts" and "deeds of gift." Neither transaction had proceeded in fact according to her ideas. Besides, in the case of the shares she had received explanations which C. W. Sewell in his evidence admitted were confusing. She had formed her own opinions. The explanations capable of completely dispelling the confusion about the shares was not given until 1933. Then her worries about the transfer began. Besides being ignorant of business she was obstinate, proud, and eighty-three years of age. It was said in evidence of the testatrix that "once she got a bone in her mouth she never let go," and that it was a family tradition that aunt would never admit that she was wrong. *Martin J.* came to the conclusion that the behaviour of the testatrix in making false accusations about the shares and the transfers of the cottages, after receiving proof of their falsity, was an exhibition of pride and obstinacy which were characteristic of her. His Honour applied the right criterion. The question was whether *this* testatrix—that is to say, a testatrix of her antecedents, experience and character—had insane delusions on these matters. I am not satisfied that the inference which *Martin J.* drew is a less probable one than that her behaviour indicated that her mind was deranged. It is not surprising that it was not possible to get permanently into that mind ideas differing from her own ideas. There is no expert or other evidence that the few written statements she made about her troubles connected with the shares and the transfer of the cottages, upon the nature of which

the caveating parties so strongly rely, are traits of madness. They are not the only matters about which she left a record. The statements were defamatory of the Sewells, especially if the innuendo is that they copied her signature. That allegation is not expressly made by her. It is a very long step to the conclusion that the testatrix would not have made the assertions unless she was mad. It does not appear to me to be at all probable that the testatrix, having regard to her natural limitations, would consider whether her assertions were injurious to the Sewells. The question may be asked, If she had been prosecuted for criminal libel, would a plea of not guilty on the ground of insanity—insane delusions—have held water?

The troubles about the shares and the transfer of the cottages were not the only serious matters that cropped up between the Sewells and the testatrix. She had lived with and had kept house for her two unmarried brothers Edward and Henry. She had lived alongside the home of her brother Joseph, the father of the two caveators, H. A. Bull and Alice Bull, down to the time her brother, Henry, was stricken with paralysis. Her nieces and nephews, the Sewells, had spent most of their school holidays with her and her bachelor brothers. She was attached to them as well as to Alice, Robert and H. A. Bull, the children of her brother, Joseph Bull. W. G. and C. W. Sewell became solicitors and partners under the firm name of Sewell & Sewell. When Henry moved to the city in 1925, the testatrix chose a house alongside her niece, Elizabeth Sewell, who had married Stuart Graham. Some time after Henry's death an arrangement was entered into whereby two rooms and later a garage were added to Graham's house. The testatrix paid one-third of the cost outright and the remaining two-thirds, a sum of over £200, was advanced to Elizabeth Graham as a loan without interest out of her share in the residuary estate of her uncle Henry. As the testatrix was the life tenant under his will, this arrangement involved a gift by the testatrix to Elizabeth of the interest on £200 during the life of the testatrix. In the result Elizabeth Graham had this sum free of interest for fifteen years. She had also received from the testatrix, as a gift, the land upon which the house was built. The cost of the garage was £30. Unfortunately Elizabeth Graham found the arrangement inconvenient and made it plain to her aunt, that she, the testatrix, could no longer remain in the Graham household. The Sewells negotiated this very advantageous arrangement for their sister, Elizabeth Graham. No suggestion was ever made to compensate the testatrix for her expenditure. The Sewells took an indemnity from the testatrix protecting themselves as the executors of Henry's will in the matter of this loan without interest, but made no provision for securing to the testatrix

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any permanency of residence. C. W. Sewell said in his cross-examination that from his experience it would be an "insane thing to do to try to make two people live together under an arrangement of that sort." In his evidence C. W. Sewell said: "We were not advising her" (the testatrix) "in the matter." Nobody else advised her. This admission discounts the suggestions made as to the constancy of the devotion of the Sewells to their aunt's interests. Their sister's decision deprived their aunt, the testatrix, of the advantages which were the sole purpose of the arrangement. The blow was a heavy and grievous one to the testatrix, as her letter dated 19th November 1929 to her niece Martha shows. The testatrix not only contributed largely to the expense of the building, but also paid twenty-five shillings per week for her board and had her own furniture. Pathetically she wrote to Martha: "You do not know how I long for a corner I could call *home*." She underlined home. No doubt she believed that she had purchased security by that monetary contribution and that it would be reinforced by the affection of her niece for her. In the letter already quoted she wrote: "I told Bess she should have thought before rushing me into the building, she said it had spoiled her house, I do not think as I paid for the edition (*sic*) that they could put me out. I have been lying awake for hours at night trying to think it all out and what to do." Elizabeth Graham's conduct was clearly calculated to excite the animosity of the testatrix. An undated letter fixed as of about 24th July 1931 from Elizabeth Graham to the testatrix well merited the endorsement the testatrix made upon it: "This letter from Bess Graham upset me terribly and I never answered it, but it was too insulting."

Even before 1929 the relations between her and the Sewells were full of troubles. As early as 21st September 1927 she wrote to Cedric Sewell asking about the proceeds of the sale of Riverview (her own property). In the same letter she inquired about the Graham company. She wrote: "I would also like to know something of Stuart's business, the last time you wrote to us for £100 towards improving the works uncle Henry said we would put no more money into it, should there not be interest on that £100, do not think I am consulting the family on this matter it is all on my own and I think I have a right to know my own affairs."

In May 1927 in a letter to W. G. Sewell she queried the payment of £100 in connection with the bringing of Ida, Sewell's sister, from Finland. The portion of her letter dealing with this query is interesting as it does not appear to be answered in any of the correspondence in evidence: "I cannot understand about the £100 bond

uncle Henry and I sent to you March 1925 to use for Ida so do not wonder that I was surprised when I heard that £100 was taken out of F. Smith's " (the purchaser of Riverview) " money to pay it." This item of £100 is shown in W. G. Sewell's letter to her dated 5th May 1927. It appears thus: "Towards Ida's expense from Finland £100 (the balance £67 was paid by Cedric and me)." Ida's affairs again crop up in a letter to C. W. Sewell from the testatrix dated 27th July 1928. She directed that the allowance to Ida of £4 6s. 8d. a month that had been debited against her account was to cease in the following month. The long letter in which C. W. Sewell replied to her on 17th September 1928 was reproachful. Elizabeth Graham had also attacked the testatrix on her dealings with Ida.

During the period from Henry's death to 16th August 1928, the testatrix had made four wills. Previous to Henry's death she had made at least three wills, in all of which she had appointed the Sewells and Henry to be executors. In the will she made on 8th March 1927 she appointed Alice Bull in conjunction with W. G. and C. W. Sewell. At this the Sewells took offence, as appears in their letter to the testatrix dated 15th August 1928. C. W. Sewell wrote: "As a matter of fact when you appointed Alice before we did not take it as a compliment to us that you should imagine it necessary to appoint another executor with us. . . . But Aunt if you were in the position of Guy or myself and I had for a number of years appointed you as my executor and then without any apparent reason appointed someone else with you would you not be inclined to feel that I had lost my confidence in you?" This statement is not correct in its implication that they were the only executors of her will. A perusal of the wills made by the testatrix show that up to the date of her brother's (Henry) death he had always been an executor of her will in conjunction with them and that in the very first will after his death she appointed Alice Bull and the two Sewells. In her next will she followed this practice, but altered it in the following will made on 19th April 1928, by which she appointed the two Sewells only as executors. By her will dated 16th August 1928 she again appointed Alice Bull to act in conjunction with the Sewells. It is in the letter forwarding this will for execution that the Sewells take the testatrix to task for appointing Alice.

In the will she made during Henry's life at first she left everything to him absolutely, but in later wills she gave, in the event of his predeceasing her, certain legacies to her niece Martha Bull, to J. R. Fulton, R. B. Fulton, and to Elizabeth Fulton, their mother, with an equal division of the residue between eight Sewells and three Bulls.

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At a later stage Henry is left a life interest and, subject to such life interest, Alice Bull is left a block of land, the three Sewell women get the gift of a residence, there are the same legacies and the disposition of the residue. There is very little alteration in the next two wills, except that Elizabeth Fulton's name is removed, as she had died. Then Martha kept house for the two Fulton boys until she went to live with the testatrix. In the will of 19th April 1928 Alice Bull is not appointed as executrix. By that will Alice Bull is to bring into hotchpot the proceeds of the sale of the land which the testatrix had given to her. However, from her letter giving instructions for a new will dated 7th August 1928 to C. W. Sewell, whatever umbrage the testatrix took at Alice's selling of the land had disappeared. She wrote: "I also want to cut out that part about Alice's land. I gave her a gift of the land and she was quite right to sell it." It thus appears that not only H. A. Bull but his sister Alice received a substantial gift of land from the testatrix. In Sewell's letter of 15th August 1928 there is a reference to statements supposed to have been made by Alice Bull and H. A. Bull "with regard to the justice of Uncle Henry's will." The letter continues:—"As I told you then, I do not believe either of them would think or say such things and I thought in any event that it was very improper that anything they had to say should be repeated to you and I felt the communication of such things to you could have been made for no proper object." In her will of 16th August 1928 she included Lavinia Bull and Martha Bull with the three Bulls and the eight Sewells as residuary beneficiaries. She gave her reason for this in her letter of instructions. She wrote: "I have been thinking a great deal about my two nieces and I feel I ought to help them and they are the only ones who have to work for their living. Lavinia is the only one who did not get a legacy at any time now I wish to make her a present of £100—one hundred pounds." Lavinia died some time after this will was made.

I now come to the period which began when the testatrix was turned out of Elizabeth Graham's home. She went to stay with Alice Bull at her private hospital, Bairnsdale. It was then that she made the first breach with the Sewells as her legal advisers. The evidence of the causes could only be obtained from the Sewells and from H. A. Bull and Alice Bull. Alice Bull admitted that her aunt was complaining that she could not understand the variations in her income. It came from her interest as the life tenant of her brother Henry's estate and her own investments. The Sewells were the trustees, and they were also

managing her investments. The statement made by the Sewells in a letter written to her soon after her brother's death that her income would be £40 a month was not being realized. The shrinkage was due to the depression. But the testatrix did not appreciate the effect of this crisis. She was agitated too about the shares in the Graham company. Alice admitted that her aunt told her she got Mr. Thomson, a Bairnsdale solicitor, to make her will. The testatrix had already written to H. A. Bull about these shares. According to him his aunt told him she was going to cut the two Sewells out. His Honour did not believe that evidence, because of the demeanour of this witness. There is no record of the contents of the five wills drawn by Thomson between 5th December 1929 and 12th June 1931. From her will drawn by Thomson and executed on 23rd November 1931 it appears that she appointed H. A. Bull and the two Sewells her executors. It is not unreasonable therefore to assume in spite of H. A. Bull's evidence that she had appointed them in her previous wills made by Thomson. By this will she gave to Martha, who had been living with her since 1930, the house and furniture for life, with the remainder to May Sewell and Elizabeth Graham, and, after certain legacies, left the residue to Martha Bull, May Sewell, Elizabeth Graham, H. A. Bull, C. W. Sewell and W. G. Sewell. To this will she added a codicil dated 4th May 1932 giving the cottages at Bairnsdale to H. A. Bull. It is quite obvious that the Sewells knew she had consulted Thomson and that they believed that he had made a will or wills for her.

It appears that on her return to 31 Albert Street, which was next door to Elizabeth Graham's home, the testatrix was again friendly with her. The chief cause of such friendship was the warm affection the testatrix had for "little Bob" Elizabeth Graham's son. While still not understanding the variations in her monthly statements and observing that the forecast of the Sewells that she would have £40 per month was far from realization, she did again consult C. W. Sewell in December 1931 about her will.

On 10th December 1931 she wrote to Cedric a letter which is important for several reasons. It recalled to his mind the fact that she was left without a home. This is of course a reference back to 1929. She displayed a lively anxiety to protect and provide for Martha. She told him Thomson had made her will and that she had appointed his brother and himself as her executors. This all appears in the following extract from her letter: "Some time ago you will remember I was left without a home & it was a great trial to me and if at the time Mattie could not have come to me I do not know what I would have done, but just at the time fortunately for me she was without

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a home also, of course I have to provide for her while I live and if she survives me I have to provide for her when I die, so I being the last of my generation decided to make my will, I went a good deal by your Uncle's will and have made you and Guy my executors. Mr. W. B. Thomson fixed it all up for me." A further letter to the Sewells which is dated 10th August 1932 shows her deep concern for Martha. In it she writes: "I was thinking of writing to you about my will, I am not at all satisfied with the provision I have made for Mattie she knows nothing about what I have done, but a little while ago she was talking about being left alone, & she said she would never live with any of her relations nor would she live alone, she would live at a Ladies Home and pay her board & be independant (*sic*), she is 64 years old & in all probility (*sic*) will outlive me, I would like to leave her independant (*sic*), I know her uncle Henry meant to do this & it is a mystry (*sic*) to me that he did not do so, I want you to advise me what to do as it is a great worry to me. I wish I was near you to talk over it, you know all the other nieces and nephews are remembered in his will & I cannot think why Mattie who neaded (*sic*) it most should be left out. I will send you a copy of my will. Mr. Thomson has the will please Ced write soon & ease my mind, should I make a new will & let my house go into my estate." C. W. Sewell replied to her on 11th August 1932 and gave it as his opinion that "it would not prove satisfactory to leave the house as you have to Mattie." He suggested an annuity. The testatrix apparently accepted his advice. His response was to draw a codicil revoking the devise to Martha of the house, the gift to her of a share in the residue, and providing for her an annuity of £50 per year. This codicil was signed on 16th September 1932 at W. G. Sewell's residence at Colac, where the testatrix had come for a holiday. At the same time she executed the transfer of the cottages to H. A. Bull. It is clear that she was familiar with will making and it is not to be assumed that because she remembered signing a will she would remember equally well the signing of a transfer. Naturally the testatrix was dissatisfied with this codicil. A fresh codicil was executed on 30th September 1932 giving Martha £52 per year instead of £50. The effect of these codicils was clearly to make Martha's position much worse, although the testatrix asked C. W. Sewell to improve it. In his cross-examination C. W. Sewell admitted this. By the codicil Martha lost her life interest in the house 31 Albert Street, which according to his evidence would let at from thirty shillings to two pounds per week, and her one-sixth share of the residue. It is unfortunate that the draft of the codicil of 30th September 1932 is missing. C. W. Sewell

thinks he drafted it himself. When the effect of the codicil became apparent to the testatrix she was profoundly disturbed. She wrote to C. W. Sewell on 26th November 1932: "I find I made a mistake in signing the codicil to my will without reading it over, I revoke that part of my will about my house & furniture being left to my nieces, but I do not agree to my niece Martha Bull being only the recipient (*sic*) of a paltry 52 pounds a year which would not pay her board & lodging & I do not intend her name being left out of my estate, I would rather leave out Bessie Graham as she has a home & husband to provide for her, Martha is the only one of all my nieces and nephews who has no home if she outlives me so her name must remain as it is in my will. . . . She is to get her share of my estate as is in my will, I also leave the contents of her bedroom which she occupies in 31 Albert St. to Martha Bull. Will you please get the Codicil made out in a few days & relieve (*sic*) me of the worry it is causing me I want it to end. I feel it very much as I have no one in this world to consult with but you." To this letter C. W. Sewell replied on 29th November 1932 forwarding a fresh codicil and giving the unfortunate assurance that the codicil as then drawn would not affect Martha's interest under the will in the residue. On 30th November 1932 the testatrix replied with a letter plainly showing her annoyance. It concludes: "I hope we will be able to come to an amicable arrangement for it is taking a lot out of me." To this C. W. Sewell answered on 2nd December 1932 pointing out that it was her place to decide and his to follow her instructions, but instead of doing so he entered into a long explanation in which he said that provision for the annuity of three pounds per week, suggested by the testatrix, would exhaust all her estate and "leave nothing for anybody else." He continued: "under all the circumstances it would be best to follow your original idea of leaving Mattie a share in the residue." With the letter he returned the codicil forwarded on 29th November. In fact it deprived Martha of her share in the residue and of the life tenancy of 31 Albert Street. If the testatrix executed it, Martha would have been left only with the furniture and fifty-two pounds per year. The testatrix acknowledged receipt of this codicil but did not execute it. The only thing for the testatrix to do was to go to another solicitor. She consulted Mr. Thomson who drew a fresh will for her which she executed on 12th December 1932. There is no evidence of the contents of the wills of 12th December 1932 and 3rd February 1933.

Comment has been made on the number of wills she executed. To comment adversely is to ignore the circumstances of the testatrix.

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She was the head of a numerous clan of collateral descendants, and she applied herself conscientiously to fitting her testamentary dispositions to their needs as she saw them. In the course of her long life their circumstances underwent changes. In some cases they materially improved. Three caveating parties, Alice Bull, H. A. Bull, and Elizabeth Graham, had received considerable gifts from her in her lifetime. Her wills were not made to please her fancies. They were serious and well-considered efforts to make a just distribution of her estate. There is a significant passage in a letter from Thomson dated January 1933 to her. It is as follows: "I quite understand the difficulty you feel about dividing your property among so many relatives, but you are quite right in doing so in accordance with your own wishes and not those of others."

In the next will made by Thomson for her on 25th May 1933 the Sewells with H. A. Bull were appointed executors, legacies were given to various members of the Bull and Sewell families, the residence 31 Albert Street with its furniture absolutely to Martha, whose name heads the list of the residuary legatees, which in addition to her includes H. A. Bull, Robert Bull, W. G. Sewell and C. W. Sewell. Alice Bull and the remaining Sewells were excluded.

In 1933 a considerable correspondence passed between the testatrix and C. W. Sewell, in which it is evident that the testatrix was dissatisfied with his firm's management of her affairs. She was confused as to the return from Henry's estate, and claimed that as she was his executrix she should be informed about its administration. It is unfortunate that in his reply C. W. Sewell did not tell her that no grant of probate had been made to her. This might have saved all the unpleasantness in 1938, when the shares belonging to Henry's estate were sold.

Once more an acute position arose over the 1,000 shares in the Graham company, and C. W. Sewell felt bound to write a long letter to her complaining of her statement and of Baragwanath's action in ringing up the company. In her reply she complained of being left in ignorance during her brother's lifetime of "our affairs," expressed her gratitude for all C. W. Sewell was doing for her and referred to Martha as "a great blessing to me." The sting of the letter was in the postscript. After pointing out that Baragwanath was an old friend and knew their uncle in Bairnsdale, she added: "I do not mean to show him your letters as you propose, as I am not in the habit of insulting my friends and do not be afraid of him at all interfering in my family affairs."

In July 1933 she had a fierce quarrel with Elizabeth Graham which further strained the bonds between her and the Sewells already fundamentally shaken by their failure or reluctance to draw the codicil she desired. She certainly did not understand the vexed question of the 1,000 shares in the Graham company. The attempts at explanation by the Sewells, though painstaking, were given with an understandable attitude of resentment at the implications which the denials of the testatrix involved. But when "the boys," for so she called the Sewells, got on their high horse she promptly mounted hers and in her self-willed way would not yield. She was fully aware that their explanation did not agree with that given to her by Stuart Graham.

The arrangement made by the Sewells to send her £40 per month from her moneys under their control was altered to £30 per month. On 14th February 1933 she wrote to them: "Please return to the formar (*sic*) monthly cheque of £30 pounds, I know the interest is reduced but not so much as to lessen my monthly cheque by £10." On 19th October 1933 she requested them to send the usual monthly statement, as they had previously done, as it would be more satisfactory for her to know how her accounts stood month by month. She wrote many letters about these matters. Her dissatisfaction led her to consult Mr. Thomson, who wrote to the Sewells. They sent him a very full explanation which was quite unexceptionable, in a letter dated 7th December 1933, to which Thomson replied on 12th December 1933. Mr. Thomson afterwards obtained permission from the Sewells to show the testatrix, his client, their letter to him. It was shown to her in April 1934. There were statements in it which aroused her anger. The letter contained a curious, and to one of her disposition a provocative, statement as to her not needing £30 per month. It contains an attack on her friend Mr. Baragwanath, which C. W. Sewell admitted was based on nothing more than suspicion. There was no real basis for the suspicion. There was also the statement: "It seems obvious that Aunt's memory is failing." It is patent that this last statement embittered her and rankled in her mind. She retaliated by writing the false statements about the shares and the transfer of the properties. It is obvious that those statements were a reply to the attack on her memory. Thomson had shared C. W. Sewell's opinion about her memory, and thought that loss of memory was the explanation of her troubles about her affairs. Neither attributed them to any form of madness. On 5th December 1933 the testatrix had signed the will drawn by Thomson which left out the Sewells and appointed H. A. Bull and Alice Bull as executors.

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This will left a legacy of £200 to Robert, Elizabeth Graham's child, of whom the testatrix was apparently still very fond, and the residue to Martha, who was put first, and to the three Bulls. Thomson apparently had no belief that she was devoid of testamentary capacity.

It is difficult to reach the conclusion that she was impelled to leave out the Sewells by any insane delusion. Her feelings were aroused by their unwillingness to make a testamentary disposition in accordance with her expressed instructions. Elizabeth Graham had antagonized the testatrix by a serious quarrel. This quarrel no doubt revived in the mind of the testatrix all the pain and anxiety which Elizabeth caused her in 1929 by asking her to leave the house. In her letter to Thomson dated 12th December 1933 the testatrix made it clear she no longer had confidence in the Sewells. She wrote: "I foolishly agreed to nearly all the Sewells did & said but I have learned a good deal of the world's ways since I have been left alone, and I have no one I can put confidence in except my niece Martha Bull who lives with me, but she helps me all she can but she is only a woman like myself." The postscript set out the Elizabeth incident of 1929. It concluded: "too late I found out my mistake in being too trusty."

The evidence relating to the succeeding years of the life of the testatrix provides strong confirmation of the conclusion that in July and August 1940 the testatrix was not suffering from any form of madness. She asked Thomson to be her executor. He declined on account of his age and a growing infirmity, but recommended the Perpetual Trustee Association. On 2nd August 1935 she made a will appointing the Association as her executor. She gave the residue to Martha, with the remainder to R. B. Fulton and his sister Dorothy Fulton. The testatrix was then eighty-five years of age. The manager of the Association, Mr. Roe, gave evidence proving that the testatrix called on him with a letter from Mr. Thomson and a memorandum in her own handwriting, which is in evidence, containing her testamentary wishes. This witness said: "As a result I drew up a will for her to the same effect as the memorandum with the exception that I realized the possibility of the niece" (Martha) "whom she had named predeceasing her." Mr. Roe said he asked the testatrix how she would like her estate to go in such an event and his evidence as to her reply is as follows:—"She then gave me two names, Robert Fulton and Dorothy Fulton, which I subsequently put in the will. I asked her whether the instructions she had written out there differed materially from any previous will she might have drawn, and she said that they did differ materially inasmuch as there were

several relatives named in her former will, but now there was only Martha Bull as an original devisee. I asked her why she was making such a serious change, and she said that the others were all well provided for, and Martha was not well provided for and would need the money." A will was made in accordance with her instructions as varied to express Mr. Roe's recommendation. There were legacies to a charity and to some members of the Cummins family. On 2nd August 1935 she made a fresh will retaining the Association as executor and substituting J. McR. Fulton for Dorothy. The Cummins were retained as legatees and other charities were given legacies. The next will was made on 5th December 1938 which was in the same terms as that of the 2nd August 1935 except that Mr. Boothby, a solicitor, was nominated as sole executor instead of the Trustee Association. He made a later will for her on 19th June 1939, eliminating all the legatees except a charity for the blind, which still retained its position in her will of 24th July 1940. Martha Bull retained her position in the will of June 1939 as residuary beneficiary, but James McR. Fulton became the sole remainderman.

The last will was that of 24th July 1940, the will which is propounded. The circumstances in which the testatrix went to Mr. Boothby, who drew that will, throw much light on the issues of the case. The testatrix consulted Mr. Baragwanath in 1937 or 1938 about a letter she received from the Sewells stating that they, as executors, proposed to sell the 500 shares of Henry deceased in the Graham company. She was entitled to the income of the shares under her brother's will. The shares were paying a dividend of fifteen per cent. Mr. Baragwanath said she asked him whether they were legally entitled to sell the shares. He told her that it would be almost impossible to reinvest the proceeds and get the same income, and advised her to write to C. W. Sewell saying that she was opposed to the sale on those grounds. Mr. Baragwanath said that she informed him that she received a further communication from her nephew in which he said he was determined to sell the shares, and would do so unless she agreed to indemnify the estate of her late brother against loss in the event of the price of the shares dropping. The witness said the testatrix was upset and said: "She could hardly believe that her nephew would treat her that way. She recalled how happy they always had been in Bairnsdale and now they would deprive her of her income." The testatrix was referring to the days before 1925. Upon the assumption that she had an insane delusion that the Sewells dishonestly plotted against her, it was quite incongruous for C. W. Sewell to ask her to sign an indemnity. The testatrix asked Mr. Baragwanath for the name

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of a local solicitor, and he nominated Mr. Boothby, who acted for a number of depositors at the bank of which he was manager. Subsequently the witness saw the testatrix, who said she had seen Mr. Boothby. Mr. Baragwanath said that the testatrix used these words: "I saw Mr. Boothby and, although his advice was unpalatable and not to my liking, I liked Mr. Boothby and I have asked him to draw up a will for me, and asked him to be my executor." The will of 5th December 1938 followed. It varied the previous will only by substituting Martha and Mr. Boothby for the Trustee Association. A perusal of the letters about the matter of the sale of the shares shows how accurate was the account which the testatrix gave to Mr. Baragwanath of the position taken up by C. W. Sewell. It appears to me that a perusal of all the solicitors' correspondence on the matter makes the suggestion that they were adjusting a business matter for an old woman suffering from a chronic delusion giving rise to insane hatred of the Sewells quite incredible. It is unfortunate that both Mr. Thomson and Mr. Boothby died before the case was heard. There is a strong presumption that Mr. Boothby, who was an experienced solicitor of good standing, never thought that the testatrix was not of sound mind, memory and understanding. When Mr. Baragwanath's evidence is checked by referring to the solicitors' correspondence about the sale of the shares, it becomes apparent that although the testatrix was opposing C. W. Sewell in the matter she gave Mr. Baragwanath a substantially accurate account of the whole matter. She did not distort or colour C. W. Sewell's proposals, although they seriously affected her financial position. This evidence shows that she was, until the end, intent on her property.

Miss Boothby's evidence shows that the execution of the will of July 1940 took place at Mr. Boothby's home. She and her father were the attesting witnesses. The codicil was executed by the testatrix when in bed suffering from bronchitis. It was attested by two neighbours, husband and wife, who had known the testatrix for many years. The evidence of all these witnesses demonstrates the calm and sane behaviour of the testatrix on an occasion when, if the case of the caveating parties is true, she was presented with opportunities to manifest her insane aversion to them. The evidence of the steps which she took to have the codicil executed demonstrates that she then retained a firm mental grasp of her affairs.

Until the end of her life the testatrix retained the Sewells as her solicitors and conducted correspondence with them. Throughout she dealt with them in a perfectly sane and rational way. This

fact strongly confirms the findings of *Martin J.* It proves that she was not affected by any chronic delusion that they treated her dishonestly, or plotted dishonest things against her. Until the end she allowed them to retain under their control almost her entire fortune. They collected her income, which was her chief means of support, held principal moneys on her behalf for investment, and received on her account principal moneys repaid by mortgagors. It would be an endless task to go through the correspondence in detail. With but few exceptions all letters from her to the Sewells or from them to her conclude with the sentiment: "Yours affectionately." There is nothing in the evidence explaining how this strong evidence of her trust and confidence in the Sewells is compatible with the suggestion that she had insane delusions that the Sewells were cheats and frauds. It cannot be explained by the suggestion that she did not realize that her valuable interests were in the hands of the Sewells. That suggestion, if made, would be demonstrably false. She was intent upon her property and the collection of her income until the end of her life. The retention of the Sewells as her solicitors to attend to all those matters involved the highest degree of trust in them. It is the strongest possible evidence that her false statements were not made under the baleful influence of an insane delusion that they had defrauded and tricked her. I refer to the last letters in the voluminous correspondence between her and the Sewells written not more than six months before the last will and codicil were made. These letters show that on 15th January 1941 C. W. Sewell wrote to her recommending that she should forego arrears of interest amounting to £61 due to her under a mortgage which was in Sewell's office. The grounds on which the recommendation was put were fair and creditable. The testatrix was told that it would occasion hardship to some mortgagors to enforce her remedy of ejectment, but the letter stated that the question was one to be decided by her. C. W. Sewell's letter to her dated 30th January 1941 conveys to her the gratitude of the mortgagors for her generosity in forbearing to evict them, and it appears from the letter that she communicated her decision to C. W. Sewell by telegram and letter dated 16th January 1941. Neither was produced at the hearing of this case. It is clear that she promptly adopted his recommendation. The testatrix saw nothing sinister in the proposal that she should forego the arrears of interest.

On 27th July 1939, it appears that the Sewells wrote to her giving her particulars of the total amount she had invested in their office, and the value of her interest in the estate of her late brother Henry, of which they were executors. They wrote:

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“ you will realize that as your interest in Uncle’s estate is as a life tenant it is very difficult for us to calculate the present value of such interest. The calculation is rather an intricate one, but we have used the standard tables of expectation of lives and for computation of life interest for this purpose. If there is any further information required please let me know.”

On 7th August 1940, that is within fourteen days from the execution of the will, and prior to the execution of the codicil, the testatrix wrote to the Sewells in these terms : “ I would be glad if you would send me a statement of amounts out on mortgage and the dates of their payments.” C. W. Sewell replied on 13th August 1940, sending the particulars, and added : “ If there is any other information about the matter you require I should be glad to let you have same.”

In my opinion the evidence clearly proves that the testatrix was fully aware of the nature and extent of her property including that which she had entrusted to the Sewells ; and that she remembered who were her relations and appreciated their claims on her bounty. The will is upon its face and having regard to the circumstances in which it was made both rational and just. The will affords evidence that the testatrix was of sound and disposing mind, memory, and understanding. Martha had the paramount claim on the bounty of the testatrix. That fact is indisputable. And as regards the Fultons an examination of the evidence shows that their devotion to and affection for the testatrix exceeded that of any of the caveating parties. It is clear too from the evidence that the Fultons were in greater need of her bounty than any of the caveating parties. There is no evidence that either of them had any means other than his salary, which was only moderate, or that the testatrix had made any gift to either of them during her lifetime. At an early stage she had expressed her expectation that their aunt, Martha, would look after them. The Sewells were well-established solicitors ; they did not charge the testatrix costs, but they received the usual costs payable by mortgagors on the matters in which they acted for the testatrix. Alice Bull owned a successful private hospital. H. A. Bull was a retired farmer. Elizabeth Graham was the wife of the managing director of the prosperous proprietary company which was paying a dividend of fifteen per cent. It has been shown that the testatrix had given these last three caveating parties substantial gifts in her lifetime.

The evidence amply justifies the finding that on 24th July and 23rd August 1940, when the will and codicil respectively were made, Miss Bull was a capable testatrix and free from any insane delusion.

In my opinion the appeal should be dismissed with costs.

WILLIAMS J. This is an appeal by the caveators and caveatrices against an order of the Supreme Court of Victoria made on 13th March 1942, whereby the Court ordered that the probate of the will and codicil of Elizabeth Bull deceased dated 24th July 1940 and 23rd August 1940 respectively should be granted to R. B. Fulton, the sole surviving executor named therein. It was not seriously contended in the Court below or on this appeal that the testatrix was generally incapable of managing her affairs, but her testamentary capacity was attacked on the ground that, at the dates she executed the will and codicil, she was suffering from the following insane delusions with respect to two of the caveators, her nephews Guy and Cedric Sewell, particulars of which were given as follows:—“4. (a) That the caveators W. G. Sewell and C. W. Sewell had purchased shares in her name in Graham Campbell Pty. Ltd. with the money of H. A. Bull (a brother of the deceased) without his knowledge and were dishonest in so doing. (b) That an application for 1,000 shares in the company had not been signed by her. (c) That original letters written by her brother with reference to these shares and which had been shown to her were not written by him. (d) That a transfer of cottages at Bairnsdale to her nephew H. A. Bull signed by the deceased had been neither signed nor seen by her. (e) That a declaration as to the value of these cottages signed by the deceased had not been signed by her. (h) That W. G. Sewell and C. W. Sewell had not accounted to her for her full rents and income.”

The testatrix, who died a spinster aged ninety-one years, was a prolific will maker. The evidence relates to twenty-six testamentary documents, made in the years 1922 to 1940 inclusive, which fall into two classes, the nineteen prior to the will of 5th December 1933, in all of which, so far as their contents are known, Guy and Cedric appeared as executors and residuary beneficiaries, and that will and the six subsequent thereto, in all of which they were excluded. Until shortly before his death the testatrix had lived with her bachelor brother Henry Bull (called uncle Henry to distinguish him from a nephew Henry Alfred Bull) on a property called Riverview situated at Bairnsdale. Another bachelor brother, Edward, had also lived there until his death in 1922. Uncle Henry had a stroke on 15th January 1925 and died on 31st August 1926. Towards the end of 1925 the testatrix, who found it difficult to nurse her brother in the country, purchased a property at 31 Albert Street, East Malvern, and she and her brother stayed there until his death. This property was next door to one owned by George Stuart Graham, who had married a niece of the testatrix named Bessie Sewell. The testatrix had the greatest affection for and confidence

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in uncle Henry, and the stroke which he suffered and his subsequent illness and death were severe shocks to her. By his will uncle Henry made her the tenant for life of his residuary estate with remainder to his nephews and nieces, so that, from his death, her fortune consisted of this income, and certain assets of her own, which she subsequently increased by substantial savings. At the date of her death in July 1941 her estate was valued for probate purposes at over £12,000. Her next of kin included nephews and nieces forming two family groups; eight Sewells, including Guy, Bessie and Cedric, sons and daughters of a deceased sister Sarah Sewell, and Alice, Robert and Henry Bull, the daughter and sons of a deceased brother Joseph Bull. Since 1920 Guy and Cedric Sewell have practised as solicitors at Colac under the name of Sewell & Sewell (hereinafter called the firm). With the testatrix, these nephews were appointed executors and trustees of uncle Henry's will, but they alone applied for probate, leave being reserved to the testatrix to come in and prove the will, which she never did.

Prior to uncle Henry's death, the firm had acted as his solicitors; and subsequently, until the date of her death, it managed most of the testatrix's business, collecting some of the rents from her real estate and investing whatever money she desired to be invested on mortgages. The income they handled on her behalf included the income of uncle Henry's estate and the income of her own assets, which they were managing. The firm drew statutory commission for acting as executors and trustees of uncle Henry's estate, but never charged the testatrix for any work they did for her personally, and only received profit costs from the mortgagors in respect of any of her capital, amounting in the aggregate to about £3,000, which they invested and re-invested upon mortgage from time to time. They rendered regular monthly statements, paid most of her bills, answered numerous inquiries which she raised with respect to her business, from time to time prepared her income-tax returns, and generally went to very considerable pains and trouble on her account for which they received no direct and comparatively little indirect remuneration. The correspondence shows that they were always careful to explain to her the details of any transactions which they undertook on her behalf. It is plain that Guy and Cedric had the entire confidence of uncle Henry, and that this faith in them was transmitted to the testatrix upon his death, so that, just as she had depended upon uncle Henry for business advice during his lifetime, she commenced to rely upon them after his death. On 11th August 1928, after Cedric had forwarded certain documents relating to an appropriation to sever her assets from those of her

brother, she wrote: "I have just received yours of the 9th & although I do not profess to understand it all, I will sign the transfers as I feel sure it is all right when you ask me to sign." The evidence shows that her trust was never betrayed, and she was, in my opinion, fortunate to have relatives who were willing to expend so much time and trouble on her affairs.

Stuart Graham, who was an engineer, had formed a company called Graham Campbell Ferrum Co. Pty. Ltd. Uncle Henry had given considerable support to this company. In January 1924 he invested £500 on his own behalf and £250 on behalf of the testatrix in acquiring 500 and 250 ordinary shares of one pound each respectively in its capital. In October 1924 the company desired to raise further capital to expand its undertaking. It proposed to raise the required sum by the issue of eight per cent preference shares of one pound each. Cedric went to Bairnsdale and suggested to uncle Henry that he should take up some of these shares. If Cedric's recollection is right the testatrix was present at the conversation. Uncle Henry agreed to apply for 1,000 shares in his sister's name. Cedric returned to Colac, and, on 15th October, wrote to uncle Henry, enclosing an application for 1,000 shares for signature by the testatrix, and suggesting payment, £250 on application and the balance, £750, on 15th December. On 20th October, uncle Henry replied enclosing a cheque for £250, the balance to be paid on completion of certain litigation with one Salter, and also forwarding the application which had been signed by the testatrix, the date for payment of the fifteen shillings per share having been altered from 15th December to 15th January. On 15th December the firm wrote to uncle Henry to say that they presumed that out of Salter's money they were to pay £750 to complete the payment of the balance owing on the shares. On 17th December uncle Henry replied telling them to do so. On 10th January 1925 uncle Henry wrote a long letter to Cedric saying that he was quite satisfied with the settlement of Salter's case and discussing family matters. It is apparent from this letter that he was then quite able to transact business, although it was written only five days before he had a stroke. On 14th August 1925 Cedric wrote to uncle Henry with respect to further moneys required by the company to finance a further extension of its plant, and asked him to reply by wire whether he would lend the company £100 at eight per cent interest. Uncle Henry caused the testatrix to send a wire agreeing to do so. This letter remained in the possession of the testatrix because, some time after December 1933, she added a footnote as follows:—"the Sewells did not mention this paper when they told him Mr. Thomson

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of the 1,000 shares and it is most important." After Uncle Henry's death the testatrix had the custody of the scrip for the original 750 shares, but that for the 1,000 preference shares remained in the custody of the firm. The company had a difficult struggle in its early years, but by 1929 it had achieved prosperity, and on 26th September the testatrix received dividends from the company for the year ending 30th June 1929 at the rate of eight per cent on 1,000 preference shares and six per cent on 250 ordinary shares. These dividends were in respect of the shares which belonged to her, while the dividend on the 500 shares belonging to uncle Henry's estate went to Guy and Cedric as his executors. The testatrix had forgotten she had signed the application for the 1,000 preference shares, and believed the dividends were being paid on the 750 original shares and 500 additional shares for which she could not account. She asked Stuart Graham when the 500 shares had been taken up, and he, believing she was referring to the 500 ordinary shares taken up by uncle Henry, told her they were part of the original capital.

After uncle Henry's death an arrangement was made between the testatrix and Bessie Graham that she should live with the Grahams, and about £300 was spent in enlarging their home for this purpose. To pay for the additions the testatrix provided about £100 out of her own money, and about £200 was advanced, with her consent, out of Bessie Graham's share in remainder in the estate of uncle Henry, the result being that the testatrix lost the income on this £200 for the rest of her life. In 1929 the task of looking after the testatrix and a young family became too much for Mrs. Graham, who was ill, and she had to suggest to her aunt that she must find another home. The testatrix left, and, after a short sojourn at Manchester Grove, Caulfield, again moved into the house next door to the Grahams where she continued to live until about six months before her death. At this stage her niece Martha Bull commenced to live with her, and this continued until Martha became ill and died shortly before the testatrix. The testatrix paid Martha a salary and gave her a home, and Martha in return looked after the testatrix with care and affection. But at the end of 1929 the testatrix was upset at having to leave the Grahams' home, and this and her belief that 500 additional shares had been acquired in her name without her knowledge caused her to write a letter to her nephew Henry on 29th October in which the expenditure upon the additions to the Grahams' house was referred to, and an accusation was made that Guy must have invested £500 of her money in the company without her authority. I agree with Mr. *Menzies* that

this letter shows the genesis of a mistrust in the Sewells. Henry, as might be expected, advised her to write to the firm for information about the additional shares. On 20th November she wrote to Cedric, stating she recollected the acquisition of the original 750 shares and the loan of £100, that uncle had told her the £100 was the last money he would put into the business, and asking when the other £500 was put in. On 23rd November Cedric replied explaining how uncle Henry had arranged to take up the 1,000 preference shares in October 1924 and enclosing copies of his uncle's letters of 20th October and 17th December 1924. This letter was not as lucid as it might have been, as Cedric assumed that her reference to 500 shares was a clerical error for 1,000 and so did not expressly state that the 1,000 shares had been acquired prior to the loan of £100. On 28th November the testatrix replied that Cedric's statements did not correspond with those of Stuart Graham, that at the time he said his uncle wrote for the 1,000 shares for her it was within a month of the time he took the stroke, and he had been a great deal too ill for months to think of business, especially a new affair which he had doubts about, and he would not ask her to put her signature to a document before consulting her and giving her information as to what she was signing; that she knew nothing about the affair; and in conclusion suggested there was something improper about the transaction by asking if it was all correct why had she not received a receipt (by which she meant scrip) the same as she had for the 750 at first put in. On 3rd December 1929, Cedric replied enclosing the scrip for the 1,000 shares. The oral and written evidence makes it clear that uncle Henry was quite fit to do business until his stroke, which was a sudden event, so that, as she must have known this at the time, seeing his health was a matter of her particular concern, once she realized the shares were acquired before and not after his illness, a belief in 1929 that the transaction occurred when he was not in a condition to authorize it definitely indicated an impairment of her memory. It is unlikely that Cedric is mistaken in saying his aunt was present at the discussion with his uncle in October 1924, or that, if he is mistaken, the latter would have obtained his sister's signature to the application without explaining what it was, so that the probabilities are, as Cedric suggested in this letter of 29th July 1933, that in her anxiety about her brother's health she had forgotten all about it. After her correspondence with Cedric she had in her possession documentary evidence which showed the chronological order of events, and probably realized that her brother had agreed; but, assuming she was still confused, while she may have doubted the authority of the firm to acquire the shares she

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had not commenced to believe there was anything dishonest in the transaction.

During the years 1930, 1931 and 1932 the testatrix's relations with Guy, Cedric and the Grahams appear to have been excellent. She was living happily and comfortably at 31 Albert Street with Martha as her companion, she was saving money steadily and augmenting her capital, and she had ceased to worry about having been forced to leave the Grahams' home or the trifling loss of £10 a year income on the £200 advanced to Bessie out of uncle Henry's residuary estate. 1931 produced a crop of three and 1932 of five wills or codicils, in all of which, so far as their contents are known, Guy and Cedric remain as executors and they and Bessie as residuary legatees.

The testatrix owned half an acre of land situated at the corner of Pyke Street and Mitchell Street, Bairnsdale, on which were erected two brick cottages. Early in 1932 there had been some correspondence between her and the firm with respect to the sale of these cottages, and, for that purpose, subdividing the vacant portion of the block from that on which the cottages stood, but nothing had been finalized. On 26th April 1932 the testatrix wrote to Cedric asking him to send her the title of the brick cottages. Cedric complied. She sent the deed to Thomson, a solicitor at Bairnsdale who had drawn her existing will, and instructed him to prepare a codicil, which she executed on 4th May, devising the land with the two houses erected thereon to Henry. She then returned the certificate of title to Cedric. About the same time she wrote to Cedric for advice as to what would be the best testamentary provision for Martha. Under her existing will Martha was the tenant for life of 31 Albert Street and a residuary beneficiary. She also told Cedric about the codicil of 4th May and explained that she had devised the cottages to Henry because he was married, had two children, and was in ill health and poor financial circumstances. Cedric suggested that, as Martha had some assets of her own, the best way to provide for her would be by an annuity, but pointed out it was difficult to discuss the matter by letter and it would be better to do so personally. He also said it might be advisable to give Henry the cottages at once instead of leaving them to him by will. On 15th September the testatrix went to stay with Guy at Colac, and, on the following day, executed a codicil at his home bequeathing Martha an annuity of £50 and revoking all her other benefits under the will. The preparation of this codicil must have followed a conversation she had with Guy on arrival at which not only Martha's future but also the gift to Henry was discussed, because the testatrix

evidently decided to adopt Cedric's suggestion and make an immediate transfer of the cottages to him. To effectuate the gift she also executed at Guy's home, on the same day as she executed the codicil, a transfer of the land to Henry, and swore and signed a statutory declaration of its value. The transfer was witnessed by Cedric and the declaration by the local Clerk of Courts, one Alfred Stewart, who was a commissioner for affidavits. Cedric swore that his aunt had a conversation with Stewart about the days when uncle Henry was the chairman of the local Bench. The codicil was witnessed by Alfred Stewart and his son, who was a clerk in the office of the firm. While still staying with Guy, the testatrix discovered the codicil of 16th September only gave Martha £50 per annum, whereas she intended her to receive one pound per week; and on 30th September executed two further codicils, the first revoking that of the 16th September, and the second bequeathing Martha £52 per annum. The codicil of 16th September and the second one of 30th September so clearly revoked all Martha's then existing benefits under the will, that it is only reasonable to infer that the testatrix at this time intended her to have the annuity and nothing else. Moreover, having regard to the evidence of the care with which the firm always explained any business transaction to the testatrix, the inference is irresistible that the immediate gift to Henry must also have been fully discussed with her; she must have been consulted with respect to the contents of the declaration of value; the Stewarts must have been properly introduced to her; and the documents which she executed on that day properly explained to her. Moreover the monthly statement for the period ended 15th October 1932 sent by the firm to her clearly showed the amounts of the duty and registration fees "on transfer to H. A. Bull" as disbursements.

After the testatrix's return from Colac to 31 Albert Street, further correspondence took place between her and the firm with respect to the provision she should make for Martha in her will. Cedric still maintained it should be an annuity, if necessary of an increased amount, but made it clear, as he had often done before, that the ultimate decision lay with the testatrix. She eventually decided to leave Martha an annuity of £52 per annum, the furniture in her bedroom, and a share in residue. At the end of November Cedric prepared a codicil which he believed would accomplish this object, but, as it did not expressly revive Martha's benefits under the will, in view of the provisions of sec. 20 of the *Wills Act* 1928 (Vict.), which he had overlooked, it would not in law have done so. In December the testatrix went to Bairnsdale, and, probably desiring to have independent advice, consulted Thomson. He prepared a

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codicil, the contents of which are unknown, which she executed on 12th December without telling her nephews. She ignored the codicil which Cedric had prepared. But it was quite usual for her to consult Thomson. He had prepared her existing will. Cedric had done nothing wrong, he had been asked for his advice as to what would be a proper provision for Martha, and he had bona fide proffered his view, which she knew she was at liberty to accept or not. There is no evidence that any dissatisfaction with respect to Cedric's advice or the codicil he had prepared affected the testatrix's subsequent testamentary peregrinations.

On 3rd February 1933 the testatrix executed a further testamentary document prepared by Thomson, of the contents of which there is no record. On 5th May she executed a new will which he had prepared, still leaving Guy and Cedric as executors, but adding Henry, devising 31 Albert Street and the furniture to Martha absolutely, and leaving the residuary estate to Martha, Henry and Robert Bull, and Guy and Cedric in equal shares. So at this stage Bessie was removed from the dwindling list of residuary beneficiaries. On 5th December the testatrix executed a further will, also prepared by Thomson, by which she appointed Henry and Alice Bull as executor and executrix, and, after bequeathing certain pecuniary legacies, the largest being £200 to Bessie's son Robert Graham, left her estate to Martha, Alice, Henry, and Robert Bull in equal shares. By the middle of 1935 the testatrix evidently considered Martha's claims had become paramount, so that by the wills of 26th June of that year and those subsequent thereto Martha was installed as sole residuary beneficiary, but, as some wise person had pointed out that Martha might predecease her, and she should provide for this event, the testatrix's mind began to fluctuate as to which two of the children of Martha's deceased sister Elizabeth Fulton should benefit under the substituted gift, until, by the will propounded in this suit, she finally chose J. M. Fulton and the respondent R. B. Fulton.

As Guy and Cedric were eliminated both as executors and trustees and beneficiaries for the first time by the will of December 1933, and were thenceforth excluded from all future wills, although the testatrix continued to make use of their services as usual free of cost to herself, an examination of the events which happened in the period between May and December 1933 to determine why she had done so is of critical importance. About June 1933, as appears from Cedric's letter to the testatrix of the twenty-ninth of that month, and her own annotations on a copy of the letter which Guy subsequently wrote to Thomson on 7th December 1933, Baragwanath, the manager

of the Government Savings Bank at East Caulfield, where the testatrix had her account, had made an inquiry on her behalf about her interests in the company. In July she told Bessie that the boys had bought some shares in Stuart's company, which she had no knowledge of, and neither she nor uncle Henry had authorized them to do so. In view of Baragwanath's inquiries and this conversation, Bessie spoke to Cedric, and he then wrote the letter of 29th July, giving the testatrix a complete account of the acquisition of the shares, and forwarding to Stuart the original letters so that he could show them to her "in order that her mind should be relieved of all misapprehension." Stuart gave the letters to Bessie, and she, early in August, showed and explained them to the testatrix, who appeared to be satisfied, and wrote a letter to Cedric on 3rd August in which she said she had read all the letters, Bessie and she had had a long talk over them, and Bessie had tried to explain to her what she did not understand. She suggested that the mistake had occurred because her brother had kept her in ignorance of her affairs during their lifetime, and said she did not mean to say that Cedric was not doing his best for her, for which she was very grateful, as he knew. Assuming that this letter genuinely represented the state of mind of the testatrix at the moment, it is evident that she quickly reverted to a condition of complete distrust of Cedric's account of the transaction, because, soon afterwards, she told Stuart Graham that the boys had taken up the 1,000 shares in his company without her authority and that of uncle Henry, and, when he showed her the application with her signature on it, would only say it looked like her signature and asked where was uncle Henry's signature. When he explained it was not necessary for uncle Henry to sign as it was an application for shares in her name, she said she had never seen it before. When she was leaving for Bairnsdale in December, Stuart Graham drove her to the train and on the way she said: "Stuart, the boys have definitely put money into your company without my authority," and maintained this attitude, although he pointed out to her that she had seen uncle Henry's letters and her signature on the application. Cummins, an accountant who married a niece of the testatrix, and whom the testatrix consulted on business, also said that, commencing in the winter of 1933, she often told him she had signed nothing. When she made the will of 5th December she was staying with Alice at Bairnsdale, and told her she had never signed an application for the shares. There is other oral evidence to the same effect. So, in the period between May and December 1933, although Cedric had explained the whole transaction in July, she had been shown the original

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documents by Bessie in August, and the application by Stuart Graham soon afterwards, her belief had hardened that it was not her signature, the letters had not been written by uncle Henry, and the moneys had been invested without his authority.

On 23rd November 1933 the testatrix wrote to Cedric that it was twelve months last September since she gave the property to Henry, and she was waiting for him to send her the papers to sign for the transfer of the title and one relating to the deed of gift as she wished to have it fixed up before Christmas. On 27th November Cedric replied, pointing out that the transfer papers were signed when she was at Colac in September 1932, and saying he had written to Henry asking him to write and tell her he had received the title from the firm several months ago. Cedric wrote to Henry enclosing a copy of his aunt's letter, and stating that, as the transfer was fixed up in September, he wanted Henry to write and tell her he had signed the papers then and he had received the title deeds some months ago. Henry drove her to Thomson the day she made the will, told her this, and reminded her he had written and thanked her for the property but she was quite unconvinced. Henry gave her his copy of Cedric's letter, and she made a note "no date" above the word September as though this was a suspicious circumstance. It is clear that the testatrix distrusted Cedric's letter *ab initio* and immediately acquired the firm belief, from which she never subsequently departed, that she had never signed the documents or been in Colac on 16th September. She told Alice in December she had never signed the transfer to Henry. The letter of 23rd November provides definite evidence that the testatrix's memory was failing. When she had made some earlier gifts she had been careful to explain in writing that they were made of her own free will, so that it is feasible she may have believed that to complete a gift a similar document was always required; but, even if this were so, she should have remembered that she had executed some documents at Colac relating to the transfer. Moreover, as she was thoroughly conversant with her affairs, and, before the transfer to Henry, the rents of the cottages had been paid by the agent who collected them direct to her, it seems clear that, if she had retained her pristine alertness and believed she still owned the cottages, she would have soon realized either the tenants were not paying or the agents were not accounting for the rents and taken some energetic step to put things right.

In November 1926, Cedric, in reviewing her financial position, had told the testatrix that her total income was £550 per year or over ten pounds per week, so she would never have any need to worry

financially. On 15th July 1933, he wrote sending her a cheque for her balance in the bank, £106 9s. 6d., and stating that in future the firm would not be able to send monthly cheques of £30 as heretofore but would send her cheques as they received moneys on her behalf. The reduction in the testatrix's income, as Cedric pointed out, was due to the statutory reduction in interest rates by twenty-two and one-half per cent and to increased taxation, but the testatrix, placing an unfair construction on what Cedric had written in 1926, commenced to tell people that the boys had promised she would have £10 a week for the rest of her life and her dissatisfaction soon grew into the suspicion that the falling off in her income was not due altogether to the above causes but also to defalcations of uncle Henry's assets. She told Alice she could not understand where the money was going, and she told Cummins before she went to Bairnsdale, and Alice and Henry after she arrived, she was going to make a new will and cut the Sewells right out, they had already obtained all they were going to get from her. But the best evidence of her growing feeling of distrust of the Sewells is her own letter to Thomson of 12th December, in which she makes a clear charge that they were taking advantage of her ignorance of business after she had been left unprotected by her brother's death and she had foolishly agreed to nearly all they did and said. In a footnote she even exhumed the complaint about her removal from the Grahams' home after her expenditure on the additions and said: "Too late I found out my mistake in being too trusting." She had already avenged herself upon Bessie by the will of May, so it must have been to exact retribution from the boys that she omitted them from the will of December. If her attitude was that her nephews were honest but had taken too much upon themselves by doing things and signing documents on behalf of uncle Henry and herself without proper authority and had failed to invest his and her assets advantageously her action would have been harsh and unreasonable, because the shares in the company had turned out trumps and were paying preference and ordinary dividends of fifteen per cent and over, and she was satisfied that Henry should have the vacant land, even if a mistake had been made in carrying out her intentions, which is unlikely, seeing that the description in the codicil of May 1932 was exactly the same as that in the transfer. But her statements showed she was actuated by more than annoyance at the way they had conducted her business. It is clear that she had formed the opinion she could not trust them. She considered they were implicated in what she regarded as the dishonest way she had been treated at the Grahams' home. She was satisfied they had taken advantage of uncle Henry's illness

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to apply £1,000 of his money without his authority in a company in which they were interested and had for this purpose concocted and signed letters purporting to have been written by him and signed her name to the application. Although she did not complain of Henry getting the land, as they were capable of profiting by her lack of business experience and signing documents on her behalf without authority, and her income had decreased in a way she could not understand, she suspected that they must have converted some of uncle Henry's money to their own use.

The year 1934 provided abundant evidence that she was placing this sinister construction upon her nephews' actions. When Guy learnt that Thomson was acting for her in December, he seized the opportunity to write a letter on 7th December 1933, giving Thomson full details of the transactions relating to the 1,000 shares, the transfer to Henry, the assets and income they were managing on her behalf, and forwarded to him uncle Henry's original letters. Naturally Thomson expressed himself as completely satisfied that she had been dealt with fairly and honourably throughout and so informed the testatrix, stating specifically he had seen the original letters. At this time she did not know Guy had suggested in his letter of 7th December that the explanation of her strange conduct was that her memory was failing, so her renewed activities early in the year were not, as Mr. *Hudson* suggested, the result of wounded pride that such a charge should have been made against her. She only saw a copy of this letter at the end of May. Prior to this she had been seeking particulars from Henry of the assets comprised in his uncle's estate to establish that some of them had disappeared. When she thought she had evidence that £3,000 was missing, she wrote to Thomson to supply her with a copy, which he did with the consent of Guy and Cedric. There is no doubt she then took offence at Guy's suggestion and became more embittered against them than before; but Cedric had made a similar statement in his letter of 29th July and she had managed to discuss this letter with Bessie and had purported to be satisfied. Her attitude in 1934 rather indicates that she considered the attack upon her memory was part of an insidious campaign by her nephews to mislead Thomson and others into the belief that the documents were genuine when she knew that they were not. On 23rd June 1934, she wrote to Henry that "as this affair is all settled up, and you have got the property as I intended alright, no more need be said about it but I still say as I think I told you before, I was in Colac for nearly a fortnight and I never saw the title or deed of gift and never signed my name to the papers but someone must have signed my name so you are right,

I could make no mistake about the time I spent in Colac, and now you will see the Sewells are saying I am suffering from want of memory which I quite deny." On 6th August she went to the Land Titles Office with Martha and inspected her signature. Its genuineness is apparent, but she remained unconvinced. She made the following note on Cedric's letter to her of 27th November 1933: "Mattie and I went to the titles office and saw the transfer papers for the first time, *my name was there but not signed by me, I was not in Colac on the 16th September* and I never signed the transfer papers or saw the papers in Colac or anywhere else, until I saw them in the transfer office." August was a busy month, because in addition to her private entries she wrote to Stuart about the shares and to Henry about them and the transfer. In a letter to Stuart of 15th August 1934, after referring to Guy's letter to Thomson of 7th December in which he stated they had sent the original letters to Stuart which he had shown to her, she said *he had never shown her the letters at any time*. It is clear she was not quibbling on the fact that Bessie and not Stuart had shown her the letters, because, in a copy of her letter which she sent to Henry with a letter to him dated 26th August 1934, she said: "I was never shown them by you" (i.e. Stuart) "*or by anyone else.*" In her letter to Henry she told him not to return any of the papers she was heartily sick of them all *but she did not believe in Guy and Cedric telling Thomson what was not true and she would not ask his advice any more as he believed all they said*. The enclosed documents, in addition to the copy letter already mentioned, gave an account of an interview with Stewart in which she said: "he did not bring the papers relating to the thousand shares instead he brought an application of a thousand shares *signed in my name but not written by me*. I asked him where my brother's signature was, he said it was not needed, he asked me if I had ever seen the application before, I at once said no I never did, he said that was all he could do, he did not produce the letters Sewells said he had. Of course I decided he had not got them *and they were not in existence*. He went away and I have heard no more about them, I feel I have got the better of them and now I do not want to hear any more about them so long as I get the dividend." She also wrote that she had "been to the Titles Office on 6th August and had seen the title of transfer for the first time, the signature supposed to be my own was witnessed by Cedric though Guy said the Clerk of Courts in Colac was the witness, the date of the deed was 16th September 1932. *I was not in Colac on that date* and on that date or any other I never saw the Clerk of Courts."

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After the transactions had been explained to her and Thomson by her nephews, and she and he had seen all the original documents and she had been advised by Thomson that everything was correct, there could be (in a true and not a Gilbertian sense) “no manner of doubt no probable possible shadow of doubt no possible doubt whatever” in the mind of any rational person that the firm had acted properly in all respects in relation to Uncle Henry’s and her affairs, but she was unable to believe the evidence of her own eyes or accept the advice of her solicitor and still persisted in her charges. She thought she had proved her nephews were deceitful finally and conclusively, and so could bury the whole matter as she had got the better of them. But she was unable to do so. Her morbid fancies would not be repressed. She repeated all the charges to Cedric when they met at Christmas 1934, by which time her suspicions had so poisoned her affections that she showed strong personal antipathy towards him, and subsequently neglected to reply to his letter of 21st January 1935, by which he tried once more to vindicate his firm in her eyes, told her he was forwarding the original letters to an address in Melbourne, where she could inspect them, and sent an authority addressed to the Collector of Imposts authorizing her to inspect the declaration. She does not appear to have inspected the letters, but, as the authority was produced by the Collector of Imposts and she referred to the visit to him in her letter to Thomson of 5th April 1935, she obviously inspected the declaration. Nevertheless in this letter she still adhered to her false belief of what had taken place with respect to the transfer stating that she had seen her signatures on the transfer and on the declaration one witnessed by Cedric Sewell and the other by the Clerk of Courts in Colac a man she had never seen and did not even know his name so that he “could not have witnessed *my* name for it was not written by me & the date of their signature I was not in Colac & my memory is quite clear although I can assure you my memory is quite clear and not as my nephew insinuated. *Now as things have turned out I am writing in self-defence as if my name can be so successfully copied in this case it can be done again.*” Thomson’s polite reply refusing to comment was a plain indication he considered further discussion of her preposterous charges was useless. At the end of 1938 or early in 1939, on the recommendation of her friend the bank manager, she commissioned a handwriting expert named Crofts to inspect her signature to the transfer, which he did; and, although he told her it was certainly hers, he could not shake her belief to the contrary.

There is oral evidence covering the years subsequent to 1934, in addition to that to which I have already specifically referred, to show that the testatrix retained the misconceptions complained of in the particulars to the end. After Christmas 1934 Guy and Cedric found that her dislike had grown so "implacable" that it was hopeless to attempt to heal the breach. About six months before the death of the testatrix, Martha became ill and had to go into a hospital, where she stayed until she died; and the testatrix, as she could not be left alone, entered a convalescent home at Camberwell, where she remained until she contracted pneumonia and died. Her continued animosity to the Sewells was apparent to Miss Stevens, the trained and certificated nurse who owned the home. When a Mr. and Mrs. Sewell called to visit her she refused to see them and said on this and other occasions that she had no time for the Sewells, "that they had worked in a very underhand way with her." It is unfortunate that Thomson, and Boothby, the solicitor whom she consulted after Thomson had died and who drew her last four testamentary documents, and Martha all predeceased her, and that Guy Sewell, who has since died, was too ill to give evidence at the hearing; and also that no procedure exists by which the will and codicil in suit and all the antecedent wills back to the 5th December 1933 could have been propounded in the alternative, in which case Guy and Cedric would have had to contest them all before they could have claimed an interest sufficient to maintain their caveat (*Baskcomb v. Harrison* (1)). The only issue therefore is whether on the dates on which the will and codicil propounded were executed the testatrix was of sound and disposing mind, memory and understanding. But, in view of the radical changes made in the will of 5th December 1933, it is impossible to deal with this issue adequately without expressing an opinion as to her mental condition between May and December 1933.

It is clear the testatrix was a woman who always enjoyed vigorous bodily health until she contracted the illness from which she died. She was mentally bright and alert but not well educated. She appears to have read a little and could write a fair letter, but her recreations, apart from will-making, were chiefly gardening, walking and motoring during the day and knitting and fancy work at night. Although she was inexperienced in business, she was shrewd and had a good knowledge of her own and her brother's affairs.

It is suggested that as the last survivor of her generation she was so proud of her position as head of the family that she would have been loath to admit that advancing age had impaired any of her

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(1) (1849) 2 Rob. Ecc. 118 [163 E.R. 1262].

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faculties. If therefore she made a mistake in her recollection she would prefer to deny the truth rather than to admit a failure of memory or, as Hamlet said of the players, "After death you were better have a bad epitaph than their ill report while you live." But is it fair to form such an estimate of her character? No doubt she was obstinate in her beliefs, but she appears to have had an upright mind and in many instances showed herself capable of generous actions. She would not, in my opinion, have been so dishonest or ungenerous as to persist in charges against the firm which she knew to be untrue once their gravity had been pointed out, or so ignorant as to believe that she could persuade experienced persons like Thomson or Cummins to accept such palpable lies. Moreover she made several inquiries in the correspondence which tacitly admitted her memory had flaws, but, when the firm refreshed her recollection and she then remembered what had occurred, she accepted an explanation. For instance, in 1929 one of her mortgagors, Mrs. Maddox, had repaid a loan of £600 which had been transferred to her in 1927. She had executed a transfer in 1927 and a discharge in November 1929, but on 18th April 1935 she wrote asking if Mrs. Maddox's money was invested yet and when Cedric reminded her of the facts she was satisfied. It is safer to assume that her character was such that when she could not recollect an event after her memory had been refreshed her faith in its infallibility was sufficient to then cause her honestly to believe it had not taken place. When the 1,000 shares were acquired in the company she was seventy-four years old. Advancing age generally takes toll of some physical or mental attribute, however tough a person's constitution may be, and it has been recognized so often that it affects the faculty of memory that a will made by a person of advanced age is always carefully scrutinized by the court (*Kinleside v. Harrison* (1)). Her inability to recollect the transaction was definite evidence of senile decay of this faculty, and her oblivion with respect to the events relating to the transfer shows how this decay had become acute by 1933. She was unable to believe she had forgotten such a recent event, and the resulting conviction that her signature had been forged increased the rising tide of doubt with respect to the share transaction; and this, coupled with her suspicion that some of her income had disappeared, overwhelmed her reason and caused a flood of irrational distrust and hatred against Guy and Cedric for which there was no possible justification. If she had simply believed they did not need help she might have removed them from the list of beneficiaries, but their removal as executors

(1) (1818) 2 Phill. Ecc. 449, at p. 462 [161 E.R. 1196, at p. 1200].

shows she distrusted them. As Thomson, an experienced observer, said in his letter of 12th December 1933, she was by then “undoubtedly suffering from loss of memory and that being so when she is confronted with certain facts her mind is a blank with regard to them and she disputes their accuracy. I had evidence of this when discussing matters with her here.” If her memory was so defective that she had become incapable of retaining a recollection of the events relating to the acquisition of the shares or the execution of the transfer, so that it had become impossible to displace the illusory beliefs on these matters which had taken possession of her mind, and they were affecting her ability to assess her nephews’ claims upon her bounty in a just manner she would not, on this ground, have had “that sound memory which in testamentary matters is essential to a disposing mind and understanding” (*Re Belliss*; *Polson v. Parrott* (1)). But having regard to her pertinacious adherence to her delusive ideas with respect to her nephews in opposition to such plain evidence of their falsity, the better conclusion is that by December 1933 her mind had become the victim of insane delusions with respect to the matters alleged in the particulars. Her rapid recession from her recognition that the letters were genuine in August 1933 shows the strength of the obsession to the contrary which had by then possessed her mind. The events of 1934, 1935, and the subsequent years demonstrated the further growth of misconceptions which were already well rooted by the end of 1933, and reflected back on earlier acts if they might otherwise have been regarded as equivocal (*Wheeler v. Alderson* (2)). No specialist in mental diseases was called, but the Court can rely on its practical knowledge derived from its own experience; and there are many definitions of an insane delusion in decided cases, several of which are collected in *Mortimer’s Probate Law and Practice*, 2nd ed. (1927), p. 50. It must be remembered, however, that some statements in the older judgments are based on current medical knowledge and that more is known about mental diseases now than then. A modern medical definition appears in *Halsbury’s Laws of England*, 2nd ed., vol. 21, p. 273: “A belief which is not true to fact, which cannot be corrected by an appeal to reason, and which is out of harmony with the individual’s education and surroundings.” In *Derrett v. Hall* (3) where eminent Sydney mental specialists gave evidence, it was defined as a fixed and incorrigible false belief which the victim could not be reasoned out of.

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(1) (1929) 141 L.T. 245.

(2) (1831) 3 Hag. Ecc. 574 [162 E.R. 1268].

(3) Unreported. High Court, 4th February 1942.

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Mr. *Hudson* suggested that if the testatrix had really distrusted Guy and Cedric she would not have left her business with their firm, but anomalies such as this and the fact that her beliefs were disclosed to some persons and not to others are characteristic of the evidence in cases of this nature. Not infrequently a testator who suffers from delusions has a bodily disease and so, because the member of the family who acts as his nurse cannot alleviate his pain, acquires the conviction that she is poisoning or otherwise illtreating him, but he nevertheless continues to accept food and other attentions from the culprit. The testatrix enjoyed such freedom from physical aches and pains that she was spared the torture of conceiving Martha to be her foe, and she became irrational in respect of those who were safeguarding her assets instead of someone who was attending to her person, but the idea of a testamentary revenge, where the delusion does not cause the victim to become violent, seems to be a frequent concomitant of the disease. If she had had a rational fear of her nephews' integrity it is probable that she would have acted differently and taken her business elsewhere.

Mr. *Hudson* pointed out her principal denunciations of the Sewells followed acts on their part which angered her, and in the case of Guy's letter that her pride was wounded by the suggestion that her memory was failing. There is no doubt that in July 1933 she and Bessie had a serious quarrel, and Cedric's tactless remarks about the bank manager in his letters in the second half of 1933 were not calculated to appease her, but her own letter shows that these matters only caused a momentary annoyance. It is also difficult to see why a sane person would have wanted to revive her anger in respect of Guy's letter in 1935 and 1938 after she had herself said in August 1934 she was heartily sick of it. Assuming that the provocation was sufficient to cause her to write deliberate lies to Henry in August 1934, it could hardly provide sufficient inducement for a sane person to make false annotations in documents which she retained in her private possession, to inspect her signature on the transfer and declaration, and to get Crofts to advise her as to its authenticity. In *Prinsep v. Dyce Sombre* (1) the Privy Council said: "Is that memoir the composition of a sane man? Was there any provocation to afford a rational ground for it? But it has been said that the publication of falsehoods will not prove a man to be of unsound mind. A proposition so put may be readily granted; indeed, otherwise, the list of insane persons would be very inconveniently enlarged. *But it is also true that falsehood, as stated by some of the physicians, is a very common accompaniment of insanity, and that*

(1) (1856) 10 Moo. P.C. 232, at p. 297 [14 E.R. 480, at p 504].

declarations of belief in what has no foundation, are one of the most frequent proofs of such insanity."

Mr. *Hudson* contended that, even if the testatrix subsequently became the victim of insane delusions, she still had testamentary capacity in December 1933, so that, as she decided to alter her will at a stage when she was still capable of estimating her nephews' claims upon her bounty, their omission from the subsequent wills should be attributed to an adherence to her previous decision and not to the influence of subsequent delusions. As it appears to me that the delusions and failure of memory did exist in December 1933, this contention becomes immaterial, but, as it was argued strenuously, I shall deal with it shortly. If the delusions only commenced subsequently to 1933, but their existence was established prior to the will of 1940, this would be one of the circumstances on which the respondent could rely to show their existence had not influenced the mind of the testatrix. Supposing she had taken her business away from the firm at the end of 1933, and there had been a complete severance of the relations previously existing between them, it would have carried great weight and might have been decisive. But where there is evidence sufficient to prove that a testator is suffering from an insane delusion which exists at the date of the will and relates to a matter calculated to have an influence upon his judgment in weighing the merits of those who have claims upon his bounty, the onus is on the person who propounds the will to establish affirmatively that it was made by a competent testator. A sound and disposing mind is one which is able to reflect upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty and the power of considering the several claims, and of determining in what proportions the property shall be divided between the claimants (*Burdett v. Thompson* (1)). Such a capacity does not exist where the testator is suffering from a disorder of the mind which "shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties" (*Banks v. Goodfellow* (2)). In *Sivewright v. Sivewright* (3) Viscount *Haldane* made some remarks which suggest that the onus of proving that a will is the product of an insane delusion is on the opponent. As Lord *Watson* in *Hope v. Campbell* (4) appears to have taken the same view it may be that in the case of a trust disposition which is made by deed the law of Scotland is different from the law of England on this point, but I agree with the learned author of *Mortimer's Probate*

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(1) (1873) L.R. 3 P. & D. 73 (note).

(2) (1870) L.R. 5 Q.B., at p. 565.

(3) (1920) S.C. (H.L.) 63.

(4) (1899) A.C. 1.

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Law and Practice, 2nd ed. (1927), p. 55, that Lord *Haldane's* remarks were made in a case where his Lordship had already decided that the belief in question was not an insane delusion and that he could not have intended to assert as a general proposition that where insane delusions are proved to exist the burden of proving that they affected the disposition of property is on those who attack the will. The point discussed in *Jenkins v. Morris* (1) to which his Lordship referred was whether a person who had an insane delusion had the capacity to contract. In *Waring v. Waring* (2) the Privy Council had held, presumably relying on medical views current at the time, that the mind was one and indivisible, so that if a person suffered from an insane delusion upon any subject however remote from the matters he would have to consider in making his will he lacked testamentary capacity. In *Jenkins v. Morris* (1) *Hall* V.C. in the Court below and the Court of Appeal on appeal disagreed with this view, which had not been followed in *Banks v. Goodfellow* (3). It is now recognized that the mere existence of a delusion does not deprive a testatrix of testamentary capacity. As *Langton J.* pointed out in *In the Estate of Bohrmann* (4): "Paranoia . . . is that form of delusional insanity which is entirely consonant with a clear unclouded intelligence on subjects which are unconnected with the delusion." But *Hall* V.C. (5) and *Baggallay* L.J. (6) both expressed the opinion that where there is evidence of a delusion the onus is on the party propounding the will to establish that it did not affect the disposition. In *Waring v. Waring* (7) it was stated that the *onus probandi* is on those setting up any act done or instrument executed after the malady has been established. In *Banks v. Goodfellow* (8) the Court said: "We readily concede that where a delusion has had, as in the case of *Dew v. Clark* (9), or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity." Lord *Atkinson* in his speech in *Sivewright's Case* (10), after agreeing that there was no disorder in the mind of the testator poisoning his affection for his wife, left unanswered the question where the onus of proof lay. He said: "Even if the delusion under which the testator undoubtedly suffered was of a character calculated to affect his testamentary dispositions to his wife's prejudice, of which I have some doubt, there is not only an entire absence of

(1) (1880) 14 Ch. D. 674.

(2) (1848) 6 Moo. P.C. 341 [13 E.R. 715].

(3) (1870) L.R. 5 Q.B. 549.

(4) (1938) 1 All E.R. 271, at p. 277.

(5) (1880) 14 Ch. D., at p. 680.

(6) (1880) 14 Ch. D., at p. 685.

(7) (1848) 6 Moo. P.C., at p. 369 [13 E.R., at p. 725].

(8) (1870) L.R. 5 Q.B., at p. 561.

(9) (1826) 3 Add. 79 [162 E.R. 410].

(10) (1920) S.C. (H.L.) 63.

evidence to show that it in fact did so act, *but, in my view, the reasonable inference to be drawn from all the facts proved is that it did not do so*" (1). Usually the evidence is such that the question upon whom the onus of proof lies is immaterial, but it is clear to my mind that, although proof that the will was properly executed is prima facie evidence of testamentary capacity, where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, then the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it (*Mortimer's Probate Law and Practice*, 2nd ed. (1927), pp. 53-55; *Sutton v. Sadler* (2); *Landers v. Landers* (3); *Bailey v. Bailey* (4); *Timbury v. Coffee* (5); *Derrett v. Hall* (6)).

But in the present case the evidence is sufficient, in my opinion, to prove affirmatively that at all material times the testatrix was convinced her morbid fancies referred to in the particulars were realities, whether this was due to failure of memory or a paranoiac condition is immaterial, so that probate of the will and codicil propounded should be refused, and the appeal therefore allowed.

Appeal allowed. Order absolute set aside except as to costs and order nisi discharged. Costs of appeal of appellants and respondents to be paid out of the estate.

Solicitor for the appellants, *Colin C. Bugg*, Colac, by *Harwood & Pincott*.

Solicitor for the respondent, *Allan E. Willox*.

J. B.

(1) (1920) S.C. (H.L.), at p. 66.

(2) (1857) 3 C.B. (N.S.) 87 [140 E.R. 671].

(3) (1914) 19 C.L.R. 222, at pp. 235, 236.

(4) (1924) 34 C.L.R. 558.

(5) *Ante*, p. 277.

(6) Unreported. High Court, 4th February 1942.

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