The questions now left for determination are:—(1) Whether the regulation was valid; and, if not, (2) whether it was validated by s. 7 of the *Customs Act* 1951; and, if so, (3) whether such validation is to be disregarded for the purpose of these proceedings.

As to (1): s. 112 of the *Customs Act* 1901-1936 provided, so far as material, that

"(1) The Governor-General may, by regulation, prohibit the exportation of any goods . . .

(*b*) the exportation of which would, in his opinion, be harmful to the Commonwealth . . .

(2) The power contained in subsection (1) . . . shall extend to authorize the prohibition of the exportation of goods generally, or to any specified place, and either absolutely or so as to allow of the exportation of the goods subject to any condition or restriction".

By the *Customs* (*Prohibited Exports*) *Regulations* the exportation of goods specified in six schedules is prohibited except that in the Third Schedule there is a list of classes of goods the exportation of which is prohibited unless the conditions and restrictions specified in that schedule opposite the names or descriptions of such goods are complied with.

In S.R. 1946 No. 138 the Govenor-General, after reciting the provisions of s. 112 of the *Customs Acts* 1901-1936, states, omitting immaterial parts:—

"and whereas I am of opinion that the exportation of goods specified in this Regulation, except with the consent of the Minister of State for Trade and Customs, would be harmful to the Commonwealth;

Now therefore I . . . make the following regulation . . .

Amendment of the Customs (Prohibited Exports) Regulations.

The Third Schedule . . . is amended (b) by adding, at the end thereof the following items:—

65. Metals, non-ferrous, scrap	The intending exporter shall produce to the Collector of Customs a covering approval issued by the Department of Supply and Shipping".

It will be observed that in the recital reference is made to the Minister of State for Trade and Customs; whereas in the condition opposite item 65 the reference is to the Department of Supply and Shipping.

Now is the condition set out opposite item 65 a valid condition?

In my opinion it is not.

The goods, the exportation of which is, in the opinion of the Governor-General, harmful to the Commonwealth are the goods

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Webb J.

the exportation of which is not consented to by the Minister of Trade and Customs: not the exportation of all non-ferrous scrap metal, but only that to which the Minister does not consent. This determination is made by the Governor-General exclusively under s. 112 (1) (*b*) and is valid, although the Governor-General limits what is harmful by reference to the Minister's consent. This is not an exercise of the power given to the Governor-General by s. 112 (2) to permit exportation subject to conditions or restrictions. The Governor-General purports to exercise that further power later in the amendment to the regulations by adding to item 65, the so-called condition appearing opposite thereto. If this condition were imposed on the exercise of a power to prohibit the exportation of goods absolutely, and not with reference to the harmful nature of such exportation in the opinion of the Governor-General, the validity of the condition could not be questioned (*Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1)). Here, however, the class of goods the exportation of which is sought to be prohibited is itself determined by reference to a condition, that is to say, to the existence of the opinion of the Governor-General that their exportation would be harmful to the Commonwealth. Then the condition opposite item 65 is a condition imposed upon a condition. But this further condition cannot be held to be a proper condition and valid if it is inconsistent with the first condition, as I think it is if it leaves the Department of Supply and Shipping free to grant its covering approval for a reason which conflicts with the opinion of the Governor-General. Now I think that is what it does. To be valid it should have indicated the reason for which the covering approval might be granted, but assuming always that the exportation would otherwise be harmful to the Commonwealth.

I think then that the part of the regulation under which the prosecution was launched was invalid.

As to (2): s. 112 of the *Customs Act* 1901-1950 was repealed by s. 5 of the *Customs Act* 1951 and the following new section was enacted:—" (1) The Governor-General may, by regulation, prohibit the exportation of goods from Australia.

(2) The power conferred by the last preceding sub-section may be exercised—(*a*) by prohibiting the exportation of goods absolutely; (*b*) by prohibiting the exportation of goods to a specified place; or (*c*) by prohibiting the exportation of goods unless prescribed conditions or restrictions are complied with ".

Section 5 of the 1951 Act does not effect a repeal and re-enactment of s. 112 (1) (*b*). If it did the regulations made under the repealed

(1) (1938) 59 C.L.R. 170.

s. 112 (1) (*b*) would continue in force as the re-enactment would then be retrospective: *Re Ashcroft* ; *Ex parte Todd* (1). Then, if the Act of 1951 made no further provision, all regulations made under the repealed s. 112 (1) (*b*) would fall with the repeal, as they would no longer have any statutory support (*Watson* v. *Winch* (2); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (3) per *Dixon* J.). To meet this situation s. 7 of the Act of 1951 was enacted. It reads:— "All regulations made under the *Customs Act* 1901-1934, or under that Act as amended, prohibiting the exportation of goods, whether absolutely or subject to conditions or restrictions, shall be deemed to have been at all times, and to be, as valid and effectual as if made under the Principal Act as amended by this Act."

It will be observed that s. 7 does not refer to regulations purporting to be made under the *Customs Act*. However, if s. 7 were unnecessary as regards valid regulations made under the repealed s. 112 then it could properly be taken to refer to, and to be intended to validate, invalid regulations ; otherwise it would serve no purpose. But as s. 7 is necessary to keep in force valid regulations it cannot, in my opinion, properly be held that Parliament also took the extreme step of validating invalid regulations, and thereby of creating offences out of acts or omissions which, when they were done or omitted, were innocent, or at least were not unlawful.

As to (3): This question need not be decided by me because of the answers I have given to the first two questions. But I cannot see how in deciding what was the law when a conviction was recorded, we can, without disregarding the intention of Parliament, exclude from consideration an enactment made retrospective to a date before the conviction, and which would have warranted the conviction. The limitation of an appeal to a determination on the materials before the Court below and on the state of the law when that Court's decision was given does not, in my opinion, justify such exclusion.

I would make the order absolute.

Appeal dismissed and Order Nisi discharged with costs.

Solicitors for the appellant, *Wm. Lieberman & Tobias.*

Solicitor for the respondents, *D. D. Bell,* Crown Solicitor for the Commonwealth.

J. B.

(1) (1887) 19 Q.B.D. 186.
(2) (1916) 1 K.B. 688.
(3) (1931) 46 C.L.R., at p. 102.

[PRIVY COUNCIL.]

LEEDER . . . . . APPELLANT;

AND

ELLIS . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.
1952
July 1;
Oct. 8.
Lords Porter, Oaksey, Tucker, Asquith of Bishopstone and Cohen.

Testator's Family Maintenance—Claim—Order—Appeal—Further evidence—Admittance by appellate court—Principles for guidance of court—Matter of opinion—Contrary views held by trial judge and appellate court—Justification—Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 (*N.S.W.*) (*No.* 41 *of* 1916—*No.* 30 *of* 1938), s. 3—*Equity Act* 1901-1947 (*N.S.W.*) (*No.* 24 *of* 1901—*No.* 41 *of* 1947), *s.* 84.

Section 84 of the *Equity Act* 1901-1947 (N.S.W.), so far as relevant, is as follows:—"(1) The Full Court shall have all the powers and duties as to amendment and otherwise of the Judge, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before the Master or a commissioner . . . (3) Upon appeals from a decree or order upon the merits at the trial or hearing of any suit or proceeding, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave."

Held, that in deciding whether fresh evidence should be admitted on the hearing of an appeal from an order made by a judge without a jury, the principles laid down for the guidance of an appellate court when considering a similar application in order to secure a re-trial of a case before a jury are of general application though the circumstances which it may be relevant to take into account may be different.

If in the case of an application for maintenance made under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) it is shown that the estate of the testator is insolvent the Court should refuse to make an order in favour of the applicant.

Decision of the High Court; *Ellis* v. *Leeder* (1951) 82 C.L.R. 645, reversed and order of the Full Court of the Supreme Court of New South Wales restored.

APPEAL from the High Court to the Privy Council.

This was an appeal by special leave by the respondent, Edie Maude Leeder, from the judgment of the Full Court of the High Court in *Ellis* v. *Leeder* (1).

G. E. Barwick Q.C. and *Peter Foster*, for the appellant.

Sir *Frank Soskice* Q.C. and *J. G. Le Quesne*, for the respondent.

Their Lordships took time to consider the advice they would tender to Her Majesty.

LORD COHEN delivered the judgment of their Lordships as follows :—

This appeal raises a point under the New South Wales statute "*Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938" (hereinafter referred to as "the Act").

Section 3 (1) of the Act so far as material is in the following terms :—"If any person (hereinafter called 'the Testator') dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them."

Section 4 (1) enacts that every provision made under the Act shall, subject to the Act, operate and take effect as if the same had been made by a codicil to the will of the deceased. Section 5 (1) provides that the court may not entertain an application by a party claiming the benefit of the Act unless in the case of a party dying after the passing of the Act the application is made within twelve months from the date of the grant or re-sealing in New South Wales of probate of the will. Section 6 (1) requires that an order making any provision under the Act shall *inter alia* specify the amount and nature of such provision and the part or parts of the estate

(1) (1951) 82 C.L.R. 645.

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out of which such provision shall be made. Section 6 (4) enables the court on the application of the executor or of a person beneficially interested in the estate to rescind or alter any order making any provision under the Act.

Their Lordships do not find it necessary to refer to any other provision of the Act but would observe that neither s. 6 (4) nor any other provision in the Act enables the court to re-open the matter at the instance of an applicant under the Act whose application has been rejected.

The testator Herbert Ellis, the terms of whose will gave rise to these proceedings, died on 28th July, 1949. He had been married once only and left him surviving his widow the respondent and three children—a son aged 33 and married, a married daughter and a younger daughter aged 17 who lived with her parents.

By his will dated 27th June, 1947, the testator appointed the appellant executrix and trustee of his will; he bequeathed to her two specified articles of furniture and to his widow the rest of his furniture; he left the whole of his residuary estate to the appellant absolutely. Probate was granted to the appellant on 15th February, 1950.

The estate of the testator consisted only of the furniture (which was claimed by the respondent to be her own property) and a cottage which was the matrimonial home, was valued as at the date of the testator's death by the Valuer-General at £1,000 and was subject to a mortgage on which there was owing about £887.

The appellant had lived with the testator and his family in the matrimonial home from some time in the year 1931 until January 1933 when she left but thereafter the testator spent almost every weekend with the appellant from Saturday morning until Sunday evening. The rest of his time he lived with his wife. He had been an invalid pensioner from 1943 until his death.

Those being the circumstances it is not surprising that on 8th March 1950 the respondent took out a summons under the Act asking that provision be made for her maintenance, education or advancement.

In her affidavit in support of that summons she said that she had no property from which she derived income and that her only income was a widow's pension of £1 17s. 0d. a week and any contributions her unmarried daughter or her son might choose to make. She referred to the Valuer-General's valuation of the cottage at £1,000 and made her claim to all the furniture in the house. In the course of her affidavit she said that she had received substantial support from her son during her husband's lifetime after her husband

became an invalid. She did not specify the nature of the support but their Lordships think that the context indicates that the support took the form of periodical payments. The son who was called did not give any evidence to suggest that he was willing to provide any substantial capital sum.

Rule 5 of the rules made under the Act required the appellant as executrix when entering an appearance to the summons to file an affidavit setting out the nature and amount of the estate and giving such information as might be available to her as to the family of the testator and the persons beneficially entitled to the estate. In compliance with the rule the appellant filed an affidavit in which *inter alia* she valued the cottage at £1,000 " as per the Valuer-General's certificate " and stated that the sum of £886 13s. 4d. was owing under the mortgage thereon. She also claimed that the testator was indebted to her in sums totalling £497 13s. 7d. These debts had not been disclosed in the affidavit lodged with the application for administration, but the trial judge accepted as satisfactory the explanation of the omission which she gave in cross-examination. The appellant filed a further affidavit dealing with the ownership of the furniture and with her relationship with the testator. Their Lordships do not find it necessary to go into these matters in detail.

There is one other matter of fact to which reference must be made. At the date of the testator's death the cottage was subject to the *Land Sales Control Act*, 1948 (N.S.W.), which in effect restricted its value to what would have been a fair and reasonable price for it on 10th February, 1942. This Act ceased to apply to the cottage on 1st September, 1949.

The case came before *Sugerman* J. (who their Lordships were informed happened to be the judge in New South Wales appointed to deal with land valuation matters), on 28th July, 1950. The respondent and her son were called and so was the appellant. The cross-examination of the appellant was directed mainly to the validity of the debts claimed by the appellant to be due from the estate but it also emerged from the cross-examination that the financial position of the appellant was far more secure than that of the respondent.

In these circumstances it is not surprising that the trial judge expressed the view which Mr. *Barwick* for the appellant did not seek to contest that if there were available in the estate the means of making further provision for the respondent, that should be done. Nonetheless the trial judge dismissed the application.

Dealing with the question of the debts claimed by the appellant to be due to her he said :—" Even if Miss Leeder's claim is not

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supportable for its full amount, it appears to be supportable as to a substantial part of it, at least an amount of somewhere between £200 and £300." He then asked himself the question whether there was likely to be any surplus out of which provision for the respondent could be made and answered the question in the negative saying :—" On probate values, the estate is clearly insolvent. It is possible, and perhaps likely, that the cottage 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. Indeed, that is not how the applicant's case has been conducted, and her counsel has said that the interest in the cottage would not be worth much at the present day. The applicant has sought rather to cut down Miss Leeder's claim."

Later on in his judgment he said :—" 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."

It was argued that the insolvency of the estate was not the real ground of his decision and that he was influenced largely by the " moral " considerations indicated in the passage of his judgment last cited. It was suggested that he ought not to have regard to these considerations. Their Lordships think that having regard to the wide words of the section such matters are not excluded from the judge's consideration. Their weight is another question, but in this case their Lordships think it is reasonably clear from the judgment of *Sugerman* J. that the basis of his judgment was his finding that the estate was insolvent. This conclusion is supported by the fact that dealing with a further argument advanced by counsel after he had concluded his judgment he said :—" The estate is insolvent and it would be nothing more than a futility to give it to the widow."

From this decision the respondent appealed to the Full Court of New South Wales. On this appeal she sought to adduce further evidence consisting of the affidavits of two qualified valuers one of whom swore that the house was worth £2,500 with vacant possession and £1,750 without it while the other estimated the then market value of the house as £2,450.

The application to adduce fresh evidence fell within s. 84 of the *Equity Act* 1901-1947 (N.S.W.) which corresponds very closely with

O. LVIII. r. 4 of *The Rules of the Supreme Court* 1883 (Imp.). Under that section the order appealed from, being an order upon the merits at the hearing, the fresh evidence could only be admitted on special grounds and with special leave.

When the matter came before the Full Court, *Street* C.J., with whom the other members of the court agreed, dealt first with the question of fresh evidence and decided that it ought not to be received. He then dealt with the matter apart from the evidence and came to the conclusion that the appeal failed saying :—" The application has to be determined on the position as presented to the court at the time of the hearing, when undoubtedly future prospects should be taken into account, if there were evidence justifying a conclusion that the estate was likely to appreciate or depreciate in the future. If there were no evidence to that effect, then the matter must be dealt with on the evidence as it then stands, and if on that evidence 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."

The respondent then appealed to the High Court of Australia who allowed her appeal on 3rd August, 1951. All the judges were of opinion that the respondent was entitled to succeed on the evidence before the trial judge bearing in mind that the *Land Sales Control Act*, 1948, no longer applied to the cottage. *Dixon*, *Williams* and *Kitto* JJ. also considered that the fresh evidence should have been admitted. *McTiernan* and *Webb* JJ., expressed no opinion on this point. Accordingly the High Court allowed the appeal and awarded the respondent the whole estate. They ordered the appellant to pay the respondent's costs in the Full Court and in the High Court. From this order the appellant by special leave granted on 14th November 1951, appealed to this Board.

Their Lordships find themselves in disagreement with the High Court of Australia on both points. Dealing first with the question of the admission of fresh evidence the conclusion of the majority was based on their view that the principles laid down for the guidance of an appellate court when considering an application for leave to adduce further evidence in order to secure a re-trial of a case before a jury have no application to an appeal of the present nature. Their Lordships, however, think that the principles are of general application though the circumstances which it may be relevant to take into account may be different. Sir *Frank Soskice* sought to support the view of the High Court by pointing out that in *Nash* v.

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Rochford Rural District Council (1) the object of the application to call fresh evidence was to secure a new trial and that the observations of Lord *Chelmsford* in *Shedden* v. *Patrick* (2) which were cited by *Scrutton* L.J., in the first-mentioned case were also directed to such applications. But their Lordships do not think that *Scrutton* L.J. or Lord *Chelmsford* would have expressed a different opinion had the object of the application been to adduce further evidence on an appeal from a judge sitting without a jury. In this connection it is to be observed that in *Sanders* v. *Sanders* (3), *Jessel* M.R. said :— " The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the court below. That he might have shaped his case better in the court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court." That was a case of an appeal from *Malins* V.C. sitting without a jury and it supports the conclusion that the principles to which their Lordships have referred are of general application. See also per *Cozens-Hardy* M.R., in *Nash* v. *Rochford Rural District Council* (4).

Sir *Frank Soskice* relied on another passage from the judgment of *Jessel* M.R., where he said :—" Moreover, speaking for myself, I think that when an application is made for an indulgence, the moral elements of the case ought to be taken into consideration. I am more inclined to grant it when what appears to be a substantially good and honest case is in danger of being defeated on technical grounds " (5). It may well be that had the Full Court decided to admit the evidence which the respondent sought to adduce the High Court would not have felt bound to reverse their decision, but the matter being one within the discretion of the Full Court, their Lordships consider that the High Court should not have interfered with the exercise of that discretion except in accordance with the well-recognized principles applicable in such cases.

Sir *Frank Soskice* relied on some observations of Lords *Atkin* and *Wright* in *Evans* v. *Bartlam* (6). Lord *Atkin* said :—" 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 " (7).

(1) (1917) 1 K.B. 384.
(2) (1869) L.R. 1 H.L. (Sc. & Div. App.) 470, at p. 545.
(3) (1881) 19 Ch. D. 373, at p. 380.
(4) (1917) 1 K.B., at pp. 390, 391.
(5) (1881) 19 Ch. D., at p. 381.
(6) (1937) A.C. 473.
(7) (1937) A.C., at pp. 480, 481.

Lord *Wright* said :—" It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order " (1).

Sir *Frank Soskice* contended that applying the principles thus laid down injustice would be done unless the additional evidence was admitted. He argued that the order of *Sugerman* J. left the respondent without redress whereas if an order in her favour had been made it could not have prejudiced the appellant if in fact the estate proved to be insolvent. He relied also on r. 5 of the rules made in pursuance of the Act which imposed on the appellant the duty of making an affidavit as to the nature and amount of the estate. It is plain, however, from the judgment of *Street* C.J. at pp. 39 and 40 of the record that both these points were present to the minds of the Full Court when that court reached its decision. Moreover the evidence which it was sought to adduce was not as to a matter of fact but as to a matter of opinion which it would have been open to the appellant to challenge and it is impossible to say that the evidence if admitted would necessarily have been conclusive of the matter or at least have an important influence on the result. See as to the importance of this consideration *R.* v. *Copestake* (2). Looking at the matter as a whole their Lordships do not think that the facts of this case would have justified the High Court of Australia interfering with the exercise by the Full Court of New South Wales of the discretion vested in it under s. 84 of the *Equity Act*. Accordingly their Lordships would not be prepared to send the case back to the Full Court of New South Wales to hear further evidence. The question therefore is whether on the facts as established before *Sugerman* J. the High Court was justified in reversing his decision confirmed as it was by the Full Court. Those facts stated shortly were as follows :—

1. The only relevant asset was the equity of redemption of the house.

2. That house was valued as at the testator's death by the Valuer-General at £1,000.

(1) (1937) A.C., at p. 486.

(2) (1927) 1 K.B. 468, at p. 477.