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by agreement or inquiry as aforesaid and the sum of £16 10s. 0d. (*being damages in respect of the conveyancing costs and stamp duty incurred by the plaintiff in relation to the said contract*), *and deducting the total thereof from a sum equal to* £700 (*the amount of the purchase money paid by the plaintiff under the said contract*) *plus interest on* £700 *at the rate of five per cent per annum from the date upon which the plaintiff paid the said purchase money until the date determined by the Supreme Court as aforesaid.*

(2) *Subject to the foregoing variations, judgment of the Supreme Court affirmed, and appeal dismissed with costs.*

(3) *Application by the respondent for special leave to appeal refused.*

Solicitor for the appellant, *L. B. Moynihan.*
Solicitors for the respondent, *D. J. O'Mara & Robinson.*

J. M. M.

[HIGH COURT OF AUSTRALIA.]

VOGES . . . . . APPELLANT;
DEFENDANT,

AND

MONAGHAN AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 27, 28;

SYDNEY, *Nov.* 18.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Will—Absolute bequest of whole estate to legatee—Secret trust imposed on legatee in favour of other persons.

An elderly testator who died in June 1946 left an estate of approximately £47,000. He was survived by a widow who was eleven years older than he, but by no other dependants. The only other persons who had any sort of moral claim on the testator were M., who had been a servant in his household on low wages from 1911 until the testator's death, and A. his niece by marriage, who was only in a modest financial position and of whom the testator had always been fond. The testator had given both M. and A. to understand that they would be provided for. The testator left his whole estate to V. who was a married woman living with her husband with a grown-up family. She had met the testator about 1926 and by 1943, when he retired as a pharmaceutical chemist, had become very useful to him in the management of his affairs generally. They were in constant contact until the testator's death and she attended to various business and household matters for him. V. knew both M. and A. and was aware of their circumstances. V. admitted that the testator told her in August 1945 that he had made his will and asked her to look after his wife, to which request V. assented. According to V., in October 1945 she had a further conversation with the testator in the course of which he suggested subject to V.'s discretion that she might give three pounds per week each to M. and A. after his death. M. gave evidence that very shortly after the testator's death V. told her that she had to go and get an envelope with the testator's wishes in it and that when she returned she produced a long narrow piece of paper from which she read, observing " This is what " the testator " wished me to do for you ". According to M., V. read that M. was to get three pounds per week for life to start from the date of the testator's death and to continue until the date of M.'s death, and then said that M. could not see the document then but she would later. V. said in evidence that the document was one written by her much later than the time deposed to by M.

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and embodied some of the suggestions that the testator had made to her subject to her discretion. The piece of paper was no longer in existence at the date of the trial. About a month after the testator's death V. wrote to A.'s mother as follows "To A." the testator "has left £156 per annum to cease at her death". V. in fact paid the sum of £156 per annum to both M. and A. by half-yearly payments until 1st September 1950 when the estate was called on to pay almost £20,000 for income tax and penalties. With the first half-yearly payment V.'s solicitors asserted that the payments were discretionary. The trial judge disbelieved V.'s evidence.

Held, by *McTiernan*, *Webb*, *Fullagar* and *Kitto* JJ. (*Dixon* C.J. dissenting), that, in the circumstances, a finding that V. held the estate upon trust to pay to M. and A. each during their respective lives the sum of three pounds per week was justified.

Decision of the Supreme Court of Victoria (*Barry* J.), affirmed.

APPEAL from the Supreme Court of Victoria.

Annie Monaghan and Ina Answerth on 19th December 1952 commenced an action in the Supreme Court of Victoria against Alice Voges as executrix of the will and estate of George Gill, late of Hamilton, Victoria, who died on 8th June 1946 leaving a will dated 25th August 1945 probate whereof was granted to the defendant on 13th September 1946. The plaintiffs claimed, *inter alia*, declarations that the defendant held the estate upon trust to pay to each plaintiff, during her respective lifetime, the sum of three pounds per week.

The action was heard before *Barry* J. who, in a written judgment delivered on 9th October 1953, held that the plaintiffs were entitled to the declarations sought and to the sum of £468 each in respect of arrears.

From this decision the defendant appealed to the High Court.

The facts and arguments are sufficiently set out in the judgments hereunder.

Gregory Gowans Q.C. and Dr. *S. H. Z. Woinarski*, for the appellant.

Dr. *E. G. Coppel* Q.C. and *H. T. Frederico*, for the respondents.

Cur. adv. vult.

Nov. 18. The following written judgments were delivered :—

DIXON C.J. This appeal has caused me a great deal of difficulty, notwithstanding that it is in substance an appeal upon a question of fact and that the trial judge's disbelief of the defendant's testimony goes a long way towards disposing of her case. The principles governing the determination of appeals on questions of fact are in

familiar use and are the subject of many authoritative statements, most of which recently in *Paterson* v. *Paterson* (1) we took occasion to collect. Consistently with them a reconsideration of the effect of the testimony of the defendant is hardly possible. But the root of the difficulty which I feel about the case is that I gravely suspect that the conclusion that has been reached is not in accord with the actual facts of the case. To make their respective cases it was necessary for the plaintiffs to establish a state of fact, the chief elements of which were that the testator had a definite intention that the defendant, as his executrix and universal legatee, should be bound to pay to each of them respectively three pounds a week during her lifetime, that this intention was communicated to the defendant during the testator's lifetime, that she expressly or impliedly undertook the obligation, that is either by agreement or acquiescence, and that on the faith of her carrying out his intention he made his will as it has been admitted to probate or left it unrevoked. As Viscount *Sumner* said in *Blackwell* v. *Blackwell* (2): "The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out" (3). But all these elements must be established to the reasonable satisfaction of the court. The evidence may be circumstantial or it may consist in admissions by the legatee upon whom it is sought to fix the trust, and the admissions may be express or by conduct or the proof may consist in both admissions and circumstantial evidence. When the issue is contested it will seldom include direct evidence of what passed between the testator and the legatee. But, in particular, the evidence must prove satisfactorily that the trust was ascertained and what it was. The present case is, to my mind, of a most peculiar kind. Immediately after the death of the testator the defendant appears to have been filled with anxiety to tell various people that the deceased had provided for them or made bequests to them of this or that article. Among statements of this sort made by her there are some strong expressions affecting the plaintiffs. For example, to the sister of the testator she wrote: "To Mrs. Answerth Mr. Gill has left £156 per annum to cease at her death". And to that plaintiff herself, she wrote: "I am sure you must have a contented feeling when you think what Mr. Gill's

(1) (1953) 89 C.L.R. 212.
(2) (1929) A.C. 318.
(3) (1929) A.C., at p. 334.

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gift will mean ". The trouble about all these statements is that they go too far ; they would not naturally be understood as meaning that the defendant had succeeded to the estate, but had agreed with the testator to pay the annuities or either of them, and they were not so intended. Moreover, the same letter to the testator's sister speaks of a number of gifts of personal articles as made by the testator when it is almost apparent that the defendant is inventing for the testator various small specific bequests she might have wished he had made. The circumstances of the case as they appear in evidence seem altogether to lack background. You feel that you do not understand why the testator made the will he did, where the defendant really stood in relation to the testator, his wife, his household and his business, or what were the motives by which the various persons concerned were animated. Clearly enough commonplace explanations do not fit. To me it looks as if for some reason or other the testator thought that he could project his own control of his financial and business affairs beyond death through the defendant and that what he wished to do was to leave her in possession of all his assets completely confiding in her and feeling certain that she would meet the moral claims upon him of his wife and his relatives and his dependants just as he would have done, if living, and according to circumstances as from time to time they changed and developed and that otherwise she should have beneficial ownership and enjoyment. Why this should be so the complete absence of information giving reason and coherence to his conduct leaves me quite unable to guess. Nor do I understand precisely why she wished to represent that he had made actual bequests, including the two annuities, or, at all events, one of them. No doubt he discussed with her what was the proper thing to do about his wife and the plaintiffs and probably notes were made of his views. No doubt she built up a body of circumstantial evidence that can be used against her in the present case. For my part, I think that she cannot complain. She has no one but herself to thank for the conclusion which the Court has reached both here and below. But in spite of her statements and the course of conduct she has pursued I would not myself be satisfied that the testator placed her under any sufficiently ascertained trust in relation to the two plaintiffs or communicated to her an intention on his part that she must pay to either of them an annuity out of the estate during the life of the recipient and independently of her own discretion or the condition of the estate. Though not without hesitation I would reach the conclusion that the decision under appeal should not be allowed to stand.

McTIERNAN J. I am of the opinion that this appeal should be dismissed. The evidence in the case is accurately and fully summed up by *Barry* J. in his reasons for judgment. The learned judge made a number of findings which establish the elements which Viscount *Sumner* said in *Blackwell* v. *Blackwell* (1) give rise to a secret trust. From these findings *Barry* J. proceeded to the conclusion that the testator imposed upon the appellant certain secret trusts in favour of the respondents respectively. Under those trusts each of them is entitled to receive as from the testator's death the sum of three pounds per week out of the estate left by him to the appellant. The findings of *Barry* J. are as follows: The testator informed the appellant of the contents of his will before he died: he intended that as from his death the appellant should provide moneys out of the estate for the maintenance of his widow and the upkeep of her household and pay out of the estate three pounds a week to Miss Monaghan and three pounds a week to Mrs. Answerth during their respective lives: the testator communicated to the appellant that he desired her to make such provisions for his widow, Miss Monaghan and Mrs. Answerth respectively, and she assured him that she would do so: and that it was on the faith of her assurance that the testator made the appellant his sole executrix and gave her the whole of his estate, or, at least, left unrevoked the will with its absolute gift of all his property to her. I have read the evidence both oral and documentary many times and, adopting what *Barry* J. said about the credibility of the witnesses, I am unable to dissent from any of his findings of fact. I think that each finding is an inference which may be properly drawn from the evidence. The appellant's answer to the evidence adduced for the respondents and the documentary evidence is not precisely that the testator's gift of the estate to her is absolute. Her evidence at the trial clearly involves that the testator made the gift to her upon the faith of some arrangement about the disposal of the estate or part of it. In the case of the respondents she did not say that they were entirely excluded from the arrangement. What she said in evidence was that the testator expressly said to her that what he desired was that the appellant would, subject to her own discretion, pay three pounds a week to Miss Monaghan for life or until she married and a similar amount to Mrs. Answerth for life. The crucial issue at the trial turned out to be whether the payment of the annuities was to be subject to the appellant's discretion and in the case of Miss Monaghan only during her spinsterhood. The issue was really not whether the

(1) (1929) A.C., at p. 334.

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testator informed the appellant that he wished Miss Monaghan and Mrs. Answerth to receive these annuities out of his estate after his death for, according to the appellant's own evidence, he did so desire, but whether these payments were to be subject to her discretion. *Barry* J. did not believe the appellant's evidence that the testator reposed a discretion in her or said that Miss Monaghan's annuity should be paid only as long as she remained unmarried. It was argued that from the rejection of this evidence there cannot be inferred the opposite, namely, that the appellant assumed the obligation to pay these annuities. That is true, but the proof of the trusts found by *Barry* J. does not depend upon dealing with the appellant's evidence in that way. The proof depends upon the oral evidence adduced for the respondents (upon which *Barry* J. acted), the documentary evidence and the admissions made by the appellant in the course of her evidence.

WEBB J. This is an appeal from an order of the Supreme Court of Victoria (*Barry* J.) declaring that the appellant (the defendant in an action in the Supreme Court), as executrix and trustee of the will of George Gill deceased, held the estate of the testator upon trust to pay to each of the respondents (the plaintiffs in the action) three pounds per week during life, and ordering the payment of arrears, £468 to each respondent, and costs.

The testator gave the whole of his estate to the appellant, a married woman with whom he appears to have worked for many years in social activities in the town of Hamilton, Victoria, and who, without payment, assisted him with his accounts in his business of chemist, and later in his retirement and during his last illness.

The respondents in their statement of claim in the action alleged, and the learned trial judge found, that the testator gave his estate to the appellant with the intention, communicated by him and acquiesced in by her, that she would pay three pounds per week to each respondent during life; and that, acting on the faith of her acquiescence, the testator gave her the whole of his estate. There was another claim by the respondent Monaghan but this need not be considered, as admittedly it was barred by the *Statute of Limitations*.

There are several grounds of appeal, including one as to the admissibility of evidence; but the only question which is now raised for decision is whether the learned trial judge could properly have declined to act on the evidence of the appellant that, although the testator had told her he had made a will, he did not divulge its contents to her; and that, although the testator had expressed a

wish to her to make payments of three pounds a week to each of the respondents, he had done so not in writing but orally, and that he had given her a discretion to withhold payment. Actually no witness claimed to have seen any writing by the testator as to such payments.

The testator was aged sixty-eight when he died leaving a widow aged eighty. Although by his will made 25th August 1945 he gave the whole of his estate, valued for probate purposes at £68,486, to the appellant, then aged fifty-four, still he had expressed to the appellant a wish that she should provide for his widow as he had been doing, and it seems that the appellant did so until the widow's death. At all events the widow, who had £13,550 of her own, by her will left £1,000 to the appellant. It was not suggested that the widow was under the influence of the appellant. On the contrary there was evidence that the widow was "reasonably alert and vigorous".

The learned trial judge found in effect that the testator told the appellant he had made his will and what it contained, and that he also told her in writing to pay three pounds a week for life to each respondent, and did not give the appellant any discretion to withhold payment. However, as already indicated, the appellant was the only living person who saw this writing, if it existed. But she denied its existence, and said that the testator's wishes were orally expressed and gave her a discretion to pay. She said that after his death she made a note in writing of these wishes, but sometime later destroyed the note as serving no further purpose.

I think it was open to the learned trial judge to find on the evidence (1) that the testator not only told the appellant he had made a will, but had also told her what this will contained; and (2) that he had directed the appellant in writing to pay three pounds per week for life to each respondent, without giving the appellant any discretion to withhold payment. On such findings if supported his Honour could properly have made the order appealed against: see *Blackwell* v. *Blackwell* (1). There is no contest about the law.

As to finding (1) the appellant in examination-in-chief said that in August 1945 the testator, just before undergoing a prostate gland operation, told her he had made a will and that it was with his solicitors; that a month or so later he returned to his office, which he was then sharing with her, and, while they were dealing with some accounts, he said to her that the respondent Monaghan had told him that he should provide for her; and that he added: "This is a suggestion, subject to your discretion, that you could give her

(1) (1929) A.C., at pp. 334, 342.

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three pounds a week and Ina Answerth could have the same". The respondent Monaghan was then a maid-housekeeper for the testator and his wife and had been in their service for over thirty years. The respondent Answerth, a married woman then aged thirty-eight, was his niece. The appellant in her examination-in-chief said nothing about her knowledge of the contents of the will. However, in cross-examination she said she "did not know what Mr. Gill's will was"; but under pressure admitted that, as a result of her conversation with him, she got the impression that she would be the person controlling his estate when he died. On this vitally important question as to whether the testator had during his life-time communicated to her the contents of the will, the respondent Monaghan, whom the learned trial judge regarded as truthful, said that on the day the testator died, or on the following day, that is to say, before the funeral and before the will was read by the solicitor who had prepared it and had retained it throughout, the appellant told Monaghan (1) that the will had made no provision for the widow; and (2) that Monaghan need not be worried if the testator had done what he told the appellant he was going to do.

As to finding (2): Monaghan said in effect that after the funeral the appellant told her that the solicitor had called at the widow's residence and had read the will, and that the appellant had to go to the office to get an envelope containing the testator's wishes; that half an hour later she returned and produced a piece of paper, saying to Monaghan, "This is what Mr. Gill wishes me to do for you"; and that the appellant then read from the paper that Monaghan was to get three pounds a week for life, and added "You cannot see this *document* now but you will later". (My italics.)

This evidence may appear to provide somewhat slender support for respondent Monaghan's claim. The evidence for respondent Answerth is stronger as it includes an admission by the appellant in a letter she wrote to the respondent Answerth's mother saying "To Mrs. Answerth Mr. Gill has left £156 per annum to cease on her death". However, with some hesitation, I think the evidence is also sufficient to support the respondent Monaghan's claim and the whole of the order. At all events I am not prepared to say that, even after allowing for the advantage his Honour had in seeing the witnesses, I would have reached a different conclusion. It is true that, when in January 1947 the solicitor for the appellant wrote to each respondent and said that the *appellant* was allowing the payment as a result of a "discretion suggested" to the appellant by the testator and also disclaimed any legal liability in the appellant to pay, neither respondent challenged this and continued to

receive the payment from time to time without protest until the payment ceased in 1950 when, following re-assessment of income tax and penalties amounting to £19,550 and reducing the net value of the estate to £28,500, the appellant refused to make any further payments to the respondents. Even then the respondents did not institute legal proceedings against the appellant until December 1952. This attitude of the respondents certainly tended to weaken whatever case they had. Again the position of the estate as regards income tax, and the liability to re-assessments and penalties, must have been known to the testator and could well have induced him to make the payments to the respondents subject to the appellant's discretion. But in failing to challenge the assertions in the letter of January 1947 the respondents could have had in mind that after all it was only one person's word against another's, that the appellant's version might be accepted by a judge or jury, and that it might be throwing good money after bad to commence proceedings while the appellant was still paying the annuities. Again the further delay in instituting proceedings after payments were withheld could have been due to a doubt as to the effect on the mind of a judge or jury of the failure to challenge or protest at the outset. As to the likelihood that the testator would give the appellant a discretion to withhold payments to the respondents because of possible income tax developments, that likelihood would have been greater if the estate had not been so large, and if the amount left after meeting taxation demands was likely to be small, because, as far as we know, the testator owed little to the appellant and presumably would not have been ready to sacrifice for her benefit others having greater claims on him.

The learned trial judge did not regard the appellant as truthful and there was much in her evidence to justify this opinion of her. But that is by no means conclusive: the communication by the testator to her of the contents of his will and his instructions to her to pay the annuities without giving her any discretion to withhold payment had to be proved independently by positive evidence. However, this was, I think, to be found in the evidence of respondent Monaghan and in the appellant's admissions in the witness box and in her letter to respondent Answerth's mother. These things having been proved by positive evidence, the acquiescence of the appellant, i.e., her acceptance of the estate on terms of paying the annuities absolutely, could reasonably have been inferred from her conduct.

I would dismiss the appeal.

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FULLAGAR AND KITTO JJ. One George Gill died on 8th June 1946 leaving a will dated 25th August 1945. The will devised and bequeathed the whole of the testator's estate to the appellant and appointed her sole executrix. The respondents brought an action in the Supreme Court of Victoria, seeking to establish that notwithstanding the unqualified terms of the disposition made by the will the appellant held the estate upon trust to pay thereout the sum of three pounds per week to each of the respondents during her life. *Barry* J. found the respondents' case proved, and gave judgment for them accordingly. From that judgment this appeal is brought.

The case for the respondents was that the testator in his lifetime expressed to the appellant a wish that after his death each of the respondents should receive from his estate the sum of three pounds a week for life, and that it was in reliance upon an undertaking by the appellant to carry that wish into effect, the undertaking being either expressed or implied by conduct, that he left his estate to the appellant. The jurisdiction thus appealed to was that which the House of Lords confirmed in *McCormick* v. *Grogan* (1). A passage in the judgment of Lord *Davey* in *French* v. *French* (2) contains probably as clear an exposition of the principle as is to be found in the books. "It is now well established," his Lordship said, "and has been settled since the time of Lord *Hardwicke*, that if a testator communicates in his lifetime to a proposed devisee or legatee that he has left him his property, and expresses a wish that the property should be disposed of in a particular manner, and the legatee or devisee by acquiescence, or even by silence, accepts that communication, and the testator dies without any repudiation, a trust is fastened upon his conscience, as it is said, and he cannot afterwards either appropriate the property to his own use or dispose of it otherwise than in accordance with the wishes which were thus communicated to him, and which he has accepted. My Lords, it is said that this jurisdiction is based upon fraud, and so it is, because if you once get to this, that it is a trust which is imposed upon the conscience of the legatee, then if the legatee betrays the confidence in reliance upon which the bequest was made to him, then it is what I should think everybody would consider a fraud, though I take the liberty to say that the moral turpitude of any particular case must vary infinitely according to the circumstances of the particular case. My Lords, the basis of it is of course that the testator has died, leaving the property by his will in a particular manner on the faith and in reliance upon an express or implied

(1) (1869) L.R. 4 H.L. 82.

(2) (1902) 1 I.R. 172.

promise by the legatee to fulfil his wishes, and your Lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think, by *Turner* V.C. in one of the cases which were cited, the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise, express or implied, made by the legatee to fulfil his wishes" (1).

The facts of the case are unusual. The testator carried on for a number of years a successful business as a chemist in Hamilton, a country town in Victoria, and retired in or about 1942. His business apparently prospered and he left an estate which was sworn for probate at about £47,000. He left a widow, who was eleven years older than he, but no children or other dependants. His wife had some means of her own, and in fact when she died, in October 1951, she left real estate, presumably consisting of the matrimonial home, valued at £4,884 and personal estate valued at £10,489, the nature of which does not appear. It is clear from the evidence, however, that the testator did not consider that his wife could properly be left without support. They had lived together apparently quite happily throughout the thirty-two years of their married life, yet for some reason he made no mention of her in his will.

The only other persons who, so far as appears, had any sort of moral claim to be provided for out of the estate were the respondents. One of them, Miss Monaghan, had been a domestic servant in the testator's household throughout the entire period of the marriage. Indeed she had entered Mrs. Gill's service as a girl of nineteen in 1911. She had worked for low wages—it was only after the testator's death that they rose to thirty shillings a week—and according to her evidence the testator had told her in 1943, in response to a request for an increase in pay, that she had no need to worry, that there would always be money for her, and that she was (or would be) well provided for if she stayed with him and his wife. Yet she was given nothing at all by the will.

The respondent Mrs. Answerth was a niece of the testator's wife. At his death she was about thirty-eight years of age, and married to a man who was fifteen years older than herself, in a modest financial position, and, as the testator knew, not qualified to receive any superannuation on retirement. Her mother, a sister of the testator's wife, had lost her husband in the first world war, and the testator had assisted her financially in connection with the education

(1) (1902) 1 I.R., at p. 230.

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of Mrs. Answerth and her brother. Mrs. Answerth and the testator were fond of one another, corresponded regularly, and met whenever he went to Melbourne where she lived. He had promised to look after her when he died, and had said that she would be remembered in his will. Yet she was omitted from the will altogether.

On the other hand the appellant, to whom the whole estate was bequeathed, was not related to the testator, and there is nothing in the evidence to suggest that he either was or considered himself to be under any obligation to make any provision for her. She was a married woman of about fifty-four with grown-up children, and she was living with her husband who was the manager of a wool and hide store. She first met the testator about 1926, and got to know him better during the depression when they were both members of a committee dispensing sustenance to people in need. At that time and continuously thereafter he allowed her to use a room over his chemist's shop for the purposes of social work of various kinds in which she engaged. Then she began to give him assistance in minor ways in connection with his business, and the extent of her participation in his affairs gradually increased. She apparently took over the task of checking the daily receipts of the business by reference to the cash register record; she helped with stock-taking; and she checked figures for his income tax returns. By the time he retired, about three years before his death, she had undoubtedly become very useful to him in the management of his affairs generally. Upon retirement he sold his business, but retained the freehold of the premises and the use of the upstairs room. In that room he thereafter kept his personal books and papers and interviewed people who desired to consult him about sick animals; and she for her part continued to use the room for her social work, and kept a key of the office and the shop. They were thus in constant contact with one another. She knew a good deal about his household affairs; she knew his wife, who used to come down to the office to see her and twice visited her home; she knew the respondent Miss Monaghan and her position in the home; and she knew the respondent Mrs. Answerth. There must have been some degree of friendship between the appellant and the testator, but she testified that they always addressed one another as Mrs. Voges and Mr. Gill.

In August 1945 the testator became ill and had to undergo an operation. On Saturday 25th August he went to the office of a Mr. Loats, a solicitor practising in Hamilton, and there he made the will which was ultimately admitted to probate. Then he telephoned the appellant, and according to her he said: "I have

made my will; it is at Westacott and Lord's and I am now going into hospital". She was not prepared to admit that there was any reason why he should tell her that he had made his will and where it was to be found. But he was clearly confiding in her a good deal and was constantly availing himself of her services in connection with his financial affairs. Indeed, from the time of his illness until he died, whenever the household accounts had to be met and he was too ill to attend to them he left it to the appellant to pay them, giving her for the purpose an authority to draw cheques on his bank account.

On the following Monday, 27th August 1945, a conversation took place between the testator and the appellant at the hospital, in the course of which he asked her "to look after Mrs. Gill". This request, which was to be repeated later, and to which she admits that she assented, constituted at once the whole of the provision the testator made for his widow and the only explanation the appellant has been able to offer of her conduct in providing out of the estate for the widow's maintenance and the running of her household during the remainder of her life. The important point about this for the purposes of the case is that, notwithstanding the vagueness of the language used, the testator, while giving his whole estate to the appellant, was making clear to her that he was depending upon her to provide for the needs of his widow, and she for her part was assuring him that she would do so. A long step has been taken when it is established that the gift, though unqualified in terms, was subject to at least one promise which bound the appellant's conscience.

In September the testator was able to leave hospital, and about the end of October there took place in the office over the chemist's shop a conversation in which, as the appellant admits, the testator expressed certain further wishes concerning the manner in which she should act in relation to his estate after his death. Her case is that it was only on this occasion and in the words she purported to quote that the testator ever communicated to her any wishes touching the respondents. She said that the testator, who was accustomed to draw one cheque for the total amount of all accounts which had to be paid at the end of a month, had made out a cheque and was giving her the accounts to pay. She added that he looked very worried. Then she proceeded: "he said 'Annie Monaghan tells me that I should provide for her. We have been very good to her, and this is a suggestion, subject to your discretion, that you could give her £3 a week, and Ina Answerth could have the same. Brown Street property is not to be sold to Sabelberg's. Clarke

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Street property could be used later to build flats. See Harry Bullock about repaying £2,000 which I have loaned him free of interest.' I have got an idea there was something else; just at the moment I can't think what it is. There was something said about solicitors—' Don't employ Hamilton solicitors, and attend to the graves and pay all accounts promptly.' As far as I can remember that is all. I didn't ask him any questions. There was nothing said about his assets; I didn't know what his assets were ".

On the first Saturday in December 1945, the testator suffered a thrombosis in the leg and until his death he was confined to his home, being at first bedridden but later able to get about in a chair or on crutches. In relation to this interval of six months the appellant gave evidence which not only makes clear the extent to which the testator was entrusting her with the conduct of his affairs while he was alive but also suggests strongly that there was an understanding between them, connected with his having made his will in her favour, which entitled him to express to her in mandatory terms wishes of a testamentary character. " I was down at the house on numerous occasions thereafter ", she said. "At first I used to go and take the mail, and he arranged that I have a signature at the bank because he wasn't interested enough, or didn't feel that he could be bothered with the business side of his affairs, and I went backwards and forwards to his home. He told me that; he asked me to come. Shortly prior to his death I had further conversations with him about his affairs, the week before he died and the week of his death. That was when he was in bed. He just said would I see that his gold watch and chain went to his nephew, Ross Morris, and his best clothes, anything that fitted him, and would I see that Mr. Bullock got his leather coat and hat, and again he asked me would I look after Mrs. Gill, and I said ' Yes ' I would if she would allow me to."

According to Miss Monaghan, the appellant was at the testator's home almost every day after he took ill in August, and while he was in bed she appeared to be doing all his business. He died at his home early in the morning on Saturday, 8th June 1946. Despite the early hour, the appellant was present. She had a conversation with Miss Monaghan in the kitchen. Miss Monaghan said, according to her evidence, " It is going to be terrible here without Mr. Gill ", and the appellant replied, " You will not have to be worried if he has done what he has told me he was going to do. The terrible part is that he has not provided for his wife in his will ". Miss Monaghan said, " That is a terrible thing. What

is going to happen ? " and the appellant replied, " I will have to do something to keep her quiet ". The appellant in giving evidence denied that she knew or said anything to the effect that she would have to do something for Mrs. Gill to keep her quiet ; but the learned trial judge believed Miss Monaghan on the point.

The conversation ended, as Miss Monaghan testified and his Honour believed, with a statement by the appellant that she had to go down the street " and get an envelope with Mr. Gill's wishes in it." His Honour was satisfied on Miss Monaghan's evidence that when the appellant came back she produced a long narrow piece of paper from which she read, observing " This is what Mr. Gill wished me to do for you ". " Then ", said Miss Monaghan, " she read off, I was to get £3 a week for life to start from the day he died until the day I died, and she said ' You cannot see this document now but you will later ' . . . Later (the witness meant a few days later) I remember asking Mrs. Voges in the event of anything happening to her would this legacy of mine still come to me, and she said ' Yes, everything has been arranged for that ' ". Miss Monaghan also gave evidence of statements by the appellant to the effect that the testator wished Miss Monaghan to be provided with a home free of rates and taxes, but no question about that arises in these proceedings.

On 12th June 1946, four days after the testator's death, the appellant called on the testator's solicitor, Mr. Loats, who produced the will and read it to her. According to Mr. Loats she evinced no surprise at its provisions. Then they went together to see Mrs. Gill, and Mr. Loats read the will to her. She made no comment but gave him a glance which in cross-examination he agreed was a sharp reaction. At some stage and the appellant was not prepared to deny that it was when Mrs. Gill first discovered she was not mentioned in the will the appellant told her not to worry. " I told her " she said, " what had been asked and what I would do."

The appellant would not admit in the box that up to that time any written record of the testator's wishes, apart from his will, was in existence. But she said that after Mr. Loats had read the will to Mrs. Gill she, the appellant, went down to the office, and having thought by then of " some of the suggestions Mr. Gill had said to me, subject to my discretion ", she got a piece of paper and wrote them down. It was from this piece of paper that she said she read later to Miss Monaghan. She said, " I read to Miss Monaghan what I had written on it, ' subject to my discretion '. I read to her what she would get. I read to Miss Monaghan that

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subject to my discretion she had been left £3 a week if she remained single. I didn't say anything further to her then." Unfortunately the piece of paper had disappeared before the trial. The appellant thought she had destroyed it as being of no further use to her.

It is instructive to turn to a later account of the contents of the piece of paper as given by the appellant during her re-examination. The trial judge was questioning her. "Give me in words a description of your mental picture of that document and the order in which your notes appeared?—It would be the property first, Brown Street and Carter Street, and then not to employ a Hamilton solicitor and then about the loan that I had to see about and collect from Mr. Bullock and then about the two ladies, Miss Monaghan and Mrs. Answerth, and then I do not know whether this would come next but to see to the grave, or whether it would be to make prompt payments with all accounts; it was something after that type."

"Having recollected the various items in that order, will you do your best to tell me just what was on the paper?—Brown Street property was not to be sold to some folk here. I wrote down the people's name. The Brown Street property was not to be sold. Clarke Street property at a later date could be used for flats. Both sides of the property had a piece of land. I did not put that on the paper though. Clarke Street property could be later used for flats. Be sure and collect the loan. I am trying my best to remember."

"Well, what was on the paper?—Be sure and collect the loan with the words, 'free of interest'. Miss Monaghan was to get, subject to my discretion, £156 per annum while she remained single. Mrs. Answerth could also receive £156 per annum until death. Attend to the grave or graves."

"But which?—I cannot remember. It is seven years ago. I cannot just remember it. 'Be sure and pay accounts promptly', that was the household accounts or any accounts outstanding, anything."

After the testator's death the appellant continued to pay all Mrs. Gill's household accounts out of moneys she had received from the testator's estate. Some accounts were paid by her monthly, and those which were paid at the door, like the baker's bills, she provided for by giving Mrs. Gill what she considered she would want to pay them. Asked in cross-examination why she had made these payments, she gave as her sole reason that the testator asked her to look after Mrs. Gill, who was his wife and an elderly woman. She said she did not regard herself as under any obligation to make

these payments, but she agreed that the accounts she paid were those which the testator had paid during his lifetime, so that in continuing to use money from his estate to pay them she was carrying on his estate just as when he was alive. In doing this she was doing exactly what she had said in a letter that the testator wished her to do. The letter, of which only an undated part is extant, was written to Mrs. Morris, a sister of the testator and the mother of the respondent Mrs. Answerth, in reply to a request by Mrs. Morris to be allowed to know the contents of the will. It was written a little over a month after the testator's death. In it the appellant stated her position to be that of executrix, and she did not add that she was universal legatee. The first significant passage in the letter was: "Mr. Gill's wishes are that his estate be carried on just as it was when he was with us all". Naturally enough, the respondents rely upon this passage, coupled with the appellant's actual conduct in meeting the outgoings of Mrs. Gill's household during the remainder of her life, as suggesting strongly that the appellant had been given the estate in order that she might apply it in carrying out wishes which the testator had expressed and which she had accepted as binding upon her. The appellant could not deny that she had written the passage, but she did deny that she had had any conversation with the testator about it. The next statement in the letter gives added weight to the suggestion. It was: "To Mrs. Answerth Mr. Gill has left £156 per annum to cease at her death"—words which it is very difficult to imagine being used by a woman of the appellant's obvious capabilities if she believed that the estate had come to her free from any obligation. Yet again she denied that she had had any conversation with the testator about the matter. She admitted in cross-examination, however, that apart from the fact that Miss Monaghan's annuity was to cease on her marriage there was no difference between the two respondents as regards the provision the testator made for them.

From other passages in the letter, counsel for the appellant sought to draw some comfort as showing that she was engaged in reciting, not binding dispositions by the testator, but voluntary decisions of her own as to the distribution of some of the testator's effects. The relevant passage reads: "To Mr. R. Morris he has left his Gold Watch and chain his best suit and there are 2 nice (shirts) (not new) if the collar bands are the correct size they will go in the parcel. Will you please let me know the size? and the following articles which you yourself might like to have a Gold signet ring with G.G. engraved on it a thin plain wedding ring a

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clock in the hall which came from Mr. Gill's home 4 prizes which Mr. Gill received at Scotch College. Two prizes which the little dog won. A nice silver cake dish also a sandwich tray. Mr. Gill has given his clothes etc. around to his friends. About the car Mr. Gill's wish is that the car is not for sale." While no doubt there is in this passage some suggestion of the exercise of a discretion by the appellant, it is too faint a suggestion to detract seriously from the impression which the earlier sentences of the letter create, namely that the writer was asserting that the testator had expressed in some effectual form wishes of a testamentary character in favour of persons including the present respondents, and that she as executrix was obliged and intended to carry them out.

A month later, on 27th August 1946, the appellant wrote a letter to the respondent Mrs. Answerth which strongly supports the respondents' case. "Please accept my sincere congratulations on your good fortune", she wrote. "I am always happy when I know other folk are happy. I am sure you must have a contented feeling when you think what Mr. Gill's gift will mean . . . When Mr. Gill's business is in order I will be in touch with you about twice a year so that will always be a contact." This obviously had reference to the £156 per annum for life which the appellant had informed Mrs. Morris that the testator had left to Mrs. Answerth; and it is difficult to see what other meaning the appellant could have expected the recipient to place upon her words than that the annuity was payable as of right, by reason of the testator's bounty, and that it would be the appellant's recurring duty as executrix to make the payments.

In January 1947 the appellant began to make half-yearly payments of seventy-eight pounds each out of the estate to each of the respondents. With the first payment, each received a letter from a firm of solicitors. The letter was in somewhat curious terms, and it spoke with two voices. It was headed "re Estate of George Gill deceased", and began by stating that a cheque for seventy-eight pounds was enclosed under instructions from the appellant "the Executrix of the above estate". Down to that point the inference was clear enough that the appellant was dispensing the testator's bounty and not her own. The letter went on, however, to describe the amount of the cheque as "the first half-yearly payment of an annuity of £156 per year which our client is desirous of allowing to you during your lifetime". Then it proceeded: "As you are aware, Mrs. Voges is the sole beneficiary under the will of the late George Gill and she desires to carry out a discretion suggested to her by Mr. Gill to pay an annuity of the

aforesaid amount to you and it is her intention to forward you each January and July the sum of £78 out of monies from the Estate. (At this point Miss Monaghan's letter differed from Mrs. Answerth's by the addition of the sentence: "Should you marry such payment would cease forthwith"). Kindly note that our client is under no legal obligation to make these payments and if at any future time circumstances materially affect income from the estate, then of course payments would have to cease."

This was the first occasion on which it was ever asserted by or on behalf of the appellant that the payment of the respondents' annuities was a matter for discretion, or that the respondents had not an enforceable right to the annuities as testamentary gifts from the testator. The appellant, it is true, swore that from the beginning she had made it clear that the testator's wishes were subject to her discretion, and that in fact the testator had done no more than say: "this is a suggestion, subject to your discretion, that you could give her (Miss Monaghan) £3 a week and Ina Answerth could have the same". But the learned trial judge emphatically refused to believe her. She was, his Honour said, a woman of great energy and considerable ability and shrewdness, but she was alertly on the defensive from the time she took the oath. He was satisfied that she had not told the full story of her dealings with the testator; and her insistence that the testator had used the phrases "this is a suggestion" and "subject to your discretion" seemed to his Honour to proceed from the exigencies of her situation as defendant in the action rather than from her recollection of a conversation that had really taken place. His Honour, who had the advantage of seeing her in the witness box, said that he did not regard her as a truthful and candid witness. In the transcript of the appellant's evidence, and particularly of her cross-examination, it is easy to see much ground for this unfavourable view of her. The answers she gave in cross-examination about the alleged discretion and what she understood to be the position in which the testator was placing her were about as unsatisfactory as they well could have been. The true character of what had passed between the testator and herself seems clearly enough to have been brought out in the course of a few questions and answers which may be quoted:—"You believed in October, after this conversation, that you were going to be in control of Mr. Gill's estate?—Yes."

"And that, of course, was made quite plain to you when he told you what solicitors you were to employ. You understood that was in connection with the administration of his estate, did you not?—Yes."

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"There is no doubt that the whole of this conversation you told us about was a discussion with Mr. Gill about what you were to do with his affairs after he died?—That was not a discussion."

"If you do not like that word 'discussion' let us say 'conversation'. He was telling you what he wished you to do after he died?—He was telling me just that, yes."

The half-yearly payments continued until 1st September 1950, each of the respondents receiving £624 in all. Then, as a result of investigation by taxation officials which revealed understatements of income in the returns lodged by the testator in his lifetime, the appellant was called upon to pay nearly £20,000 for income tax and penalties, and in consequence the net estate left in her hands was reduced in value to about £28,500. Thereupon the appellant informed both the respondents that no further payments would be made to them, and that led to the present litigation.

The issue which *Barry* J. had to decide was a very narrow one. It is an irresistible conclusion from the evidence, although the appellant was unwilling to be frank about it, that when the testator found in August 1945 that he had to undergo an operation he disclosed to the appellant not only that he was making a will but also that she was to be his executrix and the only person in whose favour any gift was to appear on the face of the will. It was common ground that in the ensuing months he communicated to her certain ideas as to what she should do with respect to his estate. Some of them, even on her own story, he expressed to her in the form of directions: "Brown Street property is not to be sold to Sabelberg's . . . See Harry Bullock about repaying £2000 (or be sure and collect the loan, as she put it later) . . . Don't employ Hamilton Solicitors, and attend to graves and pay all accounts promptly". But so far as his ideas related to financial benefits to persons other than the appellant, that is to say the widow and the respondents, the issue is whether he expressed positive wishes or only suggestions which she was to be completely free to adopt or not as she might see fit from time to time. So far as the widow is concerned the appellant does not pretend that there was anything less than a request which she promised to perform. The testator asked her "to look after Mrs. Gill", and she promised to do so. When he died and the will was read to Mrs. Gill the appellant immediately told her not to worry, and assured her that what she had been asked to do she would do. But as regards the respondents her story is entirely different: all that the testator put to her, she says, was a suggestion that she might pay each of the respondents

three pounds a week for life, and not only was this a mere suggestion, but it was expressly subject to her discretion.

It must be conceded that the appellant's case on the issue which thus presented itself was not without some claims to credibility. If in truth the testator had desired to leave all his property to the appellant beneficially there were two things against which they may both have thought that it would be important to guard. One was the possibility that local scandal might be aroused if it should become known that he had left his estate to the appellant to the exclusion of his widow and others who had just expectations; and the possibility that this may have been in the testator's mind is suggested by the appellant's evidence that he told her not to employ Hamilton solicitors. The other danger was that the disposition might be wholly or partially upset by the courts in proceedings either challenging the validity of the will or claiming provision out of the estate for the widow under the Testator's Family Maintenance provisions of the *Administration and Probate Acts*; and again there is a suggestion in the evidence that something of the sort may have occurred to the appellant at least, for one of her first statements after revealing to Miss Monaghan that the widow was omitted from the will was to say she would have to do something for Mrs. Gill to keep her quiet. Perhaps they thought that these possibilities might make periodical payments to the respondents as desirable as the meeting of Mrs. Gill's household expenses during the remainder of her life. Or perhaps the testator's ill-health, having reached the stage at which, in the appellant's language, "he wasn't interested enough, or didn't feel he could be bothered with the business side of his affairs", made him unwilling to trouble his head with questions as to the disposition of his estate after his death, and led him to leave the whole matter to the appellant to do what she should think right. It is certainly not impossible that the testator may have intended, while mentioning some benefits which he thought the appellant might bestow for reasons either of kindness or of prudence, nevertheless to leave her completely free of all legally binding obligation. The question is whether the probabilities should be regarded as in favour of that view or against it when the evidence is considered in the light of the trial judge's opinions as to the credibility of the witnesses.

It is to be noticed that neither the appellant herself nor the solicitor Mr. Loats painted a picture of a man lacking in decision. Such injunctions as he laid upon the appellant concerning the estate were not wanting in directness and do not suggest a surrender of his affairs into hands which he felt to be more capable than his

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own. The impression created is rather that of a man desiring that the practice he was following, of relying upon a trusted agent to carry out his instructions, should continue after his death; and this impression is strongly confirmed by the accounts the appellant gave of what she wrote on the piece of paper.

Assuming in the appellant's favour and contrary to the trial judge's opinion that what appeared on the paper was in the appellant's handwriting and not the testator's, and that it was written after the testator's death, yet the precision of its terms, its general character, and the very fact that it was put down in black and white at all are difficult to reconcile with the notion that the testator had no intention of imposing any binding obligation upon the appellant. But there was ample ground upon which his Honour could conclude that the paper in fact did contain a list of wishes expressed by the testator in his lifetime, and that, even if the list was not actually written out by him, at least the wishes it contained were communicated by him to the appellant in such a manner that she felt obliged to make a contemporaneous record of them. Moreover, even putting the evidence about the document on one side, it was well open to the learned judge to deduce from the appellant's evidence of her conversations with the testator, in which he expressed positive wishes about many things to be done by her in connection with his estate, that he was induced by her acquiescence to rest assured that she would pay each of the respondents three pounds a week for life. To describe what he said in this respect as a suggestion, and to include in it the somewhat artificial phrase "subject to your discretion", was to introduce an element incongruous with the general tone of the requests (if indeed they should not be called directions or instructions) which the testator was stating to his executrix. It was a conclusion not only open on the evidence but with the weight of probability in its favour that what the appellant read from the piece of paper on the day the testator died was accurately recounted by Miss Monaghan and was an accurate record of the wishes which the testator had stated to the appellant and she had agreed to fulfil.

Then, too, in the undated letter to Mrs. Morris and in the letter of 27th August 1946 to Mrs. Answerth the appellant used language utterly inconsistent with a belief on her part that the respondents' annuities were gifts from herself and could be discontinued by her whenever she might choose. Enough has been said in discussing the details of the evidence to show that there is ample support for the conclusion that when the appellant claimed a discretion to terminate the annuities, first in the solicitors' letters accompanying