[HIGH COURT OF AUSTRALIA.]

COATES . . . . . APPELLANT;
APPLICANT,

AND

NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND ANOTHER . . . . . } RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 22, 23; *June* 6.

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

Testator's Family Maintenance—Will—Testatrix—Annuity to son—Application for increase—Material circumstances—Adequacy of provision in will—Date as at which adequacy of provision to be determined—Date of death—Date of application—Matters to be considered—Administration and Probate Act 1928 (*No.* 3632) (*Vict.*), *s.* 139—*Administration and Probate* (*Testator's Family Maintenance*) *Act* 1937 (*No.* 4483) (*Vict.*), *s.* 3.

Held, by *Dixon* C.J., *Webb* and *Kitto* JJ., *Williams* and *Fullagar* JJ. dissenting, that under s. 139 of the *Administration and Probate Act* 1928 (Vict.) as amended by s. 3 of the *Administration and Probate* (*Testator's Family Maintenance*) *Act* 1937 (Vict.) the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined, not as at the date of the application, but as at the date of death of the testator, although, if that question be answered in the affirmative, the court in exercising its discretionary power to make such provision as it thinks fit must take into account the facts as they exist at the time of making its order.

In re Testator's Family Maintenance Acts (1916) 12 Tas. L.R. 11, approved. *Re Forsaith Dec'd.* (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171 and *In re Wheare* (1950) S.A.S.R. 61, disapproved.

Held further, by the whole Court, that in all the circumstances of the case an applicant who applied for provision out of the estate of a testatrix ten years after her death should receive the sum of £20 per week for life in lieu of £5 per week provided for him by the testatrix in her will.

Decision of the Supreme Court of Victoria (*Lowe* J.): *Re Coates Dec'd.* (1956) V.L.R. 72, varied.

APPEAL from the Supreme Court of Victoria.

Eleanora Coates died at Melbourne in the State of Victoria on 29th March 1945 leaving a will dated 30th July 1932 probate of which was issued out of the Supreme Court of Victoria to the executors named therein, the National Trustees Executors & Agency Co. Ltd. and Stanley John Coates on 9th July 1945. After making

provision by her will for the payment of annuities to her son Stanley John Coates of six hundred and twenty-four pounds and to his daughter Sheila Coates and his son Leo Coates of one hundred pounds each during their father's lifetime and thereafter two hundred and fifty pounds the testatrix left her estate, valued at £81,662 net among various named charities.

On 16th June 1955 on the application of the above-named Stanley John Coates *Sholl* J. ordered that the time for making an application under Pt. V of the *Administration and Probate Act* 1928 for adequate provision for the proper maintenance and support of the applicant be extended until 15th July 1955.

By summons dated 5th July 1955 the applicant applied for such provision. The respondents to the application were the National Trustees Executors & Agency Co. Ltd. and the Attorney-General for the State of Victoria. In support of his application the applicant filed an affidavit the material paragraphs whereof are here set out.

4. I was born at Northcote in the State of Victoria on 17th June 1890.

7. I was married in 1913. I have two children: a daughter now aged forty-one years and a son now aged thirty-nine years. Both these children are married and neither is dependent upon me.

8. When I was about three years of age my parents separated and my mother took me with her. My parents were not divorced. When my mother separated from my father she invested all the capital she had in hotel businesses, commencing in a small way, working up the business and selling it to purchase another. Eventually she acquired the licence of the Theatre Royal Hotel in Bourke Street, Melbourne. About the year 1902 my mother sent me to a boarding-school at Ballarat and I remained there until 1908, except for holidays when I would return to live with her. In the year 1908 my father died. He left no estate. My mother then sent me to Scotch College where I remained until I matriculated in 1910. From the year 1910 until the year 1913 I assisted my mother in her business at the Theatre Royal Hotel and I lived with her in a flat at the said hotel. In 1913 I married Bertha Marion Begg who was the daughter of a bank manager in the country. Although my mother did not disapprove of my wife, she did disapprove of the fact that I married and she stressed how much she needed my help. She persuaded me to stay on at the hotel and help her in her business. She told me that it was my duty to her as a son to help her, and said that by so doing I would be ensuring my own financial future, and that everything that she possessed would eventually go to me. About this time my mother commenced to deal extensively in real estate. She was a very successful business woman.

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She would purchase large properties in good localities and after renovating them, sell them at a profit. In the renovation of these properties I was always at my mother's beck and call. The work was not done on a contract basis, but at cost plus a profit to the contractor. It was my duty to supervise the work of the contractors and to check the cost of labour and material as charged by them. Before I was married all that I received from my mother was a small allowance for pocket-money, but my mother would pay for any special item which I needed. On my marriage I asked my mother to pay me a definite weekly sum. She would agree to give me only £3 10s. 0d. per week and persuaded me to accept that wage on the plea that the payment of any larger sum would prejudice her operations in real estate and would eventually be to my disadvantage. As my family obligations increased I asked my mother to pay me more, but she would not agree. However, she gave me additional sums from time to time to meet any special items of expense such as doctor's bills and the like. At the time my wife, myself and my two children were living with my mother at her flat at the Theatre Royal Hotel. The hours worked by me and the duties performed did not conform to any regular pattern. There were two bars at the hotel and these were open until 11.30 p.m. each night. I was required to be on duty from early in the morning till 1 p.m. and then again from 6 p.m. until 11.30 p.m. This meant that my wife and children were alone practically every night. Even when I was supposed to be off-duty I was called upon by my mother to attend to various business matters for her. This continued until I was about twenty-five years of age and I told my mother that the circumstances under which we were living were unsatisfactory and I would prefer to find employment for myself and that I would leave her. I did attempt to find other employment, but in those days there were more applicants for positions than jobs available, and previous experience was regarded as a pre-requisite to anyone seeking employment at the age of twenty-five years. After one or two attempts to eke out an existence I returned to work for my mother, at her request, and through the mediation in the first instance of the late Mr. Dudley Best of Messrs. Joske, Best and Co., merchants, and in the second instance through the influence of Dr. Robert Stirling, our family doctor. In each case approaches were made to me after some months by these gentlemen and the argument was put to me that if I would return to help my mother I would ultimately reap the benefit. About the years 1919 or 1920, six o'clock closing was introduced and thereupon my mother decided to retire from the hotel business and devote her attention to the considerable real estate which she had

acquired. I continued to work for her ; although my hours became more normal my financial position did not improve. My wife and I were kept just above the breadline, and every expenditure was decided for us by my mother. She kept sole control of the finances and paid for whatever essentials were required and for the children's school fees. These items in all would not have amounted to more than about £100 per year. She preferred to do this rather than pay me an adequate wage. About the year 1925 I again suggested to my mother that it would be better for me to earn my own living in my own way, and she reluctantly agreed. In order to help me she provided the sum of £2,700 to enable me to purchase a property at 7 Rockley Road, South Yarra and I then secured a position with General Motors (Aust.) Pty. Ltd., a company which was about to commence operations here. This position proved very congenial and lucrative. For the first time I felt financially independent. I remained with the company until the year 1931, which was in the depth of the depression. By that time I had risen to the position of divisional sales manager and was earning twelve pounds per week plus a living allowance whilst away from Melbourne and the use of a motor car. The sales of motor cars fell off during the depression and the company had to curtail its staff. Of a total wholesale selling staff of eighty-three I was one of the last three to be put off. After leaving General Motors I found a position as sales manager with Alexander Sturrock & Co., manufacturers of veneers. I was paid approximately nine pounds per week, and I retained that position for a period of twelve months, when owing to the continuance of the depression that company also had to reduce its staff and my services were terminated. After leaving Sturrock & Co. I set up my own business as a used car broker in Temple Court. I was not able to earn a living at this occupation, and had to borrow on my house at Rockley Road to support my wife, myself and my family. During the year 1935 my mother suggested that the money which was invested in my home could be used to better advantage in a different sphere, and that if I would consent to its sale and pay her the nett proceeds after discharging the mortgage and devote some of my time to the management of her affairs, she would pay me the sum of eight pounds per week during my life. An agreement was drawn up incorporating this agreement. I agreed to this proposal. The house was sold and the nett proceeds, approximately £650 were paid over to my mother and I moved into a flat at 61 Marne Street, South Yarra as a tenant and am still in occupation. At that time my mother gave me some money to replenish house linen and to purchase furniture. From then on until I enlisted in 1940 I devoted

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the greater part of my time to helping my mother in her real estate business. Early in 1940 I enlisted in the R.A.A.F. I obtained a commission and was on active service in the Darwin area for thirteen months in the years 1942-1943. I received several promotions whilst on service. In 1943 I was appointed staff officer for organisation which post I held successively in Darwin, Melbourne and Sydney Headquarters. My mother died on 29th March 1945 following an operation on a broken thigh suffered by her in an accident. I was in Sydney at the time. At my mother's wish I was not advised of her accident, but my wife and children visited her regularly in hospital prior to the operation. After her operation my wife became alarmed at my mother's condition and telephoned me in Sydney giving me my first knowledge of the accident. I at once obtained leave of absence and came to Melbourne on 29th March 1945 but my mother was dead on my arrival. A few days after my mother's death I called on Mr. Fulton of Messrs. Snowden, Neave & Demaine who, I knew, had acted as my mother's solicitors. Mr. Fulton told me that he had made a will for my mother of which he gave me a copy. That was a will dated 30th July 1932 which subsequently proved to be my mother's last will, although neither Mr. Fulton nor I knew that at the time. My mother had occasionally spoken to me about her intention to change her solicitors, but I did not attach much importance to these statements. I searched through her papers but could find no other will or any record of one having been made. I was very disappointed to learn that all that I was to receive from the estate was an annuity of twelve pounds per week.

9. I did not know then, nor at any time until I took advice in the month of February 1955, as hereinafter set out, that I had any legal right to apply to the court for a more adequate provision from my mother's estate.

10. Shortly after my mother's death I applied for my discharge from the R.A.A.F. and whilst waiting in Melbourne for the result of my application I became ill and was admitted to Heidelberg Military Hospital. While I was there a representative from the National Trustees Executors & Agency Co. Ltd. brought me out a number of documents to sign in connexion with the application by myself and the company for probate of the said will. Such probate was duly granted and was issued to me and the company on 9th July 1945.

11. My mother's estate consisted of personal property having a gross value of £90,200. All of my mother's estate was situated in Victoria and the net value as passed by the Victorian commissioner of taxes for probate was the sum of £81,662 10s. 3d. on which

probate duty amounting to £1,227 3s. 0d. was paid. Federal estate duty was assessed and paid at the sum of £847 8s. 6d. On 27th April 1955 the assets comprised in the said estate were of the value of £76,435. All the debts of the estate have been paid.

12. Since my mother's death I have actively co-operated with the National Trustees Executors & Agency Co. Ltd. in the administration of my mother's estate and I have been paid a commission from time to time at the rate of two and one-half per cent on income and two and one-half per cent on such part of the corpus as has been realised. These commissions were paid to me with the consent of the charities entitled to the estate upon the cessation of the annuities. The only other income received by me since my mother's death, apart from my salary of approximately £750 per annum, has been the annuity of twelve pounds per week, the sum of eight pounds per week payable by my mother's estate under a contract made between her and me when I sold my property at Rockley Road and gave her the nett proceeds and my commissions as a trustee as hereinbefore mentioned. I do not own any real estate and my only personal estate consists of :—(a) A sum of eight pounds per week payable by testatrix's estate to me during my life under a contract made between her and me in 1935 as aforesaid. (b) An annuity of twelve pounds per week under the said will as aforesaid. (c) Money in the bank amounting to £550. (d) A 1935 "Reo" motor car worth approximately £225. (e) Furniture and effects of a three-room flat. (f) Life insurance policy of £500. (g) Commission as executor at the rate of two and one-half per cent on income and two and one-half per cent on such part of the corpus as has been realised. These amounted since my mother's death to an average of £225 per year. At the time of the testatrix's death my other assets were approximately the same as they are to-day but I was then a Flight Lieutenant in the R.A.A.F. and my pay amounted to £9 10s. 0d. per week plus deferred pay and allowance for my wife.

13. My mother did not make any gifts to me in her lifetime apart from the money to purchase the South Yarra property and linen and furniture when I moved to my present address, and occasional cheques to meet unusual expenses ; these would not have amounted to more than a couple of hundred pounds in all.

14. When the latest amendment of the *Landlord and Tenant Act* came into operation on 1st February 1955 I realised that it would be possible for the owner of my flat to apply for a substantial increase in rent and that prospect, coupled with the fact that I would have to retire from the Air Board in June 1955, led me to interview the manager of the National Trustees Executors & Agency Co. Ltd. on 7th February 1955 and suggest to him that he should place these

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facts before the various charities entitled to the residuary estate of my mother and request the charities to agree to a larger share of her estate being made available for me. I was advised by the manager that there was a provision under the *Administration and Probate Act* under which I could apply to the court for additional benefits, and he recommended that I should take the advice of a solicitor. I thereupon consulted my present solicitors and instructed them to make an application on my behalf. Until so advised I was unaware of the existence of any legislation whereby a son could apply for additional benefits from his parent's estate, and I believed that as the will of my mother had apparently been validly executed, there was no legal method by which I could obtain any more from her estate than the annuity bequeathed to me and my commissions as a trustee.

The application was heard before *Lowe* J. who, on 26th October 1955, ordered that the amount of the annuity payable under the will to the applicant be increased from £624 to £884 per annum.

From this decision the applicant appealed by special leave to the High Court.

R. J. Davern Wright, for the appellant. The question whether an order should be made under Pt. V of the *Administration and Probate Act* 1928 as amended should be considered as at the date of the death of the testator. [He referred to *In re Porteous Dec'd.* (1); *In re Hodgson Dec'd.* (2).] The dominant purpose of the Act is the enforcement of the moral duty of testators. [He referred to *Lieberman* v. *Morris* (3).] The question of adequacy does not arise until the court has determined what is proper maintenance and support having regard to the station in life of the applicant and the size of the estate. The word "adequate" in s. 139 of the Act applies only to the provision made in the will and not to maintenance at all. The passage in *In re Duncan* (4) on which *Lowe* J. relied is erroneous in this respect. [He referred to *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (5).] The possibility of depreciation in the value of money is a circumstance to be taken into account in fixing the proper amount. [He referred to *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (6). *Welsh* v. *Mulcock* (7).] *Lowe* J. did not consider the probabilities or possibilities in the future. By inadvertence also he overlooked the fact that there was still over £70,000 in the estate. The

(1) (1949) V.L.R. 383, at pp. 387, 388.
(2) (1955) V.L.R. 481.
(3) (1944) 69 C.L.R. 69.
(4) (1939) V.L.R. 355, at p. 358.
(5) (1938) A.C. 463, at pp. 476, 481; (1938) 38 S.R. (N.S.W.) 176, at pp. 184, 185, 190; 55 W.N. 42.
(6) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176; 55 W.N. 42.
(7) (1924) N.Z.L.R. 673, at pp. 687, 688.

fact that the applicant has a dependent wife should be taken into account. [He referred to *In re F. J. McNamara Dec'd.* (1); *In re Allen Dec'd.*; *Allen* v. *Manchester* (2).] The applicant should be granted a capital sum in addition to periodical payments. [He referred to *Sampson* v. *Sampson* (3); *Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (4).]

Murray V. McInerney, for the respondent the National Trustees Executors and Agency Co. Ltd.

F. Maxwell Bradshaw, for the respondent the Attorney-General for the State of Victoria. The passage in *In re Duncan* (5), properly read, is in accordance with *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (6). There is nothing to show that *Lowe* J. did not consider all matters proper to be considered in exercising the discretion vested in him under Pt. V of the Act. Taking everything into account including the prospect that money may appreciate in value in the future the amount awarded to the applicant was fair and reasonable.

R. J. Davern Wright, in reply.

Cur. adv. vult.

June 6.

The following written judgments were delivered :—

DIXON C.J. This is an appeal by special leave from an order made by *Lowe* J. in the Supreme Court of Victoria under Pt. V of the *Administration and Probate Act* 1928 as amended by the *Administration and Probate (Testator's Family Maintenance) Act* 1937 (No. 4483). The order, which was made on the application of the present appellant, directs that he receive a proper maintenance and support out of the estate of his mother in addition to the provision made for him by her last will. The order fixes an additional sum of five pounds per week for his life payable as from the date of the order, viz. 26th October 1955. The respondents in the appeal are the trustees of the will and the Attorney-General for the State of Victoria. The Attorney-General appears in the interests of a large number of charities which are the residuary beneficiaries under the will and take the whole of the corpus. The ground of the appeal is that the provision made by the order is inadequate and was the result of a mistaken exercise of the learned judge's discretion.

The appellant's mother died as long ago as 29th March 1945 and probate of her will was granted on 9th July 1945. The appellant's

(1) (1938) 55 W.N. (N.S.W.) 180.
(2) (1922) N.Z.L.R. 218, at p. 220.
(3) (1945) 70 C.L.R. 576, at p. 583.
(4) (1932) 47 C.L.R. 113, at p. 119.
(5) (1939) V.L.R. 355, at p. 358.
(6) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176; 55 W.N. 42.

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application was made by summons issued on 5th July 1955. Section 147 of the *Administration and Probate Act* as amended provides that no application shall be heard by the court at the instance of the party claiming the benefit of that part of the Act unless the application is made within six months after the grant of probate or administration c.t.a. There is, however, a proviso enabling the court or a judge to extend the time for making an application and to do so although the time limited for making an application has already expired. The proviso is qualified by a requirement that the application must be made before the final distribution of the estate and that no distribution of any part of the estate made prior to the application must be disturbed by reason of the application or of any order made thereon. Pursuant to the power conferred by the proviso *Sholl* J. made an order dated 16th June 1955 directing that the time for making an application for adequate provision for the proper maintenance and support of the appellant should be extended until 15th July 1955. The appellant made his application to the Supreme Court accordingly and it thus became necessary for *Lowe* J. to consider, ten years after the death of the deceased, whether an adequate provision for the proper maintenance of the appellant had been made by her will and, if not, what, if any, additional provision should be made out of her estate.

At the time of her death the deceased was eighty-four years of age and a number of the facts affecting the question occurred many years ago. The appellant was born on 17th June 1890. Three years after his birth his parents separated and when he was eighteen years of age his father died leaving no estate. The appellant was their only surviving child. After separating from her husband his mother began to invest what capital she had in hotel businesses. Apparently she would work up a hotel and then sell it. At length she became the licensee of the Theatre Royal Hotel in Bourke Street, Melbourne. Her son had not finished his education and she kept him at a public school until he matriculated in 1910. After doing so he lived with his mother at the Theatre Royal Hotel for some time and helped her in the business. When he was twenty-three he married. He says that his mother did not disapprove of his wife but did disapprove of his marrying. She seems to have insisted on the necessity of his helping her in the hotel. He says in his affidavit : " She told me that it was my duty as a son to help her and said that by so doing I would be ensuring my financial future and that everything she possessed would eventually go to me ".

His mother began dealing in property. It was her practice to buy a house or building, renovate it and sell it at a profit. In the work that was involved she obtained the assistance of her son.

After his marriage the appellant asked for a weekly wage or allowance but she agreed to give him only three pounds ten shillings a week, again arguing that the property would in the end be his and, further, that to pay any larger sum would prejudice her financial operations. He and his wife and their children, two in number, lived with his mother at the Theatre Royal Hotel. Until 1919 the hours of trading were long and before six o'clock closing it was his custom to attend to the hotel from early morning until lunch time and from six o'clock until closing time. For a time, notwithstanding his mother's objections, he obtained other employment, but at length, through the intervention of intermediaries, he returned to help her. The introduction of six o'clock closing appears to have caused his mother to retire from the hotel business and devote her attention to the other property which she had acquired. At length in 1925 with her help he bought a house to live in and secured a position apparently as sales manager in a motor company. With some vicissitudes he earned his own living entirely until 1935. In that year his mother suggested that it would be better for him to sell his house and allow her to invest the proceeds. She entered into an agreement with him to pay him eight pounds a week during his life on condition that he sold the house and paid her the net proceeds. This was done and he moved into a flat in South Yarra which he still occupies. In 1940 he joined the R.A.A.F. and he was still in that force when his mother died on 29th March 1945.

It was found that the last will she had made was dated 30th July 1932. By this will the respondent the National Trustees Executors & Agency Co. Ltd. and the appellant were constituted executors. They obtained probate. The gross value of the estate was £90,200, the net value £81,662 and, after the payment of probate and estate duties, there remained £79,588. The will bequeathed an annuity to the appellant of £624. It bequeathed an annuity to his daughter and son of £100 each during the appellant's lifetime, to be increased to £250 each on his death. It empowered the trustees to appropriate part of the estate to answer the annuities. Subject to these provisions, the testatrix devised and bequeathed all her real and personal estate to her executors and trustees upon trust as to two equal third parts thereof for the benefit of nine named public hospitals in equal shares and as to the remainder one equal third part to eighteen other named public charitable institutions.

After his discharge from the R.A.A.F., which took place in 1945, the appellant became a clerk with the Commonwealth Air Board at a salary of about £750 a year. From this position he retired on 24th June 1955, after having attained the age of sixty-five. His

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means of subsistence after retirement consisted of the annuity of £624, the sum of eight pounds a week payable under the agreement made with his mother in 1935, and sums payable for commission as executor at a rate of two and one-half per cent on income. The amounts payable for commission were irregular, but the aggregate of those made during the period from his mother's death up until the making of the application is said to work out at a yearly average of £225.

Lowe J. considered that in the circumstances adequate provision had not been made in the will for the proper maintenance and support of the applicant. In reaching this conclusion his Honour had regard to the size of the estate, the facts which gave the appellant a special claim on the testatrix and the interval of the time between the actual making of the will and the death of the testatrix. In arriving at the proper order to be made his Honour said that there were two matters specially relevant. One was the size of the estate and the other that the appellant had foregone his pursuit of a professional career in order to further his mother's business for a very inadequate remuneration. This, his Honour thought, created a moral duty upon the testatrix which she had not carried out by the provision made for the appellant. The learned judge took the view that though no doubt the deceased believed that she was making adequate provision for her son's proper support and maintenance, she in fact failed to recognise sufficiently the magnitude of her means, the needs of the appellant and the unsettling circumstances which existed at the time of her death. One of the possibilities for the future at that time was the effect of the war upon money values. His Honour remarked that, as a result of the application being ten years late, he did not have to estimate the position with respect to possibilities or probabilities for the future, that is to say he had the facts before him which in the event had occurred. After discussing the question of relying upon the actual events as a measure of what was antecedently probable, his Honour again referred to the particular fact of the depreciation which has taken place in the value of money. His Honour then said: "I have come to the conclusion that the proper order to make is to increase the annuity to £884 per annum that is to increase it by £5 per week."

The appellant's complaint is that a sum so small gives no real effect to the view that the provision made by his mother's will was not adequate for his proper maintenance and support. It is perhaps not without importance that the learned judge said that his order was to operate from the day on which he made it and

said that he did this because he must not disturb existing distributions. Distributions of surplus income had been made to the charities but there had been no distribution of corpus and no difficulty existed in obtaining from the estate sufficient to meet any retrospective order his Honour might otherwise have been minded to make without in any way affecting any distribution of income which had been made. In fact at the time when the order was made the assets of the estate were of a value of £76,435. In the course of years surplus income had in fact been distributed among the charities amounting to £26,613.

The case is, of course, a very unusual one. The order of *Sholl* J. extending the time for making the application was founded upon the fact, established by the appellant to his Honour's satisfaction, that he had been unaware of the possibility of applying to the court for an order under Pt. V of the *Administration and Probate Act*. That order having been made, the duty of the court disposing of the substantative application is to consider the matter upon the merits without regard to the delay that has occurred. But of course much has taken place since the death of the testatrix and the question naturally suggests itself how far the course of events since her death or the issue of probate should be taken into account and for what purpose.

There has been a difference of view in the administration of the Acts of New Zealand and the six States of Australia as to the date as at which the court must determine whether the provision in a will for an applicant is inadequate for his proper maintenance and support. In four jurisdictions the view has been taken that the question was to be determined as at the date of the death of the testator or testatrix. They are New Zealand, *Shepherd* v. *Preen* (1); *Welsh* v. *Mulcock* (2); *Oakey* v. *Thompson* (3); Tasmania, *In re Testator's Family Maintenance Acts* (4); Victoria, *In re Porteous Dec'd.* (5); *In re Hodgson Dec'd.* (6) and Queensland, *Re Brown Dec'd.* (7). In two jurisdictions the view has been adopted that the sufficiency of the provision in the will must be determined as at the time when the court is dealing with the question. They are New South Wales, *Re Forsaith Dec'd.* (8); *Re Pichon Dec'd.* (9) and South Australia, *In re Gerloff* (10) and *In re Wheare* (11). Until 1954 (12) there was in New South Wales no power to extend the time for an

(1) (1918) N.Z.G.L.R. 60, at p. 61.
(2) (1924) N.Z.L.R. 673, at p. 687.
(3) (1951) N.Z.G.L.R. 291, at pp. 292, 293.
(4) (1916) 12 Tas.L.R. 11.
(5) (1949) V.L.R. 383, at pp. 387, 388.
(6) (1955) V.L.R. 481, at p. 489.
(7) (1952) Q.S.R. 47.
(8) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.
(9) (1946) 47 S.R. (N.S.W.) 186; 63 W.N. 256.
(10) (1941) S.A.S.R. 156.
(11) (1950) S.A.S.R. 61, at p. 66.
(12) See Act 40 of 1954, s. 4 (1) (c) (ii).

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application and it was necessary to make it within twelve months of the date of the grant or resealing in New South Wales of probate or letters of administration c.t.a. In South Australia the application must be made within six months, but the time may be extended if the extension is applied for within twelve months. The limitation of time in these two States may make the distinction of less importance. It has been suggested in South Australia that the power, in jurisdictions where it exists, of rescinding or varying an order may possibly be considered to point to an intention that the determination of the question should be made as at the time when the application for an order is made: see *In re Wheare* (1). But the application to rescind or alter an order must be made by the executor or a person beneficially interested in the estate and it was held by *Harvey* C.J. in Eq. that it did not authorise any increase of a benefit obtained under an original order made on an application within the time limited by the statute: *Re Denis Molloy Dec'd.* (2); *In re Porteous Dec'd.* (3). It is not easy to see how on this footing the existence of the power affects the point. On the other hand, much must depend on the language in which the power to make a provision out of the estate is conferred upon the courts. The words of s. 139 of the Victorian Act that are most material are "leaving a will and without making therein adequate provision for the proper maintenance and support of" etc. These words are not quite the same as the corresponding expressions in s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.). That section speaks of a person who disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow, husband or children or any of them are left without adequate provision for their proper maintenance &c. It is perhaps less difficult to give s. 3 of the New South Wales Act what may be described as an ambulatory effect so that it is capable of applying to circumstances as they may exist at whatever time the determination may come to be made. But s. 139 of the Victorian Act seems certainly to propound a question depending primarily upon the contents of the will which the deceased has left and the adequacy of the provision, if any, which it contains for the proper maintenance and support of the widow, widower and children. In the *Testator's Family Maintenance Act* 1912 (Tas.) the most material words are "if any person disposes of his property . . . by will in such a manner that upon his death the widow or any child is left without

(1) (1950) S.A.S.R. 61, at p. 66.
(2) (1928) 28 S.R. (N.S.W.) 546; 45 W.N. 142.
(3) (1949) V.L.R. 383, at p. 386.

sufficient means for her or his maintenance and support ". In distinguishing the decision of the Supreme Court of Tasmania that you must look at the state of affairs at the deceased's death, *Harvey* C.J. in Eq. in *Re Forsaith Dec'd.* (1) said : " . . . looking at the words of the Tasmanian Statute there is no loophole of escape from that construction " (2). In spite of the difference in language between the New South Wales Act and the Tasmanian and for that matter the Victorian, it may be doubted whether the distinction taken by *Harvey* C.J. in Eq. is well founded. The legislation of the various States is all grounded on the same policy and found its source in New Zealand. Refined distinctions between the Acts are to be avoided. The corresponding words of the Queensland provision (the *Testator's Family Maintenance Acts of* 1914, s. 3 (1)), the words which seem crucial on this point, are almost identical with the words of the Victorian provision. In *Re Brown Dec'd.* (3), *Townley* J. declined to apply to the Queensland statute the decision of *Harvey* C.J. in Eq. in *Re Forsaith Dec'd.* (1) or the two decisions in South Australia. In the course of his reasons *Townley* J. referred to the statement made in *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (4) for the Privy Council by Lord *Romer* to the effect that the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just rather than a fond or foolish husband or father. The learned judge then said : " To take into consideration changes in circumstances which could not have been foreseen by the testator would be to attribute to him not only wisdom and a sense of justice but also the gift of prophecy. What the testator ' ought to have done in all the circumstances of the case ' could only be determined by a consideration of matters as they stood, at the latest, at his death. Unforeseeable circumstances arising after that event surely could not govern the wisdom or justice of his actions whilst alive. The court is required to determine whether or not he has made adequate provision in his will for the proper maintenance and support of the applicant which would seem to indicate that the court is to put itself in his position, attributing to him justice and wisdom, not after but immediately before death " (5).

The considerations stated by *Townley* J. in this passage confirm the interpretation which the actual words of the provision suggest.

(1) (1926) 26 S.R. (N.S.W.) 613 ; 43 W.N. 171.
(2) (1926) 26 S.R. (N.S.W.), at p. 614 ; 43 W.N. 171.
(3) (1952) Q.S.R. 47.
(4) (1938) A.C. 463, at pp. 478, 479 ; (1938) 38 S.R. (N.S.W.) 176, at p. 187.
(5) (1952) Q.S.R., at pp. 49, 50.

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But it is important to see what exactly is involved in that interpretation. It means that the court determining the application must look at the will which the testator leaves and the dispositions if any which it contains in favour of his widow or children as the case may be and consider whether they amounted to an adequate provision for her or their proper maintenance and support. But the very question what is proper maintenance and support involves the future of the widow or children to be maintained or supported. It is, however, the future stretching forward from the date of the testator's death and therefore considered as from that date. It involves what is necessary or appropriate prospectively from that time. To determine that question contingent events must be taken into account as well as what may be considered certain or exceedingly likely to happen. When a court is called upon to consider such a question many years after the date as at which the court must take its stand, all the advantage is available of knowing the events that have occurred. The intervening events may be taken into consideration because they suggest or tend to show what antecedently might have been expected. But they must not be outside the range of reasonable foresight. If all contingencies that might reasonably have been anticipated have been taken into account, it would be difficult to say that the actual occurrence of some event which antecedently no one could reasonably have foreseen shows that the maintenance or support was not proper or the provision therefor was not adequate. It is therefore impossible to treat actual intermediate occurrences as more than evidentiary facts. The ultimate question must remain one of adequate provision for proper maintenance and support as at the date of the testator's death. In this respect the English statute has an analogous effect. In *In re Howell*; *Howell* v. *Lloyds Bank Ltd.* (1) *Evershed* M.R. said: " . . . I think, prima facie, at any rate, that it must be right to judge this matter, whether the testator was unreasonable, in the light of the circumstances which did present, or should have presented, themselves to him up to the moment of his death. No doubt the circumstances must include eventualities reasonably to be foreseen, but the testator ought not to be judged exclusively in the light of circumstances happening after his death, which might very much have altered the situation " (2). Reference should also be made to his Lordship's observations in *In re North Settled Estates*; *Public Trustee* v. *Graham* (3), with respect to the use in another context of subsequent events. It must be borne in mind that the question whether the deceased has left a will without

(1) (1953) 1 W.L.R. 1034.
(2) (1953) 1 W.L.R., at p. 1038.
(3) (1946) Ch. 13, at pp. 17, 18.

making adequate provision for the proper maintenance and support of his widow or his children is only the first or preliminary question which is set by s. 139. If, but only if, the court answers that question in the affirmative, it may, subject to the other provisions of Pt. V, proceed to " 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 ". The discretion conferred by these words is of course limited by the purpose and scope of the legislation. And what has been just said bears upon the purpose and scope of the legislation. But it would not be a proper exercise of discretion if the facts as they exist at the time the order is made were left out of account. If a child, through some accession of fortune, had ceased before the hearing of the application to require any further provision for his maintenance or support it would not be a proper exercise of discretion to make an order in his favour on the ground that it was only after his father's death that his needs were thus met. It is not a discretion to give more than what is adequate for proper maintenance in the circumstances as they have come to exist. On the other hand it is not a discretion to make a provision for proper maintenance and support which exceeds any provision that the foresight, wisdom, and fairness of a reasonable man in the testator's situation would have led him to make for the proper maintenance and support of the widow or child applying. In *Allardice* v. *Allardice* (1), Lord *Robson* said on behalf of the Privy Council that their Lordships saw no reason to differ from the learned judges of the Court of Appeal of New Zealand in the general view they took as to the proper scope and application of the powers conferred by the *Testator's Family Maintenance Act*. From that time the views expressed in *In re Allardice* (2) have provided the source whence the principles derive which have guided the courts in the administration of the Acts. They were re-stated by the Privy Council in *Bosch's Case* (3) and since then they have again been considered in *Mudford* v. *Mudford* (4). Although s. 1 of the *Inheritance* (*Family Provision*) *Act* 1938 (Imp.) is in some respects more restricted, the observations of *Harman* J. in *In re Borthwick, Dec'd.*; *Borthwick* v. *Beauvais* (5), may, perhaps for that very reason, have a strengthened application. These observations conform with the views expressed in *In re Allen Dec'd.*; *Allen* v. *Manchester* (6) and *Welsh* v. *Mulcock* (7).

(1) (1911) A.C. 730, at p. 734.
(2) (1910) 29 N.Z.L.R. 959, at pp. 969-975.
(3) (1938) A.C. 463, at pp. 477, 478; (1938) 38 S.R. (N.S.W.) 176, at pp. 186, 187.
(4) (1947) N.Z.L.R. 837.
(5) (1949) Ch. 395, at pp. 400, 401.
(6) (1922) N.Z.L.R. 218.
(7) (1924) N.Z.G.L.R. 169.

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The present case is one in which these principles really determine the result. It is a case in which a mother, leaving a very large estate and having no relatives but an only son, provided him only with a very modest income and having done that turned away from all claims which he otherwise might have upon her in order to bestow the whole corpus and the surplus income upon public charity. The charitable bequests show on their face that the charities were chosen not because of any special interest which the testatrix had in any one of the twenty-seven institutions she named but because she chose to leave her very large assets to public charity rather than to her son or his children.

It is, of course, necessary to treat with reserve the statements which a claimant under Pt. V makes with respect to the merits of his own claims upon the deceased's bounty and as to the absence of any disqualifying conduct on his part. In the present case, however, we have no ground whatever for suspecting that grounds existed which might justify or explain the course taken by his mother in her will. No suggestion comes from any quarter that the appellant had done anything to give legitimate ground of displeasure to his mother or to arouse in her a want of confidence in his future use of any property that might be bequeathed to him. It is of course true that the narrative contained in his affidavit of the work which he did for his mother and her statements as to his inheriting the property are *ex parte*, but even if they be discounted somewhat for that reason, it remains reasonably certain that his natural claims upon her testamentary bounty were much strengthened by his co-operation and support in the conduct of her business and of her affairs. If an application had been made in 1945 by the appellant it seems clear enough that an order for a very substantial increase of the provision made in his favour should have been made. His situation on the one side and the great value of her estate on the other made it clear that the annuity fell far short of an adequate provision for his proper maintenance. Her only child, he was a man of fifty-five years of age who soon must be discharged from the armed services with nothing except his income from her estate to support him, apart from his prospect of securing remunerative employment. Great uncertainty existed as to the economic consequences of the war and as to the future purchasing power of money and the prospects of industry. It must, of course, be remembered that her will was made in 1932 and no doubt that is a circumstance partly explaining the inadequacy of the provision in his favour. It was a period at which she might readily have adopted pessimistic views of her own financial position and also have regarded the annuity she bequeathed to her son as of greater

value than in earlier or later times it would have appeared to possess. Indeed it would seem likely that the unfairness of her testamentary dispositions is largely due to the mere failure of an ageing woman to make another will more suitable to the times.

The reference which *Lowe* J. made to the change in the value of money does not seem to be reflected in the amount by which his order increased the annuity, namely five pounds a week. That addition is, of course, not at all commensurate with the actual change in the purchasing power of money between 1932 and 1955. His Honour's reference to the effect of the qualification to the proviso of s. 147, which prohibits any disturbance by reason of an order of distributions already made, seems to suggest some misconception. It is not clear how his Honour applied this observation to the facts of the case. Even if there were no accumulations of income, there was no reason why capital should not be resorted to to make up arrears of what otherwise would be an income expenditure. These elements, considered with the remarkably small increase in the annuity which his Honour ordered, seem to make it right that the amount of the provision ordered should be reconsidered. The discretionary judgment of the primary judge in matters of this kind will not be reviewed upon appeal unless the Court is satisfied that the exercise of the discretion has been erroneous. But the order for five pounds a week seems one that it is impossible to support. The difficulty of saying what is a proper amount is no doubt considerable but the disparity is very great between the almost trifling increase awarded and the lowest figure commensurate with what is necessary to provide an income sufficient to maintain a man and his wife according to the standard which the testatrix ought to have attempted to secure for her son out of her fortune. An increase to twenty pounds a week does not seem at all too much.

WILLIAMS J. I agree that the appeal should be allowed and with the order proposed by the Chief Justice. I also agree that it is unfortunate that a difference of opinion exists between the courts of New Zealand, Tasmania, Victoria and Queensland on the one hand and those of New South Wales and South Australia on the other as to the time when the question whether an applicant has been left without adequate provision for his or her maintenance &c. should be determined. This is an important question because the jurisdiction of the court to make an order depends upon its answer. The view of the courts of the former States is that the proper time is the date of the death of the testator, that of the courts of the latter States that it is when the application comes on to be heard in court. The language of the Acts of the various

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States and Territories is in essence the same so that I also agree that it is advisable for this Court to express an opinion on this question which may lead to uniformity in the courts of the Australian States and Territories.

By the Acts an applicant is given a right to apply to the court for an order where he or she has been left without adequate provision for his or her proper maintenance &c. under the dispositions contained in the will of the testator. This is a plain provision but by judicial decision a gloss has been placed upon it to the effect that in order to decide whether provision should be made for the applicant the court must place itself in the position of the testator and consider what he should have done in all the circumstances of the case treating the testator for that purpose as a wise and just rather than a fond and foolish husband or father: *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (1). If the court decides that there has been a breach by the testator of this moral duty in not making such provision for the applicant in his will as he would have made if he had fulfilled it, the court may make an order designed to remedy the breach. This gloss would make it appear at first sight that the moment of death must be the proper time because the conduct of the testator could not be judged otherwise than in the light of the knowledge available to him in his lifetime. Events occurring after his death which he could not be expected to have foreseen could not be taken into account. But this gloss, though useful as a yardstick, should be used with caution. If it is used to confine the jurisdiction of the court to the making of an order only where inadequate provision has been made for the maintenance &c. of a dependant out of the testamentary estate having regard to his needs at the moment of death, it may easily lead to a gross injustice and defeat the purpose of the Act. Something quite unexpected may occur between the death and the date the application comes on to be heard which the testator could not reasonably have foreseen and which may radically alter the whole financial position of a dependant for better or worse. If the date of death is the proper time then, theoretically, a change for the better, even a change from destitution to wealth, should not prejudice the right of an applicant to an order even though it might have to be immediately suspended, rescinded or varied because of these very circumstances. But it is obvious that in such a case the court would refuse to make any provision at all because of this very change. In this case the proper time would necessarily be the time of hearing. In the converse case of a change in the financial position of a dependant for the worse after the death, if the date of death is the proper time,

(1) (1938) A.C. 463, at pp. 478, 479; (1938) 38 S.R. (N.S.W.) 176, at pp. 186, 187.

the right of the court to make an order in favour of the applicant, however urgently required, would depend upon whether or not the supervening event was or was not one which, in the opinion of the court, the testator should have been reasonably able to foresee from the knowledge available to him prior to his death.

To choose the time of death would seem to be paradoxical when on the one hand a dependant inadequately provided for at the date of death could become disentitled by a subsequent accretion of wealth, whereas a dependant adequately provided for at that date could not succeed however much his financial position might have deteriorated thereafter. The purpose of the Acts is to ensure that as far as may be the needs of the testator's family are justly provided for. The Acts are remedial in character and " ' must be so construed as to give the most complete remedy which the phraseology will permit ' " : *Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (1). They are intended, at least partly, to serve a public purpose by providing a means whereby indigent dependants of a testator who has left an estate sufficient to provide for their maintenance should not become a charge on the public purse. The right to make an application is created in the public interest and is not one that can be contracted out of: *Dillon* v. *Public Trustee of New Zealand* (2); *Lieberman* v. *Morris* (3).

The power of the court to make an order depends upon proof that a testator has died leaving a will which does not make adequate provision for the proper maintenance &c. of the applicant. The Acts vest a discretionary power in the court. It may intervene and override so far as may be necessary the provisions of the will where the estate has been disposed of in such a way as to leave the applicant without adequate provision for his proper maintenance. The dispositions of the will, so far as they extend, are intended to govern the devolution of the estate of a deceased person during the period commencing with his death and stretching into the indefinite future. The courts are empowered to override these dispositions for the whole or part of this period. At any time during this period a dependant's financial position may become such that he has been left without adequate provision for his proper maintenance under the dispositions of the will. But not to limit the time within which an application may be made to the court would be unduly to delay the administration and distribution of the estate. The Acts usually provide that the order shall operate as a codicil to the will but it is not a codicil in any true sense. No codicil could provide that it should operate according to its terms until some person or even

(1) (1932) 47 C.L.R. 113, at p. 119.
(2) (1941) A.C. 294.
(3) (1944) 69 C.L.R. 69.

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some court should think fit to suspend, rescind or vary it. The Acts do not authorize the courts to make a will or a codicil for the testator. His will-making power remains unrestricted but the Acts authorize the court to interpose and carve out of his estate what amounts to adequate provision for the applicant if he is not sufficiently provided for: *Dillon* v. *Public Trustee of New Zealand* (1). No judge can really place himself in the position of the testator. There are many things the testator may know which do not appear in the evidence but the judge can only know what is disclosed by the evidence. He must decide on the evidence whether the applicant has been left inadequately provided for or not under the testamentary dispositions. Really the judge must place himself not in the chair of the testator but as usual in his own chair on the bench. It is when he is hearing the application that he is exercising this, so to speak, posthumous power of a testamentary nature over the estate of the testator. If he should do what the testator should have done if he had been wise and just, little violence, if any, is done to the language of the Acts if he can determine the question at the moment when he is hearing the application. It is at this moment that his decision is substituted for that of the testator.

In some Acts the court is directed to make such provision as it thinks fit. In other Acts it is directed to do so after taking into consideration all the circumstances of the case. Whether this direction appears in terms in the Act or not, it is clear that the court must consider all relevant circumstances. It is a narrow and capricious view to take of these wide words to hold that the one circumstance the court cannot take into consideration is that the need of the applicant has arisen from some unforeseeable event occurring after the death of the testator. The requisites of jurisdiction are: (1) that the estate over which the power of the court extends must have been disposed of by a will and (2) that the applicant is left without adequate provision for his proper maintenance &c. under the dispositions of the will. The first requisite confines the jurisdiction of the court to making an order limited to the testamentary estate. The second requisite does not confine the inquiry to the financial position of the applicant at the date of death. He must prove that he has been left inadequately provided for under the dispositions of the will. That does not in terms shut out proof that he is in that position at any time within which he is allowed to make an application. And there is every reason for not implying such a provision. There is a tendency to widen the operation of the Acts and also to extend the time within which an application may be made. In New South Wales the principal Act, the

(1) (1941) A.C., at p. 301.

Testator's Family Maintenance and Guardianship of Infants Act 1916, by amendments introduced by the *Conveyancing Trustee and Probate Amendment Act* 1938 and the *Administration of Estates Act* 1954 has been extended so as to apply to widows or children of an intestate who are left under the laws relating to the distribution of intestate estates without adequate provision for their proper maintenance, education or advancement in life. (Intestacy is also included within the scope of the New Zealand Act and the *Inheritance (Family Provision) Act* 1938 (Imp.).) The amendments of the New South Wales Act vest in the court the same power to override the provisions governing the distribution of an estate on intestacy that it has in cases of testacy. The right of a dependant to make an application where there is an intestacy could not depend upon whether an intestate husband or father had been guilty of a breach of moral duty towards her or him. It must depend upon the inadequacy of the law relating to the distribution of intestate estates to provide for her or his proper maintenance. This question must surely fall to be determined at the time of the hearing of the application. There is also a tendency to give the courts power to enlarge the time within which applications may be brought beyond that as of right so as to enable an application to be made at a later date and indeed at any time prior to the distribution of the estate provided that the order if made out of time shall not disturb prior distributions. Both these tendencies fit in with the view that the proper time to determine whether the applicant is adequately provided for is at the time of the hearing.

WEBB J. I would allow this appeal for the reasons given by the Chief Justice. I have little to add.

In *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (1) the Privy Council approved of the observations of *Salmond* J. in *In re Allen Dec'd.*; *Allen* v. *Manchester* (2) that: " The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances " (3).

(1) (1938) A.C. 463, at p. 479; (1938) 38 S.R. (N.S.W.) 176, at p. 187.
(2) (1922) N.Z.L.R. 218.
(3) (1922) N.Z.L.R., at p. 220.

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It is not submitted by counsel for the respondents that the New Zealand statute under consideration in *Allen's Case* (1) differed in any material respect from this Victorian statute. Then, in my opinion, it follows that the claim in this case is to be determined in the light of the moral duty of the testatrix as revealed by what she knew or ought to have known as to the claimant's means and deserts, that is to say, that the claim is to be determined as at the date of her death and not as at the date of the application some ten years later. In *Bosch's Case* (2) their Lordships appear to have stated the rule applicable in all cases under the kind of statute then in question, and in question here, and not a general rule subject to exceptions. No exceptions were specified or even suggested by their Lordships. The test then in all such cases is the moral duty of the testator, the actual testator, not a hypothetical testator, at all events not a hypothetical testator with a supernatural gift of foreseeing strokes of good or bad fortune occurring after his death and improving or impairing the financial position of possible claimants on his bounty. As I understand their Lordships they had in mind the moral duty of the particular testator whose testamentary dispositions were being reviewed in the light of a claimant's means and deserts at the date of the testator's death ; and I cannot suppose that in making moral duty the test they contemplated any but normal testators employing the knowledge they possessed or should have possessed.

As to the amount that should be allowed to the claimant : as pointed out by *Salmond* J. in the observations set out above, the deserts as well as the means of the claimant are to be considered. Now this claimant's means and needs were manifest and not questioned ; but his deserts were by no means negligible. He appears to have been a dutiful son who, to oblige his mother, sold his house and gave her the proceeds, apparently to assist her, although in return she may appear to have given him eventually as much as, if not more than, she had received from him.

If I had not had the advantage of reading the reasons for judgment of the Chief Justice before making an estimate of the amount the claimant should receive I might have arrived at a different sum from that proposed by his Honour ; and I might even have proposed a lump sum payment instead of an annual payment in the hope that the claimant's wife might benefit in the event of her surviving him. It is not contested that the dependency on the claimant of his wife is, like that of his dependent children, a matter to be considered in arriving at the sum to be allowed. But having considered what his Honour proposes in this regard I see no reason for differing from him.

(1) (1922) N.Z.L.R. 218. (2) (1938) A.C. 463 ; (1938) 38 S.R. (N.S.W.) 176.

FULLAGAR J. I agree that this appeal should be allowed, and I agree with the order proposed by the Chief Justice. On the general question, however, of the time as at which the court must determine whether a will has made adequate provision for the proper maintenance and support of an applicant under a *Testator's Family Maintenance Act*, I am unable to accept the view that the material time is in all cases the date of the death of the testator. I agree with what I take to have been the view of *Lowe* J., from whom this appeal comes.

I would make two observations at the outset. The first is with regard to the general approach to the statutes with which we are concerned. As Lord *Romer* observed in *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (1), New Zealand was the pioneer in the field of what has come to be known as testator's family maintenance legislation. It is now a much ploughed, if not very well harrowed, field. Legislation of a similar character is now in force in each of the six Australian States, in Canada, and in England. It is perhaps unfortunate that each successive draftsman has thought that he could do a little better than any of his predecessors. Some have not been satisfied with a first attempt, and amendments have been made. So we find verbal differences between this Act and that, and on these differences may be founded legitimate arguments that different legal effects result. But it cannot be doubted that the general object in view was the same in all cases. When, therefore, we are called upon, as we often are, to consider, in relation to one of the statutes, decisions on one or more of the others, the searching out of nice distinctions is to be deprecated, and the approach which presumes uniformity of intention is the correct approach. The presumption cannot, of course, be conclusive, but, the end being the same and the means being the same, I think that the various statutes should, so far as possible, be given the same effect. With regard to the general question now under consideration, we may seem to find different opinions expressed in cases arising under different statutes. In so far as such differences exist, they cannot, in my opinion, be reconciled by reference to differences in the actual language of those statutes.

The second observation I would make is that the legislation has, on the whole, received everywhere a very liberal interpretation, and the general tendency, as illustrated in judicial decision, has been to amplify the jurisdiction—presumably in obedience to the well-known maxim. There has been also amplification by statutory amendment. It can hardly be doubted that the original intention behind the legislation did not go beyond making provision for

(1) (1938) A.C. 463, at p. 477; (1938) 38 S.R. (N.S.W.) 176, at pp. 185, 186.

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persons who had been actually dependent on a testator and who were left at his death in actual want. But from the very beginning the courts refused to adopt so limited a view of the scope of the legislation. The original Act in New Zealand was passed in 1908. In 1910 in *In re Allardice* (1), where the testator's estate was in the vicinity of £30,000, the Court of Appeal of New Zealand made an order in favour of adult married daughters of the testator, whose husbands were able to support them, though they were not in prosperous circumstances. An appeal from this decision to the Privy Council was dismissed, their Lordships expressly approving of the principles which the learned judges of the Court of Appeal had laid down as proper to be applied in exercising the jurisdiction given by the Act. The same principles were again approved by the Privy Council in *Bosch's Case* (2), which must be regarded as the leading case on the subject. That case went on appeal from the Supreme Court of New South Wales (*Nicholas* J.). The contrast between the view taken by their Lordships and the view which had been taken by *Nicholas* J. is striking and fundamental. It is now settled law that the discretion given by the legislation to the courts is a very wide discretion indeed, and, while the courts do not in terms deny the prima-facie right of a testator " to do what he likes with his own ", they do not hesitate to make for him, within any limits which may be expressly fixed by the relevant statute, whatever testamentary dispositions they consider that " in all the circumstances of the particular case " he ought, as a " wise and just " testator, to have made. *Bosch's Case* (2) is binding authority for all courts in Australia, and they must, and invariably do, accept the extremely liberal interpretation which was approved in that case.

The jurisdiction to make an order, however, is made by each of the statutes—though they differ in actual wording—to depend, in effect, on the death of a testator leaving a will which does *not* make " wise and just " provision for certain persons. It is with the Victorian Act that we are immediately concerned, the material provision being contained in s. 139 of the *Administration and Probate Act* 1928, as re-enacted by s. 3 of the *Administration and Probate (Testator's Family Maintenance) Act* 1937. That section provides that " if any person . . . dies . . . 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

(1) (1910) 29 N.Z.L.R. 959.

(2) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176.

thinks fit shall be made out of the estate of the testator for such widow widower or children." The New South Wales statute which was considered in *Bosch's Case* (1) did not differ materially from this Victorian provision, and the effect of the condition on which jurisdiction depends was expounded in a sentence which has frequently been quoted. Lord *Romer* said :—" Their Lordships agree that in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father " (2). His Lordship then quoted with approval a passage from the judgment of *Salmond* J. in *In re Allen Dec'd.* ; *Allen* v. *Manchester* (3), which concludes with these words : " The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances " (4). The question now to be determined is this. In considering whether a testator's will falls short of this standard of wisdom and justice, so as to attract the jurisdiction, is the court confined to a consideration of the circumstances as they existed at the date of the testator's death, or may it, where a change has taken place, have regard to those which are found to exist when the application comes before it ?

The question is not likely often to arise in an acute form, and this for two reasons. In the first place, a time limit for the making of an application (which in some cases has been, and in some cases has not been, capable of extension in the discretion of the court) is fixed by the statutes, so that an application will normally be heard within a fairly short time after the testator's death. In any case, as a matter of practical politics, administration and distribution of the estate cannot be held up indefinitely. In the second place, even the narrower view of what the court may legitimately consider concedes that we must attribute to our ideal testator an intelligent anticipation of reasonably probable contingencies. An example (possibly extreme) of such an attribution is to be found in *In re Sinnott Dec'd.* (5), where I had to consider the case of an adult daughter who was in no immediate need. The question, however, is bound to arise in an acute form on occasions, when the court is faced with circumstances which really do call for relief, but which the testator could not reasonably have foreseen. Such a case arose in *Re Forsaith Dec'd.* (6), where a married daughter had been deserted

(1) (1938) A.C. 463 ; (1938) 38 S.R. (N.S.W.) 176.
(2) (1938) A.C., at pp. 478, 479.
(3) (1922) N.Z.L.R. 218.
(4) (1922) N.Z.L.R., at pp. 220, 221.
(5) (1948) V.L.R. 279.
(6) (1926) 26 S.R. (N.S.W.) 613 ; 43 W.N. 171.

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by her husband after the testator's death, and in *In re Wheare* (1), where the widower of the testatrix had suffered serious injuries in an accident after her death. *Harvey* C.J. in Eq. in the former case, and *Paine* A.J. in the latter case, held that the matter should be considered as at the date of the hearing of the application. The only other case in which the decision seems actually to have turned on the question is *In re Testator's Family Maintenance Acts* (2). In that case the Full Court of Tasmania refused relief to an adult son on the ground that his need had arisen only after the death of the testatrix, who was his mother, and who had left the whole of a substantial estate to charities. I cannot think that this decision was right. The narrower view on the general question was expressed by *Townley* J. in a carefully reasoned judgment in *Re Brown Dec'd.* (3), but an order for a substantial sum was made in favour of the applicant, an adult married daughter, and the report does not disclose what practical effect, if any, resulted from the opinion expressed by his Honour.

Expressions of opinion favouring the narrower view are to be found in New Zealand, but the only other case to which I wish to refer specifically is *In re Porteous Dec'd.* (4). In this case *Herring* C.J. delivered the judgment of a Full Court of which I was a member. The actual point at issue was whether an order made in favour of an applicant under the Victorian Act could be subsequently varied at his instance. That Act expressly provides (s. 145 (6)) that such an order may be varied at the instance of an executor or a beneficiary under the will. The decision of the court was that an order once made could not, even though it reserved " liberty to apply ", be subsequently varied in favour of the applicant. But there is a passage in the judgment (5) which can legitimately be used as supporting the narrower view on the general question now under consideration, and the judgment cites a passage from the judgment of *Salmond* J. in *Welsh* v. *Mulcock* (6) which does support the narrower view. I can only say, speaking for myself, that the question now under consideration was remote from my mind, and that I considered the effect of what was said by *Salmond* J. only in so far as it appeared to support the view which we took on the question which actually arose in *In re Porteous Dec'd.* (4). What was said by *Herring* C.J. does not appear to me to be inconsistent with the view taken in *Re Forsaith Dec'd.* (7) and *In re Wheare* (1). The view taken by *Harvey* C.J. in Eq. in *Re Forsaith Dec'd.* (7) and by *Paine* A.J. in *In re Wheare* (1) is, in my opinion, to be preferred to

(1) (1950) S.A.S.R. 61.
(2) (1916) 12 Tas.L.R. 11.
(3) (1952) Q.S.R. 47.
(4) (1949) V.L.R. 383.
(5) (1949) V.L.R., at p. 387.
(6) (1924) N.Z.L.R. 673, at pp. 687, 688.
(7) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.

the narrower view. It is more in accord with the general object of the legislation, and allows the courts a freer hand in the exercise of a discretion which has always been regarded as very wide indeed. It is, moreover—and this is, to my mind, a decisive consideration—much more realistic. It seems to me to be the natural and sensible view. It avoids an unnecessary question, which savours of artificiality, and which often cannot really be satisfactorily answered. For, if it is rejected, then, in any case in which the circumstances of an applicant have altered for the worse since the testator's death, we have to ask ourselves the question whether the testator ought, as a reasonable armchair-sitter, to have foreseen, and provided for, the contingency which has arisen. This is an unpractical and speculative question. We may suppose the case of a testator who has two adult sons, of whom the one is an able-bodied man with excellent prospects, and the other is a cripple. He leaves a modest but substantial estate to the cripple, and makes no provision for the other son. After his death the other son is crippled in an accident. It seems idle to say that the testator ought to have foreseen and provided for such a contingency, the odds against which were tremendous. It may be, of course, that, when the accident happens, the court can do nothing because the estate has been distributed. But, if it *can* do something, it seems to me to be contrary to the intendment of the statute—and, I would add, of the decisions, if we except the Tasmanian case—to say that nothing can be done because the testator could not have foreseen what has happened.

The Tasmanian case cited above affords a very good illustration in this connexion. The son of the testatrix had been wounded and partially incapacitated while on active service in the army. It may perhaps be said that the testatrix (who left the whole of her estate to charities) ought to have foreseen this possibility. But exactly what ought she to have foreseen ? That he would be only slightly wounded, or that he would be totally incapacitated ? These considerations bring out the impracticability of a test which is unnecessary if it is permissible to look at what has actually happened.

The argument for the narrower view rests partly on the wording of the statutes, but mainly—and in the last resort, I think, wholly—on the references to the " moral duty " of the testator, which have been so frequent ever since the judgment of *Edwards* J. in *In re Allardice* (1) and the approval of the Privy Council (2) of what had been said in New Zealand in that case.

I have set out above the terms of the relevant section of the Victorian Act. The event which gives rise to the jurisdiction is expressed as being the death of a person " leaving a will and without

(1) (1910) 29 N.Z.L.R. 959, at p. 973. (2) (1911) A.C. 730, at p. 734.

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making therein adequate provision for the maintenance and support of " any member of a specified class of persons. It is said, naturally enough, that this language seems to look to the date of the testator's death as the point of time as at which the question of adequacy of provision must be answered. I think, indeed, that the section does look primarily to the date of death, which is natural, because, as I have said, it is only in exceptional cases that there will have been a material change of circumstances between death and application. In *In re Howell*; *Howell* v. *Lloyds Bank Ltd.* (1), *Evershed* M.R. said: " I think, *prima facie, at any rate,* that it must be right to judge this matter, whether the testator was unreasonable, in the light of the circumstances which did present, or should have presented, themselves to him up to the moment of his death " (2). (The italics are mine.) But the language used is not, in my opinion, such as to exclude in all cases circumstances arising after death. It involves no strained or unnatural use of language to say of a son, who finds himself at some time after his father's death in need of maintenance and support, that his father has left a will without making therein adequate provision for his maintenance and support. A construction which regards such a case as included is a perfectly reasonable construction, it is the more " beneficial " construction, and it is, in my opinion, greatly to be preferred.

The other argument, which is based on what has been said in the cases, is, at first sight, of considerable force. For, if we are to refer everything to a " moral duty " resting on a testator, how can we say that he has committed any breach of moral duty by failing to envisage every conceivable shock that flesh is heir to ?

If the result of the cases is that the expression " breach of moral duty " has now to be regarded as a literal statement of the condition on which jurisdiction depends, then it is indeed to be regretted that any such term as " moral duty " was ever used in connexion with testator's family maintenance. It is perhaps in any case to be regretted. No such term is used in any of the relevant statutes, and it is surely wrong to say that every order in favour of an applicant under any of the statutes has involved a moral reflection on the testator. But, however this may be, the present question is whether it necessarily follows from the numerous references in the cases to " moral duty " that a court, in considering whether a will does or does not make adequate provision for an applicant's maintenance and support, can never look at events which could not reasonably have been anticipated by a testator. In my opinion, no such conclusion follows. To say that it does seems to me to misunderstand the purpose and significance of what may be called the " moral duty test ". It is to turn a guide into a tyrant, a

(1) (1953) 1 W.L.R. 1034. (2) (1953) 1 W.L.R., at p. 1038.

commonly convenient factual test into a rule of law. The fact that this error is constantly committed in all sorts of cases does not make it any the less an error.

I do not think there is any rule of law that we must weigh every testator in the scales against a standard of testamentary impeccability. I do not think, generally speaking, that the courts, when they have referred to " moral duty ", have really intended to do more than suggest that the court ought to do what it is to be supposed that the testator would have done if he had known and properly appreciated all the circumstances of the case. This is quite consistent with regarding those " circumstances " as including all facts made known to the court on the hearing of an application. If, on occasions, language has been used which suggests a more far-reaching intention, I think that such language has either been used *per incuriam* or is the result of a misguided view. The statute speaks merely of a state of fact. The notion of " moral duty " is found not in the statute but in a gloss upon the statute. It may be a helpful gloss in many cases, but, when a critical question of meaning arises, the question must be answered by reference to the text and not by reference to the gloss. It is the text, and not the gloss, that we are called upon to interpret. The argument based on the references in the cases to " moral duty " is, in my opinion, unsound.

For the above reasons, I am of opinion that a court, in considering whether an applicant for an order under such an Act as the Victorian Act now in question has been left without adequate maintenance or support, may have regard to circumstances which have arisen since the death of the testator, and which the testator could not reasonably have been expected to anticipate.

Acceptance of the view which I have expressed removes difficulties which I might otherwise have felt about this particular case. I agree with *Lowe* J. that it is a case in which an order ought to be made in favour of the applicant. The rest is a matter of quantum, and with regard to quantum a court of appeal must always be reluctant to interfere with the discretion of the court of first instance. But (whatever might have been my view in the absence of authority) I am unable to avoid the conclusion that the amount allowed by the order under appeal is altogether too small, and that that order does not really represent an application of the principle laid down in *Allardice's Case* (1) and *Bosch's Case* (2). The testatrix left a large estate, and she left the bulk of it to beneficiaries which have no claim on her bounty competing with the claim of the applicant. The applicant assisted in building up the large estate which she left, and he did so partly in expectations which she had encouraged.

(1) (1911) A.C. 730.

(2) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176.

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Her last will was made many years before her death. The circumstances seem to me to call for a very substantial additional allowance, and I agree, as I have said, with the order proposed by the Chief Justice.

KITTO J. The appellant was granted an extension of time which enabled him, ten years after the death of his mother, to bring before the Supreme Court of Victoria an application under s. 139 of the *Administration and Probate Act* 1928 (Vict.) (as substituted by an Act of 1937, No. 4483), for provision to be made for him out of his mother's estate. The unusual length of the period which elapsed in this case between the death and the application makes it desirable that we should decide specifically whether the circumstances to be considered in deciding whether a case attracts the jurisdiction of the court under s. 139 are those which existed at the date of the death or those which are found to exist when the application comes before the court.

The jurisdiction is subject to a condition expressed in the words: " If any person . . . dies . . . leaving a will and without making therein adequate provision for the proper maintenance and support of the testator's widow widower or children ". In a case in which that condition is satisfied the court is empowered to order that such provision as it thinks fit shall be made out of the estate of the testator for such widow widower or children.

The words of condition refer to the manner in which a person exercises his power of testamentary disposition, and in their natural meaning they would seem to require a judgment upon his disposition to be formed as at the time when his death makes it effective. The condition is not that the applicant is found to be inadequately provided for notwithstanding any provision made for him by the testator's will. It is that there has been an omission by the testator to make adequate provision for him by his will; and the question whether such an omission has occurred can hardly be intended to admit of a different answer at an interval after the death from that which would have been given to it immediately upon the death. Words more susceptible of being read as making the condition refer to the situation of the wife or children as it is found to be by the court when the application is being considered appear in the New South Wales Act (the *Testator's Family Maintenance Act* 1916) and the South Australian Act (the *Testator's Family Maintenance Act* 1918). In the former, the relevant provision begins: " If any person . . . 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 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 ". In *Re Forsaith Dec'd.* (1), *Harvey* C.J. in Eq. thought that in the case of a person who died between the 7th October 1915 and the commencement of the Act the court would be forced to the conclusion that the period of time to be considered was the date when the court was dealing with the matter. From this his Honour inferred that the same construction must apply in all cases. If this were to be accepted in relation to the New South Wales Act it would apply *a fortiori* in relation to the South Australian Act, in which the only material difference is that the words " dying or having died since the seventh day of October, one thousand nine hundred and fifteen " are omitted. I am bound to say that the better construction of both Acts seems to me to be that " are left " directs attention to the date of death in the case of persons dying after the Act came into force and to the date of the commencement of the Act in the case of persons who were already dead at that date.

The way in which the words " are left " are used in the New South Wales Act, coupled with the omission of the draftsman to follow the example of the Tasmanian Act by modifying those words by the phrase " upon his death ", provided *Harvey* C.J. in Eq. with his only reason (apart from that which has already been mentioned) for holding in *Re Forsaith Dec'd.* (1) that the circumstances to be considered in determining whether the case is one for the exercise of the court's jurisdiction are those which are found to exist at the time when the application comes before the court. But the words " are left ", whether expressly modified in the Tasmanian fashion or not, occur in the description of the manner of disposition by will which is to give jurisdiction; and when it is said that a particular disposition is such that persons " are left " in a specified situation the meaning must surely be, unless there is a controlling context, that the leaving of those persons in that situation is the work of the disposition. And if that is so, words describing the situation must refer, prima facie at least, to qualities exhibited by the situation as and when the disposition occurs which leaves it unremedied. With the greatest possible respect, I think that *Re Forsaith Dec'd.* (1) was wrongly decided. It was followed in *Re Pichon Dec'd.* (2) and in two South Australian cases, but even in New South Wales strong reasons have been given for disagreeing with it: per *Myers* J. in *Re T. F. Dun Dec'd.* (3) and in most jurisdictions its doctrine has been rejected. The cases are collected in the judgment of the Chief Justice, and I agree with his Honour in the observations he has made upon them. In Canada, I may add, the

(1) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.
(2) (1946) 47 S.R. (N.S.W.) 186; 63 W.N. 256.
(3) (1956) S.R. (N.S.W.) 181; 73 W.N. 99.

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view has been accepted that the circumstances to be considered in deciding whether the condition of the court's jurisdiction is fulfilled are those in existence at the testator's death: *Re Hull* (1) (where references to the date of making the will are shown by the context to mean the date when the will took effect). If, as I think, this view should prevail on the wording of the New South Wales and South Australian Acts, it cannot but prevail under the still clearer words of the Victorian Act.

The conclusion I have expressed I have reached on the language of the legislation. The argument submitted to us in support of it, however, was put rather differently. It was based largely upon the proposition that the jurisdiction of the court arises only where a testator has disposed of his estate in breach of a moral duty owed by him to the applicant. How, it was asked, can a testator be convicted of such a breach upon a consideration of circumstances which did not exist until his death had made it impossible for him to give weight to them? This way of putting the matter is not, I think, satisfactory, though the language employed is drawn from passages in many judgments. It seems worth pointing out that those judgments, rightly understood, do not warrant the view that an adverse judgment on moral grounds must be passed upon a testator before the court can make an order in favour of an applicant. The only question involved in the words of condition which appear in the Act is one of objective fact: was the applicant left, by the testamentary disposition which the testator made, without adequate provision for his proper maintenance and support. If the question were whether the testator was morally at fault in not leaving the applicant better provided for, there would have to be left out of account, not only circumstances which at his death had yet to come into existence, but also any circumstances existing at his death which were unknown to him and which he could not fairly be blamed for not having ascertained. This cannot be right. The truth is that, although it is often sufficient for the purposes of a case to speak of the moral duty of the testator as a test of the adequacy of the provision needed by a widow or child for proper maintenance and support, the standard is more accurately stated by reference to the moral duty which would have lain upon a hypothetical testator engaged in making his will at the moment of the actual testator's death, not only surrounded by the very circumstances which surrounded the actual testator at that time, but fully alive to all those circumstances, including all the possibilities for the future to which it was reasonable that he should attend. The Privy Council's approval in *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (2)

(1) (1944) 1 D.L.R. 14, at p. 20.

(2) (1938) A.C. 463, at p. 478; (1938) 38 S.R. (N.S.W.) 176, at p. 187.

of the passage from *In re Allardice* (1) in which *Edwards* J. spoke of the testator being guilty of a manifest breach of his moral duty should be taken in conjunction with their Lordships' approval on the next page of a passage from the judgment of *Salmond* J. in *In re Allen Dec'd.*; *Allen* v. *Manchester* (2). The second sentence of the passage seems to me to put the question of moral duty accurately by referring to the testamentary provision "which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances." Such a father, of course, would have to prophesy as best he might, for his concern would be to provide for the contingencies of the future. Indeed present circumstances would be relevant to his purpose in so far only as they might throw light upon the future, both of persons and of property. But it is the hypothetical testator, endowed with wisdom and justice and aware of all that there was to know at the time when the testator died leaving his will to operate, whose moral duty affords a test by which a court may decide whether any and if so what provision would have had to be made by the actual testator's will in order that an applicant's proper maintenance and support should have been adequately provided for thereby.

The point I seek to make is that references to the moral duty of "the" testator should not be allowed to create the kind of misconception which *Wynn-Parry* J. had to correct in *In re Franks*; *Franks* v. *Franks* (3). Under the *Inheritance (Family Provision) Act* 1938 (Imp.), which gives the court a jurisdiction similar to that conferred by the Victorian Act now in question if it is of opinion that the will does not make "reasonable provision" for an applicant, it has often been said that the court has to find that it was "unreasonable on the part of the testator" to make no provision or not to make a larger provision for that applicant: *In re Styler*; *Styler* v. *Griffith* (4); *In re Pugh Dec'd.*; *Pugh* v. *Pugh* (5); *In re Inns Dec'd.*; *Inns* v. *Wallace* (6); *In re Howell*; *Howell* v. *Lloyds Bank Ltd.* (7). But when a case arose in which a testatrix died without having had any opportunity of making a provision in her will for a new-born child, and therefore without having been guilty of any unreasonableness, *Wynn-Parry* J. found it necessary to go back to the words of the Act and point out that it was the absence of a reasonable provision, and not unreasonableness on the part of the testator, which the Act made the condition of jurisdiction: *In re Franks*; *Franks* v. *Franks* (8). Under the Acts in force in Australia and New Zealand the jurisdiction depends upon an absence of provision

(1) (1910) 29 N.Z.L.R. 959.
(2) (1922) N.Z.L.R. 218, at p. 220.
(3) (1948) Ch. 62.
(4) (1942) Ch. 387.
(5) (1943) Ch. 387.
(6) (1947) Ch. 576.
(7) (1953) 1 W.L.R. 1034.
(8) (1948) Ch., at p. 65.

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adequate for a particular purpose. Understood in the sense I have indicated, the doctrine that a conception of moral duty should be the guide in determining adequacy for the purpose is fully warranted by the terms of the Acts. It necessarily involves that the circumstances at the death are the circumstances to consider; but it is not the starting point from which the reasoning proceeds which leads to that conclusion. Both the conclusion and the doctrine rest upon the terms of the legislation.

It remains only to say explicitly that once an applicant establishes that the case falls within the class in which the court is given jurisdiction, the circumstances as they then exist may and should receive full consideration by the court in deciding what provision it thinks fit to make for the proper maintenance and support of the applicant. It is true to say that in the light of all those circumstances the court will do what it considers wise and just for the purpose. But this has no bearing upon the question which is before the court at the preliminary stage—the question whether the case is shown to be within the limits which the legislature has seen fit to set to the extraordinary jurisdiction it has conferred on the court. At that stage the court must be satisfied, before commencing to think what provision it would be wise and just to make in the circumstances as they then exist, that the testator's will did not operate to make such a provision for the applicant's maintenance and support as would have been made if a complete knowledge of the situation and a due sense of moral obligation with respect to those matters had combined to dictate a new will to the testator immediately before he died.

To these general observations I do not find it necessary to add more than that I share the view of this case which the Chief Justice has stated in his judgment. I therefore agree that the appeal should be allowed and that the order proposed by his Honour should be made.

Appeal allowed. Vary the order of the Supreme Court dated 26th October 1955 *by substituting the figure* £20 *for the figure* £5. *Order that the costs of all parties of this appeal be paid out of the estate of the testatrix.*

Solicitors for the appellant, *Lynch & MacDonald.*

Solicitors for the respondent, the National Trustees Executors & Agency Co. Ltd., *Snowden, Neave & Demaine.*

Solicitors for the respondent, the Attorney-General for the State of Victoria, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.