7,1959

IN THE PRIVY COUNCIL No.41 of 1958

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

ELEANOR JESSIE DUN, Appellant

—— and ——

FRANCIS BOYCE DUN and CHARLES EDWIN DUN, ... Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an Appeal from an Order dated 19th December, 1957 as subsequently amended on the 14th April, 1958 of the High Court of Australia (Dixon, C.J. McTiernan, Williams, Kitto and Taylor, J.J.) allowing an Appeal from an Order dated 30th August, 1956 of his Honour the Chief Judge in Equity in the Supreme Court of New South Wales (Roper, C.J. in Equity) granting an application by the appellant under the provisions of the Testator's Family Maintenance & Guardianship of Infants Act 1916-1954 for maintenance out of the estate of her deceased husband. p. 100 p. 76

2. The statutory provisions relevant to this Appeal are as follows:-

Testator's Family Maintenance & Guardianship of Infants Act, 1916-1954.

Section 3 (1). "If any person (hereinafter called "The Testator") dying or having died since the "7th October, 1915 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 "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.

"Notice of such application shall be served by "the applicant upon the executors of the Will "of the deceased person.

"The court may order such other persons as it "may think fit to be served with notice of such "application.

" (2) The Court may attach such "conditions to the Order as it thinks fit, or "may refuse to make an Order in favour of any "person whose character or conduct is such as "to disentitle him to the benefit of such an "Order.

" (3) In making an Order the Court "may, if it thinks fit, order that the "provision may consist of a lump sum, or "periodical or other payments.

" 4 (1) Every provision made under this "Act shall, subject to this Act, operate and "take effect as if the same had been made by a "Codicil to the Will of the deceased person "executed immediately before his or her death.

" 5 (1) No application shall be heard by "the Court at the instance of a party claiming "the benefit of this Act unless application is "made, in the case of a Testator who has died "before the passing of this Act, within three "months of the date thereof, but in all other "cases within twelve months from the date of "the grant or resealing in New South Wales of "Probate of the Will or Grant or resealing of "Letters of Administration with the Will "annexed . . . "

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"2.(a) Notwithstanding anything in sub-"sections (1) and (2) of this section:

" (a) The time for making an application "under either of the sub-sections 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
"when the time for applying has already
"expired, including cases where it has
"expired before the commencement of the
"Administration of Estates Act 1954 (which
"Act inserted this new sub-section 2a);
"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.

The last recited sub-section 5 (2A) was inserted by Act No. 40 of 1954.

3. The only other amendments relevant to this Appeal which have been made to the Act since 1916 are as follows:

(a) By the Conveyancing, Trustee & Probate (Amendment) Act, 1938 (No.30 of 1938) a new section 2 (1a) was inserted which reads as follows:-

"If any person dies wholly intestate
"after the commencement of the
"Conveyancing, Trustee & Probate
"(Amendment) Act, 1938, and, in
"consequence of the provisions of
"Section 50 and 51 of the Wills, Probate
"& Administration Act, 1898-1938 his
"widow is left without adequate provision
"for her proper maintenance, 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, order that
"such provision for such maintenance 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."

(b) By the same Act a new sub-section was added to Section 5 of the principal Act as follows:-

"(2) No application under sub-section 1(a) of "Section 3 of this Act shall be heard by the "Court unless the application is made within "twelve months of the date of the Grant or "Resealing in New South Wales of Letters of "Administration of the estate of the deceased "person."

4. The appellant is the widow of Thomas Fitzgerald Dun who died on the 10th September, 1942 Probate of whose Will and Codicil was granted on the 5th January, 1943 to his Executors the present Respondents.

In pursuance of leave granted under Section 5 (2a) of the said Act, an application therefor having been made on the 7th April, 1955, the Appellant applied under the provisions of Section 3 of the said Act for maintenance to be provided for her out of her husband's estate alleging that she was left without adequate provision for her proper maintenance. The application was heard before
p. 76 Roper, C.J. in Eq. on the 15th and 16th days of August, 1956 and an Order was made in her favour granting her a legacy of £5,000 and an annuity of £1500 a year, the latter in lieu of the annuity
p. 18 and taxation benefits granted to her in the Codicil to the Testator's Will.

5. Upon the evidence given in the application before Roper, C.J. in Eq. there was no doubt that the Appellant was in some financial embarrassment at the time of the hearing of the application but there was also evidence that the provision made by the Testator in his Will and Codicil was not only adequate for the applicant's maintenance at the date of his death but was also, in the circumstances, generous. It therefore became necessary for his Honour to decide whether the time at which to determine whether the applicant had been left without adequate maintenance was the date of the Testator's death (as was submitted by counsel for the Respondents) or the date of the hearing of the application. In holding that the appropriate time was the time of the application his Honour based his decision upon the Judgment of Harvey, C.J. in Eq. in Re R.A. Forsaith (deceased) which was heard in 1926 and is reported in 26 State Reports (N.S.W.) 613.

In his Judgment in that case his Honour Mr. Justice Harvey, distinguished an earlier Tasmanian

case, In re Testator's Family Maintenance Act (12 Tas. L.R.11), which decided that the appropriate time is the date of death of the Testator, upon the grounds that the Act in Tasmania contains the words "upon his death" before the words "widow (husband or children of such persons or any or all of them") "are left", and said that the way in which the words "are left" are used seemed to him to point to the fact that the period of time in which the question of sufficient maintenance is to be considered is the date upon which the Court is dealing with the matter. He then went on to notice that the Section applies not only to persons dying after the passing of the Act but also to persons who died between the 7th October, 1915 and the passing of the Act and drew from that proviso the conclusion that:

"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 be applied in the case of all "Wills which are the subject of the section".

6. In his Judgment Roper, C.J. in Eq. shortly reviewed the evidence which had been given before him and then stated that he considered it clear that had the applicant brought an application under the Act within twelve months of the grant of Probate and had that application been heard within the normal reasonable time thereafter her application must have failed no matter whether the time for considering the circumstances be those at the date of death or those at the date of the hearing of the application. The circumstances at the actual time of hearing before his Honour, however, were essentially different from the circumstances either at the date of death or within twelve months of that date and his Honour therefore concluded that the principal question arising was the time at which the facts and circumstances should be considered. His Honour felt that three times arise for consideration on the submissions which had been made to him namely (1) the date of death of the Testator; (2) the date at which an application commenced within twelve months of the grant of Probate would normally

p.72 l.7

p.72 l.39

p.72 l.44

have come on for hearing; and (3) the date of the actual hearing of the application
p.73 l.2 before him. In his Judgment he said that he had already pointed out that if the appropriate time is either under heading (1) or heading (2) the application should not succeed.

p.73 l.9 In order to resolve the question his Honour then reviewed the decision in Re Forsaith and his own decision in Re Pichon (1947 State Reports 186), in which he
p.73 l.21 followed Re Forsaith, and compared those decisions with expressions of opinion contained in New Zealand, Victorian, Queensland, and Tasmanian decisions under
p.73 l.40 similar Acts. The submission that the decision in Bosch v. The Perpetual Trustee Company (Limited) (1938 A.C.463) impliedly overruled the decision in Re Forsaith was not accepted by his Honour because he felt that the Privy Council was not in that case considering the particular problem which
p.74 l.10 here arises. Having distinguished the decision of the Court of Appeal in Re Howell (1953 1 W.L.R. 1034) upon the ground that the Act in England is different in its language and scheme from the N.S.W.
p.74 l.46 legislation, his Honour decided to follow the decision in Re Forsaith and held that the appropriate time for considering the circumstances was the date of the
p.74 l.19 application before him. The submission by counsel for the Respondents that, even on the assumption that the date of death of the Testator is not the appropriate time for considering the circumstances, the indulgence granted by the amendment to the Act permitting applicants to apply out of time was intended merely to overcome the barring effect of lapse of time and not to place such applicant in any different position than he or she would have been if the application had been made in due time, was over-ruled by his Honour who was not disposed to take so narrow a view of the decision in Re Forsaith and the effect of the legislation.

p.74 l.46 His Honour, therefore, came to the conclusion that applying the decision in

Re Forsaith, all facts and circumstances existing when the application is actually heard by the court should be taken into account in determining whether the applicant has qualified herself for an order, and what that order should be. He thought that the problem became one of deciding what would have been the proper way for the Testator to give effect to his moral obligation to make adequate provision for the proper maintenance of his widow in all the circumstances had he known and been dealing with the facts and circumstances existing when the application was heard. Before deciding that question however he gave consideration to the submissions on behalf of counsel for the Respondents that the extravagance of the applicant over the years disqualified her from receiving the benefit of an Order and came to the conclusion that even if her expenditure had been extravagant it had not been made in order to improve her position for an application under the Act which until a short time before such application she had not known was possible. He also had regard to the fact that the undistributed estate was then large and the completing beneficiaries had no real moral claim upon the Testator. In the existing circumstances, his Honour thought, the Testator had disposed of his estate in such a manner as to leave the applicant without adequate provision for her proper maintenance and he therefore made an Order giving her a lump sum sufficient to clear her home from debt, leaving a small amount over and above the sum required for that purpose, together with an increase of her annuity as hereinbefore set out.

p.75 l. 3
p.75 l.10
p.75 l.30
p.75 l.37
p.75 l.46

7. Upon the hearing of the application evidence was given both on affidavit and orally to the following effect: The Appellant married the Testator on 15th May, 1937 and lived with him and was maintained by him until his death. It was the first marriage for both of the parties and they were respectively 37 years and 50 years of age at the time of the marriage. The Appellant had known the Testator since 1926

p. 3 l.30

and between that time and the date of her marriage she resided in the City of Melbourne with her widowed mother. The Testator died on the 10th September, 1942 having made his last Will dated the 18th August, 1939 and a Codicil thereto dated the 16th May, 1942 Probate of which was duly granted on the 5th January, 1943 to the Respondents herein who were the Executors therein named. The estate was sworn for Probate at £22,216.19.4 but for duty purposes that sum was increased to £25,344.6.2 by virtue of the inclusion of certain notional assets being gifts to the Appellant that were liable to duty. These gifts totalled £3,636.16.0 being an amount of £3,066 expended by the Testator in respect of a house erected in the township of Cowra in the name of the Appellant and £570.16.0 being the sum of various amounts given by the Testator to the Appellant between November, 1941 and September, 1942. The payment of £3,066 in respect of the house was the total cost of it.

At the date of the death of the Testator the Appellant had in addition to the house in Cowra a property in Caulfield in Victoria which was ultimately sold for £1,470 and a property at St. Kilda in Victoria which was ultimately sold for £3,186, together with the sum of £100 in Bonds and War Savings Certificates. She was indebted to the bank in the sum of £870.

p.10 l.37 Under the Testator's Will the Appellant was given the household furniture which was valued for death duty purposes at £329. She was also given the household and personal effects but none were disclosed in the Stamp Affidavit. The Testator's motor car valued at £540, which the Appellant still
p.11 l. 5 has, was also given to her. Under the Will a legacy of £500 and a subsequent legacy of £1500 were given to her together with an
p.11 l.26 annuity of £600 which by the Codicil was increased to £800.

By his Will the Testator also gave
p.12 l.45 certain legacies and some annuities of small amount to other beneficiaries, the residue

of his estate being given to the 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 investment upon trust as to both capital and income, for any child or children of the deceased but in the event of their being no such child or children for such of the brothers and sisters of the Testator as should be living at the date of his death and the child or children of any brother or sister of the Testator then dead or who should predecease him. p.13 l.19

In substituting the said annuity of £800 by a Codicil to his Will for the earlier annuity of £600 given by the Will itself to his widow, the Appellant, the Testator added a proviso to the effect that as he was desirous of relieving his wife as far as possible from the burden of income taxation he, therefore, directed his trustees to refund to the Appellant any income tax that she may pay or become liable to pay upon the said annuity. p.18 l.20 p.18 l.32

The Appellant, in her affidavit in support of her application, said that the house which she had been given by the Testator at Cowra was at the time of swearing her affidavit valued by the Valuer-General at £8,500 and that the value of the residue of the estate was £81,354.4.11. The nett income from the estate for the various years up to the 30th May, 1954 was as follows:- p. 4 l.41 p. 7 l. 6 p. 7 l.20

Date	Income
30/6/1943	£992.10. 7
30/6/1944	574. 2. 9
30/6/1945	195. 6. 0
30/6/1946	642.10.11
30/6/1947	1410.16.11
30/6/1948	2376. -. 9
30/6/1949	6127. 4. 6
30/6/1950	6806.18. 8
30/6/1951	9494. 9. 2
30/6/1952	6845.17. 7
30/6/1953	3236. 2.10
30/5/1954	8858. 7.10

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p.6 ls.7 to 17 Until the sale of the last of the Appellant's Victorian properties she received from such property for the ten years from 1943 to 1953 an average income in each year of approximately £93. In the year 1944 the Appellant invested the sum of £430 in War Savings

p.6 ls.24 to 34 Certificates and her drawings from her bank account for the years 1943 to 1953 were as follows:-

Date	Amount
30/6/1943	£708. 6. 8
30/6/1944	603. 7. 0
30/6/1945	872.17. 8
30/6/1946	1386.11. 4
30/6/1947	1190.10. 9
30/6/1948	2130. -.11
30/6/1949	1532. -. 6
30/6/1950	1409.17. 5
30/6/1951	1277.14. 4
30/6/1952	1709.12. 3
30/6/1953	1513.15. 2

p. 8 l.18
p.34 l.29
p.119 l.24 At the end of the financial year 1945 her current account was overdrawn to the amount of £167.3.10 and in June, 1956 to the extent of £4127. The Appellant in 1953 spent an amount of approximately £3,000 upon a trip to England having shortly before that sold her property at St. Kilda for the sum of £3186.9.7.

p. 4 l. 5 The Appellant both in her affidavit and in her oral evidence said that during her marriage she and her husband had lived in considerable comfort having, in the early stages of their married life, occupied a flat in an expensive suburb of Sydney with furniture of the best quality, a servant and a motor car. The Testator owned a farming and grazing property in the country and a produce business at Cowra and had another interest in a produce business at Grenfell but, while in the city,

conducted his business from a city office to which the Appellant drove him, he being a cripple. In 1940 they moved to Cowra where the Testator purchased some land and gave it to the Appellant upon which he subsequently built the house hereinbefore referred to. In Cowra, the house, the Appellant said, was furnished in the best quality available and they there employed a maid and a part time gardener. The sum of £12 per week was paid to her partly for her own use and partly to purchase household requirements. Apart from this however the Testator gave her presents ranging between £20 and £100 from time to time. During their married life a certain amount of entertaining was done and their visitors were offered alcoholic drink although the Testator was a teetotaller. For holidays the Appellant and the Testator went to Melbourne where they stayed in the best hotels and when in Sydney, which they visited for up to two weeks at a time, they stayed at an expensive hotel. The Appellant said that shortly after her marriage they planned a trip to England but were unable to take it and it was the wish of the Testator that she go alone should he be unable to do so.

p. 4 l.37
p. 4 l.42
p.5 l.20
p. 5 l.35

There was evidence both upon affidavit filed by the Respondents and orally by the Appellant that the Testator had been a teetotaller during his life but that after his death the Appellant had spent amounts of approximately £3 a week for liquor and had at one stage owed a retailer in Cowra the sum of £600 for liquor and other provisions. Although the Testator did not entertain on any large scale before his death the Appellant at times entertained lavishly on occasions.

p.114 l.18
p.114 l.32

The Testator died leaving no issue and five brothers and sisters surviving him one brother, Peter Milroy Dun, have predeceased the Testator leaving five children him surviving. The said brothers and sisters and the said children of the deceased brother are the persons who receive the residue of the Testator's Estate. All these beneficiaries with the exception of three of the children of Peter Milroy Dun are in comfortable circumstances.

8. On the 6th June, 1956, that is before the decision of Roper, C.J. in Eq. the High Court of Australia delivered judgment in the case of Coates v. National Trustees Executors and Agency Co. Ltd. & Anor. (95 C.L.R.494) but at the time of the hearing of this application before Roper, C.J. in Eq. and at the time his Honour delivered Judgment the High Court's decision was unknown to counsel or to his Honour. A report of the High Court's decision in that case, having been published, became available between the date of Roper, C.J. in Eq.'s Judgment and the expiry of the time for appeal to the High Court and the Respondents thereupon appealed from this decision relying upon the decision in Coates' Case.

9. The Majority Judgment of the High Court upon the Respondent's appeal (Dixon C.J. Kitto and Taylor J.J.) having reviewed the evidence given upon the application and the Judgment of Roper, C.J. in Eq., turned to consider the effect which the decision in
p.83 l.46 Coates' case had upon the authority of Re Forsaith. Their Honours referred to the fact that all members of the Court in Coates' case and they themselves in this present case felt that the wording of the Victorian Act and the corresponding N.S.W. Act did not contain any differences which were capable of producing contrary results
p.84 l.10 in each of the States. It is beyond question they said that the principle on which Re Forsaith was decided is no longer good law, that the order under appeal rested upon an erroneous view of the law and unless it could be justified under the correct view it could not stand. Turning to consider the test propounded in Coates' case, that is, whether the circumstances existing at the time of the application and giving rise to the right to maintenance were
p.84 l.26 reasonably foreseeable by the Testator at the time of making the Will, the majority said, that they could not see anything in the case to suggest that the vast increase in the value of the estate could have been foreseen and in view of the circumstances as they

existed at the death of the Testator it was impossible to say that the provision made by him for the Appellant was ungenerous and when regard is had to the incidence of death, estate duties and testamentary expenses, it is clear that it could not be characterised as inadequate. The Testator may well have considered that the annuity provided by his Codicil was as much as his estate would be capable of producing. Their Honours thought it clear that Roper, C.J. in Eq. would have dismissed the application if he had known that Re Forsaith had been overruled and they agreed that such a result would have been inevitable. p.84 1.45

10. McTiernan J. in his dissenting Judgment reviewed the evidence and having referred to the decision of the High Court in Coates' case quoted with approval the words of Dixon C.J. in which the Chief Justice defined the test which must be applied to discover what is proper maintenance. p.85 p.87 1.42

Intervening events from the death of the Testator may be taken into consideration because they suggest or tend to show what antecedently he might have expected; but they must not be outside the range of foreseeable foresight; actual intermediate occurrences are not to be treated as more than evidentiary and the ultimate question must remain one of adequate provision for proper maintenance and support as at the date of the Testator's death. p.88 1.15

His Honour then turned to consider whether it was a foreseeable circumstance at the time of the Testator's death that money would decrease in value and, being of the opinion that such a happening was foreseeable, he came to the conclusion that the provision at the Testator's death was not adequate for the proper maintenance of the Appellant for the future. p.88 1.32 p.89 1.26

11. Williams J. in his Judgment expressed his misgivings at the correctness of Coates' case particularly in relation to the legislation of a State such as N.S.W. where applications may be commenced with leave of the court at any point of time prior to distribution of the estate, but held himself p.90 p.96 1.26

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p.96 l.47 bound by that decision and he quoted with approval the same words from Dixon C.J's
p.98 l. 2 Judgment as were adopted by McTiernan J. His Honour felt that the decision in Coates' case enables the Court, in order to decide whether a Testator has fulfilled
p.99 l.16 his moral duty, to attribute to him a high degree of foresight. In those circumstances his Honour felt that the Testator should and could have reasonably foreseen the change in the value of money and that the only safe course would be to leave his widow the income or a proportion of the income from his estate. He would upon those grounds have dismissed the appeal and affirmed the Order made by Roper, C.J. in Eq.

12. The decision in Coates' case involved the consideration of an application brought by an only son ten years after the death of his widowed mother. At the time of the application the son was aged 65 years of age and the evidence was that he had during his youth and until the commencement of the late war assisted his mother in the accumulation of her considerable fortune. Her Will, in which she had left him what was admittedly an inadequate annuity had been made in 1932 at the time when her fortunes were considerably less than they were at the time of her death. The appeal came before the High Court primarily on the question of the quantum of maintenance which should be ordered out of the estate.

In his Judgment Dixon, C.J. said that there had been a difference in the view taken of similar legislation in New Zealand and the six States of Australia; in four jurisdictions the view had been taken that the question was to be determined at the date of death of the Testator (New Zealand, Tasmania, Victoria and Queensland); in the other two jurisdictions the view had been adopted that the appropriate time was the time of hearing (N.S.W. and South Australia). He thought that it was perhaps less difficult to give to the N.S.W. Act an ambulatory effect so that it is capable of applying to the circumstances as they exist

from time to time, but, in spite of the difference in language between the N.S.W. Act and the Tasmanian and Victorian legislation, he thought that it could be doubted whether the distinction seen by Harvey C.J. in Eq. is well founded. He noticed that the legislation of the various States is all grounded on the same policy which found its source in New Zealand and that, therefore, refined distinctions between the Acts are to be avoided. The considerations stated by Townley J. in Re Brown deceased (1952 Q.S.R.47), Dixon, C.J. thought, confirmed the interpretation which the actual words of the provision suggested. In that case Townley J. after referring to the decision of the Privy Council in Bosch v. Perpetual Trustee Company (Ltd.) (1933 A.C.463 at 478) said "to take into consideration changes in circumstances which could not have been foreseen by the Testator would be to attribute to him not only wisdom and a sense of justice but also the gift of prophecy. What the Testator 'ought to have done in all circumstances of the case' could only be determined by consideration of matters as they stood at the latest, at his death. Unforseeable circumstances arising after the event surely could not govern the wisdom or justice of his actions whilst alive. The Court is required to determine whether or not he has made adequate provision in his Will for the proper maintenance and support of the applicant which would seem to indicate that the court is to put itself in his position, attributing to him justice and wisdom not after but immediately before his death."

Dixon C.J. then propounded the principle which was cited with approval by the two dissenting Judges in Dun's case when before the High Court.

Williams J., who dissented in the High Court in Dun's case, agreed that the appeal should be allowed in Coates' case and said that he thought it unfortunate that a difference of opinion should exist between the courts of New Zealand and the various States of Australia as to the time when the

question whether an applicant has been left without adequate provision for his or her maintenance should be determined. The language of the Acts of the various States and Territories is in essence the same so that he also agreed that it would be advisable for the Court to express an opinion on the question which would lead to uniformity in the Courts of Australia and the Territories. He said that the Acts do not authorise the Courts to make a Will or a Codicil for the Testator; his Will making power remains unrestricted but the Acts authorised the Court to interpose and carve out of his estate what amounts to adequate provision for the applicant if he is not sufficiently provided for. In his view the Acts should be given a wide interpretation so as to permit the Courts to take into account all relevant circumstances even those which could not have possibly have been foreseen by the testator.

Webb J. in his Judgment referred to the decision of the Privy Council in Bosch's case and said their Lordships appear to have stated the rule applicable in all cases under the kind of Statutes then in question, and in question here, and not a general rule subject to exceptions. No exceptions were specified or even suggested by their Lordships. A test in all cases is the moral duty of the Testator not a hypothetical Testator with a supernatural gift of foreseeing strokes of good or bad fortune occurring after his death.

Fullagar J. thought that nice distinctions should not be sought between the various Statutes but that they should, so far as possible, be given the same effect. In his opinion the view taken in Re Forsaith and in the South Australia cases is to be preferred to the narrower view because it is more in accord with the general object of the legislation and allows the Courts a freeer hand in the exercise of their discretion. In his Honour's view the attempt to refer the

right of an applicant to a moral duty upon the Testator is artificial and the term moral duty is an artificial gloss which should not be used to qualify the circumstances in which an order may be made.

Kitto J. thought that, so far as the Victorian Act was concerned, the conditions laid down by the Section as to the circumstances in which an application can be made refer to the manner in which a person exercises his power of testamentary disposition and in their natural meaning they seem to require a Judgment upon his disposition be formed as at the time when his death makes it effective. The condition is not that the applicant is found to be inadequately provided for notwithstanding any provision for him by the Testator's Will; it is that there has been an omission by the Testator to make adequate provision for him by his Will. The question whether such an omission has occurred can hardly be intended to admit of a different answer at an interval after the death from that which would have been given to it immediately upon the death. After considering the terms of the N.S.W. Section and the decision in Re Forsaith, his Honour said that he thought that the words "are left" direct attention to the date of death in the case of persons dying after the Act came into force and the date of the commencement of the Act in the case of persons already dead at that date. The words "are left" he thought occurred in the description of the manner of the disposition by Will which is to give jurisdiction; and, when it is said that a particular disposition is such that the persons "are left" in a specified situation, the meaning must surely be, unless there is a controlling context that the leaving of those persons in that situation is the work of the disposition. If that is so, the words describing the situation must refer, prima facie at least, to qualities exhibited by the situation as and when the disposition occurs which leaves it unremedied. In his view Re Forsaith was wrongly decided. In Kitto J's view it is the

"hypothetical testator" endowed with wisdom and justice and aware of all there is to know when the Testator died leaving his Will to operate, whose moral duty affords a test by which a court may decide any, and if so, what provision would have to be made by the actual Testator's Will in order that an applicant's proper maintenance and support should have been adequately thereby provided.

13. It is submitted that the reasoning of Harvey J. in Re Forsaith is fallacious and that there were no grounds for his Honour there to hold that the appropriate time was the time of the hearing of the application. It is also submitted that the decision of the majority in Coates' case and in the High Court in this case is in accordance with the principles enunciated in Bosch's case and that the High Court's decision has achieved uniformity in the various States of Australia.

p. 7 l.23 14. It is submitted that in view of the income from the Testator's estate for the four years succeeding his death when it was considerably lower than the annuity provided by the Codicil to his Will the provision made thereby was as generous, indeed more generous, than the Testator could have foreseen his estate would have been able to provide.

p.73 l. 2 15. It is respectfully submitted that the statement by Roper, C.J. in Eq. as to the fate of the application if the circumstances as at the date of death were
p.84 l.26 to be looked at and the opinion of the majority of the High Court as to the foreseeability of the circumstances as they actually exist, aid the Respondents' contention that the Order of the High Court should not be varied.

p.100 16. The Respondents respectfully submit that the Order of the High Court of Australia was right and that this Appeal ought to be dismissed for the following (amongst other)

R E A S O N S

1. BECAUSE the evidence did not disclose that the Appellant was entitled to an Order under Section 3 (1) of the Testator's Family Maintenance & Guardianship of Infants Act 1916-1954.

2. BECAUSE Roper, C.J. in Eq. was satisfied that in the absence of authority of Re Forsaith, an Order should not be made.

3. BECAUSE on the evidence the Appellant had been guilty of conduct which precluded her from obtaining maintenance out of her husband's estate.

4. BECAUSE Roper, C.J. in Eq. applied the wrong principles of law in coming to his decision.

5. BECAUSE the majority of the High Court of Australia rightly applied the principles enunciated in Coates' case.

6. BECAUSE the circumstances existing at the date of the application could not reasonably have been foreseen by the Testator at the date of his death.

7. BECAUSE the provision made by the Testator in his Will for the maintenance of the Appellant was adequate.

8. BECAUSE the question of whether or not the Appellant had been left by the deceased without adequate maintenance ought to be determined as at the date of the death of the deceased and that the provision made by the Testator in his Will for the maintenance of the Appellant was on that footing adequate.

D.E. HORTON

No. 41 of 1958

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

ELEANOR JESSIE DUN
... ... Appellant

—— and ——

FRANCIS BOYCE DUN and
CHARLES EDWIN DUN
... ... Respondents

CASE FOR THE RESPONDENTS

BELL BRODRICK & GRAY,
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