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to the conclusion, after a dreadful incident of a most extraordinary description on 13th August 1948, that she would be incapable of enduring such conduct any longer and to have determined finally, and I think conclusively, that the relationship between them had to end. The only thing that appears to be remarkable to me is that she did not come to that conclusion years before.

However, in questions of constructive desertion it is necesssary to remember that the desertion depends on a factum and an animus, to use the terms which are now more fashionable than English words. The factum means the physical separation and the animus the intention of the deserting party. The physical separation in this case must probably be regarded as her act in the end, although on 13th August, it was he who actually separated himself from her.

The question then is his intention. Now this was a subject with which the Court dealt quite recently in the case of *Baily* v. *Baily* (1). The Court consisted of *Webb* and *Fullagar* JJ. and myself. After a great deal of consideration we formulated what we thought was the conclusion which the cases in this Court, in common with the cases in the United Kingdom and those in the various States of Australia, established and it was formulated in very brief terms: "The cases seem to show that what must be proved is either an actual intention to bring about a rupture of the matrimonial relation, or an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture" (2). *Lowe* J. found without any hesitation that there was in this case an intention to persist in a course of conduct which any reasonable person would regard as calculated to bring about such a rupture. It is suggested, however, that such a formulation of the criterion is inconsistent with that which the Court of Appeal has recently expressed in the case of *Bartholomew* v. *Bartholomew* (3). I am by no means prepared to concede that there is such an inconsistency. The two ways of expressing the test are not likely to produce any difference in practical result. Here what the facts suggest is a very general intention to persist in a course of conduct completely inconsistent with the maintenance of any matrimonial relationship. And as pointed out in the course of argument, it is not easy to draw a line between an intention to destroy a thing and an intention to take a course completely inconsistent with its existence. Actually the argument advanced in the present case is that the appellant, the respondent in the suit, never desired that his wife should leave

(1) (1952) 86 C.L.R. 424.
(2) (1952) 86 C.L.R., at pp. 426, 427.
(3) (1952) 2 All E.R. 1035.

him, but that he was to a great extent the victim of his own nature and of his own temperament and that his actions were not accompanied by an intention that she should cease to remain on the footing of a wife with him and that the matrimonial relationship should be completely destroyed. That argument appears to me to overlook the fact that his own states of mind were not constant, that, when he was exhibiting these temperamental states, which were all too frequent, and perhaps were less "temperamental" than was represented, he was full of animosity against his wife and full of an intention to cause her pain, do her harm and make her condition as a wife completely intolerable. It may be that, when they passed, or after there had been a reconciliation, the intention also passed. But it quickly arose again. It appears to me to be useless to present this case as one in which an intention of destroying the matrimonial relationship was always absent from his mind. The case to my mind is completely described by the language used by *Isaacs* and *Rich* JJ. in *Bain* v. *Bain* (1). Their Honours said:—"A man may intend to retain his wife's presence, but also at the same time to pursue a certain line of conduct. If at all hazards he deliberately pursues that line of conduct, his intention to retain his wife's presence is conditional on or subservient to the other intention. If his conduct is such that his wife, as a natural or necessary consequence, is morally coerced into withdrawing, it cannot be said with any truth that the husband intends her to remain. He knows in that case that the result of his deliberate act will be and is his wife's withdrawal, and, therefore, in every real sense he intends that withdrawal."

To my mind the facts show that on countless occasions he must have been in the state of mind of knowing that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would. However, he was able time after time to regain a certain amount of her womanly confidence and womanly sympathy. As a result there was no final separation until at last she felt it inevitable.

The second answer made in this case by the appellant is that she has refused offers of reconciliation, that is offers to terminate the separation. To anybody experienced in cases of this description it should be plain that the history of this marriage shows that it would be practically hopeless to expect sustained and continual reformation on the part of the husband. Indeed his case is that he acted in accordance with the temperamental and uncontrollable factors of his nature. That he would resume his behaviour of the

(1) (1923) 33 C.L.R. 317, at p. 325.

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past is to my mind almost as clear as anything resting in prophecy can be. She acted on that view in refusing these offers. They were offers which one could hardly believe to be completely sincere. At all events she knew that the implications of the offers would never be fulfilled. It is important to observe that they did not contain any express statement of repentance, or contrition, or promise of reform. The most that can be said is that she refused to entertain overtures which no reasonable person could regard as in any degree likely to lead to a tolerable matrimonial life. In my opinion her refusals were entirely reasonable and proper and the desertion which commenced was not terminated by any offer made by her husband. I am therefore of opinion that the appeal should be dismissed with costs.

FULLAGAR J.: I entirely agree.

KITTO J.: I agree.

Appeal dismissed with costs.

Solicitor for the appellant: *A. C. McLean.*
Solicitors for the respondent: *Rodda, Ballard & Vroland.*

R. D. B.

[HIGH COURT OF AUSTRALIA.]

WORTH . . . . . APPELLANT;
PLAINTIFF,

AND

CLASOHM AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 17, 19, 22.

SYDNEY, *Dec.* 11.

Dixon C.J., Webb and Kitto JJ.

Will—Testamentary capacity—Soundness of mind, memory and understanding—Testatrix alleged to suffer from senile degeneration and delusion as to food poisoning—Will prepared by nephew of testatrix, a solicitor—Residue of estate left to nephew—Testatrix examined by doctor and advised by another solicitor before execution of will—Validity of will.

In cases where a doubt has been raised as to the evidence of testamentary capacity at the relevant time, there rests upon the person propounding the will the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. In such a case the criminal standard of proof has no place, and the person propounding is not required to answer the doubt by proof to the point of complete demonstration or by proof beyond a reasonable doubt. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence; but that examination having been made, a residual doubt is not enough to defeat a claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind memory and understanding at the time of its execution.

APPEAL from the Supreme Court of South Australia.

The plaintiff, Frank Lindsey Worth, claimed to be the residuary legatee named in the will dated 14th December 1949 of Mary Jane Worth deceased, who died on 29th August 1950, and to have the will established. The defendants, William Clasohm and Henry Clasohm, brothers of the deceased and persons entitled to share in her estate in the event of an intestacy, alleged that the will was not duly executed according to the provisions of the *Wills Act*

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1936-1940 (S.A.), and that the deceased, at the time when the will purported to have been executed, was not of sound mind, memory and understanding. They counterclaimed that the court should pronounce against the will propounded by the plaintiff, declare that the deceased died intestate, and grant letters of administration of her estate to such person as the court should deem fit. The facts are stated in the judgment of the Court hereunder.

The trial judge, having found that the testatrix was suffering from senile degeneration and was subject to the delusions mentioned, held that the plaintiff had not discharged the onus which he assumed by propounding the will, and he accordingly dismissed the action.

From this decision the plaintiff appealed to the High Court.

H. G. Alderman Q.C. (with him *V. R. Millhouse*), for the appellant. The trial judge misapplied the law as to onus of proof. This testatrix was a person who was not generally insane but had a form of mental defect (if she had any mental defect at all) which was transient only. The onus was on the defendants to prove that the defect existed at the relevant time. There was strong evidence to the effect that the testatrix was capable of transacting business and possessed testamentary capacity. This evidence put on the defendants the shifting onus of proving that this apparently capable testatrix was under an irrational prejudice that would have affected her testamentary dispositions. It is only if that shifting onus is so discharged as to make the evidence evenly balanced that the question of general onus of proof arises (*Robins* v. *National Trust Co. Ltd.* (1)). The trial judge found no irrational prejudice at the time of the making of the will. He merely had a suspicion that an irrational prejudice that had existed earlier might still have been affecting the testatrix's mind. The evidence establishes no more than that the testatrix suffered at times from transitory senile delirium. [He referred also to *Battan Singh* v. *Amirchand* (2) and *Bull* v. *Fulton* (3)].

H. Homburg (with him *R. Homburg*), for the respondents. The decision was based entirely upon the facts and should not be disturbed by an appellate court. The plaintiff is faced by two difficulties, (1) the delusions of the testatrix; and (2) the fact that he was a large beneficiary under a will made by himself. No real reason existed for such a gift to him. The relationship of solicitor and client continued between the plaintiff and the testatrix

(1) (1927) A.C. 515, at p. 520.
(2) (1948) A.C. 161.
(3) (1942) 66 C.L.R. 295, at p. 339

throughout. It was for the plaintiff to show that there was no justification for suspicion (*Finny* v. *Govett* (1); *Tyrrell* v. *Painton* (2)). The testatrix did not have adequate independent advice (*Powell* v. *Powell* (3); *Wright* v. *Carter* (4); *Morgan* v. *Minett* (5)).

H. G. Alderman Q.C., in reply.

Cur. adv. vult.

Dec. 11.

THE COURT delivered the following written judgment :—

One Mary Jane Worth, a widow, died on 29th August 1950 at the age of eighty-six. She had executed a document purporting to be her last will on 14th December 1949. The present appellant, being named in that document as the residuary devisee and legatee, brought an action in the Supreme Court of South Australia to have its validity as a will established. The defendants in the action, the respondents to this appeal, are brothers of the deceased and were sued as having entered a caveat and as being two of the persons entitled to share in the deceased's estate in the event of her intestacy.

The defendants put the plaintiff to the proof of due execution of the document he propounded, and they alleged that at the time of the purported execution of the document the deceased was not of sound mind, memory and understanding. By a counterclaim they asked that the court should pronounce against the will, hold that the deceased died intestate, and should grant letters of administration to such person as it should deem fit.

The action was tried by *Reed* J. Due execution of the document as a will was proved, and the contest was confined to the issue of testamentary capacity. The learned judge found that at the date of the will the deceased, who may be called the testatrix, was suffering from senile degeneration and was subject to two delusions. One delusion was that people were stealing her possessions, but his Honour seems to have put this delusion on one side as having had no bearing upon her testamentary dispositions. The other delusion was that her food was being poisoned by certain relatives with whom she was living, and this delusion the learned judge thought was calculated to affect the mind of the testatrix in the matter of her dispositions. His Honour considered that, having regard to the course of a series of dispositions which she made over a period of some months before the date of the will propounded, a suspicion

(1) (1908) 25 T.L.R. 186.
(2) (1894) P. 151.
(3) (1900) 1 Ch. 243.
(4) (1903) 1 Ch. 27.
(5) (1877) 6 Ch. D. 638.

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arose that her mind was affected by this delusion; and, feeling unable to say that the plaintiff had satisfied him judicially that the will was that a of a free and capable testatrix, he dismissed the action. From his decision the plaintiff now appeals.

The document propounded was drawn by the plaintiff himself. He is a solicitor and a nephew of the deceased. The learned judge recognized that the circumstances were such as ought to excite the suspicion of the court, and that he ought not to pronounce in favour of the document unless a vigilant and zealous examination of the evidence satisfied him judicially that it expressed the true will of the deceased. But he came to the conclusion, upon ample evidence, that the plaintiff had removed any suspicion arising from his having prepared the will, and no reason has been shown why we should take a different view.

The document contained nothing on the face of it to cast doubt upon the mental capacity of the testatrix. It was in formal shape as befitted a will drawn by a solicitor. It appointed a trustee company sole executor and trustee, and it devised and bequeathed to the trustee the whole of the deceased's real and personal estate. In that description all real and personal property of which the deceased had power to dispose by will was expressly included, and this was important because the testatrix had a general power of appointment under the will of one Schwanefeldt deceased. Subject to the payment of debts, funeral and testamentary expenses the balance of the estate then remaining was to be possessed upon trust as to several pecuniary amounts for certain named relatives and others, and as to the residue for the plaintiff for his own use and benefit absolutely. Finally the testatrix expressed a wish that her remains should be interred in a specified cemetery. The document contained the usual attestation clause, and it was subscribed by two witnesses, both of whom were solicitors.

There was nothing in the manner in which the will treated the members of the testatrix's family to arouse any suspicion of mental incapacity. Her husband had died in 1936, and she had no issue. Those who would have been her next-of-kin in the event of her intestacy were two brothers, a sister (Mrs. Ida Swanston), six nephews, and a niece (Mrs. Dugan). The sister received a legacy of £500, which in the event of her predeceasing the testatrix was given over to a nephew A. G. Bennecke. Four other nephews were given legacies of £500 each, and the sixth (the plaintiff) was made the residuary legatee. Two friends, Olga Chaplin and Minnie Vickers, were also given £500 each. Of those whom the testatrix might have been expected to consider in making her dispositions,

only the two brothers and the niece (Mrs. Dugan) were omitted. As *Reed* J. pointed out in his reasons for judgment, the two brothers, who are the defendants, have not suggested that there was any reason why they should have received any benefit from the will. The niece, Mrs. Dugan, was apparently the mistress of the household in which the testatrix was living at the date of the will, but it seems clear that the relations between the two women were somewhat strained. Mrs. Dugan herself said in the box that in the last two years she and the testatrix had clashed very considerably and that she got very tired of the testatrix, whom she described as an opinionated woman and a nuisance about the place. The plaintiff and his two brothers had no particular claim upon the testatrix's bounty; they were only relatives of the deceased's husband, and the testatrix had had little to do with the plaintiff and apparently nothing to do with his brothers. She never gave any satisfactory explanation of her generosity to them, but fobbed off questions on the point with obviously inadequate answers. It may be, as was suggested in argument, that the testatrix had inherited her property from her husband and felt it appropriate to give a substantial portion of it to his nephews. But that is speculation. All that can be said is that there is nothing in the dispositions of the will which in itself should give rise to any doubt about the testatrix's soundness of mind.

The dispositions to which the learned judge referred as having extended over several months consisted of four wills, of which the document propounded in the action was the last. The other three were executed on 24th February 1949, 2nd March 1949 and 13th October 1949 respectively. The first two of these wills were prepared by a solicitor, Mr. S. W. Jeffries, who had known for many years a sister of the testatrix Mrs. Chaplin, and also knew Mrs. Chaplin's two sons. The testatrix produced to Mr. Jeffries a copy of a will she had made ten years before and instructed him to prepare a new will leaving everything to one of her Chaplin nephews, H. L. Chaplin, explaining that she was omitting the other, Alfred, because he had told her to leave everything to his brother lest his pension should be imperilled. This was quite a rational explanation, as Alfred was in fact a pensioner. She told Mr. Jeffries, without reference to any documents, and apparently correctly, what her investments were, and gave him the impression of being alert mentally and in full possession of her faculties. The will was prepared and her execution of it was witnessed by Mr. Jeffries and his typiste. Six days later the testatrix came in again and told him she wanted to alter the will to leave legacies

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of £1,000 to her sister Mrs. Swanston, £500 to Minnie Vickers (whom Mr. Jeffries erroneously called her sister), £500 to the nephew Bennecke, and the residue to H. L. Chaplin. The second will was accordingly prepared, carrying out these instructions, and again Mr. Jeffries and his typiste were the witnesses. Although Mr. Jeffries noticed that she was untidily dressed, slovenly, and not a model of cleanliness, he again thought the testatrix was in full possession of her mental faculties and knew exactly what she was doing. The second will she allowed to stand for eight months. Then, on 13th October 1949, she executed the third will of the series. It was prepared, apparently, by Mr. Homburg senior, of the firm of solicitors who acted for the defendants in the action and on this appeal, but the only information concerning it is contained in the plaintiff's affidavit of scripts which mentions a copy of it. By that will the testatrix gave £500 each to her nephews, Bennecke, H. L. Chaplin and Alfred Chaplin, and to Olga Chaplin, and £25 to Mrs. Dugan. The residue she left to the Adelaide Hospital. It is a fair inference that she appeared mentally normal in the office of these solicitors, for they not only accepted her instructions and allowed her to execute the will, but one of the Homburgs witnessed it and the other was named in it as executor and trustee. Neither they nor anyone else from their office went into the witness box at the trial.

After the lapse of another month, the testatrix repaired to the plaintiff and instructed him to prepare a still further will. She discussed her affairs intelligently with him, told him of the Homburg will and said she wanted to leave £500 each to H. L. Chaplin, Alfred Chaplin and their aunt Olga Chaplin and the residue to the plaintiff himself. The plaintiff obtained her written authority to receive her papers from Mr. Homburg and he set about endeavouring to do so. It was then for the first time that a suggestion of a possible lack of testamentary capacity was made, and it came from Mr. Homburg. What foundation he had for the suggestion the court was not informed. If he had been in a position to give the court material assistance as a witness, it is fair to assume that he would have done so. Several attempts by the plaintiff to get the papers from Mr. Homburg elicited no more than a statement that he was not satisfied as to the testatrix's sanity, and a suggestion that the plaintiff should ring Dr. Goode. He rang Dr. Goode, and his account of the conversation was as follows:—"I told him my name and said 'I'm acting for a Mrs. Mary Jane Worth, who has asked me to make a will for her. I have seen Mr. Homburg in connection with the matter, and he will not hand over some

papers belonging to her on the ground that she is not capable of properly instructing us, and that Mr. Homburg suggested that I ring you'. Dr. Goode said 'Well, I know Mrs. Worth, I have attended her off and on for some time, and in my opinion she is not mentally capable of making a will, she has been queer for two or three years, she is under-nourished and she has a delusion in that she thinks her food is being poisoned, and she suffers from this delusion'. I said 'Do you agree that she is capable of discussing her affairs intelligently?' and he said 'Yes'. I said 'I don't know much about this sort of thing but does the question of lucid intervals come into the matter at all?'. He said 'Yes'. That was all that was said".

The plaintiff then got the testatrix into his office. He suggested that because of her age she should see a specialist, and, upon her saying that she would see a Dr. Verco, he handed her a note to give to Dr. Verco stating: "Mrs. Mary Jane Worth has instructed us to prepare her will. From information received it appears that Mrs. Worth who is 86 years of age may not be in a fit state of health properly to instruct us. A report regarding Mrs. Worth's testamentary capacity may be forwarded to us". A perfectly intelligent conversation ensued, according to the plaintiff's evidence, as to whether she really wanted to leave her residuary estate to him, and he said she should see another solicitor before making the will. About 1st December the plaintiff received by post a certificate from a Dr. Erichsen (whom the testatrix had told the plaintiff she had seen in the absence of Dr. Verco) stating that he had examined Mrs. Worth and that in spite of her age he considered that she was mentally alert and that her testamentary capacity was good. A fortnight later, on 14th December, the testatrix called on the plaintiff and said she would like to make some additions to the will which by then the plaintiff had prepared. He then called in another solicitor, a Mr. Hunter, who practised in the same building, and left them alone. According to Mr. Hunter's evidence, the testatrix answered quite rationally all the questions he asked her, which concerned the amount of her property and the extent of the benefits she was giving. She named the additional legatees to whom she wished to give £500 each. Having seen nothing to suggest that her mental capacity was not normal, he told the plaintiff of the alterations to be made in the will and left him to have them made. The plaintiff says that he then had the will re-engrossed, but when he read it over to the testatrix she pointed out that Mrs. Swanston's name was mis-spelt and that Mrs. Vickers had been omitted. The document was re-engrossed

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once more with the corrections made. Later in the day Mr. Hunter saw the testatrix again in the plaintiff's office for about fifteen minutes, during which he went through the newly-typed will, explained it to her, item by item, and witnessed her execution of it. The plaintiff's partner, Mr. Mills, was the other witness. Both Mr. Hunter and Mr. Mills satisfied themselves that the testatrix was fully aware of what she was doing. Mr. Hunter said in chief that he had no doubts at all as to her testamentary capacity, and his evidence was not cut down in cross-examination. Mr. Mills said that he saw nothing in her manner or appearance or demeanour to suggest that she did not know what she was doing ; and he was not cross-examined at all.

The reason for reviewing first the course of events connected with the execution by the testatrix of her four wills of 1949 is that in those events the learned judge found some cause for suspicion that the mind of the testatrix was affected by a delusion, from which other evidence led him to conclude that she suffered, that the Chaplin brothers and Mrs. Dugan were poisoning her food. It will be necessary now to consider what evidence there was to show that the testatrix in fact suffered from such a delusion ; but before doing so it must be remarked that there is not, in the events that occurred or in the provisions of any of the wills, a single circumstance of suspicion, except the remarks of Mr. Homburg which must be put aside because he did not support them in the box, and the statement made to the plaintiff by Dr. Goode whose evidence will be considered in a moment. It could hardly be that the learned judge regarded as significant the omission of Mrs. Dugan from three of the wills and the smallness of the legacy given to her in the other. The fact that she was given a legacy at all is hardly consistent with the notion that the testatrix had a delusion that Mrs. Dugan and her brothers were poisoning her food ; and still more important in this connection are the facts that one of her brothers was the sole beneficiary in the first will and the residuary legatee in the second, and both of them were given legacies of £500 in the remaining two wills. These facts, and the complete absence of any evidence that the testatrix, in discussing her testamentary intentions with her various advisers, ever referred to a belief that her food was being poisoned, or expressed any antipathy to the Chaplins or Mrs. Dugan, or said or did anything suggestive of abnormality, tend strongly to support the plaintiff's case.

It is necessary now to turn to the evidence other than that which relates directly to the testamentary activities of the testatrix,

in order to see what there is to suggest the absence of a sound disposing mind at the date of the will. Three witnesses gave evidence for the defendants. One of them, the defendant William Clasohm, described the testatrix as dilapidated and dressed in rags a month before she died. He saw her two or three times a year, but she never discussed her property beyond saying that some people, whom she did not name, were stealing from her and that her clothes and a lot of crockery were stolen from her. If you discussed her business with her, he said, " she seemed to be huffy and knocked you back ". He deposed to a history of insanity in the family, but apart from what he said concerning the allegations of stealing—and they are too nebulous to be given much weight—his evidence does not suggest that the testatrix was mentally affected in any degree. The case for the defendants depends substantially upon the evidence of their other witnesses, Mrs. Dugan and Dr. Goode.

The learned judge thought that there was sufficient in the evidence of these two witnesses to lead to the conclusion that for some years prior to her death the testatrix was suffering from senile degeneration. Nevertheless he made no finding of a general state of insanity. His decision against the validity of the will was based solely upon his view that, with the aid of corroboration from Dr. Goode, Mrs. Dugan's evidence should be accepted as material on which to find that from the beginning of the year 1946 onwards the testatrix suffered from insane delusions to the effect that some unknown person or persons were attempting from time to time to steal her belongings, and that medicine prescribed for her by Dr. Goode and food prepared for her by the Chaplin family (which would include Mrs. Dugan) were poisoned. Mrs. Dugan deposed to repeated assertions by the testatrix that people were stealing her belongings, but she did not say that the testatrix ever suggested that the medicine prescribed by Dr. Goode, or any medicine, was poisoned. In relation to food being poisoned by her, her evidence was not by any means self-consistent. In giving evidence in chief she said: " She (the testatrix) would not eat at different times—she would not say it was poison, but she would say she could not eat that because it wasn't right. That happened quite often, sometimes once and sometimes twice a week while she was living with me at Clapham ". This she said towards the end of the first day on which she gave evidence. On the next day, almost at the end of her evidence in chief, she said, " She (the testatrix) was getting feeble and got very irritable, and got so that she would not eat the food I cooked. She said to me that she would not take some porridge one morning,

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as she thought I had poisoned it for her. That happened several times in the last twelve months". In cross-examination she said first that the testatrix told her "at least a dozen times" that she was poisoning her. Then she said the allegations commenced about 1947 and went on till about the middle of 1950. She contradicted her evidence of the previous day by saying that on the occasion to which she was then referring the testatrix "said outright that it was poisoned", and explained her previous contrary statement by saying "I suppose that's the way I put it". Finally she said: "Every time she would not eat she would say it was poisoned. When I said yesterday that she told me about a dozen times that it was poisoned, I suppose I was a bit worked up". It is quite obvious that from this evidence, no satisfactory conclusion can be drawn as to the frequency of the testatrix's references to poisoning; and, that being so, Mrs. Dugan's evidence as to the frequency with which the testatrix referred to people stealing her belongings must also be treated with reserve. The general picture Mrs. Dugan drew ought, of course, to be borne in mind. It was a picture of an old woman showing increasing signs of age, untidy, wanting in personal cleanliness, given to sleeping with her clothes on, opinionated, irritable, and "with fixed ideas as to what was hers and what she could do with her property". But, apart from recounting the statements of the testatrix about being poisoned and robbed, Mrs. Dugan had nothing to say which would suggest any irrationality or abnormality in the testatrix's mental processes, any failure in her comprehension of business matters, any sign of prejudice against any of her relatives, any prodigality or peculiarity in her handling of money (and she had two savings bank accounts and a fixed deposit when she visited Mr. Homburg) or her dealings with other property (and she had a home which she sold), or any imperfection of memory. And in regard to the question of poisoning Mrs. Dugan did not suggest that poison was ever mentioned by the testatrix except as a reason for refusing food she did not wish to take, or that there was any manifestation of fear on the part of the testatrix, or that she ever complained about poison to anyone (other than Dr. Goode) or sought to get away from the household, or attributed any motives to those who she said were poisoning her, or behaved in any of the ways in which a person who really laboured under a belief that an attempt was being made upon her life might be expected to behave.

Considered as a whole, Mrs. Dugan's evidence provides very unsatisfactory support for a case of insane delusions affecting

testamentary capacity. An insane delusion has been defined as " 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 " : Halsbury, *Laws of England* (2nd ed.), vol. 21, p. 273 (note) ; and, again, as " a fixed and incorrigible false belief which the victim could not be reasoned out of ". *Bull* v. *Fulton* (1). So far as appears no one ever tried to reason the testatrix out of the beliefs she is said to have expressed ; and, in any case, when due allowance is made for Mrs. Dugan's proneness to exaggeration it becomes apparent that no conclusion as to the existence of any insane delusion can safely be drawn from her evidence considered by itself. The learned trial judge remarked that she was not reliable in all respects, that she was given to exaggeration in some respects, and that she might have painted a blacker picture than the facts justified. Clearly enough, it was only because Dr. Goode's evidence provided some degree of corroboration that his Honour felt at the end of the case a sufficient doubt to refuse probate of the will.

Dr. Goode's evidence must therefore be carefully considered. He is a general practitioner, with no special qualifications in mental disorders. He had attended the testatrix at odd times over a long period of years. It was in January 1946 that he first considered her to be mentally affected. Her mental condition then, he thought, was very poor. He saw her professionally on a number of occasions afterwards, the last being on 23rd October 1948. On each of these occasions it seems that he was summoned because of some physical illness from which she was suffering. In January 1946 she had an ulcerated leg. The doctor saw her in her house, where she was living by herself. " She kept on repeating herself ", he said, " and talking incoherently ", and she told him that his medicine was poisoning her. She would not eat properly, because, she said, Mrs. Chaplin's family were poisoning her. Dr. Goode thought her mental condition so bad that she was incapable of looking after herself and should be taken to the home of her sister Mrs. Chaplin. (Mrs. Chaplin was an invalid and died in 1948. It was Mrs. Dugan who managed the home.) She did go to that home, but after a fortnight, having recovered sufficiently from her illness, she returned to her own home and looked after herself for another fourteen months. This the doctor did not know until he was in the witness box, and then he was " terribly surprised " to learn it. In 1948 he saw the testatrix on a number of occasions, but he referred specifically to only two of them, 17th August 1948

(1) (1942) 66 C.L.R. 295, at p. 339.

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and 23rd October 1948, when she was apparently suffering from bronchitis. In chief he did not suggest that on either of the last-mentioned dates she said anything about the poisoning either of medicines or of food, but in cross-examination he mentioned poisoning in relation to 17th August 1948. He gave a general description of dirtiness and unkempt appearance, and he mentioned an unfounded complaint she made on 23rd October 1948 of her nephew having blinded her with a stick. (No one else testified to any such complaint.) He considered that she was suffering from senile degeneration, and that " her mental state was very bad ", but gave no clear reasons for this opinion. He gave evidence in rather vague terms as to cases of senility being sometimes worse and sometimes better. He thought she would have been at least as ill mentally in 1949, and said that if she did business in that year she would not necessarily appear to be insane to the person with whom she did business, as she might have had lucid intervals.

Dr. Goode did not profess to have made any efforts to test the testatrix for her capacity to understand business matters or to weigh rationally considerations of the kind which are material in deciding upon testamentary dispositions. The trial judge did not find in Dr. Goode's evidence anything more than corroboration of Mrs. Dugan's evidence as to delusions ; and it was only the delusion concerning the poisoning of food that he treated as material. Yet Dr. Goode's evidence about that delusion was almost confined to the year 1946. As has been pointed out, he referred to it only once in relation to 1948, and then only casually, in cross-examination. So far as appears, he never attempted to reason with her on the subject of the poisoning of her food or medicines, and he gave no evidence suggesting inability on her part to hold a rational discussion on any subject, or any hostility or even antipathy to any of her relations. Moreover, Dr. Goode was a witness whose accuracy of recollection was open to serious doubt. He said definitely that the plaintiff came to see him in his rooms to make his inquiries about the testatrix, and he gave a circumstantial account of a conversation between them there. In court he pointed, though with hesitation, to Mr. Mills as the man who visited him on that occasion. Both the plaintiff and Mr. Mills denied ever having been to Dr. Goode's rooms, and the judge was of opinion that there was no visit by the plaintiff, and that Dr. Goode had made an honest mistake in thinking that there was. Dr. Goode's evidence, therefore, provides unimpressive support for Mrs. Dugan's story that the testatrix often spoke of poisoning after 1946 ; and when it is remembered that in 1946, according to the doctor, it