[HIGH COURT OF AUSTRALIA.]

DUN AND ANOTHER . . . . . APPELLANTS;
RESPONDENTS,

AND

DUN . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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SYDNEY, *Oct.* 1; *Dec.* 19.

Dixon C.J., McTiernan, Williams, Kitto and Taylor JJ.

Testator's Family Maintenance—Time for making application—Extension of time—Maintenance—Date as at which adequacy of provision to be determined—Date of death—Date of application—Matters to be considered—Testator's Family Maintenance and Guardianship of Infants Act 1916-1954, *ss.* 3, 5.

In applications brought under s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 the question whether the applicant is left without adequate provision is to be determined upon the facts as they existed as at the date of death of the testator. Once such question is answered in favour of the applicant the question of what order should be made is one to be decided upon the facts as they are found to exist at the time when the court is dealing with the application.

Coates v. *National Trustees Executors & Agency Co. Ltd.* (1956) 95 C.L.R. 494 disapproving *Re R. A. Forsaith (Dec'd.)* (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171, applied.

D. under the will of her husband who died in 1942 received in addition to certain specific bequests an annuity of £800 per annum and certain income tax benefits in relation to such annuity. At the time of her husband's death D. owned the matrimonial home and certain other realty. Between the years 1942 and 1955 the value of the deceased husband's estate increased greatly whilst the financial position of D. substantially deteriorated, and there was also a substantial decline in the purchasing power of money generally. Consequent upon the passing of the *Administration of Estates Act* 1954 D. in 1955 sought and obtained from the Supreme Court of New South Wales pursuant to s. 5 (2A) of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 an order extending the time within which she might bring an application for maintenance out of her late husband's estate pursuant to s. 3 of such Act and she duly brought such an application. The judge of first

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instance following *Re R. A. Forsaith (Dec'd.)* (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171 determined that as at the date of the application D. had established that she had been left without adequate provision for her proper maintenance and accordingly made an order. In the course of his reasons his Honour indicated that had he been required to determine the question as at the date of death of the husband he would have dismissed the application. At the hearing his Honour and the parties were unaware of the decision of the High Court in *Coates's Case* (1956) 95 C.L.R. 494 delivered in Melbourne a short time before and then unreported. The trustees of the husband's estate, having become aware of such decision, appealed to the High Court against the order made.

Held, (1) by the whole Court that the basis upon which the judge of first instance had made the order was erroneous.

(2) by *Dixon* C.J., *Kitto* and *Taylor* JJ., *McTiernan* and *Williams* JJ. dissenting, that upon a proper application of *Coates's Case* (1956) 95 C.L.R. 494 it could not be said that her husband had failed to make adequate provision for D. and accordingly the order made should be discharged.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.) reversed.

APPEAL from the Supreme Court of New South Wales.

The facts and relevant statutory provisions are sufficiently stated in the judgments hereunder.

K. W. Asprey Q.C. (with him *O. M. L. Davies*), for the appellants. In extending the time for making an application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916, as amended, the judge considered that he was bound by the decisions in *Re R. A. Forsaith (Dec'd.)* (1) and *Re A. L. Pichon (Dec'd.)* (2). The decision in the application thereupon made was delivered about two months after the High Court, by its decision in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (3), had overruled *Re R. A. Forsaith (Dec'd.)* (1). This was unknown to the judge and the parties. The appellants rely upon the decision in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (4). By reason of that decision the judge below erred. The net estate of the testator as at the date of his death would be, at the very most, about £15,000. The appeal should be allowed.

Gordon Wallace Q.C. (with him *A. Bridge* Q.C. and *D. A. Yeldham*), for the respondent. The question whether *Re R. A. Forsaith (Dec'd.)* (1) was well decided was outside the issue before the Court in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (3).

(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) 95 C.L.R. 494.
(4) (1956) 95 C.L.R., at pp. 501-503, 505, 524, 525.

In conformity with the well-known rule of construction that the legislature is deemed to know the law and to adopt decisions of superior courts when it either re-enacts or amends an existing Act there would be strong reasons for contending that the New South Wales legislature, when in 1938 it extended the provisions of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 to intestate estates, and *a fortiori* when by the *Administration of Estates Act* 1954 it gave an unlimited time within which to make an application, did so on the footing that *Re R. A. Forsaith (Dec'd.)* (1) was known to it; that the Act was being administered in conformity with that decision and that it clearly approved of that course. In the first-mentioned Act a state of affairs is dealt with where no questions of moral duties of the testator are involved at all: merely with a statutory distribution of an inflexible nature. [He referred to *Re A. L. Pichon (Dec'd.)* (2) and *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (3).] The Court will construe the Act as an express adoption of *Re R. A. Forsaith (Dec'd.)* (1). It did not intend that a widow who obtained her leave many years after probate to have her case decided on what may have been the situation years before. The fact that the legislature went to the very point of protecting beneficiaries and preventing distributed estates being interfered with lends colour and force to the rule of construction. *Re R. A. Forsaith (Dec'd.)* (1) is the type of decision which an appellate court will not overrule unless it feels compelled to do so because it falls within the category of a case where estates are administered and property has passed. It is submitted that subsequent events are intended by the legislature not only not to be ignored but also to be more than evidentiary facts (*Coates* v. *National Trustees Executors & Agency Co. Ltd.* (4)). The *dicta* in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (5) should be reconsidered. The judge below was in error in deciding that the applicant would have been bound to fail had she brought her application within twelve months. If the applicant had applied to the court in 1943 or 1944 she would have had a very reasonable prospect, having regard to the economic position of the day and the possibilities of the future, of being successful in submitting that the proper order would be to give her the whole income of the estate, in addition to a right to resort to corpus if it fell under, say, £800 in any one year. The estate has increased in value from £20,000 to £80,000.

(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) (1938) 38 S.R. (N.S.W.) 176; (1938) A.C. 463.
(4) (1956) 95 C.L.R., at p. 508.
(5) (1956) 95 C.L.R. 494.

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The testator should reasonably have foreseen that price control would terminate after the war then existing; that money values would change and that prices generally would rise. Property values and cost of living were reasonably foreseeable at their increased values. There are no competing claims. The discretion should not be interfered with. [He referred to *In re Borthwick Dec'd.*; *Borthwick* v. *Beauvais* (1).]

K. W. Asprey Q.C., in reply. The position in which the applicant now finds herself has been brought about wholly and solely by a course of extravagance that would never have been contemplated by her husband in her lifetime. On any view the sum of £15,000 would be the absolute maximum the applicant could have looked forward to as the estate to which she could have recourse in any application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916, as amended. *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (2) was applied in *Re Larkin, Dec'd.* (3). Those cases are vastly different from the case now under consideration. On the facts the judge below was right in answering the objective question in the negative. It would take a very powerful case to disturb that finding: see *Sampson* v. *Sampson and Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (4); *Ellis* v. *Leeder* (5). This Court will not interfere with the exercise of the discretion of the judge below. No new material has been put before this Court, nor is it suggested that any mistake was made. The decision in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (2) should not be treated as *obiter dicta*: see *Jacobs* v. *London County Council* (6). Costs should be paid out of the estate.

A. Bridge Q.C., by leave, referred to *Young & Co.* v. *Mayor & Corp. of Royal Leamington Spa* (7); *Johnsons Tyne Foundry Pty. Ltd.* v. *Maffra Corporation* (8); *Ex parte Campbell; In re Cathcart* (9); *Marczuk* v. *Marczuk* (10); *Worladge* v. *Doddridge* (11) and *Halsbury's Laws of England*, 2nd ed., vol. 31, pp. 492-494.

Cur. adv. vult.

(1) (1949) Ch. 395, at p. 401.
(2) (1956) 95 C.L.R. 494.
(3) (1957) S.R. (N.S.W.) 369; 74 W.N. 130.
(4) (1945) 70 C.L.R. 576, at p. 585.
(5) (1951) 82 C.L.R. 645, at pp. 653, 654.
(6) (1950) A.C. 361, at pp. 368, 369.
(7) (1883) 8 App. Cas. 517, at p. 526.
(8) (1948) 77 C.L.R. 544, at pp. 553, 554.
(9) (1870) L.R. 5 Ch. App. 703, at p. 706.
(10) (1956) P. 217, at pp. 257, 258.
(11) (1957) 97 C.L.R. 1.

The following written judgments were delivered :—

DIXON C.J., KITTO AND TAYLOR JJ. This is an appeal from an order made by the Supreme Court of New South Wales, pursuant to the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954, directing that in addition to the provision made for the respondent by the will of her deceased husband, Thomas Fitzgerald Dun, there should be paid to her a legacy of £5,000 and that as from 1st July 1956 there should be paid to her an annuity of £1,500 per annum in lieu of the annuity and income tax benefits provided in her favour by the said will.

By his will made on 18th August 1939 the testator bequeathed to the respondent his household furniture and personal effects and such motor-car as he might possess at the time of his death. Thereafter he bequeathed to her the sum of £500 to be paid as soon as conveniently might be after his death and also the sum of £1,500 to be paid at such times within five years after his death either by instalments or otherwise as his trustees should think fit. In addition he bequeathed to her an annuity of £600 per annum. By a codicil made on 16th May 1942 the testator substituted for this last bequest an annuity of £800 and directed his trustees to refund to his wife on demand or otherwise reimburse her for such annual or other sum or sums of money which during her life she should pay or become liable to pay any taxing authority in the Commonwealth of Australia by way of income tax or other like imposition on the said annuity. Subject to certain minor bequests and in the events which happened the testator devised and bequeathed the residue of his estate upon trust for such of his brothers and sisters as should be living at the date of his death in equal shares.

At the time of the death of the testator, which occurred on 10th September 1942, his estate was valued at £22,216 but it became necessary for death duty purposes to include in his estate certain notional assets which increased the value of his estate, for those purposes, to £26,216. The notional assets included gifts to the respondent of cash (£450), War Loan Bond (£100), War Savings Certificate (£20) and payments (£3,066) made by the testator in connexion with the erection of a building on land owned by the respondent. This was the matrimonial home which at the time of the death of the testator was owned by the respondent. She also owned other property which in subsequent years and before the date of the application she sold for a total sum of £4,600.

The difficulty in the case, if upon the present state of the authorities there is one, arises out of a state of facts which may be briefly stated. As already appears the testator died on 10th September

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1942. But the respondent's application was not made until 16th June 1955 and during the intervening period of nearly thirteen years the estate increased greatly in value whilst the respondent's financial position substantially deteriorated. In 1955 the estate, according to the evidence, consisted almost wholly of liquid assets and their value was said to approximate £82,000. On the other hand, the respondent, at the date of the testator's death, was the owner of the matrimonial home and of other valuable assets. But the latter assets she no longer has ; they were realised from time to time during the period intervening between the testator's death and the making of the application for the sum of £4,600, and the home at Cowra, which is said to be worth £8,500, is subject to a mortgage to secure repayment of the sum of £4,200.

Prior to the enactment of the *Administration of Estates Act* 1954 no application for relief under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938, was competent unless made within twelve months from the date of grant of probate or letters of administration. But by s. 4 (1) (c) (ii) of the first-mentioned Act a new sub-section was inserted in s. 5 of the earlier Act. By this new sub-section it was provided that the time for making an application under the Act might be extended for a further period by the court after hearing such of the parties affected as the court should think necessary. The power to make such an order expressly extended to cases where the time limited by the statute had already expired. The necessary order extending the time for the making of the respondent's application was made by *Myers* J. on 3rd June 1955 and it is apparent that his Honour was influenced to a considerable extent in exercising his discretion in favour of the respondent by the fact that, in New South Wales, the decision in *Re R. A. Forsaith (Dec'd.)* (1) had established that, in seeking to determine whether a testator has failed to make adequate provision for the proper maintenance of any person within the class of those entitled to make an application, the governing consideration is the state of affairs as they exist at the date of the application and not as they existed at the time of the testator's death. The same consideration was a vital factor in inducing *Roper* C.J. in Eq., to make an order in favour of the respondent on the substantive application. His Honour followed *Re R. A. Forsaith (Dec'd.)* (1) but in the course of his reasons indicated quite clearly that if he had been required to consider whether the respondent had, at the date of the death of the testator, been left without adequate provision for her proper maintenance he would have dismissed the application. He said :—

(1) (1926) 26 S.R. (N.S.W.) 613 ; 43 W.N. 171.

"I think it is clear that had the widow brought an application under the *Testator's Family Maintenance Act* within twelve months of the grant of probate in his estate, and had that been heard within the normal reasonable time thereafter her application must have failed whether the time for considering the circumstances had been taken as the date of the death or as the date of the hearing of the application. At the present time, however, the circumstances relating to the application are essentially different. It is notorious that the cost of living had soared, and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation." After some discussion of the authorities cited to him, including *Re R. A. Forsaith (Dec'd.)* (1), his Honour added :—"I think that applying the decision in *Re Forsaith*, all facts and circumstances existing when the application is actually heard by the Court should be taken into account in determining whether the applicant has qualified herself for an order, and what order should be made. The problem becomes that of deciding what would have been the proper way for the testator to give effect to his moral obligation to make adequate provision for the proper maintenance of his widow in all the circumstances had he known and been dealing with the facts and circumstances existing when the application was heard." Thereupon, on 30th August 1956, his Honour made the order which is now under appeal. But on 6th June 1956 this Court had delivered judgment in Melbourne in a case dealing with a similar problem which arose in an application made under the *Administration and Probate Act* 1928 (Vict.) : *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (2). Upon consideration a majority of the Court was of opinion that, where in an application under that Act an applicant claims that a testator has disposed of his property by will in such a manner that he, as a child of the testator, is left without sufficient means for his maintenance and support, the initial question should be determined not upon the facts as they exist at the date of the application but as they existed at the date of the testator's death although, once that question is answered in favour of the applicant, the question of what order should be made is one to be decided upon the facts as they are found to exist at the time of the application.

(1) (1926) 26 S.R. (N.S.W.) 613 ; 43 W.N. 171.

(2) (1956) 95 C.L.R. 494.

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The words of s. 139 of the Victorian Act, as *Dixon* C.J. said in *Coates's Case* (1), " are not quite the same as the corresponding provisions in s. 3 " (2) of the New South Wales Act but it is clear that the decision of the Court did not turn upon any observed differences of expression. Unlike *Harvey* C.J. in Eq., in *Re R. A. Forsaith (Dec'd.)* (3) no member of the Court observed any difference of expression capable of producing one result in Victoria and the contrary result in New South Wales. Indeed three members of the Court were of the opinion that the language of each statute led to a common result whilst *Dixon* C.J., with whom *Webb* J. agreed, expressly doubted " whether the distinction taken by *Harvey* C.J. in Eq. is well founded " (4). It is unfortunate that the decision in *Coates's Case* (1) had not been reported when the respondent's application came on for hearing and that, therefore, no mention of it was made before *Roper* C.J. in Eq. But it is beyond question that the principle upon which *Re R. A. Forsaith (Dec'd.)* (5) was decided is no longer good law. The result is that the order under appeal rests upon an erroneous view of the law and unless it can be justified upon the correct principle it cannot stand.

It was, however, contended before us that the order made by *Roper* C.J. in Eq. could be justified on the principles laid down in *Coates's Case* (1). The changed circumstances, it was said, were the result of circumstances which, not only could have been foreseen by the testator at the time of his death, but which should in some substantial measure, have been within his contemplation when considering what provision should be made for the proper maintenance of his widow. But there is nothing in the case to suggest that the vast increase in the value of the estate could have been foreseen; indeed, it may well be thought that if the events which produced this result could reasonably have been foreseen their actual occurrence would not have occasioned such a marked and rapid increase in the value of the estate. Looking at the circumstances as they existed at the death of the testator we think it is impossible to say that the provision made by him for the applicant was ungenerous and when regard is had to the incidence of death and estate duties and testamentary expenses it is clear that it cannot be characterised as inadequate. On the contrary, if, as the testator appears to have thought, it was desirable that the main provision for his widow should consist of an annuity, he may well have considered that the annuity provided by his codicil was as much as his estate would be

(1) (1956) 95 C.L.R. 494.
(2) (1956) 95 C.L.R., at p. 506.
(3) (1926) 26 S.R. (N.S.W.), at p. 614; 43 W.N., at p. 171.
(4) (1956) 95 C.L.R., at p. 507.
(5) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.

able to provide. As already appears it is clear that *Roper* C.J. in Eq. would have dismissed the respondent's application if he had been aware that in *Re R. A. Forsaith (Dec'd.)* (1) had been overruled. We agree that such a result would have been inevitable and, accordingly, the appeal should be allowed and the order of the Supreme Court set aside.

McTIERNAN J. The order of *Roper* C.J. in Eq., which is the subject of this appeal, is one made in the exercise of the discretionary power which is conferred upon the Supreme Court in Equity by s. 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.). The provisions of the testator's will and codicil and the facts of the case are stated in the reasons for judgment of the learned judge and I do not discuss them in detail. The principal question which arose at the hearing of the application was whether the court ought to determine the question of the adequacy of the provision made by the testator in the will and codicil for the applicant as at the date of the testator's death or in the circumstances existing at the time the court was dealing with the application. A special feature of the case is the length of time between the testator's death and the entry by the respondent of her application. The testator died in September 1942 and probate of his will was granted in January 1943. The application was entered in June 1955. The respondent obtained an order under s. 4 of the *Administration of Estates Act* 1954 extending the time allowed by s. 5 of the *Testator's Family Maintenance and Guardianship of Infants Act* for making an application. That time is twelve months from grant of probate.

In 1926 the Supreme Court of New South Wales decided that s. 3 of the Act meant that the discretionary power of the court may be exercised if there is not sufficient testamentary provision for the proper maintenance of the applicant at the time the court is dealing with the matter: *Re R. A. Forsaith (Dec'd.)* (1). *Roper* C.J. in Eq., decided to follow that decision. It did not appear to his Honour that the enactment of s. 4 of the *Administration of Estates Act* affected the authority of that decision. But after judgment the report of *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (2) came to hand. In this case *Re R. A. Forsaith (Dec'd.)* (1) met with disapproval. The disapproval involves that, apart altogether from s. 4 of the *Administration of Estates Act*, the correct way to apply s. 3 of the *Testator's Family Maintenance and*

(1) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.

(2) (1956) 95 C.L.R. 494.

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Guardianship of Infants Act is to determine the question whether the applicant is left without adequate provision as at the date of the testator's death, and, if it is determined affirmatively, to exercise the discretionary power of ordering provision out of the estate by taking into account the circumstances as they exist at the time the court is dealing with the matter.

The main ground of the appeal is that the basis upon which *Roper* C.J. in Eq. decided the question of the adequacy of the provision made in the will and codicil for the respondent is shown by the decision in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (1) to be erroneous. *Roper* C.J. in Eq., said, in the course of his reasons for judgment, that if the application had been brought within twelve months from grant of probate and heard in the normal course, that he would not have found that under the testamentary dispositions in question the applicant was left without adequate provision for her proper maintenance whether it was right to determine that question as at the testator's death or in the circumstances existing when the hearing would have taken place. The appellants rely upon these observations as presenting difficulty to sustaining the order of *Roper* C.J. in Eq., on the basis that if the circumstances at the time the testator died are considered the respondent was left without adequate provision for her proper maintenance. I do not agree that this use can be made of the observations because the assumption on which they were based necessarily involves the omission of all the circumstances that occurred after such hypothetical hearing.

It is clear from the principles involved in the interpretation which *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (1) has placed upon s. 3 that all the circumstances intervening between the testator's death and the hearing of an application under the section cannot be ruled out in determining the question whether the applicant is without adequate provision for her or his proper maintenance. *Roper* C.J. in Eq., after reviewing the benefits which the respondent took under the will and codicil, her financial means and the value of the testator's estate at the time of his death, stated how the circumstances had altered by the time the application came on for hearing. His Honour said: "It is notorious that the cost of living has soared, and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself

(1) (1956) 95 C.L.R. 494.

has been sold and yielded a much higher figure than its probate valuation. The estate now is almost wholly in liquid assets and is valued at about £82,000. In addition to this, the applicant is now indebted to a bank to the extent of nearly £4,200 on overdraft secured upon her home, and has disposed of the other property which she had at the date of death and expended the proceeds. Her present position is that apart from the provision made for her in the will and codicil by way of annuity, she only has the home now valued at £8,500, but subject to a mortgage to the extent of nearly £4,200, and the motor car." The probate valuation of the estate was £22,000. His Honour further said: "At present she is in a position of comparative pecuniary difficulty. The undistributed estate is now large and the competing beneficiaries under the will do not have and never had any real moral claim on the testator. Most of them are in comfortable circumstances, three only, whose combined interests in the residue of the estate is about one-twelfth, showing any real financial need." The substantial deterioration in the purchasing power of the annuity bequeathed to the respondent and the enormous rise in the value of the undistributed estate still in the hands of the appellant are sound reasons for holding that at the time the application was heard the respondent was not under the will and codicil provided with adequate means for her proper maintenance. *Dixon* C.J., said in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (1): "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

(1) (1956) 95 C.L.R. 494.

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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 " (1).

The question therefore arises whether it was at the period of the testator's death beyond the range of reasonable foresight that money would decrease in value. In 1942 inflationary pressures were evident and were being restrained by statutory regulations. In my opinion it is correct to say that the future loss of purchasing power suffered by the provision made in the will and codicil for the respondent could reasonably be foreseen at the time the testator died. It was a contingency that might reasonably have been anticipated by the testator but was not taken into account by him in the provision which he made in his will and codicil for the maintenance of the respondent. Considering the question as at the testator's death the provision was not adequate for the proper maintenance of the respondent in the future. I would hold that in the circumstances of the case the testator disposed of his property by his will and codicil, in such a manner that the respondent is left without adequate provisions for her proper maintenance. Following the principles laid down in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (2) the provision which the Court may in exercise of the discretionary power, created by s. 3, order out of the estate is to be estimated by taking into account the facts existing at the time of the testator's death. *Roper* C.J. in Eq., indeed estimated on that basis the amount of the additional provision which he ordered out of the estate.

I am of opinion that the amount is just and reasonable taking into consideration all the circumstances which might reasonably have been anticipated by the testator. It was submitted for the appellants that the evidence showed that the respondent's need for further provision out of the estate was due to her extravagance. *Roper* C.J. in Eq., considered the evidence in question but did not regard it as affording sufficient reason for rejecting the respondent's application. I do not feel satisfied that the learned Judge was in error in treating that evidence as he did. I am therefore of opinion that the order

(1) (1956) 95 C.L.R., at p. 508. (2) (1956) 95 C.L.R. 494.

of *Roper* C.J., in Eq., should be affirmed but on the basis that at the date of the testator's death the respondent was under the testamentary dispositions of the testator left without adequate provision for her future proper maintenance.

The appeal should therefore be dismissed.

WILLIAMS J. This is an appeal by the executors of the estate of Thomas Fitzgerald Dun who died on 10th September 1942 from an order made under s. 3 (1) of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1954 (N.S.W.) on 30th August 1956 by *Roper* C.J. in Eq. sitting as the Supreme Court of New South Wales in its equitable jurisdiction. The respondent Eleanor Jessie Dun in whose favour his Honour made the order is the widow of the testator. His Honour ordered that in addition to the provisions made for her by the will and codicil of the testator the applicant be paid a legacy of five thousand pounds (£5,000) that legacy to be payable on 30th day of September next and to bear interest as from that date and that as from 1st day of July last passed in lieu of the annuity and the income tax benefits provided in her favour the applicant be paid an annuity of one thousand five hundred pounds (£1,500) per annum.

The testator and the respondent were married on 15th May 1937 he then being fifty years of age and she thirty-seven. Neither had been married before. They lived together happily until his death some five and one-half years later. It would appear that they would have married earlier if the respondent had not had to look after her widowed mother who died in 1936. In an affectionate letter written to the respondent on 13th April 1937 the testator disclosed that he had had " a little heart trouble for some little time " and said that he realised that physical fitness was a big asset when contemplating matrimony but that " The only consolation I would have is that I can leave you well provided for should anything happen to me ". This statement was justified because the testator although he had been crippled in childhood and could not walk carried on a farming and grazing business on real estate he owned at Greenthorpe and also a produce business in Cowra and had an interest in a produce business in Grenfell. After their marriage the parties lived until 1940 in a comfortable manner in an expensive flat at Point Piper and travelled from time to time to Cowra and Melbourne and other places. In 1940 they moved to Cowra where the testator purchased a block of land as a gift for his wife and built upon it a fine home surrounded by a large garden at a cost of £3,066.

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By his will made on 18th August 1939 the testator appointed the appellants as executors and trustees and made a number of gifts to his wife. He bequeathed to her his household furniture and household and personal effects and any motor-car he owned at the time of his death and was making use of for personal purposes. He also bequeathed to her a pecuniary legacy of £500 to be paid to her as soon as conveniently might be after his death and a further pecuniary legacy of £1,500 to be paid to her at such time within five years after his death either by instalments or otherwise as his trustees should think fit but so that such sum should not carry interest. He also bequeathed an annuity of £600 to her during her life to commence from the date of his death. Subject to two other legacies and two other annuities of small amounts the testator gave devised and bequeathed his residuary real and personal estate upon trust to sell and convert it into money and out of the proceeds of conversion and his ready money to pay and provide for his debts funeral and testamentary expenses and the said legacies annuities and allowances and any duties or assessments payable on any legacy annuity or allowance bequeathed free of duty and subject thereto to invest the proceeds of sale and to hold his residuary estate upon trust as to both capital and income for his children or child if only one living at his death who being sons or a son should attain the age of twenty-one years of age or being daughters or a daughter should attain that age or previously marry and if more than one in equal shares as tenants in common with a substituted gift to the children of any child of his who died in his lifetime. If these trusts failed by reason of no person attaining a vested interest therein the testator directed that his residuary estate should be held in trust for such of his brothers and sisters as should be living at his death (and if more than one in equal shares) and the child or children of any brother or sister of his who was then dead or who should predecease him but so that such last mentioned child or children should take and if more than one equally between them the share only which his her or their parent would have taken if such parent had been living at his death. Clause 7 of the will authorised the trustees to appropriate investments sufficient at the date of appropriation to answer any annuity in respect of which the appropriation was made and directed that thereafter the annuity should be paid primarily out of the income and if necessary out of the capital of such investments and that the residuary estate or the income thereof should no longer be liable to provide for the annuity in respect of which the appropriation was made. Clause 12 of the will provided

that: "Notwithstanding the trust for sale and conversion hereinbefore contained I Declare that my Trustees shall not for a period of five (5) years after my death except with the consent in writing of my said wife if living or if dead and leaving a child or children her surviving except with his her or their consent in writing or the consent of the Court in the event of any such child being a minor sell or dispose of any business or undertaking or my interest in any business or undertaking partnership or otherwise carried on by me or in which I shall be interested at the time of my death . . . or my interest or any part thereof in Tresilian & Dun (Grenfell) Limited . . . but that during such period they shall manage and carry on such business or undertaking or join in managing and carrying on the same and retain my interest in the said Company and I express the earnest wish but without imposing any legal obligation on my Trustees to conform therewith that after the expiration of such period as aforesaid they will continue to manage and carry on any such business or undertaking or join in managing and carrying on the same and will retain my interest in the said Company for so long in either case as in their discretion it shall appear to be in the best interest of my said wife (if living) and of the person or persons entitled to share in my residuary estate that they should do so . . .".

By a codicil to his will made on 16th May 1942 the testator increased the annuity of £600 given to his wife during her life to £800 during her life and in order that she might enjoy to the full the provision made for her during her life directed his trustees to refund to her or otherwise reimburse her for such annual or other sums of money which during her life she should pay or become liable to pay any taxing authority in the Commonwealth of Australia (whether such authority be State or federal) by way of income tax or other like imposition on the annuity or as the case might be (in the event of his trustees making an appropriation of investments as provided for in cl. 7 of his will) upon any income that might be earned from the investments appropriated to answer such annuity and he declared that any and every sum so directed to be refunded or so reimbursed should be a charge upon and be paid out of his residuary estate.

The estate of the testator was sworn for probate purposes at £22,216 19s. 4d. but the value of the dutiable estate was increased to £26,216 7s. 10d., by the discovery of certain notional assets which were subsequently disclosed to the Commissioner of Stamp Duties. Included in these notional assets were gifts to his wife consisting of £450 in cash, of a War Loan Bond for £100, of War Savings Certificates for £20 16s. 0d. and of the payments amounting to £3,066

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made by the testator for the building of the house at Cowra. The respondent at the date of the death of the testator owned the following property: the house at Cowra valued at £3,066, a property at Caulfield in Melbourne valued at £1,470, a property at St. Kilda, Melbourne valued at £3,186, both of which she had inherited from her father, £200 of War Loans, £230 of War Savings Certificates, her total assets being valued at £8,152 less £870 owing to the bank, making the net value £7,282. Probate of the will of the testator was granted to his executors on 5th January 1943 so that the time for making an application under the *Testator's Family Maintenance Act* 1916 expired on 5th January 1944. The widow did not apply within this period but the Act was subsequently amended by the *Conveyancing Trustee and Probate Amendment Act* No. 30 of 1938 and further amended by the *Administration of Estates Act* No. 40 of 1954. By the Act No. 30 of 1938 provision had been made for a widow to make an application under the Act if under the law of intestacy she was left without adequate provision for her proper maintenance and by the Act No. 40 of 1954 this provision was extended to include the children of an intestate and the words "their proper maintenance, education, or advancement in life as the case may be" substituted for the words "her proper maintenance". The Act of 1954 amended s. 5 of the principal Act by inserting after sub-s. (2) sub-s. (2A) which provides that notwithstanding anything in sub-ss. (1) and (2) of s. 5 (a) the time for making an application under either of those sub-sections may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary, and this power extends to cases where the time for applying has already expired, including cases where it has expired before the commencement of the *Administration of Estates Act* 1954; but every application for extension shall be made before the final distribution of the estate, and no distribution of any part of the estate made before the application shall be disturbed by reason of the application or an order made thereon.

Pursuant to the provisions of sub-s. (2A) of s. 5 of the Act the Supreme Court of New South Wales in its equitable jurisdiction (*Myers* J.) on 3rd June 1955 on the application of the widow made an order extending the time within which she might make an application until June 17th 1955; the case is reported *Re T. F. Dun (dec'd.)* (1). The present application was instituted by originating summons on 16th June 1955 and therefore within this time. Between the date of the death of the testator and the commencement of these proceedings changes which can only be described

(1) (1956) S.R. (N.S.W.) 181; 73 W.N. 99.

as drastic had occurred both in the value of the estate of the testator and in the financial circumstances of the widow. The residuary estate of the testator none of which has been distributed had increased in value from about £15,000 to about £82,000 and the total financial resources of the respondent had dwindled to the annuity bequeathed to her by the codicil, the ownership of the house at Cowra valued at £8,500 but subject to an overdraft of £4,200, and a motor-car. The house is situated on the top of a steep hill. The motor-car is a 1937 model and has reached the stage where it requires frequent and expensive repairs. The respondent, who is now fifty-seven years of age, suffers from blood pressure, and has been advised by her physician that she needs a motor-car to enable her to continue her usual daily activities. No doubt the precarious financial position in which the respondent now finds herself is due to some extent to extravagance but clearly it is also very largely due to the severe depreciation in the value of money and to the high increase in the cost of living that has occurred in recent years. The main extravagances with which she is charged are a trip to England in 1943 and 1944 which cost her about £3,000 and some large parties which she gave at some of the annual picnic race meetings at Cowra. Her trip to England was paid for out of the proceeds of sale of her property at St. Kilda and her conduct in giving these occasional parties would not appear to merit any very severe condemnation.

The application came on to be heard before *Roper* C.J. in Eq. on 15th and 16th August 1956 when his Honour reserved judgment. He delivered judgment on 30th August 1956. Judgment had been delivered by this Court in *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (1) on 6th June 1956 but that decision was not brought to his Honour's notice. This was unfortunate because the question whether the crucial date for determining whether the applicant has been left without adequate provision for his or her proper maintenance is the date of the death of the testator or is the date when the application comes on to be heard which was so strenuously argued before his Honour had already been decided in favour of the former date by this Court in *Coates's Case* (1). Unaided by that decision his Honour naturally decided to follow the decision of *Harvey* C.J. in Eq. *Re R. A. Forsaith (Dec'd.)* (2), in favour of the latter date a decision which had stood in New South Wales for thirty years and must be presumed to have been within the knowledge of the New South Wales legislature when it authorised the court to extend the time for making an application under the Act. In the course

(1) (1956) 95 C.L.R. 494.

(2) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.

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of his reasons his Honour said "I think it is clear that had the widow brought an application under the *Testator's Family Maintenance Act* within twelve months of the grant of probate in his estate, and had that been heard within the normal reasonable time thereafter, her application must have failed, whether the time for considering the circumstances had been taken as the date of death or as the date of the hearing of the application. At the present time, however, the circumstances relating to the application are essentially different. It is notorious that the cost of living has soared, and the annuity provision in her favour has decreased in value very significantly. On the other hand, the value of the estate, which has remained undistributed, has increased vastly, partly by the accumulation of large profits, particularly from the farming property, and partly by the fact that the farming property itself has been sold and yielded a much higher figure than its probate valuation." Having discovered the existence of *Coates's Case* (1) soon after his Honour had delivered judgment the executors promptly appealed to this Court. Naturally they contend on the one hand that his Honour's order, founded as it is on *Re R. A. Forsaith (Dec'd.)* (2), and therefore made on the basis that the question whether the applicant has been left without adequate provision for her proper maintenance should be decided in the light of the size of the testator's estate and of her financial position in August 1956 cannot stand, and on the other hand rely on his Honour's statement that if it had been brought within twelve months of the grant of probate her application must have failed. That statement is entitled to the greatest respect. But it was made at a time when his Honour considered that he was free to decide whether the widow had been left without adequate provision for her proper maintenance in the light of all the circumstances that existed in August 1956. His Honour therefore was never forced to decide this problem in the light of the circumstances existing at the date of the death of the testator. I can only express my misgivings as to the correctness of the decision in *Coates's Case* (1), particularly in a State like New South Wales where an application can now be made with the leave of the Court at any point of time prior to the distribution of the estate and where the scope of the *Testator's Family Maintenance Act* has been extended to cover intestacy. But I am bound by the decision of the majority in that case and I must dispose of the appeal accordingly. That case decides that the date of death is the crucial date for determining whether the applicant has been left by a testator without adequate

(1) (1956) 95 C.L.R. 494.

(2) (1926) 26 S.R. (N.S.W.) 613; 43 W.N. 171.

provision for his or her proper maintenance, education and advancement in life. In order to decide this question the Court must put itself in the position of the testator immediately before his death 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. In *Coates's Case* (1) the Chief Justice said : " 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 " (2). His Honour added " 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

(1) (1956) 95 C.L.R. 494. (2) (1956) 95 C.L.R., at p. 508.

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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" (1). From these passages it is apparent that the Court, in order to decide whether a testator has fulfilled his moral duty to make adequate provision for the proper maintenance of his widow and children, is entitled to attribute to him a high degree of foreseeable prescience. Every future event intervening between the date of death and the date the application is heard can be taken into account provided it is not outside the range of reasonable foresight.

The present will was made just on the eve of the outbreak of the Second World War and therefore before the economic consequences of a world war and its effect upon the purchasing power of money and the cost of living could be appreciated, but the codicil was made three years later when the war had reached a climax both in Europe and in the Pacific. In order to finance the war, the rates of Commonwealth income tax had then been raised to unprecedented levels and the uniform tax system was about to be inaugurated. The testator did not overlook the necessity in these circumstances of increasing the provision he had made for his widow. By his codicil he increased her annuity by £300 and made it tax free. He died four months later. What he did not appear to foresee, but he reasonably might have foreseen, was that the longer the war continued the more serious its economic consequences would be upon the value of money and the cost of living and therefore upon the financial position of people with fixed incomes. He evidently foresaw that it would probably not be advisable to sell his farm or produce business for some time after his death, presumably because he considered that it was likely that the income and assets of his estate would be built up by continuing these businesses, and he must evidently have contemplated that this would assist his widow because he provided that no sale was to take place for five years after his death without her consent. The only vital thing that he appears to have overlooked in deciding what would be adequate for the proper maintenance of his widow in the future stretching forward from his death, which it can be said that as a wise husband he should have been able to foresee, was the danger of providing for his widow, then only forty-two years of age, mainly by leaving her a fixed income. The testator in his wisdom should have realised, as Mr. *Wallace* submitted, that the only safe course would be to

(1) (1956) 95 C.L.R., at p. 509.

leave her at least the income or a proportion of the income of his estate, but with a proviso that if her income fell below a certain amount it should be supplemented out of capital, either as of course or possibly at the discretion of his trustees. As he had no children, his widow was the only person with any real moral claim upon his bounty. As his Honour said: "The undistributed estate is now large and the competing beneficiaries under the will do not have and never had any real moral claim on the testator. Most of them are in comfortable circumstances, three only, whose combined interests in the residue of the estate is about one-twelfth, showing any real financial need." In my opinion the testator failed in his moral duty adequately to provide for his widow because he should have realised that in the foreseeable future a fixed income was likely to become inadequate for her proper maintenance. The Court is therefore free to make such an order for her proper maintenance as it thinks fit taking into consideration all the circumstances as they exist at the date the application is heard. The next question is what order should be made. In the circumstances that existed in August 1956 the propriety of the order made by *Roper* C.J. in Eq. in her favour is not open to challenge. I feel confident that if *Coates's Case* (1) had been cited to his Honour and he had realised the extent to which he could take into account foreseeable future events in deciding whether the widow had been left without adequate provision for her proper maintenance at the date of death, his Honour would have held that he had jurisdiction to make an order and would have made the same order.

In my opinion the appeal should be dismissed.

* *Appeal allowed. Order of the Supreme Court of New South Wales discharged. In lieu thereof order that the respondent's application to that Court be dismissed. Further order that the respondent's costs of the application and of this appeal be paid out of the estate of the testator.*

Solicitors for the appellants, *Iceton, Faithfull & Baldock.*

Solicitors for the respondent, *Garden & Montgomerie,* Cowra, by *Gould & Shaw.*

J. B.

(1) (1956) 95 C.L.R. 494.

* Upon the matter being mentioned in the High Court on 14th April 1958, the parties consented to the "further order" as then appearing in the formal order being amended to read as follows:—"Further order that the costs of the appellant executors and of the respondent of and incidental to all proceedings in the Supreme Court and of this appeal be taxed as between solicitor and client and be paid out of the estate of the testator."