

IN THE HIGH COURT OF AUSTRALIA

EDWARDS

V.

BOYD

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY, 7th DECEMBER, 1955.

EDWARDS v. BOYD

JUDGMENT (ORAL)

DIXON C.J.
WEBB J.
KITTO J.

EDWARDS v. BOYD

This is an appeal against the order of Roper C.J. in Eq. made in the Probate jurisdiction on 24th March 1955. The appeal is now confined to so much of the order as pronounced in favour of a will dated 29th September 1950. The question upon which the appeal depends is concerned ^{entirely} with the evidence upon which his Honour found that the will was duly executed. Mr. Benjamin, for the appellant, has put forward an able argument directed to satisfying us that the learned Judge's view of the facts took too unfavourable a view of one of the witnesses to the will whose evidence, if accepted, would at least throw grave doubt on its due execution. The other witness to the will was not called, she at that time being in England.

We are of opinion that we cannot interfere with his Honour's finding of fact upon this issue which is amply justified by the evidence before the learned Judge as it stands. The principles which we have recently restated in Patterson v. Patterson, 89 C.L.R. 212, are those which are to be applied to a case of this description and we are of opinion that upon a proper application of these principles the appeal cannot succeed.

It is, however, suggested that the evidence of the other attesting witness can now be made available and that it would, if admitted, prove to be inconsistent with the conclusion that a probate should be granted to this will. Our jurisdiction does not extend to entertaining an application to set aside an order or decree on the ground of the discovery of fresh evidence or of the availability of fresh evidence, or to admission of fresh evidence for the purpose of deciding an appeal before us and we therefore do not look at the affidavit which we understand has been sworn and would disclose what that evidence is.

It follows that the appeal must be dismissed, but we dismiss the appeal without prejudice to any application or appeal that the now appellant may make or institute in the Supreme Court of New South Wales.

The order will be: Appeal dismissed with costs but without prejudice to any application or appeal the now appellant may make or institute in the Supreme Court of New South Wales. In so far as the respondent's costs of the appeal are not paid by the appellant, such costs to be paid out of the estate.