IN THE HIGH COURT OF AUSTRALIA.

ORIGINAL

VOGWELL

V.

VOGWELL.

REASONS FOR JUDGMENT.

No. 23 of 1941

Judgment delivered at SYDNEY

on TUESDAY THE 9th DECEMBER, 1940

1941

H. J. Green, Govt. Print., Melb.

C.11235

W SOUTH WALES REGISTRY.

No. 23 of 1941.

ON APPEAL from the Supreme Court of New South Wales.

BETWEEN

LILY JANE CHARLTON VOGWELL.
(Plaintiff) Appellant.

and

WILLIAM OSWALD VOGWELL.
(Defendant) Respondent.

9th December 1941.

Without calling on Counsel for the Respondent the following oral judgments were given.

RICH A.C.J: In this case it appears that when an application was made by the respondent for grant of probate of the will of his mother, the appellant (his sister) lodged a caveat claiming interest as daughter in the estate of her mother and demanding that nothing be done without notice to her. Her address for service of all proceedings given in the caveat was that of a firm of solicitors. Subsequently an order nisi was granted ordering the caveatrix to show cause why probate should not be granted to the applicant (the present respondent). On 18th October 1937 on the hearing of the motion to make the order nisi absolute, the appellant was represented by a solicitor but the order nisi was made absolute, the question of costs being reserved. The appellant did not file any affidavit in opposition to the order being made. But on 8th and 29th November 1937 when the adjourned motion was heard the appellant filed an affidavit alleging want of testamentary capacity and undue influence costs of which she was ordered to pay. After the grant of probate to the respondent he acted as executor of the will. And the appellant recognising his status as executor sued him both at common law and in equity. In an action at common law tried before a jury the appellant sued the respondent as such executor for services rendered as housekeeper and nurse during the lifetime of her mother on an alleged agreement that the appellant was to receive £2.8.10 per week for such services. The sum claimed was £2030.17.10. The jury returned a verdict for the defendant executor. And in a proceeding under the Testator's Family Maintenance Act, 1916-1934, New South Wales, which was heard on the 23rd, 29th, 30th March and 12th, 13th, 17th and 18th April 1939 before Mr. Justice Long Innes, the Chief Judge in Equity, she

obtained an order conditional upon her releasing the testatrix's estate from all further claims or demands. This condition was not fulfilled and the order was not taken out or availed of. Three years after the grant of probate in October 1940 the appellant filed a statement of claim praying for revocation of the will and alleging want of capacity on the part of the testatrix and undue influence and coercion on the part of the defendant. The case came on for hearing before His Honour the Probate Judge when by way of preliminary objection, Counsel for the then defendant (the respondent to this appeal) contended that the matter was res judicata and that the plaintiff was estopped. The learned probate judge "gave no ruling on the point but thought it better to allow evidence to be tendered on the testamentary capacity of the testator", I shall follow his example and deal with the appeal on its merits. And His Honour gave no ruling on another ground that of acquiescence which, however, does not appear to have been expressly taken, Newell v. Weeks, 2 Phill. 224 at p.233, Young v. Holloway 1895 P.87, 89, 90.

The will in question is short and simple. The solicitor who on the morning of the 27th January, 1937 took the testatrix's instructions, drew the will and was one of the attesting witnesses gave evidence that the testatrix said "Mr. Morgan, I have never made a will and I now want to make a will'. She said 'I am going to leave it to my son'. I said 'All right, Mrs. Vogwell, how do you want to leave your property?' I said 'Have you any other children'. She said 'Yes, I have a daughter - I do not intend to leave her anything'. She subsequently said 'Oh, I will leave her £5'. She said 'My son has been a very good son and has been most attentive to me. When I have been sick he has been a regular constant visitor and has largely contributed to the support of the home for some years'. She gave me the name of her daughter and also of her son. I asked her her full name. She said 'Sarah Mary Vogwell, but I am generally known as Mary'. I drew the will and read it over to her. I either telephoned or rang the bell or I opened the door leading to the passage and asked for a Sister to come. A few minutes afterwards a Sister came - I subsequently ascertained that she was the Matron. I said to the Matron "Mrs. Vogwell is making a will'.

HIS HONOUR: Q. Did you say that in the presence of Mrs. Vogwell? A. Yes- 'And I want you to be one of the witnesses' She said 'All right'. I

then placed the will before Mrs. Vogwell, who signed it. I said 'That is your will, Mrs. Vogwell, and you request the Sister and myself to witness it'. She said 'Yes'. We then witnessed the will. I was there 2 or 3 minutes afterwards and then went away."

In cross-examination he said that at the time the testatrix "was quite lucid and clear mentally". The other attesting witness, the matron of the hospital, could not be called as she was at the time out of the jurisdiction, engaged in war work. Mr. Morgan's evidence is supported by the evidence of Sir Charles Blackburn, a leading physician, who had for 14 or 15 years attended the testatrix before her removal to the hospital where she died. Dr. Blackburn attended the testatrix daily while she was an inmate of the hospital from the 15th December to the 27th January 1937 (see Hospital Records) and his evidence is that she was always quite rational when he saw her and appeared capable of understanding her affairs and what she was talking about. Whenever he saw her in the day time she was rational and normal. The evidence given on behalf of the plaintiff was that of herself and some women friends who did not see the testatrix at any relevant time and of handwriting experts who attempted to prove incapacity from the testatrix's handwriting. The plaintiff was given the opportunity of an adjournment to call a medical expert but did not avail herself of the opportunity. The learned Probate Judge who had the advantage of hearing and seeing the witnesses accepted the evidence of the Solicitor corroborated as it was by that of Dr. Blackburn. Unless I, who have not had this advantage, can come to the conclusion that the primary judge was plainly wrong I must defer to his judgment, Powell v. Streathan Manor Nursing Home 1935 A.C. at p.250. It was also contended before us that the matter should be referred back to the primary judge so that the appellant should have the opportunity of calling "further evidence" from medical men, the purport of which we have seen, for the purpose of rebutting the evidence of Dr. Blackburn. Before the Supreme Court of New South Wales to which the appellant first appealed a similar application was made and refused. Counsel for the appellant admitted that the principles upon which "further" evidence is allowed to be given were correctly stated by the Chief Justice of the Supreme Court but contended that the evidence to be tendered fell within

those principles. I cannot accede to this contention. The "further" evidence to be given by the witnesses whom the appellant proposes to call consists of opinions of doctors who had never attended the testatrix. Their belief is similar in character to the Pauline definition of Faith "the substance of things hoped for, the evidence of things not seen". It would not countervail the clear and definite evidence given by the physician who had attended the testatrix for over 14 years and had also attended her during her last illness at the hospital and in particular on the day when the instructions for the will were given and the will was executed. For these reasons I consider that the judgment of the Full Court of the Supreme Court of New South Wales upholding that of the learned Probate Judge was right.

The appeal should be dismissed with costs.

LILY JANE CHARLTON VOGWELL.

(Plaintiff) Appellant.

v.

WILLIAM OSWALD VOGWELL.

(Defendant) Respondent.

JUDGMENT. STARKE J.

I agree. The evidence upon which Mr. Watt relied of Dr. Smallpage and the other doctors would not, in my opinion, influence the decision of this Court at all. They are speculations based upon various matters brought to their attention but they are utterly insufficient to influence a decision based upon the explicit evidence of the Solicitor who drew the will, the medical attendant who attended the testatrix for many years and on the very day on which she made the will.

I think the decision was right and ought to be affirmed.

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JUDGMENT. McTiernan J.

I agree with the judgment of the Acting Chief Justice. No special grounds are shown for admitting the "further" evidence. When it is considered with the evidence given in support of testamentary capacity I do not think that the "further" evidence would, if admitted, be likely to have a determining or important factor in the result of the case. There are no probable grounds for thinking that it could lead to a different result. I agree that the appeal should be dismissed.

Williams J. I agree that the appeal should be dismissed.

The evidence tendered before the learned Probate Judge, particularly that of Sir Charles Blackburn, was sufficient in my opinion to justify His Honour's conclusion that the testatrix had testamentary capacity on the day she gave instructions for and executed the will. Moreover His Honour accepted the evidence of Mr Morgan who drew the will and, cursory as his examination of the testatrix was, it shows that the details were supplied by the testatrix herself. As the appellant possessed assets approximately equal to those of the testatrix the will was not irrational, and there was no evidence that the testatrix, although able to transact ordinary business, was obsessed by an insane delusion which rendered her incapable of judging fairly her daughters claims.

I agree with the judgment of the learned Chief Justice of the Supreme Court that special leave should not be granted to admit the fresh evidence of testamentary incapacity on the ground that it would not be likely to have any material influence on the result because none of the specialists had ever examined the testatrix in her lifetime, and, there was no reasonable probability that their ~~theoretical~~ imaginings, some of which were contradicted by the facts, would have been accepted against the clear views to the contrary expressed by Dr Blackburn.