PC. LAC cite memorandum
– R. 86 C.L.R. 64: 1953 AC. 52

C. of A. 1953. 141 C.L.R. 433.

[HIGH COURT OF AUSTRALIA.]

ELLIS . . . . . APPELLANT;
APPLICANT,

AND

LEEDER . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *July* 18, *August* 3.

Dixon, McTiernan, Williams, Webb and Kitto JJ.

Testator's Family Maintenance—Claim—Justification—Order—Effectiveness—Duty and discretion of court—Appeal—Further evidence—Admittance by appellate court—Costs—Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 (*N.S.W.*) (*No.* 41 *of* 1916—*No.* 30 *of* 1938)—*Equity Act* 1901-1947 (*N.S.W.*) (*No.* 24 *of* 1901—*No.* 41 *of* 1947), *s.* 84.

If the Court thinks that a claim under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) is justified it should seek ways to give effect to it. Such a claim should only be refused where it is clear that it is impossible to make an effective order.

Upon an appeal against an order under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938, the appellate court should admit further evidence if that evidence would be likely materially to assist the court in the discharge of its duty.

So *held* by *Dixon, Williams* and *Kitto* JJ.

Observations by *Jordan* C.J. in *In re the Will of Gilbert*, (1946) 46 S.R. (N.S.W.) 318, at pp. 323, 324; 63 W.N. 176, at pp. 179, 180 as to the proper approach of an appellate court on an appeal from an order under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938, approved by *Dixon, Williams* and *Kitto* JJ.

Decision of the Supreme Court of New South Wales (Full Court), reversed.

[EDITOR'S NOTE:—On 14th November 1951 the Judicial Committee of the Privy Council granted special leave to appeal from the decision of the High Court.]

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APPEAL from the Supreme Court of New South Wales.

Herbert Ellis, of No. 2 Woid's Avenue, Hurstville, New South Wales, electrical engineer, died on 28th July 1949, leaving a will dated 27th June 1947, of which probate was granted by the Supreme Court of New South Wales in its probate jurisdiction on 15th February 1950 to Edie Maude Leeder, the executrix named therein. By his will the testator left to his executrix a genuine Chesterfield wardrobe, a Spanish mahogany wardrobe and a grandfather clock, valued at about £45. He bequeathed the rest and residue of his furniture to his wife Nance Ellis and devised all his real estate wheresoever situate and bequeathed the rest and residue of his personal estate of whatsoever kind and wheresoever situate subject to the payment of his just debts, funeral and testamentary expenses to the said Edie Maude Leeder.

Including the grandfather clock and the Spanish mahogany wardrobe specifically referred to in the will, there not being any knowledge or record of "a genuine Chesterfield wardrobe", the total furniture was valued at £120 15s. 0d., but all the items thereof were claimed by the testator's widow, Nance Ellis, as her property, she alleging that they had been purchased out of moneys provided by her.

The only other asset in the testator's estate was the cottage, No. 2 Woid's Avenue, Hurstville. The value of the land and cottage as at the date of the testator's death, as given by the Valuer-General upon a valuation made during land sales control, was £1,000. The land, so improved, was subject to a mortgage to the War Service Homes Commission, under which at the date of his death the testator owed the sum of £886 13s. 3d. According to the Stamp Affidavit the land had a frontage of 98 feet to Woid's Avenue, and an average depth of 100 feet. The cottage, which was erected in 1928, was a double-fronted brick on stone cottage with a tile roof, comprising four rooms, kitchen, offices and verandah. At the date of the hearing of the application the sale price of land was no longer controlled.

In March 1950 the widow, by way of originating summons, made an application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) for maintenance out of her deceased husband's estate.

At the date of his death the testator was aged 71 years and his widow was 60 years of age. They had been married for upwards of 35 years and had lived together during the whole of that period; their place of residence since October 1928 being No. 2 Woid's Avenue, Hurstville. There were three children of the marriage,

a married son, a married daughter and an unmarried daughter, who at the date of the application were respectively aged 33 years, 27 years and 17 years. The unmarried daughter resided with her parents and contributed to the upkeep of the home.

In 1931 the executrix, then aged 22 years, went to live with the applicant and the testator and remained until January 1933. During that period she formed an association with the testator, and in January 1933 moved into a home of her own at Bondi where, according to an affidavit filed by her, she " was on intimate terms of friendship with him for a period of approximately 20 years prior to his death ", and, after January 1933, " the deceased subsequently visited me at my home every week-end from Friday to Sunday and Thursday to Tuesday when public holidays permitted ".

The testator suffered from tuberculosis and in 1943 ceased to work, an invalid pension having been granted to him. His wife received a wife's allowance granted in connection with that pension, and certain other social benefits which ceased upon the death of the testator, after which event she was granted a widow's pension of £2 2s. 6d. a week. This was her only source of income, and, apart from her furniture, she did not have any property. For many years the married son gave substantial assistance to his mother.

In an affidavit filed by her in connection with the widow's application for maintenance, the executrix claimed that she lent money to the testator, or, on his behalf, paid moneys, *inter alios*, to the War Service Homes Commission in reduction of the mortgage debt, and that at the date of his death he was indebted to her in the sum of £497 12s. 7d. The trial judge thought that she had a supportable debt to the extent of something between £200 and £300. He said " it may well be granted that if there were available in the estate the means of making further provision for the applicant, that should be done; that is to say, that Miss Leeder's claim, regarding her as a beneficiary simply and not as a creditor, should not be regarded as competing with the widow's claim. But since it does not appear that there is anything out of which further provision might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application ".

The dismissal of the application was affirmed by the Full Court of the Supreme Court (*Street* C.J., *Maxwell* J. and *Roper* C.J. in Eq.).

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That Court refused an application made under s. 84 of the *Equity Act* 1901 (N.S.W.) that further evidence, by way of affidavits of two valuers, be admitted on the hearing of the appeal to give a more detailed description of the land and cottage and to show that the value thereof as at that date was about £2,500.

From that decision the widow, by special leave, appealed to the High Court.

During the hearing of the appeal the Court was informed that after the dismissal of her appeal to the Full Court of the Supreme Court and before the special leave to appeal to the High Court had been granted, the widow had been evicted from the land and cottage, and that in the interval the executrix had expended moneys in repairs preparatory to selling the property.

G. Wallace K.C. (with him *C. B. Lynch*), for the appellant. An order should have been made in favour of the appellant. The onus is not upon an applicant to furnish evidence to support an argument by her on the question whether there is anything in the estate from which an allowance can be made or in respect of which an order might be made. The fact that the testator's estate was apparently insolvent was not a sufficient reason for refusing to make an order. The further evidence to show that the testator's estate was not in fact insolvent, should have been admitted. Upon the whole of the evidence an order should be made in favour of the appellant.

G. E. Barwick K.C. (with him *E. Lusher*), for the respondent. The decision of the trial judge was correct. He correctly exercised his discretion. He found as a fact that at least £200 was owing by the testator to the executrix. On that evidence, and the judge so found, the estate was insolvent. The Court will not make a speculative order. The principles regarding the examination of a discretion are as stated in *In re the Will of F. B. Gilbert* (1). The Full Court adopted the correct attitude on the question of the admissibility of further evidence. The appellant bound herself by her conduct at the trial. She herself led evidence that the value of the land and cottage was £1,000. The hearing was conducted on the basis that to depress the value was to her advantage, as the smaller the estate the more likely she would be granted an order for the whole estate; alternatively, if the value were inflated something might be granted to the respondent having regard to the financial assistance apart from the debts which

(1) (1946) 46 S.R. (N.S.W.) 318; 63 W.N. 176.

she, the respondent, claimed she had given to the testator in his lifetime. The appellant acted at the trial with full knowledge of her position. The questions of value and insolvency were referred to early at the hearing. The appellant elected to endeavour to cut down the amount owing to the respondent and thus, by disposing of the debts, show a surplus. The respondent also led evidence that the value of the land and cottage was £1,000. To that extent the parties were on common ground as to value. It was similar to an agreed value : see *Pursell* v. *Railway Executive* (1). There was not any surprise. The further evidence was always available. There was not any explanation for not having called it at the trial. This Court cannot admit the further evidence. The matter would have to be remitted to the Full Court to admit the further evidence. This would cause further expense to the estate.

G. Wallace K.C. in reply.

Cur. adv. vult.

The following written judgments were delivered :—

DIXON, WILLIAMS and KITTO JJ. This is an appeal from an order of the Full Supreme Court of New South Wales dismissing with costs an appeal from an order of *Sugerman* J. dismissing an application by the appellant under the provisions of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) for maintenance out of the estate of her deceased husband. He died on 28th July 1949, leaving a will by which he appointed the respondent his sole executrix and trustee. He bequeathed his furniture to the appellant except for three articles which he bequeathed to the respondent and devised and bequeathed his real estate and his residuary personal estate, subject to the payment of his just debts, funeral and testamentary expenses, to the respondent absolutely.

The appellant claims that the furniture bequeathed to her by the will, valued at about £45, belongs to her. If this furniture is left out of account the only asset in the estate of the deceased, is a cottage, No. 2 Woid's Avenue, Hurstville. The improved capital value given by the Valuer-General for probate purposes for this cottage as at the date of death was £1,000. The place was subject to a mortgage of £886 to the War Service Homes Commission. The net value of the estate was therefore the value of the equity of redemption and of the furniture bequeathed to the respondent or

(1) (1951) 1 All E.R. 536.

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in other words, about £160. At the date of death the cottage was subject to land sales control, but this control was relinquished in September 1949.

At the date of his death the deceased was 71 years and his widow 60 years of age. They had been married for over 35 years. There were three children of the marriage, a married son then aged 33, a married daughter aged 27 and an unmarried daughter aged 17 who lived at home and contributed to the upkeep. The appellant and the deceased had lived together during the whole of their married life. They had lived at 2 Woid's Avenue, Hurstville, since October 1928 when they had built it. The respondent, then aged 22 years, came to live with them in this cottage in 1931 and remained until January 1933. In the course of her stay she formed an association with the deceased. In January 1933 she moved into a home of her own at Bondi and thereafter the deceased used to spend his week-ends with her. He had been an electrical engineer, but became tubercular and did not work after 1943. After that date he received an invalid pension and the appellant as his wife received a wife's allowance and other social service benefits. The appellant also received substantial assistance from her son.

The respondent claims that she lent money to the deceased or expended moneys on his behalf from time to time and that he was indebted to her for £497 at the date of his death. *Sugerman* J. thought that her claim could be supported at least to an amount of between £200 and £300.

Apart from her furniture the appellant has no property. Her sole income is a widow's pension of £2 2s. 6d. a week.

The children have not made a claim under the Act. The widow is the sole claimant. It is clear that she has been left without adequate maintenance and that an order should be made in her favour if it is possible. *Sugerman* J. recognized this. He said: "It may well be granted that if there were available in the estate the means of making further provision for the applicant, that should be done; that is to say, that Miss Leeder's claim, regarding her as a beneficiary simply and not as a creditor, should not be regarded as competing with the widow's claim". But he proceeded to say "since it does not appear that there is anything out of which further provision might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application".

It will be seen from this passage that, although his Honour considered that the claim of the widow to any surplus should clearly be preferred, yet because he was not satisfied that there would be a surplus he declined to interfere, in the widow's interest, with the right which the will gave to Miss Leeder, who would thus take what surplus there might prove to be and, moreover, would in any event be left in a position to pay off the debts, take the cottage and turn the widow out.

His Honour's opinion would appear to be that an order should not be made in favour of a deserving applicant unless the court is satisfied that the order will be effective, or in other words, that there will be assets available to satisfy it and that no order should be made unless the likelihood of an estate proving insolvent is negatived. In the Full Court the Chief Justice, in whose judgment *Maxwell* J. and *Roper* C.J. in Eq. concurred, took the same view and was emphatic about it. He said " the estate is almost non-existent or a minus quantity, or at the best is so small that no effective order could be made, and indeed on that footing the proceedings ought never to have been brought ". Later he said " if on that evidence (that is the evidence before his Honour) the order would be in effect a nullity and would confer no benefit, then I do not think the court would be justified in making an order on the chance that it might, in some unforeseen circumstances, provide some benefit for the applicant ".

With all respect to these views they do not, in our opinion, represent the right approach to the administration of the *Testator's Family Maintenance and Guardianship of Infants Act*. If the court thinks that a claim is justified it should seek ways to give effect to it. It should only refuse such a claim where it is clear that it is impossible to make an effective order. In the present case the only established debt was the mortgage debt of £886. There were no death duties. The funeral and testamentary expenses were not likely to be heavy, even assuming that the testamentary expenses included the costs of an application under the *Testator's Family Maintenance and Guardianship of Infants Act*. The validity of the debt to the respondent was doubtful. It would appear that she had paid several instalments falling due under the mortgage from time to time, but the widow gave evidence that her furniture had been damaged by fire, that she had been paid £600 insurance moneys, that she had only expended £100 on renovating the furniture, and that she had handed over £500 to her husband to be applied in reduction of the mortgage debt, but the money had not been so applied. The respondent also produced some promissory

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notes, but they may be bound up with the illicit cohabitation between her and the deceased and their validity may be doubtful. Her debt is not one the existence and validity of which had been admitted, nor had it been proved in a court of law. It could not therefore be assumed. No tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man. The widow's application should not be refused because the result might be to disturb the arrangements which the deceased had made with a view to simplifying the discharge of his obligations to the respondent. She should be left to prove her debt if she can.

There was a paucity of evidence before *Sugerman* J. about the value of the cottage, but the application did not come on for hearing until July 1950 and he knew that the Valuer-General had made his valuation during land sales control and that it was likely to be on the low side. His Honour said " it is possible, and perhaps likely, that the cottage would now realize more than the probate valuation which was made while land sales control was still in force ". At least it appeared from the Stamp Affidavit that the land had a frontage of 98′ to Woid's Avenue and an average depth of 100′ and that the cottage was a double-fronted brick on stone cottage with a tiled roof comprising four rooms, kitchen, offices and verandah. It had been built in 1928. The price being no longer controlled, common experience would suggest the very high probability that such a cottage had a value considerably above £1,000 in the middle of 1950. If the cottage belonged to the widow, she could live in it herself, her unmarried daughter could live with her and contribute to the upkeep, and the widow could take at least one boarder. There is also evidence that the son gave her substantial assistance from time to time. It was not unlikely that the widow would be able to raise the necessary funds to pay the funeral and testamentary expenses and the respondent's debt, if any. The widow would then have the cottage subject to the mortgage which was repayable by easy instalments. Far from being unlikely it was more than likely that an order in favour of the widow would be effective and be the means of providing substantial maintenance. In our opinion the case was clearly one in which, on the evidence before him, his Honour should have made an order in her favour and in all the circumstances given her the whole estate.

Before the Full Court of the Supreme Court an application was made that the Court might under the power given by s. 84 of the *Equity Act* admit further evidence upon the appeal consisting of the affidavits of two valuers giving a more detailed description

of the cottage and stating that in fact it was worth about £2,500. If this evidence had any basis it meant that the ground upon which *Sugerman* J. had exercised his discretion was quite mistaken in fact and that a gross injustice had been done to the widow by which the respondent had profited. The Full Court refused, however, to admit the further evidence. In view of the opinion we have expressed already it is strictly unnecessary to discuss the attitude of the Full Supreme Court to the application to receive the further evidence. But the matter was argued before us and, as we think that in the circumstances of this case the evidence ought to have been received, we shall state our views. It is a matter which cannot be considered independently of the nature of the proceeding. Before dealing with it something must be said concerning the duty of an appellate court in dealing with an appeal in a proceeding under the *Testator's Family Maintenance and Guardianship of Infants Act*. That Act confers a discretionary jurisdiction, but it is one controlling substantive rights in property. It is a jurisdiction the exercise of which is determined by settled principles and its purpose is to ensure as far as may be that the needs of the testator's family are justly provided for.

There are two decisions of the Supreme Court of New South Wales upon the duty of the Supreme Court upon an appeal under the *Testator's Family Maintenance and Guardianship of Infants Act*. *In re Ryan* (1) and *In re the Will of Gilbert* (2). In the first case it was said (1) that the Full Court must exercise its own discretion and should not hesitate to reverse the decision of the judge of first instance if it is satisfied that the discretion has not been exercised in the way in which its own discretion would be exercised. We think that this statement goes too far because it implies or suggests that the Full Court should exercise its discretionary power afresh and in the same way as it would if it were sitting as a primary court. But we agree with *Jordan* C.J. in *In re the Will of Gilbert* (3) when he says that there is a material difference between the exercise of a discretion on a point of practice or procedure and the exercise of a discretion which determines substantive rights. Generally we agree with his views on the proper approach of an appellate court on an appeal from an order under the *Testator's Family Maintenance and Guardianship of Infants Act* (4). Normally an appellate court will not interfere

(1) (1923) 23 S.R. (N.S.W.) 354; 40 W.N. 57.
(2) (1946) 46 S.R. (N.S.W.) 318; 63 W.N. 176.
(3) (1946) 46 S.R. (N.S.W.), at p. 323; 63 W.N. 176, at p. 179.
(4) (1946) 46 S.R. (N.S.W.), at pp. 323, 324; 63 W.N. 176, at pp. 179, 180.

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with the exercise of the judge's discretion except on grounds of law, but it has an overriding duty to intervene to prevent a miscarriage of justice. In *Evans* v. *Bartlam* (1) Lord *Atkin* said "Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it".

The application to admit the fresh evidence in the present case was directed to showing that a grave injustice had been done and that it had been done because *Sugerman* J. had proceeded in the exercise of his discretion upon an assumption of fact which the evidence displaced so that, if the evidence was correct, his Honour's refusal to make an order produced a result opposed to that which he considered right. It was quite evident from his Honour's reasons that he would have made an order in favour of the appellant if it had been proved that the cottage was worth £2,500 or that there was any considerable surplus value. Since the Full Court was of opinion that it ought not to reverse the order of *Sugerman* J. on the evidence before him, it became necessary to admit the fresh evidence if the Full Court was to be placed in a position to remedy an injustice. There is no decision that an appellate court should confine itself to the evidence given below in discharging its powers and duty upon an appeal from an exercise of a substantive discretion. The Supreme Court relied on principles which have been laid down for guiding the exercise of the discretion of an appellate court whether or not to grant a new trial on the ground of fresh evidence. These principles were recently discussed by this Court in *Orr* v. *Holmes* (2) and *Bugg* v. *Day* (3). *Street* C.J. said: "again and again the courts have laid down principles with regard to the admissibility of fresh evidence, and where it has been discovered since the hearing, or there is some element of surprise, courts have acceded to applications to permit this evidence to be tendered."

But those principles are concerned with the justice of setting aside a verdict obtained after a regular trial between the contesting parties and sending the cause down for trial before another jury. A court of appeal invited to receive further evidence to enable it

(1) (1937) A.C. 473, at pp. 480, 481.
(2) (1948) 76 C.L.R. 632.
(3) (1949) 79 C.L.R. 442.

better to determine an appeal which is before it is exercising a different function. The proceeding before it is an appeal by way of rehearing. The purpose of the further evidence is to enable the court of appeal itself better to reach a final determination of that proceeding, not to send the case down for a new trial. The power to admit further evidence is statutory and the discretion which the statute confers cannot be reduced in scope or limited in the grounds of its exercise by artificial rules which the statute does not embody. Section 82 (1) of the *Equity Act* 1901-1947 provides that all appeals under the Act shall be by way of rehearing. Section 84 (1) provides that the Full Court shall have full discretionary power to receive further evidence upon questions of fact. Section 84 (3) provides that upon appeals from a decree or order upon the merits such further evidence shall be admitted on special grounds only and not without special leave. Appeals from the court in its equity jurisdiction cover a wide variety of cases. What are special grounds must depend upon the facts of each case. The same considerations of policy as gave rise to the common law rules governing the granting of new trials for the discovery of fresh evidence may sometimes, indeed often, provide valuable guides in the exercise of the discretion. The fact that a party had or but for lack of reasonable diligence might have had an opportunity of adducing the " further " evidence in the first instance may in some descriptions of case weigh against admitting the further evidence and prove a decisive consideration. See the observations in *Nash* v. *Rochford Rural Council* (1), which, however, are stated perhaps too widely and too strongly. *Sinanide* v. *La Maison Kosmeo* (2) provides an example of a case where it was thought proper to admit evidence simply because it appeared just to do so. As Viscount *Reading* C.J. said in *R.* v. *Robinson* (3), it is quite clear that the Court of Appeal would in civil matters have the power to admit fresh evidence which the court thought might throw material light upon the matter before it. His Lordship added that the jurisdiction must always be exercised with great care.

But, with all respect to the learned judges forming the Full Court, the considerations affecting the admission of further evidence for the purpose of retrying a disputed issue of fact in the Court of Appeal have little application to an appeal of the present nature and the kind of evidence tendered. On such an appeal the important consideration is whether the evidence if admitted would be likely

(1) (1917) 1 K.B. 384.
(2) (1928) 44 T.L.R. 574; 139 L.T. 365.
(3) (1917) 2 K.B. 108, at p. 110.

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materially to assist the court in the discharge of its duty. The Full Court had before it an appeal where it was quite clear that the appellant was entitled to an order unless it was impossible to make an effective order in her favour. The fresh evidence was directed to showing that an effective order could be made. It was essential that the Full Court should know the true value of the cottage if the statutory discretion was to be properly exercised. It was clear that an injustice had been done if the cottage was anything like the value of £2,500. In the present case special circumstances existed. A plain injustice had to be remedied. In our opinion the Full Court should have admitted the evidence. We cannot act on the affidavits because, if they had been admitted, the respondent must have been given an opportunity of rebutting them. It is sufficient to say that if we thought that the widow's rights depended upon the value of the cottage being in the vicinity of £2,500, we would remit the case to the Full Court for rehearing. But it is unnecessary to do so because, in our opinion, on the evidence before *Sugerman* J. he ought to have made an order.

During the hearing we were informed that the appellant had been evicted from the cottage after the appeal had been dismissed by the Supreme Court and before this Court granted special leave to appeal, and that in the interval the respondent had expended moneys in repairs preparatory to selling the cottage. It may be that the respondent may have some claim against the estate for these moneys. It is a matter into which we cannot go and there is, of course, no evidence before us as to what the facts are. But we shall reserve liberty to either party to apply to the Supreme Court.

As to costs, it was necessary for the appellant to apply to the Supreme Court for an order under the *Testator's Family Maintenance and Guardianship of Infants Act* if she was to benefit from the estate of the deceased and the Act required that notice of such application should be served on the respondent as the executrix of the will. The respondent should, we think, have her costs of the application before *Sugerman* J. as between solicitor and client out of the estate. But the costs of the appeal to the Supreme Court and this Court are in a different position. Under the *Testator's Family Maintenance &c. Rules* made on 13th December 1946 it is provided (rule 5) that the executor or administrator, as the case may be, when entering an appearance, shall file and serve an affidavit setting out, *inter alia*, the nature and amount of the estate. The fresh evidence made it appear that the respondent had failed properly to set out the amount of that estate and that failure had resulted in a

miscarriage of justice. But the respondent opposed the admission of the fresh evidence and it is clear that she was then acting in her capacity not as executrix but as beneficiary. She adopted the same attitude in this Court. She was contesting both appeals in her own interest. They should be dealt with as hostile litigation and she should be ordered to pay the costs of both appeals.

McTIERNAN J. This was an application under s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938. The circumstances were such as to entitle the appellant to make the application and to make it very proper for her to bring the application. The application was, however, dismissed by the learned primary judge. His Honour said nothing in derogation of the appellant's right to bring the application or its merits. These were indeed recognized by his Honour's order making her costs as between solicitor and client payable out of the estate.

The application was dismissed for reasons which do not imply either any demerit in the appellant or merit in the respondent entitling her to priority over the appellant. The reasons depend upon the findings which his Honour made as to the financial position of the estate. According to these findings the estate is bankrupt. Taking that view, his Honour considered that it would be futile to make an order providing for the appellant's maintenance and that no order should therefore be made. The Full Court agreed with this view. In my opinion it was not erroneous to decline to make an order if there were no property in the estate out of which the appellant could be provided with maintenance.

It appears that the question whether there would be any surplus after liabilities were met depends upon the value of the testator's house, in which he and the appellant resided. The evidence of the value of the house was that according to a valuation made for probate purposes by the Valuer-General as at 28th July 1949, the improved capital value of the house was £1,000. This evidence is contained in the appellant's affidavit made on 8th March 1950 and in an affidavit made on 3rd July 1950 by the executrix. The application was heard on 28th and 31st July 1950.

The Commonwealth Regulations under which the price at which the house could be lawfully sold, were in force on the date as at which the Valuer-General valued the house. This control had been ended before the application came on for hearing. The learned trial judge said:—"On probate values, the estate is clearly insolvent. It is possible, and perhaps likely, that the cottage

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would now realise more than the probate valuation, which was made while land sales control was still in force. How much more does not appear and there is no evidence that it would be so much as to leave a surplus". His Honour here took notice of a notorious fact that the consequence of terminating the control of the sale of land was that the market price of cottages rose, and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. The amount which it was necessary to add to the valuation to give a true valuation of the cottage was obviously a matter of the utmost importance. It governed the question whether there would be a surplus after the payment of debts. The appellant's right to an order depended upon that question: for, taking all the circumstances of the case, it would be just to order that she should be paid any surplus that exists, as a provision for her maintenance.

As the evidence stands, the valuation of the cottage at £1,000 is prima facie less than its true value. While the value of the cottage is not determined there cannot be a presumption that the estate is bankrupt. Taking all the circumstances of the case, justice requires that an order should be made unless there is proof that there is no surplus of assets to meet it. In the absence of any definite evidence that the order would be futile, I think it should be made.

In my opinion it was erroneous, while acting upon the presumption that the valuation of the cottage was less than its true value, to find that there would be no surplus in the estate after the payment of liabilities, in the absence of any evidence as to what was the true value of the house. In my opinion it would be right to order that any surplus that may be realized should be paid to the appellant by way of a provision for her maintenance.

This conclusion renders it unnecessary to consider the question whether the fresh evidence of value should be admitted.

I should allow the appeal with costs. The appellant should also have the costs of the appeal to the Full Court.

WEBB J. I agree that this appeal should be allowed.

Sugerman J. refrained from making an order in the appellant's favour, because if he did so it might disturb the arrangement by the testator. But this arrangement was founded in part on the testator's moral obligation to the respondent. With respect I do not think that his Honour should have refused for this reason to make an order in the appellant's favour. As against the appellant

the testator's moral obligation, if any, to the respondent, and the arrangement made by him to discharge it, should, in my opinion, have been disregarded. If it had been disregarded his Honour must, I think, in the proper exercise of his discretion, have made an order giving the appellant the whole of the estate for what it might be worth, leaving the respondent to enforce whatever rights she might have against the estate as a creditor. She was not, I think, entitled to be in any better position as against the appellant. The debts due to the respondent and other creditors might well prove so considerable as to leave nothing for the appellant, but there was no certainty of that, even on the evidence before his Honour.

It becomes unnecessary for me to decide the point as to the tendering of fresh evidence of the value of the cottage.

Appeal allowed with costs. Order of Full Supreme Court set aside. Order of Sugerman J. set aside except as to costs. Respondent to pay costs of appeal to Supreme Court. Order that provision be made for the appellant out of the estate of Herbert Ellis deceased by directing that in lieu of the beneficial dispositions of the will the executrix be directed to hold the whole of the real and personal estate on trust for the appellant absolutely. Otherwise usual order under s. 6 (3) *of the Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938.

Solicitor for the appellant, *R. W. Hawkins*, Public Solicitor.

Solicitors for the respondent, *T. C. Redmond & Daley*, Kogarah, by *Colquhoun & King*.

J. B.