the end turn out to be a valuable possession. The embankment belonged also to the pursuer, although the Dumbarton Water Commissioners acquired the rights which were transferred to them to use the embankments and enjoy the benefit their use confers. But then, although that is so, I can find no statement that the Dumbarton Water Commissioners are going to take the property either of the *solum* or of the embankment. I do not think they have proposed to do that. There is nothing specific or satisfactory on that subject. Then again, in regard to the 9th section of the statute, the ambiguity left is certainly very unfortunate. It would have been the easiest thing in the world, and quite a natural thing, to have put Lord Blantyre's name in that clause as it was put in the clause reserving his rights in Loch Humphrey. He was a principal proprietor in these parts, and had a most material interest in the loch, and in the burns. It is not likely that he would have been classed under "mill-owners and others," especially when in the next clause there was a specific reservation of his rights. I should have had doubts in regard to that. But I am not sure that, even if the doubt were given effect to, it would have come to anything different, because if the artificial supply was sufficient for the mill-owners, I think it could probably be found sufficient for Lord Blantyre also. At all events, it raised a very strong presumption that no further compensation was required to make up for any injury he suffered by the abstraction of water. I do not think it material, however, to solve that matter, because I can find no proof whatever of a claim on the part of the Dumbarton Water Commissioners for anything not already acquired in their arrangment with Lord Blantyre. The commissioners have not obtained anything else; that is the position in which the case stands. Another matter is this. Even the arbiter when he gave £3000 for possible rights in the waters of Loch Humphrey does not specify what the details of his valuation are. If he had, it would have saved some of the intense darkness and confusion that hangs over the whole matter.

On the whole matter, I am unable to come to any other conclusion than that at which your Lordships have arrived—that Lord Blantyre has not shown that he has any further claim for compensation.

Lord Young was absent from the debate, and therefore gave no opinion.

The Court adhered.

Counsel for Pursuer—Party—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—J. P. B. Robertson—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Wednesday, March 3.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BALLANTYNE AND ANOTHER *v.* EVANS.

Succession—Will—Power of Testing—Insanity—Partial Insanity.

A person committed suicide while of unsound mind and under the influence of the delusion that he was believed to be guilty of a crime. In his pocket was found a will, written on the day of the suicide, but itself rational, and apparently unconnected with the subject of his delusion. He had always behaved rationally and been accounted sane. *Held*, in a challenge by the heir-at-law, that the will ought to be supported and to receive effect.

This was an action of reduction of the will of the late Major James George Ballantyne, of the 11th Devonshire Regiment, proprietor of the estates of Holylee and Nether Horsburgh, in the county of Selkirk who died unmarried on 23d December 1884. The ground of reduction was that the will "was not the deed of Major Ballantyne, in respect that when he made and executed the same he was insane, and not of sound disposing mind, and was therefore incapacitated from disposing of his estate and effects." His sole surviving sister, Elizabeth Burnet Ballantyne, was his heir-at-law and next-of-kin. She had been imbecile from her childhood, and her *curator bonis* was Frederick Pitman, W.S.

In November and December 1884 Major Ballantyne was travelling on the Continent, and returned to England on 21st December, when he took up his residence at the Charing Cross Hotel, London. On the evening of the 23d he prepared to start to return to Dublin, where his regiment was then stationed, but that same evening he committed suicide in his bedroom in the hotel under circumstances detailed below. In his pocket was found this letter to his brother-in-law, Major Evans, husband of his deceased sister— "23 *Dec.* 1884.

"My dear James,—I have in a rough way left all I have to you for your life.

"Please take good care of Bess, poor thing.

"Look after G. Murray, the Montgomeries, and my old horse at Newry.

"I should like you to select someone bearing the name of Ballantyne to succeed you. If you cannot do that, some one of my father's family at any rate.

"As these are the last words I shall write, the horrible accusation made against me has no foundation. There is not even a shade of truth in it; but I can bear the thing no longer.

"With kindest love to you and yours.—Yours affecly., "J. G. Ballantyne."

The letter was enclosed in an envelope addressed by Major Ballantyne to Major J. Llewellwyn Evans, Beaufort House, Bath. There was also found in his pocket the following paper (being the will under reduction), undated, but assumed by both parties to this action to have been written on the same day as the letter of 23d Dec. 1884, as a settlement of his affairs—"I, James George Ballantyne, will

and bequeath all my real and personal estate to my brother-in-law Major James Llewellyn Evans, residing at Beaufort House, Bath, to be used by him for the term of his natural life, the estates of Holylee and Nether Horsburgh to be bequeathed by him to a male representative of the family of Ballantyne. (Signed) J. G. Ballantyne."

It afterwards appeared that he had also written the following letter to his brother-in-law Major Evans:— "*Charing Cross Hotel, London, 23d Dec.* 1884.

"My dear James,—I have been a very bad correspondent lately, having had a long wander—Milan, Bologna, Florence, Rome, Pisa, Genoa, and Turin. I enjoyed Florence and Rome, more especially the latter. What a people to leave such ruins behind! The Colosseum is more like some great mountain in its effect on you than a building.

"I came back two days ago, and have been very busy about a matter which has given me a good deal of annoyance for some time.

"I will write you a long letter after Xmas, and hope to send some New-Year gifts for the children.

"I cross to Dublin to-night.

"Excuse haste, and accept best Xmas wishes. —Yours affectly., "J. G. Ballantyne."

This letter was enclosed in an envelope addressed to Major Evans in Major Ballantyne's handwriting. It was posted on the 23d, was received by Major Evans on the 24th, the day after Major Ballantyne's death.

This action of reduction of the will above quoted was brought in April 1885 by Miss Ballantyne as heir-at-law and next-of-kin of Major Ballantyne, and Mr Pitman as her *curator bonis*, against Major Evans as the disponee and universal legatory thereunder. The ground of reduction, as above stated, was that Major Ballantyne was not when he executed the will of sound disposing mind.

The defender denied the alleged incapacity. He pleaded—"(3) The said Major Ballantyne not having been in any way incapacitated from making the will in question, the defender should be assoilzied."

A proof was taken. The following was the result of the proof. Major Ballantyne, who was born in 1837, joined the army in 1859, and in the course of his service had been several times quartered in foreign stations, All Major Ballantyne's friends and brother-officers in the Devonshire Regiment (which he joined from the 98th Foot in the end of 1872 or beginning of 1873) gave but one character of him, and that was that he was a man of considerable intelligence, of good judgment, and of scrupulous honour, though of silent temperament, and rather easily depressed in spirits. He was however highly respected by his friends, and his sanity was never questioned by them. He attended personally and in every detail to the management of his property. He was a keen sportsman.

In July 1883 he became impressed with the idea that rumours prejudicial to his character were circulated against him in the Junior United Service Club, of which he was a member, and that the Committee were inquiring into them, and a witness, who was a member of that club, deponed that he had been able to satisfy Major Ballantyne on this point by inquiring, with his consent, as to it of the Vice-Chairman of the Committee of the Club, and by then informing Major Ballantyne, on his authority, that there was no truth whatever in the idea that the Committee were considering any charges against him. This witness further deponed that on his informing Major Ballantyne of this he laughed and said it was probably all fancy. It also appeared that in 1883 and the early part of 1884 he had complained about his brother officers being cold to him; this idea had likewise, according to his brother officers, no foundation.

In the autumn of 1883 he took the advice of Professor Ferrier, a specialist on nervous diseases. He then complained of depression of spirits, languor, inability to fix his attention on subjects or to interest himself in his surroundings, want of sleep, and general dyspeptic symptoms. He then attributed his state to living in a relaxing climate at Exeter on his military duty. Professor Ferrier looked upon the case as an ordinary case of depression associated with dyspepsia, worry, and overwork, and ordered him to travel in Switzerland, which he did for some time, and after which he called again on Professor Ferrier and declared himself well. His conversation on these visits was rational and that of a cultivated gentleman.

In the latter part of 1884 Major Ballantyne made a complaint to one of the officers of his regiment that he was being accused of certain immorality, then the subject of much excitement, and known as the Dublin Scandals. The only foundation for that idea seems to have been, as deponed to by the witness, that Major Ballantyne thought he had overheard some people talking about the Dublin trials, and one of them had said, "How about this Major Ballantyne." He also said that in Dublin he had heard people of bad character speaking about this in the streets and saying he was one of them. His friends reasoned with him and pointed out that any well-dressed man might have had the same thing said to him outside the barracks. He was also under the impression that he was followed about after he had left Ireland in connection with this matter.

In November and December 1884 he again travelled on the Continent. In December 1884 he returned from this tour, and on 22d December called for advice upon a lawyer in London, Mr Brown, who was personally a stranger to him, but who had been recommended by a relative. Major Ballantyne then complained of his having been followed about by people who spread a rumour that he was connected with the Dublin Scandals, and stated that in consequence of hearing porters at Turin Railway Station speaking about this matter he had consulted the British Consul at Turin, who had treated the matter lightly. Mr Brown, although believing that the whole affair was a fancy, advised him to return to Dublin and consult the Colonel of his regiment, as being the best person for him to talk to about the matter. He talked perfectly rationally about every other subject.

Major Ballantyne was at this time staying in the Charing Cross Hotel. On the next day (23d) he gave directions to have his baggage ready for the Irish Mail, which left Euston at 8·25 p.m. He stood in the hall of the hotel while his luggage

was being put on a cab, but then suddenly turned and ran upstairs to his room. After an interval of about ten minutes the porter went upstairs and found him lying with his throat cut on the floor of his room. The razor with which he had committed the deed was believed to be his own, and not to have been packed up with his luggage. He was removed to Charing Cross Hospital, but died on the way there.

It was proved that Miss Ballantyne, the pursuer, was in as good circumstances as could be enjoyed by one in her situation, and that Major Ballantyne had previously made a will in favour of his deceased sister Mrs Evans, the defender's wife, which by her predecease had become inoperative, that he had had a new will under consideration but was uncertain to whom to leave his property, and was, as his agent believed, endeavouring to obtain information about his heirs. He had no relatives nearer than cousins —children of his father's sisters, who were little, if at all, known to him.

"Bess" mentioned in the will brought under reduction was his sister, the pursuer. "G. Murray" was a gamekeeper in Major Ballantyne's service.

The intimacy between Major Ballantyne and the defender had lasted from boyhood and been very affectionate.

For the pursuer were called Professor Ferrier and Dr Cadell. The former deponed that all the symptoms he had observed in 1883 as above detailed were consistent with the early stage of melancholia, and that viewed in the light of after evidence he thought that when he consulted him he was suffering from mental depression more than his physical symptoms accounted for; that his opinion was that the suicide was an act of insanity, but that he saw no reason to think he had not during his life, both before and after he saw him, been able to manage his affairs, and that it was possible that even on the day of the suicide he was able to do so.

Dr Francis Cadell deponed—"I have heard the evidence about his [Major Ballantyne's] delusions, and I am of opinion that these delusions are consistent with the phenomena of melancholia. Looking at the way in which his life was ended, I consider he was insane at the time he committed suicide. During the progress of the disease, as may be gathered from the various symptoms which I have heard detailed, I consider that the insanity under which he ended his life probably extended backward for an uncertain period. I saw the statement by Dr Ferrier, in which symptoms are described that point to the commencement of mental disease. I also heard Dr Ferrier give his evidence in the witness-box. In his statement he described certain physical symptoms—constipation, indigestion, and sleeplessness, combined with mental depression—which I think, taken in connection with the subsequent evidence, point to a state of mental disease. Delusions with regard to accusations being made against them is a very common symptom with persons suffering from mental disease. I think the second letter of 23d December 1884, is, in view of the whole circumstances, indicative in my opinion that Major Ballantyne was in an unhinged condition of mind. I think it shows that he was in that state at the time of writing that letter. (Q) Is your view upon the whole facts of the case, as you know them, that Major Ballantyne was insane during the whole of the 23d of December 1884?—(A) I believe he was. *Cross.*—(Q) Assume that he was a shy sensitive man, that very likely he heard loose women cry after him at the time of the Dublin Scandals that 'there was one of them,' that he brooded over this subject, and fancied that people suspected him, and that he found this intolerable and cut his throat—Is that insanity?—(A) Not necessarily alone; I take it with the other delusions. A delusion that points to insanity very strongly is his impression that some people had made a specific complaint to the Committee of the Club about him, which was found to be quite a delusion on his part. This was in July 1883. . . . (Q) Does the insanity which you describe consist simply in a delusion upon one subject?—(A) There may be no delusion; there may be only mental depression, but I think there was delusion in Major Ballantyne's case. (Q) But the insanity consists in this case in the melancholy delusion that he was suspected?—(A) Yes. As far as I can tell, his mind on all other subjects was completely sound. That applies to the day of his death. (Q) So that the kind of insanity which you believe in in this case is insanity confined to one subject, and leaving the mind quite sound and well-balanced as to other subjects?—(A) Yes."

Dr John Batty Tuke, examined for the defender, deponed—"I have heard the evidence in this case. The conclusion that I draw as to the condition of the late Major Ballantyne is, that he was mentally affected to a certain extent for some time previous to his death. He appears to have been labouring under a false belief of a suspicious character which had been existing for some months previous to his death. According to my experience and knowledge of mental disease, that form of unsoundness might co-exist with unimpaired judgment in other matters than the subject of the delusion. Taking the case as I have heard it stated, it is quite a common case in practice that a man who is naturally of a nervous disposition will develop a delusion or false ideas, which may be started by some comparatively slight circumstance, and that this delusion may not warp his judgment in any matter or influence it in any way where he himself is not concerned. The quality of the disease is not necessarily such as to involve a derangement of the judgment in other subjects. *Cross.*—False beliefs of a suspicious character are a symptom that is very common in mental disease. They may co-exist with mental disease where the mind is totally unhinged. The delusions to which Major Ballantyne was subject might quite possibly co-exist with impaired judgment on other matters? (Q) Is it possible, where you have not had the advantage of actually being in personal contact with the individual in question, to say how far the unhingement of the mind may exist?—(A) Under any circumstances one must be guided by the evidence before him, whether reported or observed. (Q) But where you have not had the advantage of personal observation, is it possible for you to say how far the progress of disease of that form might go through the mind?—(A) I think so, if one has reports from trustworthy persons. I have no doubt whatever that Major Ballantyne did commit suicide from insanity or mental unhingement. I have seen the letter [found in Major Ballantyne's pocket on the day he died]. The paragraph [beginning "As

these are the last words I shall write"] in that letter is certainly evidence of unhingement of mind."

The Lord Ordinary (KINNEAR) sustained the third plea-in-law for the defender (above quoted), and assoilzied him, finding that the expenses of both parties ought to be paid out of Major Ballantyne's estate.

"*Opinion.*—There can be no question that at the time when the will under reduction was executed the testator was labouring under the mental disease to which his suicide must be attributed. But the will is a perfectly rational and proper one; and there is no apparent connection between the delusions by which the testator's mind was undoubtedly affected and the disposition which he has made of his estate.

"The pursuer maintains that the existence of an insane delusion is in itself fatal to the validity of the will, because there can be no such thing as partial insanity; and therefore if a testator can be shown to have been insane on any point when his will was executed he cannot be held to be of sound disposing mind. No authority was cited from our own law in support of these propositions, and they appear to me to be inconsistent with the principles upon which such questions have hitherto been determined.

"That there can be no such thing as partial insanity is not a proposition of law but of fact; and if it can be proved as matter of fact that a person labouring under insane delusions was nevertheless capable of thinking and acting rationally with reference to the settlement of his affairs, and had in fact made a rational will, there appears to me to be no ground in law for saying that his will shall not receive effect. What the law requires is that a testator shall be of sound disposing mind with reference to the particular settlement which he has made; and the effect of an insane delusion, or of any other form of disease, upon the powers of will and intelligence necessary for that purpose is a question of fact. It is said that the mind is one and indivisible, which is no doubt perfectly true. But the answer, as Lord Deas points out, in the case of *Nisbet*, is that this indivisible unity has to perform a variety of functions; and whether a mind which is incapacitated by disease for the performance of some of these may not still be soundenough for the conduct of many important affairs, is not a point to be determined by speculative reasoning upon the nature of the mind, but a question of fact and experience, which for the purposes of a litigation must be decided upon the same kind of evidence as any other question as to the mental capacity of a testator. It appears to me, therefore, to be altogether erroneous to suppose that as matter of law insanity constitutes incapacity to test. It is evidence of incapacity, more or less conclusive, according to the extent to which it has affected the mental operations of the testator. But it is no more than evidence. It is said that when the mind is admittedly in an abnormal condition it is impossible to say with certainty that the disease cannot have interfered with the just exercise of the disposing faculty. But it is equally impossible to say the contrary with certainty. Judicial decisions must be given on such materials as are attainable, however imperfect these may be. And if the facts which may be investigated tend to establish the validity of the will there is no legal principle which requires that it should be rejected upon any presumption as to matters which are beyond the reach of investigation.

"This view of the law appears to me to be placed in a clear light by the charge of the Lord President in *Morrison* v. *M'Lean's Trustees*, 24 D. 625. His Lordship pointed out to the jury that 'the test of capacity to execute a settlement might very reasonably be stated with reference to the nature of the settlement itself, but could not possibly be stated without reference to the settlement, because a man may have the power of intellect to enable him to do one thing—to make one kind of mental exertion—and yet he may be totally incapable of making another. And after considering the evidence as to certain insane delusions under which the testator was said to have laboured, he goes on to say—'You must observe, further, in regard to this supposed delusion, that it has no kind of connection with the subject-matter of his settlement. . . . I do not see that it would lead him to execute a settlement in one direction more than another; and if the man's mind generally is sound and capable of understanding what he is about, I do not know that we could very safely rush to the conclusion that because he has a strange disordered belief upon some extraneous matter, therefore he is incapable of making a will. I cannot tell you that there is any such legal principle as that.' It is true that the delusions alleged in that case were very different from those now in question; and the Lord President indicated an opinion that they were capable of an explanation quite consistent with the sanity of the testator. But the case is of importance, not for the facts, but for the manner in which the question was presented to the jury. And the directions to which I have referred appear to me to be quite inconsistent with the notion that the existence of an insane delusion constitutes incapacity to test, or that it is to be regarded otherwise than as evidence to be weighed along with the other evidence in the case.

"The case of *Nisbet* v. *Nisbet*, 9 Macph. 931, is not a direct precedent, for the decision proceeded upon other grounds. But the question whether the existence of an insane delusion is to be regarded as a conclusive test of capacity to make a will was very fully considered by Lord Ardmillan and Lord Deas in the First Division, and by Lord Gifford in the Outer House, all of whom arrived without hesitation at the conclusion which is thus expressed by Lord Ardmillan—'We must admit that partial mental disorder may co-exist with such an amount of mental capacity as can sustain a simple and rational act or writing. We must inquire into the nature and extent of any partial disorder which is discovered; and if there be any mental delusion we must ascertain its character and see if it is calculated to affect the act or writing we are considering.' The Lord President expressed no opinion upon the point, holding it proved that when the will under discussion was executed, the testator had completely recovered from an insanity which while it existed was not partial but total. But there is nothing in his Lordship's opinion that is inconsistent with that expressed by Lord Ardmillan.

"The current of authority in England appears to be in the same direction. The earlier cases

are examined in the very important judgment of the late Lord Chief-Justice Cockburn in *Banks* v. *Goodfellow*, L.R., Q.B. v. 549; and if two decisions are excepted, the view which would appear to have been taken, both in the cases when the will was upheld and when it was set aside, is that the true question for consideration is not whether the mind of the testator was in all respects free from disease, but merely whether he had taken a rational view of the matters to be considered in making a will, and acted upon it in a rational way.

"In the two cases referred to—*Waring* v. *Waring*, and *Smith* v. *Tibbets* [*cit. infra*]—the doctrine seems to have been laid down that if the mind is unsound upon one subject it is unsound upon others also; and that 'any act done by such a person, however apparently rational that act may be, is void, as it is the act of a morbid and unsound mind.' But in *Banks* v. *Goodfellow* the Lord Chief-Justice pointed out that in both of these cases there were sufficient grounds for setting aside the will without resorting to the doctrine in question; and he says that it is a doctrine in which he and the other Judges of the Queen's Bench were unable to concur. Lords Ardmillan and Deas also dissented from it in the case of *Nisbet*.

"The case of *Banks* v. *Goodfellow* is a very important one both for the decision and for the reasoning on which it proceeded. A will was upheld although the testator was shown to have been subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present. The jury were directed to consider whether at the time of making the will the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it. And this was held to be a right direction, notwithstanding that the jury had not been told to consider whether delusions which he had previously manifested might not have been latent in the mind of the testator when the will was made, because the Court was of opinion that it was impossible to connect the delusions of the testator with the dispositions of the will; and they thought that in such a case a jury should be told that the existence of a delusion compatible with the retention of the general powers and faculties of the mind will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.

"In the present case the evidence upon the two points indicated in the passage just cited is all in favour of the validity of the will. It appears that for some time before his death, but for how long has not been ascertained, the testator had been suffering from mental disease, which exhibited itself in depression, combined with certain physical symptoms, and in an insane delusion that accusations of a very distressing character had been made against him on various occasions by a number of unknown persons. But all the evidence goes to show that, apart from the particular symptoms of disease to which I have adverted, the general powers and faculties of his mind were unaffected. He is said to have been a man of excellent judgment, who on that account was much consulted by his brother officers; and he retained his character for sound judgment to the last. His conversation upon topics unconnected with his delusion was perfectly sensible and rational; and all the medical men who were examined are of opinion that the form of mental disease from which he was suffering may co-exist with unimpaired judgment in other matters than the subject of the delusion. The only physician who can speak to his condition from actual observation is Dr Ferrier, whom he consulted in July and September 1883. His opinion is therefore of great importance, and he says that from all he saw or has since heard of Major Ballantyne he has 'not the slightest doubt as to his capacity to manage his own affairs.'

"With this evidence as to his general capacity it is all-important to consider the character of the will. Major Ballantyne appears to have been a person of very sensitive conscience and of scrupulous honour; and if his will had disregarded the claims of natural affection, or disappointed just expectations, that would, in my judgment, have afforded the strongest possible evidence that he was not in possession of his faculties when it was made. But when the circumstances of his family and the character ascribed to him are considered, it appears to be just such a will as he might reasonably have been expected to make. And it is material to observe that it is not only in itself a natural and rational will, but that it makes a much better disposition of the testator's property than the law would have made for him if he had died intestate. His only near relation is a sister, who is heir-at-law and next-of-kin. And it appears from the evidence of Dr Anderson that she has been an imbecile all her life, that there is no chance of improvement in her state, that she is incapable of more enjoyment than she has at present, and that 'it would be of no advantage to her to spend more money upon her than is being spent now.' If the law of intestate succession were to take effect, therefore, the whole estate would be tied up during the lifetime of this imbecile lady, and would go at her death to persons of whom Major Ballantyne knew nothing, except that they must stand in some degree of relationship more or less remote to him. This is such a disposition of his affairs as, if he were capable of forming a just judgment upon such a matter, he would certainly desire to obviate; and, on the other hand, it appears to be equally certain, from the evidence as to the relations which subsisted between them, that the defender is the person whom he would naturally desire to benefit by his will if his faculties were still unimpaired. The effect in law of the provision as to the bequest to be made by the defender is a different matter. But whatever be its effect, it is in no way inconsistent with the conclusion that the testator was capable of forming an intelligent judgment as to the testamentary disposition which he ought to make, and of acting rationally upon the judgment he had formed.

"The result of the evidence is, that the testator was suffering from a form of mental disease which in the experience of medical men is found to be consistent with capacity in the patient to manage his own affairs; that he ap-

peared to be capable of reasoning correctly upon subjects unconnected with his delusion, and of acting in other respects as a sane man would act; that his will is a rational one, and such as in his circumstances he might have been expected to make; and that there is nothing in its dispositions to betray the influence of any delusion. I am therefore of opinion that the will should be sustained."

The pursuers reclaimed, and argued — The question here is whether the testator was insane or not. The burden of proving the validity of a will when the testator was admittedly insane lies upon the party setting up the will. If a man were proved to labour under insane delusions, he was not of sound mind—*Her Majesty's Advocate* v. *James Macklin*, May 9, 1876, 3 Coup. 257; *Her Majesty's Advocate* v. *Thomas Barr*, May 10, 1876, 3 Coup. 261. It might be assumed that Major Ballantyne was suffering under an insane delusion when he committed suicide; the will in question was written in connection with and as part of the preparations for his suicide, so that the two facts were connected, and therefore he was of unsound mind when he made his settlement. That was sufficient to upset it. There was testimony under Major Ballantyne's own hand, viz., in his letter to Major Evans, that it was this delusion caused him to commit suicide —*Jamieson and Another* (*Nisbet's Trs.*) v. *Nisbet and Others*, June 30, 1871, 9 Macph. 937; *Waring* v. *Waring*, July 4, 1848, 6 Moore's Privy Council Reps. 341. If disease prevailed in the mind of a testator it did not matter that the subject in which it is manifested is not connected with his testamentary disposition—*Smith and Others* v. *Tibbitt and Others*, Aug. 6, 1867, 1 L.R., P. & D. 399. These cases were not indeed followed in *Banks* v. *Goodfellow*, July 6, 1870, 5 L.R., Q.B. 549. But it had been held in a later case that a man might be capable of transacting business and yet might be subject to delusions so as to be unfit to make a will—*Smee* v. *Smee*, Dec. 5, 1879, 5 L.R., P. Div. 84. The test of insanity was delusion. Whenever the patient once conceives something extravagant to exist which had no existence but in his heated imagination, and he was incapable of being argued out of that idea, he was suffering under an insane delusion. That was the case here—*Dew* v. *Clark and Clark*, Easter Term, 1826, 3 Adams' Ecc. Rep. 79. The *testamenti factio* was a privilege given by the law of Scotland to some persons but withheld from others. A fatuous person, *i.e.*, one quite destitute of judgment, could not make a will, but even if he had some reason he could not execute a deed which would be hurtful to him—Ersk. Inst. i. 7, 48. The law recognised deeds by insane persons, but only such as are made in a lucid interval—1 Bell's Comm., bk. ii. pt. 2, chap. 8.

Argued for the respondent—All the facts stated and proved in the case showed that Major Ballantyne carried on all matters relating to his business sensibly down to the last. No one, either abroad or at home, thought he was insane, and his conduct gave no ground for thinking so, except in regard to the one idea that he was accused of being connected with the Dublin Scandals, but that was not an insane delusion. He might have been so accused, and however unjustly, very likely was. There was no connection between the making of the will and the testator's suicide, although even if it were shown that the making of the will was in anticipation of this suicide, that would not connect the two facts so as to invalidate the will. This case was very much on the lines of *Banks* v. *Goodfellow* (cited *supra*), where it was left to the jury to say whether the testator was so insane as to be unable to conduct his own business, and Major Ballantyne was evidently quite able to do so. The law of Scotland was that where any acts done by some person are traceable to a monomania with which the person is afflicted, these acts were null, but if they were not so affected then they remained good in law—Bell's Prin. 2105; *Forsyth* v. *Forsyth*, July 19, 1862, 4 D. 1435. The rationality of the will here under discussion was an important point. It was always a strong argument for the sanity of a testator that the will he had made was a sensible and reasonable one. Here it was the most sensible will that could have been made, as Major Ballantyne knew that his sister was unable to derive any good from any provision made for her, and Major Evans was his most intimate friend. Lord President's opinion in the case of *Nisbet* cited *supra*—*Jenkins* v. *Morris*, April 5, 1880, 14 L.R., C. Div. 674. The wording of the will showed that the delusion he laboured under did not affect his mind at the time he made the will. If the granter of any deed had executed that deed in a lucid interval, although he might at other times be insane, by the law of Scotland that deed was not reducible on the ground of the granter's insanity—*Crawford*, June 1583, M. 6275; *Alexander* v. *Kinnear*, February 21, 1632, M. 6278. On the whole matter the will in question had been validly executed, and ought not to be reduced.

At advising—

Lord Justice-Clerk—This is a very painful case as well as a difficult one. It is an action to set aside the will of Major Ballantyne of Holylee, who was an officer in the army, and who died on the 23d December 1884 by his own hand.

The will which is the subject of the suit is a short document written by himself, without date, leaving all that he had to his brother-in-law, the defender, who had married his sister. He had no other near relatives excepting one sister, who had been imbecile from her birth, but who was amply provided for, and with his brother-in-law he had lived on terms of unbroken friendship. His sister, Mrs Evans, was dead.

The will is challenged by the *curator bonis* for the imbecile sister, on the ground that Major Ballantyne was at the date when this will was executed of unsound mind.

Questions of this kind are always attended with more or less difficulty, seeing that information as to the state of mind of the person concerned is hardly ever accurate, or at least complete. Much necessarily depends in the first instance on the habits, character, and history of the person whose sanity is questioned. Much always depends on characteristics which are more or less ambiguous, and much also on the nature of the alleged mental incapacity or unsoundness. In the present case the opinion at which I have arrived, after considering the very full testimony which has been given in the proof, and the writings produced, is that Major Ballantyne was at no time of unsound mind prior to the act which terminated his life.

The picture which is drawn of his mental condition in the record on the part of the pursuer is not only not substantiated, but is entirely contradicted by the general tenour of his life as described in the proof and testified by the documentary evidence. He was a man of nervous temperament, of high spirit, sensitive honour, shy and depressed, but a first-rate officer, having a reputation among his friends not only for gentlemanlike manners and feelings, but for ability in his profession, and soundness of judgment. These things are quite certain, for they are spoken to by several of his intimate friends. The nervousness and tendency to depression which are said to have accompanied these qualities may or may not have been morbid. I see no evidence that they were, or that they exceeded in degree those differences of nervous constitution which are constantly exhibited by different members of any community. It is quite clear from the documents produced, and the evidence, that down to the very last—that is, down to the date when this will was written—he was in the full possession of the management of his own affairs, and was thoroughly qualified to take charge of them. On this matter no one seems to have suggested any hesitation or doubt. He managed his own estate of Holylee. He gave his own directions, and instructed those below him; and we have one or two letters on these subjects, which prove that he was of clear and collected judgment. He transacted his own business with the army agents, Messrs Cox, down to the last, and until the fatal night on which I imagine that this will was written—although that is not quite clearly established—while there were peculiarities which have been observed in his thoughts and temperament, no one ever imagined or suspected that he was of unsound mind. Now that his life has come to an end by his own hand, a colour is of course given to his prior history, and it turns out that he was beyond all question possessed during the later months of his life by a painful impression. He had been quartered in Dublin during some of the scandals which arose there two years ago, and he had conceived the idea that he was suspected of having been more or less involved in them. This seems to have preyed upon his mind, and if there were any foundation for the accusation having been made, it is not wonderful that it should. He imagined that the committee of the club to which he belonged were going to investigate those charges. He also imagined, during a tour which he undertook for the benefit of his health during 1883, that he had been followed, and if, with or without reason, he thought he had been accused, very slight elements might have raised this impression. He had been advised on his return from his tour to go back to Dublin and see his commanding officer upon the subject. He had taken all measures to leave London and to return to Dublin. He was residing at the Charing Cross Hotel. His cab was at the door, and he was about to start, when he suddenly rushed upstairs to his bedroom, and upon the master of the hotel sending up after the lapse of ten minutes he was found lying with his throat cut on the floor of his bedroom. The will in question and a letter to his brother-in-law were found in his pocket. Now, it cannot be doubted that, whatever the cause of the mental excitement which seized him was, it was more than he had power to resist, and to that extent it may be said that his mind was unsound. But it is impossible to allege, as physiological fact, that suicide is necessarily a proof of prior unsoundness of mind, in the sense of a man not being responsible for his actions, or capable previously of giving rational and intelligent directions. On the contrary, we know well by experience and history that many men of strong intellect and great accomplishment have, on a sudden impulse, from fear of dishonour or danger to reputation or otherwise, done so, although there was no reason whatever to suppose that their previous mental state had been unsound. Such instances in the recollection of everyone must be quite familiar.

But the question we have to consider is, whether these things arose from the operation of an unsound mind, and whether the document now under reduction—the holograph will which Major Ballantyne left—an instrument perfectly clear and perfectly intelligent, and quite reasonable, subject to no observation of any kind on the ground of its being unjust or inequitable—must be set aside because the man who wrote it was not of sound mind when it was written. I see no reason for coming to that conclusion, and I think it would be contrary to the truth of the case were we to say so.

I have no doubt that the act of self-destruction was a direct consequence of those brooding thoughts in regard to the accusation which he imagined had been made against him, and of his courage failing when the time came to face his comrades in Dublin. It is said that these thoughts were an insane delusion, and of themselves were a proof of insanity. But even of this I am not satisfied. That there was any ground for the supposed imputations I of course discard entirely. There was no ground for them, but whether there was or was not ground on the part of Major Ballantyne for supposing that people had suggested that he was more or less implicated in those matters is a totally different question, and one not to be assumed. We do not know what the real source of this disquietude was. He was a reticent man at any time, and one may well conceive that he was unwilling to enter into details, even with his intimate friends, on that subject. Possibly he had no further foundation for the supposition than casual expressions reaching his ears in the crowd in the Dublin streets, or brought by members of his club within his hearing. But even then it is nothing unusual for men who are in perfect possession of their faculties to draw far-fetched inferences from very simple matters where there is a disposition from one cause or another to brood on the particular cast or complexion of painful thought. It was a time and a position in which men the most innocent might be sensitive—the more innocent the more sensitive. That it should have happened so with Major Ballantyne is only what was probable from the high-strung nervous temperament of the man attaching importance to trifles. Fearing disasters which are not likely to happen, imagining that friends are altered, and acquaintances grown cold, are phases of character not unusual, and not indicating what is called unsoundness of mind in any degree, although no doubt they may co-exist with it. Therefore I am not disposed to hold that these fears and tremors

of Major Ballantyne constituted to any extent either insanity or a proof of it. A delusion is simply an erroneous impression produced by facts or circumstances inadequate to sustain it. An insane delusion is a false impression or idea produced by unsoundness of mind. The fact that a delusion exists does not argue unsoundness but only want of thorough logical capacity, and therefore before the fact of a delusion existing (in the sense of a false impression) can be held to prove unsoundness of mind it must appear either from its own extrinsic nature, which it often does, or from the surrounding circumstances, that it was an impression which no sane man could have entertained, and which rested upon no satisfactory or solid basis of fact. I do not think we have the means of coming to the conclusion that any of Major Ballantyne's convictions on these matters were of that nature. I do not think they arose necessarily from his mind being unsound.

Formerly it used to be laid down from the bench in cases of insanity that the mind being one and indivisible, a man could not be partly sane and partly insane, and that therefore where a person was proved to have entertained false delusions—insane delusions—his other acts, however rational in themselves or intelligent they might be, were necessarily those of a person whose mind was deranged. That doctrine, however, manifestly had the effect of putting out of the pale of rational and intelligent acts a great many proceedings which were in themselves clearly the product of intelligence and reason, and it seems now to have been held in England, in some cases which were quoted to us, that if the act which is the subject of investigation be in itself intelligent and reasonable, bearing no trace of the want of ordinary self-command, it may stand good, although it should prove that on other subjects unconnected with the act in question the maker of the deed or the doer of the act laboured at the time under an insane delusion. I think that this principle, to the extent to which it has as yet been carried is founded on good sense, and has support from the more recent researches into the phenomena of mental derangement. It may be objected—not perhaps without weight—that the attempt to trace the operation of cause and effect in an unsound mind is neither philosophical nor practicable, for it is chiefly there that the disordered intellect shows itself most inscrutable. I do not stop to consider or solve these doubts. My own opinion has always been that in questions in this difficult branch of social jurisprudence generalisation is to be avoided, for we deal with matters beyond our cognisance—with clues and ramifications we are unable to trace or follow. Each case must be considered in its own circumstances, without attempting to deduce general rules as a guide for others. In this case I am quite satisfied that no insane delusion was at work in the execution of the instrument under reduction; that the mind which conceived it was perfectly capable of doing so; and that the man that wrote the will perfectly understood the effect and purport of the instrument.

That being so, I think this case must fail; and I am of opinion that the will must be supported.

Lord Young — I understand that all your Lordships — not only your Lordship in the chair, but the rest of your Lordships—are agreed with the Lord Ordinary. Having regard to the circumstances, about which there is no dispute, it would certainly be a misfortune if the will in question here were set aside. In these circumstances it appears to be altogether a sensible will, and it pays every regard to convenience and propriety in the matter of the legal succession to the estate of the deceased.

Now, I am not to differ from the conclusion at which your Lordships with the Lord Ordinary, have arrived. Indeed, I may say that after considerable doubts and difficulties I am of opinion on the evidence that that decision is in accordance with the authorities. But for these authorities I think I should have myself arrived at another conclusion on the facts of this case, for I think the case involves a question of law which I should have regarded as of great importance, but that I think that question has already been decided by the previous cases in accordance with the result at which—applying that law to the facts in this case—your Lordships have arrived. I think it right, however, as this case goes somewhat further than any which has preceded it, to state—as I think I shall be able to do in a few words—the difficulties I have encountered.

I should be disposed to say generally that there is a distinction, although I do not find it much noticed by the authorities, between a testamentary instrument and the transactions connected with a man's personal or business affairs in his lifetime. To a certain extent that distinction must be recognised, for even in the case of a lunatic—a born idiot—if he goes into a shop and buys food which he consumes, the transaction would not be set aside on the ground of idiocy, and if a man, although he may be insane, and may be subject to many delusions, yet if he is fit to be left at large, and is in the management of his own affairs, makes contracts which are quite rational, they could not be challenged on the ground of his mental condition. As regards the testator here, even although insanity were affirmed so as to set aside his will, he being a man accustomed to transact all the details of his business, his ordinary transactions in the course of that business up to the last moment of his existence would have been upheld. But declaring your will as to the disposal of the territory of this country or a portion of it, or the property in this planet—declaring directions which are to be followed after a man has ceased to be a proprietor and ceased to be an inhabitant of the planet altogether—is quite another matter. There is not the same necessity for upholding such directions. Like most countries, we admit proprietors to the power of testing. In England they were later I think—very considerably later—in recognising that power than we were in this country. The law here has always recognised the right of the proprietor to do with his property what he pleases while he is in life and is the proprietor of it. But after he ceases to be the proprietor, at death, there is always a law of the country which disposes of that property, which is no longer his. Now, declaring his own will, which is to supersede that law, is not a matter of natural right at all but of positive law, and wherever it is declared in that way it is an

interference which operates the displacement of the right which the law confers upon somebody. Now, I say that is in a different position from the ordinary transactions and the ordinary business of a man's life. For the law must look not merely to what a man wishes, but to practical considerations of public and common convenience. But the law seems to be as the Lord Ordinary has stated it. What he says must be in accordance with the decisions. These are his words—"Insanity does not constitute an incapacity to test. It appears to me to be altogether erroneous that, as matter of law, insanity constitutes incapacity to test. It is evidence of incapacity, more or less conclusive, according to the extent to which it has affected the mental operations of the testator. It is not more than evidence."

His Lordship is of opinion—and I quite agree with him—that there can be no question that at the time when the will in litigation was executed the testator was labouring under the mental disease to which his suicide must be attributed. And in the same sentence he refers to the delusions by which the testator's mind was undoubtedly affected. Again, his Lordship says,—"It appears that for some time before his death, but for how long has not been ascertained, the testator had been suffering from mental disease, which exhibited itself in depression, combined with certain physical symptons, and in the insane delusion that accusations of a very distressing character had been made against him on various occasions by a number of unknown persons." I agree with his Lordship that that is the result of the evidence. There may have been other cases—no doubt there have been other cases—of similar states of mind, and ending much in the same way as the testator's state of mind did here, but I should say that all these people who were in a similar state of mind were insane—that they were labouring under mental disease. I suppose there were a great many people besides Major Ballantyne who were greatly distressed by those facts which preyed upon his mind, but they, not being insane—not being under mental disease—the same results were not produced upon them. They were not seized with any impulse to commit suicide as he was, and that is just the distinction between people labouring under a mental disease and people who are not—that those facts which more or less pain people *compos mentis*, who have command of their own intelligence, are borne with more or less pain no doubt, but with perfect command of themselves; while those, on the other hand, who are suffering under mental disease are driven to distraction, and to the very extreme proceeding of escaping from their distress by terminating their own existence. I am therefore not able to doubt, any more than the Lord Ordinary, that the testator here was insane, that he was labouring under mental disease, and that that culminated in the suicidal impulse which he was not *compos mentis* enough to resist, but to which he yielded.

But then insanity is not a ground for setting aside a will. That statement is according to the decisions, unless you connect the suicide with the will, and show thereby that the will itself was insane. Now, I think here that notwithstanding that Major Ballantyne was insane, and his mind diseased, yet he was quite fit to be at large, except in so far as his own personal safety was concerned—that is to say, his own life was not safe from being taken with his own hand, but otherwise he was quite fit to be at large and to manage his own affairs. He appears to have been a man of reasonably good sense, and certainly the will we have been inquiring into here is a sensible will, which it would be a misfortune to have set aside. I should have had difficulty but for the authorities in coming to that result, that insanity—mental disease—existing at the time when the will was made, was not a ground for setting aside the will however sensible it might be, but I cannot resist the authorities to that effect. The chief difficulty which I have had, and which lingered longest notwithstanding those authorities, was in seeing that this will is not connected with the insanity of its maker. I think it is connected with that insanity to this extent, that it was made under the insane impulse—the very same insane impulse—which led him to terminate his own existence, but for which we have no reason to believe the will would have been made at all. His insanity or mental disease, as I agree with the Lord Ordinary in calling it, produced the impulse to terminate his existence as no longer bearable—the same facts not producing any such result, or any similar result, or anything at all like it, on any of his brother officers, who were exposed to them just as he was when he was under the impulse and resolved to yield to it. Now, when he was under that impulse he made this will. It was part of his preparation, just as much as taking his razors out of his dressing-case and opening one of them to cut his throat with. It is there my difficulty consists, that by our decision we displace legal rights standing upon the law of the land, and which he himself displaced by giving these instructions as to the disposal of his property while he was not in a sound state of mind. I say that those legal rights were displaced by the will expressed as really part of the insane impulse which was upon the man immediately before he completed the act of terminating his existence. In that respect I say this case goes further than its predecessors. On the whole, however, I am not able to resist the reasoning, that according to the authorities, mental insanity is not a sufficient ground for setting aside a will if the Court judging of the matter are nevertheless of opinion that the man, insane or diseased in mind although he was, was capable of expressing his will as to how his property should go after his death. I think the testator here was capable of doing that. I think he quite understood what estate he had. I think he had an intelligent judgment as to how it was desirable that his property should go, and that he expressed that will of his own in words by the testament before us.

That is the conclusion at which I have arrived through the doubts and difficulties I have expressed, and which I do not mean to represent as other than considerable.

Lord Craighill—I concur with your Lordship in thinking that the result at which your Lordship has arrived is consistent with the law and facts of the case. I cannot have any doubt that the late Major Ballantyne was subject to what may be correctly described as insane delusions. At the same time the insane delusions were not

of such a nature as to colour, so to speak, the ordinary transactions of his life. I do not think, therefore, that it could be held that anything which was not coloured by the delusions to which he was subject was insufficiently done by him, nor can any such action be described as having been done by him while he was in a state of unsound mind. For that reason I think it cannot be held that he was incapable of disposing of his property. The question which we have to consider here, as in every such case, is one of simple fact—whether or not, according to the evidence brought forward, the testator had or had not a sound disposing mind, or was or was not capable of conceiving and executing the will which he left behind? If, on the evidence brought forward, the Court or the jury are satisfied that he was so capable, then the ground of challenge is absolutely swept away, and it matters not that on something else the testator might have shown that he was of unsound mind. That he was of unsound mind in connection with something else is not the question. The question is, Was the will well made? Was it made by anyone who knew what he was doing? Was it made when he was uninfluenced by any peculiarity in regard to the particular matter he was doing? Is there anything to be found in the will which shows that in executing it he was influenced by the peculiarity or delusions to which he was subject? Now, I think that the answer to that question must be in the negative. I conceive that it would not only be very unfortunate, but a very strange result, if this will were to be set aside in the circumstances of this case. For some years—perhaps not for many, but for some years—Major Ballantyne was capable of doing everything that any sane man would be expected to do, or which it was necessary for any man to do. He performed all his duties as an officer. He performed all his social duties and his duties to his friends and others. So far as we can see, he transacted in a perfectly satisfactory way every duty which he was called upon to perform. The manner in which he performed his duties gave no indication of any mental peculiarity whatever. He did his part just as well as any man going out and in in the world would do. Now, if we come to the conclusion on these facts that this will was not made by a man capable of disposing of his property, I should think it would be a very unreasonable one. There seems to me to be no ground for any such conclusion. It would be strange as well as unreasonable to hold that when he was doing other things so reasonably and satisfactorily he could not make a will just as well. Of course these remarks are all on the assumption that the making of the will was not influenced by the delusion which led to the suicide, and which undoubtedly coloured his later actions.

I have said this much, but I do not know that there is any reason for going further—if, indeed, there is reason for going so far—for the Lord Ordinary has given an admirable exposition of his own views both as to the law and the facts of the case, and I entirely concur with him, and in truth adopt everything he has said.

LORD RUTHERFURD CLARK—I concur.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Russell & Dunlop, C.S.

Counsel for Defenders—J. P. B. Robertson, Q.C.—Dickson. Agents—J. & F. Anderson, W.S.

Wednesday, January 6.

FIRST DIVISION.

[Sheriff of Fife.

DENHAM *v.* BETHUNE AND OTHERS.

Process—Appeal—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Sheriff—Proof.*

An action to interdict the defender from golfing or "putting" on a piece of ground forming part of Pilmour Links at St Andrews was raised at the instance of Lieut.-Col. Bethune and others on behalf of the St Andrews Ladies' Golf Club, who claimed to be tenants of the ground in question, and to have enjoyed uninterrupted possession thereof for more than seven years prior to the action. The defender maintained right, as an inhabitant of St Andrews, to golf on the ground. The Sheriff allowed a proof, and the defender applied for a jury trial. The Court were of opinion that a proof ought to be taken, and *remitted* to one of the Sheriffs-Substitute of the district to take a proof in the cause.

Counsel for Appellant — M'Kechnie. Agents—Mitchell & Baxter, W.S.

Counsel for Respondents—Gillespie. Agents—Mackenzie & Kermack, W.S.

Wednesday, January 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SELKIRK (COUPLAND'S TRUSTEE) *v.* COUPLAND.

Bankruptcy—Goodwill of Hotel Business—Delivery of Licence—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 29), *secs.* 91 *and* 93.

The tenant of an hotel became bankrupt, and after his sequestration obtained, with the concurrence of the trustee, a new certificate or licence. The trustee then sold the goodwill of the business. *Held* that the license was an accessory of the goodwill, and that the trustee was entitled to delivery of it for behoof of the creditors.

This was an appeal of the trustee against a deliverance of the Sheriff in the process of sequestration of the estates of H. C. Coupland, hotelkeeper, Langham Hotel, Buchanan Street, Glasgow, under the Bankruptcy (Scotland) Act 1856. The question "Will you hand me the certificate of license for the Langham Hotel?" was put to the bankrupt by the agent for the trustee, and objected to by the agent for the bankrupt "(1) on the ground that it was hypothecated