Cons. 17 NSWLR 2.

[HIGH COURT OF AUSTRALIA.]

DELACOUR . . . . . APPELLANT,
RESPONDENT,

AND

WADDINGTON . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 4, 7;

MELBOURNE, *Oct.* 5.

Dixon C.J., Kitto and Taylor JJ.

Testator's Family Maintenance—Conduct precluding relief—Application by widow—Applicant living apart from testator—Applicant debarred from order for maintenance while testator alive—Relevance of principles relating to maintenance of deserted wives—Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 (*N.S.W.*) (*No.* 41 *of* 1916—*No.* 30 *of* 1938), *s.* 3.

The question whether an order may, or should, be made under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) in favour of a widow, whom the evidence shows to have been living apart from her husband, cannot be concluded merely by considering whether the applicant would have been entitled, in her husband's lifetime, to an order for maintenance under the *Deserted Wives and Children Act* 1901-1952 (N.S.W.).

The conduct of an applicant should not be regarded as disentitling her to an order unless it has been of such a character as to induce a court to hold that, in the circumstances, there was no moral obligation upon the deceased to make any testamentary provision for her.

Re Parr (1929) 30 S.R. (N.S.W.) 10; 46 W.N. 207, not followed.

Decision of the Supreme Court of New South Wales (*Myers* A.J.) affirmed.

Refd. 56 S.R. (NSW) 184.

APPEAL from the Supreme Court of New South Wales.

The respondent to this appeal was married to Rudolph Victor Waddington (hereinafter called the testator) on 7th April 1942. Prior to the marriage the testator was a widower, and the respondent had been divorced by her first husband. Neither of the parties had any natural children by their previous marriages, nor were there any children of their marriage, but the respondent had an

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adopted daughter who, at the time of the marriage, was attending school.

The testator owned a house at Warrawee which was occupied by a tenant, and the respondent owned a house at Mosman. The parties lived together in the respondent's house for some three months, when, according to the respondent's affidavit, the testator suddenly announced that he was leaving. He removed his possessions, including some furniture, and subsequently rented a house in Roseville, where he invited the respondent to join him. The respondent had already written asking him to return to her. She took the view that his request was not genuine, his object being to create legal justification for refusing to maintain her. After some correspondence between them the testator returned to Mosman in June 1943. He remained with the respondent until October 1944, when he again announced his intention of leaving, and did so.

The respondent, in an affidavit, said that the testator, before his second departure, continually pressed her to move from Mosman. She declared that she had a great affection for the house, which had been left to her by her mother, and which was comfortable, and convenient to her daughter's school. On 26th September, according to the respondent's affidavit, the testator wrote out two letters, which were signed by the respondent and the testator respectively, and were in the following terms :—

" Dear Ru :

As I feel that we could live more happily apart than we are at present living together, I am prepared to if you will make me an allowance of three pounds (£3 0s. 0d.) per week, payable each month (thirteen pounds) £13, which covers the rate of £3 per week, to do so and make no further claim upon you in any way.

Ruth I. Waddington."

" Dear Ruth :

In reply to your letter of this day which I acknowledge, and confirm to agree to the contents thereof.

Ru. V. Waddington."

On 11th April 1946, the testator informed the respondent that he would " shortly be residing at (his) Warrawee residence and . . . would be pleased if (she) would rejoin (him) there ". The respondent replied that " whilst thanking you, I cannot see at the present time how I would be any happier or contented by doing so ". The testator wrote again on 2nd December 1946, making a similar request, which was again refused. Subsequently the respondent refused to meet him in order to discuss the question of her living

with him at Warrawee, and on 6th January 1947, the testator wrote :—

" Dear Ruth :

Replying to your letter of the 17th Decr. I have made every endeavour for you to come and live with me at my home but as you apparently wish to lead only your own life in your own way and at your own home, without any consideration for me in any way I fail to see why I should continue to contribute towards your keep, as I have been doing for the past two years or more. I am enclosing my cheque for this month and will then cease to make further remittances to you."

No further payments were made by the testator to the respondent.

The testator made his will on 15th March 1946. After bequeathing certain pecuniary legacies, he bequeathed to the respondent during her life and as long as she did not remarry an annuity of £156. He directed an appropriation of investments of an amount sufficient at the date of appropriation to answer out of the income thereof the whole of the annuity. The income was declared to be the primary fund for answering the annuity, and the capital the secondary fund. The residuary estate was absolved from any liability to provide for the annuity. The residue of his estate was directed to be converted and, after payment of debts, &c., it was to be divided into two equal parts. The first of such parts was directed to be paid to or held in trust for his brother, sisters, and their children. The other part was directed to be paid to or held in trust for six persons and their children. A codicil, dated 25th March 1949, was executed, but its provisions are not relevant to this report.

The testator died on 4th October 1951, and his estate was assessed for duty on a value of £41,525 0s. 6d.

The respondent filed an originating summons on 1st May 1952, claiming that she was left without adequate provision for her proper maintenance or advancement, and asking for such provision to be made. The executrix of the testator's will contested the application.

The summons was heard by *Myers* A.J., who delivered judgment on 29th May 1953, and ordered that the amount of the annuity bequeathed to the respondent by the will be increased to £416.

From this decision the executrix appealed to the High Court.

N. H. Bowen Q.C. (with him *P. S. Smyth-King*), for the appellant. The respondent failed to show that proper provision was not made for her by the will. Alternatively, she was guilty of conduct disentitling her to relief. It is further submitted that the order was

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excessive. If the agreement between the parties evidenced by the exchange of letters of 26th September 1944, had continued to be observed, this case would have been on all fours with *In re Phillips* (1). Here, the wife repudiated all the obligations of the marriage, and, in these circumstances, it is submitted that she was disentitled to relief: *Re Parr* (2). The question is whether the latter case is distinguishable, and, if not, whether it was correctly decided. It is submitted that *Harvey* C.J. in Eq. in *Re Parr* (2) intended to lay down a principle, which he then proceeded to apply to the facts. The distinction suggested by *Myers* A.J., that the remarks made by *Harvey* C.J. in Eq. in applying the principle show a different basis for the decision, cannot be supported. It is not contended that the principle stated in *Re Parr* (2) is applicable simply as a rule of thumb. It is clear that a wide discretion is given to the court in applications under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.). However, where there has been a repudiation of the marriage, and a determination on the part of the wife to live as a *feme sole*, the principle stated by *Harvey* C.J. in Eq. is properly applicable. The question whether proper maintenance has been provided is, initially, a question of jurisdiction. [He referred to *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (3).] Whether "proper" maintenance has been provided depends on the circumstances. A widow may have no means, and yet be disentitled to an order—as a matter of jurisdiction, not of conduct: *Re Parr* (2). *Re Vines* (4) is distinguishable from *Re Parr* (2) on its facts. If it is held that the court has jurisdiction, the widow having been left without adequate provision for her proper maintenance, then it is submitted that she is not entitled to an order, because of her conduct. She deliberately chose to live apart from the testator, and to live her own life. The onus on the executrix is discharged by proof of deliberate separation by the applicant.

J. D. Evans, for the respondent. It is submitted that this Court will not review the exercise of the trial judge's discretion: *Re Ford*; *Ford* v. *Trustees Executors & Agency Co. Ltd.* (5); *Lovell* v. *Lovell* (6); *Sampson* v. *Sampson* (7). In particular, the Court will not review the amount fixed by the order. *In re Phillips* (1) and

(1) (1929) 29 S.R. (N.S.W.) 191; 46 W.N. 22.
(2) (1929) 30 S.R. (N.S.W.) 10; 46 W.N. 207.
(3) (1938) A.C. 463; 38 S.R. (N.S.W.) 176; 55 W.N. 42.
(4) (1939) Q.S.R. 68.
(5) (1952) A.L.R. 198.
(6) (1950) 81 C.L.R. 513.
(7) (1945) 70 C.L.R. 576, at p. 586.

Re Parr (1) must be read in the light of their facts. They do not support the wide propositions for which they were relied upon by the appellant. *In re Phillips* (2) is contrary to authority in other States and in the High Court: *Sampson* v. *Sampson* (3); *In re Gerloff* (4); *Cook* v. *Webb* (5); *In the Will of Birch* (6); *Re Wilton* (7); *Re Cairns* (8); *Re Dalton* (9); *Re Harris* (10). *Re Parr* (1) was correctly distinguished by the trial judge. The correct approach is adopted in *Re Vines* (11): see also *Re Bradbury* (12). *Re Parr* (1) is distinguishable on the facts. There the wife's separation was "deliberate and complete", and was initially her own act. On the facts in evidence in this case it is impossible to say who caused the separation between the parties. Further, the broad statement in *Re Parr* (13) is wrong in principle. The approach of *Myers* A.J., in the court below, is to be preferred. The testator recognized the existence of a moral obligation by providing his widow with £3 per week under the will, which was confirmed by the codicil after the correspondence relied upon as establishing a complete and final separation. He provided an amount insufficient in relation to her needs. This Court will not interfere with the discretion of the trial judge on the question of *quantum*: see *Sampson* v. *Sampson* (3).

N. H. Bowen Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:— Oct. 5.

The appellant in this appeal is the executrix of the will of Rudolph Victor Waddington deceased, and she appeals from an order of the Supreme Court of New South Wales made pursuant to the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) whereby an annuity of £156 per annum bequeathed by the will of the deceased to the respondent, his widow, was increased to £416 per annum.

The deceased died on 4th October 1951. By his will, made on 15th March 1946, he bequeathed a number of pecuniary legacies and thereafter bequeathed to his wife the abovementioned annuity. Clause 3 of the will directed an appropriation of investments to

(1) (1929) 30 S.R. (N.S.W.) 10; 46 W.N. 207.
(2) (1929) 29 S.R. (N.S.W.) 191; 46 W.N. 22.
(3) (1945) 70 C.L.R. 576.
(4) (1933) S.A.S.R. 351.
(5) (1918) 37 N.Z.L.R. 664.
(6) (1920) 42 A.L.T. 39.
(7) (1942) N.Z.G.L.R. 246.
(8) (1950) N.Z.G.L.R. 409.
(9) (1952) N.Z.G.L.R. 230.
(10) (1936) S.A.S.R. 497.
(11) (1939) Q.S.R. 68.
(12) (1947) Q.S.R. 171.
(13) (1929) 30 S.R. (N.S.W.), at p. 14; 46 W.N., at p. 209.

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secure the annuity and declared that the income of the appropriated investments should be the primary fund for answering the same and that the capital of such investments should form the secondary fund for that purpose in the event of the income proving insufficient. After the making of the necessary appropriation the residuary estate of the deceased was, pursuant to the will, no longer liable to provide for the annuity, which was to continue until the death or remarriage of his wife whichever event should first happen. Thereafter the deceased devised all his real estate and bequeathed the residue of his personal estate to his trustees upon trust to convert the same, and directed that out of the moneys to arise from such conversion his trustees should pay or provide for his debts, funeral and testamentary expenses and that, subject thereto, his trustees should stand possessed of the residue of the said moneys upon trust to divide the same into two equal parts or shares, and thereafter to hold the same upon the trusts declared by cll. 6 and 7 of his will. By cl. 6 he directed that specified percentages of one of such parts or shares should be paid respectively to his brother Joseph Robert Waddington and his two sisters Norma Sidonia Parrington and Beryl Marguerite Schace. The payments so directed amounted, in all, to eighty-four per cent of the first part or share, and as to the remaining sixteen per cent thereof he directed his trustees to hold the same upon trust for such of them the children of his said brother and sisters as should survive him and attain the age of twenty-one years. As to the other of the said parts or shares he directed payments of certain specified percentages respectively to each of six named persons. These payments amounted to sixty-eight per cent of this part or share. The remaining thirty-two per cent he directed should be held upon trust for such of them the children of the six said named persons as should survive him and attain the age of twenty-one years. The value of the estate remaining after payment of debts and testamentary expenses, death and estate duties and the pecuniary legacies directed by the will to be paid was, it was agreed, approximately £25,000.

The respondent, who at the time of the making of this application, was sixty-one years of age, was married to the deceased on 7th April 1942. At that time the respondent, who had been previously married, lived in a home of her own at Mosman and after the marriage she and the deceased made their home there. But within three months the deceased suddenly announced his intention of leaving the house. This intention he immediately carried into effect by removing both himself and his belongings from the home. From then on for several months the respondent, on a number of

occasions, endeavoured to persuade him to return to the home, but it was not until June 1943 that she was successful. In that month the deceased returned to the marital home but sixteen months later he repeated his former performance and made his final exit from the home. Some four years later the deceased obtained possession of a house at Warrawee which he owned and shortly thereafter he requested the respondent to join him there. In the meantime the deceased had remained away from the respondent making to her during the earlier portion of the separation an allowance of £2 10s. per week. But in September 1944 the deceased prepared two letters to one of which he procured his wife's signature and the other of which he signed himself. These letters were in the following terms :

" Dear Ru :

As I feel that we could live more happily apart than we are at present living together, I am prepared to if you will make me an allowance of three pounds (£3 0s. 0d.) per week, payable each month (thirteen pounds) £13, which covers the rate of £3 per week, to do so and make no further claim upon you in any way.

Ruth I. Waddington ".

" Dear Ruth :

In reply to your letter of this day which I acknowledge, and confirm to agree to the contents thereof.

Ru. V. Waddington ".

Both of these letters were apparently signed in the respondent's home in the circumstances deposed to by her and, after signature, they were retained by the deceased. From then on until January 1947 an allowance of £3 per week was paid monthly to the respondent, but after the deceased obtained possession of his house at Warrawee he wrote to her on 2nd December 1946, in the following terms : " Herewith I am enclosing my cheque for £13 0s. 0d. As I previously advised you of my intention to take up residence at my home I now have the place comfortably furnished and I want you to rejoin me there, as soon as you can conveniently do so. The place has recently been renovated outside as well as inside, and is looking rather nice, in addition I am also replanning the grounds which should much improve the appearance of the home and I think, make it generally inducive to happiness. We now have the opportunity of starting afresh, and there is no reason why we should not live happily together if we make it our intention to do so. Now Ruth I look forward to your early return and will be glad to know when you intend to come ".

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To this letter the respondent replied: "I received your letter dated 2nd Dec. with cheque enclosed. Whilst thanking you for your offer and after giving it due consideration, I do not feel that I would be any happier trying to measure up to what would be expected of me nor do I think that I would be any better in health, nor Frances either and she is still my responsibility. All my life I have found out that a contented atmosphere was necessary even if it entails more work and responsibility and after having to alter my plan of life so many times during the last twelve years or so, I feel it would be fairer for us all if I did not accept your offer.

Re the Telephone Dept.: I have (*sic*) a conversation on the phone with the Officer in Charge a few days ago re the £5 0s. 0d. necessary for a change of name in the Book. I told him that I was not able to pay it at present and if the money is not paid before Dec. 15th it may be too late for the next issue of the Phone Book so it will have to stand over (the alteration I mean) until the money is paid. Just at present apart from Xmas altogether I have not the money to spare for something which I didn't know anything about and had not been informed of by the Dept. before. I don't know whether you were aware of it or not.

Please excuse haste but I have just been called on the phone to fix up a small matter for a sick friend and as I am going past the P. Office to obtain my Ration Book I wanted to post this for Sunday's mail".

The outcome of the short correspondence which succeeded these letters was that on 6th January 1947, the deceased wrote to the respondent enclosing his cheque for the current month's allowance and said: "I have made every endeavour for you to come and live with me at my home but as you apparently wish to lead only your own life in your own way and at your own home, without any consideration for me in any way I fail to see why I should continue to contribute towards your keep, as I have been doing for the past two years or more. I am enclosing my cheque for this month and will then cease to make further remittances to you". From that point of time the deceased and the appellant continued to remain apart and no contribution was made by him to the respondent's support.

In these circumstances the appellant both before this Court and the Supreme Court contended that the respondent was not entitled to any relief under the Act, it being claimed that the case was covered by the principles upon which, it was contended, *Re Parr* (1) was decided. In that case the court was concerned

(1) (1929) 30 S.R. (N.S.W.) 10; 46 W.N. 207.

with an application made by a wife, who after living with her husband for some ten years after their marriage, left him and remained away during the short period which intervened before his death in 1928. In considering whether an order should be made, *Harvey* C.J. in Eq. said: "Had the question come up for determination in a magistrate's court on an application for maintenance, or in the Divorce Court in a suit for restitution of conjugal rights, on the facts disclosed at the present time, I think there is very little doubt that the husband would have come off victorious in either jurisdiction—that the magistrate's court would have held that the wife had deliberately separated herself from her husband and was therefore not entitled to any maintenance and that the Divorce Court would have held that her separation from him was quite unjustifiable and would have ordered her to return to him within the usual period. If this be the true view of the facts it seems to me that I ought to apply the same principles in determining the question whether the husband at his death, in view of all the circumstances, left her insufficiently provided for or maintained so as to entitle her to maintenance under the Testator's Family Maintenance and Guardianship of Infants Act, 1916. In my opinion that question should be answered in the negative—that he did not leave her without sufficient maintenance in view of all the circumstances of the case. In my opinion the wife deliberately cut herself off from her husband and left him to his own devices; she went her way and made it clear to him that she would not look to him in the future for anything and that he was not to look to her in the future for anything. I can quite understand that if the wife could have anticipated that within one year of her separation her husband was likely to die, her choice would probably have been the other way. Under the circumstances it appears to me, although it is unfortunate that this woman in her state of health is left without the maintenance which she might originally have contemplated as the wife of the testator who has left an estate which was valued for probate purposes at about £5,000 but which on present values is worth about £4,000, she is confined to the half-share of the business and the assets which the testator by his agreement had given her, and she cannot look for any further maintenance from his estate" (1).

The appellant relied upon the earlier paragraphs of this passage as establishing, as a matter of principle, that the Act does not authorize the making of an order in favour of an applicant wife where prior to her husband's death she was living apart from him,

(1) (1929) 30 S.R. (N.S.W.), at pp. 13-14; 47 W.N., at p. 209.

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and the circumstances were such that she would have been unable to obtain an order for maintenance under the provisions of the *Deserted Wives and Children Act* 1901-1952 (N.S.W.) and, accordingly, it was said, the respondent in this case was not entitled to any relief. For our part we are unable to see any real resemblance between the issues which arise in an application by a wife against her husband for an order for maintenance under the *Deserted Wives and Children Act* and an application by a wife, pursuant to the *Testator's Family Maintenance and Guardianship of Infants Act*, against her husband's estate. Whilst it is obvious that a wife may be guilty of such conduct as to disentitle her to support either in or away from the matrimonial home, many applications under the former Act are doomed to failure, not because a wife living apart from her husband has forfeited her right to or is not entitled to support, but because that support has never been denied to her. In a case such as the present an application under that Act would have failed because the wife would not have been able to show that she had been left without means of support, for, upon the facts, there was support available for her at the home established by her husband if she had cared to take advantage of it. Her allowance, it will be remembered, ceased after she refused to rejoin her husband following upon the request made in December 1946. But, even assuming that she had no legal justification for failing or refusing to rejoin her husband, how can it be said, in any real sense, that she had abandoned or forfeited the right to be maintained by him? It is true that she had no right to be maintained away from the deceased's home but had she so desired, she might have rejoined her husband and if support had then been denied to her or if the deceased had refused to allow her to rejoin him, she may well have been entitled to an order for maintenance. With deference to the views expressed by *Harvey* C.J. in Eq., we cannot think that the question whether an order may or should be made under the *Testator's Family Maintenance and Guardianship of Infants Act* in favour of a wife, whom the evidence shows to have been living apart from her husband, can ever be concluded merely by considering whether the applicant would have been entitled in her husband's lifetime to an order for maintenance under the *Deserted Wives and Children Act*. No doubt the wife's conduct in such a case may well constitute a material factor in considering whether an order should be made, but her conduct should not be regarded as disentitling her to an order unless it has been of such a character as to induce a court to hold that, in the circumstances, there was no moral obligation upon the deceased to make any testamentary

provision for her. Indeed unless this be so, it is difficult to understand the basis upon which a husband or adult child may claim relief on the ground that they have been left, in the words of s. 3, without adequate provision for their proper maintenance or advancement in life.

The reason why the issues in the two kinds of proceedings to which reference has been made are quite different from one another is that proceedings under the *Deserted Wives and Children Act* are designed to enable a wife to enforce what at common law has always been recognized as a duty on the part of her husband to support her, whereas s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* is directed against the unfair consequences of inofficious or inadequate testamentary dispositions with reference to a widow and other relatives. The provisions of that Act, in so far as they relate to what is called Testator's Family Maintenance, are designed to provide for relief where testamentary dispositions have been made without regard to the moral claims which one spouse may be said to have upon the other, or which a child or children may be said to have upon a parent. A consideration of the classes of persons for whose benefit the provisions were enacted makes it clear that the Act contemplates the existence of such moral claims even though particular claimants may have had no legal right to be maintained by the testator in his lifetime. This being so, we can see no reason why the claim of a wife against her deceased husband's estate should fail merely because in the circumstances as they existed in her husband's lifetime she would have been unable to obtain an order for maintenance under the *Deserted Wives and Children Act*. Section 3 (2) of the *Testator's Family Maintenance and Guardianship of Infants Act* provides that the court may refuse to make an order in favour of any person whose character or conduct is such as to disentitle him to the benefit of such an order. But, having regard to the nature of the right given by s. 3 (1), the "character or conduct" envisaged by the later sub-section must be taken to refer to character or conduct of such a nature as to entitle the court to say that the applicant has forfeited or abandoned his or her moral claims on the testator.

Accordingly we are of the opinion that *Myers* A.J. did not err in refusing to accept as sound the broad proposition advanced in answer to the respondent's application before him. Nor do we think that he should have held that the respondent had been guilty of conduct disentitling her to relief. It is, we think, unnecessary to review the evidence in detail on this latter point, and it is, perhaps, enough to say that the break in the married life of the

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respondent and the deceased was made, and apparently unjustifiably made, by the deliberate choice of the latter, and the only criticism of the respondent's conduct is concerned with the fact that she chose to continue the separation when after a break of some years she refused to respond to what appear to have been somewhat formal invitations to re-establish a joint home. Possibly it is not unworthy of note on this aspect of the case that, although in January 1947 the deceased discontinued his wife's allowance, the circumstances did not then, or later, dispose him to revoke the testamentary provision for her which he had previously made.

The third ground upon which the order was attacked was that the provision thereby made is excessive. This contention the appellant sought to support by reference to the fact that for a time the respondent accepted maintenance at £2 10s. per week and that, on 26th September 1944, she agreed to accept an allowance of £3 per week and to make no further claim upon the deceased. The operation of this agreement, however, came to an end in 1946, and the case is unlike that of *In re Phillips* (1) to which we were referred by counsel for the appellant. Moreover, we would not, upon the evidence, be prepared to hold that the letters of 26th September 1944, prepared and executed in the circumstances disclosed by the evidence, should be regarded as fixing finally the extent of the provision which should be made for the respondent. Nor would we be prepared to agree that, even if the letters evidenced a mutual statement of what the parties regarded as sufficient provision in 1944, their estimate should now be regarded as conclusive of the extent of the provision adequate for her proper maintenance. This being so, and having regard to the principles upon which this final submission should be considered (*In re the Will of Gilbert* (2) and *Sampson* v. *Sampson* (3)), we do not think that this Court should interfere with the order under appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Blake & Ring.*
Solicitors for the respondent, *Biddulph & Salenger.*

G. D. N.

(1) (1929) 29 S.R. (N.S.W.) 191 ; 46 W.N. 22.

(2) (1946) 46 S.R. (N.S.W.) 318 ; 63 W.N. 176.

(3) (1945) 70 C.L.R. 576.