[HIGH COURT OF AUSTRALIA.]

DEHNERT . . . . . APPELLANT;
APPLICANT,

AND

THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED AND OTHERS . . . } RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 26, 27; *Sept.* 14.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Testator's Family Maintenance—Testator—Failure of testator to make "adequate provision for the . . . maintenance . . . of the testator's . . . children" —Competence of applicant—Child adopted by testator—Statutory provision that adopted child to "stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock" in respect of maintenance—Costs—Separate representation on appeal of Attorney-General representing charitable beneficiaries —Administration and Probate (Testator's Family Maintenance) Act 1937 (*No.* 4483) (*Vict.*), *s.* 3—*Adoption of Children Act* 1928 (*No.* 3605) (*Vict.*), *s.* 7 (1) (2) (a).

Section 139 of the *Administration and Probate Act* 1928, as amended, provides that where a testator dies leaving a will and without making therein adequate provision for the proper maintenance and support of his widow, widower, or children the court may, on application by or on his or her behalf, order such provision as it thinks fit to be made out of the estate of the testator for such widow, widower or children. Section 7 (1) of the *Adoption of Children Act* 1928 provides that "upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents . . . of the adopted child, in relation to the future custody, maintenance and education of the adopted child . . . shall be extinguished and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters . . . the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock". Section 7 (2) entitled the adopted child "to

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succeed" to the property of the adopter to the same extent as would have been the case if the child had in fact been a child born to the adopter in lawful wedlock.

Held that an adopted child could apply under s. 139 of the *Administration and Probate Act* 1928 for provision from the estate of the adopter.

Coventry Corporation v. *Surrey County Council* (1935) A.C. 199 applied.

Decision of the Supreme Court of Victoria (*Hudson* A.J.) reversed.

APPEAL from the Supreme Court of Victoria.

Paul Edward Dehnert of Elwood, Victoria, died on 19th September 1952 aged ninety years, leaving an estate valued at £107,845 3s. 1d. Probate of the will of the deceased, dated 8th July 1952 was granted by the Supreme Court of Victoria, on 16th December 1952, to the Perpetual Executors & Trustees Association of Australia Ltd., Stanley Bruce Wade and Paul Roy Dehnert, the executors named therein.

By summons dated 19th May 1953 Elsie Marie Dehnert, aged twenty-seven years, who had been adopted at an early age together with her natural brother, the above named Paul Roy Dehnert, by the deceased, pursuant to an order of the County Court at Melbourne made under the provisions of the *Adoption of Children Act* 1928 (Vict.), applied under the *Administration and Probate Acts* (Vict.) Pt. V for an order making provision for her out of the said estate. The respondents to this application were the above named executors and, by leave of the trial judge, the Attorney-General of the State of Victoria, representing the charities which were beneficiaries under the will.

The application was heard before *Hudson* A.J., who in a written judgment delivered on 20th October 1953, held that there was no jurisdiction to make an order in favour of the applicant, because, at the date of death of the testator, she was not entitled to be treated as one of his children for the purposes of s. 139 of the *Administration and Probate Acts*, s. 7 of the *Adoption of Children Act* 1953 (Vict.), which conferred that right on her, not having come into operation until 1st September 1953 and not being retrospective in its operation. The trial judge intimated that had there been jurisdiction to do so, he would have made an order for the present payment of the sum of £2,000, left to the applicant by the will on attaining the age of forty years, and for an additional payment to the applicant out of the estate of the sum of £4,000. Accordingly the application was dismissed.

From this decision the applicant appealed to the High Court of Australia.

Dr. *E. G. Coppel* Q.C. and *B. J. Dunn*, for the appellant.

W. O. Harris, for the respondents, the Perpetual Executors & Trustees Association of Australia Ltd., Stanley Bruce Wade and Paul Roy Dehnert.

F. Maxwell Bradshaw, for the respondent the Attorney-General of the State of Victoria.

Cur. adv. vult.

The oral argument was concerned with the question whether the *Adoption of Children Act* 1953 had a retrospective operation. Subsequently, at the invitation of the Court, the following written submissions were made.

Dr. *E. G. Coppel* Q.C. and *B. J. Dunn*. If the *Adoption of Children Act* 1953 does not entitle the appellant to make a claim under Pt. V of the *Administration and Probate Acts*, then the *Adoption of Children Act* 1928 entitles the appellant to make such a claim. The *Adoption of Children Act* 1928 was the first Victorian legislation which dealt with the adoption of children. Before that Act was passed, the legal relations between a child and its parents and others included the following :—(i) The father was bound to maintain his child and in certain circumstances this obligation could be enforced under the *Maintenance Act* 1928. (ii) Upon the death of either parent intestate, the child, in certain circumstances, was entitled to share in the estate under Div. 6 of Pt. 1 of the *Administration and Probate Act* 1928 (the Statute of Distributions). (iii) A child might also have a right to share in the intestate estate of a relative of either parent, if he were in fact one of the statutory next-of-kin. (iv) Any child might acquire property under a will made by either parent which included a gift to " my children ". (v) A child might also acquire property under a will made by someone other than his parents which included a gift to " the children of X ". (vi) If either parent died disposing of his or her property by will in such a manner that any child was left without sufficient means for his maintenance and support, that child could apply for an order under Pt. V of the *Administration and Probate Act* 1928. Upon the making of an adoption order under the *Adoption of Children Act* 1928, the obligation of the parent under (i) was extinguished and a corresponding obligation was imposed on the adopter—s. 7 (i). Similarly the right of the child under (ii) above was extinguished (s. 7 (2) (b)) and a corresponding right

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was conferred to share in the intestate estate of the adopter—s. 7 (2) (a). The right under (iii) above was preserved—s. 7 (2) (b) proviso (i)—and any corresponding right to share in the intestate estate of a relative of the adopter or adopters was denied—s. 7 (2) (a) proviso (i). The right of the child under (iv) above was extinguished unless the child was " expressly named " in the will—s. 7 (2) (b). And a corresponding right to take under the will of the adopter was conferred—s. 7 (2) (a). The right of the child under (v) above was preserved with a qualification—s. 7 (2) (b) proviso (ii). And this qualification was the basis upon which a new right was conferred to take as a child of the adopter under the will of a person other than the adopter or adopters. Having regard to these detailed provisions, it is difficult to suppose that the legislation overlooked the right of the child under (vi) above. Assume that an adopter dies leaving a will making some, but quite inadequate, provision for the maintenance of his adopted child who is still of tender years. Assume also that the natural parents are still alive. The natural parents have no obligation to support the child—s. 7 (1). Unless the child has a right to apply under Pt. V of the *Administration and Probate Act* for provision out of the estate of the adopter, the burden of its maintenance will fall upon the state. On the other hand, assume that the natural father dies leaving by will no provision for the maintenance and support of the child, although his estate is considerable. The child is in fact being maintained by the adopter. Can the child notwithstanding apply for provision out of the estate of his natural father ? The word " exclusively " in s. 7 (1) appears to preclude this. These examples support the view that as a result of the *Adoption of Children Act* 1928, the right of the adopted child under (vi) above is extinguished and a corresponding right to claim against the estate of the adopter is conferred, if the words of the Act reasonably admit of such a construction. The construction contended for is to be found in the combined effect of ss. 7 (1) (2) (a). Section 7 (1) imposes on the adopter the duty to maintain his adopted child to the same extent as if he were a child born in wedlock and in respect of the same matters the adopted child is to stand to the adopter exclusively in the position of a child born to him in lawful wedlock. Section 139 of the *Administration and Probate Act* gives a statutory remedy to the child in cases where a parent's will makes insufficient provision for his maintenance after the parent's death. The right to make such an application is a " matter relating to the future maintenance " of the child and is therefore conferred upon an adopted child as against the adopter exclusively : see *Coventry Corporation* v.

Surrey County Council (1). If such an application succeeds the order takes effect as if its provisions were contained in a codicil made by the testator immediately before his death—s. 145 (5). The adopted child thus succeeds to the property of the adopter to the same extent as would have been the case if the child had been born to the adopter in wedlock—s. 7 (2) (a). The words " whether under any intestacy or disposition " are not limiting words but designed to show that all modes of succession are included in s. 7 (2) (a).

W. O. Harris and *F. Maxwell Bradshaw*. In order to be entitled to seek relief under Pt. V of the *Administration and Probate Act* 1928 a person must come within the description " widow widower or children " of the testator. There has been no attempt to make the Act extend to other persons who might also have a reasonable ground for seeking provision to be made for them out of the estate of the testator. Thus illegitimate or adopted children are not, if only the language of the Act is regarded, entitled to any relief, nor is a legitimate naturally born child if his parent has died intestate. For an adopted child therefore to come within the provisions of Pt. V it is necessary for some other Act so to operate that he is deemed a child of the testator for the purposes of Pt. V or otherwise is brought within its provisions. Thus the *Adoption of Children Act* 1953 has been so framed with respect to the persons to which it applies as to achieve this result. An adopted child, who has been adopted pursuant to the *Adoption of Children Act* 1928 and to whom the *Adoption of Children Act* 1953 does not apply, may only base his claim to be a child of a testator for the purposes of Pt. V on the provisions of s. 7 (1) and (2) of the *Adoption of Children Act* 1928. Section 7 (1) of the *Adoption of Children Act* 1928 deals with the legal rights, duties, obligations and liabilities of the adopter in relation to the adopted child during the life time of the adopter and during the infancy of the adopted child. This follows from the fact that the rights &c. referred to are limited to those " in relation to the future custody, maintenance and education of the adopted child." These words must be read *noscitur a sociis*, so that :—(a) custody refers to the rights of parents and guardians to the custody of infants during the lifetime of the parents or guardians. The statutory provisions relating to such rights are to be found in the *Marriage Act* 1928, Pt. VII and the *Maintenance Act* 1928, s. 6 (5). (b) Maintenance refers to the duty of parents to maintain their infant children (again during the lifetime of the parents).

(1) (1935) A.C. 199

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The relevant statutory provisions are the *Maintenance Act* 1928, s. 6 (1) and the *Marriage Act* 1928, s. 146 (1). (c) Education refers to the duty of parents to educate their children, a duty which in Victoria is so far as legal duty is concerned restricted in substance to sending the children to school until they reach the age of fourteen years: see *Education Act* 1928, Pt. II Div. 2 (s. 26 being amended by Act No. 4993 which has not been proclaimed) and Pt. IV Div. 2. In addition, s. 7 (1) expressly includes the right of the adopter to appoint a guardian (by deed or will) and consent to the marriage of the adopted child. Both these are rights which are exercisable with respect to infants. It is true that the adopter may appoint a guardian by will, but this right must still be exercised by the adopter during his life, and in relation to the child while still an infant, although the will will only speak from the death of the testator. (No question of succession is involved here). If the submission is correct that s. 7 (1) of the *Adoption of Children Act* 1928 refers only to rights &c. existing during the lifetime of the adopter and during the infancy of the adopted child, then s. 7 (1) cannot be the source of a right on the part of an adopted child to institute proceedings (as is the case with Pt. V of the *Administration and Probate Act* 1928) on the basis of coming within a category in no way confined or necessarily related to infancy. This argument is in no way affected by the fact that in 1928 and until 1937, there was a definition of " children " in s. 138 of the *Administration and Probate Act* 1928 that " children does not include any male person who is over 18 years of age or any female person who is over 21 years of age or married ". This definition was repealed by s. 2 of Act No. 4483. A similar position arises because of the fact that an application under Pt. V is not made against the adopter in his lifetime, but seeks to have provision made out of his estate after his death. Not only does the analysis of s. 7 (1) support this, but the contrast between the expression " future custody maintenance and education " and the expression " adequate provision for the proper maintenance and support " is very striking. The maintenance referred to in the latter expression is surely something of much wider import than that referred to in the first (cf. *Delacour* v. *Waddington* (1)). In addition, when s. 7 (1) of the *Adoption of Children Act* 1928 refers to " rights, duties, obligations and liabilities " it is of necessity referring to legal rights, duties, obligations and liabilities. No other type of right is sought to be conferred, and no other type of duty, obligation or liability is sought to be imposed, with respect to the future custody, maintenance

(1) (1953) 89 C.L.R. 117.

and education of the adopted child. On the other hand, Pt. V of the *Administration and Probate Act* 1928 confers on the court a discretionary power to make an order in a case where a testator has died leaving a will without making therein " adequate provision for the proper maintenance and support " of his widow (widower) or his children. No duty, obligation or liability is imposed on testators by this Act to make a will providing adequate provision for the proper maintenance and support of the testator's widow or children : see *Dillon* v. *Public Trustee of New Zealand* (1) ; *Lieberman* v. *Morris* (2) ; per *Latham* C.J. (3) ; per *Williams* J. (2). These cases establish that the duty of a parent recognized by the Act is merely a moral one. The only right which is given by the Act is the right of a widow (widower) or child to make an application asking for the court to exercise its discretion in the applicant's favour (s. 139 ; *In re Duncan* (4)). It is true that an order under Pt. V does " operate and take effect " as though it were a codicil to the will of the testator made immediately before his death (s. 145 (5)) but this is only a machinery provision. The order for further provision is not deemed to have been made by the testator as a codicil to his will ; it merely takes effect in the same way as such a codicil. Before s. 145 (5) can have any effect there must be jurisdiction in the court to make the order. Section 7 (2) deals with the right of the adopted child to succeed to property after the death of the adopter or certain other persons referred to in the sub-section. It does not equate the position of the adopted child with that of the naturally born legitimate child but makes detailed and exact provision as to the extent to which the adopted child is to succeed on intestacy and under the will or by instrument *inter vivos* (see s. 7 (7) for definition of " disposition ") on the death of the adopter, relatives of the adopter, the natural parents of the child and relatives of its natural parents. The fact that the sub-section is drafted so as to commence with the general proposition that the adopted child is to be entitled to succeed to the real and personal property of the adopter to the same extent as would have been the case if the child had in fact been a child born to the adopter or adopters in lawful wedlock does not alter the fact that when the provisos have been read with this general proposition, the result is that the position of the adopted child is very different from that of the naturally born child. (In this connection it is of interest to note that the section makes no provision with regard to succession *from* an adopted child.)

(1) (1941) A.C. 294 ; esp. at p. 301.
(2) (1944) 69 C.L.R. 69, at p. 91.
(3) (1944) 69 C.L.R., at pp. 80-81.
(4) (1939) V.L.R. 355.

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Furthermore what is referred to in this sub-section is the legal right of the adopted child to succeed to the real and personal property of the persons referred to. "Succession" involves taking as of right. The word "entitled" is used and this signifies a definite right to property as distinct from receiving property as the result of the exercise of a discretionary power. (See *Stroud's Judicial Dictionary*, 3rd ed. (1952), Vol. 2, pp. 968-973 for meaning of "entitled"). Succession on intestacy or by assurance (see s. 7 (7)) means that the adopted child takes the property as of right. "Assurance" is an instrument which operates as a transfer of property: *In re Ray* (1). It is submitted that s. 7 (2) is the sole source of the right of an adopted child to succeed to property of the adopter. A successful applicant under an application pursuant to Pt. V of the *Administration and Probate Act* 1928 does not *succeed* to any property of the testator. What he receives, he receives by force of the order of the court, made in the exercise of its discretion. Counsel for the appellant have argued that because the six legal relations which are referred to in their submission existed between parents and children before the *Adoption of Children Act* 1928, and because that Act made some of these relations applicable as between the adopter and adopted child, therefore "it is difficult to suppose that the legislature overlooked the right of the child" under the sixth head (the right to make an application under Pt. V of the *Administration and Probate Act* 1928). It is submitted that this is not so at all. The argument is ill-founded. It looks at those relations, and then looks at the section to see what words in the section can be construed so as to give the result which it is suggested the legislature would have intended. It is submitted that the correct approach is to look at s. 7 first and construe it in its natural meaning, and giving the words in it a meaning appropriate to the context in which they are to be found. If this approach is followed, it then appears that the legislature framed a scheme which deliberately limited in certain respects the rights and duties of the adopter and adopted child respectively. There is therefore no basis for saying that something which is not specifically mentioned, viz., testator's family maintenance, was included. *Coventry Corporation* v. *Surrey County Council* (2) does not throw any light on the construction of s. 7. All that the House of Lords said was that in construing another statute and in determining whether the relevant section of the *Adoption of Children Act* applied to it, you must see whether the statute deals with the rights or obligations of parents or the position of a child in relation to matters

(1) (1896) 1 Ch. 468. (2) (1935) A.C. 199.

of custody, maintenance or education (see (1)). *This is the very question in issue.* It does not decide that the provisions of testator's family maintenance legislation deal with " maintenance " of adopted children within the meaning of s. 7 (1). It is of interest to note that in at least one instance the legislature recognized the difficulty of applying s. 7 to other Acts before it passed the *Adoption of Children Act* 1953. The definition of " children " in Pt. III of the *Wrongs Act* 1928 was amended to include an adopted child (Act No. 4380, s. 2), although in a broad sense one might have said that Pt. III dealt with the maintenance of an adopted child. It is also argued by counsel for the appellant that the adopted child whose adopted parent dies while the child is still " of tender years " leaving a will but without making therein adequate provision for his proper maintenance and support can make an application under Pt. V, even though his natural parents are still alive. It is true that there is a moral basis for such a conclusion, but s. 7 gives no legal foundation for it. It is true that it is a somewhat incongruous situation in that the section does extinguish so many of the ties between the child and its natural parent, but it must be remembered that if the word " maintenance "—s. 7 (1)—does have the meaning contended for in par. 1 of this submission, then while the natural parent is no longer liable to maintain the infant, it is still possible that the infant would have a right to apply under Pt. V, if his natural parent died whether the adopted parent was still living or not. If the adopter was only able to maintain the infant in a modest way, but the natural parent died leaving a large fortune, it is submitted that there is nothing very incongruous in permitting the infant to apply in respect of the estate of his natural parent. The fact that the legislature has seen fit to enact the *Adoption of Children Act* 1953, by which the position of the adopted child is equated with that of the natural (legitimate) child, is an indication that before that Act, the rights of an adopted child were of a restricted nature. It may well be an anomaly if the 1928 Act did not enable an adopted child to apply under Pt. V, but this does not enable the words of s. 7 to be distorted in order to bring him within it. The anomaly existed; Parliament has now rectified the matter for the future.

Dr. *E. G. Coppel* Q.C. and *B. J. Dunn*, in reply. Counsel for the respondents submit that the rights, duties, obligations and liabilities referred to in s. 7 (1) of the *Adoption of Children Act* 1928 must be legal rights, duties, obligations and liabilities and must be confined

(1) (1935) A.C., at pp. 205-206.

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to those which subsist during the minority of the adopted child. The words of s. 7 (1) are opposed to both these contentions. Section 7 (1) refers to the liability of a child to maintain its parents. This is, in Victoria, a moral and not a legal obligation. It is, moreover, an obligation which is not confined to the minority of the child. If the *Adoption of Children Act* 1928 does not confer upon an adopted child any right to apply for provision out of the estate of a deceased adopter, then it must follow that the Act does not extinguish the right to make such an application for provision out of the estate of the natural parent. The Act must do both these two things or neither of them and the examples quoted were designed to show how much more probable it was that the Act had done both. When the Act destroyed the obligation of the natural parent during his lifetime to maintain a child who had been adopted by someone else, it *ipso facto* extinguished the moral duty to provide for that child by will.

Sept. 14.

The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the judgment prepared by *Kitto* J. and agree in it. But I desire to add the following observations.

The words in sub-s. (1) of s. 7 of the *Adoption of Children Act* 1928 to which for the purpose in hand most importance attaches are " in respect of the same matters . . . the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." Now " the same matters " are " the future custody maintenance and education of the adopted child ". The earlier words of the sub-section deal with the rights, duties, obligations and liabilities of the adopter and adopted child with respect to these matters. But the later words to which, as I say, most importance attaches deal with a somewhat different, and in some ways wider conception, namely the position in which with reference to these matters the adopted child stands to the adopter. This distinction is made and the meaning of " the same matters " is shown by a short passage in Lord *Atkin's* opinion, in which the House concurred, in *Coventry Corporation* v. *Surrey County Council* (1) : " It is to be observed that the Act does not put the adopter and the child into the position of natural parent and child for all purposes. But, as to the matters enumerated in sub-s. 1, custody, maintenance and education, it does in the plainest language transfer from the natural parent to the adopter the whole of the rights and obligations that flow from parenthood ; and

(1) (1935) A.C. 199.

places the child in the same position as though he were the lawful natural child of the adopter" (1). It should perhaps be added that, so far as "rights duties obligations and liabilities" of adopter and adopted child may be relevant, it must be borne in mind that they need not be rights &c. *inter se*: they may be rights &c. *adversus extraneos*. "It must be noted that the rights and obligations referred to are not merely rights and obligations as between father and child": per Lord *Atkin* (2).

With sub-s. (1) of s. 7, thus interpreted, must be read sub-s. (2) which entitles the adopted child "to succeed" to the property of the adopter to the same extent as would have been the case if a child had in fact been a child born to the adopter in lawful wedlock. At the same time the child's "right of succession" to the property of his natural parent is destroyed. The words "succeed" and "succession" are very wide and general and are capable of a flexible application. It seems almost self-evident that no provision in favour of the adopted child could be made out of his natural parent's estate under s. 139 of the *Administration and Probate Acts* (substituted by No. 4483). The provision would take effect as if the same had been made by a will and codicil of the natural parent: see s. 145 (5). Surely the adopted child, if such an order were made, would then have "succeeded" to property of his natural parent, although s. 7 (2) (b) of the *Adoption of Children Act* 1928 says that he shall not have any right to do so. If it be right, as I think it must be, that an adoption order made under that section put an end to the child's potential claim under s. 139 of the *Administration and Probate Acts* to a provision out of the estate of either of his natural parents, on the death of the parent, it seems a reasonable corollary that s. 7 (2) (a) includes under the word "succeed" succession to property of the adopter by means of a provision made under s. 139. Now s. 139 takes as the very ground of its operation the fact that a testator leaves a will "without making therein adequate provision for the proper maintenance and support of the testator's widow widower or children". So far as children are concerned "maintenance" is part of the subject matter of "the custody maintenance and education" with respect to which s. 7 of the *Adoption of Children Act* 1928 in the words of Lord *Atkin* "places the child in the same position as though he were the lawful natural child of the adopter". To ascertain whether s. 139 of the *Administration and Probate Acts* affects the adopted child in relation to the deceased adopter, again in the words of Lord *Atkin*: "it is only necessary to consider whether the statute purports to

(1) (1935) A.C., at p. 205.

(2) (1935) A.C., at p. 206.

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deal with the rights or obligations of parents or the position of the child in relation to the matters of custody maintenance and education" (1). It was on this ground that his Lordship regarded an adopted child as a dependent under s. 4 of the *Workmen's Compensation Act* 1925 (2).

I am not disposed to regard sub-s. (1) and sub-s. (2) of s. 7 of the *Adoption of Children Act* 1928 as presenting separate or alternative questions of interpretation with reference to their effect or operation upon s. 139 of the *Administration and Probate Acts*. It appears to me that all the foregoing matters combine to show that s. 7 of the former Act provides a general rule with respect to the position of an adopted child taking property on the death of an adopter wide enough to include a statutory power in the court to vary the testamentary dispositions made by the adopter so as to make a provision for the adopted child's maintenance. To interpret s. 7 otherwise would be to mistake its purpose and miss the fact that it is a provision which expresses a principle to be applied generally in the law affecting parent and child, namely that in reference to custody, maintenance and education and the devolution of property, the adopter takes the place of the natural parent.

I agree that the appeal should be allowed.

McTIERNAN J. I concur in the judgments prepared by the Chief Justice and *Kitto* J.

In my opinion the appeal should be allowed.

WEBB J. I would allow this appeal for the reasons given by the Chief Justice and *Kitto* J.

FULLAGAR J. In this case I have had the advantage of reading what has been written by the Chief Justice and by *Kitto* J., and I am content to say that I agree.

KITTO J. The appellant is an adopted daughter of one Paul Edward Dehnert deceased who will be referred to as the testator, and she appeals against an order of the Supreme Court of Victoria (*Hudson* A.J.) dismissing her application for provision to be made for her out of the estate of the testator under Pt. V of the *Administration and Probate Acts* (Vict.).

On the merits of the case the learned judge was prepared to make an order in the appellant's favour, but he held that she had no *locus standi* to make the application. For that reason alone he refused to make the order.

(1) (1935) A.C., at p. 206.

(2) (1935) A.C., at p. 208.

Part V of the *Administration and Probate Acts* contains the Victorian legislation corresponding with the *Testators' Family Maintenance Acts* in force in other States. The only persons competent to apply under the provisions of that part are the widow or widower and the children of a testator, and it was as a child of the testator that the appellant made her application. She was not a natural-born child of his, but she had been adopted by him, she said, in early childhood. This was taken in the Supreme Court to mean, and it is not denied on this appeal, that under the provisions of the *Adoption of Children Act* 1928 (No. 3605) (Vict.) an adoption order had been made under which the appellant was the adopted child and the testator was the adopter. The effect of such an order is prescribed by s. 7 of the *Adoption of Children Acts*. Until an amending Act (No. 5666) came into force on 1st September 1953 (the date fixed by proclamation under s. 1 (2) of that Act), s. 7 provided (so far as material) that " Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents . . . of the adopted child, in relation to the future custody, maintenance and education of the adopted child . . . shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters . . . the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock ".

The testator died on 19th September 1952, and the appellant instituted her application under Pt. V by a summons issued on 19th May 1953. The hearing did not take place, however, until September 1953, the order now under appeal being made on 20th October 1953. In the meantime the amending *Adoption of Children Act* of 1953 had come into operation, and it substituted a new section for s. 7. The provisions of the new section need not be set out here. It is enough to say that if they had been in force at the death of the testator the appellant would certainly have been entitled to maintain her application as occupying the position of a child of the testator for the purposes of Pt. V of the *Administration and Probate Acts*. The respondents, however, contended that the new s. 7 on its true interpretation had not such a retrospective operation as to avail the appellant in this case, and so the learned judge decided.

His Honour's very careful statement of his reasons for judgment shows that it was not contended before him that the former s. 7 or any other provision contained in the *Adoption of Children Act*

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1928 would entitle the appellant to the benefit of the provisions of Pt. V of the *Administration and Probate Acts*. Upon consideration, however, I am of opinion that the appellant is entitled to succeed on the original terms of the section.

It has been contended on behalf of the respondents that the section deals only with the legal rights, duties, obligations and liabilities subsisting in relation to the adopted child during his infancy and the adopter's lifetime. It is true that s. 7 (1) deals first with rights, duties, obligations and liabilities, but the provision which is important for this case is that which is contained in the concluding words of the portion of s. 7 (1) which has been set out above: "in respect of the same matters . . . the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." If "the same matters" were the rights, duties, obligations and liabilities previously referred to, there might be much force in the respondents' contention; but it has been held by the House of Lords, on the construction of an identical provision contained in s. 5 of the *Adoption of Children Act*, 1926, 16 & 17 Geo. 5, c. 29 (Imp.), that the matters referred to are custody, maintenance and education: *Coventry Corporation* v. *Surrey County Council* (1). "In construing any statute" said Lord *Atkin* with whom all their Lordships agreed, "in order to ascertain whether it affects adopter or adopted children it is only necessary to consider whether the statute purports to deal with the rights and obligations of parents or the position of a child in relation to the matters of custody, maintenance, or education. If it does the adopter has the same rights and obligations as though he were the natural parent, and the child is in the same position as though he were the legitimate child of the adopters" (2). Earlier his Lordship had said: "It is to be observed that the Act does not put the adopter and the child into the position of natural parent and child for all purposes. But, as to the matters enumerated in sub-s. 1, custody, maintenance and education, it does in the plainest language transfer from the natural parent to the adopter the whole of the rights and obligations that flow from parenthood; and places the child in the same position as though he were the lawful natural child of the adopter" (3).

The provision for the purposes of which it is necessary to decide in the present case whether the appellant is to be considered a child of the testator is s. 139 of the *Administration and Probate Acts* (substituted for the original s. 139 by Act No. 4483 in 1937).

(1) (1935) A.C. 199.
(2) (1935) A.C., at pp. 205-206.
(3) (1935) A.C., at p. 205

It is in these terms : " If any person (hereinafter in this Part called ' the testator ') dies (whether before or after the commencement of the *Administration and Probate (Testator's Family Maintenance) Act* 1937) leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's widow widower or children the court may in its discretion on application by or on behalf of the said widow widower or children order that such provision as the court thinks fit shall be made out of the estate of the testator for such widow widower or children ".

In this section, " maintenance and support " is a phrase of no wider import than the word " maintenance " as used in the *Adoption of Children Act*. " Maintenance " alone is used in the analogous English legislation, the *Inheritance (Family Provision) Act* 1938, 1 & 2 Geo. 6, c. 45. To apply Lord *Atkin's* test, therefore, s. 139 is a statutory provision purporting to deal with the position of children in relation to the matter of maintenance. This being so, it must be held that an adopted child is in the same position for the purposes of the section as though he were the legitimate child of the adopter.

The repeal in 1953 of the original s. 7 of the *Adoption of Children Act* of course did not affect the right which the appellant had acquired under that section or her then pending legal proceeding in respect of that right : *Acts Interpretation Act* 1928 (Vict.), s. 6 (2). She was therefore entitled to an order for such provision as the court should think fit to make for her out of the testator's estate. She was given by the will an annuity of £5 per week and a legacy of £2,000 if and when she should attain the age of forty years. *Hudson* J., after a full review of the facts, concluded that if the appellant was a competent applicant there should be an order in her favour making the £2,000 legacy payable immediately and giving her an additional legacy of £4,000. On the hearing of the appeal all parties were content that such an order should be made in the event of the appellants succeeding.

In my opinion the appeal should be allowed, the order of the Supreme Court should be discharged (except as to costs), and in lieu thereof an order should be made entitling the appellant to a legacy of £6,000 presently payable instead of her contingent legacy of £2,000. As regards costs, the appellant and the respondent executors must, of course, have their costs here as well as below out of the estate of the testator. It is not so clear that the Attorney-General should also have his costs of the appeal. His position in the case is analogous to that of a beneficiary, and it is by no means as of course that a beneficiary is allowed his costs of an appeal on

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which he chooses to be represented separately from the executor. In the Supreme Court, however, the case was regarded as one in which it was proper that the Attorney-General should be separately represented, and in all the circumstances it seems reasonable to take the same view in respect of the appeal.

Appeal allowed. Discharge order appealed from except as to costs and the certificate for counsel. In lieu thereof order that provision be made out of the estate of the testator Paul Edward Dehnert deceased for the applicant Elsie Marie Dehnert as follows namely that in lieu of the legacy bequeathed by the testator's will to her if and when she shall attain the age of forty years the said applicant be entitled to a legacy of six thousand pounds presently payable and that it be directed that a certified copy of the order be made upon the probate of the will, and further order that the costs of the applicant of her application in the Supreme Court be taxed as between solicitor and client and paid out of the estate of the testator.

Order that the costs of this appeal of the appellant and of the respondents the executors and the Attorney-General and the costs, if any, of the respondent Paul Roy Dehnert be taxed as between solicitor and client and paid out of the estate.

Solicitors for the appellant, *Morgan, Fyffe & Mulkearns.*

Solicitors for the respondents, the Perpetual Executors and Trustees Association of Australia, Stanley Bruce Wade and Paul Roy Dehnert, *Davies, Campbell & Piesse.*

Solicitor for the respondent, the Attorney-General of the State of Victoria, *Frank G. Menzies*, Crown Solicitor for the State of Victoria.

R. D. B.