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IN THE HIGH COURT OF AUSTRALIA.

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**ORIGINAL**

.....DERRETT.....

V.

.....HALL AND ANOTHER.....

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**REASONS FOR JUDGMENT.**

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No. 34 of 1941

*Judgment delivered at* .....SYDNEY.....

*on* .....4th February, 1942.....

ORDER:

Appeal allowed. Order of the Court below discharged, and in lieu thereof, order that the suit be dismissed. Costs of plaintiffs and defendant of the hearing in the Court below and of this appeal, those of the plaintiffs as between solicitor and client, to be paid out of the residuary estate of the testator.

DERRETT

V.

HALL AND ANOTHER.

JUDGMENT.

RICH, . . . J.

DERRETT

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JUDGMENT.

RICH, . .J.

The order from which this appeal originates was made in a suit brought by the plaintiffs for the purpose of obtaining probate of the will of a testator who died at the age of 74 or thereabouts. The defendant, the testator's eldest child, opposed the grant of probate but His Honour the Probate Judge made the grant whereupon the defendant lodged this appeal. Her attack is not directed against the testator's general capacity but against his testamentary competency on the ground that his mentality had been affected by the insane belief that he was the victim of her persecution to such an extent that he was unable properly to weigh her claims to his bounty. The judgment of my brother Williams which I have had the advantage of reading, contains a summary of the evidence in the case and I shall refrain from stuffing the record with recapitulating it. Nothing turns upon <sup>of witnesses</sup> ~~the~~ credibility/or conflict of testimony. We are not interfering in any way with the findings of fact of the learned trial judge. But we are at liberty, and indeed bound, to

draw our own inference from them, Mersey Docks v. Proctor, 1923 A.C. 253, at p. 259. So far as burthen of proof is concerned it is well established that before a will can be pronounced valid, the Court or jury must be able, affirmatively, on a review of the whole evidence, to declare that the testator was of sound mind, memory and understanding, at the time of its execution, Smith v. Tebitt, L.R. 1 P. & D. 398 at p. 436; Landers v. Landers, 19 C.L.R. 222 at pp. 235, 236. The question then is whether this onus has been discharged. Since the appeal was argued I have had the opportunity of re-reading the transcript and of reviewing the evidence and it appears that the evidence of the experienced medical men called by both sides concurs in the conclusion that the testator's state of health was such that it was at least probable that his brain might become obsessed by a completely irrational and incorrigible belief that some person with whom he was brought in frequent contact was tormenting him. In my opinion the facts show conclusively that he did acquire such a belief with regard to the appellant and that the delusion was such as a diseased mind would engender. The testator's brain had undergone a degenerative change which caused con-

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fusion ~~ix~~/a delusional state. This mental weakness was caused by general failure of the circulatory system. The contributory factors were three (a) ~~a~~athero\_sclerosis, which affects the cerebral vessels and results in definite delusions of persecution, (b) aortic aneurysm and (c) deprivation of morphia. At the relevant date the testator was in a paranoiac ~~a~~ state which denotes that the patient has delusions of persecution. They were persistent and incorrigible with regard to the appellant and in the circumstances the testator's judgment was so impaired ~~that~~ he was completely incapable of dealing fairly with the appellant in respect of her claims to benefits under his will.

His Honour considered, as I understand his judgment, that he would not be justified in attributing<sup>a</sup>/delusions to the testator which he kept concealed from his friends with whom he played cards or met socially. This rather suggests that His Honour was regarding the case as one in which the onus of proving the delusion lay on the defendant. However this may be I am satisfied that the inference from the facts is that the testator's mind had become affected in the way the doctors suggested it might.

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Moreover I do not think that the testator did keep his hallucination concealed from his friends. Even if he had done so it would not be inconsistent with the delusional state of <sup>his</sup> ~~his~~/mind. The case falls within the ambit of the well known decision of Banks v. Goodfellow, L.R. 5 Q.B.549 at p.565.

The appeal should be allowed.

DERRETT V HALL AND ANOTHER.

JUDGMENT.

STARKE J.

Appeal against a judgment of the Supreme Court of New South Wales, which declared that the will of George Edward Richardson dated 29th. July 1940 propounded by the executors - the respondents here - should be admitted to probate.

The testator died in August 1940. He owned at the time of his death about 50 acres of farming land sworn of a value of £1833 and some personal estate sworn of a value of £388. He had been a farmer, and had also owned a bullock team. Many years ago, he had divorced his wife. He had three sons and two daughters but seems to have lost touch of them all other than his daughters Gladys Loretta Derrett, the appellant here, and Eileen Myrtle White. He made a number of wills. One in November 1937 directed that £200 be paid to his daughter Myrtle and the balance of his estate be divided between his daughter Gladys and two sons. Another in September 1938 directed that £50 be paid to his daughter Myrtle, £100 to his son Reginald, and the balance of his estate divided between his daughter Gladys and another son. In September of 1939, he directed the expenditure of £50 upon the erection of <sup>that</sup> a tombstone, and/the balance of his estate be divided between his daughters Myrtle and Gladys. By a codicil of June 1940, he directed that a sum of £50 be paid to Stella Howieson, a friend. In July of 1940, the testator made the will propounded and admitted to probate as already mentioned. By this will, he appointed the respondents here executors and trustees of his will, and he gave certain household effects of small value, under £12, to his daughter Gladys, directed the expenditure of £50 upon the erection of a tombstone, gave £50 to his friend Stella Howieson, and the balance of his estate he gave to his daughter Myrtle absolutely.

It was not a just will. Gladys, the elder daughter, had always been in closetouch with, and had done more for the testator than any other member of the family. Myrtle, the



younger daughter, who lived in Queensland, had seen little of and had done practically nothing for him. Some compromise between the sisters would appear to have been desirable, but greed and obstinacy and want of firmness, I should think, on the part of the legal advisers have led to a trial which, in this small estate, lasted no less than eight days, and an appeal which took another ~~two~~ days before this Court.

The will was challenged, not unnaturally perhaps, by the daughter Gladys, on the ground that the testator was not of sound mind memory and understanding when it was made. It was explained at the hearing, said the learned trial judge, that she did not allege that, when the will was made, the testator was not capable of transacting business or of carrying on social intercourse, but that the testator had formed an antipathy to her which was insane or delusional and of such a character that it deprived <sup>him</sup> of that power of considering the claims of his children which he is required by law to possess. The testator was aged from 72 to 74 years at the time of the will. He was in bad health and suffered from an abdominal aneurism of the aorta and degeneration of the arteries. At times he suffered intense pain, from which he could only be relieved by the injection of morphia. Except for a couple of weeks when he was ill in hospital, he resided with his daughter Gladys from April 1940 until the time of his death, and paid her £1 per week for his board. A room was specially prepared for him, and his daughter attended to him and slept in his room at night time for that purpose. Her husband and she conducted a general store and they also accommodated travellers and others in their home.

The testator was apparently a friendly old man who liked to sit in the kitchen to warm himself and talk to the staff. Doubtless he was in the way in the kitchen and impeded the staff in their work. But his daughter was rather firm in handling him

and he resented her actions. Apparently she refused to allow him to sit in the kitchen or have meals with the ~~the~~ staff or to have morning tea and so forth at irregular hours. Another grievance was in connection with a visit to Sydney about the middle of June 1940 which the testator undertook, at his own wish, to consult a specialist. He was not well enough to travel by himself, and his daughter and her husband went with him. The expenditure in connection with his visit was between £50 and £60, including the travelling and living expenses of his daughter and her husband, which latter the testator, unreasonably as I think, regarded as excessive. But above all, his daughter would not inject morphia whenever he desired relief from pain. It was no fault of hers that she did not do so, for the medical instructions which she had received limited her to injections at intervals of four hours. However, her refusal to give an injection when the testator was in intense pain and demanded an injection on the night preceding the making of the will led directly to the will itself.

The story is best told in the words of the daughter herself:-

Q. That brings us somewhere towards the end of June. You told us yesterday you used to give him injections of morphia, at what time of the night? --- It depended how he felt, mostly at 10 o'clock.

Q. Did you have any stated time from the doctor? --- No, I did not give it unless he absolutely needed it.

Q. When would that be? --- About 10 o'clock if it was in the early part. Sometimes he would go through to 3 or 4 o'clock in the morning.

Q. You were sleeping in the same room? --- Yes, all night.

Q. Would you give the morphia to him at different times on different nights? --- Yes.

Q. At that stage how frequently were you giving him morphia during the night? --- Some nights it might have been one dose and some nights two, I would not be sure.

Q. When you gave him two, what space used you leave between the two? --- If he had pain I would go to the four hours, I would not dare give it before.

Q. Why was that? --- Because it was my doctor's instructions to give it at least at four-hour intervals.

Q. During the month of July, did you have any trouble with him over the question of morphia and treatment? --- The night time was worse. He seemed to be fairly well in the day but there were nights when the pain was terrific. Very often I had to give him the two. He used to sit up in bed and hold the pillows like that and breathe like this (demonstrating). He could not get his breath and then he would throw himself over the side and he would say 'For God's sake give me that needle or I will die'. He would hold the top of the bed and lie back with his head on the back of the bed.

Q. From your observation did he appear to be suffering very considerable pain? --- He was suffering excruciating pain.

Q. On those occasions were you always able to give him morphia? --- Not always because he may have had the injections perhaps one hour before and I could not possibly give it to him then.

Q. Used he ask for it or what used to happen? --- He would say 'You give me that bloody needle or I will die'.

Q. Were you able to give it to him? --- If the time was due I would give it to him immediately and immediately I would give it to him he would lie back on his pillows like that (indicating). Maybe it would last five minutes, it might take effect in five minutes and he would get almost instant relief.

Q. If you were not able to give it to him by reason of the

time what used to happen? --- He would abuse me and he would say ~~me~~ I was trying to kill him.

Q. Did he ever use language to you? --- Filthy language.

Q. Had he ever done that previously in his life? --- Never in his life did he use bad language to me or anybody else in my presence, not to women in my presence.

Q. During the daytime he was comparatively freer from pain? --- No, I would not say that.

Q. I said freer? --- Yes.

Q. Where used you keep the morphia and needle? --- In my drawer.

Q. Is this the box (showing witness box)? --- Yes, that is the original box.

Q. You used to keep that in your drawer in your room? ---Yes.

Q. Not this room at all? --- No.

Q. On some occasions did you find your father with the box? --- Why I put the needle away was on one occasion when I was removing it he said 'You leave that b---- needle, it is my property and if I want the needle I can give it to myself'.

Q. Did you find him in your room seeking this? --- On one occasion I found him with the box in his hand and I took it from him. That was late in the evening.

Q. When you did that what happened? --- He told me it was his property and he would take it if he wanted it. I said 'No, Dad, you will not'. I took it from him. Up to then I had not locked it but after that I always locked it.

Q. After that did you find him trying to find where you kept it? --- I locked it in my wardrobe.

Q. After that did you find him near the wardrobe? --- I found him in my room on two other occasions. On one occasion he had my pillows disarranged and my pillows off the top of the bed. I had a medicine chest in my room and the door was open once.

Q. Did you know of any other purpose for him being in your room except in connection with morphia? --- No.

Q. What time did these episodes occur? --- Towards the end of July.

Q. The last week in the month of July how did he suffer and just what happened during those last few nights? --- On the Sunday night, the 28th. July it was the worst night I <sup>had</sup> ~~have~~ ever experienced with him. I gave him an injection about 10 o'clock but I could not settle him down, he was so restless, talked in his sleep, having imaginary conversations with people, and towards the morning, between half-past three and four he said 'You will get me that b---- needle or I will die'. He shouted that and you could have heard him in the street and I got the needle because I knew it was time to give him the needle and when I was getting it ready he said 'You can put two tablets in it, one is no good to me'. I said 'I could not do that'. Each tablet was a quarter grain and he said 'You b----, you would like to see me in that street out there. I will do to you what I did to your b---- mother. You are only a b---- anyway'.

Q. What does the 'B' stand for? --- Bastard. He was holding the side of the bed with his head between his legs.

Q. Did he appear to be in excruciating pain? --- Absolutely.

Q. Had you ever seen him in as bad pain? --- Not up to that night.

Q. You gave him the injection? Yes.

Q. That was in the early hours of the morning? --- Yes, between half-past three and four.

Q. When you gave him the injection was it sufficient for him? --- Yes, it eased him.

Q. After that what happened? --- He had a sleep.

Q. How long did he sleep? --- The next recollection was about half-past six. When I got up out of bed he got up. That was

an unusual thing because he used to get up at 11 o'clock. I used to bring his breakfast in to him.

Q. And give him his early morning medicine in bed? --- Yes.

Q. That was the day for his bowel wash? --- He had that on the Sunday.

Q. He got up the same time as you? --- Yes, half past six.

Q. Previously did you help him dress? --- I always did.

Q. Did you help him that morning? --- No, I got up and went to my room and when I returned he was dressed and he was coming through into the kitchen. I said to him, 'Dad, what is the matter, where are you going?' He said 'I am going to Macksville in the bus.' I said 'Don't do that, I will take you up when Jack is over with the truck'. Jack is my son, He said 'You can mind your own b---- business, if I want to go to Macksville I will go, you are always bossing me but you are not going to boss me any longer, I will fix you my b---- lady'. I went to catch hold of his arm and he said 'You get out of my road or I will knock you ~~down~~'. He made a push at me and I got out of his road - he did not strike me.

Q. Had he ever got like that before? --- No.

Q. What time did he leave your home? --- Twenty or half past eight.

Q. How did he go? --- Up to the local bus.

Q. When did you see him again that day? --- About five o'clock in the afternoon at home.

Q. He came to your place? --- Yes, my husband brought him home."

The testator went to Macksville in the bus to see his solicitor who had prepared his earlier wills. The conversation with the solicitor is thus related by him:-

"Q. Tell His Honour as fully as you recollect the whole of the interview that day - describe his appearance and all you remember as well as what <sup>he said and</sup> <sup>in</sup> you said? A. Yes. He came to my office in the vicinity of half past nine. He was just in a normal mood - I remember he had a top coat on. He was well dressed with a top coat. He said - 'I want to cut my daughter Mrs. Derrett out of my will. She said she did not want my money and she won't get it. But I will give her the furniture - I have some furniture round in the house and she can have that'.

Q. That furniture is only worth a few pounds? A. I do not know. I have not seen it.

Q. Go on? A. I thought that probably they had had a row, and I said to him - "Very well - how in next time you are up and I will have it ready". He said 'No, I want to do it now'. I said, 'Well, it will take some time to type and it would be more convenient for me if you would leave it until you came up some time - I will have it ready and next time you come up you can sign it'. He said 'No, if you have not time to do it I will get a J.P. or somebody else to make the will'. Having in mind that there might have been a row between the two of them, I said - 'Is this a hurried decision?' He said 'No, I intended doing it just after I returned from Sydney when I was in hospital last'. He said 'My daughter gives me a hell of a time down there when she is in her usual bad temper. She and her husband took me down to Sydney when I went down to see a specialist - I wanted to get an account from them of the expenses and I could not get it for a long time - I wanted to square up everything - and eventually I got it'. He was annoyed at some of the items - he said 'They have charged me railway fares, and I do not mind paying my daughter's, but I do not think I should have to pay Sam Derrett's'.

Q. You knew I take it that the occasion he was referring to

was the occasion he went down to Sydney in the previous month of June to consult Dr. Wilfred Evans - the time he was in St. Vincent's Hospital? A. Yes, I knew he was referring to that time. He also said - "They did not come near me except occasionally to ask how I was but they did not stay. They went to the races and parties. Had it not been for my friend at Parramatta - the lady I left the £50 to - I would have had a very quiet time". I then said - "Well, Mrs. Derrett was very good to you while you were in hospital in Macksville, she visited you regularly". He said, 'Yes, but how long did she stay?' I was not really interested in the conversation and I did not ask the details about that. But I saw that he was determined to make this other Will.

Q. You could see he was determined to do it? --- A. Yes.

Q. And you could see also that he believed that he had a grievance against Mrs. Derrett? A. Yes - but I have not finished. He said 'She interferes with all my friends. I stayed at McIlwain's for a number of years and I was very happy there, and they were very good to me, she caused a row with <sup>the</sup> McIlwains and she also tried to make mischief between me and my lady friend at Parramatta, Mrs. Howieson'. I think it was then that I said 'Well, after all she visited you ~~when~~ while you were in the Macksville Hospital'.

I then saw that he was going to make the will and if I did not make it somebody else would, so I said 'Very well, give me a little time and I will prepare it'. He said 'Very well - I came up by the bus and I want to return by the mid-day bus'-that is the bus from Nambucca Heads to Macksville. He said 'I will walk around and see the McIlwains'. I do not remember what time I asked him to come back. However he came back and I read the will over to him and he executed it.

Q. Did he say anything on the occasion when he read it over?



A. Not immediately after reading it over. After he executed it he said - 'I feel that I have done the right thing. My daughter Myrtle has always been a good ~~dear~~ girl - she is married to a laboring man and has nothing and the Derretts are comfortably off."

This is the will propounded by the respondents and challenged by the appellant. Obviously, the old man was angry, unreasonable, and very unjust to the daughter who had done so much for him. But he returned from Macksville to the home of his daughter, and allowed her to attend to him as before, visited his little circle of friends, played cards with them, and carried on quite normally until a week or so before his death, when his physical condition ~~caused~~ compelled him to take to his bed, where he died in August 1940.

It would seem that the testator allowed his anger to overpower his reason and his sense of justice at the time of making his will, but testamentary incapacity is not established by outbursts of ill temper and irritation.

Ira furor brevis est, animum <sup>in</sup>qui nisi paret

Imperat: hunc frenis, hunc tu compesce catena.

However, a number of medical witnesses were called, who differed amongst themselves as to the capacity of the testator at the time he made his will. But I will take the evidence of a specialist in mental diseases. He never saw the testator, and merely expressed opinions upon possibilities put to him. A cardiograph of the vascular system of the testator indicated definitely, he said, an aortic aneurism, which was not syphilitic in origin, and must therefore be regarded as a form of atherosclerosis. He concluded that it was reasonable to assume that the cerebral vessels were also involved. But he denied that the testator was afflicted with paranoia, which he said was a rare condition, and he would not have him as a "paranoid psychopath", a person whom he described as one having a tendency to suspicion,

but he said that the testator might be in a paranoid state, which was a symptom of mental disorder, involving delusions of persecution. "The first expression that one could conclusively say might be a delusion is on 29th. July when he came into the McGrath's home and said that he had fixed her and that she had been trying to poison him". But to the solicitor who made the will and in letters of the testator written early in July and also in August no suggestion was made that his daughter was trying to poison him, though other complaints were made. The specialist saw the point, but suggested that if a person had a delusion he might not express it and added that any definite statements of facts in the letters which were untrue would be an indication of a state of mind that the person was suffering from in relation to the person about whom the belief was expressed.

But why all this conjecture and guesswork, which in itself is far from convincing, when it is clear that the testator was angry with his daughter because she would not give him relief from intense pain which was in her power to give? And, like many another sick person, he was querulous, and magnified his grievances such as they were. But then his language to his daughter was cited. It was disgraceful in any circumstances, but it is the traditional language of bullock drivers. And the testator had been a bullock driver!

In my opinion, unjust though the will of the testator is to his daughter Gladys, the learned trial judge rightly admitted it to probate, and this appeal should be dismissed.

Judgment.

Williams J.

This is an appeal against a judgment of His Honour the Probate Judge of the Supreme Court of New South Wales in a suit in which <sup>the</sup> plaintiffs sought the grant of probate of a will of the testator George Edward Richardson executed on the 29th day of July 1940. He died at Nambucca Heads on 20th August 1940 aged about 74 years leaving an estate of the approximate value of £2,200. The defendant, who opposed the grant, is his eldest daughter. His Honour decided in favour of the plaintiffs and the defendant has appealed to this Court.

The testator had executed at least four previous testamentary documents. On the 22nd November 1937 he made a will by which he gave the sum of £200 and two cottages to his daughter Irene Myrtle White, and directed that the balance of his estate should be divided between the defendant and two of his sons. On the 2nd September 1938 he made a will by which he directed that £50 be paid to Irene Myrtle White, £100 to a son Reginald, and the balance of his estate be divided between the defendant and another son. By a will made on the 4th September 1939 he directed that, after spending £50 on the erection of a tomb stone, the balance of his estate should be divided between the defendant and Irene Myrtle White; and by a codicil made on the 26th June 1940 he directed that a sum of £50 be paid to Stella Howieson and otherwise confirmed this will.

By the will in dispute he appointed the plaintiffs his executors, bequeathed his household furniture and other effects in the home of the defendant worth about £10 to her absolutely, directed the expenditure of a sum not exceeding £50 in the erection of a tomb stone and the payment of a legacy of £50 to Mrs Howieson, and gave the balance of his estate to his daughter Irene Myrtle White.

The testator had divorced his wife about 1910, when the defendant was about 10 years old, the children other than the defendant being three sons and the daughter Irene Myrtle ~~White~~ who subsequently became the wife of Joseph White. The defendant became her father's housekeeper and continued to look after him until she was married in 1917. After she married they kept in close touch and remained on affectionate terms. He used to stay with her frequently; and when he was taken ill in Sydney, on two occasions in 1918 and 1927 res-

pectively, he sent for her and she immediately went to him.

Since 1933 the defendant and her husband have lived at Nambucca Heads, running a business of a combined store and boarding house. In 1936 testator, who in his earlier life had been a bullock driver, but had subsequently worked in Sydney, came to live on part of a small farm which he owned in the district. It was situated about 7 miles away from the defendant's home and was the main asset in his estate at his death. The testator and the defendant continued to visit each other regularly. In 1937 he collapsed on his farm with cardiac trouble and pneumonia and was taken to a private hospital in Macksville. He was in hospital for three weeks during which time she visited him regularly. After he came out of hospital ~~in Macksville~~, he went to live with a Mrs McIlwain in Macksville, and remained there until early in 1938. He then went to Sydney to see a specialist. The defendant accompanied him. He returned to the farm, where he lived, with the exception of a short break, until March 1940 when he again became ill whilst staying with the defendant and was taken to hospital. He was in hospital for six weeks suffering from cardiac trouble, during which time the defendant visited him regularly, generally three times a day. At his own request he left hospital and commenced to live with the defendant; and remained with her, except for a week in May when he was again in hospital, until his death. The defendant moved his furniture including a double bed into a large room at the back of her premises which the testator expressed a wish to occupy. As he required constant attention every night, she and her husband moved their double bed into the same room so that she could nurse him. From the time he came to live with her until his death she looked after him without any skilled assistance. Most of the time she had to give him injections of morphia and provide brandy and milk or rum and milk, very often three times during the night, as he was generally restless between 1 a.m. and 4 a.m., for which purpose she had to keep a small spirit stove in the room. She had to rub his back twice a day, <sup>to</sup> give him medicines and enemas regularly, ~~tender~~ <sup>and to tend to generally</sup> him, as a trained nurse has to do to a patient.

In June 1940 the testator desired to consult a specialist. At his request the defendant and her husband accompanied him to Sydney, and from about the 10th to the 19th of that month he was a patient in St.

Vincent's Hospital under the care of a Macquarie Street physician Dr McCrystal. Dr McCrystal ascertained that he was suffering from athero sclerosis, which is a degeneration of the coats of the blood vessels affecting the larger vessels of the cardiac vascular system, that he had an aneurysm of the aorta which was eroding the spinal vertebrae and pressing upon his ~~nervous system~~ causing intense pain, especially when he was lying in bed which was at first spasmodic, but tended to become constant as the ~~erosion~~<sup>erosion</sup> went on. Dr McCrystal said such an aneurysm causes changes in the blood vessels of the heart, and that it is a fair assumption there would be changes in the blood vessels ~~in~~<sup>of</sup> the brain as well; that the blood vessels are occluded and ~~there~~<sup>their</sup> circulation is blocked, causing softening of the centre of the brain, and that when he saw the testator he showed mental degeneration as he seemed confused in his talks, his co-ordination was rather poor, his mind would wander, and he was somewhat ~~xx~~ ~~xx~~ emotionally unstable. No medical practitioner examined the testator after he left St. Vincent's Hospital, but another physician Dr Collins and a psychiatrist Dr. McGeorge were called to give expert evidence on behalf of the defendant, and a physician Dr S.A. Smith to do so on behalf of the plaintiffs. Dr Smith said that he had found the people who were suffering from heart conditions associated with cardiac vascular disease frequently, although not characteristically, develop<sup>ed</sup> mental instability ranging from a simple delusion on one subject to straight out total mental incapacity, and that they frequently developed an unreasonable antipathy against the person who was nursing them. Dr Collins said that in his experience all the arteries of the body share~~ing~~ in the degeneration including the cerebral arteries, and that patients in the closing stages of heart disease very frequently develop mental disorders. Dr McGeorge said that one of the few things in which psychiatrists had reached some agreement is that changes in cerebral vessels do give rise to various symptoms ~~xxxxxx~~ including delusions.

The evidence ~~shows~~<sup>who</sup> that the testator was a good natured man, moderate in his language, /was not accustomed to swear in the presence of women. Prior to his visit to Sydney the defendant used to write all his correspondence for him, she had the custody of his keys, and they used to sing together and generally to enjoy each other's company.

After he returned from Sydney his affection for his daughter changed completely. She said that he seemed absolutely to hate her and his conduct caused her acute distress. The evidence which his Honour accepted shows that she continued to attend to him at all times with filial devotion, but he commenced to refer to her as a bloody bitch and a bastard, and, in other immoderate language, to slander and vilify her character, and to believe that she was trying to poison him, rob him, spy on him and generally to illtreat and neglect him so as, to quote his own words to the solicitor when he was giving instructions for the will, "to give him a hell of a time". He imagined that the morphia, because it relieved his pain and gave him a feeling of euphoria of well being, was <sup>c</sup>urative and not merely sedative, and that in withholding injections in amounts and at times beyond those prescribed by the <sup>doctor</sup> Dr. she was killing him. When he was in hospital in Sydney, the defendant visited him regularly three times a day, except on three occasions when he wished to be alone with Mrs Howieson, but after his return he maintained that she had neglected him, and stayed at an extravagant <sup>a</sup> hotel, and had turned the whole trip into a costly jaunt at his expense. He also developed the belief she had paid him scant attention when in hospital at Macksville. The defendant had paid all the expenses of the Sydney trip <sup>so that</sup> and after <sup>they</sup> ~~his~~ return <sup>ed</sup> he asked for an account. In the first instance she gave him an account limited to his own expenses, but he said that was not the right account, what did it cost for all of them? She said the total expenses came to over £50; he said "you are a b. . liar we were only <sup>there</sup> ~~that~~ a week. She said, Dad I don't want any money for my expenses. He said you don't want my dirty money; she said I did not say that, I was only too pleased to take you to see the <sup>doctor</sup> Dr. He said, I did not b. well ask you to take me to Sydney, I could have gone on my own; Stella (that is Mrs Howieson) told me what you were when she told me you were trying to kill me. He never recouped her at all, but in letters to Mrs Howieson and Mrs White he vacillated between assertions he had paid the whole amount £53-14-3, and £48, which he said was the total amount less the Derrett's' hotel expenses, and on other occasions said he had advanced the defendant £10 and given her the proceeds of sale of his boat. On Sunday the 28th July he had the worst night the defendant had ever experienced.

When she refused to give him a double dose of morphia he cursed her, and in the morning got up at the unusually early hour of half past six and told her in expressive language that he was going to Macksville in the bus and would fix her. She said that after that night he had no feeling for her. He would not look her in the face. If he was out of bed he would dodge her. If he saw her coming, he would go the other way.

On the day he executed the will he caught the early bus to Macksville. When he arrived there he called on the chemist to whom he described the defendant as a bloody old bitch, and said that she was trying to kill him. He then went to his solicitor Mr Stone and told him he wanted to make a fresh will in order to cut the defendant out. He said that she gave him a hell of a time when she was in her usual bad temper. He gave the solicitor a garbled account of what had happened with respect to the expenses of the Sydney trip, and said that the defendant and Mr Derrett did not come near him except occasionally to ask how he was, and then did not stay but went to the races and parties; and that, if it had not been for Mrs Howieson, he would have had a very quiet time. He charged the defendant with interfering with all his friends, making mischief, and taking him away from Mrs McIlwain. Mr Stone tried to point out how attentive the defendant had been to him when in hospital at Macksville which he denied, ~~and Mr Stone~~ <sup>He</sup> soon saw the testator would not listen but was determined to make a new will. After he had executed the will, the testator said to Mr Stone as an afterthought that he felt he had done the right thing because Mrs White had been a good girl, she was married to a labouring man and had nothing, whereas the Derretts were comfortably off. Mrs White gave evidence that she was two and a half years old at the time of the divorce. She was then brought up by a Miss Laird and at 15 years of age went to work in a solicitor's office. She was married in 1926 and went to Brisbane, where she had lived ever since. Apart from a visit of three weeks to the defendant in 1940, she had seldom seen the testator and had only received one present of £10. On the same day that he made the will, <sup>totally</sup> he visited Mrs McIlwain and told her he was not satisfied with his treatment, that he ~~had~~ intended to leave his money between

the two daughters, but on account of this treatment he had changed his mind and altered his will, and that, on account of the way they treated him at the Derretts, he was going to leave them very little. He also saw his friends Mr and Mrs McGrath and told them that he had fixed the b. . b. . , that she would get nothing now and he had cut her out of the will because she was bad and had been trying to poison him, <sup>that</sup> ~~that~~ she had been putting water in the needle instead of the dope, <sup>and</sup> ~~that~~ that he believed the needle was doing him good and was going to cure him. On subsequent occasions he told Mr and Mrs McGrath and another friend Mr Barden that she was trying to poison him, that she would not give him his medicine, and that she was a fair bitch, He wrote two letters to his friend Mrs Howieson, dated the 3rd and 10th of August 1940 respectively, abusing the defendant, complaining her treatment was such that when he visited his friends ~~she~~ seemed to be in a different world, and invented <sup>ing</sup> the story that the defendant had told him that Mrs Howieson in the presence of four other persons had said that she was sorry ~~xxxxx~~ he was getting better. On the 10th of August he also wrote a letter to Mrs White informing her he had altered his will so that she would get nearly everything, that the defendant had neglected him in Sydney while Mrs Howieson had looked after him, giving her a completely false account of the ~~dispute~~ about the expenses, stating that the defendant never spoke to him, that she was unfair to him as a sick man, that she was ~~shameless~~ and friendless, that he would rather go to the poor house than be under a compliment to the Derretts, and that he wanted her to believe him " that every word in this letter <sup>is the</sup> ~~was~~ God's truth". It is apparent from Mrs Howieson's letters in reply that she was energetically fanning the flames of his animosity, although she had the impudence to swear that she had always tried to do all ~~that~~ that she could for the defendant and had never attempted to turn the testator against her. It must have been a shock ~~to find that she had helped to oust the defendant,~~ only to make way for a daughter with whom his associations ~~had~~ been so casual.

It is plain ~~that~~ that the defendant's moral claims upon the testator's bounty were at all times outstanding, and that, after the testator had become ill, they were increasing as she continued to board, lodge



and nurse him through his trying illness for the inadequate remuneration<sup>of</sup> £1 per week. Mrs White had hardly crossed the threshold of the testator's life at all and her claims upon his bounty were ~~trifling~~<sup>trifling</sup>. Until the 29th July the testator had shown a consistent testamentary intention to discharge his moral obligations to the defendant. In July, shortly <sup>the</sup> before execution of the will, his previous warm affection was replaced by an intense and persistent hatred induced by an utterly false and completely irrational belief that she was tormenting and persecuting him in <sup>the</sup> various ways already mentioned. His malevolent misdescription of her character and conduct in conversations with his friends and in his letters appears to me to have gone far beyond the diatribes of a querulous patient, however cranky he had become because his nurse would not permit him to have all his own way. He suffered pain chiefly when in bed at night. When he was up and about in the day time he was reasonably free from it, but his animosity to his daughter and his belief that life at her home in a room he had begun to describe as a shed was like living in hell persisted by ~~xi~~ day and night, and manifested itself in his conversations and writings when describing imaginary or flimsy grievances. The eminent medical opinions show the physical disease he suffered from<sup>s</sup> frequently associated with what Dr McGeorge called loosely constructed delusions of fear and suspicion, or, in other words, a paranoaic state. The patient develops an illogical feeling of antagonism and resentment against ~~the~~ person with whom he comes frequently in contact, which causes his judgment to become disordered with respect to that particular person, giving rise to a desire to retaliate and to get even with the persecutor by some means violent or otherwise. As the testator was incapable of physical violence he had to avenge "the oppressor's wrong" by the more subtle method of secretly excluding the defendant from his will so that "when she heard it read she would get the biggest shock of her life". Dr McGeorge said a delusion was an incorrigible false belief, that you cannot argue the patient out of it, he believes it to be true; and Dr Smith said that when there is a degree of fixity in the antipathy so that the patient does not feel a mere momentary antagonism but feels the same every day, it would indicate a change of his mental powers if the feeling was unreasonably<sup>e</sup> and incorrigible. The antipathy to his

daughter which the testator had developed after his return from Sydney was utterly unreasonable, and completely fixed; and, although no one appears to have tried <sup>seriously</sup> to argue him out of ~~them~~ <sup>the</sup> beliefs were based on ~~premises~~ <sup>premises</sup> which were so perceptibly ~~fictitious~~ <sup>distorted or</sup> that his common sense would have rejected them if they had not been incorrigible. His hatred was such as in the words of Dr McGeorge "to cause a complete change in disposition and a <sup>+</sup> definite antagonism and not only a change in disposition but a change in demeanour and behaviour and the use of expressions to which he <sup>had</sup> ~~and~~ apparently never been previously accustomed." And the ~~Dr.~~ <sup>doctor</sup> cannot be accused of exaggeration when he concludes "that suggests some degenerative process ~~had~~ taken place in the brain".

Counsel for the respondents stressed the improbability that the testator would have continued to live with his daughter and allowed her to attend to his wants, though some of his friends were so impressed by his accounts of his agonising existence in the ~~Barrett's~~ <sup>Derrett's</sup> "shed" that they offered to have him in their own homes, if he had really believed he was being poisoned and otherwise ill-treated, but the medical evidence shows that this anomaly is a usual feature of a delusional disorder, and, indeed, if he had had a rational fear of poisoning or a real basis for his other complaints one might have expected he would have acted normally and availed himself of their hospitality. I might add this anomaly existed in certain similar but unreported cases ~~xxx~~ <sup>tried</sup> before Harvey J. where His Honour refused probate in comparable circumstances and also in a recent Queensland case *Timbury v. Coffee* which came on appeal to this Court and is shortly reported in 15 A.L.J. 159. As my brother Dixon pointed out in his judgment in that case "we are not bound to go on applying views held over a century ago about ~~of~~ mental disturbances and insanity and to disregard modern knowledge and understanding of such conditions". Moreover, as Dr Collins pointed out, many patients in mental hospitals suffering from insane delusions are expert chess and bridge players. I think he might have added that the cricket and other teams of such asylums often contain a number of patients who play the game against the public in a skilful and normal manner. So the testator's ability to play cards with his cronies was in no way inconsistent with such a condition. It is well known that a person who suffers from delusions on one subject may be normal in all other respects and able

to transact his ordinary business and that he may hide his obsession from some persons and disclose <sup>it</sup> partly or fully to others.

A will, rational on its face and shown to have been executed and attested in the manner prescribed by law, is presumed in the absence of any evidence to the contrary to have been made by a person of competent understanding; but where the evidence as a whole is sufficient to throw a doubt upon his competency, then a decree of the Court must be against its validity unless the evidence as a whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it *Timbury v. Coffee (supra)*. The ultimate onus therefore lay on the plaintiffs to establish as a fact that the testator was competent to make the will on the 29th July.

In my opinion the plaintiffs did not discharge this onus/. On the contrary the evidence which His Honour accepted appears to me <sup>to</sup> lead to the affirmative conclusion that the will was not merely the capricious product of a mind normally just which had become temporarily irritated by some imaginary grievance based on a sane but unfair misconstruction of his daughters conduct <sup>but to be the outcome</sup> of a disordered mental state which within the language of Cockburn C.J. in *Banks v. Goodfellow* L.R. 5 Q. B. 549 at p. 565, had poisoned his affections, perverted his sense of right and prevented the exercise of his natural faculties. There is no doubt that the will was due to its baneful influence.

I agree that it is unfortunate that the parties were unable to settle the suit, although counsel made it clear that every attempt was made to do so. But since the defendant is not challenging the previous will, under which the residuary estate is <sup>to be</sup> divided between her sister and herself, it is unlikely that she asked for more than this. If Mrs White refused this settlement, she can only thank her own cupidity if a substantial <sup>part</sup> of the estate is frittered away in costs.

The appeal should be allowed. The order of the Court below should be discharged, and, in lieu thereof, the order should be that the suit be dismissed and the costs of the plaintiffs and the defendant ~~at~~ of the hearing in the Court below and of this appeal, those of the plaintiffs as between solicitor and client, to be paid out of the residuary estate of the testator.