7,1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N : ELEANOR JESSIE DUN Appellant

-- and --

FRANCIS BOYCE DUN and CHARLES EDWARD DUN Respondents

C A S E FOR THE A P P E L L A N T

RECORD

1. This is an appeal (brought by special leave of Her Majesty the Queen in Council by order dated the 3rd day of June, 1958) from an order of the High Court of Australia (Dixon C.J., Kitto and Taylor JJ, McTiernan and Williams JJ dissenting) dated the 19th day of December, 1957, allowing an appeal by the above named Respondents Francis Boyce Dun and Charles Edward Dun from an order of the Supreme Court of New South Wales (Roper CJ in Equity sitting as the Supreme Court of New South Wales in Equity) dated 30th day of August 1956. The said order of Roper CJ in Eq. was made under s.3(1) of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 in pursuance of leave granted by Myers J. sitting as the Supreme Court of New South Wales in Equity under the provisions of s.5(2) (A) (hereinafter set forth) dated 3rd day of June, 1955. The decision and reasons of His Honour Mr. Justice Myers are reported in 56 S.R. (N.S.W.) 181.

p.101

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p.76

2. The question for decision is whether in an application under the said Testator's Family Maintenance and Guardianship of Infants Act where the applicant widow or child of a testator claims that a testator has disposed of his property by will in such a manner that the applicant is left without adequate provision for his or her proper maintenance, education or advancement in life as the case may be the initial issue should be determined upon the facts as they exist as at the date of the application or upon the facts as they existed at the date of the testator's death.

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3. In 1926 the Supreme Court of New South Wales in its equitable jurisdiction (Harvey C.J. in Eq.)
p.73, l.10 decided in Re Forsaith (26 S.R. (N.S.W.) 613) that
p.82, l.10 the proper time for deciding the issue is at the date of the hearing of the application. This decision had been followed by the Supreme Court of New South Wales from the time of the decision in Re Forsaith until shortly after the decision of
p.83, l.24 the High Court in Coates v. National Trustees Executors and Agency Company Limited 1956 (95 C.L.R. 494) which was a decision under the corresponding Victorian Act and in which a majority of the High Court (Dixon C.J. Webb and Kitto JJ; William and Fullagar JJ dissenting) held that under the Victorian Act the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined not as at the date of the application but as at the date of death of the testator and in so ruling the said majority discussed and disapproved of the said New South Wales decision in Re Forsaith. In addition to having been applied continuously in the Equity Courts of New South Wales between 1926 and 1956 the said decision in Re Forsaith was expressly applied by the Supreme Court of New South Wales in its equitable jurisdiction (Roper J as he then was)
p.73, l.20 in a reported decision, namely Re A.L. Pichon (47 S.R. (N.S.W.) 186).

p.3, l.7 4. The Appellant is the widow of the late Thomas Fitzgerald Dun (hereinafter called "the Testator")
p.3, l.10 who died at Sydney in the State of New South Wales on the 10th day of September, 1942.

5. The Appellant was married to the said Testator
p.3, l.30 on the 15th day of May, 1937, and lived with him in
p.4, l.3; Sydney and in the town of Cowra in the State of New
l.34 South Wales during the marriage. There was no child born of the said marriage.

6. The said Testator duly executed his last Will
p.3, l.11 and Testament on the 18th day of August, 1939, and by such Will he appointed the abovenamed
p.3, l.15 Respondents to be executors and trustees thereof and disposed of his real and personal estate in the following manner :

(a) The household furniture and household and
p.10, l.37 personal effects and motor car of the Testator were bequeathed to the Appellant together with
p.11, l.5 the sum of £500 to be paid as soon as conveniently may be after the death of the

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Testator and the further sum of £1500 to be paid to the Appellant at such times within five years of the death of the Testator as the trustees should think fit and in addition also an annuity amounting to £600 during the life-time of the Appellant; p.11, l.8 p.11, l.25

(b) The sum of £100 was given to the Board of Directors of the First Church of Christ Scientist, Sydney and the sum of £250 each to the Respondents; p.11, l.14 p.11, l.19

(c) Annuities of £52 each were given to Bridget Long, widow, and to each of the said Respondents upon certain conditions and in lieu of commission and an annuity of £100 was given to Hanorah Dun the mother of the Testator; p.11, l.28 p.11, l.30 p.11,

(d) The residue of the estate of the Testator was given to the said Respondents upon trust to sell call in and convert the same into money and to pay thereout all debts funeral and testamentary expenses and to invest the residue and stand possessed of such investments upon trust as to both capital and income for any child or children of the deceased provided that if such lastmentioned trust should fail then the residuary estate was directed to be held in trust for such of the brothers and sisters of the Testator as should be living at his death and the child or children of any brother or sister of the Testator then dead or who should predecease him. p.12, l.42 p.13, l.19 p.13, l.36

7. By a Codicil dated the 16th day of May, 1942 to his last Will and Testament the Testator revoked the annuity to the Appellant of the sum of £600 and in place thereof he substituted an annuity of £800 and inserted the following provisions :- p.18 p.18, l.29

"AND WHEREAS I desire to relieve my said wife as far as possible from the burden of Income Taxes and other like impositions so that she may enjoy to the full the provision made for her during her life NOW I HEREBY DIRECT my trustees to refund to my said wife on demand or otherwise reimburse her for such annual or other sum or sums of money which during her life she shall pay or become liable to pay any taxing authority p.18, l.32

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in the Commonwealth of Australia (whether such authority be State or Federal) by way of Income Tax or other like imposition on the said annuity ....."

p.19, l.14. In all other respects the Testator confirmed his said Will.

8. The Testator in his lifetime was a merchant
p.4, l.26. and was the owner of a produce store in Cowra, New
p.4, l.29. South Wales, was governing director of Tresilian and Dun (Grenfell) Pty. Limited which Company carried on a produce business at Grenfell, New South Wales, and also was the owner of a farming
p.4, l.25. and grazing business at Greenthorpe in New South Wales.

9. Probate of the said Will and Codicil of the Testator was duly granted to the Respondents by
p.3, l.15. the Supreme Court of New South Wales on the 5th day of January, 1943 and the estate of the
p.3, l.19-24. Testator as at the date of his death was valued at Twenty-two thousand two hundred and sixteen pounds (£22,216) but the discovery of certain notional assets increased the value of the estate for death duty purposes to Twenty-six thousand two hundred and sixteen pounds (£26,216).

p.3, l.35-39. 10. The Appellant had known the Testator since the year 1926 and during the following ten years she resided in Melbourne and cared for her widowed mother who died in the year 1936 and shortly thereafter the Testator paid a visit to Melbourne and proposed marriage to the Appellant. On the
p.37-38. 13th day of April 1937 the Testator wrote to the Appellant the following letter such letter being in evidence before Mr. Justice Roper at the hearing of the Application referred to above -

Telephone
COWRA 353

TRESILIAN AND DUN (COWRA)
Wool and Wheat Buyers,
Produce Merchants, Machinery Agents,
Kendal Street, COWRA

Kendal Street, COWRA
13th April, 1937

Ny Dear Nell,

Very pleased to get your letter this morning

darling and I can see you will be having a very busy time for the next few weeks dearest anyhow dear one dont worry about going to college as I think it will be too much for you to fit in and your time will be fully occupied in packing and disposing of the furniture, etc. I presume dear you are letting the flat unfurnished as you intended. I think it would be advisable to dispose of the car dear as I will have the Chrysler in Sydney and we will not need two cars. You will soon get into the way of driving the Chrysler. I will have to buy a new utility for Frank here as it will be more useful in the business than an ordinary car. I hope you will be able to get a decent price for it. Dearest I have not said a word to any of my family as I have always said I would do things very quietly if ever so I am just going to give them a surprise.

Kit is at present staying with my sister Edith (Mrs. Rava) at Wagga but I expect she will be going to Sydney in the course of a week or so. My feeling is dearest that it will be better for us to be married in Melbourne next month and your trip to N.S.W. will be a honeymoon but as I have told you before dear and I dont like the idea of rushing you into it and I am quite prepared to do anything to meet your wishes. There is one thing dear that I am a little concerned about and that is my health, as you know I am a Christian Scientist and have been able to rise above all difficulties and meet any problems in regard to health or other things and with God's help and protecting care I am sure I will continue to do so. I have seemingly had a little heart trouble for some little time and I feel that it is only fair that I should mention it to you as I realise that you do not want to be in the dark in regard to any problems that you have have to face and while I am sure that I can meet this problem I wanted to tell you about it. My record has been rather a remarkable one dearest as I have not had a day in bed or away from business except when on holidays for over 30 years. I thought I would leave this until I saw you and could talk it over with you anyhow dear one I have told you now, I realise that physical fitness is a big asset when contemplating matrimony. The only consolation I would have is that I can leave you well provided for should anything happen to me. Dont feel at all alarmed about what I have told you darling, I just feel I have to put all my cards on the table.

Farewell my darling,

Fondest love

Tom.

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11. By the 15th day of August 1956 being the date of the hearing of the said Application made by the Appellant under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 as aforesaid the value of the residue of the Estate of the Testator had increased to approximately £82,000 and
p.27; p.72, l.27. the assets consisted mainly of Commonwealth Government Bonds.
p.27.

12. At the said date all debts legacies and other outgoings had been paid but otherwise the Estate had not been distributed and the said residue
p.7, l.17. amounting to approximately £82,000 as aforesaid remained in the hands of the Respondents.

13. By Section 3 Subsection 1 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916, which came into force on the 18th September 1916 it was originally provided as follows :-

> If any person (hereinafter called "the testator") dying or having died since the 7th day of October one thousand nine hundred and fifteen disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education or advancement in life as the case may be, the Court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband or children, or any of them, order that such provision for such maintenance, education, and advancement as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

p. 71, l.11. 14. By Section 5 Subsection (1) of the said Act it was provided that no application shall be heard by the Court at the instance of a party claiming the benefit of the Act unless the application be made within twelve months of the date of the grant or resealing in New South Wales of the Probate of the Will of the Testator.

15. Amendments relevant to this appeal have been made to the said Act since 1916 as follows :-

(a) By the Conveyancing, Trustee and Probate

(Amendment) Act, 1938 (No. 30 of 1938) Section 3 (1A) was inserted which section reads as follows :-

If any person (hereinafter called the "intestate") dies wholly intestate after the commencement of the Conveyancing, Trustee and Probate (Amendment) Act, 1938, and, in consequence of the provisions of the Wills, Probate and Administration Act, 1898, as amended by subsequent Acts, that are applicable to the distribution of his estate as on intestacy, his widow, or children, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may, at its discretion and taking into consideration all the circumstances of the case, upon application made by or on behalf of such widow, or children, or any of them, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of such person.

Notice of such application shall be served by the applicant on such persons as the court may direct.

In this subsection "children" includes children (being under the age of twenty-one years at the death of the intestate) of any child of the intestate who died before the intestate.

(b) By the said Act No. 30 of 1938 a new sub-section was added to Section 5 of the principal Act namely :-

(2) No application under Subsection (1A) of Section 3 of this Act shall be heard by the Court unless the application is made within 12 months from the date of the grant or resealing in New South Wales of Letters of Administration of the Estate of the deceased person.

Until the year 1954 there was no provision in the said Act for extending the time within which application might be made.

(c) By Act No. 40 of 1954 a new subsection (2A) was inserted in Section 5 of the said Act, such sub-section being in the following terms :- p.71, l.18. p.81, l.43.

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(2A) Notwithstanding anything in subsections (1) and (2) of this Section :

(a) The time for making an application under either of those subsections may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary, and this power extends to cases where the time for applying has already expired, including cases where it has expired before the commencement of the Administration of Estates Act, 1954; but every application for extension shall be made before the final distribution of the estate, and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or of an order made thereon.

16. Each of the said applications made by the Appellant under s.5(2)(A) and s.3(1) respectively was opposed by the Respondents.

17. On the said application made under s.3(1) Roper CJ in Eq. made an order in favour of the Appellant whereby he directed that she be paid a
p.75, l.46. legacy of £5,000 in addition to the provisions made for her in the Will and Codicil such legacy to be payable on the 13th September 1956, and to bear interest as from that date and that as from 1st July, 1956 in lieu of the annuity and the income tax benefits provided in her favour in the Codicil
p.76, l.1. she be paid an annuity of £1500 a year. The Appellant adopts the findings of facts set forth in such judgment.

18. The reasons of His Honour included the following amongst other views :-

p.73, l.21-31. (a) That the New Zealand, Victorian, Queensland and Tasmanian cases in which principles have been acted upon differing from those expressed in re Forsaith were cases in which the Acts under consideration all differed from the Act in force in New South Wales and the different conclusions may be attributed to the slight but important differences in the language used

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(b) That in Bosch v. Perpetual Trustee Company Limited (1938 A.C. 463) the Privy Council was not considering the particular problem arising here, and the language used by the Privy Council was not used in reference thereto. Such decision does not impliedly overrule the decision in re Forsaith and still leaves open the question of what are the circumstances of the case to be considered when coming to a conclusion as to a testator's moral duties or as to what a wise and just husband should have done in the circumstances of the case. p.73, l.40.

19. In re Forsaith (26 S.R.(N.S.W.) 613) Harvey CJ in Eq. in holding that the period of time which is to be considered when determining whether the applicant has been left without adequate provision is the date on which the Court is dealing with the matter distinguished the Tasmanian case of In Re Testator's Family Maintenance Act (12 Tas. L.R.11) because the wording of the Tasmanian Act left no loophole of escape from the construction given to the Tasmanian Statute therein, the wording of such Statute being "If any person disposes of his property in such a manner that upon his death his widow or child are left without sufficient means for the maintenance .....". His Honour said in regard to the New South Wales Section that it applied not only to persons who died after the passing of the Act but also to persons who died between the 7th day of October 1915 and the passing of the Act and His Honour added :

> "and it is provided so far as those particular testators were concerned that 'if any person who has died since the 7th October has disposed of his property in such a way that his children are left without maintenance', the Court could then act. I think in the cases of such wills the Court would be forced to the conclusion that the period of time which was to be considered was the date on which the Court was dealing with the matter, and the same construction, therefore, must apply in the case of all wills which are the subject of the Section."

The same distinction between the New South Wales Statute and the South Australian Statute on the one hand and the Statutes of certain other States of Australia and of New Zealand on the other hand p.73, l.32.

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has been drawn in two Judgments of the Supreme Court of South Australia, namely In Re Gerloff (1941 S.A.S.R. 156); and In Re Wheare (1950 S.A.S.R. 61). By Section 3 of the Testator's Family Maintenance Act, 1918-1943 (South Australia) it is provided :-

> If any person ..... disposes of or has disposed of his property by will in such a manner that the wife, husband or children of the testator or any of them are left without adequate provision for their proper maintenance education or advancement in life the Court may at its discretion, on application by or on behalf of the said wife, husband or children or any of them, order that such provision as the Court thinks fit shall be made out of the Estate of the Testator for the maintenance education and advancement of such wife husband or children or any of them.

p.73, l.24. In the States of Queensland and Tasmania the wording of the relevant Statutes is substantially the same as in the Victorian Statute and the Courts in those states have not followed Re Forsaith (26 S.R. (N.S.W.) 613) as has the Supreme Court of South Australia.

p.83, l.19. 20. On the 6th day of June, 1956, the High Court of Australia delivered judgment in the case of Coates v. National Trustees Executors and Agency Company Limited (95 C.L.R. 494). This judgment was in respect of an application by a widow, residing in the State of Victoria, under the provisions of Section 139 of the Administration and Probate Act, 1928 (Victoria) as amended by the Administration and Probate (Testator's Family Maintenance) Act, 1937 (Victoria) and such judgment was delivered by the High Court of Australia in Melbourne. The existence of this case and the
p.84, l.6. contents of the judgment were not known either to Counsel or to His Honour Mr. Justice Roper at the time of the hearing and delivery of His Honour's said judgment and a report of the judgment of the High Court of Australia did not come to hand until shortly thereafter.

21. Coates v. National Trustees Executors and Agency Co. Ltd. was decided upon the terms of the Victorian Statute which the Appellant submits differs materially from the provisions of the Testator's Family Maintenance and Guardianship of

Infants Act, 1916-1954 (N.S.W.) The relevant wording of Section 139 of the Victorian Statute is as follows :-

> If any person ..... dies ..... leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's widow, widower or children the Court may in its discretion on application by or on behalf of the said widow, widower or children order that such provision as the Court thinks fit shall be made out of the Estate of the testator for such widow, widower or children.

22. The Chief Justice (Sir Owen Dixon) with whose reasons Webb J agreed after referring to the fact that in New Zealand, Tasmania, Victoria and Queensland the view has been taken that the question was to be determined as at the date of death of the Testator and that in New South Wales and South Australia the view has been adopted that the sufficiency of the provision in the Will must be determined as at the time when the Court is dealing with the question, pointed out that until 1954 there was in New South Wales no power to extend the time for an application but that now in both New South Wales and in South Australia provision has been made for extension of time, and added : (95 C.L.R. at 506) "The limitation of time in those two States may make the distinction of less importance". His Honour went on to say (at page 506) "On the other hand, much must depend on the language in which the power to make a provision out of the Estate is conferred upon the Court." His Honour then considered the words of Section 139 of the Victorian Act and added :-

> "It is perhaps less difficult to give Section 3 of the New South Wales Act what may be described as an ambulatory effect so that it is capable of applying to circumstances as they may exist at whatever time the determination may come to be made. ..... In spite of the difference in language between the New South Wales Act and the Tasmanian and for that matter the Victorian, it may be doubted whether the distinction taken by Harvey C.J. in Eq. is well founded. The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided."

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At page 508 His Honour added :-

> "But the very question what is proper maintenance and support involves the future of the widow or children to be maintained or supported. It is, however, the future stretching forward from the date of the testator's death and therefore considered as from that date. It involves what is necessary or appropriate prospectively from that time. To determine that question contingent events must be taken into account as well as what may be considered certain or exceedingly likely to happen."

23. His Honour Mr. Justice Williams, who dissented in respect of the particular matter now in question, after referring to the decision of the Privy Council in Bosch v. Perpetual Trustee Company Limited (1938 A.C. 463) said (at page 512):-

> "To choose the time of death would seem to be paradoxical when on the one hand a dependant inadequately provided for at the date of death could become disentitled by a subsequent accretion of wealth, whereas a dependant adequately provided for at that date could not succeed however much his financial position might have deteriorated thereafter. The purpose of the Acts is to ensure that as far as may be the needs of the testator's family are justly provided for. The Acts are remedial in character and 'must be so construed as to give the most complete remedy which the phraseology will permit' (Holmes v. Permanent Trustee Company of New South Wales Limited 47 C.L.R. 113 at 119)".

After referring to the amendment of the New South Wales principal Act by Act No. 30 of 1938 His Honour added (at page 515) :-

> "The right of a dependant to make an application where there is an intestacy could not depend upon whether an intestate husband or father had been guilty of a breach of moral duty towards her or him. It must depend upon the inadequacy of the law relating to the distribution of intestate estates to provide for her or his proper maintenance. This question must surely fall to be determined at the time of the hearing of the application. There is also a

tendency to give the courts power to enlarge the time within which applications may be brought beyond that as of right so as to enable an application to be made at a later date and indeed at any time prior to the distribution of the estate provided that the order if made out of time shall not disturb prior distributions. Both these tendencies fit in with the view that the proper time to determine whether the applicant is adequately provided for is at the time of the hearing."

24. His Honour Mr. Justice Fullagar (at page 517) said :-

"I agree that this appeal should be allowed and I agree with the order proposed by the Chief Justice. On the general question, however, of the time as at which the court must determine whether a will has made adequate provision for the proper maintenance and support of an applicant under a Testator's Family Maintenance Act, I am unable to accept the view that the material time is in all cases the date of the death of the testator ..... (and at page 520) The view taken by Harvey C.J. in Eq. in Re Forsaith and by Paine A.J. in In re Wheare is, in my opinion, to be preferred to the narrower view. It is more in accord with the general object of the legislation, and allows the courts a freer hand in the exercise of a discretion which has always been regarded as very wide indeed. It is, moreover - and this is, to my mind, a decisive consideration - much more realistic. It seems to me to be the natural and sensible view. It avoids an unnecessary question, which savours of artificiality, and which often cannot really be satisfactorily answered."

25. His Honour Mr. Justice Kitto, who held that the relevant date was the date of death and not of the hearing, said at page 524 :-

"Words more susceptible of being read as making the condition refer to the situation of the wife or children as it is found to be by the court when the application is being considered appear in the New South Wales Act (The Testator's Family Maintenance Act 1916) and the South Australia Act (The Testator's Family Maintenance Act, 1918) .... I am bound to say

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that the better construction of both Acts seems to me to be that 'are left' directs attention to the date of death in the case of persons dying after the Act came into force and to the date of the commencement of the Act in the case of persons who were already dead at that date."

26. After the Judgment in Coates v. National Trustees Executors and Agency Company Limited came to hand and within the period allowed for appealing to the High Court of Australia the Respondents appealed as of right to the High Court from the judgment and order of Roper C.J. in Eq.

p.78-9.

27. The said appeal came on for hearing on the 1st October, 1957, and on the 19th December, 1957, the High Court of Australia upheld the appeal and made an order which was subsequently amended, the final order being as follows :-

p.100-1

> Appeal allowed. Order of the Supreme Court of New South Wales discharged. In lieu thereof order that the Respondent's application to that Court be dismissed. Further order that costs of appellant Executors and of Respondent of and incidental to all proceedings in Supreme Court and of this Appeal be taxed as between solicitor and client and paid out of the estate of the testator.

28. The High Court of Australia was again divided and the majority consisted of Dixon C.J., Kitto and Taylor JJ; whilst the minority comprised McTiernan and Williams JJ.

29. In the joint Judgment of the majority it is stated :-

p.84, l.6.

> "It is unfortunate that the decision in Coates's case had not been reported when the Respondents' application came on for hearing and that, therefore, no mention of it was made before Roper J. But it is beyond question that the principle upon which Re Forsaith was decided is no longer good law. The result is that the order under appeal rests upon an erroneous view of the law and unless it can be justified upon the correct principle it cannot stand. It was, however, contended before us that the order made by Roper J. could be justified on the principles laid down in Coates' case. The

changed circumstances, it was said, were the result of circumstances which, not only could have been foreseen by the testator at the time of his death, but which could in some substantial measure have been within his contemplation when considering what provision should be made for the proper maintenance of his widow. But there is nothing in the case to suggest that the vast increase in the value of the estate could have been foreseen; indeed, it may well be thought that if the events which produced this result could reasonably have been foreseen their actual occurrence would not have occasioned such a marked and rapid increase in the value of the estate".

30. His Honour Mr. Justice McTiernan after referring to the disapproval of Re Forsaith expressed by the majority of the High Court in Coates' case and after quoting the words of Dixon C.J. in Coates v. National Trustees Executors and Agency Company Limited (95 C.L.R. at page 508) continued :- p.85, l.45. p.87, l.44.

"The question therefore arises whether it was at the period of the testator's death beyond the range of reasonable foresight that money would decrease in value. In 1942 inflationary pressures were evident and were being restrained by statutory regulations. In my opinion it is correct to say that the future loss of purchasing suffered by the provision made in the will and codicil for the respondent could reasonably be foreseen at the time the testator died. It was a contingency that might reasonably have been anticipated by the testator but was not taken into account by him in the provision which he made in his will and codicil for the maintenance of the respondent. Considering the question as at the testator's death the provision was not adequate for the proper maintenance of the respondent in the future. I would hold that in the circumstances of the case the testator disposed of his property by his will and codicil, in such a manner that the respondent is left without adequate provision for her proper maintenance. p.88, l.32.

31. His Honour Mr. Justice Williams, after referring to Coates v. National Trustees Executors p.95, l.13.

RECORD and Agency Company Limited said :-

p.95, l.26. "unaided by that decision His Honour naturally decided to follow the decision of Harvey C.J. in Eq. in Re Forsaith (26 S.R. (N.S.W.) 613), in favour of the latter date, a decision which had stood in New South Wales for thirty years and must be presumed to have been within the knowledge of the New South Wales legislature when it authorised the Court to extend the time for making an application under the Act ..... I can only express my misgivings as to the correctness of the decision in Coates' case, particularly in a State like New South Wales where an application can now be made with the leave of the Court at any point of time prior to the distribution of the estate and where the scope of the Testator's Family Maintenance Act has been extended to cover intestacy. But I am bound by the decision of the majority in that case and I must dispose of the appeal accordingly."

p.96, l.46. After quoting from the Judgment of Dixon C.J. in Coates v. National Trustees Executors and Agency Company Limited (95 C.L.R. at page 508 and page 509) His Honour then gave reasons why accepting
p.98-9. that decision the order of Roper C.J. in Eq. should nevertheless remain undisturbed and then His Honour concluded by stating :-

p.99, l.25. "In the circumstances that existed in August, 1956, the propriety of the order made by Roper C.J. in Eq. in her favour is not open to challenge. I feel confident that if Coates's Case had been cited to his Honour and he had realized the extent to which he could take into account foreseeable future events in deciding whether the widow had been left without adequate provision for her proper maintenance at the date of death, his Honour would have held that he had jurisdiction to make an order and would have made the same order."

32. The Appellant submits that the appeal ought to be allowed, the judgment of the High Court of Australia set aside and the order of the Supreme Court of New South Wales restored for the following amongst other

REASONS

(1) That the judgment of Harvey C.J. in Eq. in Re Forsaith (26 S.R. (N.S.W.) 613), and of Roper C.J. in Eq. in Re A.L. Pichon (47 S.R. (N.S.W.) 186) and in the present case correctly construe the relevant sections of the New South Wales Statute.

(2) The two amendments of the New South Wales Statute made in 1938 and in 1954 were both made many years subsequent to the decisions in Re Forsaith and the 1954 amendment which authorised the Court to extend the time (without limitation) for making an application under the said Act was made several years after the decision in re A.L. Pichon (deceased) and such decisions should be deemed to have been within the knowledge of the New South Wales legislature when it enacted such amendments.

(3) When the legislature extended the benefits of the Act to intestate estates and granted power to the Court to extend the time for making an application under the Act (and without limitation of time) it is a strong inference that it intended the decision in re Forsaith to continue to apply in the administration of the Act as so amended.

(4) That as the judgment of Harvey C.J. in Eq. in Re R.A. Forsaith was of long standing and had been followed and applied over a period of nearly thirty years it should not have been overruled.

(5) That there is not persuasive reason why the legislation of different States upon this subject should be construed in the same manner because the subject-matter of the legislation is exclusively a State subject-matter and can be formulated as the Legislature of each State may wish.

(6) That in any event McTiernan and Williams JJ were correct in holding that upon the facts of the case the testator should have foreseen the events that occurred more especially as it was held by His Honour Mr. Justice Roper that there were no real competing claimants as understood by an Equity Court in

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administering this Act. The other beneficiaries, being brothers and sisters and nephews and nieces of the Testator, were nearly all persons of substance.

(7) Having regard to

(i) the present size of the Testator's estate;

(ii) the fact that it is still undistributed;

(iii) the fact that there are no competing claims as understood by the Equity Court;

(iv) the Appellant's own financial circumstances as set forth in the said judgment of Roper CJ in Eq.

(v) the letter from the Testator to the Appellant dated 13th April, 1937, which is hereinbefore set forth;

(vi) the fact that the other beneficiaries take under the will only because there is no issue of the marriage of the Appellant with the Testator;

the order of Roper C.J. in Eq. was correct and should be restored.

GORDON WALLACE.

No. 41 of 1958

IN THE PRIVY COUNCIL

ON APPEAL FROM

THE HIGH COURT OF AUSTRALIA

B E T W E E N :

ELEANOR JESSIE DUN — Appellant

-- and --

FRANCIS BOYCE DUN and CHARLES EDWARD DUN — Respondents

C A S E

for the

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