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Judgment  
✓, 1959

IN THE PRIVY COUNCIL

No. 41 of 1958

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

RECORD OF PROCEEDINGS

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Solicitors for Appellant.

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Solicitors for Respondents.

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

RECORD OF PROCEEDINGS

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No. 41 of 1958

ON APPEAL FROM  
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B E T W E E N:

ELEANOR JESSIE DUN           ...           Appellant

- and -

FRANCIS BOYCE DUN and CHARLES  
EDWARD DUN           ...           ...           Respondents

RECORD OF PROCEEDINGS

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No. 1

ORIGINATING SUMMONS

In the  
Supreme Court  
of New South  
Wales

IN THE SUPREME COURT }  
OF NEW SOUTH WALES }  
IN EQUITY }

No. 585 of 1955

No.1  
Originating  
Summons.  
16th June 1955

IN THE MATTER of the Will and Codicil of  
Thomas Fitzgerald Dun late of Cowra in  
the State of New South Wales, Merchant,  
deceased

20

AND IN THE MATTER of an Application by  
ELEANOR JESSIE DUN, the Widow of the  
said deceased

AND IN THE MATTER of the Testators Family  
Maintenance and Guardianship of Infants  
Act 1916-1954.

30

LET FRANCIS BOYCE DUN of Gondoblin in the said  
State, Grazier and CHARLES EDWARD DUN of Roseville,  
in the said State, Bank Officer, Executors of the  
Will and Codicil of THOMAS FITZGERALD DUN the  
above named deceased cause an appearance to be en-  
tered for them to this Summons within sixteen days  
after service upon them of this Summons which is

In the  
Supreme Court  
of New South  
Wales

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No. 1

Originating  
Summons.

16th June 1955  
- continued.

issued by ELEANOR JESSIE DUN, Keswick Street, Cowra in the said State the Widow of the abovenamed deceased who claims to have been left without adequate provisions for her proper maintenance or advancement and who claims that such provision for her maintenance or advancement as this Court thinks fit shall be made out of the estate of the abovenamed deceased and in particular for an Order specifying:-

- (a) the amount and nature of such provision as aforesaid, 10
- (b) the part or parts of the said estate out of which such provision as aforesaid should be raised or paid and prescribing the manner of raising or paying such provision,
- (c) the manner in which the burden of such provision as aforesaid as between the persons beneficially entitled to the said estate shall be borne, and
- (d) for an order providing for the costs of and incidental to this application. 20

Appearances may be entered in the Office of the Master in Equity, Elizabeth Street, Sydney.

DATED the 16th day of June 1955.

A.G. WHITE

(L.S.)

for CHIEF CLERK IN EQUITY.

This Originating Summons is taken out by Gould & Shaw of Sydney, agents for Graeme Gillies Johnstone of Cowra, Solicitor for the abovenamed Eleanor Jessie Dun of Cowra in the said State.

NOTE: If the defendants do not enter an appearance within the time and at the place abovementioned such order will be made and proceedings taken as the Judge thinks fit and expedient. 30

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AFFIDAVIT OF ELEANOR JESSIE DUN

In the  
Supreme Court  
of New South  
Wales

No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955.

ON the Second day of September One thousand nine hundred and fifty-five ELEANOR JESSIE DUN of Cowra in the State of New South Wales Widow being duly sworn makes oath and says as follows :-

1. I am the Widow of the abovenamed Thomas Fitzgerald Dun who died on the 10th September, 1942 and the Applicant herein.
- 10 2. The Testator died on the 10th September, 1942 having made his last Will and Testament dated 18th August, 1939 and Codicil thereto dated 16th May, 1942, true copies of such documents are hereunto annexed and marked respectively with the letters "A" and "B". Probate of the said Will and Codicil was granted on the 5th January, 1943 to Francis Boyce Dun and Charles Edward Dun the Executors therein named.
- 20 3. The Estate of the Testator was sworn for Probate at £22,216.19.4d but the value of the dutiable estate was increased to £26,216.7.10d by the discovery of certain notional assets which were subsequently disclosed to the Commissioner of Stamp Duties. Included in these notional assets were gifts to me of £450.0.0d in cash, a gift to me of War Loan Bond of £100.0.0d, War Savings Certificate of £20.16.0d and payments made by the Testator for the building of a house on land owned by me of £3066.0.0d.
- 30 4. I was married to the Testator on the 15th May, 1937 and lived with him and was maintained by him until his death. Neither the Testator nor myself had been previously married and at the date of marriage I was 37 years old and the Testator was 50 years of age. I had known the Testator since 1926 and prior to our marriage I resided in Melbourne and cared for my Widowed Mother. My Mother died in 1936 and shortly afterwards the Testator paid a visit to Melbourne and we were married in 1937.
- 40 5. The Testator's brother John Fitzgerald Dun died a Bachelor in about the year 1951. To the best of my knowledge and belief the surviving Brothers and Sisters of the deceased and the children of Peter

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Milroy Dun deceased are persons of very comfortable means and are not in any financial difficulty and in fact some of them are persons of considerable wealth.

No.2

Affidavit of  
Eleanor Jessie  
Dun.  
2nd September  
1955 - continued

6. After our marriage the Testator and I lived in a flat at Point Piper. The flat was considered one of the best flats in that area and comprised two bedrooms, dining room, lounge, kitchen, bathroom and maid's quarters. The maid's quarters consisted of bedroom and bathroom. The Testator paid £5.0.0d per week for the flat unfurnished. The Testator had had polio in his youth and had considerable difficulty in walking and was unable to move about without the aid of crutches and for this reason the flat we occupied was on the ground floor. Similar flats on the second and third floors were rented for £6.0.0d and £7.0.0d respectively.

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The testator left all the furnishing of the flat to me and told me to buy only the best quality and I purchased the furniture from Beard Watsons and it was all paid for by the Testator. We lived in a very comfortable fashion and frequently went to theatres and concerts. We employed a maid full time and the Testator paid her wages. The Testator owned a Farming and Grazing property at Greenthorpe and a Produce business in Cowra, had an interest in a Produce business in Grenfell and was the Executor of an Estate which owned a Produce Business in Young. He had a City Office in Goldsborough Mort & Co.'s building and I drove him to town each morning and called for him in the evening and approximately every month or six weeks I would drive him to Cowra to inspect the farm and business.

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7. In about 1940 we moved to Cowra. The Testator purchased a block of land in my name in one of the choicest residential positions in Cowra and built a very fine home on it for me. Once again he left the furnishing to me and told me to purchase only the best quality furniture which he paid for and we lived in this home until the Testator's death and I still reside there. The house is now valued by the Valuer-General at £8,500.0.0d. The Testator made me an allowance of £12.0.0d per week for my own use and out of this I purchased some of the food required e.g. milk, meat, bread and vegetables. Most household groceries and most of my clothes were charged to the Testator's accounts at the various stores and paid for by him although a few minor

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items of clothing were paid for by me out of my allowance. The Testator employed and paid for a full time maid until just prior to his death when we were unable to obtain one due to manpower shortages. He also employed a gardener one day a week. I understand that my allowance or part of it was shown on the Testator's books as wages but I had no connection with the business apart from driving the Testator wherever he wished to go. During the Testator's lifetime he had store accounts at Anthony Horderns Ltd., Beard Watsons Ltd., Farmer & Co. Ltd., and David Jones Ltd. as well as at the Cowra Stores and I charged anything I wanted to these accounts which were paid by the Testator. He always gave me presents of cash at Christmas or on my birthday and these ranged between £20 and £100 each. In addition to my allowance and the above presents he used to give gifts often up to £100 when he received his Wool cheque.

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8. The Testator and I lived well and he did a fair amount of entertaining. He entertained business associates at home and played bridge and although he was a teetotaler he kept drink in the house for the use of his guests. We had frequent holidays during our married life and went to Melbourne three or four times for periods of from two to four weeks. Whilst in Melbourne we stayed at either the "Chevron" or "Scots" Hotel and always had a suite of rooms. In addition when living at Cowra we often went to Sydney for periods of up to two weeks and on these occasions we would stay at 52 Macleay Street or the Wentworth Hotel and would also visit Canberra and Orange and stay at the Hotel Canberra and Hotel Canobalas and on all these occasions the Testator engaged a Hotel suite for our occupation. Shortly after our marriage we planned a trip to England and hoped to get away in 1942. The Testator had visited America before we were married but after the war broke out we had to postpone our trip and the Testator expressed the wish that I should go to England after the war even if he was unable to go.

9. At the date of my husband's death in addition to the Cowra house which was owned by me I also owned housing properties in St. Kilda and Caulfield, Melbourne and had £100.0.0d in Bonds and War Savings Certificates. My bank account at the Bank of New South Wales, Cowra was overdrawn by approximately £870.0.0d, at the time of the Testator's death and the Testator had guaranteed payment of this account.

In the  
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Wales

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No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955 -  
continued.

In the  
Supreme Court  
of New South  
Wales

No.2

Affidavit of  
Eleanor Jessie  
Dun.  
2nd September  
1955 -  
continued.

I have lived since the Testator's death from my annuity from his estate, a small income from my properties in Melbourne and also by spending of capital. This has been occasioned by very considerable increase in my cost of living. The following was my income from my Melbourne properties:-

Year ended	30.6.1943	£101. 0. 0	
"	" 30.6.1944	147. 0. 0	
"	" 30.6.1945	179. 0. 0	
"	" 30.6.1946	99. 0. 0	10
"	" 30.6.1947	38. 0. 0	
"	" 30.6.1948	115. 0. 0	
"	" 30.6.1949	75. 0. 0	
"	" 30.6.1950	Loss of 42. 0. 0	
"	" 30.6.1951	123. 0. 0	
"	" 30.6.1952	Loss of 52. 0. 0	
"	" 30.6.1953	150. 0. 0	

I sold the last of my Melbourne properties in August 1953 and had no other income other than my annuity since that date apart from rent received from my house while I was away in England.

10. My drawings for the years 1943 to 1953 as shown by figures kept by my Accountants were as follows:-

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. 0.11	
30.6.1949	1532. 0. 6	30
30.6.1950	1409.17. 5	
30.6.1951	1277.14. 4	
30.6.1952	1709.12. 3	
30.6.1953	1513.15. 2	

Since the 30th June, 1953, I have not had any books of account kept. I say that expenditure of the said sums was necessary to enable me to live at a standard which did not exceed that which I lived in the lifetime of the testator in the sense that although my mode of living changed somewhat after my husband's death and I spent my income in some respects differently from the moneys spent in respect of myself prior to my husband's death. I estimate that allowing for the changes in the purchasing power of money, the total annual expenditure in respect of myself by my husband was approximately

equivalent to my annual expenditure after his death. In particular our pre-war expenditure was equivalent to my post-war expenditure and our expenditure during the war was equivalent to my expenditure during the war.

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Wales

No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955 -  
continued.

11. The value of the Testator's estate as at 30th June, 1954 was as follows:-

	Land and Buildings	£3462. 0. 0
	Shares	874. 0. 0
10	Loan to Tresillian & Dun-Grenfell	7000. 0. 0
	Sundry Debtors	1354. 6. 8
	Bonds	33100. 0. 0
	Current Account	5563.18. 3
	Fixed Deposits	30000. 0. 0
		<hr/>
		£81354. 4.11

20 To the best of my knowledge, information and belief the Assets of the Estate so set forth still remain in substantially the same form and have not been distributed. The net income from the estate for the various years are as follows :-

	Period 10.9.1942 to 30.6.1943	£992.10. 7
	Year ended 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. 0. 9
	30.6.1949	6127. 4. 6
	30.6.1950	6806.18. 8
30	30.6.1951	9494. 9. 2
	30.6.1952	6845.17. 7
	30.6.1953	3236. 2.10
	30.6.1954	8858. 7. 0

40 12. Despite the provisions contained in the Will regarding my receiving my annuity free of tax, questions did arise some years after my husband's death, when rates of taxation had increased as to whether I should be liable to reimburse the estate for provisional taxation and what should be the position with regard to the increased rate of taxation on the estate, because of property privately owned by me and on my property privately owned by reason of the income from the estate. Further questions arose of taxation on tax because of my nominal

In the  
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No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955 -  
continued.

receipt of moneys to meet taxation assessed in the previous year. These problems were accentuated by the Taxation Commissioner for some reason amending assessments over some period of years in about the year 1948. As a result the trustees took out an originating summons before this Honourable Court to determine the incidence of taxation and this matter was duly determined and I crave leave to refer to these proceedings if necessity arises. In the result I was liable to meet taxation on my own property at the full rate which was produced by virtue of my also receiving the annuity from the estate.

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13. In the early period after my husband's death, namely in 1944, I was able to invest another £200 in war loans and £230 in War Savings Certificates, but I soon found that I had not sufficient income to maintain my former standard of living. On the 30th June, 1945 my current account was £167.3.10d overdrawn. During the following year I sold war bonds to the face value of £300 but by the 30th June, 1946 my current account was overdrawn £322. By the 30th June, 1947 such account was overdrawn £725.7.10d. During the year ended 30th June, 1948, I received part of the £1500 balance of my legacy and sold my war savings certificates and ended with a debit balance of £1298.4.5d. During this year I paid £563.6.5d income tax, mainly on amended assessments for previous years. During the year ended 30th June, 1950, I sold the Caulfield property and my debit balance was £1426.6.11d.

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14. With regard to the sale of the Caulfield property I received £870.11.0d under the contract and in addition the sum of £600.0.0d in cash. When asked about matter in cross-examination upon the application for leave to extend time, the evidence I gave that I did not receive moneys other than by cheque was not correct. No other questions had been asked about this matter earlier, the previous question being about auction bridge and I had never had occasion in recent years to refer back to this aspect of the transaction and I gave this answer on the spur of the moment. I regret the answer given by me and wish to bring it to the attention of the Court and correct it.

40

15. On the 4th August, 1953 I sold my St. Kilda property and received £3186.9.7d. I then sailed for England and returned in October, 1954. I had

always intended to take this trip and the Testator had always wished that I did so, and I took it when I did whilst I could enjoy it and paid for it out of my own moneys. At the time of sailing for England I anticipated receiving about £700.0.0d tax reimbursement from the Testator's Estate as a result of the decision of this Court on the question of taxation of my annuity but the amount actually received by me was £278.3.0d. My bank account on the 31st May, 1955 was £3649.13.1d overdrawn. My only assets now are a car left to me by the deceased, which is becoming worn out and expensive to maintain, the house referred to and the furniture. The house is valued by the Valuer-General at £8,500.0.0d and the overdraft is secured on this house. This is the home in which I have lived for many years and at my time of my husband's death I did not desire to move if it can be avoided as it is here where I am close to the people I know and it would be a great personal upheaval to me if I had to move. The house however, is an expensive one to run and to maintain in the standard that the testator and I lived before and in the standard which he was able to afford from his estate. The house is about half a mile from the centre of the town and on a steep hill and the car is essential for this reason. Although I am still well, my health is not good enough to permit me to walk great distances.

16. I am informed by my solicitors and verily believe that it appears from the Year Book of the Commonwealth of Australia, No. 40 of 1954 prepared by the Commonwealth Bureau of Census and Statistics at page 265 that "C" Series Price Index has an average for the six capital cities of the Commonwealth show the following :-

Base Year 1923-7 - 1000

	Food and Groceries	Clothing	Miscellaneous	Total "C" Series Index
1942	1031	1308	1112	1091
1952 December Quarter	2542	3177	2035	2243

In the  
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No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955 -  
continued.

In the  
Supreme Court  
of New South  
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No.2

Affidavit of  
Eleanor Jessie  
Dun.

2nd September  
1955 -  
continued.

I am further informed and verily believe that the corresponding figures issued by the Commonwealth Statistician on the 16th July, 1954 are for the quarter ended June, 1954 in respect of the weighted average of the six capital cities for the total "C" series Index was 2335 and I have been informed by my Solicitors and verily believe that these figures indicate that on the items comprised in the respective indices the costs thereof have more than doubled since the death of the Testator. This has been my personal experience in meeting the cost of living.

10

17. I say that the provision made for me by the testator was not adequate for my proper maintenance and I ask that the Court may make an order increasing the capital and income provided for me under the said will and codicil.

SWORN &c.

No.3

Annexure "A"  
18th August  
1939.

No. 3

ANNEXURE "A" (WILL OF THOMAS FITZGERALD  
DUN, dated 18th August, 1939)

20

THIS IS THE LAST WILL of me THOMAS FITZGERALD DUN formerly of Cowra but now of Sydney in the State of New South Wales Merchant.

1. I REVOKE all former Wills.

2. I APPOINT my Brothers FRANCIS BOYCE DUN and CHARLES EDWARD DUN (hereinafter styled "my Trustees") to be the Executors and Trustees of this my Will.

3. I DIRECT that the Trustees of this my Will be never less than two in number and that any vacancy in the Trusteeship hereof shall be filled up as soon as conveniently may be but never the less that the Trustees hereof for the time being shall during any vacancy have the same powers authorities and discretions and may act in all respects as if there were two or more Trustees hereof.

30

4. I BEQUEATH to my wife ELEANOR JESSIE DUN all my household furniture and my household and personal



effects and such motor car as at the time of my death I shall own and make use of for personal purposes.

In the  
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5. I BEQUEATH the following pecuniary legacies:-

TO MY SAID WIFE - the sum of FIVE HUNDRED POUNDS (£500.0.0) to be paid to her as soon as conveniently may be after my death

No.3  
Annexure "A"  
18th August  
1939 -  
continued.

10 TO MY SAID WIFE - the sum of ONE THOUSAND FIVE HUNDRED POUNDS (£1,500.0.0) to be paid to her at such times within (5) years after my death either by instalments or otherwise as my Trustees shall think fit but so that such sum shall not carry interest.

20 TO THE BOARD OF DIRECTORS of the First Church of Christ Scientist Sydney - the sum of ONE HUNDRED POUNDS (£100.0.0) AND I DECLARE that the receipt of the Treasurer or other proper officer of the said Church shall be a complete discharge to my personal representatives TO EACH OF MY TRUSTEES who shall prove my will and act wholly or partially in the trusts thereof the sum of TWO HUNDRED AND FIFTY POUNDS (£250.0.0) but if there shall be one only of such Trustees who shall prove such Will when the sum of FIVE HUNDRED POUNDS (£500.0.0) to such one.

30 6. I BEQUEATH the following annuities to commence from the date of my death:- TO MY SAID WIFE - the sum of SIX HUNDRED POUNDS (£600.0.0) during her life. TO MY MOTHER HANORAH DUN the sum of ONE HUNDRED POUNDS (£100.0.0) during her life. TO BRIDGET LONG of 27 Blenheim Street Randwick near Sydney aforesaid Widow - the sum of FIFTY-TWO POUNDS (£52.0.0) during her life TO EACH OF MY TRUSTEES who shall act in the trusts of my Will including any future trustee of such Will who shall be appointed to fill any vacancy in the Trusteeship and shall act therein the sum of FIFTY-TWO POUNDS (£52.0.0) during such period as such Trustee or Trustees shall continue to carry on any business carried on by me in partnership or otherwise at the time of my death or to act jointly or severally in my stead in the Office of Governing Director of Tresilian & Dun (Grenfell) Limited it being my intention that the said annuity and the legacy or legacies aforesaid respectively shall be accepted by such trustee or trustees as recompense (in lieu of commission) for his or their pains and trouble in looking after all the affairs of my estate.

In the  
Supreme Court  
of New South  
Wales

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No.3

Annexure "A"

18th August  
1939 -  
continued.

7. I AUTHORISE my Trustees at their own discretion and without the necessity to confirm with any statutory provision relating to the appropriation of assets to appropriate in respect of any annuity bequeathed by this my Will or any codicil hereto in their names investments of any nature hereinafter authorised for the investment of trust funds of an amount sufficient at the date of such appropriation to answer out of the income thereof the annuity in respect of which such appropriation is made and I declare that such income shall be the primary fund for answering the said annuity and the capital of the said investments shall form the secondary fund for answering the same in the event of the income proving insufficient and further that after any such appropriation shall have been made my residuary estate or the income thereof shall no longer be liable to provide for the annuity in respect of which such appropriation shall have been made.

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8. I DECLARE that all legacies annuities and allowances bequeathed by this my Will or any codicil hereto shall be paid clear of all probate and other duties and assessments payable upon or by reason of my death which duties and assessments shall be borne by and paid out of my residuary estate AND I FURTHER DECLARE that such annuities and allowances shall be paid by such instalments and at such periods during each year or term of their currency as my Trustees shall from time to time determine.

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9. SO far as I may lawfully so do I as Governing Director of Tresilian & Dun (Grenfell) Limited DIRECT that the said Company shall out of its profits continue to pay to RUBY DUN the widow of my brother the late Peter Milroy Dun an annuity of TWO HUNDRED AND EIGHT POUNDS (£208.0.0) during her widowhood by such instalments and at such periods during each year of its currency as my Trustees shall from time to time determine AND I DIRECT that my Trustees shall use their best endeavours to see to the carrying out by the Company of this provision.

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10. I GIVE DEVISE AND BEQUEATH all my real and personal property not otherwise disposed of by my Trustees under the authority of this my will or in due course of the administration of my estate UNTO my Trustees UPON TRUST subject as hereinafter appearing to sell call in and convert into money the same or such part thereof as does not consist of

money or of investments of the nature hereinafter authorised AND out of the clear moneys to arise from such sale calling in and conversion as aforesaid and out of my ready money and such investments as aforesaid my Trustees shall pay or provide for my debts funeral and testamentary expenses and the said legacies annuities and allowances and any duties or assessments payable on any legacy annuity or allowance bequeathed free of duty AND subject there-  
 10 to my Trustees shall invest in manner hereinafter authorised the residue of the said clear moneys and stand possessed of such investments and of the residue (if any) of such investments as aforesaid which shall have formed part of my estate at time of my death and of all parts of my estate for the time being unsold (all of which is hereinafter called "my residuary estate") upon the following trusts:-

20 (a) IN TRUST as to both capital and income for all and every my children or my child (if only one) living at my death who being sons or a son shall attain the age of Twenty-one years or being daughters or a daughter shall attain that age or previously marry and if more than one in equal shares as tenants in common.

30 (b) PROVIDED never the less that in case any child of mine shall die in my lifetime leaving a child or children living at my death who being male attain the age of twenty one years or being female attain that age or previously marry such last mentioned child or children shall stand in the place of such deceased child and take equally between them if more than one the share of my residuary estate which such deceased child would have taken if he or she had survived me and attained a vested interest.

40 (c) PROVIDED LASTLY that if the trusts hereinbefore declared shall fail by reason of no person attaining a vested interest therein THEN I direct that my residuary estate shall be held in trust for such of my brothers and sisters as shall be living at my death (and if more than one in equal shares) and the child or children of any brother or sister of mine who is now dead or who shall predecease me but so that such last mentioned child or children shall take and if more than one equally between them the share only which his her or their parent would have taken if such parent had been living at my death.

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 No.3

Annexure "A"

18th August  
 1939 -  
 continued.

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Annexure "A"

18th August  
1939 -  
continued.

11. I DECLARE that my Trustees may postpone the sale calling in and conversion of any part of my real or personal estate for such period as they may in their absolute discretion deem fit (subject never the less to the provisions of the next succeeding clause hereof) without being liable to account notwithstanding that it may be of a wasting speculative or reversionary nature or of a character not authorised by law for the investment of trust funds.

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12. NOTWITHSTANDING the trust for sale and conversion hereinbefore contained I DECLARE that my Trustees shall not for a period of five (5) years after my death except with the consent in writing of my said wife if living or if dead and leaving a child or children her surviving except with his or her or their consent in writing or the consent of the Court in the event of any such child being a minor sell or dispose of any business or undertaking or my interest in any business or undertaking partnership or otherwise carried on by me or in which I shall be interested at the time of my death (subject as hereinafter appearing) or my interest or any part thereof in Tresilian & Dun (Grenfell) Limited (hereinafter called "The Company") but during such period they shall manage and carry on such business or undertaking or join in managing and carrying on the same and retain my interest in the said Company and I express the earnest wish but without imposing any legal obligation on my Trustees to conform therewith that after the expiration of such period as aforesaid they will continue to manage and carry on any such business or undertaking or join in managing and carrying on the same and will retain my interest in the said Company for so long in either case as in their discretion it shall appear to be in the best interests of my said wife (if living) and of the person or persons entitled to share in my residuary estate that they should do so and the following powers and provisions shall be deemed to be incidental to the carrying out of the directions or wishes aforesaid:-

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(a) My Trustees may employ or permit to be employed in any such business or undertaking any capital which may be employed therein at my death or advance with or without taking security any additional capital which they may deem desirable for effectually carrying on such business or undertaking.

(b) My Trustees may arrange and agree for the introduction either immediately or at any future time or times of any person or persons as a partner or partners in any such business or undertaking and as the division of the profits thereof or the payment of any sum in lieu of profits to any partner or joint adventurer and as to the hiring or employment of any person or persons therein at such salary or remuneration as they shall think proper and as to the extension of curtailment of the business thereof or the adoption of any new line of business or undertaking PROVIDED ALWAYS and I hereby declare as regards the business carried on by me under the name or style of "Tresilian & Dun" (Cowra) if at the time of my death my nephew FRANCIS BARRETT DUN shall be employed by me therein my Trustees shall if my said nephew so desires continue such employment for such period as they in their discretion shall think fit on the basis of my said nephew while so employed receiving out of the net profits of the said business (after all deductions shall have been made for working expenses and other outgoings in carrying on the said business including the salary of my said nephew and a sum of Five Hundred Pounds (£500.0.0) as representing both interest on capital outlay and a fair rental charge for the business premises) one third of such net profits.

(c) If at the time of my death I shall hold the office of Governing Director of the said Company my Trustees (either jointly or severally or alternately) as they may from time to time decide shall (subject to the provisions aforesaid relative to my interest in such Company) continue to act in such office and exercise all the powers and discretions vested in me as such Governing Director by the Articles of the said Company provided always that any emoluments paid to my Trustees or one of them by the said Company in respect of the office of Governing Director shall be deemed to be assets in my estate and be received by my Trustees and be accounted for accordingly.

(d) The prohibition against selling or disposing of any such business or undertaking as aforesaid or my interest therein shall not be deemed to extend to any lands used or employed by me or in which I shall be interested in the carrying on (alone or with others) of the business of a Farmer and Grazier unless in the opinion of my Trustees it shall be

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continued.

necessary for the successful carrying on of any other business which I may own or be interested in that such lands or part thereof shall be retained as appurtenant or complementary to such other business.

(e) For the purposes aforesaid or any of them my Trustees may enter into execution and do all such agreements deeds and acts as may be necessary or expedient.

13. IN the course of managing and carrying on or joining in managing and carrying on any such business or undertaking as aforesaid or in dealing generally with the affairs of my estate my Trustees shall (subject to any such prohibition as aforesaid) have full discretionary powers as to insurance alteration partition exchange disposition leasing letting (on the shares system or otherwise) and the increase or diminution of land live stock and other property including the purchase of land live stock and other property and as to the employment of agents servants and labourers and the extent of personal superintendence to be exercised by my Trustees and they may at their discretion expend any moneys forming part of my estate in so managing and carrying on or joining therein and may borrow money and mortgage or give security over any property forming part of my estate and generally (subject as aforesaid) may act in the management of any such business or undertaking and use my real and personal property thereon as if they were absolute owners thereof Provided always and I hereby declare that notwithstanding any such prohibition as aforesaid no purchaser or other person including the Registrar General shall be concerned or entitled to enquire as to the propriety of any sale or disposition of or other dealing with any part of my estate by my Trustees or as to the application or misapplication of any moneys payable to them in respect of any such sale disposition or other dealing.

14. I DECLARE that all moneys liable to be invested under this my Will may be invested in any mode or class of investment (whether authorised by law or not for the investment of trust funds) that my Trustees shall in their absolute discretion think fit.

15. MY Trustees shall have the following further powers :-

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(a) Any Trustee being a Solicitor or other person engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a Trustee could have done personally.

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Annexure "A"

18th August  
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continued.

10 (b) To agree and settle accounts with all persons liable to account to my estate and for that purpose to execute effectual receipts releases and discharges.

(c) To determine in all cases of doubt whether any moneys coming to their hands are capital or income and to apportion blended funds and every such determination or apportionment shall be final and binding on all persons beneficially interested under this my Will.

20 (d) To take and act upon the opinion of any King's Counsel practising in any jurisdiction of the High Court of Australia or of any Supreme Court of any State of the Commonwealth of Australia whether in relation to the interpretation of this my Will or any other document or statute or as to the administration of the trusts hereof or in relation to any other matter or thing affecting my estate without being liable to any of the persons beneficially interested in respect of any act done by them in accordance with such opinion but nothing in this clause contained shall prohibit my Trustees from  
30 applying to the Court if they should think fit or shall prohibit any of the beneficiaries from so doing.

16. NO Trustee of this my Will shall be liable for any loss not attributable:

(a) To his own dishonesty or

(b) To the wilful commission by him of any act known by him to be a breach of trust.

40 And in particular he shall not be bound to take any proceedings against a co-trustee for any breach of alleged breach of trust committed by such co-trustee.

17. LASTLY the Statutory power of appointment of new Trustees of this my Will shall be exercised by

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my said Wife during her widowhood.

IN WITNESS whereof I have to this my Will con-  
tained on this and the six preceding sheets of paper  
set my hand this Eighteenth day of August One  
thousand nine hundred and thirty-nine.

No.3

Annexure "A"  
18th August  
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continued.

SIGNED by the abovenamed )  
THOMAS FITZGERALD DUN as his )  
last Will in the presence of )  
us both present at the same )  
time who in his presence and )  
in the presence of each other )  
have hereunto subscribed our )  
names as witnesses )

T. F. DUN

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H.C.M. Garling  
Solicitor  
Sydney.

A.C.M. Garling  
Solicitor  
Sydney.

No.4

Annexure "B"  
16th May 1942.

No. 4

ANNEXURE "B" (CODICIL TO WILL OF THOMAS  
FITZGERALD DUN, dated 16th May, 1942)

THIS IS A CODICIL to the last Will of me THOMAS  
FITZGERALD DUN formerly of Sydney but now of Cowra  
in the State of New South Wales Merchant which Will  
bears date the Eighteenth day of August One thousand  
nine hundred and thirty-nine.

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1. WHEREAS by my said Will I have bequeathed an  
annuity of Six Hundred Pounds (£600.0.0.) to my wife  
Eleanor Jessie Dun during her life AND WHEREAS I  
desire to increase such annuity to Eight Hundred  
Pounds (£800) NOW I HEREBY REVOKE the said annuity  
of Six Hundred Pounds (£600.0.0) and in place there-  
of I BEQUEATH to my said wife an annuity of Eight  
Hundred Pounds (£800) during her life. AND WHEREAS  
I desire to relieve my said Wife as far as possible  
from the burden of Income Taxes and other like im-  
positions 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

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other sum or sums of money which during her life she shall pay or become liable to pay any taxing authority 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 or as the case may be (in the event of my Trustees making an appropriation of investments as provided for in Clause 7 of my said Will) upon any income that may be earned from the investments appropriated to answer such annuity AND I DECLARE that any and every sum so directed to be refunded or reimbursed to my said Wife shall be a charge upon and be paid out of my residuary estate.

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3. IN all other respects I confirm my said Will.

IN WITNESS whereof I have hereunto set my hand this Sixteenth day of May One thousand nine hundred and forty-two.

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SIGNED by the above named THOMAS FITZGERALD DUN as a Codicil to the last will, in the presence of us both present at the same time who in his presence and in the presence of each other have hereunto subscribed our names as attesting witnesses ) T. F. DUN

George F. Truskett. Storeman Cowra. R.C. Morgan. Clerk Cowra.

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No. 5

AFFIDAVIT OF FRANCIS BOYCE DUN and CHARLES EDWARD DUN, dated 23rd December, 1955

ON the twenty-third day of December One thousand nine hundred and fifty-five FRANCIS BOYCE DUN of Melrose Street, Condoblin in the State of New South Wales, Grazier and ON the twenty-third day of December One thousand nine hundred and fifty-five CHARLES EDWARD DUN c/o Bank of New South Wales, 341 George Street, Sydney in the said State, Bank

In the Supreme Court of New South Wales

No.4

Annexure "B" 16th May 1942 - continued.

No.5

Affidavit of Francis Boyce Dun and Charles Edward Dun.

23rd December 1955.

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No.5

Affidavit of  
Francis Boyce  
Dun and  
Charles Edward  
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continued.

Officer being severally duly sworn make oath and say as follows:-

1. We are the Trustees of the Will and Codicil of the abovenamed deceased.

2. We have read what purports to be a copy of the Affidavit of the Applicant sworn on the 2nd day of September, 1955.

3. We crave leave to refer to the Affidavit of Francis Boyce Dun one of these Deponents sworn on the 26th day of May, 1955 and filed in Summons No. 340 of 1955. 10

4. In answer to paragraph 3 of the said Affidavit of the Applicant herein and in partial correction of paragraph 3 of the Affidavit of the said Francis Boyce Dun we say that we have examined the records of the Commissioner of Stamp Duties and it appears therefrom and we verily believe that following the disclosure to the Commissioner of Stamp Duties of the assets listed in paragraph 3 of the said Affidavit of me this deponent Francis Boyce Dun the final dutiable Estate of the Testator amounted to £25,344.6.2d. 20

5. In reply to paragraph 5 of the said Affidavit of the Applicant we say that the children of Peter Milroy Dun, a brother of the deceased, who predeceased the Testator, are as follows and that the circumstances of each of such persons are to the best of our knowledge, information and belief those set out alongside the name of each of such persons:-

(a) William John Dun of Grenfell, is the Manager of and a Shareholder in Tresilian and Dun (Grenfell) Pty. Limited. To the best of our knowledge, information and belief his only other assets are his interest in the Residuary Estate of John Fitzgerald Dun deceased and a house and about 130 acres of land situate near Grenfell together with 250 sheep depasturing thereon. He is married with one child. We have been informed by the said William John Dun that he estimates the value of his assets at approximately £14,000 and his liabilities at approximately £6,000. 30 40

(b) Francis Barrett Dun of Condoblin is the owner of a grazing property at Condoblin which we understand to be subject to mortgage. To the best of our knowledge, information and belief his only other assets is an interest in the residuary Estate of John Fitzgerald Dun deceased. We have been informed by the said Francis Barrett Dun that he estimates the value of his assets at approximately £40,000 and his liabilities at approximately £33,000.

10 (c) Ronald Kealey Dun at present resides in Sydney and is employed by Bryson Industries Limited. He is divorced and has no children and to the best of our knowledge, information and belief he has no assets other than a motor car. We believe that he has expended the moneys received by him from the Estate of John Fitzgerald Dun.

20 (d) Colin Dun is resident in New Guinea and is employed by the Administration of that Territory. He is married with no children and to the best of our knowledge information and belief he has no assets other than his interest in the Residuary Estate of John Fitzgerald Dun deceased.

(e) Betty Frances Doust is married and has two children. We understand that her only assets consist of her interest in the Residuary Estate of John Fitzgerald Dun deceased with which she purchased a small farm.

30 In further reply to paragraph 5 of the said Affidavit of the Applicant we say that we are informed and verily believe that the net value of the Residuary Estate of John Fitzgerald Dun who died on the 15th November, 1951, with the exception of his one-sixth interest in the residue of the estate of the Testator, was approximately £29,000. By his Will the said John Fitzgerald Dun after giving certain specific bequests which are immaterial to the present application provided that his Residuary Estate, after payment of debts, testamentary expenses and duties, was to be divided into 88 equal shares to be paid to the following persons.-

(i) two shares to his sister Edith Gertrude Rava,

(ii) 43 shares to his sister Katherine Nora Craig,

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Affidavit of  
Francis Boyce  
Dun and  
Charles Edward  
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Affidavit of  
Francis Boyce  
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continued.

- (iii) 9 shares to his cousin Ellen Long,
- (iv) 6 shares to the said Charles Edward Dun,
- (v) 6 shares to the said William John Dun,
- (vi) 6 shares to the said Francis Barrett Dun,
- (vii) 5 shares to the said Ronald Kealey Dun,
- (viii) 5 shares to the said Colin Dun,
- (ix) 6 shares to the said Betty Doust.

We are informed and verily believe that the Estate of the said John Fitzgerald Dun has now been completely realised and distributed with the exception of a house property at Wagga Wagga and a small number of shares in Ampel Petroleum Limited and Amalgamated Textiles Limited and the interest of the estate of the said John Fitzgerald Dun in one-sixth of the residue of the Estate of the Testator. The house property at Wagga Wagga and the said shares in Companies are of the approximate value of £6,000 and the ultimate value of the interest of the Estate of the said John Fitzgerald Dun in the Estate of the Testator (on present day values) is approximately £13,700. The amount distributed per share to date is approximately £330 and the prospective ultimate value of the balance payable in respect of each of such shares on present day values is approximately £224.

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6. In answer to paragraph 7 of the said Affidavit of the Applicant we say that according to the cash book of Tresilian and Dun (Cowra) the wages paid to the Applicant as the Secretary of the business were as follows :-

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For the year ending 30th June 1938	£300. 0. 0
" " " " " " 1939	£360. 0. 0
" " " " " " 1940	£545. 0. 0
" " " " " " 1941	£520. 0. 0
" " " " " " 1942	£545. 0. 0
" " period ending September 1942	£205. 0. 0

According to the Testator's records in our possession this was the only allowance paid to the applicant. In further answer to the said paragraph 7 of the said Affidavit of the Applicant we say that we have caused to be examined the books and record of the Testator in our possession including the farm cash book and they do not disclose any payments

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made by the Testator for groceries or any payment, with the exception of small items, made by him to Farmer & Co. Limited or David Jones Limited.

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Affidavit of  
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10 7. In reply to paragraph 8 of the said affidavit of the Applicant we say that we visited the Testator many times during his lifetime at the Hotel in Cowra where he boarded before his marriage, at the Hotel Metropole in Sydney where he customarily stayed when in Sydney and in his home in Cowra  
20 after his marriage, and that although it was known to him that neither of us was a teetotaler nevertheless neither of us was ever offered any alcoholic drink by him whether in the Hotel or in his own home. In partial correction of paragraph 7 of the affidavit of the said Francis Boyce Dun sworn on the 26th day of May, 1955 we say that the Testator was a strict Christian Scientist and that he had from time to time told both of us that he would not knowingly pay for alcoholic liquor for use in his home or elsewhere and from our knowledge of the Testator, extending throughout the whole of his lifetime, we say that after he became a Christian Scientist he developed an abhorrence for liquor and would never have willingly permitted it to be kept or consumed in his home.

30 8. In further reply to paragraph 8 of the said affidavit of the Applicant we say that we have caused to be examined the books and record of the Testator in our possession and they do not disclose any payments for holidays other than the following:

May, 1939	"Melbourne Expenses"	£25. 0. 0
May, 1939	"Melbourne Expenses"	£25. 0. 0
December, 1939		£15. 0. 0
January, 1940		£25. 0. 0
October, 1941	52 Macleay Street	£21.17.10
April, 1942	Hotel Wentworth	£32.6. 5
April, 1942	Hotel Wentworth	£31. 7. 8
July - August, 1942	52 Macleay Street (5 cheques) total	£130.0. 0

40 With regards to the payments made to 52 Macleay Street in July-August, 1942 we say that over the

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same period two cheques totalling £60 were paid by the Testator to Gloucester House and that to the best of our knowledge, information and belief the sums so paid to 52 Macleay Street were in respect of the residence there of the Applicant while the Testator was ill in Gloucester House.

9. In further reply to paragraph 8 and paragraph 15 of the said Affidavit of the Applicant we say that although we frequently saw the Testator in the three years prior to his death at no time did he mention to us or either of us that he and the applicant proposed to take a trip to England although he was in the habit of discussing his affairs with us. Prior to his death the Testator expressed to us considerable concern and anxiety over the deterioration of his finances.

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10. During the period from 30th June, 1942 to 30th June, 1951 the Applicant received the benefit of sums totalling £2,351.15.7d by virtue of the provisions of Clause 2 of the Codicil to the Testator's Will and we are informed by our Solicitors and verily believe that on or about the twenty-second day of November last past our said Solicitors received from the Solicitors for the Applicant a letter dated the 21st November 1955, reading as follows :-

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"Re Mrs. E.J. Dun and Est. T.F. Dun. We enclose herewith amended assessments of Income Tax for years ended 30/6/52, 30/6/53 and 30/6/54 together with adjustment sheets.

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We suggest that the amounts payable £274.18. should be paid by the Trustees and any proportion owing by Mrs. Dun can be adjusted later.

Yours faithfully,

GARDEN AND MONTGOMERIE

per G.G. JOHNSTONE."

In reply to paragraph 15 of the said Affidavit of the Applicant we say that the Applicant had no justification in anticipating the receipt of a sum of £700 tax reimbursement from the Testator's Estate

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as a result of the decision of this Honourable Court in Suit No. 142 of 1951.

11. The house in which the applicant resides is large. It contains two bedrooms, together with maid's quarters which virtually constitute a separate flat. We submit that the size of this house greatly exceeds the applicant's reasonable requirements.

10 12. On the twelfth day of March, 1954 we instituted a suit by Originating Summons in this Honourable Court in its Equitable Jurisdiction in which the Applicant was joined as a defendant. In this suit the Court is asked to decide whether or not the Will and Codicil of the Testator confer on us a power of appropriation in respect of payments which are required to be made under Clause 2 of the Codicil and in the event of the answer to that question being in the negative the Court is asked to approve of an appropriation. This suit has not yet come on for hearing as the applicant did not before making application for leave to bring the present application furnish details of her income from sources other than the Estate, although requested to do so on many occasions over a period of nine months prior to her institution of the application for leave.

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30 13. Annexed hereto and marked with the letters "A" and "B" respectively are true copies of the Estate Balance Sheet as at 30th June, 1955, and the income and expenditure account for the year ending 30th June, 1955 respectively. Two of the income items appearing in the Income and Expenditure Account annexed hereto and marked with the letter "B" are items of a non-recurring nature, these being as follows:-

Final payment J.O. Wool	
Organisation	£229.16.10
Return Insurance Premium	60. 0. 0

40 The said Income and Expenditure Account also includes dividends for the years 1953 and 1954 paid to the Estate by Tresilian and Dun (Grenfell) Pty. Ltd. and in consequence the dividend item appearing in such Income and Expenditure Account is

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greater than is customary. Moreover we have been informed and verily believe that as the said Tre-silian & Dun (Grenfell) Pty. Limited incurred a trading loss for the year ending 30th June, 1955 no dividend will be payable to the Estate from that Company in respect of the year 1955. To the best of our knowledge, information and belief the net income from the Estate from now on will be fairly uniform and will be approximately £2800 per annum. It would appear that now that the Applicant has no income producing assets other than her interest in the Estate of the Testator, the average annual amount which would be received by the Applicant from the Estate under the terms of the Will and Codicil will be the equivalent of £800 plus the tax thereon.

10

SWORN, &c.

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ANNEXURE "A" (BALANCE SHEET OF ESTATE OF TESTATOR as at 30th JUNE, 1955)

THE ESTATE OF THOMAS FITZGERALD DUN (Deceased) - COWRA

BALANCE SHEET as at 30th JUNE, 1955

<u>Liabilities</u>		<u>Assets</u>
<b>SUNDRY CREDITORS</b>		
Sundries	176. 5. 0	3462. 0. 0
PROVISION FOR TAXATION 1954 and 1955	4750. 0. 0	
UNDISTRIBUTED INCOME ACCOUNT		874. 0. 0
Balance as at 30/6/54	20152. 8. 0	
Add: Profit for Twelve months	<u>2893. 3. 3</u>	
	23045.11. 3	7000. 0. 0
Less: Annuity - E.J.Dun	<u>800. 0. 0</u>	
	22245.11. 3	1835. 8. 0
Less: Provision for Federal Income Tax Account 1955	<u>750. 0. 0</u>	
	21495. 11. 3	
<b>CORPUS ACCOUNT</b>		62875. 0. 0
Balance at 30/6/54	55933.19. 9	
Less: Legal Expenses re E.J. Dun Court Application	<u>200. 4. 0</u>	
	55733.15. 9	6109. 4. 0
		<u>4000. 0. 0</u>
		£ 82155. 12. 0
		£ 82155. 12. 0

£ 82155. 12. 0

No. 7

ANNEXURE "B" (INCOME AND EXPENDITURE STATEMENT for the  
TWELVE MONTHS ended 30th JUNE, 1955)

THE ESTATE OF THOMAS FITZGERALD DUN (Deceased) - COWRA  
RENTED PROPERTY ACCOUNT FOR THE TWELVE MONTHS ENDED 30th JUNE, 1955

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No. 7  
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30th June 1955

		1955	
June 30		June 30	Rent received
	Municipality of Grenfell - Rates	102.13. 1	
	Central Tablelands County Council	19. 3.10	
	Insurance - Buildings	63.15. 0	
	Repairs	123. 3. 7	
	Painting	<u>19. 3. 2</u>	
	Net Profit transferred to Income and Expenditure Account	192. 1. 4	
		<u>£ 520. 0. 0</u>	<u>£ 520. 0. 0</u>

No. 8

AFFIDAVIT OF ELEANOR JESSIE DUN  
dated 14th June, 1956

In the  
Supreme Court  
of New South  
Wales

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No.8

Affidavit of  
Eleanor Jessie  
Dun.

14th June 1956

On the fourteenth day of June One thousand nine hundred and fifty-six ELEANOR JESSIE DUN of Cowra in the State of New South Wales, Widow, being duly sworn makes oath and says as follows:-

10 1. I am the Applicant herein and I have read what purports to be a copy of the affidavit of Francis Boyce Dun and Charles Edward Dun, the Trustees of the Will and Codicil of the abovenamed deceased, sown on the 23rd day of December, 1955.

20 2. I crave leave to refer to my affidavit sworn on the 2nd day of September 1955 and filed herein and with reference to paragraph 5 thereof I say that the said Francis Boyce Dun is a bachelor and to the best of my knowledge information and belief he has considerable pastoral interests and he is at the present time on a trip to England. The said Charles Edward Dun is also a bachelor and is an Inspector in the Bank of New South Wales and to the best of my knowledge information and belief he also has substantial interests in grazing properties in the Condoblin and Hay districts. The husband of Edith Rava one of the sisters of the deceased has a large produce hardware and refrigeration business which is carried on in Wagga Wagga, Orange and Wollongong under the name of M. Rava & Co. Katherine Nora Craig, a sister of the deceased is the wife of the  
30 Chief Security Officer of the Bank of New South Wales and to the best of my knowledge information and belief she is the lessee of a large grazing property in the Condoblin district which is run in conjunction with her brother's grazing property.

40 3. In answer to paragraph 5 of the said affidavit of the Trustees I say that to the best of my knowledge information and belief the said William John Dun is the owner of a majority of shares in Tresilian & Dun (Grenfell) Pty. Limited and he has recently built a modern home and drives a late model Rover motor car. In further reply to paragraph 5 of the said affidavit of the Trustees I say that to the best of my knowledge information and belief Francis Barrett Dun has recently built a modern home in Condoblin; he is the owner of a car and until

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recently has had one of his sons as a boarder at the Scots College, Bellevue Hill and I believe that this son is now a student at the University of Sydney.

4. I have read what purports to be a copy of the affidavit of Colin Fitzgerald Dun sworn on the 21st day of May 1956 and in answer to paragraphs 2 and 3 of the said affidavit and in further reply to paragraph 5 of the Affidavit of the Trustees I say that some months ago the said Colin Fitzgerald Dun called to see me and informed me that he had a good position in Papua and that his employer provided him with a home and servants. He stated that he had just purchased a car and that he and his wife were making a holiday trip to Western Australia.

10

5. In reply to paragraph 6 of the said affidavit of the Trustees and in partial correction of paragraph 7 of my own affidavit I say that for some months prior to the testator's death, my allowance was at the rate of £12.0.0d per week and I say that the figures set forth in paragraph 6 of the said affidavit of the Trustees correctly represents the allowance made to me by the Testator for the years therein referred to, but I am of the opinion that such sums do not include the gifts made to me by the testator from time to time as set out in paragraph 7 of my said affidavit.

20

6. In answer to paragraph 8 of the said affidavit of the Trustees I say that I am not aware how much the deceased drew from his bank account for the holiday expenses but I say that during our holidays in Melbourne he frequently gave me cash to enable me to purchase clothing and other items which I required and I know that he carried a considerable amount of cash in his wallet and would often hand to me a £10 note and ask me whether that would be sufficient. The deceased was not always in the habit of writing the name of the payee upon his cheque but would frequently write down the last three numbers of the cheque itself.

30

7. In reply to paragraph 9 of the said affidavit of the Trustees I do not admit that the deceased was in the habit of discussing all his affairs with the Respondents except during the three months prior to his death and he never told me it was his habit to discuss his affairs with them. I have in my possession a letter from the testator to myself

40

dated the 13th day of April 1937 wherein the deceased stated that he had not told his family of his intended marriage and also that if anything happened to him he could leave me well provided for. Annexed hereto and marked with the letter "A" is a true copy of such letter.

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10 8. With reference to paragraph 10 of the said affidavit of the Trustees I say that on or about the 12th day of December 1955 my solicitors received a letter from Messrs. E. Steel & Co. of Cowra as follows :-

"We have just received from Messrs. Icceton Faithfull and Baldock notices of amended assessments for the years 1952, 1953 and 1954, showing total amount of taxes payable by Mrs. Dun and due on or before 14th December, 1955 of £274.18.0d.

20 As you will realise, these taxes are a primary liability of this taxpayer, and although in past years the trustees of the Estate of the late T.F. Dun have gone to the expense of ascertaining the proportion due by the Estate, it is felt that your client should in the first place attend to the payment of the total tax due, and then submit for the trustees' consideration the proportion calculated as due by the Estate.

30 Under these circumstances, the assessments with the adjustment sheets are returned to you for your attention."

9. On the 22nd day of February 1956 my solicitors wrote to the solicitors for the Trustees a letter which omitting formal parts reads as follows:-

40 "We refer to the Affidavit of the Executors of 23rd December, 1955 in this matter and in particular to paragraph 5 thereof and would advise that it is our client's understanding of the matter that the beneficiaries mentioned are in comfortable circumstances and that, in particular, W.J. and F.B. Dun are men of considerable means.

If the Executors intend claiming at the Hearing that any of the beneficiaries have a claim which competes with the widow in any way

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or that the smallness or otherwise of their assets are relevant, we must insist that these matters be properly proved. In particular we object to any evidence other than the best evidence in respect of W.J. and F.B. Dun.

If it is claimed that Messrs. R.K. and C. Dun and Mrs. B.F. Doust are in competition with the widow's claim or that the amount of their assets is relevant, we wish to advise that objection will have to be taken to the present form of the affidavit.

10

In order that the matter can proceed as quickly as possible, we would appreciate your advices on the points raised above as soon as possible."

10. On or about the 9th day of March 1956 my solicitors received from the solicitors for the Trustees a letter which omitting formal parts reads as follows:-

"We acknowledge receipt of your letter of 22nd ultimo the contents of which we have noted.

20

We should like an opportunity to discuss this matter with our clients, both of whom are at present in the country, and, as we will not be able to obtain their instructions before the end of March, we will be pleased if the hearing of your client's application could be deferred until we have had the opportunity of obtaining such instructions and placing before the Court such further evidence as it may be thought fit to adduce as to the financial circumstances of the respective beneficiaries."

30

11. On the 13th day of March 1956 my solicitors wrote to the solicitors for the Trustees a letter, which omitting formal parts reads as follows:-

"We acknowledge receipt of your letter of 7th instant and note the contents.

We are instructed to agree to allow you until the 6th April to file any further affidavit which the trustees may be advised to file, but, in view of the long delay already experienced in this matter, we have to inform you that we cannot consent to any further time after that date."

40

12. On the 16th day of April 1956 my solicitors received from the solicitors for the Trustees a letter which omitting formal parts reads as follows:-

10 "We acknowledge receipt of your letter of the 13th ultimo. As we anticipated in our letter of the 7th ultimo, it was not possible for us to obtain the Trustees' instructions concerning the portion of the affidavit adverted to by you until the end of last month, but we have now obtained those instructions and are proceeding with the preparation of further affidavits, which should be in unobjectionable form. As, however, we were unable to obtain immediate instructions, and as the beneficiaries in the Estate are scattered all over New South Wales, it has been quite impossible for us to file such further affidavits within the time limited by you.

20 While the Trustees are very anxious to have this matter heard at the earliest possible opportunity, and while we appreciate that your client is equally desirous of obtaining an early hearing, we might point out that the matter which is now delaying the hearing was not raised until your letter of the 22nd February last, although the material objected to by you is contained in the Affidavit of the Trustees, which has been in your possession since the 23rd December last.

30 In these circumstances we trust that you will permit us a reasonable extension of time for the filing of the required affidavit. We shall proceed in this matter as expeditiously as possible, and shall inform you as soon as the affidavits are complete."

13. On the 19th day of April 1956 my solicitors wrote to the solicitors for the Trustees a letter, which omitting formal parts reads as follows:-

40 "We acknowledge receipt of your letter of the 12th instant and would advise that whilst we are anxious to have this matter dealt with as soon as possible, we do not wish to be unreasonable with regard to the time required for the preparation of such affidavits as the trustees may desire to file.

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However, as it is now eight weeks since we raised the objections to the trustees' affidavit, we feel that it is not unreasonable to require that any affidavits which you desire to file should be filed by the 4th May next.

We would draw your attention to the fact that, despite repeated requests by us and assurances by you that the matter was being expedited, the trustees' affidavit was not served on our city agents until 23rd December last, although the applicant's affidavit had been in your possession since the 5th September.

10

We therefore feel that, in the circumstances, the extension to the 4th May should be quite sufficient time to enable any affidavits to be prepared."

14. Since I swore my affidavit on the 2nd day of September 1955 my financial position has deteriorated and my bank account is now overdrawn to the extent of £4,127 and I have been advised by my banker that I cannot draw any further cheques. I have lived very carefully since the hearing of my application for leave to extend the time for the making of this my application and I have been unable to live adequately on the income received from the estate of the said testator.

20

15. The following is a list of expense incurred by me since the month of June, 1955:-

Income Tax amended assessments	£274. 0. 0	
Interest to Bank		30
30/6/55	£87.11. 9	
30/12/55	<u>97. 1.11</u>	184.13. 8
Insurance for period	27.0.0	
Total for 12 months		43.14. 6
Telephone for six months to October 1955		9.18. 9
Electricity Supplied		43.15. 7
Repairs to electric stove		9. 2. 0
Firewood		8.12. 0



	Plumbing repairs	8. 5. 0	In the Supreme Court of New South Wales
	Electrical repairs to meter post etc.	15. 1. 6	
	Gardener (Tomlin)	62.13. 0	
	Blume & Co., Electrical lawn mower purchased on hire purchase	41. 4. 3	No.8
	Blume & Co., Hardware, paint &c. for wedding gifts	34. 6. 3	Affidavit of Eleanor Jessie Dun.
	Lachlan Motors (new battery and general car expenses)	49.14. 0	14th June 1956 - continued.
10	Car registration	11. 8. 6	
	Panel beater (car hit outside theatre one night - advised not to claim on Comprehensive Policy)	10. 0. 0	
	F. Whitty, Carpenter - repairs to wire gauze windows, bedroom drawers, fence, garage doors, etc.	8.13. 6	
	Hutchins painting wire doors, gates and iron verandah railing	5. 0. 0	
	Rates	53. 5. 7	

20 These expenses do not include expenses in respect of the running of my car or expenses for food or clothing.

30 16. I have discontinued my subscriptions to all papers and magazines except the "Women's Weekly", the "Cowra Guardian" (twice a week) and the "Sydney Morning Herald" and "Daily Telegraph" on Thursday and Sundays only. During my husband's lifetime and until I myself went abroad, I had the following papers delivered:- "Sydney Morning Herald" and "Daily Telegraph" every day "Vogue", "Harpers", "House and Garden" and "Woman". The only major item of clothing which I have acquired since June 1955 is a suit which I have had made from a suit length which I purchased about ten years ago and the cost of having the same made up was Twenty one pounds (£21). I have not yet renewed my membership of Cowra Golf Club and the Picnic Race Club and have not been to the Golf Club more than twice

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Affidavit of  
Eleanor Jessie  
Dun.

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- continued.

since June 1955. I will not be able to renew my subscriptions to the above clubs unless I receive an increased allowance from the estate. I have no money for living expenses and my next payment of income amounting to £200 is not due until the end of June 1956.

17. Many of the fittings in the house wherein I reside are approximately 15 years old and now starting to require replacement and in particular the venetian blinds need reducing and rewedding, the outside awnings need new canvasses (for which I have received a quotation for £65) And the boundary fence will soon require attention.

10

18. With reference to paragraph 8 of my affidavit sworn on the 2nd day of September 1955 I saw that for a number of years I have taken an active part in civic affairs and in the public life of the community. Some of my activities have been as follows:

(a) I have been a member of the Cowra District Hospital Board since 1943 and I am the only woman member of the Board. Prior to my departure for England in 1953 the Board of Directors issued me with a Certificate under seal to enable me to visit hospitals overseas. The said Certificate is hereunto annexed marked "B". While in London I visited St. Bartholomew's Hospital and Hammersmith Hospital.

20

(b) I have held the position of Vice-President of the Cowra Red Cross and have on several occasions been a delegate to Red Cross conferences in Sydney;

30

(c) I was the Foundation Secretary of the Cowra Branch of the Liberal Party and was for some years delegate to the State Council and a member of the New South Wales State Executive of the party, which necessitated frequent trips on my part to Sydney; at the request of the Country Women's Association and the Cowra District Hospital Board I have allowed my home to be used for parties for both these organisations and I have also held card parties at my home in aid of the Red Cross;

40

(d) I am a Justice of the Peace and in the past I have held other positions in public life.

Apart from the Cowra District Hospital Board I have not taken an active interest in public life since my return from England.

SWORN etc.

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Affidavit of  
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14th June 1956  
- continued.

No. 9

ANNEXURE "A" (LETTER FROM TESTATOR TO  
APPLICANT, dated 13th April, 1937)

No.9

Annexure "A"  
13th April  
1937

Telephone  
COWRA 353

10

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

Kendal Street, COWRA.

13th April, 1937.

My Dear Nell,

20

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 that 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

30

In the  
Supreme Court  
of New South  
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No.9  
Annexure "A"  
13th April  
1937

price for it. Dearest I have not said a word to any of the 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 problem 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 may 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 put all my cards on the table.

Farewell my darling,

Fondest love,

Tom.

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No. 10

ANNEXURE "B" (CERTIFICATE ISSUED BY COWRA  
DISTRICT HOSPITAL, dated 21st  
September 1954.

In the  
Supreme Court  
of New South  
Wales

No. 10

Annexure "B"

21st September  
1954.

THE COWRA DISTRICT HOSPITAL

Secretary,

P.O. Box 44,

R.E. Hargraeves

COWRA

21st September, 1953.

TO WHOM IT MAY CONCERN

10 This is to certify that Mrs. E.J. Dun of Cowra, New South Wales, has been a member of the Board of Directors and a Life Member of this Hospital for the past ten years. During that period she has been a most keen and energetic worker. She has been a driving force in collecting and organising functions, and her efforts over the years have resulted in some thousands of pounds being raised for the hospital. She is keenly interested in hospital organisation and administration.

20 Any help or advice in this sphere that can be given her will be greatly appreciated, both by her and her co-directors.

Given under the Seal of the Board by special resolution this eighteenth day of September, 1953.

THE  
COWRA DISTRICT  
HOSPITAL

R.E.Hargreaves (Sgd)  
Secretary.

M.Whitby J.P. (Sgd)  
Chairman of the Board

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In the  
Supreme Court  
of New South  
Wales

No. 11

AFFIDAVIT OF WALTER THOMAS GARNER  
ATKINS, dated 14th June, 1956

No. 11  
Affidavit of  
Walter Thomas  
Garner Atkins.  
14th June 1956.

ON the Fourteenth day of June One thousand nine hundred and fifty six WALTER THOMAS GARNER ATKINS of Cowra in the State of New South Wales Medical Practitioner being duly sworn makes oath and says as follows :-

1. I am a duly qualified Medical Practitioner residing and practising in Cowra.

10

2. Eleanor Jessie Dun the abovenamed applicant has been a patient of mine for ten years. I examined her on the Sixth day of June One thousand nine hundred and fifty-six and I found her to be suffering from raised blood pressure ( $\frac{200}{120}$ ) with a degree of aortic incompetence. She has in addition some arthritis associated with a chronic psoriasis which at the moment is not causing her great discomfort.

3. In my opinion she needs a motor car to enable her to continue her usual daily activities.

20

SWORN &c.

No. 12

Affidavit of  
Charles Edward  
Dun.

No. 12

AFFIDAVIT OF CHARLES EDWARD DUN  
dated 21st June, 1956

21st June 1956.

ON the twenty-first of June One thousand nine hundred and fifty-six CHARLES EDWARD DUN of Sydney in the State of New South Wales, Bank Officer, being duly sworn makes oath and says as follows:-

1. I am one of the Trustees of the Will of the abovenamed deceased and one of the Respondents herein.

30

2. I have examined what purport to be certain books, records and papers of Squire Pepper Pty.Ltd. a Company incorporated in the State of New South Wales and carrying on business as General Merchants and Storekeepers at Cowra in the said State, and in particular certain documents which purport to be copies of itemised accounts sent by that Company to

the Applicant herein during each of the years from 1949 to 1955 inclusive, and I say that in the course of making such examination I have extracted from such books particulars of the value of purchases of liquor, excluding soft drinks, during each of the months included in the said period by the Applicant from the said Squire Pepper Pty. Limited and charged by the Applicant to the charge account conducted by her with the said Company and that in the course of such examination and in conjunction with the extraction of the particulars above referred to I have extracted from the said books and papers particulars of the total value of the goods of all types purchased by the Applicant from the said Company in each of such months and charged to such account conducted by her as aforesaid and of the overall debit balances of the account of the Applicant with the said Company at the end of each of such months and that a true copy of the extracts so made by me is annexed hereto and marked with the letter "A".

3. I have been informed by Mr. Clive Squire, a former Director of the said Squire Pepper Pty. Ltd. that the books and records of the Company relating to the account conducted by the Applicant with the said Company prior to the year 1949 were destroyed in a fire which destroyed the shop premises including the office of the said Company on or about the Twelfth day of January One thousand nine hundred and forty-nine.

4. I have also examined the books of account kept by the Applicant and her Accountants on her behalf and produced by her under subpoena herein dated the First day of June instant and in particular the Applicant's Cash Book and I say that in the course of such examination I extracted from the said Cash Book particulars of all amounts which appear to have been paid by the Applicant to Hotels over the period from the Twenty-first day of December One thousand nine hundred and forty-two to the Nineteenth day of June One thousand nine hundred and fifty-three inclusive. A true copy of the extract so made by me of such particulars is hereunto annexed and marked with the letter "B".

SWORN &c.

In the  
Supreme Court  
of New South  
Wales

\_\_\_\_\_  
No. 12

Affidavit of  
Charles Edward  
Dun.

21st June 1956  
- continued

In the  
Supreme Court  
of New South  
Wales

No. 13

ANNEXURE "A" (EXTRACTS FROM BOOKS OF  
SQUIRE PEPPER PTY. LIMITED for period  
January 1949 to May 1955)

No. 13

Annexure "A"

January 1949  
to May 1955.

## SUMMARY OF PURCHASES

	Liquor	Total Purchases	Debit Balance at end of month	
1949				
January	£7. 1. 6	£9.19.11	£273. 3.11	
February	5. 4. 0	5.15. 5	278.19. 4	10
March	14. 5. 6	25.14. 1	295.11. 4	
April	3. 5. 0	-	255. 2. 7	
May	7.17. 0	7.17. 0	261.18. 7	
June	-	-	-	
July	28. 4. 3	44. 5. 4	303. 5. 6	
August	10. 7. 9	19.12. 7	197. 8. 9	
September	20. 4. 3	25. 6.10	222.15. 7	
October	17. 8. 0	22. 9. 2	245. 4. 9	
November	13.16. 9	15.19. 6	259. 5. 4	
December	26.19.10	43. 7. 3	297. 4. 1	20
	<u>£ 154.12. 4</u>	<u>220. 7. 1</u>		
1950				
January	16.14. 6	22. 3. 7	319. 7. 8	
February	29. 7. 9	32. 3. 4	251.11. 1	
March	24. 4. 6	26.10. 6	273.12.10	
April	30.14. 6	32.13. 8	306. 6. 6	
May	75. 2. 3	90. 4. 1	395.12. 8	
June	14. 6. 2	25.19. 6	421.12. 2	
July	2.13. 3	4. 0. 7	417. 7.10	
August	25. 0. 9	30. 9. 2	372.11. 6	
September	4. 6. 9	8.18. 5	376.12. 6	30
October	34.13. 3	46.12. 0	422.18. 9	
November	21.16. 0	35. 2. 6	458.1. 3	
December	16. 7. 0	25.18. 9	484. 0. 0	
	<u>£ 295. 6. 8</u>	<u>380.16. 1</u>		



	Liquor	Total Purchases	Debit Balance at End of Month	
1951				
January	£34.13. 9	£62. 3. 3	£490. 8. 6	
February	30.16. 0	40. 4. 8	527.12. 3	
March	2. 6. 6	4.19.11	532.12. 2	
April	8. 8. 6	12. 2. 9	493.14.11	
May	21. 6. 0	28.16. 9	522.11. 8	
June	16.15. 0	33.17. 4	33.17. 4	
10		Separate A/c.	459.11. 8	493. 9. 0
July	12.11. 6	21.17. 7	53. 1. 8	
			459.11. 8	512.13. 4
August	17.12. 6	29.12. 4	48. 5. 3	
			459.11. 8	507.16.11
September	11. 5. 9	21. 2. 4	48. 3. 3	
			439.11. 8	487.14.11
October	3. 3. 0	29. 5.10	77. 9. 1	
			439.11. 8	517. 0. 9
November	17.16. 6	24. 0. 6	53. 6. 4	
20			439.11. 8	492.18. 0
December	35.14. 6	60. 0. 7	105.11. 2	
			439.11. 8	545. 2.10
	£ 212. 9. 6	368. 3.10		
1952				
January	17. 6. 0	24. 0. 8	100. 6. 0	
			418.17. 6	519. 3. 6
February	8.10. 0	21.18. 3	117.14. 3	
			418.17. 6	536.11. 9
March	9. 9. 0	13. 4. 4	100.18. 7	
30			418.17. 6	519.16. 1
April	18. 7. 0	25.13. 1	73.10. 8	
			418.17. 6	492. 8. 2
May	17.10. 0	25. 7. 9	98.18. 6	
			418.17. 6	517.16. 0
June	20. 6. 6	25.11. 5	124. 9.11	
			418.17. 6	543. 7. 5
July	14.15. 0	29.13. 9	93. 8. 8	
			418.17. 6	512. 6. 2
August	26.12. 3	34. 3.10	127.11. 7	
40			418.17. 6	546. 9. 1

In the  
Supreme Court  
of New South  
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No. 13

Annexure "A"

January 1949  
to May 1955.

- continued.

In the Supreme Court of New South Wales		Liquor	Total Purchases	Debit Balance at End of Month		
No. 13 Annexure "A" January 1949 to May 1955 - continued.	1952					
	September	11. 1. 3	19. 2. 8	146.14. 3	565.11. 9	
				<u>418.17. 6</u>		
	October	19.11. 9	27.14. 9	129. 4.10	528. 2. 4	
				<u>398.17. 6</u>		
	November	8.19. 8	36. 6.11	165.11. 9	564. 9. 3	
				<u>398.17. 6</u>		
	December	27. 2. 0	44.14.10	210. 6. 7	609. 4. 1	10
				<u>398.17. 6</u>		
			<u>£ 199.10. 5</u>	<u>327.11. 3</u>		
		1953				
	January	9.13. 0	37.11. 5	182. 3. 0	481. 0. 6	
				<u>398.17. 6</u>		
	February	14. 0. 0	23. 0. 8	205. 3. 8	604. 1. 2	
				<u>398.17. 6</u>		
	March	12. 8. 3	19. 9. 6	224.13. 2	623.10. 8	
				<u>398.17. 6</u>		
	April	12. 8. 3	16.15. 7	241. 8. 9	640. 6. 3	20
				<u>398.17. 6</u>		
	May	31.14. 9	50.11. 6	217. 0. 3	615.17. 9	
				<u>398.17. 6</u>		
	June	15.11. 0	26.17. 8	243.17.11	642.15. 5	
				<u>398.17. 6</u>		
	July	11. 3. 6	18.10. 9	187. 8. 8	586. 6. 2	
				<u>398.17. 6</u>		
	August	22. 7. 6	32. 7. 6	217.19. 8	616.17. 2	
				<u>398.17. 6</u>		
	September	24. 8. 0	32. 8. 1	250. 7. 9	649. 5. 3	30
				<u>398.17. 6</u>		
	October	2.13. 0	10. 6. 3	Accounts merged	354.18.11	
	November				354.18.11	
	December					
		<u>£ 156. 7. 3</u>	<u>267.18.11</u>			

Debit Balance  
at end of  
monthIn the  
Supreme Court  
of New South  
Wales

	Liquor	Total Purchases	Debit Balance at end of month
1954			
January			154.18.11
June	£3. 8. 6	£4. 1. 5	159. 0. 4
December	15. 0. 0	17.19. 2	164.19.11
	<u>£ 18. 8. 6</u>	<u>22. 0. 7</u>	

No. 13  
Annexure "A"  
January 1949  
to May 1955  
- continued.

	1955			
	January	£7.17. 6	£14. 1.10	158.12. 0
10	February	9.14. 6	12. 9. 0	162.15. 0
	March	16. 6. 0	19.18. 3	162.15. 0
	April	8. 8. 6	10.10. 1	162.14. 3
	May	6.11. 6	8.19. 3	163. 5. 3
		<u>£ 48.18. 0</u>	<u>65.18. 5</u>	

No. 14

ANNEXURE "B" (EXTRACTS FROM BOOKS OF APPLICANT  
re PAYMENTS TO HOTELS for period  
21st December 1942 to 19th June 1953

No. 14

Annexure "B"  
21st December  
1942 to 19th  
June 1953.

PAYMENTS TO HOTELS

20	21.12.42	Chevron Ltd.	£10. 0. 0
	6. 1.43	"	12.18. 6
	13. 1.43	"	10. 0. 0
	25. 1.43	"	15. 0. 0
	2. 2.43	"	12. 0. 0
	5. 2.43	"	12. 0. 0
	12. 2.43	"	10. 0. 0
	18. 2.43	"	10. 0. 0
	23. 2.43	"	10. 0. 0
	4. 3.43	"	18. 0. 0
30	4. 5.43	52 Macleay Street	8.16. 9
	1. 6.43	"	9. 9.10
	4. 6.43	"	15. 0. 0
	11. 6.43	"	12. 0. 0
	14. 6.43	"	5. 0. 0
	18. 6.43	"	8.18. 8
	22. 6.43	"	10. 0. 0

In the	12.11.43	52 Macleay Street	15. 0. 0	
Supreme Court	20.11.43	"	15. 0. 0	
of New South	23.11.43	"	8.13.10	
Wales				
<hr/>				
No. 14	27.10.44	"	20. 0. 0	
Annexure "B"	4.11.44	"	24.15. 2	
	10.11.44	"	25.18. 3	
	16.11.44	"	30. 0. 0	
21st December	4. 7.45	Ushers	15. 0. 0	
1942 to 19th	11. 7.45	"	15. 0. 0	
June 1953	13. 7.45	"	8. 0. 0	10
- continued.	29. 8.45	"	20. 0. 0	
	5. 9.45	"	20. 0. 0	
	13. 9.45	"	20. 0. 0	
		"	10. 0. 0	
	19. 9.45	"	20. 0. 0	
	22. 9.45	"	10. 0. 0	
	24. 9.45	"	10. 0. 0	
	11. 2.46		10. 0. 0	
	2. 3.46		25. 0. 0	
	8. 3.46	Ushers	5. 3. 5	20
	22. 3.46	"	20. 0. 0	
	3. 4.46	"	20. 0. 0	
	6. 4.46	"	10. 0. 0	
	30. 4.46	"	10. 0. 0	
	8. 5.46	"	15. 0. 0	
		"	10. 0. 0	
	4. 7.46	"	25. 0. 0	
	4. 7.46	"	10. 0. 0	
	6. 7.46	"	15. 0. 0	
	10. 7.46	"	25. 0. 0	30
	12. 7.46	"	12. 0. 0	
	18.10.46	"	10. 0. 0	
	22.10.46	"	20. 0. 0	
	24.10.46	"	15. 0. 0	
	24.10.46	"	1. 0. 0	
	1.11.46	"	15. 0. 0	
	2.11.46	"	12. 0. 0	
	11.11.46	Windsor	10. 0. 0	
	14.11.46	"	10. 0. 0	
	19.11.46	"	10. 0. 0	40
	20.11.46	"	10. 0. 0	
	25.11.46	"	34. 0. 0	
	15. 7.47	Ushers	10. 0. 0	
	18. 7.47	"	25. 0. 0	
	23. 7.47	"	10. 0. 0	
	25. 7.47	"	25. 0. 0	
	29. 7.47	"	30. 0. 0	

	22.11.47	Ushers	10. 0. 0	In the Supreme Court of New South Wales
	28.11.47	"	25. 0. 0	
	2.12.47	"	15. 0. 0	
	6.12.47	"	25. 0. 0	
	10.12.47	"	17. 0. 0	
	21. 1.48	"	15. 0. 0	No. 14 Annexure "B" 21st December 1942 to 19th June 1953 - continued.
	4. 2.48	"	30. 0. 0	
	7. 2.48	"	20. 0. 0	
10	13. 2.48	"	35. 0. 0	
	14. 2.48	"	15. 0. 0	
	19. 2.48	"	25. 0. 0	
	22. 7.48	"	25. 0. 0	
	26. 7.48	"	15. 0. 0	
	29. 7.48	"	17. 7. 8	
	20.10.48	"	30. 0. 0	
	21.10.48	"	20. 0. 0	
	26.10.48	Astra	10. 0. 0	
	28.10.48	"	9. 7. 3	
	14.11.48	Ushers	12. 6	
20	18. 1.49	"	35. 0. 0	
	27. 1.49	"	35. 0. 0	
	4. 2.49	"	10. 0. 0	
	8. 2.49	Astra	10. 0. 0	
			15. 0. 0	
	19. 4.49	Ushers	7. 8	
	3. 5.49	"	15. 0. 0	
	6. 5.49	"	30. 0. 0	
	6. 5.49	Menzies	5. 0. 0	
30	12. 5.49	"	5. 0. 0	
	14. 5.49	"	10. 0. 0	
	18. 5.49	"	20. 0. 0	
	24. 5.49	"	34.12. 1	
	3. 8.49	Ushers	21.14. 4	
	5. 8.49	"	8. 9	
	30.11.49	"	10. 0. 0	
	3.12.49	"	38. 0. 0	
	27. 3.50	"	55. 0. 0	
	19. 9.50	"	47.12.11	
40	26. 9.50	Hotel Carrington	1.15. 0	
	3.11.50	Ritz Hotel	3. 1. 6	
	8.11.50	Hydro	10. 0. 0	
	13.11.50	Hotel Imperial	2.14. 0	
	18. 3.51	Astra	40. 0. 0	
	13. 4.51	Mayfair Hotel	14. 2. 2	
	14. 9.51	Hotel Canobolas	5. 0. 0	
	28. 9.51	Astra	25. 0. 0	
	12.10.51	Highway Hotel	9. 4. 6	
	29.10.51	Astra	45. 0. 0	

In the Supreme Court of New South Wales <hr/>	1.11.51	Canobolas Hotel	20. 0. 0
	15. 2.52	Canobolas	2. 0. 0
	5. 3.52	Astra	33.19. 6
	24. 3.52	Berley Hotel	19. 0. 0
No. 14		Ushers	2.19.10
Annexure "B"	22. 5.52	Hotel Lachlan	4. 0. 0
21st December	21. 3.53	Baley Hotel	16.11. 9
1942 to 19th	27. 3.53	Ushers	20. 0. 0
June 1953	19. 6.53	Prince of Wales Hotel	7.10.10
- continued.			

No. 15  
Affidavit of  
Graeme Gillies  
Johnstone.  
8th August  
1956.

No. 15

10

AFFIDAVIT OF GRAEME GILLIES JOHNSTONE  
dated 8th August, 1956.

ON the eighth day of August One thousand nine hundred and fifty-six GRAEME GILLIES JOHNSTONE of Cowra in the State of New South Wales Solicitor being duly sworn makes oath and says as follows :-

1. I am the solicitor for Eleanor Jessie Dun the applicant herein.

2. I have read what purports to be a copy of the affidavit of Francis Boyce Dun and Charles Edward Dun sworn on the 23rd day of December, 1955 and with reference to paragraph 6 thereof I say that I have examined what purports to be a cash book of the deceased, such cash book having been made available to me at my request by the solicitors for the respondents and I have extracted from such cash book particulars of cheques drawn in favour of the said Eleanor Jessie Dun from the 1st day of July, 1937 until the 10th September, 1942. In addition to certain other cash payments which are set out below the cash book reveals that from the 1st July 1937 until the 30th June, 1938 the applicant received regular monthly payments of £25 each; from the 1st July, 1938 until the 30th June, 1939 she received regular monthly payments of £30 each; and from the 1st July, 1939 until the date of the testator's death she received regular monthly payments of £35 each.

3. The cheques drawn in favour of the applicant

20

30

over the period above referred to as disclosed by the said cash book were as follows :-

In the  
Supreme Court  
of New South  
Wales

No. 15

Affidavit of  
Graeme Gillies  
Johnstone.

8th August  
1956 -  
continued.

	<u>Year Ending</u>	<u>Total of regular monthly payments</u>	<u>Additional payments</u>	<u>Total</u>
	30.6.38	£300. 0. 0	£ 30. 0. 0	£330. 0. 0
	30.6.39	360. 0. 0	46. 0. 0	406. 0. 0
	30.6.40	420. 0. 0	125. 0. 0	545. 0. 0
10	30.6.41	420. 0. 0	120. 0. 0	540. 0. 0
	30.6.42	420. 0. 0	275. 0. 0	695. 0. 0
	30.6.42/ 10.9.42	105. 0. 0	405. 0. 0	510. 0. 0

4. With reference to paragraph 8 of the said affidavit of the respondents I have extracted from the cash book referred to in paragraph 2 hereof particulars of payments apparently made by the testator for holidays and I say that in addition to the payments disclosed in paragraph 8 of the respondents' affidavit the following payments appear from such cash books:-

<u>Folio No.</u>	<u>Date</u>	<u>Payee</u>	<u>Amount</u>
11	Sept. 1938	Travelling expenses	£ 6.17. 0
11	"	Cash (3 separate cheques)	£35. 0. 0
32	Oct. 1940	52 Macleay St.	£15. 0. 0
33	Dec. 1940	"	£13. 0. 0
34	April 1941	"	£33. 0. 0

30 As is indicated in the affidavit of the respondents the sum of £15.0.0 was withdrawn by the testator in December, 1939 for "Melbourne expenses" but in addition the said cash book discloses that cheques payable to "cash" totalling £90.0.0 were drawn by the testator during the month of December, 1939.

40 5. I have extracted from the said cash book totals of cheques drawn payable to "cash" during each of the financial years from the 1st July, 1937 to the 30th June, 1942 and during the period from the 1st July, 1942 until the 10th September, 1942 and the position disclosed is as follows :-

<u>Year Ended</u>	<u>Total of Cheques payable to "cash"</u>
30.6.38	£673. 1. 7
30.6.39	£622.10. 0

In the Supreme Court of New South Wales	<u>Year Ended</u>	<u>Total of Cheques payable to "cash"</u>
	30.6.40	£504.16. 0
	30.6.41	£ 42. 0. 0
	30.6.42	£145. 0. 0
	1.7.42/	
No. 15	10.9.42	£485. 0. 0

Affidavit of  
Graeme Gillies  
Johnstone.

8th August  
1956 -  
continued.

6. On the 25th day of June, 1956 I wrote to the solicitors for the respondents a letter which omitting formal parts reads as follows:-

re: DUN v. ESTATE T.F. DUN.

10

"We refer to the balance sheet for the Estate of the late T.F. Dun annexed to the affidavit of Executors sworn on 23rd December, 1955 and would request that the following additional information be furnished as soon as possible:-

As regard the loan of £7000.0.0 to "Tresilian & Dun (Grenfell) Pty. Limited would you please advise:

- (i) The circumstances of the making of the loan including the reasons for the loan and the date or dates of the advances; 20
- (ii) If there is anything in writing to evidence the loan and its terms and if so may we inspect the same;
- (iii) Full terms of the loan including rate of interest and when repayable;
- (iv) Details of any security held for the loan;
- (v) Details of all amounts received by the estate for interest and repayment of principal since the loan was made. 30

With regard to the debt of £1835 shown as owing by the same Company, would you please advise how the debt arose and let us have the information requested in items (i), (ii), (iii) (iv) and (v) above.

Would you also please let us have a list of shareholders in Tresilian & Dun (Grenfell) Pty. Ltd. and also a copy of the Balance Sheet



and Profit and Loss Accounts for the year before the loan of £7000 was made and annually since that date.

Please also advise the number of shares held by the testator in Tresilian & Dun (Grenfell) Pty. Ltd. at the date of death and the value of the same as adopted by the Commissioner of Stamp Duties for Death Duty purposes.

10 In view of the provisions of Clause 12 of the testator's will, would you kindly inform us whether any security was held by the testator for advances made to the Company during his lifetime.

With regard to the Companies 'Milby' Pty. Limited' and 'Wyoming Pastoral Co. Pty. Limited' referred to in the affidavit of W.J. Dun and F.B. Dun, would you please let us have -

(i) A list of shareholders

20 (ii) Copy balance sheets and profit and loss accounts for the past three years.

With regard to fixed deposits shown on Estate balance sheets, would you please advise details of all admounts on fixed deposit since the date of sale of the farming property at Greenthorpe including rate of interest and actual amounts of interest received.

30 Would you also please let us have copies of the Estate balance sheets and profit and loss accounts for the year ended 30th June, 1953 which has not been furnished to the applicant."

7. I subsequently received from the respondents' solicitors a letter dated the 16th day of July, 1956 which letter omitting formal parts reads as follows :-

Estate late T.F. Dun ats Mrs. E.J. Dun

40 "We refer to your letter of the 25th ultimo, and in reply thereto furnish the following information:-

In the  
Supreme Court  
of New South  
Wales

\_\_\_\_\_

No. 15

Affidavit of  
Graeme Gillies  
Johnstone.

8th August  
1956 -  
continued.

In the  
Supreme Court  
of New South  
Wales

No. 15

Affidavit of  
Graeme Gillies  
Johnstone.

8th August  
1956 -  
continued.

1. Re the loan of £7,000 to Tresilian & Dun  
(Grenfell) Pty. Limited

(i) The circumstances of the making of this loan were that the then directors of the Company namely Messrs. F.B. Dun, C.E. Dun and W.J. Dun having determined that the Company was in need of liquid funds, requested the Trustees of the Estate to advance same out of the funds of the Estate. The advances were made on the following dates -

10

November 8th 1949	£2000
October 1st 1950	£3000
November 1st 1950	<u>£2000</u>
	£7000

(ii) The Accountants for the Trustees, Messrs. E. Steel & Co., Chartered Accountants (Aust) of Kendall Street Cowra hold written acknowledgments from the Company for each of the amounts advanced and same may be inspected by you by arrangement with Messrs. E. Steel & Co.

20

(iii) Each of the loans amounting in all to £7,000 was repayable on demand and carried interest at  $3\frac{1}{2}\%$ .

(iv) No security is held for any part of the loan.

(v) The following amounts have been received by the Estate for interest since the first of the loans were made -

30

26th May 1950	£39. 1. 6
18th November 1950	£38. 5. 2
7th June 1951	£142.18. 4
4th June 1952	£245. 0. 0
5th June 1953	£245. 0. 0
7th June 1954	£245. 0. 0
2nd June 1955	£265. 8. 4
28th June 1956	£245. 0. 0

There has been no repayment of principal.

2. Re Debt of £1,835 owing by Tresilian & Dun (Grenfell) Pty. Limited.

40

This debt represents dividends declared and unpaid.

3. Re Shareholders and Balance sheets etc. of Tresilian & Dun (Grenfell) Pty. Limited.

We fail to see the relevance of this information to the Suit and do not propose to supply same.

4. Re the Testator's shareholding in Tresilian & Dun (Grenfell) Pty. Ltd.

10 At the date of his death, the Testator held 874 shares in Tresilian & Dun (Grenfell) Pty. Limited and such shares were accepted by the Commissioner of Stamp Duties for Death Duty purposes at a value of £1 each.

5. Re advances made by Testator to Tresilian & Dun (Grenfell) Pty. Limited during his lifetime.

20 We are instructed that the Testator never held any security for advances made from time to time by him to the Company during his lifetime.

6. Re. Milby Pty. Limited and Wyoming Pastoral Co.

The Trustees in their capacity as such Trustees are not possessed of the information sought by you and do not propose to supply it.

7. Re fixed deposits.

30 We are instructed that particulars of the fixed deposits shown on the Estate Balance Sheets are as follows:-

- (a) £30,000 lodged 14th April, 1954 for 12 months at  $1\frac{1}{2}\%$  - cashed 14th April, 1955 - interest received £450.
- (b) £4,000 lodged 18th April, 1955 for six months at  $1\frac{1}{2}\%$  - renewed for three months at  $1\frac{1}{4}\%$ . £1,500 of this Fixed Deposit was withdrawn on the 8th

In the  
Supreme Court  
of New South  
Wales

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No. 15

Affidavit of  
Graeme Gillies  
Johnstone.

8th August  
1956 -  
continued.

In the  
Supreme Court  
of New South  
Wales

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December, 1955 and the balance of  
£2,500 renewed. This falls due on  
the 18th December, 1956. The inter-  
est received on the latter Fixed  
Deposit amounts to £37.16.3d.

No. 15  
Affidavit of  
Graeme Gillies  
Johnstone.  
8th August  
1956 -  
continued.

8. Re Accounts for year ended 30th June 1953.  
Copy of Estate Balance Sheet and Accounts  
for the year ended 30th June, 1953 are  
enclosed herewith."

SWORN &c.

10

No. 16  
Affidavit of  
Eleanor Jessie  
Dun.  
8th August  
1956.

No. 16

AFFIDAVIT OF ELEANOR JESSIE DUN,  
dated 8th August, 1956

ON the eighth day of August One thousand nine  
hundred and fifty-six ELEANOR JESSIE DUN of Cowra  
in the State of New South Wales Widow being duly  
sworn makes oath and says as follows:-

1. I am the applicant herein and have read what  
purports to be a copy of the supplementary affida-  
vit of Charles Edward Dun sworn on the 21st day of  
June, 1956 and with reference to the annexure  
marked "B" to such affidavit I say that during the  
12 months from the 1st July, 1945 to the 30th June  
1946 I attended meetings in Sydney of the State  
Executive of the Liberal Party of Australia (N.S.W.  
Division) on the following dates:-

20

12th July 1945  
13th July 1945  
26th July 1945  
22nd August 1945  
27th August 1945  
3rd September 1945  
7th February 1946  
4th March 1946  
1st April 1946  
29th April 1946 and  
25th June 1946

30

I have ascertained that the State Council of the  
Party met during such period on the following dates:-

28th June 1945  
 27th July 1945  
 30th August 1945  
 1st December 1945  
 15th February 1946  
 25th March 1946 and  
 30th April 1946.

In the  
 Supreme Court  
 of New South  
 Wales

\_\_\_\_\_  
 No. 16

Affidavit of  
 Eleanor Jessie  
 Dun.

8th August  
 1956 -  
 continued.

10 I say that I was present at the majority of such meetings, I was also a member of the Organisation Committee, Women's Activities Committee, and Youth Movement Committee of the Liberal Party all of which met fairly frequently and it was necessary for me to travel to Sydney to be present at such meetings. I remained a delegate to the State Council of the Party until February 1950 and regularly attended Council meetings in Sydney up till that date. Whilst in Sydney I generally stayed at Ushers Hotel.

20 2. I crave leave to refer to my affidavit sworn on the 2nd day of September, 1955 and with reference to paragraph 7 thereof I say that at the time of my swearing the said affidavit I believed that the Testator had regularly paid the accounts which were in his name at David Jones Limited, Farmer & Co. Limited and also the accounts at the Cowra Stores. I have now had an opportunity of perusing the cash book of the testator and my own cash book which were not available to me in September, 1955 and it appears from such cash books that the principal payments of the accounts at such stores were made by me and I desire to bring this fact to the notice of this Honourable Court and to correct the statement in paragraph 7 of my said Affidavit which was made by me in good faith and in the belief at the time that it was true.

30

3. Both before and after we went to reside in Cowra the testator always appeared to have fairly substantial sums of cash with him although I am not aware of the source or sources from whence they came. He habitually gave me cash for the purpose of paying the maid and the gardener who were in our employ and also frequently gave me additional sums of cash to use for household expenses. He would sometimes ask me how I was off for cash and on other occasions I would ask him for money for household expenses and he would always give me any amount which I required.

40

SWORN &c.

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In the  
Supreme Court  
of New South  
Wales

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AFFIDAVIT OF RUTH BEATRICE BROWN

No. 17  
Affidavit of  
Ruth Beatrice  
Brown.

10th August  
1956.

ON the 10th day of August One thousand nine hundred and fifty-six RUTH BEATRICE BROWN wife of Keith Samuels Brown of Kingsford in the State of New South Wales Storekeeper being duly sworn makes Oath and says as follows:-

1. During the years 1937 to 1943 I was a dress designer and maker of exclusive model gowns carrying on business at New South Head Road Double Bay and the applicant, Eleanor Jessie Dun, was one of my customers during the whole of that time.

10

2. During the period from 30th June 1937 to the 30th September 1942 the applicant was a regular customer of mine and purchased a great deal of expensive clothing from me including costumes and dress materials which I subsequently made into costumes and gowns exclusively designed for her many of which contained intricate and expensive beadwork and hand work and I say that during the whole of that period the applicant was in the habit of dressing very well and wearing very expensive clothing of the best quality. The applicant was always accompanied by her husband who took a great deal of interest in her clothing.

20

3. I know of my own knowledge that during that period the applicant purchased expensive hats designed to match the costumes which I had made for her, had her foundation garments designed and tailored for her exclusively and always had the best of shoes, handbags and accessories.

30

SWORN &c.

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No. 18

AFFIDAVIT OF CHARLES EDWARD DUN  
dated 13th August 1956

In the  
Supreme Court  
of New South  
Wales

No. 18

Affidavit of  
Charles Edward  
Dun.

13th August  
1956.

ON the thirteenth day of August One thousand nine hundred and fifty-six CHARLES EDWARD DUN of Sydney in the State of New South Wales, Bank Officer, being duly sworn makes oath and says as follows:-

10 1. I am one of the Trustees of the will and codicil of the abovenamed deceased.

20 2. I have read what purports to be a copy of an affidavit entitled "Supplementary Affidavit and Affidavit in reply" sworn by the Applicant herein on the 14th day of June One thousand nine hundred and fifty-six and in reply to Clause 7 thereof I say that to the best of my knowledge information and belief the deceased was in the habit of discussing his affairs with me and my co-Trustee, Mr. Francis Boyce Dun and that the only matter of importance in his life which he did not discuss with us was his proposed marriage to the applicant.

30 3. I crave leave to refer to Paragraph 8 of the Affidavit sworn by me this deponent and my said co-Trustee herein on the 23rd day of December One thousand nine hundred and fifty-five and in supplementation of that paragraph I say that the amounts of £15 and £25 referred to therein as having being expended in December 1939 and January 1940 respectively were both described in the books and records of the Testator as being "Melbourne expenses".

SWORN &c.

No. 19

AFFIDAVIT OF ALBERT THRONE CRICK  
dated 14th August, 1956

No. 19

Affidavit of  
Albert Throne  
Crick.

14th August  
1956.

ON this Fourteenth day of August One thousand nine hundred and fifty-six ALBERT THRONE CRICK of 62 Billyard Avenue, Wahroonga, Retired being duly sworn makes oath and says as follows:-

1. I am well acquainted with Eleanor Jessie Dun

In the  
Supreme Court  
of New South  
Wales

No. 19

Affidavit of  
Albert Throne  
Crick.

14th August  
1956 -  
continued.

the applicant herein and during his lifetime I was well acquainted with Thomas Fitzgerald Dun her late husband.

2. My brother Guy Crick designed and supervised the building of the home at Cowra in which the deceased was living at the time of his death and shortly before the completion of such house in about April 1941, I went with my wife and my said brother and his wife to Cowra to inspect the new property and to visit Mrs. Dun and the late Mr. Dun. 10

3. At the invitation of Mr. and Mrs. Dun we spent one night and one day at the home in which they were then living they having not at that time moved into the new house. Both before and after dinner either the late Mr. Dun or else Mrs. Dun in his presence offered us a choice of whisky or gin and I think but I am not certain that we were offered sherry also and I observed bottles of liquor on the side board. My brother and his wife and I each had at least one drink and it may have been more although I cannot remember exactly how much liquor we consumed. 20

SWORN &c.

No. 20

Transcript of  
Evidence.

15th August  
1956.

No. 20

TRANSCRIPT OF EVIDENCE TAKEN BEFORE HIS  
HONOUR MR. JUSTICE ROPER (C.J. IN EQUITY)  
on 15th AUGUST 1956

T.F. DUN (dec'd) and T.F.M. ACT

MR. WALLACE, Q.C., with Mr. YELDHAM, appeared for the Applicant.

MR. ASPREY, Q.C., with Mr. ST. JOHN, Q.C., and Mr. DAVIES, appeared for the Respondents. 30

(At 11.30 Mr. Wallace opened to His Honour).

(Eight photographs of Cowra residence tendered and admitted; Exhibit "A").

(Affidavits read).

(Paragraphs 1 to 15 of Affidavit of Francis Boyce



Dun sworn on 26th May 1955 in Matter 340/55, tendered and admitted; Exhibit "1").

(Decretal Order made by His Honor, Mr. Justice Myers, on 13th April, 1953, in matter No. 142/51, tendered; objected to as irrelevant; admitted; Exhibit "2").

(Genealogical tree tendered and admitted; Exhibit "B").

(Luncheon adjournment).

10 UPON RESUMPTION:

(Mr. Asprey tendered transcript of cross-examination of applicant before His Honor, Mr. Justice Myers on 3rd June 1955.

Mr. Wallace did not object at this stage but asked that he be allowed to do so, if necessary, after the transcript had been read to His Honor; transcript admitted; Exhibit "3").

20 (Exhibit "3" read to His Honor. At Mr. Wallace's request, re-examination of applicant was also read to His Honor).

(Paragraph 14 of affidavit of E.J. Dun, sworn 6th April, 1955, in Matter No. 340/55, tendered and admitted; Exhibit "C").

(David Graham Steel, of E. Steel & Co., of Wyoming Pastoral Company Pty. Ltd. and on subpoena duces tecum, produced balance sheets and other documents of Milby Pty. Ltd. Counsel were given access to these documents)

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No.20(A)

EVIDENCE OF ELEANOR JESSIE DUN

APPLICANT

Sworn, examined as under:

MR. WALLACE: Q. Is your full name Eleanor Jessie Dun? A. Correct.

Q. And you are the applicant in this matter before the Court? A. That is right.

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No. 20

Transcript of  
Evidence.

15th August  
1956 -  
continued.

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Cross-Examination:

MR. ASPREY: Q. When you were in England from August 1953 to October 1954 your house at Cowra was let by you, was it not? A. Yes.

Q. And the rental was £8 a week? A. Yes.

Q. And you received that rent? A. Yes.

Q. For a period of about 14 months? A. Yes, about 14 months it would be.

Q. What was the state of your account with the Bank of New South Wales before you left for abroad in August 1953? A. I was not dealing with the Bank of New South Wales. 10

Q. What Bank did you have? A. It was the Commercial of Australia.

Q. What was the state of your account with the Commercial of Australia before you left for England in August 1953? A. Actually, I couldn't tell you.

Q. Was it in overdraft? A. Yes.

Q. When you left? A. Yes, when I left.

Q. And had you been - I suppose you had been booked to go to England some considerable time prior to August 1953? A. No, as a matter of fact, very shortly before I left. 20

Q. You made up your mind on the spur of the moment, did you? A. Practically on the spur of the moment; really, on the advice of my Bank Manager.

Q. He advised you to go, did he? A. Yes. I had sold the property and he advised me to go.

Q. That was the manager of the Commercial Bank of Australia at Cowra? A. Yes, I had sold the property, and he advised me to use the money to go. 30

HIS HONOR: Q. Your own, Victorian property? A. Yes, it was my own property. I used my own money for the trip. May I just - -

MR. ASPREY: Q. Could I ask you this question: You are telling His Honor that you informed the Bank

Manager that you sold your Caulfield property? A. No, the Hotham Street property.

Q. That is the St. Kilda property? A. Yes.

Q. And he told you to spend the proceeds of that on a trip to England? A. Yes.

Q. And you took his advice? A. Yes.

Q. And was that the reason why you went to England?

10 A. No, it wasn't altogether the reason I went to England, because I had always wanted to go and, as I swore in my first affidavit about my husband wanting me to do this trip to England, and I felt, as I have said in my affidavit before, that that was the reason why I went, that he wanted me to do it, and I had the money of my own, and I did it.

Q. And you hadn't economised for any period prior to the trip in order to gain the money to go? A. No. I wished to go and I went. I had the money; I had that £3,000.

20 Q. Did you obtain the two Melbourne properties, the Caulfield property and the St. Kilda property, through your mother's will? A. My father's will - (Objected to as irrelevant; allowed).

Q. Did you get this property from your father's will? A. Yes.

Q. Did you get any other assets from your father's will? A. No - actually, it was all altered; when my father died we had land.

Q. Did you get any other assets? A. No.

30 Q. Just the two houses? A. Just the two houses; that is, after my mother died.

Q. After your mother died? A. And a small car.

Q. And you sold that just before you got married?

A. Yes. It was very old. It was about 10 years old.

Q. This Mrs. Brown; do you remember Ruth Beatrice Brown who has sworn an affidavit which had been filed on behalf of your application to His Honor? A. Yes.

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Q. What was the name which she traded under when you bought these exclusive, model gowns, in 1937 to 1943? A. Ruth Bland.

Q. And did you pay her by cheque? A. I paid her by cheque.

Q. And you always kept books of account of your expenditure during the years 1937 to 1943? A. Yes.

Q. Have you looked at your books of account to see how much the account books show that you expended upon Ruth Bland? A. I did not go into those figures, not really, but in those days even, what I was charged was quite a big amount. If it was done to-day it would be about four or five times more.

10

Q. That was a lady carrying on business in a shop in Double Bay, A. New South Head Road.

Q. Have you any idea what you used to spend on her for these exclusive, model gowns? A. To be perfectly honest, I wouldn't exactly know.

Q. Have you got your account books in Court? A. No, I don't know where they are.

20

MR. ASPREY: A subpoena was given for those account books, Your Honor. (To witness) I call upon you to produce the books of account to His Honor. (Produced; access to documents given to counsel).

Q. Would you agree with me that your total amount of your expenditure to Ruth Bland in 1938 didn't exceed £35? A. That might be; but that was in 1938.

Q. Would you agree with me - ? A. If it is in the book, it must be correct, but that is in 1938.

30

Q. Would you agree with me that in 1939 it was £67.2.1? A. Evidently, yes.

Q. And in 1940 £43.9.6? A. Yes.

Q. And in 1941 £63.3.7? A. Yes.

Q. And in 1942 £64.19.10? A. Yes.

Q. Just over, I suppose, an average of about a little over a £ a week? A. Yes, but what would it cost

me today!

Q. I didn't ask you that, but is that what you intended to convey when you put this information before the Court? A. Yes, that is correct.

Q. You didn't only buy liquor from Squire Pepper, did you? A. No. I bought other things.

Q. No, you misunderstand me. You bought liquor - ?  
A. Yes.

10 Q. - at other places than Squire Pepper's? A. I have bought liquor at other places, yes.

Q. Western Stores and Edgeley's? A. Yes.

Q. Hotel Cowra? A. Yes.

Q. Hotel Lachlan? A. Yes.

Q. So that the figures in the account books for your liquor purchases at Squire Pepper's would all be in addition to the purchases you made at these other three places? A. Yes.

20 Q. Can you give us any idea how much you would have spent a week on liquor purchases at Western Stores and Edgley's? A. That is since they bought Squire Pepper's. You have the accounts.

Q. What about the Hotel Lachlan and Hotel Cowra?  
A. I wouldn't have any idea.

Q. Wouldn't have any idea? A. No.

Q. You remember giving me the answer - you remember giving evidence before His Honor, Mr. Justice Myers? A. Yes.

30 Q. Do you remember I asked you, when you sold the Caulfield property did you receive any moneys other than by cheque and you said "No"? A. I remember that. That statement was corrected.

Q. I said "Are you sure?" And you said "I am certain"? A. But it was on the spur of the moment.

Q. But you knew it was incorrect? A. I was thinking of the last question and of Hotham Street.

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HIS HONOR: Q. Think of the question now - -

MR. ASPREY: Q. I will ask you again. When you gave me that answer in front of Mr. Justice Myers, you knew when you gave it that it was incorrect? (Objected to).

HIS HONOR: Would you repeat that question?

MR. ASPREY: Q. Don't answer this question yet until Mr. Wallace objects to it; When you gave me the answer before His Honor, Mr. Justice Myers, that when you sold the Caulfield property you didn't receive any moneys other than by cheque, that answer, you knew, was not correct? (Objected to; argument ensued).

10

HIS HONOR: I propose to rule that the witness needn't answer the question if she doesn't want to, because it is obviously an answer that may incriminate her.

MR. ASPREY: I wouldn't press it if that is the ground that is taken. (Discussion and argument ensued).

20

HIS HONOR: Mrs. Dun, I didn't want to have to come to this stage. You are not bound to answer the particular question which has been put to you if you don't wish to, and if you feel that it might lead to a risk of punishment or incrimination or penalties in some way or other, you are not bound to answer it.

WITNESS: What do I say? Anything or nothing, Your Honor?

HIS HONOR: If you are frightened of it, if I might put it that way, don't answer it. I won't force you to answer it.

30

MR. ASPREY: Q. What do you want to do? A. I will not answer it. Is that right. I am only -----

MR. ASPREY: I will accept that.

MR. ASPREY: Q. There is an affidavit dated 19th June sworn by - (Withdrawn).

Q. This house of yours at Cowra, you have received an offer to buy it, have you not? A. I have had a couple of offers.

Q. Do you know Mr. Edgell offered to buy it? A. He wanted to buy it many years ago when my husband first died and I would not even hear of an offer because - May I just explain? This is -

Q. Just answer the question. A. All right, he did offer to, many years ago.

Q. Was it 11,000? A. When I say "offered", he didn't offer he asked me if I would sell it.

Q. For 11,000? A. No.

10 Q. What was the figure he had in mind? A. I wouldn't have a clue. Mr. Edgell wouldn't give me 11,000.

Q. Did you receive an offer of 11,000? A. No, never.

Q. Did anybody suggest that they might pay you 11,000 or any figure in that vicinity? A. No.

Q. Nothing like it? A. No.

Q. What is the best offer you have had for it? (Objected to as irrelevant).

20 Q. What is the best offer you have received for the house? A. I have received - I have been offered 8,000, including carpets, blinds, hangings, tables, lamps; practically the whole box-and-dice; 8,000.

Q. When did you receive that offer? A. I received that about - shortly after I came home.

Q. From England? A. Yes.

Q. That is the house fully-furnished for £8,000? A. Yes.

30 Q. What was the Valuer-General's valuation at that stage? A. £8,500.

Q. And you tell His Honor that you have never received an offer in excess of the V.G's - A. I have not.

Q. And I suppose housing is pretty short at Cowra? A. It is very short.

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Q. What is the present Valuer-General's value of it? A. I think it will be about £9,000. He - I have not had the valuation; it will come in this year some time. He has been and - -

MR. WALLACE: What is the present valuation? That is all you were asked?

WITNESS: £8,500 - And I think it is going to go up to £9,000 -

MR. WALLACE: All right.

MR. ASPREY: Q. This house, you have shown photographs of it to His Honor? A. Yes. 10

Q. And you heard counsel, Mr. Wallace, tell His Honor that there is a completely equipped maid's suite in the house? A. There is not a suite.

Q. Self-contained Flat, I think he said? A. Well, it is a small - a bed-sitting room and a bathroom and toilet.

Q. There are two bedrooms and it is a very large house? A. Yes, quite a large house.

Q. It is a large house. Do you think you could be better suited in your state of health in a smaller place? A. If I could get my price for the home, probably I might be. 20

Q. Well, as a matter of interest, what is your price? (Objected to; not pressed).

Re-Examination. Re-Examination

MR. WALLACE: Q. Mrs. Dun, I think with regard to that evidence about the Caulfield property that you corrected in your next affidavit, I think you came to me almost immediately after the hearing of the Court case? A. Yes. 30

Q. On that afternoon, did you not? A. Yes.

Q. And told me about it - -

MR. ASPREY: His client has taken an objection and she won't answer my question on the ground that it may incriminate her, and my friend is re-examining on it.



MR. WALLACE: There is nothing wrong with that, I submit. (Argument enused; rejected).

Q. With regard to hotels, did you cash a cheque at the hotel, do you recollect? A. I often cashed cheques at hotels. That is how I used to have my cash for shopping and carrying on for fares or whatever - shows, whatever I might do.

10 Q. And I think you told us that you used to - you entertained friends at your home? A. I have entertained quite a lot.

Q. And have you any other means of entertaining in a country town? A. Really, none.

Q. Entertaining friends? A. Really none.

Q. And I think, for example they have an annual picnic meeting? A. An annual picnic Race Meeting, yes.

Q. And have you occasionally entertained - ? A. I have had house parties.

Q. During picnic week? A. Yes.

20 MR. ASPREY: Q. (By permission): What is the subscription to the Race Club? Four guineas a year? A. Three guineas, I think.

Q. And the Golf Club? Four? A. Two, I think.

Q. Have you ever cashed a cheque at an ordinary retail store? A. Yes, often.

MR. WALLACE: Q. I don't think you paid your subscription to the Golf Club? A. I haven't paid it - -

MR. ASPREY: She has sworn that in the affidavit.

30 (Witness retired)

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No.20(B)

EVIDENCE OF CHARLES EDWARD DUN

Sworn, examined, deposed:

MR. ASPREY: Q. Your name is Charles Edward Dun?  
A. Yes.

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No.20(B)

Charles  
Edward Dun.

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Q. And you are an Inspector of the Bank of New South Wales? A. Yes.

Q. And you are one of the respondents to the present application? A. I am.

Cross-Examination

MR. WALLACE: Q. You have an interest in grazing property, have you not? A. Yes, at Condoblin.

Q. And you have a shareholding in Milby Pty. Ltd.? A. No.

Q. In Wyoming? A. No.

10

Q. Do you know the area of land which is owned by those companies? A. No.

Q. Respectively? A. No, I can't tell you exactly.

Q. Just roughly? A. Well, possibly 5,000 and 20,000; that would be very - -

Q. Well, the shareholders of those companies are all residuary beneficiaries under the will of the deceased in this matter? A. I don't know. I don't know who the shareholders are.

Q. I beg your pardon? A. I don't know who the shareholders are.

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Q. You are not aware, for instance, that your co-executor is a shareholder? A. He is the owner, or he was the original owner of the land - that was converted to companies.

Q. Are you aware that he is a shareholder of each of these companies? A. I can only assume that because he was the owner of the original properties.

Q. Where is your brother at the moment, do you know? A. He is in England.

30

Q. And, if you take Milby's - would you tell me where the land is? A. It is 11 miles south-west of Condoblin.

Q. And what is the approximate area of it? A. I think, 5,600 acres. I can't be sure of that.

Q. And are you aware that it is freehold land? A. Yes.

Q. You are Securities Officer, or have been? A.No, Inspector.

10 Q. You have a very good idea of land values, haven't you? A. Well, I wouldn't like to say that, exactly. I have some knowledge of them.

Q. And you have been on this land, of course, haven't you? A. Not on Wyoming; on Milby, yes.

Q. I am speaking of Milby at the moment, I thought? A. Well, I have been on Milby.

Q. Have you any idea of what would be its value per acre? A. Well, I would say - it would be probably conservative, £6 an acre.

20 Q. Would you have any idea of the area of Wyoming? A. Approximately 20,000; but I am not sure of that. It is somewhere near 20,000 acres.

Q. Would you have any idea of its value per acre on a freehold basis? A. I would say about 30 shillings.

Q. Would you say - have you ever had occasion to value either of those properties? A. No, I haven't.

Q. And you have never been on Wyoming? A. No. It is out near Bulligal; near the Hay district.

30 Q. You have never seen the balance-sheets? A. No.

Q. Know nothing about them? A. No.

Q. Do you remember in your joint affidavit of 23rd December 1955, in paragraph 5 thereof you said that the net value of the residuary estate of John Fitzgerald Dun, who died on 15th November, 1951, with the exception of his one-sixth interest in the residue of the estate of the testator, was approxi-

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mately £29,000? Do you remember that? A. I don't quite remember, but if it is there - - -

Q. That would be correct? A. Yes.

Q. What I have just put to you? A. Yes.

Q. 29,000, and if to that you add one-sixth of the - - -

MR. ASPREY: Mr. Wallace, I think it is only fair to put to the witness that he is giving that information on information and belief. "We are informed and verily believe" - You are putting it to him that he said it as a fact.

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MR. WALLACE: Q. Well, you were informed and you verily believed at the time you swore this affidavit that the John Fitzgerald Dun Estate was 29,000, but excluding his one-sixth interest in the residuary estate - ? A. That would be correct.

Q. - of Thomas Fitzgerald Dun? A. Yes.

Q. So that, if that belief is correct, and you add one-sixth of 82,000 to the 29,000, you would get an estate of the late John Fitzgerald Dun of somewhere between £42- and £43,000? A. That seems to be correct.

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MR. ASPREY: No questions.

(Witness retired).

MR. WALLACE: That is the whole of the evidence.

(Counsel addressed).

(Further hearing adjourned to 10 a.m.  
Thursday, 16th August, 1956).

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No. 21

REASONS FOR JUDGMENT OF HIS HONOR MR. JUSTICE  
ROPER (C.J. in Equity), dated 30th August, 1956

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HIS HONOR: This is an application under the Testators Family Maintenance Act, 1916, by the widow of a testator, she claiming that because of the manner

in which he disposed of his property by will she is left without adequate provision for her proper maintenance, and that, taking into consideration all the circumstances of the case, an order should be made for provision for such maintenance.

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10 The outstanding feature of the application is that it was initiated by process filed on 16th June 1955, whereas the testator died on 10th September 1942, and probate of the will and one codicil was granted on 5th January 1943.

20 Prior to the enactment of the amending Act, No. 40 of 1954, the right to have such an application heard by the Court had long since been barred by expiration of time (see T.F.M. Act, 1916, S.5). But by the amending Act referred to, the court was empowered to extend the time for the making of such an application, notwithstanding that it had already expired (see S. 5 (2A - added by the amending Act). Pursuant to this new sub-section, the widow made an application to the Court of an order extending the time for making an application under the Act. She was successful in that application, and the present application was brought within the time as extended by the Court. The judgment on the application for an extension of time is reported in 73 W.N. 99.

30 It appears that the applicant was married to the testator in 1937, he then being 50 years of age and she 37. It was the only marriage for each of them. He had been crippled since childhood and could not walk, but was otherwise healthy. He carried on the business of a merchant in Cowra, and also owned real estate on which he carried on farming pursuits. They lived together happily until his death some five years after the marriage. He left an estate, the main asset in which was his farm, and the estate was, for probate purposes, valued at about £22,000. For stamp duty purposes, this valuation was increased to some £25,000 by the inclusion of notional estate being almost wholly assets which the testator had transferred to his wife by way of gift during his lifetime.

40 By his will and codicil the testator left his wife the furniture and contents of their home, which home he had previously given to her, and a motor-car, and legacies which, in substance, amounted to £2,000. He also provided for the payment to her of an annuity of £800 per annum and the income tax which the receipt of that annuity would

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attract. She, at the time of his death, owned the home and some other assets of no great significance in value which he had given to her during his lifetime, and she also owned some assets which she had acquired independently of him and which were sold some years after his death, realising some £4,600.

I think it is clear that had the widow brought an application under the Testators Family Maintenance Act within 12 months of the grant of probate in his estate, and had that been heard within the normal reasonable time thereafter, her application must have failed whether the time for considering the circumstances had been taken as the date of death or as the date of the hearing of the application. At the present time, however, the circumstances relating to the application are essentially different. It is notorious that the cost of living has soared, and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation.

The estate is now almost wholly in liquid assets and is valued at about £82,000. In addition to this, the applicant is now indebted to a bank to the extent of nearly £4,200 on overdraft secured upon her home, and has disposed of the other property which she had at the date of death and expended the proceeds. Her present position is that apart from the provision made for her in the will and codicil by way of annuity, she only has the home now valued at £8,500, but subject to a mortgage to the extent of nearly £4,200, and the motor car.

The principal question arising in the application on these facts is at what time existing facts and circumstances should be considered in deciding whether she is entitled to any, and if so, what, order under the Testators Family Maintenance Act. Three times arise for consideration on the submissions which have been made, namely, (i) the date of death of the testator; (ii) the date at which an application commenced within 12 months of the grant of probate would normally have come on for hearing,

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and (iii) the date of the actual hearing of the application. I have already pointed out that if the appropriate time is that under the heading (i) or heading (ii), the application should not succeed, but in my opinion if the date is that under (iii) an order should be made.

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10 The question has received consideration in a number of cases in New South Wales, in New Zealand, and in other states. In New South Wales, it was held, in *Re Forsaith* (deceased) (26 S.R.613), that the time at which the existing circumstances should be considered on such an application is the date on which the Court hears the application. This decision has stood for 30 years, and although the number of cases in which a material difference exists between the results of considering the circumstances existing at the date of hearing on the one hand and at the date of death on the other hand are relatively few, there must have been a number of them (see, for example, *Re Pichon* (47 S.R.186)).

20

Principles different from those expressed in *Re Forsaith* have been acted upon in New Zealand (see *Welsh v Mulcock* (1924 N.S.L.R.673) in Victoria (see *Re Portecus* (1949 V.L.R.383)), in Queensland (see *Re Brown* (1952 Q.S.R. 47)), and in Tasmania (see *Re Testators Family Maintenance Act* (12 Tas.L.R.11)). The Acts which were under consideration in these cases, however, all differed from the Act in force in New South Wales and the different conclusions I think may be attributed to the slight but important differences in the language used.

30

In South Australia, where the Act is for this purpose almost identical with the New South Wales Act, the principle of *Re Forsaith* has been adopted (see *Re Gerloff* (1941 S.A.S.R.156); *Re Wheare* (1950 S.A.S.R.62)). I think also that the Victorian decision in *Re Coates* (1956 V.L.R.72) brings the position in that State very close to the position existing in New South Wales under *Re Forsaith*.

40 It has been submitted that *Re Forsaith* is no longer good law in this State, having been impliedly overruled by the decision of the Privy Council in *Bosch v P.T. Co. Ltd.* (1938 A.C.463), because it is submitted that the language used by the Judicial Committee in *Bosch's* case, in dealing with what a testator should do, is only applicable if the circumstances to be taken into account are those

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existing at the testator's death. In Bosch's case however, the Privy Council was not considering the particular problem arising here, and the language is not used in reference to it. It 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.

The decision of the Court of Appeal in Re Howell (1953 1 W.L.R.1034) is upon an Act different in its language and its scheme from the New South Wales Act. It appears to me that in considering this application I should follow the decision in Re Forsaith, and that there is nothing in that decision inconsistent with subsequent higher authority.

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It would follow that the date of death of the testator is not the appropriate time for considering the existing circumstances, but it was argued that even if this view is taken the provisions of Act No. 40 of 1954 were not intended to place the applicant in any better position than she would have been if she had made an application in due time, but was intended merely to enable her to enforce the right which she would have had under the Act if it had not become barred by effluxion of time. This view, it is submitted, gives effect to the decision in Re Forsaith and is consistent with the principle that the Legislature will not be presumed to interfere with vested rights except to the extent to which its language necessarily shows that such rights are to be cut down. I think that these submissions take too narrow a view of the decision in Re Forsaith and the effect of the legislation and that the effect of the legislation really is to permit an application being made within extended time where time is extended by an order of the Court, and to make the extended time just as effective for all purposes as the time prescribed by the Act itself. The Act clearly does not interfere with vested rights and contains its own limitations upon the extent to which they shall be interfered with when it provides that no distribution made before the application shall be disturbed by reason of the application or an order made thereon.

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I think 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 order should be made. The problem becomes that 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. It was submitted that even on this basis the Court should not exercise its discretion in favour of the applicant. If she had not lived extravagantly, it is said, and if she had not overspent her income and wasted her capital assets, she could now be in a position in which it could not be said that adequate provision had not been made for her proper maintenance under existing circumstances. It is however, in my opinion material to bear in mind that in her manner of living and the expenditure which she made from the testator's death until this application was made she did not know that an application could be made under the Act and did not dispose of assets for the purpose of improving or affecting her position in the making of an application. The extravagant expenditure relied upon as in a sense disqualifying her from the benefit of an order all occurred at a time when she had no right to make an application under the Act. At present she is in a position of comparative pecuniary difficulty. The undistributed estate is now large and the competing beneficiaries under the will do not have and never had any real moral claim on the testator. Most of them are in comfortable circumstances, three only, whose combined interest in the residue of the estate is about one-twelfth, showing any real financial need.

I think that in the existing circumstances the testator has disposed of his estate in such a manner as to leave the applicant without adequate provision for her proper maintenance. I think that she should be given a lump sum sufficient to clear her home of debt and leave her a small sum for contingencies, and that she should be given an income which should enable her to live in the reasonable comfort due to the widow of a wealthy testator.

I order that she be paid a legacy of £5,000 in addition to the provision made for her in the will and codicil, the legacy to be payable on 30th September of this year and to bear interest as from

In the  
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Wales

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No. 21

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that date, and that as from 1st July, 1956 in lieu of the annuity and of the income tax benefits provided in her favour in the codicil she be paid an annuity of £1,500 a year.

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Reasons for  
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30th August  
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continued.

I order that the costs and expenses of the respondents of and incidental to this application and the costs as between solicitor and client of the applicant, should be paid out of the estate; otherwise usual order.

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No. 22  
Order  
30th August  
1956.

No. 22

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ORDER OF THE SUPREME COURT OF NEW SOUTH WALES  
IN EQUITY dated 30th August, 1956

UPON APPLICATION made herein on the fifteenth and sixteenth days of August instant before the Honourable Ernest David Roper Chief Judge in Equity by Counsel on behalf of the Applicant Eleanor Jessie Dun the widow of the abovenamed Testator Thomas Fitzgerald Dun in pursuance of the Originating Summons filed herein on the sixteenth day of June One thousand nine hundred and fifty-five WHEREUPON AND UPON HEARING READ the said Originating Summons the Affidavits set out in the Schedule hereto and all filed herein and the Exhibits put in evidence on behalf of the Applicant and marked with the letters "A" "B" and "C" and the Exhibits put in evidence on behalf of the Respondents and marked with the figures "1" "2" and "3" AND UPON HEARING the oral evidence of Eleanor Jessie Dun the Applicant and of Charles Edward Dun one of the Respondents AND UPON HEARING what was alleged by Mr. Wallace of Queen's Counsel with whom was Mr. Yeldham of Counsel for the Applicant and by Mr. Asprey of Queen's Counsel with whom was Mr. St. John of Queen's Counsel and Mr. Davies of Counsel for the Respondents Francis Boyce Dun and Charles Edward Dun the Executors of the Will and Codicil of the said Testator THIS COURT DID ORDER that this application do stand for Judgment And the same standing in the list this day for Judgment accordingly THIS COURT DOTH ORDER that in addition to the provisions made for her in the said Will and Codicil the Applicant be paid a legacy of Five thousand pounds (£5000) that legacy to be payable on the thirtieth day of September next and to bear interest as from that date and that

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as from the first day of July last past in lieu of the annuity and of the income tax benefits provided in her favour the applicant be paid an annuity of One thousand five hundred pounds (£1500) per annum AND THIS COURT DOETH FURTHER ORDER that it be referred to the Deputy Registrar or Chief Clerk in Equity to tax and certify the costs of the Applicant of this application as between Solicitor and Client and the costs and expenses of the Respondents of and incidental to this application and that the said costs and expenses when so taxed and certified as aforesaid be paid out of the Estate of the said Testator to the said parties respectively or to their respective Solicitors AND THIS COURT DOETH FURTHER ORDER that the said Executors of the said Will and Codicil do within fourteen (14) days after service upon them of an office copy of this Order produce to the Master in Equity the Probate of the said Will and Codicil with a true copy of this Order endorsed thereon and lodge with the said Master a separate copy of this Order AND THAT the said Master or the Deputy Registrar in Equity or Chief Clerk in Equity do endorse on each of the said copies his certificate that the same is correct and do forthwith transmit the said separate copy so certified as aforesaid to the Registrar of Probates of this Court AND both parties are to be at liberty to apply as they may be advised.

In the  
Supreme Court  
of New South  
Wales

No. 22  
Order

30th August  
1956 -  
continued.

SCHEDULE

30	<u>Name of Deponent</u>	<u>Date Sworn</u>
	Eleanor Jessie Dun	2nd September 1955
	Francis Boyce Dun and Charles Edward Dun )	23rd December 1955
	William John Dun	26th May 1956
	Francis Barrett Dun	16th June 1956
	Ronald Kealey Dun	25th May 1956
	Colin Fitzgerald Dun	21st May 1956
	Betty Frances Doust	19th June 1956
	Eleanor Jessie Dun	14th June 1956
40	Walter Thomas Garner Atkins	14th June 1956
	Charles Edward Dun	21st June 1956
	Graeme Gillies Johnstone	8th August 1956
	Eleanor Jessie Dun	8th August 1956
	Ruby Beatrice Brown	10th August 1956

In the  
Supreme Court  
of New South  
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Name of Deponent

Date Sworn

Albert Throne Crick 14th August 1956  
Charles Edward Dun 13th August 1956

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PASSED this Twenty-eighth day of September 1956  
R.T.C.S.

Order

30th August  
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continued.

ENTERED same day.

T.L.

Sgd. R.T.C. STOREY (L.S.)

Deputy Registrar in Equity

In the  
High Court of  
Australia

No. 23

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NOTICE OF APPEAL TO THE HIGH COURT OF AUSTRALIA

No. 23

Notice of  
Appeal.

18th September  
1956.

TAKE NOTICE that the appellants herewith appeal to the Full Court of the High Court of Australia from the whole of the decretal order of the Supreme Court of New South Wales in its Equitable Jurisdiction made by the Honourable Ernest David Roper Judge in Equity of the Supreme Court of New South Wales on the 30th day of August 1956 in suit No. 585 of 1955 in which the present respondent was the applicant and the present appellants were the respondents upon the following amongst other grounds :-

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1. THAT His Honour was in error in holding that he should follow the decision in Re Forsaith reported in 26 S.R. (N.S.W.) 613.
2. THAT His Honour was in error in holding that 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 order should be made pursuant to the provisions of the New South Wales Testator's Family Maintenance and Guardianship of Infants Act, 1916-1954.
3. THAT His Honour was in error in holding that the applicant was left without adequate means for her proper maintenance.
4. THAT His Honour was in error in holding that the competing beneficiaries under the will did not have and never had any real moral claim on the testator.

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5. THAT His Honour should have held that in exercising the jurisdiction conferred by the provisions of the said Act, the question whether the provision made in the will for an applicant is inadequate for his or her proper maintenance is to be determined, not as at the date of the application, but as at the date of death of the testator.
- 10 6. THAT His Honour should have held that the provisions of the New South Wales Administration of Estates Act, 1954, s.4. had the effect of enabling an applicant, who might be allowed an extension of time pursuant to the provisions of that section, to apply for and obtain such order as he or she might have obtained if application had been made within the time prescribed by the said Testator's Family Maintenance and Guardianship of Infants Act, and had been heard within a reasonable time thereafter.
- 20 7. THAT His Honour should have held that, having regard to the conduct of the applicant and her extravagant manner of living, no order should be made in her favour.

AND FURTHER TAKE NOTICE that the appellants seek an order dismissing with costs the application made by the respondent herein in lieu of the order appealed from.

DATED this eighteenth day of September, 1956.

OWEN DAVIES

30 Counsel for the Appellants

NOTE: This Notice of Appeal is filed by Messrs. Iceton, Faithfull & Baldock of 28 O'Connell Street, Sydney, the solicitors for the above-named Appellants.

TO: Eleanor Jessie Dun and her solicitors  
Messrs. Garden & Montgomerie, Kendall Street,  
Cowra, by their agents Messrs. Gould & Shaw,  
72 Pitt Street, Sydney.

AND TO: The Registrar of the High Court of  
Australia, New South Wales Registry.

In the  
High Court of  
Australia

No. 23

Notice of  
Appeal.

18th September  
1956 -  
continued.

In the  
High Court  
of Australia

No. 24

REASONS FOR JUDGMENT OF -

No. 24  
Reasons for  
Judgment.  
19th December  
1957.

(a) THEIR HONOURS, THE CHIEF JUSTICE,  
SIR OWEN DIXON, MR. JUSTICE  
KITTO AND MR. JUSTICE TAYLOR  
(Dun & Anor v. Dun) dated 19th  
December, 1957.

(a) The Chief  
Justice, Sir  
Owen Dixon,  
Mr. Justice  
Kitto,  
Mr. Justice  
Taylor.

This is an appeal from an order made by the  
Supreme Court of New South Wales, pursuant to the  
Testator's Family Maintenance and Guardianship of  
Infants Act 1916 - 1954, directing that in addi-  
tion to the provision made for the respondent by  
the will of her deceased husband, Thomas Fitzgerald  
Dun, there should be paid to her a legacy of £5,000  
and that as from the 1st July 1956 there should be  
paid to her an annuity of £1,500 per annum in lieu  
of the annuity and income tax benefits provided in  
her favour by the said will.

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By his will made on 18th August 1939 the  
testator bequeathed to the respondent his household  
furniture and personal effects and such motor-car  
as he might possess at the time of his death.  
Thereafter he bequeathed to her the sum of £500 to  
be paid as soon as conveniently might be after his  
death and also the sum of £1,500 to be paid at such  
times within five years after his death either by  
instalments or otherwise as his trustees should  
think fit. In addition he bequeathed to her an  
annuity of £600 per annum. By a codicil made on  
16th May 1942 the testator substituted for this  
last bequest an annuity of £800 and directed his  
trustees to refund to his wife on demand or other-  
wise reimburse her for such annual or other sum or  
sums of money which during her life she should pay  
or become liable to pay to any taxing authority in  
the Commonwealth of Australia by way of income tax  
or other like imposition on the said annuity.  
Subject to certain minor bequests and in the  
events which happened the testator devised and  
bequeathed the residue of his estate upon trust  
for such of his brothers and sisters as should be  
living at the date of his death in equal shares.

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At the time of the death of the testator,  
which occurred on 10th September, 1942, his estate

was valued at £22,216 but it became necessary for death duty purposes to include in his estate certain notional assets which increased the value of his estate, for those purposes, to £26,216. The notional assets included gifts to the respondent of cash (£450), War Loan Bond (£100), War Savings Certificate (£20) and payments (£3,066) made by the testator in connection with the erection of a building on land owned by the respondent. This was the matrimonial home which at time of the death of the testator was owned by the respondent. She also owned other property which in subsequent years and before the date of the application she sold for a total sum of £4,600.

The difficulty in the case, if upon the present state of the authorities there is one, arises out of a state of facts which may be briefly stated. As already appears the testator died on 10th September 1942. But the respondent's application was not made until 16th June 1955 and during the intervening period of nearly thirteen years the estate increased greatly in value whilst the respondent's financial position substantially deteriorated. In 1955 the estate according to evidence, consisted almost wholly of liquid assets and their value was said to approximate £82,000. On the other hand, the respondent, at the date of the testator's death, was the owner of the matrimonial home and of other valuable assets. But the latter assets she no longer has; they were realised from time to time during the period intervening between the testator's death and the making of the application for the sum of £4,600 and the home at Cowra, which is said to be worth £8,500 is subject to a mortgage to secure repayment of the sum of £4,200.

Prior to the enactment of the Administration of Estates Act, 1954, no application for relief under the Testator's Family Maintenance and Guardianship of Infants Act, 1916 - 1938, was competent unless made within twelve months from the date of grant of probate or letters of administration. But by section 4(1)(c)(ii) of the first-mentioned Act a new subsection was inserted in section 5 of the earlier Act. By this new subsection it was provided that the time for making an application under the Act might be extended for a further period by the Court after hearing such of the parties affected as the Court should

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think necessary. The power to make such an order expressly extended to cases where the time limited by the statute had already expired. The necessary order extending the time for the making of the respondent's application was made by Myers J. on 3rd June 1955 and it is apparent that his Honour was influenced to a considerable extent in exercising his discretion in favour of the respondent by the fact that, in New South Wales, the decision in Re Forsaith (26 S.R. 613) had established that, in seeking to determine whether a testator has failed to make adequate provision for the proper maintenance of any person within the class of those entitled to make an application, the governing consideration is the state of affairs as they exist at the date of the application and not as they existed at the time of the testator's death. The same consideration was a vital factor in inducing Roper J., to make an order in favour of the respondent on the substantive application. His Honour followed Re Forsaith but in the course of his reasons indicated quite clearly that if he had been required to consider whether the respondent had, at the date of the death of the testator, been left without adequate provision for her proper maintenance he would have dismissed the application. He said:-

"I think it is clear that had the widow brought an application under the Testator's Family Maintenance Act within twelve months of the grant of probate in his estate, and had that been heard within the normal reasonable time thereafter her application must have failed whether the time for considering the circumstances had been taken as the date of the death or as the date of the hearing of the application. At the present time, however, the circumstances relating to the application are essentially different. It is notorious that the cost of living has soared, and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation."

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After some discussion of the authorities cited to him, including Re Forsaith, his Honour added :-

10 "I think 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 order should be made. The problem becomes that 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".

20 Thereupon, on 30th August 1956, his Honour made the order which is now under appeal. But on 6th June 1956 this Court had delivered judgment in Melbourne in a case dealing with a similar problem which arose in an application made under the Administration and Probate Act, 1928 (Victoria) (Coates v. National Trustees Executors and Agency Company Limited and Another 95 C.L.R. 494). Upon consideration a majority of the Court was of the opinion that, where in an application under that Act an applicant claims that a testator has disposed of his property by will in such a manner that

30 he, as a child of the testator, is left without sufficient means for his maintenance and support, the initial question should be determined not upon the facts as they exist at the date of the application but as they existed at the date of the testator's death although, once that question is answered in favour of the applicant, the question of what order should be made is one to be decided upon the facts as they are found to exist at the time of the application.

40 The words of section 139 of the Victorian Act, as Dixon C.J., said in Coate's case, "are not quite the same as the corresponding provisions in section 3 of the New South Wales Act" but it is clear that the decision of the Court did not turn upon any observed differences of expression. Unlike Harvey J., in Re Forsaith, no member of the Court observed any difference of expression capable of producing one result in Victoria and the

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contrary result in New South Wales. Indeed three members of the Court were of the opinion that the language of each statute led to a common result whilst Dixon C.J., with whom Webb, J., agreed, expressly doubted "whether the distinction taken by Harvey C.J. in EQ. is well Founded". It is unfortunate that the decision in Coate's case had not been reported when the respondent's 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.

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It was, however, contended before us that the order made by Roper J. could be justified on the principles laid down in Coate's 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 should 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. Looking at the circumstances as they existed at the death of the testator we think it is impossible to say that the provision made by him for the applicant was ungenerous and when regard is had to the incidence of death and estate duties and testamentary expenses; it is clear that it cannot be characterised as inadequate. On the contrary, if, as the testator appears to have thought, it was desirable that the main provision for his widow should consist of an annuity, he may well have considered that the annuity provided by his codicil was as much as his estate would be able to provide. As already appears it is clear that Roper J., would have dismissed the respondent's application if he had been aware that in Re Forsaith had been overruled. We agree that such a result would have been inevitable and, accordingly, the appeal should be allowed and the order of the Supreme Court set aside.

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(b) HIS HONOUR, MR. JUSTICE McTIERNAN  
 (Dun & Another v. Dun) dated 19th  
 December, 1957.

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(b) Mr. Justice  
 McTiernan.

10 The order of Roper C.J., in Eq., which is the  
 subject of this appeal, is one made in the exercise  
 of the discretionary power which is conferred upon  
 the Supreme Court in Equity by Section 3 of the  
 Testator's Family Maintenance and Guardianship of  
 Infants Act, 1916 - 1954 of New South Wales. The  
 provisions of the testator's will and codicil and  
 the facts of the case are stated in the reasons for  
 judgment of the learned Judge and I do not discuss  
 them in detail. The principal question which arose  
 at the hearing of the application was whether the  
 Court ought to determine the question of the ade-  
 quacy of the provision made by the testator in the  
 will and codicil for the applicant as at the date  
 of the testator's death or in the circumstances  
 20 existing at the time the Court was dealing with  
 the application. A Special feature of the case is  
 the length of time between the testator's death and  
 the entry by the respondent of her application. The  
 testator died in September 1942 and probate of his  
 will was granted in January 1943. The application  
 was entered in June 1955. The respondent obtained  
 an order under Section 4 of the Administration of  
 Estates Act 1954 extending the time allowed by  
 Section 5 of the Testator's Family Maintenance and  
 Guardianship of Infants Act for making an applica-  
 30 tion. That time is twelve months from grant of  
 probate.

40 In 1926 the Supreme Court of New South Wales  
 decided that Section 3 of the Act meant that the  
 discretionary power of the Court may be exercised  
 if there is not sufficient testamentary provision  
 for the proper maintenance of the applicant at the  
 time the Court is dealing with the matter: Re For-  
saith (Deceased) 25 S.R. (N.S.W.) 613. Roper C.J.  
 in Eq. decided to follow that decision. It did  
 not appear to his Honour that the enactment of  
 Section 4 of the Administration of Estates Act  
 affected the authority of that decision. But  
 after judgment, the report of Coates v. National  
Trustees Executors and Agency Company Limited and  
Another 95 C.L.R. 494 came to hand. In this case  
Re Forsaith (Deceased) met with disapproval. The  
 disapproval involves that, apart altogether from

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(b) Mr. Justice  
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Section 4 of the Administration of Estates Act, the correct way to apply Section 3 of the Testator's Family Maintenance and Guardianship of Infants Act is to determine the question whether the applicant is left without adequate provision as at the date of the testator's death, and, if it is determined affirmatively, to exercise the discretionary power of ordering provision out of the estate by taking into account the circumstances as they exist at the time the Court is dealing with the matter.

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The main ground of the appeal is that the basis upon which Roper C.J. in Eq., decided the question of the adequacy of the provision made in the will and codicil for the respondent is shown by the decision in Coates v. National Trustees Executors and Agency Company Limited and Another to be erroneous. Roper C.J. in Eq., said, in the course of his reasons for judgment, that if the application had been brought within twelve months from grant of probate and heard in the normal course, that he would not have found that under the testamentary dispositions in question the applicant was left without adequate provision for her proper maintenance whether it was right to determine that question as at the testator's death or in the circumstances existing when the hearing would have taken place. The appellants rely upon these observations as presenting difficulty to sustaining the order of Roper C.J. in Eq., on the basis that if the circumstances at the time the testator died are considered the respondent was left without adequate provision for her proper maintenance. I do not agree that this use can be made of the observations because the assumption on which they were based necessarily involves the omission of all the circumstances that occurred after such hypothetical hearing.

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It is clear from the principles involved in the interpretation which Coates v National Trustees Executors and Agency Company Limited and Another has placed upon Section 3 that all the circumstances intervening between the testator's death and the hearing of an application under the section cannot be ruled out in determining the question whether the applicant is without adequate provision for her or his proper maintenance. Roper C.J. in Eq., after reviewing the benefits which the respondent took under the will and codicil, her financial means and the value of the testator's

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estate at the time of his death, stated how the circumstances had altered by the time the application came on for hearing. His Honour said: "It is notorious that the cost of living has soared and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation. The estate now is almost wholly in liquid assets and is valued at about £82,000. In addition to this, the applicant is now indebted to a bank to the extent of nearly £4,200 on overdraft secured upon her home and has disposed of the other property which she had at the date of death and expended the proceeds. Her present position is that apart from the provision made for her in the will and codicil by way of annuity, she only has the home now valued at £8,500, but subject to a mortgage to the extent of nearly £4,200 and the motor car". The probate valuation of the estate was £22,000. His Honour further said: "At present she is in a position of comparative pecuniary difficulty. The undistributed estate is now large and the competing beneficiaries under the will do not have and never had any real moral claim on the testator. Most of them are in comfortable circumstances, three only, whose combined interests in the residue of the estate is about one-twelfth, showing any real financial need". The substantial depreciation in the purchasing power of the annuity bequeathed to the respondent and the enormous rise in the value of the undistributed estate still in the hands of the appellants are sound reasons for holding that at the time the application was heard the respondent was not under the will and codicil provided with adequate means for her proper maintenance. Dixon C.J., said in Coates v. National Trustees Executors and Agency Company and Another 95 C.L.R. at p.508 "But it is important to see what exactly is involved in that interpretation. It means that the court determining the application must look at the will which the testator leaves and the dispositions if any which it contains in favour of his widow or children as the case may be and consider whether they amounted to an adequate provision for her or their proper

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- continued.

maintenance and support. 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. When a court is called upon to consider such a question many years after the date as at which the court must take its stand all the advantage is available of knowing the events that have occurred. The intervening events may be taken into consideration because they suggest or tend to show what antecedently might have been expected. But they must not be outside the range of reasonable foresight. If all contingencies that might reasonably have been anticipated have been taken into account, it would be difficult to say that the actual occurrence of some event which antecedently no one could reasonably have foreseen shows that the maintenance or support was not proper or the provision therefore was not adequate. It is therefore impossible to treat actual intermediate occurrences as more than evidentiary facts. The ultimate question must remain one of adequate provision for proper maintenance and support as at the date of the testator's death".

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 power 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 provisions for her proper maintenance. Following the principles laid down in Coates v. National Trustees Executors and Agency Company Limited and Another the provision which the Court may in exercise of the discretionary power, created by Section 3, order out of the estate is to be estimated by taking into account the facts existing at the time of the testator's death. Roper C.J. in Eq., indeed, estimated on that basis the amount of the additional provision which he ordered out of the estate.

I am of the opinion that the amount is just and reasonable taking into consideration all the circumstances which might reasonably have been anticipated by the testator.

It was submitted for the appellants that the evidence showed that the respondent's need for further provision out of the estate was due to her extravagance. Roper C.J. in Eq., considered the evidence in question but did not regard it as affording sufficient reason for rejecting the respondent's application. I do not feel satisfied that the learned Judge was in error in treating that evidence as he did.

I am therefore of opinion that the order of Roper C.J. in Eq., should be affirmed but on the basis that at the date of the testator's death the respondent was under the testamentary dispositions of the testator left without adequate provision for her future proper maintenance.

The appeal should therefore be dismissed.

In the  
High Court  
of Australia

\_\_\_\_\_  
No. 24

Reasons for  
Judgment.

19th December  
1957.

\_\_\_\_\_  
(b) Mr. Justice  
McTiernan

- continued.

In the  
High Court  
of Australia

(c) HIS HONOUR, MR. JUSTICE WILLIAMS  
(Dun and Anor. v. Dun), dated 19th  
December, 1957.

No. 24

Reasons for  
Judgment.

19th December  
1957.

(c) Mr. Justice  
Williams.

This is an appeal by the executors of the estate of Thomas Fitzgerald Dun who died on the 10th September 1942 from an order made under Section 3 (1) of the Testator's Family Maintenance and Guardianship of Infants Act 1916 - 1954 (New South Wales) on 30th August 1956 by Roper C.J. in Eq. sitting as the Supreme Court of New South Wales in its equitable jurisdiction. The respondent Eleanor Jessie Dun in whose favour his Honour made the order is the widow of the testator. His Honour ordered that in addition to the provisions made for her by the will and codicil of the testator the applicant be paid a legacy of five thousand pounds (£5,000) that legacy to be payable on 30th day of September next and to bear interest as from that date and that as from 1st day of July last past in lieu of the annuity and the income tax benefits provided in her favour the applicant be paid an annuity of one thousand five hundred pounds (£1,500) per annum.

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The testator and the respondent were married on 15th May 1937 he then being fifty years of age and she thirty seven. Neither had been married before. They lived together happily until his death some 5½ years later. It would appear that they would have married earlier if the respondent had not had to look after her widowed mother who died in 1936. In an affectionate letter written to the respondent on 13th April 1937 the testator disclosed that he had had "a little heart trouble for some little time" and said that he realised that physical fitness was a big asset when contemplating matrimony but that "The only consolation I would have is that I can leave you well provided for should anything happen to me". This statement was justified because the testator although he had been crippled in childhood and could not walk carried on a farming and grazing business on real estate he owned at Greenthorpe and also a produce business in Cowra and had an interest in a produce business in Grenfell. After their marriage the parties lived until 1940 in a comfortable manner in an expensive flat at Point Piper and travelled from time to time to Cowra and

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Melbourne and other places. In 1940 they moved to Cowra where the testator purchased a block of land as a gift for his wife and built upon it a fine home surrounded by a large garden at a cost of £3,066.

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Williams

- continued.

10 By his will made on 18th August 1939 the  
testator appointed the appellants as executors and  
trustees and made a number of gifts to his wife.  
He bequested to her his household furniture and  
household and personal effects and any motor-car  
he owned at the time of his death and was making  
use of for personal purposes. He also bequeathed  
to her a pecuniary legacy of £500 to be paid to  
her as soon as conveniently might be after his  
death and a further pecuniary legacy of £1,500 to  
be paid to her at such time within five years after  
his death either by instalments or otherwise as his  
trustees should think fit but so that such sum  
should not carry interest. He also bequeathed an  
20 annuity of £600 to her during her life to commence  
from date of his death. Subject to two other  
legacies and two other annuities of small amounts  
the testator gave devised and bequeathed his  
residuary real and personal estate upon trust to  
sell and convert it into money and out of the pro-  
ceeds of conversion and his ready money to pay and  
provide for his debts funeral and testamentary  
expenses and the said legacies annuities and  
allowances and any duties or assessments payable  
30 on any legacy annuity or allowance bequeathed free  
of duty and subject thereto to invest the proceeds  
of sale and to hold his residuary estate upon trust  
as to both capital and income for his children or  
child if only one living at his death who being  
sons or a son should attain the age of twenty-one  
years of age or being daughters or a daughter  
should attain that age or previously marry and if  
more than one in equal shares as tenants in common  
with a substituted gift to the children of any  
40 child of his who died in his lifetime. If these  
trusts failed by reason of no persons attaining a  
vested interest therein the testator directed that  
his residuary estate should be held in trust for  
such of his brothers and sisters as should be  
living at his death (and if more than one in equal  
shares) and the child or children of any brother  
or sister of his who was then dead or who should  
predecease him but so that such last mentioned  
child or children should take and if more than one  
50 equally between them the share only which his her

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or their parent would have taken if such parent had been living at his death. Clause 7 of the Will authorised the trustees to appropriate investments sufficient at the date of appropriation to answer any annuity in respect of which the appropriation was made and directed that thereafter the annuity should be paid primarily out of the income and if necessary out of the capital of such investments and that the residuary estate or the income thereof should no longer be liable to provide for the annuity in respect of which the appropriation was made. Clause 12 of the will provided that: "NOTWITHSTANDING the trust for sale and conversion hereinbefore contained I DECLARE that my Trustees shall not for a period of five (5) years after my death except with the consent in writing of my said wife if living or if dead and leaving a child or children her surviving except with his her or their consent in writing or the consent of the Court in the event of any such child being a minor sell or dispose of any business or undertaking partnership or otherwise carried on by me or in which I shall be interested at the time of my death ..... or my interest or any part thereof in Tresilian & Dun (Grenfell) Limited ..... but that during such period they shall manage and carry on such business or undertaking or join in managing and carrying on the same and retain my interest in the said Company and I express the earnest wish but without imposing any legal obligation on my Trustees to conform therewith that after the expiration of such period as aforesaid they will continue to manage and carry on any such business or undertaking or join in managing and carrying on the same and will retain my interest in the said Company for so long in either case as in their discretion it shall appear to be in the best interest of my said wife (if living) and of the person or persons entitled to share in my residuary estate that they should do so ....."

By a codicil to his will made on 16th May 1942 the testator increased the annuity of £600 given to his wife during her life to £800 during her life and in order that she might enjoy to the full the provision made for her during her life directed his trustees to refund to her or otherwise reimburse her for such annual or other sums of money which during her life she should pay or become liable to pay to any taxing authority in

the Commonwealth of Australia (whether such authority be State or Federal) by way of income tax or other like imposition on the annuity or as the case might be (in the event of his trustees making an appropriation of investments as provided for in clause 7 of his will upon any income that might be earned from the investments appropriated to answer such an annuity and he declared that any and every sum so directed to be refunded or so reimbursed should be a charge upon and be paid out of his residuary estate.

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The estate of the testator was sworn for probate purposes at £22,216.19.4d but the value of the dutiable estate was increased to £26,216.7.10d by the discovery of certain notional assets which were subsequently disclosed to the Commissioner of Stamp Duties. Included in these notional assets were gifts to his wife consisting of £450 in cash, of a War Loan Bond for £100, of War Savings Certificates for £20.16.0d., and of the payments amounting to £3,066 made by the testator for the building of the house at Cowra. The respondent at the date of the death of the testator owned the following property; the house at Cowra valued at £3,066, a property at Caulfield in Melbourne valued at £1,470, a property at St. Kilda, Melbourne valued at £3,186, both of which she had inherited from her father, £200 of War Loans, £230 of War Savings Certificates, her total assets being valued at £8,152 less £870 owing to the bank, making the net value £7,282. Probate of the will of the testator was granted to his executors on 5th January 1943 so that the time for making an application under the Testator's Family Maintenance Act 1916 expired on 5th January 1944. The widow did not apply within this period but the Act was subsequently amended by the Conveyancing Trustee and Probate Amendment Act No. 30 of 1938 and further amended by the Administration of Estates Act No. 40 of 1954. By the Act No. 30 of 1938 provision had been made for a widow to make an application under the Act if under the law of intestacy she was left without adequate provision for her proper maintenance and by the Act No. 40 of 1954 this provision was extended to include the children of an intestate and the words "their proper maintenance, education or advancement in life as the case may be" substituted for the words "her proper maintenance". The Act of 1954 amended sec.5 of the principal Act by inserting after subsec. (2)

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subsec. (2A) which provides that notwithstanding anything in subsecs. (1) and (2) of sec. 5(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 an order made thereon.

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Pursuant to the provisions of subsec. 2A of sec. 5 of the Act the Supreme Court of New South Wales in its Equitable Jurisdiction (Myers J.) on 3rd June 1955 on the application of the widow made an order extending the time within which she might make an application until June 17th 1955; the case is reported Re T.F. Dun (Deceased) 56 S.R. (N.S.W.) 181. The present application was instituted by originating summons on 16th June 1955 and therefore within this time. Between the date of the death of the testator and the commencement of these proceedings changes which can only be described as drastic had occurred both in the value of the estate of the testator and in the financial circumstances of the widow. The residuary estate of the testator none of which had been distributed had increased in value from about £15,000 to about £82,000 and the total financial resources of the respondent had dwindled to the annuity bequeathed to her by the codicil; the ownership of the house at Cowra valued at £8,500 but subject to an overdraft of £4,200 and a motor car. The house is situated on the top of a steep hill. The motor car is a 1937 model and has reached the stage where it requires frequent and expensive repairs. The respondent, who is now fifty-seven years of age, suffers from blood pressure, and has been advised by her physician that she needs a motor car to enable her to continue her usual daily activities. No doubt the precarious financial position in which the respondent now finds herself is due to some extent to extravagance but clearly also very largely due to the severe depreciation in the value of money and to the high increase in the cost of living that has occurred in recent

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years. The main extravagances with which she is charged are a trip to England in 1953 and 1954 which cost her about £3,000 and some large parties which she gave at some of the annual picnic race meetings at Cowra. Her trip to England was paid for out of the proceeds of sale of her property at St. Kilda and her conduct in giving these occasional parties would not appear to merit any very severe condemnation.

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10 The application came to be heard before Roper  
C.J. in Eq., on 15th and 16th August 1956 when His  
Honour reserved judgment. He delivered judgment  
on 30th August 1956. Judgment had been delivered  
by this Court in Coates v. National Trustees Exe-  
cutors and Agency Company Limited and Another 95  
C.L.R. 494 on 6th June 1956 but that decision was  
not brought to his Honour's notice. This was un-  
fortunate because the question whether the crucial  
date for determining whether the applicant has been  
20 left without adequate provision for his or her  
proper maintenance is the date of the death of the  
testator or is the date when the application comes  
on to be heard which was so strenuously argued  
before his Honour had already been decided in favour  
of the former date by this Court in Coate's case.  
Unaided by that decision his Honour naturally de-  
cided 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  
30 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. In the course of his reasons his Honour said  
"I think it is clear that had the widow brought an  
application under the Testator's Family Maintenance  
Act within 12 months of the grant of probate in his  
estate, and had been heard within the normal reason-  
able time thereafter, her application must have  
40 failed, whether the time for considering the cir-  
cumstances had been taken as the date of death or as  
the date of the hearing of the application. At the  
present time, however, the circumstances relating  
to the application are essentially different. It  
is notorious that the cost of living has soared,  
and the annuity provision in her favour has de-  
creased in value very significantly. On the other  
hand, the value of the estate, which has remained  
undistributed, has increased vastly, partly by the  
50 accumulation of large profits, particularly from

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- continued.

the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation". Having discovered the existence of Coate's case soon after his Honour had delivered judgment the executors promptly appealed to this Court. Naturally they contend on the one hand that his Honour's order, founded as it is on In Re Forsaith and therefore made on the basis that the question whether the applicant has been left without adequate provision for her proper maintenance should be decided in the light of the size of the testator's estate and her financial position in August 1956 cannot stand, and on the other hand rely on his Honour's statement that if it had been brought within twelve months of the grant of probate her application must have failed. That statement is entitled to the greatest respect. But it was made at a time when his Honour considered that he was free to decide whether the widow had been left without adequate provision for her proper maintenance in the light of all the circumstances that existed in August 1956. His Honour therefore was never forced to decide this problem in the light of the circumstances existing at the date of the death of the testator. I can only express my misgivings as to the correctness of the decision in Coate's 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. That case decides that the date of death is the crucial date for determining whether the applicant has been left by a testator without adequate provision of his or her proper maintenance, education and advancement in life. In order to decide this question the Court must put itself in the position of the testator immediately before his death and consider what he should have done in all the circumstances of the case, treating the testator for that purpose as a wise and just rather than a fond and foolish husband or father. In Coate's case (supra) the Chief Justice said at p.508: "But it is important to see what exactly is involved in that interpretation. It means that the court determining the application must look at the will which the testator leaves and the dispositions if any which

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it contains in favour of his widow or children as  
 the case may be and consider whether they amounted  
 to an adequate provision for her or their proper  
 maintenance and support. 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 in-  
 10 volves what is necessary or appropriate prospec-  
 tively from that time. To determine that question  
 contingent events must be taken into account as  
 well as what may be considered certain or exceed-  
 ingly likely to happen. When a court is called  
 upon to consider such a question many years after  
 the date as at which the court must take its stand,  
 all the advantage is available of knowing the  
 events that have occurred. The intervening events  
 20 may be taken into consideration because they sug-  
 gest or tend to show what antecedently might have  
 been expected. But they must not be outside the  
 range of reasonable foresight. If all contingen-  
 cies that might reasonably have been anticipated  
 have been taken into account, it would be difficult  
 to say that the actual occurrence of some event  
 which antecedently no one could reasonably have  
 foreseen shows that the maintenance or support was  
 not proper or the provision therefore was not ade-  
 30 quate. It is therefore impossible to treat ac-  
 tual intermediate occurrences as more than eviden-  
 tiary facts. The ultimate question must remain  
 one of adequate provision for proper maintenance  
 and support as at the date of the testator's death".  
 His Honour added at p. 509 "But it would not be a  
 proper exercise of discretion if the facts as they  
 exist at the time the order is made were left out  
 of account. If a child, through some accession  
 of fortune, had ceased before the hearing of the  
 application to require any further provision for  
 40 his maintenance or support it would not be a  
 proper exercise of discretion to make an order in  
 his favour on the ground that it was only after  
 his father's death that his needs were thus met.  
 It is not a discretion to give more than what is  
 adequate for proper maintenance in the circum-  
 stances as they have come to exist. On the other  
 hand it is not a discretion to make a provision  
 for proper maintenance and support which exceeds  
 any provision that the foresight, wisdom and fair-  
 50 ness of a reasonable man in the testator's situ-  
 ation would have led to make for the proper

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maintenance and support of the widow or child applying". From these passages it is apparent that the Court, in order to decide whether a testator has fulfilled his moral duty to make adequate provision for the proper maintenance of his widow and children, is entitled to attribute to him a high degree of foreseeable prescience. Every future event intervening between the date of death and the date the application is heard can be taken into account provided it is not outside the range of reasonable foresight.

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The present will was made just on the eve of the outbreak of the Second World War and therefore before the economic consequences of a world war and its effect upon the purchasing power of money and the cost of living could be appreciated, but the codicil was made three years later when the war had reached a climax both in Europe and in the Pacific. In order to finance the war, the rates of Commonwealth income tax had then been raised to unprecedented levels and the uniform tax system was about to be inaugurated. The testator did not overlook the necessity in these circumstances of increasing the provision he had made for his widow. By his codicil increased her annuity by £300 and made it tax free. He died four months later. What he did not appear to foresee, but he reasonably might have foreseen, was that the longer the war continued the more serious its economic consequences would be upon the value of money and the cost of living and therefore upon the financial position of people with fixed incomes. He evidently foresaw that it would probably not be advisable to sell his farm or produce business for some time after his death, presumably because he considered that it was likely that the income and assets of his estate would be built up by continuing these businesses, and he must evidently have contemplated that this would assist his widow because he provided that no sale was to take place for five years after his death without her consent. The only vital thing that he appears to have overlooked in deciding what would be adequate for the proper maintenance of his widow in the future stretching forward from his death, which it can be said that as a wise husband he should have been able to foresee, was the danger of providing for his widow, then only forty-two years of age, mainly leaving her a fixed income. The testator in his wisdom should have

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realised as Mr. Wallace submitted, that the only safe course would be to leave her at least the income or a proportion of the income of his estate, but with a proviso that if her income fell below a certain amount it should be supplemented out of capital, either as of course or possibly at the discretion of his trustees. As he had no children his widow was the only person with any real moral claim upon his bounty. As his Honour said: "The undistributed estate is now large and the competing beneficiaries under the will do not have and never had any real moral claim on the testator. Most of them are in comfortable circumstances, three only, whose combined interests in the residue of the estate is about one-twelfth, showing any real financial need." In my opinion the testator failed in his moral duty adequately to provide for his widow because he should have realised that in the foreseeable future a fixed income was likely to become inadequate for her proper maintenance. The Court is therefore free to make such an order for her proper maintenance as it thinks fit taking into consideration all the circumstances as they exist at the date the application is heard. The next question is what order should be made. 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 Coate's case had been cited to his Honour and he had realised 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.

In my opinion the appeal should be dismissed.

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ORDER OF THE FULL COURT OF THE HIGH COURT  
OF AUSTRALIA, dated 19th December, 1957.

No, 25

Order of the  
Full Court  
of the High  
Court of  
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19th December  
1957.

IN THE HIGH COURT OF AUSTRALIA }  
NEW SOUTH WALES REGISTRY }

No. 59 of 1956.

ON APPEAL from the Supreme Court of New  
South Wales in its Equitable Jurisdiction

BETWEEN: FRANCIS BOYCE DUN  
and  
CHARLES EDWARD DUN Appellants 10  
and  
ELEANOR JESSIE DUN Respondent

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN  
DIXON, MR. JUSTICE McTIERNAN, MR. JUSTICE WILLIAMS,  
MR. JUSTICE KITTO AND MR. JUSTICE TAYLOR.

THURSDAY THE 19TH DAY OF DECEMBER, 1957.

THIS APPEAL from the judgment and order of the  
Supreme Court of New South Wales in its Equitable  
Jurisdiction given and made by his Honour Mr.  
Justice Roper on the 30th day of August, 1956 on 20  
the hearing of an application by the respondent  
under the Testator's Family Maintenance and  
Guardianship of Infants Act 1916 - 1954 coming on  
for hearing before this Court at Sydney on the 1st  
day of October 1957 UPON READING the transcript  
record of proceedings herein AND UPON HEARING Mr.  
Asprey of Queen's Counsel and Mr. Davies of Counsel  
for the Appellants and Mr. Wallace of Queen's  
Counsel, Mr. Bridge of Queen's Counsel and Mr.  
Yeldham of Counsel for the Respondent THIS COURT 30  
DID ORDER on the said 1st day of October 1957 that  
this appeal should stand for judgment and the same  
standing for judgment this day accordingly at  
Sydney THIS COURT DOTH ORDER that this Appeal be  
and the same is hereby allowed AND THIS COURT  
DOTH FURTHER ORDER that the said Order of the  
Supreme Court of New South Wales be discharged  
And in lieu thereof THIS COURT DOTH ORDER that  
the respondent's application to that Court be dis-  
missed AND THIS COURT DOTH FURTHER ORDER that it 40

10 be referred to the proper officers of the Supreme Court of New South Wales and of this Court respectively to tax as between solicitor and client and certify the costs of the Appellants and of the Respondent of and incidental to all proceedings in the Supreme Court of New South Wales and to tax as between solicitor and client and certify the costs of the Appellants and of the Respondent of this Appeal and that all such costs when so taxed and certified be paid out of the estate of the Testator Thomas Fitzgerald Dun deceased AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of £50 paid into Court as security for costs be paid out of Court to the Appellants or to their Solicitors, Messieurs Iceton, Faithfull & Baldock.

BY THE COURT  
N. GAMBLE.  
District Registrar.

In the High Court of Australia

No. 25

Order of the Full Court of the High Court of Australia.

19th December 1957

- continued.

No. 26

20 ORDER IN COUNCIL GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

L.S.

AT THE COURT OF BUCKINGHAM PALACE

The 3rd day of June, 1958

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT

MR. GEOFFREY LLOYD

MR. SECRETARY LENNOX-BOYD

MR. MAUDLING

30 WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 15th day of May 1958 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Eleanor Jessie Dun in the matter of an Appeal from the High Court of Australia between the Petitioner and Francis Boyce Dun and Charles

In the Privy Council

No. 26

Order in Council granting leave to appeal to Her Majesty in Council.

3rd June 1958.

In the  
Privy Council

No. 26

Order in  
Council  
granting leave  
to appeal to  
Her Majesty  
in Council.

3rd June 1958

- continued.

Edwin Dun Respondents setting forth (amongst other matters) that the Petitioner is the widow of the late Thomas Fitzgerald Dun who died at Sydney in the State of New South Wales on the 10th September 1942 having by his will dated the 18th August 1939 appointed the Respondents executors and trustees: that in pursuance of leave granted by the Supreme Court of New South Wales in its Equitable Jurisdiction the Petitioner applied in that Court under Section 3 (1) of the Testator's Family Maintenance and Guardianship of Infants Act 1916 - 1954 for adequate provision for her proper maintenance that on the 30th August 1956 the Court delivered judgment in favour of the Petitioner: that the Respondents appealed to the High Court of Australia which Court on the 19th December 1957 allowed the Appeal: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Order of the High Court of Australia dated the 19th December 1957 and for such other Order as to Your Majesty in Council may seem fit:

10

20

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Order of the High Court of Australia dated the 19th day of December 1957 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

30

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

40

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice

103.

of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

10

W.G. AGNEW.

---

In the  
Privy Council

          
No. 26

Order in  
Council  
granting leave  
to appeal to  
Her Majesty  
in Council.

3rd June 1958

- continued.

EXHIBITS

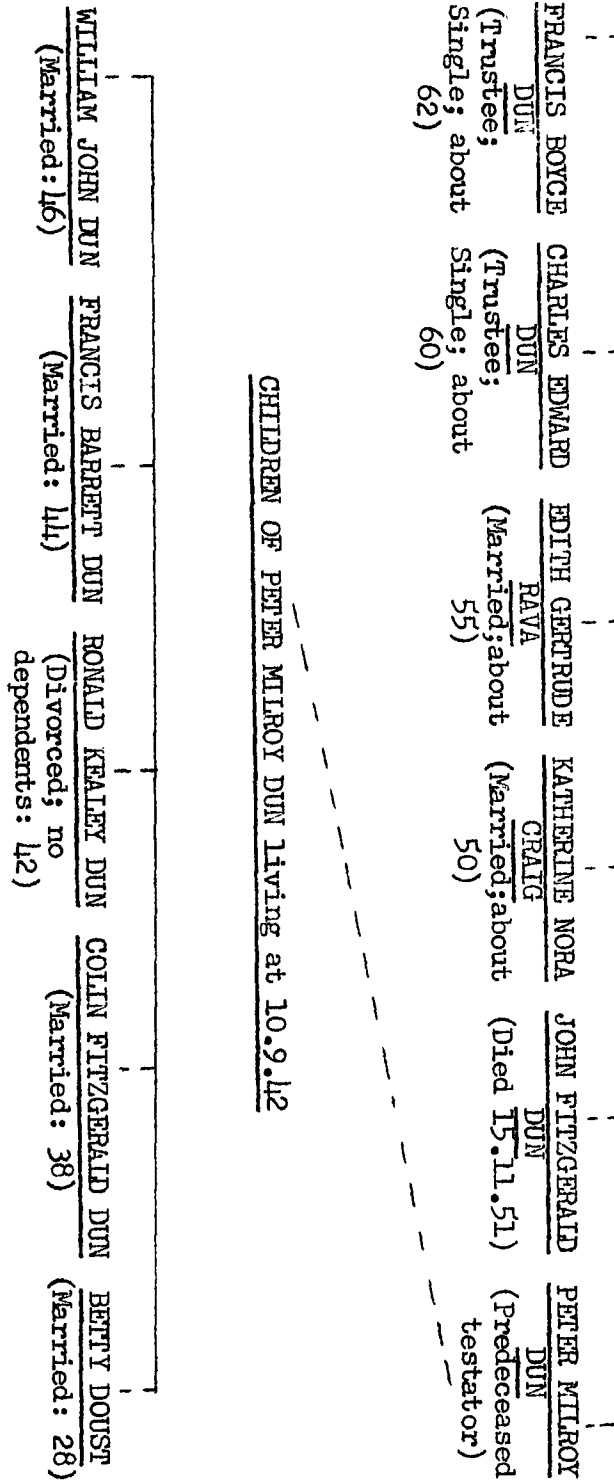
E X H I B I T S

"B"

EXHIBIT "B"

Geneological  
Tree of the  
Testator's  
Family.

(Geneological Tree of the Testator's Family.)



BROTHERS AND SISTERS OF THE TESTATOR

THOMAS FITZGERALD DUN

## EXHIBIT "C"

(Paragraph 14 of Affidavit of Eleanor Jessie Dun in Suit No. 340 of 1955 in the Supreme Court of New South Wales in Equity - dated 6th April, 1955).

---

EXHIBITS

"C"

Paragraph 14  
of affidavit  
of Eleanor  
Jessie Dun -  
6th April 1955.

14. As examples of my own increase in the cost of living are the following :-

10

Rates in 1942 were £19 and in 1955 are £48.10.0 per annum. Garden in 1942 was 10/- per day and in 1955 £2 per day. Cost of original food such as meat, bread, milk and vegetables in most cases are more than  $2\frac{1}{2}$  times as much and in some cases as much as three times as much in 1955 as they were in 1942. The cost of repairs to the house is up to  $2\frac{1}{2}$  to 3 times as great now as in 1942.

---

## EXHIBIT 1.

"1"

20

(Paragraphs Nos. 1 to 15 inclusive of Affidavit of Francis Boyce Dun in Suit No. 340 of 1955 in the Supreme Court of New South Wales in Equity - dated 26th May, 1955).

---

Paragraphs  
Nos. 1 to 15  
of affidavit  
of Francis  
Boyce Dun -  
26th May 1955.

1. I am one of the Trustees of the Will and Codicil of the above-named deceased.

2. I have read what purports to be a copy of the Affidavit of the Applicant sworn on 6th April, 1955.

30

3. In answer to paragraph 4 of the said affidavit I say that the value of the Testator's dutiable estate was increased to £26,216.7.10 by the discovery of certain notional assets which I and my Co-trustee subsequently disclosed to the Commissioner of Stamp Duties. These assets were as follows :-

EXHIBITS

"1"

Paragraphs  
Nos. 1 to 15  
of affidavit  
of Francis  
Boyce Dun -  
26th May 1955  
- continued.

- |  |            |    |
|--|------------|----|
| (a) Bonus given to Applicant on 14th July, 1942, by cheque No. 430   | £ 100      |    |
| (b) Amount given to Applicant on 26th April, 1942, being part of proceeds of cheque No. 446  | £ 200      |    |
| (c) Amount given to Applicant to pay income tax on 5th September, 1942, being part of proceeds of Cheque No. 451                       | £ 150      |    |
| (d) War Loan Bond given to widow on 6th March, 1942  | £ 100      | 10 |
| (e) Various small gifts of money to relatives of Testator  | £ 62.12.6  |    |
| (f) War Savings Certificate purchased and given to Applicant on 12th November, 1941  | £ 20.16.0  |    |
| (g) Four payments made by Testator to A.G. Brown, Cowra, in respect of house erected in Cowra by Testator in the name of the Applicant | £3066. 0.0 | 20 |

4. The farming property of the Testator which is situated near Cowra was valued at £13,872 for probate purposes by Messrs. Squire & Gray, Stock and Station Agents of Cowra and this valuation was accepted by the Deputy Commissioner of Taxation in assessing duty under the Estate Duty Assessment Act and by the Commissioner for Stamp Duties in assessing Death Duty under the Stamp Duties Act.

5. In answer to paragraph 5 of the said affidavit I say that I have examined the books of the Testator and they disclosed that the land in Cowra on which the dwelling was subsequently erected was owned by the firm of Tresilian and Dun (Cowra) of which the Testator was the sole proprietor, that the said land was transferred by Tresilian and Dun (Cowra) to the Applicant for the sum of £283.2.0 and that the Testator paid this sum to Tresilian and Dun (Cowra). 30

6. In further answer to paragraph 5 of the said affidavit I say that I have been informed by Guy Crick of 7 Angel Place, Architect, and verily 40



believe that the dwelling which was erected on the said land at Cowra cost the Testator the sum of Three thousand and sixty-six pounds (£3066). I have examined the books and records of the Testator and I say that it appears from the said books and records that furniture and furnishings for the said house cost the Testator at least the sum of One thousand and thirty-three pounds (£1033).

EXHIBITS

"1"

Paragraphs  
Nos. 1 to 15  
of affidavit  
of Francis  
Boyce Dun -  
26th May 1955

- continued.

10 7. In further answer to paragraph 5 of the said affidavit I say that the Testator was a strict Christian Scientist who did not permit the consumption of Liquor or the smoking of cigarettes in the home. The Testator entertained only to the extent of asking a few friends occasionally to play cards.

20 8. My Co-trustee and I frequently saw the Testator in the three years prior to his death. At no time did the testator mention to us or either of us that he and the Applicant proposed to take a trip to England, although he was in the habit of discussing his affairs with us. Prior to his death the testator expressed to us great concern and anxiety over the deterioration of his finances. Moreover, he had considerable difficulty in walking and was unable to move about without the aid of crutches.

30 9. In further answer to paragraph 5 I say that I have examined the books and records of the testator including the Farm Cash Book and they do not disclose any payments made by the testator for groceries.

10. According to the Cash Book of Tresilian and Dun (Cowra) the wages paid to the Applicant as Secretary of the business were as follows :-

For the year ending 30th June 1938	£300
1939	£360
1940	£545
1941	£520

40 For the year ending 30th June 1942	£545
For the period ending September 1942	£205

According to the testator's records this was the only allowance paid to the Applicant. The duties of the Applicant as Secretary of the business were purely nominal.

EXHIBITS

"1"

Paragraphs  
Nos. 1 to 15  
of affidavit  
of Francis  
Boyce Dun -  
26th May 1955

- continued.

11. In answer to paragraph 6 of the said affidavit I say that it appears from the records of the Commissioner for Stamp Duties that the Applicant's account with the Bank of New South Wales was overdrawn in the sum of £866.1.8 with accrued interest of £19.9.0 at the time of the testator's death and that the Testator was the guarantor of this account.

12. The Applicant's statement in paragraph 9 of the said affidavit that she received the balance of her legacy, £1500, during the year ended 30th June, 1948, is not correct. The legacy was in fact paid in the manner following :-

10

October 1944	£500 on account
October 1947	£500 on account
April 1948	£260 on account
December 1948	£305.14.5 deducted from legacy to reimburse estate for tax paid by it on behalf of Applicant
August 1948	£343.5.7 balance of legacy

20

13. Although the Applicant was considered to be indebted to the Estate in the sum of £643.11.0 as at 30th June, 1952, this sum was calculated on the assumption that the applicant owed the estate the difference between her total taxation liability for each year and the amount of taxation attributable to an income of £800 per annum. However, following upon the Decretal Order made by this Honorable Court, a recalculation of the Applicant's entitlement was made by which it appeared that the Estate owed the Applicant the sum of £278.3.0 which said sum was paid to the Applicant on 25th January 1955. Annexed hereto and marked with the letter "A" is a true copy of a letter dated 23rd September, 1953, from Messrs. Eric Steel & Co. on behalf of the Trustees of the Estate to the Solicitors for the Applicant.

30

14. During the period from 30th June, 1942 to 30th June, 1951 the Applicant received the benefit of sums totalling £2,351.15.7 by virtue of the provisions of Clause 2 of the Codicil to the Testator's will.

40

15. The house in which the Applicant resides is large. It contains 2 bedrooms and maid's quarters which virtually constitute a separate flat.

## EXHIBIT 3.

EXHIBITS

"3"

(Transcript of oral evidence taken on the hearing before His Honor Mr. Justice Myers in Suit No. 340 of 1955 in the Supreme Court of New South Wales in Equity on 3rd June, 1955)

Transcript of oral evidence, 3rd June 1955.

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 APPLICANT:

Sworn, examined, deposed:

10 TO MR. WALLACE: My name is Eleanor Jessie Dun. I reside at Keswick Street, Cowra. I am the applicant in this summons. I am the widow of the late Thomas Fitzgerald Dun of Cowra.

## CROSS-EXAMINATION:

MR. ASPREY: Q. Mrs. Dun, you remember swearing your affidavit in this matter on 6th April, 1955?  
A. I do.

Q. Did you read it before you swore it? A. Yes.

Q. Carefully? A. Yes.

20 Q. Do you remember saying in para. 8 that your drawings for the years 1943 to 1953 shown by figures and accounts kept by your accountant were as you set them out in para. 8? A. Yes.

Q. Do you remember setting them out? A. My accountant set them out to my solicitor.

Q. You did not include the years 1944, 1949 or 1951 in those drawings - did you notice that when you read the affidavit through? A. I did not notice that.

30 Q. Was that just an oversight on somebody's part?  
A. It must have been an oversight on somebody's part, evidently from the accountant.

Q. I don't suppose you would remember without the aid of the books what the figures were for those periods? A. I would not.

Q. Mr. Steele is your accountant, is he not?  
A. Yes, he has been.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955  
- continued.

Q. And he keeps your books? A. He has been keep-  
ing them, not for the last two or three years.

Q. You yourself used to keep books? A. No, I did  
not.

Q. Did you not keep your own books at one stage?  
A. No.

Q. Never at any time? A. Never at any time.

.....

APPLICANT

On former oath:

MR. ASPREY: Q. Before the luncheon adjournment, 10  
Mrs. Dun, I asked you whether you had kept any  
books yourself at any time? A. That is correct.

Q. Are you quite sure about that? A. I am quite  
sure.

Q. Did you ever make any entries in your cash book?  
A. Not that I remember.

Q. Would you deny that you did? A. Yes.

(Mr. Asprey was allowed to see the cash book.)

Q. Would you look at that book and tell me whether 20  
any of the entries in that book are in your own  
handwriting? A. Yes, that is correct.

Q. (Approaching witness): The witness is looking  
at folio 12. Is that in your handwriting?  
A. Yes. What year is this?

Q. Just one moment. And folio 11, is that in your  
handwriting? A. Yes.

Q. And folio 10? A. Yes.

Q. And folio 9? A. Portion of it.

Q. And folio 13 on the right hand side? A. Yes.

Q. Folio 14 on the right hand side? A. Yes, that 30  
is correct.

Q. Folio 15 on the right hand side? A. Yes.

Q. Folio 16 on the right hand side, portion of it?  
A. Yes, portion of it.

EXHIBITS

"3"

Q. That (indicating) is not your handwriting?  
A. No. I am sorry, sir, but I did not remember it.

Transcript of  
oral evidence,  
3rd June 1955

Q. You know how to keep books, don't you? A. Not exactly.

- continued.

Q. You have kept books in the past, haven't you?  
A. No. Evidently this must have been under my husband's guidance because this is all his writing beside it.

10

(Cash book m.f.i.l)

Q. You have sworn that the expenditure of the sums referred to as drawings in para. 8 of your affidavit were necessary to enable you to live at a standard which did not exceed the standard at which you lived in the lifetime of the testator? A. Would you mind repeating that please?

20

Q. You have sworn in para. 8 of your affidavit of the 6th April 1955 that the expenditure of the said sums, those of the drawings, "was necessary to enable me to live at a standard which did not exceed that which I lived in in the lifetime of the testator?" A. I think that would be correct.

Q. You think it would be correct? A. Yes.

Q. Do you think that is a fair statement to make to the Court? A. Yes.

Q. And you think you are being perfectly frank with the Court when you make that statement? A. I do.

30

Q. Your husband was unfortunately crippled with poliomyelitis? A. That is correct.

Q. And had been since the age of about 15? A. Yes.

Q. And he used to get out on crutches? A. Yes.

Q. And could get about without them only with the greatest difficulty? A. He really could not.

Q. He was a Christian Scientist? A. Yes.

Q. And a very strict one, wasn't he? A. Yes.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

Q. And he was a man who had a strong objection to the consumption of alcoholic liquor? A. Yes.

Q. And would not permit it in the house? A. Yes, he would permit it in the house.

Q. You say he would? A. Yes.

Q. You heard your counsel say that you knew him for some years before you married him? A. I did.

Q. Before you married him you were well aware of his habits? A. Yes.

Q. And you were well aware of his standard of living? A. Yes. 10

Q. And he was a man who lived somewhat frugally? A. In what sense frugally?

Q. He did not go in for any extravagances in living? A. I would not say extravagance, but he did live very, very well.

Q. Was not it his boast that he had accumulated the money that he had by careful living? (Objected to).

MR. ASPREY: It is just preliminary to something I wish to come to in a minute. 20

HIS HONOR: All right, I will allow it.

MR. ASPREY: Q. Did not he boast that the money that he had accumulated was the result of very careful living on his part? A. I don't agree.

Q. Did he make a regular habit of going to Sydney and staying at first class hotels? A. He did.

Q. Regularly during the period you were married to him? A. Regularly.

Q. And Melbourne? A. And Melbourne.

Q. How often would he go to Sydney in the years that you were married to him? A. We were living in Sydney for three years. 30

Q. In a hotel? A. No; at a flat.

Q. How often did he stay at first class hotels?

A. Every time that we went to Sydney and every time we went to Melbourne.

EXHIBITS

"3"

Q. You were living in a flat in Sydney for three years; that leaves two years of your married life; how often did he go to Sydney in those two years?

Transcript of oral evidence, 3rd June 1955

A. Quite regularly.

- continued.

Q. What hotel did he stay at? A. 52 Macleay Street until just before he died, and then it was the Wentworth, and at both hotels we always had suites.

10 Q. How long did he stay at 52 Macleay Street? A. We would stay at least three weeks, maybe a month.

Q. Was that for the purpose of obtaining medical treatment? A. No; it was a holiday.

Q. Did that happen in each of these two years? A. Yes. The only time he had medical treatment was when I had to have him removed from the suite at 52 Macleay Street to Gloucester House.

Q. Have you not since his death spent a considerable sum of money in staying at hotels? A. Yes.

.....

20 MR. ASPREY: Q. In 1948 you paid several visits to Sydney and stayed at Ushers Hotel, did you not? A. Yes.

Q. Would the amounts you paid Ushers Hotel be recorded in your books? A. I fancy they would be. In 1948.

Q. Would you look at your cash book for 1948 and tell us (m.f.i.l shown)? A. I do not see it there.

30 Q. Perhaps I might be permitted to look at the book (m.f.i.l handed to Mr. Asprey). 1948 4th February, that is Ushers Hotel, isn't it? (indicating). A. Yes.

Q. £30? A. Yes.

Q. 7th February, Ushers Hotel, £20? A. Yes.

Q. 13th February, Ushers Hotel, £35? A. Yes.

Q. 14th Ushers Hotel, £15? A. Yes.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

- Q. 17th Ushers Hotel, £75? A. Yes.
- Q. 19th Ushers Hotel, £10? A. Yes.
- Q. July 26th Ushers Hotel, £15; correct? A. Yes.
- Q. 29th July, Ushers Hotel, £17.7.8? A. Yes.
- Q. 20th October, Ushers Hotel, £30? A. Yes.
- Q. 21st October, Ushers Hotel, £20; correct?  
A. Yes.
- Q. November 14th, a small amount, Ushers Hotel?  
12/6? A. Yes.
- Q. That is the whole of 1948? A. Yes.
- Q. You used to buy very large quantities of liquor, did  
you not? A. At times. 10
- Q. Would you deny that in 1948 your expenditure on  
liquor would be well over £100? A. I haven't the  
books here. The accountant would have those, and  
if he says that ----
- Q. You would buy your liquor from one place? A. Yes.
- Q. From Squire, Pepper Pty. Ltd.? A. Yes.
- Q. Would you deny your expenditure would approxi-  
mate £3 a week in 1948 for liquor alone from Squire,  
Pepper; would you deny that? A. If the books show 20  
it, I do not deny it.
- Q. Never mind what the books show; what do you say?  
A. If the books show it, it is correct.
- Q. Never mind about what the books show. What do  
you say? A. It may be right.
- Q. I am suggesting that, say in the year 1948 you  
spent on hotels and Squire Pepper's for liquor some-  
thing in the vicinity of £8 a week? A. Hotels  
would be for boarding and for cash for buying. I  
would get the cheques made payable to Ushers and 30  
get the cash.
- Q. You used to give very large parties, did you not?  
A. Occasionally.
- Q. At your home? A. Occasionally, but I was only  
returning hospitality which had been given to me.



Q. For instance, you would have something like 100 people present? A. Yes, two or three times I did.

EXHIBITS

"3"

Q. You ran up a bill at Squire, Pepper's for hundreds of pounds, did you not, for entertainment?  
A. Not for entertainment.

Transcript of oral evidence,  
3rd June 1955

- continued.

Q. For liquor? A. Not for liquor, no, not alone.

Q. For liquor and provisions? A. Liquor, provisions, haberdashery, dress lengths - -

10 Q. Before you went to England in 1953, was that bill something like £600-odd? A. Not for the month.

Q. No, not for the month. Had you run a bill up there of £600-odd? A. Yes, I had, but that was over a long period.

Q. When you gave the parties - you have a garage in your home, have you not? A. Yes.

Q. And you would turn the garage into a bar?  
A. Yes.

20 Q. And you entertained on quite a lavish scale?  
A. But may I ask - - -

Q. Didn't you do that? A. I did do it, but haven't I a perfect right to do that?

Q. That is a matter which is not for my decision. Your husband never gave any parties on the scale you did, did he, in his lifetime? A. No, he did not.

Q. Your husband never spent £3 a week for liquor, did he? A. No, but I do not see that that has any - - -

30 Q. Nor did you in his lifetime? A. No, not in his lifetime. £3 a week? Well, it could be £2.

Q. In fact, it was more approximately £3, wasn't it?

MR. WALLACE: She means during his lifetime.

MR. ASPREY: Q. Do you suggest your husband spent about £2 a week on liquor? A. There were always about two bottles in our cupboard, always.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955  
- continued.

Q. He did not touch it? A. He did not touch it but he did not mind me having it or anyone else. I have never been a total abstainer and he had no objections to me.

Q. You and your husband used to play auction bridge?

A. Yes, quite a bit.

Q. And for very moderate stakes? A. Yes.

Q. How often might you do that? A. Fairly often.

Q. What do you call fairly often? A. Two or three times a week on occasions. Other times once a week. 10

Q. What, sixpence a hundred. A. Yes.

Q. After he died you began to play poker, did you not? A. Yes.

Q. And for high stakes? A. Yes.

Q. And you lost a considerable sum of money?  
A. Pardon me. I won a considerable sum of money and I stopped.

Q. What did you win? A. £80, so I thought that was time for me to get out, so I got out.

Q. Would you mind telling us the type of stakes you played poker for? A. Yes, 2/-, 4/-, 6/- and 8/-. 20

Q. For cards? A. Yes.

Q. How much have you seen change hands at the table (Objected to)? A. Has that anything to do - (Argument ensued; question rejected).

Q. You swore in your affidavit in paragraph 5 that just prior to your husband's last illness you and he planned a trip to England? A. Correct.

Q. And he said that if he was unable to go you should go? A. Yes. 30

Q. When you say you had planned this trip, had you made any arrangements? A. We had not actually made arrangements but we had planned it in our own minds.

Q. When were you going to take the trip? A. In 1942.

Q. There is no doubt about that? A. Definite.

Q. That is when you were going to go? A. When we were going to go.

Q. Do you remember that there was a war on in 1942?  
A. I remember very well.

Q. I suppose you would remember that 1942 was one of the darkest years of the war? A. Yes, but we had planned just shortly after we were married to go in 1942.

10 Q. But you swore in the affidavit and you agreed with me just now that this planning was done just prior to the testator's last illness? A. No, not just before his last illness.

Q. You swore in your affidavit "Just prior to the testator's last illness he and I planned a trip to England? A. That is a big mistake. That is very wrong.

Q. That is absolutely untrue, isn't it? A. That is untrue, quite untrue, but we had planned ---

20 Q. When you swore that, of course, you had completely forgotten that 1942 was the darkest period of the war? A. Yes. As a matter of fact that is why we were in Cowra.

Q. Your husband, you have told us, was a man who got about with the greatest difficulty? A. Yes.

Q. Do you suggest that it is any way true that you or your husband had planned to go to England in any year? A. Yes.

30 Q. However, what you swore in your affidavit in that regard is totally untrue? A. Yes, it should not have been 1942.

Q. What year should it have been? A. Round about 1938 or 1939. It was just when we were married and he said in 3 to 5 years.

Q. Was it to fulfil his wish that you went to England in 1953? A. To a big extent, yes.

Q. You put that forward, do you; you want His Honor to believe that it was to fulfil your husband's wish? A. Yes. He did ask me to do it after

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955  
- continued.

the war was over.

Q. He asked you to do it when the war was over?  
A. Yes.

Q. When did he ask you to do that? A. When we  
were planning.

Q. When you were planning this trip he asked you to  
do it? A. If he could not go, if he should pass  
on.

Q. You have just told His Honor that his planning  
was done in the year 1937 or 1938, before the war  
began? A. When it was first spoken of. 10

Q. But you have just told His Honor that you did  
this planning in 1937 and 1938? A. Yes.

Q. And you have told us your husband said that you  
would go after the war was over? A. Yes.

Q. Do you adhere to that? A. Yes.

Q. In 1937 and 1938?

MR. WALLACE: She said 1939 also.

WITNESS: I said 1939, 1937, 1938 and 1939.

MR. ASPREY: His Honor no doubt heard what was said. 20

MR. WALLACE: Very well, have it read back.

MR. ASPREY: Q. I will ask you again. When did you  
and your husband plan this trip? A. 1937 when we  
first spoke of it.

Q. The idea was not to go immediately? A. No.

Q. To go in three to five years' time? A. Correct.

Q. Did he say then when the war was over? A. Be-  
fore he died he did, about me going when the war  
was over.

Q. He told you "If I die and I cannot go, I want  
you to go"? A. Yes. 30

Q. Is that what you want to tell His Honor? A. Yes,  
I will.

Q. You will? A. I have.

Q. You tell His Honor it was to fulfil your husband's wish that you went in 1953? A. Yes.

MR. WALLACE: Partly, she said.

MR. ASPREY: Q. How much did that trip to England cost you? A. Around about £2,500.

Q. Is that recorded in your books somewhere? A. It was done with my own money from my own property.

10 Q. Is the expenditure on your trip recorded somewhere in your books? A. It is in my bank book.

Q. Is it not entered up in the cash book or the ledger in any way? A. I have had no books done -- my books have been with the accountant and - - -

Q. All I asked you was, it is not in the books? A. It is not in the books. I have not had books made up since 1953.

MR. WALLACE: You have had our books and she has not had access to them.

20 MR. ASPREY: Q. You say it cost about £2,500? A. Yes.

Q. It might have cost more? A. It might have cost £100 or £200 more.

Q. Will you give His Honor your best idea of what that trip cost, the maximum? A. It would not have been more than £3,000.

Q. How long were you away? A. 12 months.

Q. Where did you go? A. To England and Scotland.

Q. The Continent? A. No.

30 Q. You did say you thought your husband in his lifetime spent about £2 a week on liquor? A. Yes.

Q. Where did he spend it? A. He bought it.

Q. Whereabouts did he buy it? A. In Cowra.

Q. In Squire, Pepper's? A. He gave me - -

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

Q. Did he buy it in Squire, Pepper's? A. He did not buy it. He gave me the opportunity of ordering it.

Q. Is it on the household accounts with Squire, Pepper's? A. It could be.

Q. I want to know; you were his wife? A. I do not know because I haven't got my books.

Q. Who paid for it? A. He did.

Q. What, by cheque? A. Sometime and sometimes he would give me cash. 10

Q. You have told us that your husband made you an allowance of £12 a week? A. Yes.

Q. How did he make that allowance to you? A. Because I was his driver.

Q. How did he? A. By cheque. £60 a month, or thereabouts. I am not sure that it was quite £60, but it was somewhere in that vicinity.

Q. By cheque? A. He used to pay that into my account.

Q. Drawn on what account? A. Pardon? 20

Q. What accounts was it? A. I do not know which cheque book he used.

Q. But it was paid into your bank account? A. Yes.

Q. There is no doubt about that? A. Yes, I am certain.

Q. Was that in addition to amounts paid to you as nominal secretary? A. Yes.

Q. In addition? A. You are meaning extra bonuses, etcetra?

Q. You were paid, were you not, some regular sums as secretary of Tresilian and Dun, Cowra, were you not? A. They would be the cheques that would go on. 30

Q. Are those the same cheques as the £12 a week you talk about? A. I suppose they are. It depends on what amounts the cheques are, because I do not --

Q. Do you tell His Honor you do not know whether the £12 a week you got from your husband was in addition to these sums of money? A. It was in addition, to several sums of money. He used to give me extra sums of money.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

Q. But he paid you the £12 a week? A. Yes, the £60 a month or thereabouts.

Q. And in addition you got these regular sums from Tresilian and Dun, Cowra; is that what you say?

10 A. I do not remember just exactly how it went into the bank, but he used to give me extra sums of money at different times and probably that would be through Tresilian and Dun's account.

Q. Were the sums you got from Tresilian and Dun, Cowra, by cash or by cheque? A. From Tresilian and Dun?

Q. Yes? A. Whatever is in that book must be correct with the Tresilian and Dun cheques. To be perfectly honest, I really do not just remember exactly what cheque book he used to pay them in.

20

Q. From your husband personally or from any firm he was connected with, how much do you say he received a year? A. That I just do not remember because I would like to mention to you, or to His Honor, that he used to give me these extra sums of money in cash, a lot of it, and in the last few years, which should show in his books, when the wool cheque would come in he would give me perhaps £50 or £100. I do not know how they are entered.

30 Q. Have you any idea what your husband's income was? A. Yes, to a big extent; for many a year it was £3,000.

Q. For the years you were married to him, it averaged about £3,800, didn't it? A. Yes, thereabouts.

Q. Would you agree with me that you yourself have been spending for your own purposes since your husband died, in the 11 years you have given us between 1943 and 1953, moneys at the rate of about £1,300 a year? A. I have been spending at the rate of £1,300 a year?

40

Q. Yes. A. Yes.

Q. And living rent free in addition? A. Yes.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955

- continued.

Q. Do you tell His Honor that you are only living now at the standard your husband lived at when you and he were married together? A. Yes. I have been considering the cost of living. That comes into it again.

Q. What about the parties? A. I think I have a perfect right to use my money for parties if I wish to, occasionally. I am sure perhaps some of the honourable gentlemen here have given parties - they might not - but probably there are other people in Court who give parties. 10

Q. I suppose people who give parties ought to cut their cloth according to their measure? A. Yes, probably they should, but at that time - -

Q. There would not be too many people up at Cowra giving parties where 100 people were present, would there? A. There have been some fairly big parties.

Q. What, by the wealthy graziers? A. Before they were wealthy. It always has been.

Q. You wanted to compete with them, didn't you? 20  
A. It was not competing, it was returning hospitality.

Q. You played poker with the graziers, didn't you? A. Perhaps I did, but what does that matter. They are friends of mine.

Q. Have you been to a doctor for your health? A. Not exactly attending a doctor regularly, but I have a check up.

Q. In your affidavit in paragraph 15 you said that you did not consult a solicitor in Cowra until about the year 1948. Do you remember swearing that? 30  
A. For what reasons?

Q. That is what you said. I will read you the whole sentence. "The estate was being handled by solicitors in Sydney with whom I had no direct contact and I did not consult a solicitor in Cowra until about the year 1948. I then consulted Messrs. Garden and Montgomerie with a view to obtaining better provision for myself out of the estate but I was advised it was too late to make such an application"? A. Yes, that is correct. 40



Q. Do you suggest you did not consult a solicitor in Cowra at all until 1948? A. Certainly not.

EXHIBITS

"3"

Q. You were in touch with solicitors, were you not, after your marriage, during your marriage, after your husband's death? A. Yes, with my own private affairs but not with the estate affairs.

Transcript of  
oral evidence,  
3rd June 1955

- continued.

10 Q. And you do not wish His Honor to believe that it was merely through inadvertence on your part or through lack of facilities to get advice that you did not make an application within the 12 months?  
A. I did not know there was such an Act.

Q. When you swore in your affidavit that you and your husband did a fair amount of entertaining, you are referring to the auction bridge, are you?  
A. Yes, to a big extent.

Q. That is getting in a couple to play auction bridge? A. Yes, but now and again we might get other people in.

20 Q. When you sold the Caulfield property did you receive moneys other than by cheque? A. No.

Q. Are you sure? A. Certain.

## RE-EXAMINATION

MR. WALLACE: Q. Over the 12 years since your husband's death, can you tell His Honor on how many occasions you have given a party of any size with 100 people? A. Since his death?

Q. Yes. A. I would say for large parties, round about four or five.

30 Q. Altogether? A. For big parties, They used to happen on New Year's Eve. I did give a couple, lend my house, but I did not give them, for charity.

Q. You were asked by my friend about your going to England. You said that your reason in part was because of your husband's wish. What other reason did you have for going to England; what was your general desire in the matter? A. My idea was that I am not getting anyyounger and I would like to do it whilst I could enjoy the trip.

40 Q. I think you were about 53 or 54 years of age when you went abroad? A. Yes.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955  
- continued.

Q. With regard to your husband, you were asked questions by Mr. Asprey as to whether you thought he could really get about and go to England, do you remember? A. That is correct.

Q. Is it within your knowledge whether he went to England or America in some previous year? A. He did go to America.

Q. Some time in the 1920's? A. Somewhere thereabouts.

Q. You were asked about your mode of living with your husband. In addition to the places you went with your husband in Sydney, what about Melbourne? Where used you go with your husband in Melbourne? A. To Chevron in St. Kilda Road. 10

Q. Did you have a suite at Chevron? A. We always had a suite at Chevron.

Q. What is the longest time you can remember staying there? A. Not more than a month. It may be a fortnight or three weeks or a month.

Q. When you lived in Sydney at the flat, where was the flat - with your husband, I mean? A. In Point Piper. 20

Q. Was it a nice flat? A. Yes, it was a very nice flat, one of the nicest.

Q. Did you always have domestic assistance? A. Always, permanent.

Q. During your husband's lifetime? A. Yes, practically right up to the time he died.

Q. And a gardener? A. And a gardener and other help in the house. 30

Q. Have you had domestic help in recent years? A. Just for a day.

Q. One day a week? A. It is really half a day.

Q. During your husband's lifetime you had permanent full time domestic help? A. Yes.

Q. Your books of account, I think you have not seen them for some years; is that so? A. No, I have not.

Q. There is some issue between you and your accountant? A. Yes.

Q. And the figures, I think, were made up from balance sheets which you had in your possession? A. Yes.

Q. Which were compiled by your accountant? A. Yes.

Q. And I think that accountant is the accountant to the estate? A. Yes, or has been. I do not know whether he is now.

10 Q. Folios 10 to 14 in the cash book to which Mr. Asprey referred as being in your handwriting, were they written in your husband's lifetime? Is that what I understood you to say? A. In 1948, yes.

HIS HONOR: Some of them were, the earlier ones.

MR. ASPREY: Folios 11 to 15, I think, from recollection.

MR. WALLACE: Folios 10 to 14, I think.

HIS HONOR: They were 9 to 15.

20 MR. WALLACE: Q. I think you had known your husband for many years before marriage? A. Yes, 10 years, 11 years.

Q. And neither of you had been married before? A. No.

Q. Your mother was ill - - -

MR. ASPREY: Do not lead please.

MR. WALLACE: Q. Will you tell His Honor when your mother died? A. In 1936.

Q. Were you the only child? A. I was.

30 Q. When did your father die? A. When I was aged 17.

Q. Long before? A. Yes, in 1917.

Q. What was the state of your mother's health in the last few years? (Objected to).

EXHIBITS

"3"

Transcript of oral evidence, 3rd June 1955

- continued.

EXHIBITS

"3"

Transcript of  
oral evidence,  
3rd June 1955  
- continued.

Q. At all events you were asked some questions about your husband's condition. How used your husband get about and go to work? A. I used to drive him.

Q. Always? A. Always. On odd occasions the nephews drove him if I was not available.

Q. You have a motor car today, haven't you? A. Yes.

Q. Is that the same motor car your husband had at his death? A. Yes. It is a 1935 model.

(Witness retired).

IN THE PRIVY COUNCIL

No. 41 of 1958

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

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RECORD OF PROCEEDINGS

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