[HIGH COURT OF AUSTRALIA.]

McCOSKER AND OTHERS . . . . . APPELLANTS;
RESPONDENTS,

AND

McCOSKER . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 26, 27; *Nov.* 28.

Dixon C.J., Williams and Kitto JJ.

Testator's Family Maintenance—Will—Exclusion of son from benefit—Provision made for him in testator's lifetime—Estate left to other sons both of whom in comfortable circumstances—Excluded son not as well-to-do—Able-bodied and in good health—Able to support himself—Entitlement to order—Amount proper to be awarded—Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 (*N.S.W.*), *s.* 3.

A testator, who was survived by five sons and two daughters all over the age of thirty-five years, bequeathed a legacy of £500 to each daughter and gave his net residuary estate of value about £30,000 to two of his sons equally as tenants in common. He declared that he had made no provision for his other three sons, one of whom was A. M., as he had adequately provided for them in his lifetime. The testator's two daughters had married husbands who were well able to support them and his two sons, apart from A. M., who took nothing under his will had with assistance from the testator in the form of guarantees of advances successfully established themselves in life as graziers. A. M., the testator's second son aged 49 years at the death of his father in 1954, was a poultry farmer having assets worth £7,830 and liabilities of £2,450. He was a widower, without children, and since 1946 he and a war widow whom he had not married because marriage would have involved the loss of a pension received by her, had lived as man and wife. He was able-bodied and in good health and in the year ended 30th June 1956 had a net income of £400 after paying interest to his bank and making required reductions in the amount of his overdraft. A. M. had worked on the testator's property for about a year after leaving school at the age of 17 years, after which time he became, at the testator's instance, a bank clerk, in which employment he remained for three or four years. Thereafter until 1928 he followed various

callings, in which year the testator dissuaded him from taking up a position in Perth and brought him home to work on the testator's properties. He was then aged 25 years and he remained working on the properties until 1936, at which time he left to try some other occupation. When he left, the testator gave him £300. He worked as a traveller in Sydney until his enlistment in the A.I.F. in 1940. His wife, whom he married in 1937, became seriously ill soon after his discharge in 1944 and died in 1946. After the war A. M. ventured unsuccessfully into pig farming, using as part of his capital a sum of £1,200 given him by the testator. In 1947 he turned to poultry farming and the testator gave him a further sum of £1,200 to assist him in this new venture. At all times A. M. was on friendly terms with the testator and the other members of his family. A. M. made an application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.), he being the only child of the testator to do so, and the judge of first instance awarded him a legacy of £6,500 out of the testator's estate. On appeal,

Held by *Dixon* C.J. and *Williams* J., *Kitto* J. dissenting, that the trial judge was justified in holding that A. M. was entitled to an order under the Act.

Held further by *Dixon* C.J. and *Williams* J. that in all the circumstances the sum awarded was too liberal and should be reduced to £3,500.

Per Dixon C.J. and *Williams* J.: (1) The presence of the words "advancement in life" in s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.) in addition to the words "maintenance and education" is not unimportant. "Advancement" is a word of wide import. Whilst if found in a trust instrument it can often be confined by the context to the early period of the life of a beneficiary, it cannot be so limited in such section because the Act applies to children of any age.

(2) The broad proposition that an able-bodied son able to maintain himself in the future exactly as he has done in the past cannot hope to succeed in an application made under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.) cannot be sustained. Each case must depend on its own circumstances.

Decision of the Supreme Court of New South Wales in Equity (*McLelland* J.), varied.

APPEAL from the Supreme Court of New South Wales.

On 23rd March 1956 Athol William McCosker of "Collindale" near Kendall in the State of New South Wales applied by originating summons to the Supreme Court of New South Wales in its Equitable Jurisdiction for relief under s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.) out of the estate of his late father Cornelius McCosker upon the ground that the latter had by his will dated 2nd February 1953

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failed to make adequate provision for his proper maintenance and advancement. The respondents to the application were Nigel Cyril McCosker, Maxwell Cornelius McCosker and Lionel Vincent McCosker the executors of the said will of the said Cornelius McCosker.

The application, which was opposed by the respondents, came on for hearing before *McLelland* J., who on 7th December 1956 ordered that the respondent and such executors as aforesaid should pay to the applicant Athol William McCosker a legacy of six thousand five hundred pounds (£6,500) out of the estate of the said Cornelius McCosker, such legacy to carry interest from 7th March 1957 if not paid before that date.

From this order the respondents appealed to the High Court upon alternate grounds (a) that the court was in error in holding that the respondent was entitled to any order in the said application; or (b) that the court was in error in determining that the applicant was entitled to an award of a legacy of as great a sum as six thousand five hundred pounds (£6,500), and by their notice of appeal the respondent sought (a) an order that the order under appeal be set aside and in its place an order made dismissing the said application with costs, or (b) an order that the order under appeal be set aside and in its place an order made awarding the applicant a legacy of two thousand five hundred pounds (£2,500).

The relevant facts are sufficiently set forth in the judgment of the Court hereunder.

A. B. Kerrigan Q.C. (with him *R. G. Henderson*), for the appellants. The judge below erred in approaching the application from the viewpoint of what sum was needed to put the applicant on his feet, instead of ascertaining whether proper provision had been made for his maintenance. The testator being under no moral duty to provide for him, the question is whether he is in such need that the court ought to make provision for him. There is no rule as to the approach to be made to an application by an able-bodied son, but the problem has been variously discussed. [He referred to *Re A. Sherrard* (1) and *In re Sinnott* (2).] We respectfully adopt the approach of *Fullagar* J. in the second case, that where there is no moral duty, then the court must find some special need or some special claim before it will make an order in the case of an able-bodied son, and in the present case of an able-bodied son without dependants his Honour's remarks apply with greater force. No such special

(1) (1938) 55 W.N. (N.S.W.) 38, at p. 39.

(2) (1948) V.L.R. 279, at pp. 280, 281.

need or special claim has here been made out to attract the jurisdiction of the court. If this was a proper case in which to make an order then the provision made by the judge below was so much more than was adequate in the circumstances as to be an improper exercise of the discretion vested in him. [He referred to *Coates* v. *National Trustee Executors & Agency Co. Ltd.* (1).] Where a court comes to the conclusion that a lump sum should be awarded then the court ought not to be over-generous in the amount given, because once given the sum is gone beyond recall. Here more than one-fifth of the distributable estate was awarded to the applicant. Such an amount is unnecessarily large, and the applicant in his case did not claim more than £2,100. In all these circumstances a sum of £2,500 is a more appropriate figure than that awarded. The judge below sought not only to meet the applicant's needs but to free him of mortgages on his property and put him in the way of being a successful poultry farmer, and in doing so lost sight of the duties imposed on him by the Act to ascertain the sum necessary to provide him with adequate maintenance.

J. S. Ferrari, for the respondent. The whole of the history of the applicant as appearing in the evidence was such as to cast upon the testator, who was possessed of ample assets, a moral duty to make provision for him. The testator's estate is not only one totalling £30,000 to be distributed amongst his family on his death, but is one which is left after having established his sons apart from the applicant in prosperous grazing properties in his lifetime. So far as the other sons are concerned, the benefits given them by the will are a pleasant addition to their already substantial assets. Only the applicant stood in any need, and, on the evidence, in real need. Whilst the applicant may in one sense be said to have adequate means to keep body and soul together, they are not adequate for his proper maintenance and advancement in life as contemplated by the Act and as expounded in *Bosch* v. *Perpetual Trustee Co.* (*Ltd.*) (2).

[WILLIAMS J. Can you rely on the words "advancement in life" in relation to a man aged fifty years? Are there any authorities on the point?]

Not so far as I am aware, but I rely upon those words. It was perfectly proper for the judge below to provide for the adequate maintenance of the applicant by freeing his property of mortgages thereby enabling him to develop it for his own benefit. On the

(1) (1956) 95 C.L.R. 494, at pp. 509-511, 523.

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

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question of quantum, the sum awarded ought not to be disturbed and the problem ought not to be approached in the mathematical way suggested by the appellants. [He referred to *Coates* v. *National Trustee Executors & Agency Co. Ltd.* (1).] The judge below was under no misconception as to the principles to be applied by him in the making of an order and no ground exists for interfering with such order. There was here jurisdiction to make the order under appeal and the amount awarded is a proper sum having regard to the applicant's need.

A. B. Kerrigan Q.C., in reply.

Cur. adv. vult.

Nov. 28.

The following written judgments were delivered :

DIXON C.J. AND WILLIAMS J. This is an appeal from an order made by the Supreme Court of New South Wales in Equity (*McLelland* J.) under the provisions of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.) on 7th December 1956. The order was made in the estate of the testator, Cornelius McCosker, deceased. The appellants Nigel Cyril McCosker, Maxwell Cornelius McCosker, and Lionel Vincent McCosker, three sons of the testator, are the executors of his estate and the respondent, Athol William McCosker, in whose favour the order was made, is another son. The order was that the appellants as executors of the will of the testator should pay to the respondent a legacy of £6,500 out of the estate of the testator, such legacy to carry interest from 7th March 1957 if not paid before that date. The testator, who was a prosperous grazier living in the Inverell district of New South Wales, made his last will and testament on 2nd February 1953 and died at Inverell on 25th August 1954 aged 83 years. Probate of his will was duly granted by the Supreme Court of New South Wales in its probate jurisdiction to the appellants on 6th April 1955. The testator, whose wife pre-deceased him, was survived by five sons and two daughters—Elva Mary Schofield born in 1900, Leslie James Owen McCosker born in 1902, Athol William McCosker born in 1905, Nigel Cyril McCosker born in 1911, Maxwell Cornelius McCosker born in 1913, Mary Rita Michell born in 1914 and Lionel Vincent McCosker born in 1918. His estate was sworn for probate purposes at a net value of £40,899 19s. 5d. After payment of all death duties, debts and legacies the residuary estate available for distribution is of the value of about £30,000. By his will, the testator gave, devised and bequeathed his

(1) (1956) 95 C.L.R., at p. 511.

residuary estate upon trust for his sons Maxwell Cornelius McCosker and Lionel Vincent McCosker as tenants in common in equal shares absolutely. By cl. 5 of his will the testator declared that he had made no provision for his sons Leslie, Athol and Nigel " as I have provided adequately for them during my life ".

The financial position of the testator's four children, other than the respondent, who do not participate under the will was such at the date of his death that it could not be said that they had been left without adequate provision for their proper maintenance. His eldest and third sons had successfully established themselves in life as graziers after the testator had assisted them materially by guaranteeing advances made to them for that purpose and his two daughters had married husbands who were well able to support them. No claims for maintenance under the Act have been made by any of these four children.

The testator was a man who made a success of life as a grazier in the Inverell district. The evidence contains details of a number of properties he purchased and worked from time to time and some of which he sold to his sons. He left an estate of considerable value. His two sons Maxwell and Lionel under his will, if its provisions are not disturbed, will inherit about £15,000 each. The residuary estate includes a debt of £7,965 owing to the estate by Maxwell and one of £7,071 owing to the estate by Lionel. These debts represent balances of purchase money owing to the testator for properties which he had sold to them in his lifetime. After these debts have been discharged by setting them off against their respective shares of residue, there will still be, apart from any order made in favour of the respondent under the Act, approximately £7,000 in cash left for Maxwell and £8,000 in cash for Lionel. If the present order stands, after paying £6,500 out of the residue to the respondent, they will still be entitled to approximately £3,750 and £4,750 in cash respectively.

The question is whether, in all the circumstances of the case, it can be said that the respondent has been left by the testator without adequate provision for his proper maintenance, education and advancement in life. As the Privy Council said in *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (1) the word " proper " in this collocation of words is of considerable importance. It means " proper " in all the circumstances of the case, so that the question whether a widow or child of a testator has been left without adequate provision for his or her proper maintenance, education or advancement in life must be considered in the light of all the competing claims upon

(1) (1938) A.C. 463; (1938) 38 S.R. (N.S.W.) 176.

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the bounty of the testator and their relative urgency, the standard of living his family enjoyed in his lifetime, in the case of a child his or her need of education or of assistance in some chosen occupation and the testator's ability to meet such claims having regard to the size of his fortune. If the court considers that there has been a breach by a testator of his duty as a wise and just husband or father to make adequate provision for the proper maintenance education or advancement in life of the applicant, having regard to all these circumstances, the court has jurisdiction to remedy the breach and for that purpose to modify the testator's testamentary dispositions to the necessary extent.

In the present case the relevant circumstances are that the residuary estate of the testator is of considerable value, and that the only persons who have claims or possible claims upon the bounty of the testator are three sons, the respondent in whose favour an order has been made and the two sons to whom the residue has been left. These claimants are alike in this respect, that they are all able-bodied. The residuary estate is large enough for an order to be made in favour of the respondent, whose financial position is not strong, without seriously prejudicing the two younger sons.

The respondent is the second son of the testator. He was born in 1905 so that he was at the date of the death of the testator forty-nine years of age. He went to school until he was seventeen and during his school holidays and often during term-time worked on his father's grazing properties. After leaving school he worked for his father for about a year when his father arranged for him to become a clerk in the Government Savings Bank. He was employed in the bank for three or four years. He then went into business for a short time but did not succeed and became an employee of the Jennings Rubber Company. Whilst he was with that company he received an offer to take up a position in Perth, Western Australia, which offered good prospects of advancement in life. Before proceeding to Perth he went home on a visit but found that his father was against his accepting this offer and he was persuaded to return to work on his father's properties. This was in 1928 so that he was then twenty-three years of age. For the following eight years he worked for his father receiving as remuneration only his keep and during the last year fifty shillings per week as pocket money. By 1936 his brothers Maxwell and Nigel were also working on these properties. The respondent was then thirty-one years of age and his father did not indicate that he had any plans for his future. This led the respondent eventually to tell his father that he had decided to try something else. There was

no quarrel and the respondent then and in later years always remained on friendly terms with his father and the rest of the family. On the day the respondent left home his father gave him a cheque for £300. He obtained a position as a traveller with Cooper Engineering Company in Sydney and remained in that employment until he joined the A.I.F. on 27th May 1940. He was in the Army for over four years and was discharged on 24th July 1944 having spent two and a half years of that time abroad.

Whilst in the Army he visited his family when on leave and corresponded with his father and upon his discharge visited his father at the home in Inverell which his father had bought in 1937 and where his father and mother were living. The respondent was married in 1937. But his wife became seriously ill soon after he was discharged and died at Taree Hospital on 23rd February 1946. After his discharge the respondent did a course in pig farming at Wallangbar State Experimental Farm of three months' duration. About this time the testator promised him £1,200 to help him get a fresh start in civil life and said that he would guarantee an account in the respondent's name with his bank in Inverell for this amount. The respondent and his wife had at that time about £400 between them. In August 1945 the respondent bought a block of 100 acres at Kendall about thirty-five miles north of Taree. He paid £1,223 for the block, obtaining, in addition to the £1,200 provided by his father, a loan of £500 on mortgage from the Commonwealth Bank and a further loan of £1,000 from the Rural Bank for the development of it. At that time his wife was very ill, the medical expenses in connexion with her illness used up a great deal of the small capital they had, and the attention that it was necessary for him to give her prevented him from developing the property to the extent to which he had hoped. However he was able to get the property into a sufficient condition to commence pig farming but this venture failed and he was forced to change over to poultry farming. In 1947 his father gave him a further £1,200. With the capital provided by his father and with loans from the Commonwealth Bank and the Rural Bank the respondent has been able to develop his poultry farm to some extent, but it is obvious that he requires more stock and the necessary housing for them if he is to have a real prospect of making a success of this new venture. His financial position in July 1956 was as follows: he owned land valued at £7,000, stock at £400, plant at £250, vacant land at £150 and he had in the bank £30, the total value of his assets being about £7,830. He owed the Commonwealth Bank the sum of £1,500, the Rural Bank £450, and trade creditors about £500, his

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total liabilities being about £2,450. His net assets on a book value basis were therefore worth roughly £5,380. He is under an obligation to repay the debt to the Commonwealth Bank at the rate of £200 per annum and to the Rural Bank at the rate of £30 per annum. He has approximately 1,400 birds. His net income from his business is between £400 and £450 per annum out of which he has to make the annual repayments of capital to the Commonwealth Bank and the Rural Bank so that there remains about £200 for his living expenses. He has laid the foundations for two large poultry houses which would each hold about 1,000 head of poultry. The cost of constructing each house would be about £1,000 and £600 would be needed to purchase the necessary stock. Since 1946 the applicant and a war widow have been living as man and wife. Though there is no impediment, they have not married because she is receiving a war widow's pension the loss of which they have not been able to afford. At the present time she is not in good health and is faced with the prospect of losing the sight of one and possibly both eyes.

His Honour in his reasons said " the impression I have formed is that he (the respondent) considered as a farmer was not so capable as his four brothers and I rather get the impression also that he was not so close to his father as the other four brothers ". Later his Honour said : " Although, as I have said, the applicant was not so close to his father as the other sons and daughters, he did keep in touch with his father and with the family generally. I am of the opinion that the father was aware of the position of this applicant son when his will was made and at the time of his death and that, in all the circumstances, he should have given consideration to the applicant's general situation, having regard to the means then at his disposal . . . . I am satisfied that the applicant has made out a case under the Act and that he was left without adequate means for his proper maintenance. The next question is what order should be made from the estate ? I am of opinion that the applicant should be provided with a sufficient amount to pay off all his debts, amounting to £2,450 ; that he should be supplied with a sum of money which would enable him, without too much reliance on borrowing (if any) to build his two new poultry houses and also for some small provision, as a protection against unexpected circumstances. The sum which I think is the proper amount in the circumstances is £6,500."

Counsel for the appellants contended in the first place that no order under the Act should have been made in favour of the applicant, and in the second place that, if any order should have been made, his Honour must have erred in the exercise of his discretion because

£6,500 exceeded any sum that could reasonably be considered necessary to provide for the respondent's proper maintenance, education and advancement in life. The power of the court to make an order under the Act depends upon proof that a testator has died leaving a will which does not make adequate provision for the proper maintenance, education or advancement in life of the applicant. If that is proved, the court may at its discretion, and taking into consideration all the circumstances of the case, order that such provision for such maintenance, education and advancement as the court thinks fit shall be made out of the estate of the testator for such applicant. In our opinion his Honour was justified in holding that the respondent was entitled to an order. The presence of the words " advancement in life " in the New South Wales Act in addition to the words " maintenance and education " is not unimportant. These words appear in some but not all of the corresponding Acts and Ordinances of the other States and Territories of the Commonwealth. " Advancement " is a word of wide import. If found in a trust instrument it can often be confined by the context to the early period of the life of a beneficiary. But in the *Testator's Family Maintenance and Guardianship of Infants Act* no such limitation can be implied because the Act applies to children of any age. It may be said that prior to his enlistment in the A.I.F. the tendency of the respondent was to desert life on the land and engage in other occupations for which little capital would be required. But his service in the army constituted a complete break with his previous civil life. Prior to his enlistment he had spent the greater part of his life on the land and it was not unnatural that after an open air life in the army he should desire to resume this life. In order to engage in any form of primary production considerable capital is required to purchase the necessary land, plant and stock. The testator evidently did not disapprove of the respondent's desire to go back to the land because he gave him two sums of £1,200 each to assist him in doing so. It may be that the testator thought that this sum would or ought to be sufficient for the purpose but it has turned out to be insufficient and the testator was mistaken when he said that he had adequately provided for Athol during his life. There is no suggestion that the respondent is not a hard worker although it may well be, as his Honour said, that he is not as good a farmer as his brothers, or that he does not live economically and save as much as possible out of his somewhat meagre income to spend on improvements. Unfortunately his first attempt to set up a pig farm failed and he was forced to turn to poultry farming. At the date of his father's

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death he was making some progress in this new enterprise but he was hampered for lack of capital. The testator must have realised if he had considered the question as a wise and just father that the respondent needed more stock and for that purpose more housing if he was to make any real progress. With his present equipment the respondent appears to be able only to make a net income of about £400 to £450 a year out of which he has to repay the £200 per annum to the Commonwealth Bank and £30 per annum to the Rural Bank leaving about £200 for his living expenses and that is a very small income in these days of depreciated currency. The broad proposition that an able-bodied son able to maintain himself in the future exactly as he has done in the past cannot hope to succeed in an application made under the Act cannot be sustained. Each case must depend on its own circumstances. The claim of such a son may well have to be relegated to a low order of priority where there are other competing claims, such as those of a widow or unmarried daughters, and the estate is of insufficient value to meet them all. The present contest is between persons all of whom are able-bodied sons and the estate is of considerable value. But for his war service it might have been difficult for the respondent to succeed. If he had not enlisted, he would probably have continued to work for wages or a salary. But his enlistment brought an end to that phase of his life. Upon his discharge in 1944 he commenced a new phase in which he definitely required capital, and in that respect he had a moral claim for assistance upon his father. As *Salmond* J. pointed out in *In re Allen (Dec'd.)*; *Allen* v. *Manchester* (1), *Allardice* v. *Allardice* (2) was not a decision that a testator owes no moral duty to an adult son capable of earning his own living.

His Honour considered that he required the necessary capital to build two more poultry houses and to stock them, the cost of which would be £2,000 for the buildings and £1,200 for the birds. His Honour also considered that the whole of his indebtedness to the banks and other creditors should be discharged and that he should also be awarded an additional sum to meet unexpected circumstances. The order he made was certainly a generous one but 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. It was submitted that £6,500 exceeded even what the respondent himself had suggested that he needed. He had said in cross-examination that he would not try to build the two poultry houses

(1) (1922) N.Z.L.R. 218, at p. 221. (2) (1910) 29 N.Z.L.R. 959; (1911) A.C. 730.

at once. "I would not be ambitious enough to build the two houses, I would build one house first." That answer however referred to the most he would be ambitious enough to try to do with the help of his bank out of his then resources. It was submitted that if the respondent were awarded a sufficient sum to build one house and stock it, that is £1,600, and a further sum of roughly £1,000 towards the payment of his debts, this should be ample to put him on his feet. It was pointed out that the debts to the Commonwealth Bank and the Rural Bank are repayable by instalments which total only £230 per annum and it was submitted that the respondent, out of the additional profits he should be able to make from 1,000 more birds, should be able to meet these instalments as they fell due without difficulty. It was pointed out that even if a sufficient sum be allowed to build two new poultry houses and stock them, and also to repay the whole of the respondent's debts, the total amount would only be £5,800, yet his Honour had added to this generous amount an additional sum of £700. It was suggested that his Honour may have done this because he was under the impression that the war widow could be considered to be a dependant of the respondent whereas she should be considered to be nothing more than his housekeeper. But his Honour did not say that he regarded her as a dependant or that he had added any part of the sum of £700 for this reason. All that he said with respect to this sum was that he thought that he should make in addition to the £5,800 some small provision as a protection against unexpected circumstances. Whether £700 can be regarded as a small sum, even in these days, may be open to doubt. It may be that his Honour thought that one unexpected circumstance was that the respondent might have to assist the widow if she should have to undergo an operation for her eyes, but if this is so, such assistance would not necessarily go beyond the expenditure which a man living on the land might consider necessary in order to keep his housekeeper. The respondent has no outside assistance and he might find it very difficult to run a poultry farm and cater for his domestic needs as well. And the respondent obviously could not afford to pay an ordinary housekeeper out of his present income. There is really nothing in this suggestion. His Honour was probably not thinking of the housekeeper at all in referring to unexpected circumstances but of the unexpected expenses which are always liable to occur in the running of a business, especially a business where the stock consists of livestock. Questions such as whether the respondent should have been awarded a sufficient sum to build and stock one or two new poultry houses, whether he should have been

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awarded an additional sum to liquidate his debts wholly or in part, and whether he should have been awarded an even further sum to be in a position to meet unexpected circumstances are all questions which fall peculiarly within the province of the tribunal upon which the duty of exercising the discretionary judgment is cast. But even then, the sum of £6,500, which allowed for all these ingredients in full, appears to be altogether too liberal. The court is only authorised to alter a testator's disposition of his property so far as is necessary to provide adequately for the proper maintenance education and advancement in life of the applicant.

His Honour asked the respondent a number of questions when he was in the witness box directed to getting a " picture " of what would be necessary to make the respondent's poultry farm " a going concern with his experience " and the " picture " consisted of the whole of the items included in £6,500. But the respondent was not entitled to be made into a going concern. Since education does not enter into the " picture " he was entitled only to an adequate provision for his proper maintenance and advancement in life in all the circumstances of the case. One important matter, which appears to have been overlooked was that, if the two poultry houses are built, the respondent will be able to claim depreciation at 20% for five years on the £2,000, in other words to claim £400 per annum as a deduction from his assessable income under the provisions of s. 57AA of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. With the help of the additional profits that should be derived from an extra 2,000 birds and of this large deduction from his assessable income, the respondent should be well able to pay his way. To build these houses and stock them £3,200 is required. If the respondent is awarded this sum and an extra £300 to cover unexpected circumstances, he will receive the utmost that could reasonably be considered not to exceed an adequate provision for his proper maintenance and advancement in life.

For these reasons the appeal should be allowed and the sum of £6,500 reduced to £3,500.

KITTO J. In my opinion the respondent did not make out a case for an order under the *Testator's Family Maintenance Act.*

He is a son of the testator, and at his father's death he was forty-nine years of age. He is a poultry farmer with assets worth £7,830 and liabilities of £2,450. He is a widower, without children. He is in good health, and is making an income which, in the year ended 30th June 1956, left him with a net amount of about £400 after paying interest to the bank and making required reductions

in the amount of his overdraft. This enables him to live in circumstances which, so far as appears, are not less comfortable than those to which he has been accustomed throughout his adult life. His father was well-to-do, leaving an estate of the order of £30,000 net, and no doubt it was a disappointment to the respondent to find that he was left out of the will. But the jurisdiction under the *Testator's Family Maintenance and Guardianship of Infants Act* is not one for the fulfilment of such hopes of testamentary benefit as a court, with its necessarily imperfect understanding of family situations, may think might legitimately have been held. The testator has shown by the terms of his will that he did not fail to consider what he ought to do for the several members of his family and that it was his deliberate judgment that some of them, including the respondent, had been adequately provided for by assistance he had given them. His opinion on the subject is, of course, by no means conclusive. But there is nothing to suggest that he was under any misapprehension, or that he was in any way prejudiced against the respondent; and the case seems to me to be one of those in which the testator is much more likely to have formed a correct conclusion on the subject of the moral obligations he owed to his family than a court can well hope to be.

The respondent went his own way in life at an early age. He did not share his father's interests, and in recent years they met infrequently. The respondent did not take to the pastoral pursuits which his father followed, and which his brothers followed in their turn. True, he worked on his father's property from 1924 to 1936. He tried various occupations without much success, in a bank, as an agent for motor accessories and parts in Sydney, and in a tyre retreading business in Brisbane; and in 1928, when he was twenty-three, his father paid his debts in Brisbane (apparently only small in amount) and brought him home to help in the family pastoral business. The fact that he stayed as long as eight years seems to be accounted for by the economic depression which commenced soon afterwards. For some years, employment was difficult to get. But when the depression was over he returned to the city, taking employment as a traveller for an engineering firm in Sydney. He was in the army for four years during the war, and then, after an unsuccessful attempt to get a start in pig farming, he took up his present occupation of a poultry farmer. There is evidence that his father offered him a grazing property, but that he was not interested and preferred to go his own way. This he denies; but the fact is that his father sold the property and gave him substantial sums of money, two sums of £1,200 each, out of the proceeds.

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The evidence makes it clear that the testator was hard hit by the depression, and he must have made his money between 1936 and 1954. In that period the respondent was away, making his own career in his own way. Why, in the circumstances, it should be considered that the testator was not at liberty to do what he wished with his money, I do not see. Of course the respondent is not well off, and anything he may get out of his father's estate will be very welcome. This is the kind of case in which it would be much more pleasant to be open-handed with the testator's estate than to confine oneself to the jurisdiction under the Act. But even if I felt sure that I understood the whole situation so well that I could deal with the estate more justly than the testator dealt with it, I should still not feel justified in asserting that when he decided to give the respondent no more than he had already given him, and to leave his estate to members of the family who had been closer to him and to whom he had his own reasons for being generous, he failed to recognise a moral duty which lay upon him.

I do not think it correct to say that the testator left his hale and hearty, and long-independent, forty-nine-year-old son without adequate provision for the maintenance—or even the advancement in life—that was proper in all the circumstances of the case.

In my opinion the appeal should be allowed, the order under appeal should be set aside, and the application for provision under the *Testator's Family Maintenance and Guardianship of Infants Act* should be dismissed.

Appeal allowed. Order of the Supreme Court varied by substituting for so much thereof as orders the respondents as executors of the will to pay to the applicant a legacy of £6,500 *out of the estate of the deceased an order that the respondents as executors of the will of the said deceased do pay to the applicant a legacy of* £3,500. *Costs of the appellants of the appeal as between solicitor and client to be paid out of the residuary estate of the testator Cornelius McCosker deceased. Usual order under s.* 6 (3) *of the Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954.

Solicitors for the appellants, *Borthwick & Butler*, Inverell by *Rand, Drew, Villeneuve-Smith & Dawes.*

Solicitors for the respondent, *Maddocks, Cohen & Maguire.*

R. A. H.