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32, 1952

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
21 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

No. 11 of 1952.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA
(IN ITS APPELLATE JURISDICTION.)

IN THE MATTER of the ESTATE of HERBERT ELLIS late of Hurstville in the State of New South Wales, Electrical Engineer deceased.

IN THE MATTER of the APPLICATION of NANCE ELLIS of Hurstville in the said State, Widow.

AND

IN THE MATTER of the TESTATOR'S FAMILY MAINTENANCE AND GUARDIANSHIP OF INFANTS ACT 1916-1938.

BETWEEN

EDIE MAUD LEEDER *Appellant*

AND

NANCE ELLIS *Respondent.*

RECORD OF PROCEEDINGS

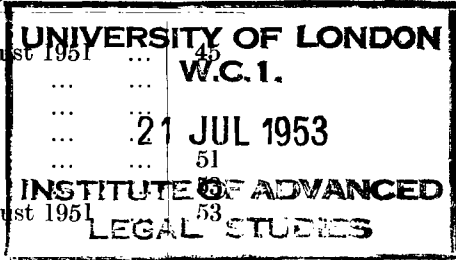
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INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

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In the Privy Council.

No. 11 of 1952.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA (IN ITS APPELLATE JURISDICTION.)

IN THE MATTER of the ESTATE of HERBERT ELLIS late of Hurstville in the
State of New South Wales, Electrical Engineer deceased.

IN THE MATTER of the APPLICATION of NANCE ELLIS of Hurstville in the
said State, Widow.

AND

IN THE MATTER of the TESTATOR'S FAMILY MAINTENANCE AND
GUARDIANSHIP OF INFANTS ACT 1916-1938.

BETWEEN

EDIE MAUD LEEDER *Appellant*

AND

NANCE ELLIS *Respondent.*

RECORD OF PROCEEDINGS.

No. 1.

Originating Summons.

In the
Supreme
Court of
New South
Wales in
Equity.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

In the Matter of the Estate of Herbert Ellis late of Hurstville in the State
of New South Wales, Electrical Engineer, deceased.

No. 1.
Originating
Summons,
8th March,
1950.

In the Matter of the Application of Nance Ellis of Hurstville in the said
State, Widow.

And in the Matter of the Testator's Family Maintenance and Guardianship
of Infants Act, 1916-1938.

10

LET EDIE MAUDE LEEDER the Executrix of the Will of Herbert
Ellis deceased cause an appearance to be entered for her to this Summons
within eight days after service upon her of this Summons which is issued by

In the
Supreme
Court of
New South
Wales in
Equity.

Nance Ellis of Hurstville in the State of New South Wales who claims to have been left without adequate provision for her proper maintenance education or advancement and who claims that such provision for her maintenance education or advancement as this Court thinks fit shall be made out of the estate of the testator and that an order be made :

No. 1.
Originating
Summons,
8th March,
1950—
continued.

- (a) specifying the amount and nature of such provision ;
- (b) specifying the part or parts of the estate out of which such provision should be made or raised and prescribing the manner of raising and paying such provision ;
- (c) stating the conditions restrictions or limitations imposed by the 10 Court, and
- (d) stating the manner in which the costs of and incidental to this application should be paid.

And for such further or other order as the nature of the case may require.

Appearances may be entered in the office of the Master in Equity, Elizabeth Street, Sydney.

Dated the eighth day of March One thousand nine hundred and fifty.

C. D. IRWIN,
Chief Clerk in Equity.

No. 2.
Appear-
ance,
3rd July,
1950.

No. 2.
Appearance.

20

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

The abovenamed Respondent EDIE MAUDE LEEDER by THOMAS CYRIL COX REDMOND her Solicitor appears herein and disputes the whole of the Plaintiff's claim.

Dated this third day of July 1950.

T. C. REDMOND,
Solicitor for the Respondent,
4 Regent Street, Kogarah. 30

No. 3.
Affidavit of Nance Ellis.

In the
Supreme
Court of
New South
Wales in
Equity.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

No. 3.
Affidavit of
Nance Ellis,
8th March,
1950.

On the eighth day of March, in the year One thousand nine hundred and fifty NANCE ELLIS of Hurstville in the State of New South Wales Widow being duly sworn makes oath and says as follows :—

1.—I am the widow of the abovenamed deceased.

2.—The abovenamed deceased died on the twenty-eighth day of July,
10 One thousand nine hundred and forty-nine having first made his Will dated the twenty-seventh day of June, One thousand nine hundred and forty-seven Probate whereof was granted to Edie Maude Leeder the executrix therein named by this Honourable Court in its Probate Jurisdiction on the fifteenth day of February, One thousand nine hundred and fifty. A true copy of the said Will is hereunto annexed and marked with the letter " A."

3.—The abovenamed deceased was at the time of his death seised and possessed of real estate in New South Wales. I am informed by my Solicitors and verily believe that search at the Probate Office of this Honourable Court discloses that the estate of the deceased has been sworn for Probate
20 purposes to have consisted of the following :—

ALL THAT piece or parcel of land situate in the Municipality of Hurstville Parish of St. George and County of Cumberland being Lot portions 2 and 3 (D) on Deposited Plan 2793 having a frontage of 98' 2" to Woid's Avenue and being the whole of the land in Certificate of Title volume 4093 Folio 249 valued at (£1,000.0.0) One thousand pounds. In Schedule I of the Affidavit for the Stamp Office in the Estate of the abovenamed deceased it is stated " Furniture not yet valued will be disclosed later." An amount of
30 (£886.13.3) Eight hundred and eighty six pounds thirteen shillings and threepence was sworn to be owing by the deceased at the date of his death to the War Service Homes on Mortgage.

4.—The deceased was married once only, namely to myself, this deponent. There were three children of the marriage, namely Herbert Claude Ellis aged 33 years ; Floria Patricia Magazinovic aged 27 years, a married woman; and Anne Maureen Ellis aged 17 years. The said Anne Maureen Ellis is the only child still living with me. She pays me One pound (£1.0.0) per week for her board and buys her own clothing. The said Herbert Claude Ellis is a married man with a home of his own.

In the
Supreme
Court of
New South
Wales in
Equity.

No. 3.
Affidavit of
Nance Ellis,
8th March,
1950—
continued.

5.—The abovenamed deceased was formerly an electrical engineer and for many years had a satisfactory income. From about the year One thousand nine hundred and thirty nine his income was reduced and he gave me approximately thirty shillings (30/-) per week for housekeeping expenses which sum was later reduced to twenty shillings (20/-) per week and so remained until he applied for the invalid pension in the year One thousand nine hundred and forty three, as he was suffering from tuberculosis. Thereafter my husband received the invalid pension until his death and I received the Wife's Allowance granted in connection with the said invalid pension which amounted to twenty four shillings (24/-) per week at my husband's death. During this period I also received substantial support from my son Herbert Claude Ellis. From December in the year One thousand nine hundred and forty seven until the death of the said deceased I have received Social Service payments amounting to twenty five shillings (25/-) per week. The abovenamed deceased did not at any time pay me any portion of his invalid pension. 10

6.—Since the death of the abovenamed deceased the Social Services payments and the wife's allowance in connection with the invalid pension have ceased and I have been granted a Widow's pension amounting to One pound seventeen shillings per week. I have no property from which I derive income and have no source of income other than the Widow's pension and any contributions from my daughter Anne Maureen Ellis or from my son Herbert Claude Ellis. I have the following property :— 20

The furniture in 2 Woid's Avenue as referred to in paragraph 8 hereof.

Save as aforesaid I have no assets or income.

7.—The property at which I am now living namely Number 2 Woid's Avenue is the property comprised in Certificate of Title Volume 4093 Folio 249 of which the abovenamed deceased is the registered proprietor. It was valued as at the twenty eighth day of July last by the Valuer-General at One hundred and forty pounds (£140.0.0) unimproved capital value, One thousand pounds (£1,000.0.0) improved capital value and an assessed annual value of Seventy pounds (£70.0.0) I have paid the municipal rates on this property since One thousand nine hundred and forty one. I have been living in this property with my husband since about October, One thousand nine hundred and twenty eight up till the date of his death and am still living there and I have nowhere else to go. 30

8.—The will of the abovenamed deceased purports to bequeath to the executrix " One genuine chesterfield wardrobe, one Spanish mahogany wardrobe and my grandfather clock " and the remainder of the furniture to me All the furniture in the house including the abovenamed articles are my own property and were purchased by me at Auction in the year One thousand nine hundred and twenty and One thousand nine hundred and twenty one 40

after the abovenamed deceased returned from service during the first World War. The furniture was insured in my name with the Sun Insurance Office under Policy number 16939116. In the year One thousand nine hundred and thirty three after a fire in the home the Sun Insurance Office paid me a cheque for Six hundred pounds (£600) : Of this I spent about One hundred pounds (£100.0.0) in replacing or repairing the furniture which had been damaged by fire and it was then agreed between the abovenamed deceased and myself that the balance of these insurance moneys was to be paid into the War Services Home Commission in reduction of the mortgage debt on the abovementioned house but I believe that such insurance moneys were not so used by my husband.

In the
Supreme
Court of
New South
Wales in
Equity.

—
No. 3.
Affidavit of
Nance Ellis,
8th March,
1950—
continued.

9.—In the year One thousand nine hundred and forty three Messrs. Seabrook & Co., as Solicitors for the Kogarah Council wrote to the abovenamed deceased in connection with a judgment signed by the council for Two pounds nine shillings and threepence (£2.9.3) owing by my husband in connection with war damage contribution and threatening to issue execution against his belongings. Produced and shown to me at the time of swearing this my Affidavit and marked with the letter “ B ” is a true copy of a letter in the handwriting of my son Herbert Claude Ellis drafted at the instruction of the abovenamed deceased.

10.—The abovenamed deceased met Miss Leeder about the year One thousand nine hundred and thirty one and she stayed at our home on some occasions in the next couple of years but was not at our home from the year One thousand nine hundred and thirty three until the time of the abovenamed testator's illness immediately preceding his death. The abovenamed testator was usually away from home during this period at weekends from Saturday morning until Sunday afternoon. Miss Leeder is no relation to the family.

11.—The abovenamed deceased was ill for about twelve months prior to his death and was confined to bed for about the last four months. During the whole of his illness I nursed my husband. He insisted on my spending almost the whole of my time in the room with him during the period when he was bedridden. Even on occasions when I had to leave the room to answer the door he would call out for me and I had to have my meals in the room and remain with him almost all the time and I so nursed and cared for him up to the time of his death.

12.—In or about the year One thousand nine hundred and twenty the said deceased bought a weatherboard cottage at 510 Railway Parade, Hurstville, together with adjoining blocks of land for Seven hundred pounds (£700.0.0). Of this amount I paid to the said deceased the sum of One hundred pounds (£100.0.0), the balance was obtained by him from the War Service Homes Commission. This house was sold while the present home at 2 Woid s Avenue, Hurstville was being built on part of the adjoining land and the proceeds of sale of the old house after liquidating the indebtedness to the War Service Homes Commission was used in building the new

In the
Supreme
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Wales in
Equity.

house in Woid s Avenue together with a fresh advance from the War Service
Homes Commission.

13.—I respectively request that this Court will make adequate provision
for me out of the estate of the abovenamed deceased.

No. 3.
Affidavit of
Nance Ellis,
8th March,
1950—
continued.

Sworn by the abovenamed deponent }
on the day and year first above- } NANCE ELLIS.
mentioned at Sydney before me :— }

A. W. GODFREY, J.P.

3 (a).
Will of
Herbert
Ellis, dated
27th June,
1947
(Exhibit A
to
Document
No. 3).

No. 3 (a).
Will of Herbert Ellis. Exhibit A to Document No. 3. 10

THIS IS THE LAST WILL AND TESTAMENT of me HERBERT
ELLIS of Kogarah in the State of New South Wales—Electrical Engineer.
I HEREBY REVOKE all former Wills and testamentary dispositions heretofore
made by me AND DECLARE this to be my last Will and Testament I APPOINT
EDIE MAUD LEADER sole Executrix and Trustee of this my Will I BEQUEATH
to the said EDIE MAUD LEADER one genuine chesterfield wardrobe, one
Spanish mahogany wardrobe and my grandfather clock and I BEQUEATH
the rest and residue of my furniture to my wife NANCE ELLIS I DEVISE all
my real estate wheresoever situate and I BEQUEATH the rest and residue 20
of my personal estate of whatsoever kind and wheresoever situate subject to
the payment of my just debts, funeral and testamentary expenses to the said
EDIE MAUDE LEADER absolutely.

IN WITNESS whereof I have hereunto set my hand this 27th day of
June One thousand nine hundred and forty-seven.

Signed by the said Testator as and for his last
Will and Testament in the presence of us both
present at the same time who at his request
in his sight and presence and in the sight and
presence of each other have hereunto sub-
scribed our names as Attesting Witnesses : } H. ELLIS.

T. C. REDMOND, C. DALEY,
Solicitor, *Solr.,*
Kogarah. Kogarah.

This is the annexure marked " A " referred to in the annexed Affidavit of
NANCE ELLIS sworn the eighth day of March 1950 at Sydney.

Before me,
A. W. GODFREY, J.P.

No. 3 (b).

Letter, Herbert Ellis to Seabrook & Co. Exhibit B to Document No. 3.

2 Woids Ave.,
Hurstville.

14/12/43.

Seabrook & Co.,
Solicitors,
133 Pitt Street,
Sydney.

Dear Sirs,

10 Your threatening letter of the 10th inst. to hand and contents noted.
I might state for your clients (W.D.C.) Information

- 1.—I have a War Service Home which I am indebted £900.
- 2.—The contents of the above are not my property.
- 3.—The only income I have at present is a pension.

Perhaps your client (W.D.C.) will instruct you to garnishee my pension.

This is the Annexure marked " B " referred to in the annexed Affidavit of Nance Ellis sworn at Sydney this eighth day of March 1950.

Before me,
A. W. GODFREY, J.P.

In the
Supreme
Court of
New South
Wales in
Equity.

3 (b).
Letter,
Herbert
Ellis to
Seabrook &
Co.,
14th
December,
1943.
(Exhibit B
to
Document
No. 3.)

20

No. 4.

Affidavit of Herbert Claude Ellis.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

On the twenty eighth day of February in the year One thousand nine hundred and fifty HERBERT CLAUDE ELLIS of 11 Budgen Road, Sutherland in the State of New South Wales Electrical Foreman being duly sworn makes oath and says as follows :—

- 1.—I am the son of the abovenamed deceased.
- 2.—On or about the fourteenth day of December One thousand nine
30 hundred and forty three my father asked me to write out a letter for him to Messrs. Seabrook & Co. and I wrote out a draft letter at his dictation. This draft is hereunto annexed marked " A. "*
30

*Exhibit " A " to this Affidavit is the same as Exhibit " B " to Affidavit of Nance Ellis (Document No. 3) and has therefore not been printed again.

No. 4.
Affidavit of
Herbert
Claude Ellis
resworn
8th March,
1950.

In the
Supreme
Court of
New South
Wales in
Equity.

3.—I had on frequent occasions written out drafts of letters for my father but he did not get me to write out the originals and I did not write out the original of the letter hereunto annexed marked "A."

4.—I believe that my father had the originals of letters written out by me typed.

No. 4.
Affidavit of
Herbert
Claude Ellis
resworn
8th March,
1950—
continued.

Sworn by the above-named deponent on the
day and year above mentioned at Sydney before } H. C. ELLIS.
me :

A. W. GODFREY, J.P.

Resworn by the abovenamed deponent on this } H. ELLIS.
eighth day of March 1950 at Sydney

10

Sgd. A. W. GODFREY, J.P.

No. 5.

No. 5.

Affidavit of Frank Kirkpatrick Bowler, 27th July, 1950, with Exhibits thereto.

(Not printed).

No. 6.
Affidavit of
Edie Maude
Leeder,
3rd July,
1950.

No. 6.

Affidavit of Edie Maude Leeder.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

20

On the third day of July One thousand nine hundred and fifty EDIE MAUDE LEEDER of Bondi in the State of New South Wales, Clerk, being duly sworn makes oath and says as follows :—

1.—I am the Executor of the Will of the abovenamed deceased.

2.—The nature and amount of the estate of the deceased's property at the date of his death is as follows :—

(a) A House property No. 2 Woids Avenue, Hurstville being the whole of the land comprised in Certificate of Title Volume 4093

Folio 249 valued at £1,000/-/- as per the Valuer Generals Certificate.

(b) Furniture in the above premises not as yet valued.

(c) The sum of Eight hundred and eighty six pounds thirteen shillings and threepence (£886/13/3) was owing by the deceased at the date of his death to the War Service Homes Commission in respect of a mortgage on the above property No. 2 Woids Avenue Hurstville.

In the
Supreme
Court of
New South
Wales in
Equity.

No. 6.
Affidavit of
Edie Maude
Leeder,
3rd July,
1950—
continued.

3.—The deceased was at the date of his death indebted to me this
10 deponent in the sum of Four hundred and ninety seven pounds twelve
shillings and seven pence (£497/12/7) being :—

Money lent and secured by Promissory Notes	£200:0:0
Monies paid by me to the War Service Homes Commission on behalf of the deceased in respect of the repayments of mortgage monies in connection with No. 2 Woids Avenue, Hurstville	205:10:0
Monies paid by me on behalf of the deceased and at his request	92:3:7

4.—To the best of my knowledge and belief the deceased left him
20 surviving a widow, the applicant herein, and three children HENRY CLAUDE
aged 33 years approximately, married, GLORIA PARTICIA MAGAZINOVIC aged
27 years approximately, married and ANNE MAUREEN aged approximately
17 years, single. The last mentiond child resides at the home of the deceased
and during his lifetime the deceased refused to acknowledge this child.

5.—I am the Edie Maude Leeder referred to in the Will of the deceased
and was on intimate terms of friendship with him for a period of approxi-
mately 20 years prior to his death. I am 42 years of age and single and I am
a Clerk by occupation.

Sworn by the deponent on the day and year }
first hereinbefore mentioned at Sydney before } E. LEEDER.
me :

30 R. MORRIS, J.P.,
A Justice of the Peace.



No. 7.

Further Affidavit of Edie Maud Leeder.

In the
Supreme
Court of
New South
Wales in
Equity.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 7.

No. 170 of 1950.

Further
Affidavit of
Edie Maud
Leeder,
12th July,
1950.

On the 12th day of July One thousand nine hundred and fifty EDIE MAUD LEEDER of Bondi in the State of New South Wales, Clerk, being duly sworn makes oath and says as follows :—

1.—I am the Executor of the Will of the deceased and also a beneficiary therein.

2.—In reply to paragraph six of the Affidavit of Nance Ellis sworn 10 the 8th day of March last past I deny that the furniture therein mentioned is the property of the Applicant.

3.—In reply to paragraph 8 of the said Affidavit I deny that all the furniture is the property of the Applicant and that the same was purchased by her at auction in 1921. Many years ago the deceased gave me a bundle of receipts for various articles of furniture and said “ You may need these one day.” I have visited the deceased’s premises regularly since 1931 and say that the furniture in the premises in 1931 is the same furniture that was in the premises at the date of the deceased’s death with the exception of a lounge settee and some tapestry. 20

4.—In reply to paragraph 9 of the said Affidavit I say that for the last 20 years approximately I have done all the deceased’s correspondence and typing both business and private and had his complete and absolute confidence. I have never seen or heard the deceased refer to any such letter referred to.

5.—In reply to paragraph 10 of the said Affidavit I say that I lived at the deceased’s home from 1931 until January 1933. The deceased subsequently visited me at my own home every weekend from Friday to Sunday and Thursday to Tuesdays when Public Holidays permitted.

6.—In reply to paragraph 11 of the said Affidavit I say that the deceased 30 suffered a heart attack in August 1948 was admitted to hospital on the 25th August 1948 and discharged on the 28th August 1948. I visited him at his request during that period in hospital and on his return to his home I visited him there until the date of his death. He was able to get up and about the house but could only travel beyond the house by a motor car. He continued to visit me at my home every second weekend going by car for which I paid. During the whole of this period I bathed him and attended

to his personal needs as he informed me that his wife, the applicant, would not do so. During this period he attended the Dental Hospital Sydney and I frequently had to obtain leave from my employment to take him there, wait for him until he was attended to and then take him home. In March 1949 the deceased wanted to come and stay at my home for a change for some weeks and I arranged this for him and also arranged my annual holidays for that period in order to look after him. On the 19th March 1949 he came to stay at my home but on the 20th March he suffered a seizure and I took him to hospital where he was admitted and not discharged until the 30th March. On each occasion that he came to my place I had a Doctor call and examine him at his request and for which I paid and the deceased repeatedly said that he wished his mind to be at rest as to the state of his health. During this period in hospital I stayed with him frequently from 9 a.m. to 4 p.m. and every night from 6.30 p.m. till 8 p.m. His wife visited him on one night only and arrived after visiting bell had been sounded and the visitors had gone and stayed only a few minutes. She only visited him very occasionally in the afternoon. After his discharge from hospital in March 1949 I took him to his home and visited him every night after business hours, every Saturday afternoon and Sunday and frequently stayed with him until the early hours of the morning. The Applicant frequently requested me to stay at the home of the deceased over night. I came to attend to the deceased but I refused to stay over night. On one occasion she phoned me very early in the morning and said the deceased was very ill and he wanted me to come and look after him. On another occasion she phoned me at my place of employment and asked me to bring £10/-/- along when I came also. I did so and stayed all day with him. The deceased was again admitted to hospital on the 7th May 1949 and was discharged on the 17th May 1949. I again visited the deceased regularly during this period in hospital. The Applicant visited the deceased and would arrive at the conclusion of the visiting hours and would stay only a few minutes. It was on his return from hospital on the 17th May that the deceased was not able to go out and was confined to the bed. I continued to visit him daily at his request and the Applicant again frequently asked me to stay over night at the house particularly at week-ends. She frequently complained to me of his illness. In June 1949 I met with an accident at my place of employment and injured my back. The following day the Applicant telephoned me and asked for my electric jug as with gas restriction she found it difficult to heat water to make a cup of tea for the deceased. I left my bed and in terrific pain and heavy rain I took the jug to the deceased's home. When I arrived there he asked if I would bring him my petrol stove the following day as he was afraid the gas might go off. Again in heavy rain and with pain in my injured back I travelled back to the deceased's home the following day with the stove. Whilst I was convalescing from my own injuries I visited him daily and spent the whole of the day by his bed. Frequently when I arrived the deceased was most distressed and wanted the Doctor but the Applicant repeatedly said she did not think he was ill enough to call the Doctor and, on these occasions I got the Doctor for the deceased myself.

In the
Supreme
Court of
New South
Wales in
Equity.

—
No. 7.
Further
Affidavit of
Edie Maud
Leeder,
12th July,
1950—
continued.

In the
Supreme
Court of
New South
Wales in
Equity.

—
No. 7.
Further
Affidavit of
Edie Maud
Leeder,
12th July,
1950—
continued.

I frequently had to go to neighbours in the street at the back of the deceased's home and request them to stop hammering and making other noises which was upsetting the deceased. The Applicant refused to complain as the neighbours might not like it. On the last occasion the deceased was in hospital namely in March 1949, the Applicant absolutely refused to take the deceased home and said she would not look after him and it was not until he insisted and reminded her that it was his home that she permitted him to return from the hospital. I remember on one particular occasion before when she said that the deceased should be told he was going to die.

7.—A strong friendship between the deceased and myself existed for 10 twenty years. The Applicant was aware of this and of the high regard the deceased and I had for each other. Apart from the moneys I loaned to the deceased and the moneys spent by me on his behalf referred to in paragraph 3 of my affidavit sworn on the 3rd day of July 1950 and filed herein I have been of financial assistance to the deceased repeatedly during the years. Since 1933 I have done all the deceased's washing and ironing.

Sworn by the Deponent on the day and year }
first hereinbefore mentioned at Sydney before } E. LEEDER.
me :

R. MORRIS, J.P.,
A Justice of the Peace.

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**No. 8.
Oral Evidence for the Applicant.**

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

Coram : SUGERMAN, J.

Friday, 28th July, 1950.

H. ELLIS (deceased) and T. F. M. Act.
(Originating summons for maintenance)

Mr. HENCHMAN appeared for the applicant.

Mr. LUSHER appeared for the respondent.

30

(Affidavits read)

Valuation of furniture tendered and marked
Exhibit " A ")

NANCE ELLIS. Sworn, examined, deposed.

Nance Ellis,
Examina-
tion.

To MR. HENCHMAN : I am a widow, residing at No. 2 Woids Avenue, Hurstville. I am 60 years of age and the applicant in this matter. At the present time I am in receipt of the Widows' Pension. It amounts

- to £2 2s. 6d. per week. I have let one of the rooms in the house and for that I receive an additional 30s. per week, making my total income £3 12s. 6d. per week.
- Q.* The furniture in the house at the present time, whose is that?—
A. That is my property.
- Q.* The Spanish mahogany wardrobe?—*A.* That is my property.
- Q.* Do you remember where you bought it?—*A.* Yes, at W. A. Little's and paid £20 for it.
- Q.* The Chesterfield wardrobe?—*A.* There has never been a
 10 Chesterfield in our home. In fact I have never seen one.
- Q.* The Grandfather Clock?—*A.* Yes, it is there, but it is very badly damaged by fire.
- Q.* Did you purchase that?—*A.* Yes, my money paid for that from Parkinson and Laws.
- Q.* The whole of the rest of the furniture in the house is yours?—
A. Yes, it was bought by my money.
- Q.* The rates on the house at the present time?—*A.* Yes.
- Q.* £6 to the Kogarah Municipal Council?—*A.* No, I don't owe that much.
- 20 *Q.* That is what the amount is?—*A.* Yes, about £6 I think it is.
- Q.* Water rates?—*A.* Yes, they are paid up.
- Q.* I am sorry I have to ask you this question, but in view of the affidavit—you have said in the affidavit that one of your daughters lives at your home, and during his lifetime the deceased refused to acknowledge his child?—*A.* That is wrong: he never ever questioned anything like that.
- Q.* Have you ever heard of any suggestion of that sort?—*A.* No, never until this case started to come on.
- Q.* She is in fact the child of yourself and the deceased?—*A.* Of course.

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CROSS-EXAMINATION.

- 30 Mr. LUSHER. *Q.* You say in your affidavit you bought this furniture in 1920/21?—*A.* Yes, and added pieces all the time. Cross-examination.
- Q.* Do you claim that the deceased never bought any furniture?—
A. He used my money to buy it. I got the money off my two aunts—I was living with them.
- Q.* In what fashion did you get it from them?—*A.* They gave me £300.
- Q.* When did they give you that?—*A.* In 1918—I was there in—I went up there in 1917 and came back in 1918 and they were two very old ladies and I looked after them for that time.
- 40 *Q.* When do you claim that you bought this Spanish Mahogany wardrobe?—*A.* I bought that; I have got a catalogue—I bought it a week before—I have a catalogue of some other things I bought. I bought it in 1920 I think it was November, and I will verify that in a few minutes.
- Q.* Do you know that your husband bought this Mahogany wardrobe—is quoted as inlaid mahogany?—*No*, it is plain—it is a Chippendale.

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Q. Do you know your husband bought a mahogany wardrobe in 1929?—*A.* That is a Sheridan; bought it at Lawsons. That is up at my home.

Q. That was bought by your husband?—*A.* Yes, I gave him the money.

Q. That was bought in 1929?—*A.* Yes.

Q. That is not 1920/21. Yes; I said from time to time we added pieces.

Q. In your affidavit you swore you bought the whole of this furniture?—*A.* No, I did not; I said the majority of our furniture was bought in 10 20/21.

Q. You swore this on p. 4; you swore all the furniture in the house—
“are my own property and were purchased by me at auction in the year
“1920 and 1921 when the above-named deceased returned from service
“after the First World War.” *A.* That is right, but you can always add
another piece of furniture to your other stock.

Q. You had the benefit of inspection of these forms from your solicitor?—*A.* Yes, quite right, but the majority of my furniture was bought in 1920/21.

Q. You had no idea of course that the deceased had kept all these 20 receipts?—*A.* They are my receipts—they were stolen from my home.

Q. Stolen from your home?—*A.* Yes.

Q. When?—*A.* Through the years.

Q. When?—*A.* He had been stealing everything out of my house since 1938.

Q. Who, your husband?—*A.* Yes, stealing my property; I have a list of that there.

Q. A list of the things your husband stole?—*A.* Yes, I have a list of the things stolen from my home.

Q. By your husband?—*A.* Yes, paid for by my money. 30

Q. Were you on good terms with your husband?—*A.* Yes—good terms, but he had T.B. What could you do about it?

Q. And he stole from you?—*A.* Yes, I went to the Magistrate to see what I could do.

Q. You had no idea that your husband had given all these receipts to Miss Leeder?—*A.* I knew she had them, but it didn't affect me in the least because it is my furniture.

Q. You have a traymobile out there at the home?—*A.* Oh yes, there is one there.

Q. With Jacobean legs?—*A.* Yes. That is my dining-room suite. 40

Q. When did you buy that?—*A.* We bought it later on from when we bought the dining-room suite.

Q. When?—*A.* It would be 1929/30.

Q. You made no reference to that in your affidavit, did you?—
A. Why did I make a reference to that. I said the furniture is owned by me, and it is owned by me and you cannot prove it is not owned by me.

Q. In 1920/21, immediately after your husband returned from the

war, you said—take the Maple bed—when did you buy that?—*A.* The Maple bed?

Q. Yes?—*A.* That was bought in—I really

Q. When did you buy that?—*A.* That was bought in about 1929.

Q. In fact, everything was bought in 1929?—*A.* Yes—you know I didn't because while I was away on holidays, half of the things got burnt. There was a fire in the place, and we had to replace them. It is still my money.

Q. That fire you swore took place in 1930?—*A.* There were two fires
10 —one was only smoke damage.

Q. You swore here only as to one fire?—*A.* I did not swear to one fire.

Q. You can take my words for it?—*A.* It is my money bought it.

Q. You swore the fire took place in 1933?—*A.* I have got '32, no '32 I renovated it in 1933.

Q. It says here in the affidavit that you swore, the furniture is insured in your name?—*A.* Yes.

Q. In the year 1934?—*A.* That is when I got the cheque.

Q. You say it took place in the year before that?—*A.* It took place late in the year on the 28th November 1932.

Q. If the fire took place in 1932, there would be no explanation for a
20 lot of furniture being bought in 1929?—*A.* We moved into our new home.

Q. You gave the explanation to His Honor that the reason was this furniture was purchased in 1929, was because you had a fire?—*A.* So we did. It didn't take everything, it only burnt a few things and we had to replace them, and it was replaced with the insurance money, and it is still my property. All those receipts you have got in your hand were stolen out of my receipt book at home.

Q. By your husband?—*A.* Yes.

Q. They are all receipts in his name?—*A.* It does not matter whether
30 it is in his name or not. It was my money paid for it and I helped him in his business until he got on his feet. I was the one who did all the hard work.

Q. If I suggested you never bought a stick of this furniture and I suggest that you have completely forgotten that your husband had all these receipts?—*A.* I knew all the receipts were gone; don't worry about it.

Q. And I suggest you claim this furniture so you could suggest that your husband left you nothing. Can you explain why your husband left you the furniture?—*A.* It is all badly damaged; it is out of repair.

Q. You seem to want to claim it?—*A.* Certainly I claim it because it is mine.

Q. Can you offer any explanation as to why your husband should make
40 a will leaving your furniture to you?—*A.* I suppose he had to leave me something. He did not think I would be going for maintenance. I suppose he thought I was too silly.

Q. Did he discuss with you the fact that he was making a will?—*A.* He did and said he was leaving me everything he possessed in the world.

Q. Can you explain the reason why he left you furniture you owned?
—*A.* He was in a very bad state when he made the will; it took Miss

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Leader from 1933 to 1947 to get him to make a will. It took him that long to make his will.

Q. You sent for her to get him to make a will?—*A.* Yes, and she used force against him. He hated the sight of her in the finish.

Q. That is why you used to ring up and ask her to come up and nurse him?—*A.* I never asked her to come up and nurse him. She would ring up and telephone when I was looking after him.

Q. You have had the benefit of seeing the affidavits in the file?—*A.* Yes

Q. You have entered the witness box here and you have not denied anything she said in the affidavit—

Mr. HENCHMAN : You can blame me for that.

Mr. LUSHER : *Q.* You know that there is a sworn affidavit in which you said that you asked her to come up to the home and nurse this man—used to ring her up?—*A.* I do not suppose I rang her more than twice.

Q. You used to ring this lady up did you not?—*A.* Yes.

Q. And ask her to come up and nurse him?—*A.* No, never. What did she do—sit in the room and chatter, chatter, chatter all the time.

Q. She was at home practically all the time with him?—*A.* She was not.

Q. You did not get on with him at all well?—*A.* I did, very well and it was a very great shock to me to find he let the house over my head to anyone else.

Q. Did you know he made a will?—*A.* Yes he told me he made a will seven years before. He told me about a week before he died he made it seven years before.

Q. Your husband of course was never home at your place at all at the weekend, was he?—*A.* Yes, sometimes he did not go away at the weekend. He used to go away at weekends and some weekends he missed out.

Q. Your husband rarely was home at weekends?—*A.* Rarely but he was at home some weekends.

Q. You swore that the testator was usually away from home during this period, 1933 onwards?—*A.* Yes, but he was home all the other times.

Q. Saturday morning to Sunday night?—*A.* Yes.

Q. You know where he used to be on those weekends?—*A.* Not at first I did not know where he was.

Q. What do you mean by “at first”?—*A.* He might have been running around for about six or seven years before I knew exactly where he was. I could not prove it.

Q. You knew he used to go to Miss Leader’s every weekend?—*A.* Not at first, I did not know.

Q. For the last ten years, you knew he was at Miss Leader’s home?—*A.* He was with her for sixteen years.

Q. You are somewhat bitter towards Miss Leader?—*A.* Of course I am bitter towards her.

Q. You knew that your husband went to her home every weekend?—*A.* Yes.

Q. And you know that he used to go there and stay for a week at a

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time, did he not ?—*A.* Not very often ; he was home nearly all the week.

Q. He used to go to town during the week ?—*A.* Sometimes two or three days a week. When he got T.B. he did not go to town, only at the weekend ; for four years he stopped home all the time and just went out at the weekend.

Q. He did not seek any company from you at all ? —*A.* He was always very well looked after.

Q. He was not there at weekends ?—*A.* They are nothing : I looked after him the other part of the week.

10 *Q.* He used to spend his days in town going to the picture shows ?—*A.* He might go to the picture shows once a week.

Q. He used to do that right up to the year he died ?—*A.* From August 25th he was practically an invalid until he died in the next July, that is eleven months.

Q. You have told us in your affidavit that he was on a pension from 1943 onwards ?—*A.* Yes, from November 1943 I think I said.

Q. You know of course that your husband had a new suit in 1947, made at Verey's ?—*A.* Yes, and who paid for that ?

Q. You know that it cost £14 odd ?—*A.* No, he told me £25.

20 *Q.* Who did pay for that ?—*A.* He paid for it himself.

Q. You do not really mean that ?—*A.* He did pay for it.

Q. A man on a pension to give £25 for a suit ?—*A.* He had more for that ; he had a V-8 car which he sold.

Q. A man on a pension had a V-8 ?—*A.* No, he did not own it really. It was my son's, but he took the money for it.

Q. What you are telling us is that your husband owned a motor car ? —*A.* He did not. His son owned it, but he got the money for it when it was sold.

30 *Q.* The V-8 motor car he owned, that was registered in your husband's name ?—*A.* No, my son owned it.

Q. Was it ever registered in your husband's name ?—*A.* I suppose it was.

Q. You know the car ?—*A.* Listen, I do not know much of my husband's business because he would not let me know it ; ever since he started to run around with that woman he would not let me know any of his business at all.

Q. What I am suggesting to you was that your husband had no money at all ?—*A.* He did have money.

40 *Q.* How much ?—*A.* I know he had £50 on fixed deposit in the English Scottish Bank on the corner of Pitt and Bathurst Streets.

Q. When ?—*A.* He drew it out, in November 1947.

Q. You know he borrowed £200 in 1945 ?—*A.* He never borrowed that £200, that is a fact.

Q. You have seen your husband's signature on promissory notes ?—*A.* It does not look like my husband's signature.

Q. Do you swear that the signatures on the promissory notes are not your husband's signatures ?—*A.* There are two of them I would not say are. The other two look like his.

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Q. What I am suggesting is that over the last seven or eight years at least, Miss Leader helped your husband financially to a great extent?—*A.* She did not; she never helped him financially. She used to ring up trying to borrow money off him. My daughter can tell you that.

Q. Would you be surprised that Miss Leader had a receipt at least for the suit?—*A.* Yes, she might have anything.

Q. That was bought by him at Verey's?—*A.* She might have anything.

HIS HONOR: How does it affect this matter?

Mr. LUSHER: There were large sums of money spent on this man over the years. 10

HIS HONOR: The suggestion is that it was in repayment of debts.

Mr. LUSHER: What he had borrowed and the generosity she had shown him.

HIS HONOR: Go on.

Mr. LUSHER: *Q.* What I was putting to you is that your husband's means were not such as to permit him to make these expenses?—*A.* I tell you he had £400 from a V-8 motor car.

Q. Did you know that he had sold his car?—*A.* Yes my son was the man who sold it and he took the money and he would not give it to us.

Q. And continued to get his pension—(Objection; not pressed). 20

Q. It is true, is it not, that all of your husband's washing over the past years was done at Miss Leader's place?—*A.* One shirt that he left there. Just the one shirt, I have done all his washing for years.

Q. Over the last ten or twelve years is it not a fact that Miss Leader has done all the man's washing?—*A.* No. She washed one shirt. I washed every other article of clothing.

Q. Did not the deceased man do his own cooking until he was violently ill?—*A.* Never in his life.

Q. Did he not go and buy his own meat and bring it home and cook it himself?—*A.* There was always plenty of meat in the house there. 30

Q. Used he not cook his own food because you declined to cook for him?—*A.* I never declined to cook for him in my life. I was a perfect slave if you want to know.

Q. It was true was it not that you used to telephone Miss Leader to bring up equipment to your home?—*A.* The day the gas failed badly I rang her up to bring up an electric jug which was his.

Q. When she brought it up it had been one taken from our home a few years before.

Q. Did you not also ring up and ask for other household items from her?—*A.* Never. 40

Q. Is it not a fact that Miss Leader was almost continuously in your house for the last months?—*A.* Only the last four months, he was a very ill man and dying and I did not want to upset him by kicking her out.

Q. She had lived in your home?—*A.* She lived in my home at the weekends only; sometimes she might come down in the middle of the week, but it was weekends only. In 1931 and 1932, she only came there at the weekends.

Q. You never wore a wedding ring when your husband was away ?—
 A. Yes, this is the same wedding ring I got but it is a bit small.
 Q. You never wore that ?—A. Yes, it won't fit.
 Q. You never wore it at all about the home ?—A. Yes, when I was
 not washing or anything like that ; it is too small for my finger, I have got
 fat.

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Q. When was Anne born ?—A. 28th November, 1932.

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Q. Miss Leader was then living at the home ?—A. She was there but
 she was going to business when Anne was born.

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10 Q. There was a violent argument between you and your husband at
 that time ?—A. There was never a violent argument, and I object to that.
 (Objected to.)

HIS HONOR : What is the relevance of the question ?

Mr. LUSHER : I am fixing a time ; I am merely asking the question
 to fix the time, the date at which there was a particularly violent quarrel.

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 ination—
continued.

WITNESS : It has never been suggested to me in my life, anything like
 that.

HIS HONOR : Q. All Mr. Lusher is putting is did a very violent
 quarrel occur between you and your husband about the time your youngest
 daughter was born ?—A. Never.

Mr. LUSHER : Q. Is it not a fact that shortly after, that almost
 immediately after, Miss Leader left the home ?—A. She left the home in
 1933.

Q. Was it not 1932 that she left, almost immediately after your daughter
 was born ?—A. No, she left in January 1933 and I can tell you why she did
 leave the home.

Q. I want to come on to the furniture, which you say was burnt in the
 fire. You know that Miss Leader has sworn that the furniture in the house
 now was there in 1930 ?—A. She was not there in 1930 ; she did not meet
 him till October, 1931—the first time she came to my place was October . . .

Q. What furniture was lost in the fire ?—A. I had two fires—

Q. Following the 1933 fire you were paid £600 ?—A. That fire was only
 smoke damage ; all my things were intact. They are there now but are not
 worth anything because they are smoke damaged ; they are only junk.

Q. Are they included in this list ?—A. Yes.

Q. Did you have the fire brigade down at the fire ?—A. Yes, both
 Kogarah and Hurstville. We live on the Kogarah side and both Kogarah
 and Hurstville came.

Q. There were officers from the fire brigade there ?—A. Yes.

Q. When was the second fire ?—A. That was the second fire you are
 talking about now.

Q. When was the first fire ?—A. It was in 1927.

Q. Which was the fire following which you were paid £600 ?—A. The
 1933 fire.

Q. That was the fire when the furniture was damaged by smoke ?—
 A. Yes, everything was smoked ; I had everything re-polished and every-
 thing ; but the things are deplorable in this way . . .

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Q. You are telling us you were paid £600 for fire damage because the stuff was smoked?—A. Because it was damaged beyond resale. You could not do anything with it—it is not worth anything.

Q. On the list of the furniture, which articles of furniture there were damaged in the fire (list produced to witness)?—A. The grandfather clock was damaged.

Q. Just look at the list, which article of furniture there? (No answer).

HIS HONOR: Q. Perhaps you could tell us without looking?—

A. Yes, the grandfather clock.

Mr. LUSHER: Q. What else?—A. There were a few marble statues 10
and things like that there, and useless at the present time.

Q. What else was damaged in the fire in 1933?—A. Practically everything in the room.

Q. All those articles there?—A. No, they are not all in one room; they are bedrooms.

Q. Which are the articles which were damaged?—A. Everything in the two rooms—the dining room and the lounge room which were damaged by fire, smoke damaged, which is the worst damage of all.

Q. You say that the fire brigade attended on that occasion?—A. Of course it did. 20

Q. You were paid, you say, £600 for the damage?—A. Yes, there was £600 worth of damage done.

Q. To the furniture?—A. Yes, there were carpets damaged, and everything in the place was damaged, and I had a piece of tapestry which was burnt, and the lounge was burnt.

Q. Is it true that all the furniture in the house now was there before the 1933 fire?—A. Yes, there has been nothing burnt since—only furniture repolished and curtains—that is all and the carpets cleaned.

Q. Everything you had before the fire is still there?—A. Yes.

Re-examin-
ation—

RE-EXAMINATION

30

Mr. HENCHMAN: Would you have a look at that, did you get a letter last year from C. H. Buchanan & Company, Loss Assessors?

(Objection to tendering of document.)

Mr. HENCHMAN: I propose to have it marked.

Q. Did you get last year a letter from C. H. Buchanan & Company, Loss Assessors?—A. Yes.

Q. About the fire?—A. Yes.

Q. Can you see those big letters at the top?—A. Yes.

Q. Is that the letter you got?—A. Yes.

(Letter tendered, to be marked for identification.) 40

(Witness retired)

Mr. HENCHMAN: In view of my friend's questions about the Ford car, I ask leave to call evidence.

HERBERT CLAUDE ELLIS, sworn, examined, deposed.

To Mr. HENCHMAN: I reside at Sutherland. I am a son of the applicant and an electrical foreman by occupation. I was in Court when my mother was being cross-examined by Mr. Lusher. I heard questions about the deceased owning a Ford motor car.

Q. Did he own a Ford car?—A. Yes.

Mr. LUSHER: I object to evidence being adduced on this matter.

(Objection allowed)

(Witness retired)

10 Mr. HENCHMAN: That is my case.

(Case for the applicant closed.)

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Oral Evidence for the Respondent.

EDIE MAUD LEEDER, sworn, examined, deposed.

Mr. LUSHER: During his lifetime, you say money was loaned by you to the deceased. Did you yourself borrow that money to loan to him?—A. I did.

Q. From a finance company?—A. I did.

Q. And paid interest on the money yourself?—A. I did.

20 Q. And there was an account of £31 12s. 0d.?—A. Yes, Labour Funerals.

Q. You yourself know nothing about that?—A. No.

Q. You yourself have not paid that?—A. No.

CROSS-EXAMINATION.

Mr. HENCHMAN: You have four promissory notes, have you?—A. Yes, I have.

Q. Would you produce those (produced).

Q. You claim to have paid £92 3s. 7d. for the deceased at his request?—A. Yes.

30 Q. You say you had a request for the £92?—A. I have the receipts, yes.

Q. You will produce the receipts for that £92?—A. Yes.

Q. Similarly you say you paid to the War Service Homes Commission £205 10s. 0d.?—A. Yes.

Q. And all those payments, of course, were made before his death?—A. Yes.

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Record
Part II.
Exhibit
" B "

Q. And you have known since 1944 that at least £100 was owing to you?—A. Yes. (Objected to; allowed.)

Q. You knew that as from July, 1944, that at least £100 was owing to you on two promissory notes?—A. Yes.

Q. £50 from the 20th January, 1946 and £50 from the 19th December, 1947?—A. Yes.

Q. And you had spent all these other moneys on his behalf?—A. Yes.

Q. You swore, did you not, in your application over Probate that the deceased man owed no debts whatever except to War Service Homes?—

A. Would you repeat.

Q. You swore in your application in the document with your application for probate that the deceased man owed no debts whatever except to the War Service Homes?—A. He was a pensioner.

Q. Is that so or is it not?—A. I just don't quite see it.

Q. Do you remember making an application for probate?—A. Yes.

Q. Do you remember signing and swearing a document in which you set out what the deceased estate was?—A. Yes.

Q. Did you swear in that document that he had no debts whatever except to the War Service Homes?—A. Yes.

Q. Would you let me see the affidavit, please (produced).

Q. That is your affidavit is it not (Shown witness). Have a look at the front. You will see your signature?—A. Yes.

Q. And in that on the 9th February, 1949 (it should be 1950) you swore that there were no debts owing except to the War Service Homes. Now will you tell His Honor why you did not claim the debts owing there?—A. I will tell you. The estate, the amount of money owing to the War Service Homes was £800 and the amount of the property was £1,000, and if I had put my account in on it, the estate would have been declared bankrupt and would have taken a longer time to wind up.

Q. How did you know that?—A. Mr. Redmond told me.

Q. So, you chose to swear something falsely so that the estate would not take so long to wind up?—A. No, it is not sworn falsely.

Q. Look, there was not one word of these debts owing to you, was there, until after what we call the originating summons was served on you?—A. The deceased was a pensioner.

Q. There was not one word of these debts to anyone until the originating summons was served on you?—A. Yes.

Q. You got a notice, did you not, that the widow was dis-satisfied with the position and would be bringing proceedings like this long before you took out probate, didn't you, a letter from her solicitor?—A. Would you repeat that, I just can't follow you.

Q. I will see if I can find the actual document for you.

Mr. HENCHMAN: May I have the four promissory notes marked for identification? (Tendered for marking.)

(Stamp affidavit tendered and marked Exhibit " B "

(Further hearing adjourned to Monday, 31st July, 1950.)

SECOND DAY

EDIE MAUD LEEDER, Cross-examination continued.

Mr. HENCHMAN : You told me on Friday that you would produce receipts this morning for the £92 3s. 7d. ; have you them here ?—*A.* Not all of them.

Q. You heard me ask on Friday to produce the receipts for £92 3s. 7d. ?
—*A.* Yes, but you cannot get receipts for taxis ; taxis do not give you receipts.

Q. Can you produce all the receipts except for sums paid for taxis ?—
10 *A.* Taxis, and you do not get receipts for brandies.

Q. What amount was paid for taxis ?—*A.* There were five trips.

Q. How much did they come to ?—*A.* About £5 12s. 6d.

Q. For five trips ?—*A.* Yes.

Q. Long trips ?—*A.* No. When you have to get a taxi you have to pay both ways.

Q. Can you produce receipts this morning for the £92 3s. 7d. less £5 12s. 6d. ?—*A.* No.

Q. How much less do you account for ?—*A.* When I went to the deceased's home he asked me to leave some money, and I never got receipts
20 for that, and I did not get receipts for brandy that I bought.

Q. You swore on Friday that you could produce those receipts ; you swore that sitting in that witness box, didn't you ?—*A.* No, I did not say that I could produce them.

HIS HONOR : I think you asked her specifically about the receipts for moneys paid to the War Service Homes.

Mr. HENCHMAN : I was asking about the £92.

HIS HONOR : I thought you asked particularly about the £205 10s. 0d.

Mr. HENCHMAN : Yes, and about the £92.

Q. Have a look at that letter I show you ; that is from your solicitors
30 to the applicant's solicitors. Do you see an item there for £92 3s. 7d. ?—
A. Yes.

Q. Do you see the statement there : " Amounts owing to her of different advances and amounts paid receipts for which are held by her—£92 3s. 7d. " ; do you see that ?—*A.* Yes.

Q. That is not true, is it ?—*A.* You did not say all the receipts.

Q. It is not true ; you have not receipts for the £92 3s. 7d. ?—*A.* No.

Q. How much of that £92 3s. 7d. can you produce receipts for ?—
A. £4 10s. 5d. paid to the Water Board.

Q. Have you gone over them during the week-end ?—*A.* No.

40 *Q.* What is the total ; do you know ?—*A.* No, I just have the receipts.

(Letter dated 23rd June, 1950, tendered and marked Ex. C).

Q. Do you agree with me that no mention was made of those debts being owing to you until after the summons commencing this matter was issued ?—*A.* Yes, but on the advice of my solicitor we did not mention them

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because if I had included them in the affidavit the estate would have been bankrupt and I would not have got probate, and that would have prevented winding it up.

Q. You were prepared to swear something which was not true?—

A. It was not true.

Q. But you were prepared to swear it?—*A.* It was acknowledged—

Q. That is right, isn't it? It was not true, but you were prepared to swear it?—*A.* It was true, the moneys were owing to me.

Q. Then why did not you say so in your affidavit?—*A.* Because as I explained, if it was included in the affidavit, the estate would have been declared bankrupt. 10

HIS HONOR: She may have been entitled to do that because the form of affidavit is rather peculiar in this respect; it says: "The annexed inventory contains a true statement of all the real and personal estate," but it does not say that it contains a true statement of all debts. All it says is that the debts therein stated were actually due and owing.

Mr. HENCHMAN: Yes, but in the schedule there is a schedule of debts.

HIS HONOR: Yes, but the schedule contemplates that the debts will be set out. However, the precise terms of the affidavit do not say that the schedule discloses all the debts; it merely says that those which are disclosed were actually due and owing. 20

Mr. HENCHMAN: You can see the difficulty which might have arisen if the estate had been insolvent.

Q. You are 42 years of age?—*A.* Yes.

Q. And you are an accountant?—*A.* Yes.

Q. You are employed by W. J. Coote, the jeweller?—*A.* Yes.

Q. What salary do you get?—*A.* That is personal.

Q. What salary do you get there?—*A.* £9 per week.

Q. Do you receive any further allowances on top, of that?—*A.* Not from there. 30

Q. Are you in receipt of other income?—*A.* I make and sell coat hangers at Christmas time, and I do knitting.

Q. What do you get during the year for that?—*A.* Sometimes between £50 and £60.

Q. For the coat hangers and the knitting together?—*A.* No, just for the coat hangers, and I make several garments during the year and that probably brings in about £20.

Q. Are you in receipt of any other money?—*A.* I get some money from the estate of my people. 40

Q. How much is that?—*A.* I should say near the £200 mark.

HIS HONOR: Are you in receipt of anything else? We have to know if you resist the application?—*A.* No. It is just what I make.

Q. You have a bank account?—*A.* No.

Q. You have no bank account?—*A.* No.

Mr. HENCHMAN: Have you any land or property?—*A.* No, I sold the land.

- Q. And you still have the proceeds of sale of that land?—A. Yes.
- Q. You have some of it?—A. Not very much.
- Q. Tell me what it is?
- HIS HONOR: Tell us approximately; not to the nearest £1, but to the nearest £10?—A. I suppose I have about £20 or £30.
- Mr. HENCHMAN: Where was the land?—A. At Lidcombe.
- Q. How big was the estate?—A. I could not tell you the feet.
- Q. Was it an ordinary building block?—A. No, a factory site.
- Q. And you got £20 for it?—A. No, I did not.
- 10 Q. You have £20 left?—A. Yes.
- Q. How much did you get for it?—A. £70.
- Q. For a factory site at Lidcombe?—A. Yes.
- Q. Have you any other property of any kind at all?—A. No.
- Q. What about jewellery?—A. Yes, I have jewellery.
- Q. You have several diamond rings?—A. Yes.
- Q. Given to you by the deceased?—A. No, only one.
- Q. That in fact was his wife's engagement ring?—A. No, it was his diamond tie pin.
- Q. Were you never told that the ring he gave you was his widow's engagement ring? Has there never been a claim made on you in respect of that engagement ring?—A. No, never.
- Q. Nobody has ever suggested that to you?—A. No.
- Q. Did he give you any other property?—A. Yes, lots of little gifts.
- Q. He gave you a fur coat once?—A. Yes.
- Q. And that was pretty valuable?—A. No.
- Q. How much was it worth?—A. About £29.
- Q. What other gifts did you get from him?—A. A pair of stone-martens.
- Q. I suppose he had been making gifts to you right throughout your association?—A. No. That went right back to 1933, but for the last 15 or 16 years I have not had a thing. You are asking me about things which happened 20 years ago.
- Q. I am asking about anything he gave you. He furnished your flat?—A. No, I bought it on T.P.
- Q. None of the furniture in that flat was given to you by him?—A. No.
- Q. Do you suggest you used to pay to the War Service Homes the money due on this house?—A. Yes, I paid the monthly instalments.
- Q. Do you mean you paid it out of your money, or you paid it at his request?—A. He asked me; he was not in a position to pay it because
- 40 for years he did not pay any rent at all.
- Q. To whom?—A. To the War Service Homes. He never paid any rent for years to the War Service Homes.
- Q. Did you merely take his money down to the War Service Homes?—A. Not all the time.
- Q. Or did you pay it out of your own pocket?—A. I paid it out of my own pocket, but I left it to him; he used to pay it sometimes, and I paid sometimes, and our messenger paid it sometimes.

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Q. What is your messenger's name?—*A.* Mr. Adams.
Mr. LUSHER: That is the messenger where she works.
Mr. HENCHMAN: Those instalments that you paid to the War Service Homes Commission, did you pay those out of your own personal money?—*A.* Yes.

Q. How much did you pay out of your own personal money between 1945 and 1948?—*A.* £200 odd.

Q. Every time you paid it out of your own money you would fill in the slip?—*A.* Yes. I used to leave the money at home sometimes and the deceased would come to my place and he would pay it at the Bondi Road Post Office when I could not get there. 10

Q. Sometimes you took it to the post office, and sometimes the deceased would?—*A.* Yes. I only took it once to the post office.

Q. Have you anything to identify the payments made by you over that period?—*A.* No, only the vouchers I filled in.

Q. (Vouchers produced from War Service Homes Commission asked for; produced). These go from the 28th January, 1945 to the 31st August, 1948. Can you tell me which of these were paid out of your own moneys?—*A.* They were all paid out of my own moneys.

Q. The whole lot?—*A.* Yes. 20

Q. Even those signed with the testator's signature?—*A.* Yes.

Q. I put it to you there are only 15 slips with your name on them?—*A.* I paid all the moneys to the War Service Homes.

HIS HONOR: What do those vouchers show?—*A.* Like going to the bank.

Q. They are like bank deposit slips?—*A.* Yes.

Mr. HENCHMAN: You say now that you paid every one of these?—*A.* When you say I paid every one, I left the money to be paid, but if the testator paid it, it would have his signature on it, and if I did it would have mine. 30

Q. And if he deposited it it would have his signature?—*A.* Yes.

Q. Did you pay every one of those out of your pocket and out of your own moneys?—*A.* Yes. If you want me to clear it up in one go, I have done nothing but live on credit.

Q. You have been living on credit all these years?—*A.* Yes. My deceased sister left a child and I reared her, and when she was able to go to work she paid me board. I was in receipt of a small amount from her father to keep her.

Q. You have been living all these years on credit, and you paid somebody else's debts?—*A.* Yes. 40

Q. What was the object of that?—*A.* He was a very good friend; he was like a father to me, and I could come with all my troubles.

Q. You and he have been together every week-end since you were 22?—*A.* Yes.

Q. On Friday you produced a promissory note dated 1944?—*A.* Yes. Outside of those debts, these are debts—

Q. The first is dated 15th July, 1944?—*A.* Yes.

Q. How did you come to get that ?—A. He asked could I get it, and I got it through my place of employment. I had been in employment for many years and there was no difficulty in getting it.

Q. Under what circumstances did the deceased give this promissory note dated 15th July, 1944 to you ?—A. I had to have some acknowledgment of the money I gave him.

Q. You asked him for it ?—A. No. He suggested I should have it.

Q. Where did it happen ?—A. I might have given it to him in George Street, Pitt Street or in my own home.

10 Q. He did not sign it in Pitt Street ?—A. No.

Q. Where did he sign it ?—A. It might have been at my home or in the bank.

Q. Where was it ?—A. I think it was at my home.

Q. Do you recall the occasion at all ?—A. Yes. I am sure it was at my home.

Q. Do you recall where you were in your home ?—A. No—in the lounge room, I suppose.

Q. Do you recall any word of the conversation which led up to it ?—
A. When he asked me to borrow the money and I gave it to him, he said
20 later when he was at my place for the week-end “ You have not acknowledgment of that money you borrowed.” I said “ No.” He said “ I had better give you a promissory note for it.” I said “ All right, that will suit. I will get the promissory note,” I got the promissory note and he signed it.

Q. You typed it out ?—A. Yes. I filled them all in. I borrowed the money and gave it to him, and in acknowledgment of the amount of money he signed it.

Q. How much was the amount of money ? £50 ?—A. Yes.

Q. That was the whole of the money that passed on that occasion ?—

A. No, it was £100.

30 Q. Why did you come to have two promissory notes for £50 ?—A. I filled it in for £50, and he got another £50, and that was the acknowledgment of the £100.

Q. They were both signed on the same day, the 15th July ?—A. Yes.

Q. Why did you have two instead of one ?—A. He said he would give me promissory notes for the £100 I borrowed, and he said to fill them in, and I filled them in for £50 and £50.

Q. Why did not you give him one for £100 ?—A. I did not give him the £100 on the one day.

Q. When did you give him the first £50 ?—A. One day in town.

40 Q. How long before the signing of this note ?—A. The week-end.

Q. When did you give him the second £50 ?—A. At the week-end.

Q. The same week-end ?—A. Yes.

Q. By the 15th July he owed you £100 ?—A. He owed me more than that, but I did not account for it. I gave him a lot of things which are not debts ; they are gifts, but they are the only ones he promised to pay back. I used to take him everywhere.

Q. By the 15th July he owed you £100 ?—A. If that is the date on

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there. You are referring to dates, and I just do not keep all the dates in mind. He owed me a lot more than £100. That £100 cost me £125, but I did not charge him that on it.

Q. Why did you have two promissory notes?—A. Because I filled it in for £50 when I paid him the £50.

Q. Did you fill it in at your business place?—A. I filled it in at my place of business, but they were signed at my place. Of course I filled them in; I had to use my typewriter to do it.

Q. Why did you fill in one in red type and the other in black?—A. The typewriter ribbon might have been up on red, and then it might have been 10 down on black.

Q. You filled one in on the same day in red, and another in black on the same day?—A. Yes. If someone wants a valuation while they wait, I would take it out of the machine and do it.

Q. It was pretty important to you?—A. I knew the testator; he was a man of his word.

Q. How often in your life have you typed out two promissory notes before?—A. I had no occasion to.

Q. Yet you typed out one in black and one in red, and the only explanation you can give us is that you might have been doing something 20 else?—A. Yes.

Q. The third one is in November, 1946?—A. Yes.

Q. Again it is for £50?—A. Yes.

Q. How did it come to be for £50?—A. He had a lot more than £50 from me.

Q. How did that one come to be given?—A. I did not ask what he wanted this money for.

Q. How did that promissory note come to be given?—A. I had to have acknowledgment of the money I lent. He asked me to get the promissory note and he would fill them in for the amount he borrowed from 30 me so that I would have an acknowledgment.

Q. This third one is 2½ years later. How did that one come to be given?—A. Two and a half years later he borrowed £50 from me.

Q. At that time did you go to the finance office too?—A. No, not that time.

Q. What was the name of the finance office on the first occasion?—A. Select.

Q. Where is that?—A. Elizabeth Street.

Q. Was it a pawn shop?—A. No, a finance place.

Q. Did you give any security for the loan?—A. I did not have to; 40 my job was sufficient security.

Q. This finance office loaned you £50 on the security of your job?—A. Yes.

Q. Or was it £100?—A. Yes.

Q. Where did you get the £50 for the third promissory note in November 1946?—A. I borrowed that from a friend, Mrs. Smith.

Q. Where does Mrs. Smith live?—A. Bondi.

- Q. Whereabouts in Bondi ?—A. Bennett Street.
- Q. Has she a number ?—A. I do not think so.
- Q. Is it a flat or a house ?—A. A house.
- Q. Did she require any security from you ?—A. No.
- Q. Have you paid her back ?—A. Yes, all except £5.
- Q. A year later there is another transaction for £50 ?—A. Yes.
- Q. How did that one come about ?—A. He wanted the money ; I did not ask him what he did with his money. He was a man who got around and travelled and enjoyed life to the fullest while he could.
- 10 Q. How did this note come to be given ?—A. He asked me would I get him £50, and I said yes. He knew I could get it.
- Q. Where did you get it ?—A. A finance company.
- Q. And paid it back ?—A. Yes.
- Q. What is the name of the man you dealt with at the finance company ?—A. A man named Walker.
- Q. What is the address of this company ?—A. It is in Elizabeth Street ; I am not too sure of the name of it.
- Q. Whereabouts is it ?—A. May I refer to something ?
- HIS HONOR : Yes.
- 20 WITNESS : It is 243 Elizabeth Street.

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(Promissory notes tendered and marked Ex. D.)

- Mr. HENCHMAN : You claimed to have paid for a suit for the testator ?—A. Yes.
- Q. You bought that at Verey's ?—A. Yes.
- Q. Is not it a fact that he went in there in person ?—A. Yes, he selected it.
- Q. And paid £14 12s. 6d. in cash ?—A. Yes.
- Q. For himself ?—A. Yes, for himself.
- HIS HONOR : I observe that the furniture was not included in this stamp affidavit.
- 30 Mr. HENCHMAN : It was stated to be there but not yet valued.
- Mr. LUSHER : Yes, it is there.
- HIS HONOR : It will be disclosed later.
- Mr. LUSHER : There was some difficulty about inspection.

RE-EXAMINATION.

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ation.

- Mr. LUSHER : Does this list contain a list of the money amounting to £93 as well as the two promissory notes and the rent that you paid ?—A. Yes.
- Q. Are those receipts that you have the receipts that you hold for those 40 moneys ?—A. Yes.
- Q. The ones with the tick marks alongside of them are the ones for which you hold the receipts ?—A. Yes.

Q. Were they all paid with your moneys ?—A. Yes.

Q. And the C.I.G. : that is a chemists' organisation ?—A. The Oxygen people. One lot of that was posted out by registered mail by me.

Q. The suit referred to as being paid for by the deceased himself, from whose money was that paid for ?—A. That was mine ; I gave it to him.

Q. Is that the War Service Homes instalment book I show you ?—
A. Yes.

Q. In whose possession has that been for a number of years ?—A. Mine.

Q. Has it been out of your possession other than when you gave it to the deceased to pay moneys ?—A. No.

10

(War Service Homes receipt book tendered and
marked Ex. 1.)

(Bundles of receipts in respect of furniture purchases
etc. tendered and marked Ex. 2.)

Q. Look at this bundle of documents I show you ; who gave you those documents ?—A. They were all rolled up and given to me by the deceased.

HIS HONOR : Was it all part of the same bundle ?—A. Yes, it was in the one bundle.

(Bundle of receipts m.f.i.).

(War Service Homes Commission slips tendered by
Mr. Henchman and marked Ex. E.)

20

(Counsel addressed.)

HIS HONOR : I shall consider my decision.

HIS HONOR : It is not necessary in this application to determine the ownership of the furniture which the applicant claims is hers, and it would not be altogether just to her to do so in this application. The matter may be dealt with on the assumption that the gross assets available for the making of any further provision for the applicant are the interest in the cottage,

valued for probate at £113, and the two items of furniture bequeathed to Miss Leeder, valued at £45, a total of £158. That is a gross amount which does not allow for funeral expenses of £31, the costs of obtaining probate, the costs of this application, or any other testamentary or administrative expenses.

Miss Leeder, the executrix and residuary beneficiary, claims to be a creditor in respect of various debts totalling £497 ; £200 of this is secured by promissory notes. The rest depends largely upon her own uncorroborated evidence, but some items are supported by vouchers and at least one item the applicant is in a position to deny but has not denied. Other circumstances tend to support Miss Leeder's claim.

From 1943 onwards the testator was an invalid pensioner and his income would not support the expenditures which were made on his account. A close relationship existed between Miss Leeder and the testator. She earned a good salary and had some means of her own and it is apparent that the testator was accustomed to look to her for assistance. Apart from what is now claimed as a debt, she also assisted him by way of gift. Against these considerations, the testator is said to have received £400 on the sale of a motor car, but it does not appear when that was, and he is also said to have withdrawn £50 from a fixed deposit in November, 1947, but the applicant's evidence is not reliable as to dates. Also, how he disposed of the £200 secured by the promissory notes does not appear.

Even if Miss Leeder's claim is not supportable for its full amount, it appears to be supportable as to a substantial part of it, at least an amount of somewhere between £200 and £300. The question then is whether there is likely to be any surplus out of which further provision for the widow might be made.

On probate values, the estate is clearly insolvent. It is possible, and perhaps likely, that the cottage would now realise more than the probate valuation which was made while land sales control was still in force. How much more does not appear and there is no evidence that it would be so much as to leave a surplus. Indeed, that is not how the applicant's case has been conducted, and her counsel has said that the interest in the cottage would not be worth much at the present day. The applicant has sought rather to cut down Miss Leeder's claim.

There is the further consideration in the peculiar circumstances of this case that the testator appears to have made Miss Leeder his executrix and given her the residue of his estate, such as it is, in part by way of protection for her against difficulties which she might have in establishing the amount of the financial assistance which she undoubtedly gave him in his lifetime, and in part by way of recognition of a moral obligation in respect of financial assistance not treated as a debt and of unascertainable amount.

It may be granted that if there were available in the estate the means of making further provision for the applicant, that should be done ; that is to say, that Miss Leeder's claim, regarding her as a beneficiary simply and not as a creditor, should not be regarded as competing with the widow's claim. But since it does not appear that there is anything out of which further provision

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might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application.

The only matter which remains is the question of costs, on which I should be glad to hear what the parties have to say.

Mr. HENCHMAN : I do not want to canvass what Your Honor has said but did Your Honor consider a matter which in the event of Your Honor finding this way, might meet the position, and that is, that the widow should reside in the house during her lifetime. 10

HIS HONOR : It was not raised.

Mr. HENCHMAN : No, I feel sure it was not.

HIS HONOR : I must confess it did not occur to me even as a possibility. What was pressed for was the whole estate. But having been put to me, the same considerations govern it. If I sought to give the widow some right of residence in the cottage, there is the overriding claim of the executrix.

Mr. HENCHMAN : Yes, but it only amounts to a postponement of the debt during the life of the widow.

HIS HONOR : I think it is governed by the same considerations. The broad consideration is that there is nothing to give. The estate is insolvent and it would be nothing more than a futility to give it to the widow. There is nothing I can do by way of providing a life estate for the widow, for nothing could override the claims of creditors. 20

Mr. HENCHMAN : I submit this is a case, although the widow fails, in which she should at least be entitled to a formal order for costs out of the estate. I suggest it is a proper matter for a widow to bring a claim in a matter in which she is left nothing.

HIS HONOR : What do you say, Mr. Lusher ?

Mr. LUSHER : I refer Your Honor to the fact that shortly after the service of the summons was made on Miss Leeder, a letter was written to the applicant's solicitors informing them of the position regarding the estate so far as the debts were concerned and indicating the situation. That was sent before any affidavits were filed by Miss Leeder and before any expense was incurred in respect of the issue of the summons. But no further inquiries were made or sought, and so I submit under the circumstances that the matter be dismissed with costs. 30

Mr. HENCHMAN : Yes, but thereafter the executrix swore that there were no debts.

HIS HONOR : I think that the widow should have her costs of this application. I think that the application was quite properly instituted, because the stamp affidavit sworn by the executrix stated the final balance of the estate to be £113 6s. 9d., and did not disclose the existence of any debt to the executrix. 40

In dealing with the substance of the matter I have not thought that fatal to the executrix's claim that there was a debt, because she has given an explanation of it which I think is true and which shows that although

she acted wrongly in not putting her debts into the stamp affidavit, there was no intent to defraud the revenue, and as I have said there are other matters pointing to her having a supportable debt, at least to the extent of something between £200 and £300. However, that was the situation when the originating summons was filed and when the originating summons and affidavits were first handed to the respondent's solicitor, namely, that on the face of the stamp affidavit there appeared to be a gross estate of £113 6s. 9d. (plus the furniture if it formed part of the estate) out of which there would only be testamentary and funeral expenses to be paid, leaving something for the widow, and if there was anything to give her, the widow would undoubtedly have been entitled to have it.

Then, as Mr. Lusher points out, the applicant's solicitor was told some time later by letter of the claims which the executrix made upon the estate for moneys lent and moneys paid by her to the testator's use, and it may be that if circumstances had been otherwise, the applicant's costs should be restricted to costs incurred up to that date. But as there was already the oath of the respondent that in effect there were no debts other than the mortgage and that the nett balance was £113 6s. 9d., I think that the applicant was entitled to have the position investigated and to test it as far as she could; that is to say, she was entitled to have the executrix support her claim on oath and to test the matter as far as she could.

For those reasons I think the application should be dismissed, but that the costs of both parties as between solicitor and client should come out of the estate. That, Mr. Henchman points out, is also an order which may not be of any very practical consequence having regard to the fact that the estate appears to be insolvent. But for what it is worth I make the order.

No. 11.
Decretal Order.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

30

No. 170 of 1950.

In the Matter of the Estate of Herbert Ellis late of Hurstville in the State of New South Wales Electrical Engineer, deceased.

In the Matter of the application of Nance Ellis of Hurstville in the said State, Widow.

And in the Matter of the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938.

Friday the fourth day of August One thousand nine hundred and fifty.

UPON APPLICATION made on the twenty-eighth and thirty-first days of July last unto this Court before the Honourable Bernard Sugerman a Judge of the Supreme Court sitting in Equity on behalf of Nance Ellis the

40

In the
Supreme
Court of
New South
Wales in
Equity.

—
No. 10.
Judgment,
4th August,
1950.

Sugerman,
J.—

continued.

No. 11.
Decretal
Order,
4th August,
1950.

In the
Supreme
Court of
New South
Wales in
Equity.

No. 11.
Decretal
Order,
4th August,
1950—

tinued.

widow of the abovenamed Testator Herbert Ellis in pursuance of Originating Summons filed herein on the eighth day of March last WHEREUPON AND UPON HEARING READ the said Originating Summons the Affidavit of the applicant sworn herein on the eighth day of March last the affidavit of Herbert Claude Ellis sworn herein on the twenty-eighth day of February last and resworn on the eighth day of March last the affidavit of Frank Kirkpatrick Bowler sworn herein on the twenty-seventh day of July last and the two affidavits of Edie Maud Leeder sworn herein on the third and twelfth days of July last and all filed herein AND UPON HEARING the oral evidence of the applicant and Herbert Claude Ellis called on behalf of the applicant and Edie Maud Leeder called on behalf of the respondent AND UPON READING AND EXAMINING the exhibits put in evidence on behalf of the applicant and marked with the letters "A" "B" "C" "D" and "E" respectively and the exhibits put in evidence on behalf of the respondent and marked with the figures "1" and "2." AND UPON HEARING what was alleged by Mr. H. J. H. Henchman of Counsel for the applicant and by Mr. E. Lusher of Counsel for the respondent Edie Maud Leeder the Executrix of the Will of the said Testator THIS COURT DID ORDER that the said application should stand for judgment AND the same standing in the list this day for judgment accordingly THIS COURT DOETH ORDER that this application be and the same is hereby dismissed out of this Court AND THIS COURT DOETH FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to such officer of this Court as the Master in Equity may appoint to tax as between Solicitor and client and certify the costs of both parties of this application and that such costs when so taxed and certified as aforesaid be paid out of the estate of the said Testator in manner following that is to say:—the costs of the applicant be paid to her or to her Solicitors and the costs of the respondent be retained by her or paid to her solicitors AND THIS COURT DOETH FURTHER ORDER that the said exhibits may be handed out to the parties producing the same respectively subject to their undertaking to return the exhibits respectively handed out to them when required AND both parties are to be at liberty to apply as they may be advised.

R. T. C. STOREY (L.S.),

Deputy Registrar in Equity.

No. 12.
Notice of Appeal.

In the
Supreme
Court of
New South
Wales in
Equity.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

No. 12.
Notice of
Appeal,
18th
August,
1950.

In the Matter of the Estate of Herbert Ellis late of Hurstville in the State
of New South Wales Electrical Engineer, deceased.

In the Matter of the application of Nance Ellis of Hurstville in the said
State, Widow.

10 And in the Matter of the Testator's Family Maintenance and Guardianship
of Infants Act, 1916-1938.

NOTICE OF APPEAL.

TAKE NOTICE that the applicant appeals against the Order of the
Honourable Bernard Sugerman a Judge of the Supreme Court sitting in
Equity dated the fourth day of August instant upon the following amongst
other grounds and reasons that is to say :—

1. THAT His Honour was in error in refusing to make an Order in
favour of the applicant in this application.
- 20 2. THAT His Honour was in error in holding that the fact that the
estate was apparently insolvent was a sufficient reason for refusing
to make such an order.
3. THAT His Honour was in error in holding that the fact that the only
result of making an Order would appear to be disturb the arrange-
ments which the testator had made partly with a view of simplify-
ing the discharge of his obligation to Edie Maud Leeder was a
sufficient reason for refusing to make such an order.
4. THAT further evidence is available (*inter alia*) to show that the
estate of the testator is not in fact insolvent.
5. THAT upon the whole of the evidence an Order should be made in
favour of the applicant.

30 Dated the eighteenth day of August, 1950.

H. J. H. HENCHMAN,
Counsel for the Appellant.

In the
Supreme
Court of
New South
Wales in
Equity.

No. 13.

Affidavit of Charles Osbourne Litchfield.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 13.
Affidavit of
Charles
Osbourne
Litchfield,
4th
October,
1950.

No. 170 of 1950.

On the fourth day of October in the year One thousand nine hundred and fifty CHARLES OSBOURNE LITCHFIELD of Sydney in the State of New South Wales Real Estate Valuer being duly sworn makes oath and says as follows :—

1.—I am an executive officer of Richardson & Wrench Limited of 92 Pitt Street, Sydney a licensed Auctioneer, a member of the Commonwealth Institute of Valuers and of the Real Estate Institute of New South Wales and have had twenty-eight years experience in all branches of Real Estate including valuations in the Hurstville district. 10

2.—On the fourteenth day of August last I inspected the freehold property being part of Lots 2 and 3 Section 9 Deposited Plan No. 2793 having approximately a frontage of 98 feet 2 inches to Woids Avenue by a depth on one side of 109 feet $5\frac{1}{2}$ inches and on the other of 88 feet $2\frac{3}{4}$ inches with a rear line of 33 feet $4\frac{1}{4}$ inches on which is erected a cottage known as No. 2 Woids Avenue, Hurstville.

3.—The said cottage is a double-fronted brick cottage on stone foundations with tiled and iron roof, having Porch Entrance in front and enclosed front verandah with wooden floor and wire screening and containing Lounge Room and Dining Room connected by grille, three bedrooms, tiled bathroom, gas heater, toilet and pedestal wash hand basin, linen press, tiled kitchen porcelain enamel sink and terrazzo draining board, gas stove, small rear verandah with laundry off, cement tubs and gas copper. The ceilings throughout are fibrous plaster. Detached at street level is a garage built of concrete and there is a stone front fence, gas, water, electric light and sewer are connected. 20

4.—I estimate the fair present market value of the property, occupied, at One thousand seven hundred and fifty pounds (£1,750 0s. 0d.) and with vacant possession, at Two thousand five hundred pounds (£2,500 0s. 0d.). 30

Sworn by the deponent on the day first above-mentioned at Sydney before me } C. O. LITCHFIELD.

R. C. SPEED, J.P.

No. 14.

Affidavit of James Wallace Simon

In the
Supreme
Court of
New South
Wales in
Equity.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

No. 14.
Affidavit of
James
Wallace
Simon,
5th
October,
1950.

On the fifth day of October in the year One thousand nine hundred and fifty JAMES WALLACE SIMON of Sydney in the State of New South Wales Real Estate Valuer being duly sworn makes oath and says as follows :—

1.—I am a qualified Real Estate Valuer and an Associate of the Real
10 Estate Institute of New South Wales and have had five years experience in the Valuation Department of the Rural Bank of New South Wales and fifteen months experience in the Valuation Department of L. J. Hooker Limited including valuations in the Hurstville district.

2.—On the fifteenth day of August last I inspected the freehold property having approximately a frontage of 98 feet 2 inches to Woids Avenue by a depth on one side of 109 feet $5\frac{1}{2}$ inches and on the other of 88 feet $2\frac{1}{4}$ inches with a rear line of 33 feet $4\frac{1}{4}$ inches on which is erected a cottage known as "Thellis," No. 2 Woids Avenue, Hurstville.

3.—The said property is situated on the north-eastern side of Woids
20 Avenue between Railway Parade and First Avenue, within ten minutes of train services.

4.—Erected upon the land is a double fronted brick cottage on stone foundations, having a tiled roof and comprising concrete entrance porch, lounge room with fireplace and archway to dining room with glass doors opening to wood verandah enclosed with brick and gauze, three bedrooms, tiled bathroom containing built-in bath, gas heater, basin and toilet, kitchen containing porcelain enamel sink and terrazzo drainer and built-in cupboard, laundry containing gas copper and two cement tubs and rear open wood porch. Detached is a weatherboard toilet and a galvanised iron
30 shed. Gas water sewer and electricity are connected.

5.—I estimate the present market value of the said property to be Two thousand four hundred and fifty pounds (£2,450 0s. 0d.).

Sworn by the deponent on the }
day first abovementioned at } J. W. SIMON.
Sydney before me : }

G. THOMPSON, J.P.

In the
Supreme
Court of
New South
Wales in
Equity.

No. 15.

Affidavit of Frank Kirkpatrick Bowler, 5th October, 1950.

(Not printed).

No. 15.
In the Full
Court of
the
Supreme
Court of
New South
Wales.

No. 16.

Judgments.

No. 16.
Judgments,
1st
November,
1950.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Coram : STREET, C.J.
MAXWELL, J.
ROPER, C.J. In Eq.

Wednesday, 1st November, 1950. 10

Street,
C.J.

STREET, C.J. : In this case the testator died in July 1949, leaving a will dated some two years earlier of which probate was granted in February of 1950. In March of 1950 these proceedings were instituted by way of originating summons, the widow of the testator claiming to be entitled to an order making some provision for her under the powers conferred upon the Court by the Testators Family Maintenance Act.

By the testator's will, he left to his widow certain furniture which it would now appear probably belonged to the widow in any event, and therefore that gift conferred in itself no benefit on her and, apart from that small gift, the total furniture being valued at only £120, he left the whole of his estate to a woman with whom he had been living intermittently for a period of some sixteen years. 20

The estate consisted of cottage property, a house which was subject to a mortgage of £886, and also this furniture to which I have referred. In the stamp affidavit the executrix who was the woman with whom the testator was living tendered evidence of the value of this cottage property by furnishing the Valuer General's certificate, which showed the improved value at £1,000, and the nett surplus, after allowing for the mortgage debt, was therefore somewhere in the neighbourhood of a little more than £100. The total nett value of the assets, on the figures then given, putting the best complexion upon them in favour of the estate, amounted to between £150 and £160. 30

After the originating summons had been filed the executrix provided evidence on affidavit that there were further debts due and owing by the estate, namely, the sum of £497 owing to her by the testator. To support this claim she tendered four promissory notes amounting in all to the sum of

£200, and she also gave evidence that she had paid a sum slightly in excess of £200 as instalments due to the mortgagee in respect of the mortgaged premises, and she claimed a further £92, saying that she had receipts for this money, but it would appear that the evidence in that regard was not very satisfactory.

If, of course, those amounts were actually due and owing by the estate, then the testator died clearly insolvent. When the applicant put evidence before the Court in support of her application her own affidavit contained a statement of the fact that these cottage premises had been valued by the Valuer General at the sum of £1,000, and she furnished no other evidence as to the value of this asset. The executrix apparently had merely relied upon the stamp affidavit, and it was on those facts, as put before the Court on the application of March of this year, that His Honour finally determined that the application must fail because he came to the conclusion that the estate, even giving an appropriate discount to the executrix's claim to this sum of £497, was still insolvent, and therefore that any order made by him would be futile.

The substantial ground which has been argued in support of this appeal is first that fresh evidence should be admitted by competent valuers in order to establish that the real value in March of this year, when the application was heard and determined by His Honour, of these premises, was somewhere in the neighbourhood of £2,400 or £2,500 in place of this £1,000, which was the Valuer General's estimate, apparently fixed at a time when price control still operated. It was said that the control now having been lifted and the land being saleable on an open market, this evidence ought to be received because if it were received then the estate, far from being insolvent, would be able to discharge the whole of the liabilities and would leave a surplus available to the widow or might even possibly permit the debts to be discharged by an additional amount raised on the security of the house and thereby enable her to remain in occupation of these premises where she now resides.

So far as tendering this fresh evidence is concerned, I think that this application should not be acceded to. I am fully conscious of the circumstances which lie behind this application and I am not unmindful of the position of the widow in this regard, but while the appellant, the original applicant, presses this Court that justice should be done, there are various aspects to which regard must be paid in considering what constitutes justice. It is impossible for this Court, within the limits which necessarily control it, to achieve abstract justice in every case. It must work within its prescribed limits, and rules must be observed and complied with in the general interests of justice, and one general interest is that there should be an end to litigation, once it is instituted, and that parties should not be permitted to protract proceedings indefinitely by taking a chance on the hearing in the lower court as to whether the evidence is sufficient, and on finding it insufficient should then be able to come to the appellate court and ask for fresh evidence to be admitted, which was available at the time and in respect of which no difficulty arose in the way of putting that evidence before the Court, and seek to have the matter reopened on that ground.

In the Full
Court of
the
Supreme
Court of
New South
Wales.

—
No. 16.
Judgments,
1st
November,
1950.
Street,
C.J.—
continued.

In the Full
Court of
the
Supreme
Court of
New South
Wales.

—
No. 16.
Judgments,
1st
November,
1950.
Street,
C.J.—
continued.

Again and again the Courts have laid down principles with regard to the admissibility of fresh evidence, and where it has been discovered since the hearing, or there is some element of surprise, Courts have acceded to applications to permit this evidence to be tendered. But it is quite obvious that the value of this house was the central point, or one of the central points, round which the evidence and the argument revolved at the hearing before His Honour. His Honour refers expressly in his judgment to the fact that it may be likely that the cottage would now realise more than the probate valuation which was made while the land sales control was still in force, but no such evidence was given before His Honour, and it was upon that evidence that was tendered at that time, that this case must be decided.

10

It was argued that the onus rested upon the respondent, the executrix, to furnish this evidence, but it seems to me that where an applicant desires to put an argument to the Court on the question whether there is anything in the estate from which an allowance can be made or in respect of which an order might be made, then the applicant should furnish that evidence. The applicant contented herself here with relying upon the statement of the Valuer General's valuation. It was no surprise. This was not matter which had come to the knowledge of the applicant after the hearing had taken place in March. The situation with regard to the Land Control Regulations was the same then as it is now, and I think that consistently with principle, and recognising that hard cases will occur, of which this may be one, this Court still would not be justified in the present case in acceding to this application that fresh evidence should be admitted.

20

It was further argued that some evidence ought to be admitted, which was objected to at the hearing and rejected, relating to the question of a certain sum of money—about £400—which had been paid by the testator's son to him at some period about the time when it was suggested that these promissory notes were signed or these other moneys were alleged to have been lent by the executrix. That only goes to the question, whether these claims made by the executrix to be entitled to recover as a creditor, are good or not. But even if they are disallowed, after the various costs such as testamentary expenses, funeral expenses and costs of the first proceedings are taken into account, the estate is almost non-existent or a minus quantity, or at the best is so small that no effective order could be made, and indeed on that footing the proceedings ought never to have been brought.

30

It was also argued that, it being conceded that if there were an estate from which provision could be made, the applicant would obviously be entitled to some order, this Court ought to make an order even though the estate might be insolvent; that is to say, that the widow ought to have the chance of receiving something if the estimate of the value of the estate, as presented to His Honour at the hearing below, should turn out to be incorrect as a result of some future happening. I do not think that that is the proper way to approach the matter. The application has to be determined on the position as presented to the Court at the time of the

40

hearing, when undoubtedly future prospects should be taken into account, if there were evidence justifying a conclusion that the estate was likely to appreciate or depreciate in the future. If there were no evidence to that effect, then the matter must be dealt with on the evidence as it then stands, and if on that evidence the order would be in effect a nullity and would confer no benefit, then I do not think the Court would be justified in making an order on the chance that it might, in some unforeseen circumstances, provide some benefit for the applicant.

In my opinion this appeal, therefore, should be dismissed.

10 Mr. HENCHMAN: Before Your Honour makes the order, would the Court contemplate allowing the widow to reside in the house during her lifetime? This is a complete re-hearing of the case before the Court, and the Court has a full discretion to deal with any aspect. The Court is now seized of the circumstances, and as I say the widow, in her affidavit, says that she has nowhere else to go. She has this house in which she lets one room at £1 per week, and she has nothing else but her old age pension. The circumstance of allowing her to remain in the house for the whole of her life amounts to no more than postponing these debts until a later period, and I would ask the Court to allow her to do that.

20 STREET, C.J.: I think that that is asking for an order on the basis that that other evidence has been admitted. The Court only makes an order permitting an occupation of that nature where there is an asset available to occupy, and the Court has no power to order creditors to postpone their claims for that period. I do not think that an order to that effect can be made.

The only question is the question of costs. I think the usual rule must be followed, and the appeal must be dismissed with costs.

Mr. HENCHMAN: As far as the widow is concerned, I submit that she has been held to be justified in the Court below.

30 STREET, C.J.: Yes, but she was not satisfied with that.

Mr. HENCHMAN: She has, of course, failed in this Court, but I suggest that in the peculiar circumstances of this case there is no reason why she should be ordered to pay the executrix's costs, and I submit that the executrix's costs should come out of the estate, but otherwise no order. She is getting £1,000 more than she expected.

STREET, C.J.: That is not a ground in law. I think the appeal must be dismissed with costs.

MAXWELL, J.: I agree with the judgment of the Chief Justice, and the reasons so fully cover the ground that I find it not necessary to add
40 anything.

ROPER, J.: I also agree.

STREET, C.J.: Then the appeal will be dismissed with costs.

In the Full
Court of
the
Supreme
Court of
New South
Wales.

—
No. 16.
Judgments,
1st
November,
1950.
Street,
C.J.—
continued.

Maxwell, J.

Roper, C.J.,

Street,
C.J.

In: he Full
Court of
the
Supreme
Court of
New South
Wales.

No. 17.

Order.

IN THE SUPREME COURT OF NEW SOUTH WALES IN EQUITY.

No. 170 of 1950.

No. 17.
Order,
1st
November,
1950.

In the Matter of the Estate of Herbert Ellis late of Hurstville in the State
of New South Wales Electrical Engineer, deceased.

In the Matter of the application of Nance Ellis of Hurstville in the said
State, Widow.

And in the Matter of the Testator's Family Maintenance and Guardianship
of Infants Act, 1916-1938.

10

Wednesday the first day of November, One thousand nine hundred and
fifty.

UPON the Appeal of the abovenamed Applicant from the order made
herein dated the 4th day of August last by the Honourable Bernard
Sugerman a Judge of the Supreme Court sitting in Equity coming on to be
heard this day before the Honourable Kenneth Whistler Street, Chief
Justice, The Honourable Allan Victor Maxwell, Puisne Judge and Ernest
David Roper, Chief Judge in Equity of this Court in pursuance of Notice
of Appeal filed herein the eighteenth day of August last WHEREUPON AND
UPON READING the said Notice of Appeal the transcript record of the
proceedings in this matter and the exhibits put in evidence at the hearing
of this application AND UPON HEARING what was alleged by Mr. H. J. H.
Henchman of Counsel for the Appellant and Mr. E. A. Lusher of Counsel
for the Respondent Edie Maud Leeder the Executrix of the Will of the above-
named Testator THIS COURT DOTH ORDER that this Appeal be and the
same is hereby dismissed out of this Court AND THIS COURT DOTH
FURTHER ORDER that it be referred to the Deputy Registrar in Equity or to
such officer of this Court as the Master in Equity may appoint to tax and
certify the costs of the respondent of this appeal AND that such costs when
so taxed and certified as aforesaid be paid to the Respondent or her Solicitors
out of the sum of one hundred pounds paid into this Court by the appellant
by way of security for the costs of this appeal AND that if the said sum be
insufficient to pay such costs in full the balance of such costs be paid by the
appellant to the respondent within fourteen days after service upon the
appellant of an office copy of the certificate of such taxation AND both
parties are to be at liberty to apply as they may be advised.

20

30

Passed this 7th day of March, 1951.

Entered same day. J. A. M. H. L.

R. T. C. STOREY,
Deputy Registrar in Equity. 40

L. S.

No. 18.

Affidavit of Harold Joseph Cunningham, 29th March, 1951, with Exhibits thereto.

(Not printed).

In the High Court of Australia New South Wales Registry.
No. 18.

No. 19

Order granting Special Leave to Appeal.

IN THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY.

No. 14 of 1951.

No. 19.
Order Granting Special leave to Appeal, 12th April, 1951.

10 In the Matter of the Estate of Herbert Ellis late of Hurstville in the State of New South Wales Electrical Engineer, deceased.

In the Matter of the Application No. 170 of 1950 in the Supreme Court of New South Wales in Equity of Nance Ellis of Hurstville in the said State, Widow.

In the Matter of the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938.

And in the Matter of an Application for special leave to appeal by the above-named Nance Ellis against the judgment on appeal of the Supreme Court of New South Wales.

20 Before Their Honours Mr. Justice DIXON, Mr. Justice WILLIAMS, Mr. Justice WEBB, Mr. Justice FULLAGAR and Mr. Justice KITTO.

Thursday the 12th day of April, One thousand nine hundred and fifty-one.

UPON MOTION made by Counsel on behalf of the abovenamed Applicant on the 9th day of April last WHEREUPON AND UPON READING the Affidavit of Harold Joseph Cunningham sworn on the 29th day of March last and filed herein AND UPON HEARING what was alleged by Mr. Wallace of King's Counsel with whom was Mr. Lynch of Counsel for the said

In the High Court of Australia New South Wales Registry.

No. 19.
Order Granting Special leave to Appeal,
12th April, 1951—
continued.

Applicant THIS COURT DID ORDER that this application should stand for judgment AND this application standing in the list for judgment this day THIS COURT DOETH HEREBY GRANT special leave to the Applicant to appeal against the judgment and order of the Full Court of the Supreme Court of New South Wales given and made on the 1st day of November 1950 dismissing her appeal against the order made on the 4th day of August 1950 by the Honourable Bernard Sugerman a Judge of the Supreme Court of New South Wales sitting in Equity dismissing her Application No. 170 of 1950 made in pursuance of the abovementioned Act AND THIS COURT DOETH ORDER that the transcript record prepared for the said Supreme Court may be used as part of the transcript record upon the said appeal in this Court. 10

By the Court,

F. C. LINDSAY. L.S.

District Registrar.

No. 20.
Notice of Appeal,
24th April, 1951.

No. 20.

Notice of Appeal.

IN THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY.

No. 14 of 1951.

On Appeal from the Full Court of the Supreme Court of New South Wales. 20

Between

NANCE ELLIS *Appellant*

and

EDIE MAUDE LEEDER *Respondent.*

TAKE NOTICE that pursuant to the Order of this Honourable Court made on the 12th day of April 1951 granting special leave to appeal herein the Appellant appeals to the High Court of Australia against the judgment and order of the full Court of the Supreme Court of New South Wales given and made on the 1st day of November 1950 dismissing her appeal against the order made on the 4th day of August 1950 by the Honourable Bernard Sugerman a Judge of the Supreme Court of New South Wales sitting in Equity dismissing her Application No. 170 of 1950 made in pursuance of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 upon the following amongst other grounds :— 30

(a) THAT the Full Court of the Supreme Court of New South Wales was in error in refusing to make an order in favour of the applicant.

- (b) THAT the said Court was in error in holding “ that where an applicant desires to put an argument to the Court on the question “ whether there is anything in the estate from which an allowance “ can be made or in respect of which an order might be made then “ the applicant should furnish that evidence.”
- (c) THAT the said Court was in error in holding that the fact that the estate of the Testator was apparently insolvent was a sufficient reason for refusing to make such an order.
- 10 (d) THAT the said Court was in error in refusing to admit further evidence to show that the estate of the Testator was not in fact insolvent.
- (e) THAT upon the whole of the evidence an order should be made in favour of the applicant.

In the High Court of Australia New South Wales Registry.

No. 20.
Notice of Appeal,
24th April, 1951—
continued.

Dated this 24th day of April, 1951.

R. W. HAWKINS,
Solicitor for the Appellant.

No. 21.
Judgments.

No. 21.
Judgments,
3rd August,
1951.

(a) DIXON, WILLIAMS and KITTO, J.J.

Dixon,
Williams
and Kitto,
JJ.

20 This is an appeal from an order of the Full Supreme Court of New South Wales dismissing with costs an appeal from an order of Sugerman, J., dismissing an application by the appellant under the provisions of the Testators Family Maintenance Act, 1916–1938 (N.S.W.) for maintenance out of the estate of her deceased husband. He died on 28th July 1949 leaving a will by which he appointed the respondent his sole executrix and trustee. He bequeathed his furniture to the appellant except for three articles which he bequeathed to the respondent and devised and bequeathed his real estate and his residuary personal estate subject to the payment of his just debts, funeral and testamentary expenses, to the respondent absolutely.

30 The appellant claims that the furniture bequeathed to her by the will belongs to her. If this furniture is left out of account the only asset in the estate of the deceased, apart from the furniture bequeathed to the respondent, valued at about £45, is a cottage, No. 2 Woid’s Avenue, Hurstville. The improved capital value given by the Valuer-General for probate purposes for this cottage as at the date of death was £1,000. The place was subject to a mortgage of £886 to the War Service Homes Commission. The net value of the estate was therefore the value of the equity of redemption and of the furniture bequeathed to the respondent, or, in

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other words, about £160. At the date of death the cottage was subject to land sales control but this control was relinquished in September 1949.

At the date of his death the deceased was 71 years and his widow 60 years of age. They had been married for over 35 years. There were three children of the marriage, a married son then aged 33, a married daughter aged 27 and an unmarried daughter aged 17 who lived at home and contributed to the upkeep. The appellant and the deceased had lived together during the whole of their married life. They had lived at 2 Woid's Avenue, Hurstville, since October 1928 when they had built it. The respondent, then aged 22 years, came to live with them in this cottage in 1931 and remained until January 1933. In the course of her stay she formed an association with the deceased. In January 1933 she moved into a home of her own at Bondi and thereafter the deceased used to spend his weekends with her. He had been an electrical engineer but became tubercular and did not work after 1943. After that date he received an invalid pension and the appellant as his wife received a wife's allowance and other social service benefits. The appellant also received substantial assistance from her son. 10

The respondent claims that she lent money to the deceased or expended moneys on his behalf from time to time and that he was indebted to her for £497 at the date of his death. Sugerman, J., thought that her claim could be supported at least to an amount of between £200 and £300. 20

Apart from her furniture the appellant has no property. Her sole income is a widow's pension of £2 2s. 6d. a week.

The children have not made a claim under the Act. The widow is the sole claimant. It is clear that she has been left without adequate maintenance and that an order should be made in her favour if it is possible. Sugerman, J., recognised this. He said "It may well be granted that if there were available in the estate the means of making further provision for the applicant, that should be done; that is to say, that Miss Leeder's claim, regarding her as a beneficiary simply and not as a creditor, should not be regarded as competing with the widow's claim." But he proceeded to say "since it does not appear that there is anything out of which further provision might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application." 30

It will be seen from this passage that although his Honour considered that the claim of the widow to any surplus should clearly be preferred, yet because he was not satisfied that there would be a surplus he declined to interfere, in the widow's interest, with the right which the will gave to Miss Leeder, who would thus take what surplus there might prove to be and moreover would in any event be left in a position to pay off the debts, take the cottage and turn the widow out. 40

His Honour's opinion would appear to be that an order should not be made in favour of a deserving applicant unless the Court is satisfied that the order will be effective, or in other words, that there will be assets available to satisfy it and that no order should be made unless the

likelihood of an estate proving insolvent is negatived. In the Full Court the Chief Justice, in whose judgment Maxwell, J. and Roper, C.J. in Equity concurred, took the same view and was emphatic about it. He said "the estate is almost non-existent or a minus quantity, or at the best is so small that no effective order could be made, and indeed on that footing the proceedings ought never to have been brought." Later he said "if on that evidence (that is the evidence before his Honour) the order would be in effect a nullity and would confer no benefit, then I do not think the Court would be justified in making an order on the chance that it might, in some unforeseen circumstances, provide some benefit for the applicant."

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With all respect to these views they do not, in our opinion, represent the right approach to the administration of the Testators Family Maintenance Act. If the Court thinks that a claim is justified it should seek ways to give effect to it. It should only refuse such a claim where it is clear that it is impossible to make an effective order. In the present case the only established debt was the mortgage debt of £886. There were no death duties. The funeral and testamentary expenses were not likely to be heavy, even assuming that the testamentary expenses included the costs of an application under the Testators Family Maintenance Act. The validity of the debt to the respondent was doubtful. It would appear that she had paid several instalments falling due under the mortgage from time to time, but the widow gave evidence that her furniture had been damaged by fire, that she had been paid £600 insurance moneys, that she had only expended £100 on renovating the furniture, and that she had handed over £500 to her husband to be applied in reduction of the mortgage debt but the money had not been so applied. The respondent also produced some promissory notes, but they may be bound up with the illicit cohabitation between her and the deceased and their validity may be doubtful. Her debt is not one the existence and validity of which had been admitted, nor had it been proved in a court of law. It could not therefore be assumed. No tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man. The widow's application should not be refused because the result might be to disturb the arrangements which the deceased had made with a view to simplifying the discharge of his obligations to the respondent. She should be left to prove her debt if she can.

There was a paucity of evidence before Sugerman, J. about the value of the cottage but the application did not come on for hearing until July 1950 and he knew that the Valuer General had made his valuation during land sales control and that it was likely to be on the low side. His Honour said "it is possible, and perhaps likely, that the cottage would now realise more than the probate valuation which was made while land sales control was still in force." At least it appeared from the stamp affidavit that the land had a frontage of 98' to Woid's Road and an average depth of 100' and that the cottage was a double fronted brick on stone cottage with a tiled roof comprising four rooms, kitchen, offices and verandah. It had

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been built in 1928. The price being no longer controlled, common experience would suggest the very high probability that such a cottage had a value considerably above £1,000 in the middle of 1950. If the cottage belonged to the widow, she could live in it herself, her unmarried daughter could live with her and contribute to the upkeep, and the widow could take at least one boarder. There is also evidence that the son gave her substantial assistance from time to time. It was not unlikely that the widow would be able to raise the necessary funds to pay the funeral and testamentary expenses and the respondent's debt, if any. The widow would then have the cottage subject to the mortgage which was repayable by easy instalments. Far from being unlikely it was more than likely that an order in favour of the widow would be effective and be the means of providing substantial maintenance. In our opinion the case was clearly one in which, on the evidence before him, his Honour should have made an order in her favour and in all the circumstances given her the whole estate. 10

Before the Full Court of the Supreme Court an application was made that the Court might under the power given by sec. 84 of the Equity Act admit further evidence upon the appeal consisting of the affidavits of two valuers giving a more detailed description of the cottage and stating that in fact it was worth about £2,500. If this evidence had any basis it meant that the ground upon which Sugerman, J. had exercised his discretion was quite mistaken in fact and that a gross injustice had been done to the widow by which the respondent had profited. The Full Court refused, however, to admit the further evidence. In view of the opinion we have expressed already it is strictly unnecessary to discuss the attitude of the Full Supreme Court to the application to receive the further evidence. But the matter was argued before us and as we think that in the circumstances of this case the evidence ought to have been received we shall state our views. It is a matter which cannot be considered independently of the nature of the proceeding. Before dealing with it something must be said concerning the duty of an appellate Court in dealing with an appeal in a proceeding under the Testators Family Maintenance Act. That Act confers a discretionary jurisdiction but it is one controlling substantive rights in property. It is a jurisdiction the exercise of which is determined by settled principles and its purpose is to ensure as far as may be that the needs of the testator's family are justly provided for. 20 30

There are two decisions of the Supreme Court of New South Wales upon the duty of the Supreme Court upon an appeal under the Testators Family Maintenance Act, *In re Ryan* 23 S.R. 354 ; and *In re Gilbert* 46 S.R. 318. In the first case it was said at p. 354 that the Full Court must exercise its own discretion and should not hesitate to reverse the decision of the Judge of first instance if it is satisfied that the discretion has not been exercised in the way in which its own discretion would be exercised. We think that this statement goes too far because it implies or suggests that the Full Court should exercise its discretionary power afresh and in 40

the same way as it would if it were sitting as a primary Court. But we agree with Jordan C.J. in *In re Gilbert* when he said at p. 323 that there is a material difference between the exercise of a discretion on a point of practice or procedure and the exercise of a discretion which determines substantive rights. Generally we agree with his views on the proper approach of an appellate Court on an appeal from an order under the Testators Family Maintenance Act which appear on pp. 323 and 324. Normally an appellate Court will not interfere with the exercise of the judge's discretion except on grounds of law but it has an overriding duty to

10 intervene to prevent a miscarriage of justice. In *Erans v. Bartlam* 1937 A.C. 473 at pp. 480-481, Lord Atkin said " Appellate jurisdiction is always " statutory : there is in the statute no restriction upon the jurisdiction " of the Court of Appeal : and while the appellate Court in the exercise " of its appellate power is no doubt entirely justified in saying that normally " it will not interfere with the exercise of the judge's discretion except on " grounds of law, yet if it sees that on other grounds the decision will " result in injustice being done it has both the power and the duty to " remedy it."

20 The application to admit the fresh evidence in the present case was directed to showing that a grave injustice had been done and that it had been done because Sugerman J. had proceeded in the exercise of his discretion upon an assumption of fact which the evidence displaced so that, if the evidence was correct, his Honour's refusal to make an order produced a result opposed to that which he considered right. It was quite evident from his Honour's reasons that he would have made an order in favour of the appellant if it had been proved that the cottage was worth £2,500 or that there was any considerable surplus value. Since the Full Court was of opinion that it ought not to reverse the order of Sugerman J. on the evidence before him, it became necessary to admit

30 the fresh evidence if the Full Court was to be placed in a position to remedy an injustice. There is no decision that an appellate Court should confine itself to the evidence given below in discharging its powers and duty upon an appeal from an exercise of a substantive discretion. The Supreme Court relied on principles which have been laid down for guiding the exercise of the discretion of an appellate Court whether or not to grant a new trial on the ground of fresh evidence. These principles were recently discussed by this Court in *Orr v. Holmes* 76 C.L.R. 632, and *Bugg v. Day* 79 C.L.R. 442. Street C.J. said " again and again the courts have laid down principles " with regard to the admissibility of fresh evidence, and where it has been

40 " discovered since the hearing, or there is some element of surprise, courts " have acceded to applications to permit this evidence to be tendered."

But those principles are concerned with the justice of setting aside a verdict obtained after a regular trial between the contesting parties and sending the cause down for trial before another jury. A court of appeal invited to receive further evidence to enable it better to determine an appeal which is before it is exercising a different function. The proceeding before it is an appeal by way of rehearing. The purpose of the further

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evidence is to enable the court of appeal itself better to reach a final determination of that proceeding, not to send the case down for a new trial. The power to admit further evidence is statutory and the discretion which the statute confers cannot be reduced in scope or limited in the grounds of its exercise by artificial rules which the statute does not embody. Sec. 82 (1) of the Equity Act 1901–1947 provides that all appeals under the Act shall be by way of rehearing. Sec. 84 (1) provides that the Full Court shall have full discretionary power to receive further evidence upon questions of fact. Sec. 84 (3) provides that upon appeals from a decree or order upon the merits such further evidence shall be admitted on special grounds only and not without special leave. Appeals from the court in its equity jurisdiction cover a wide variety of cases. What are special grounds must depend upon the facts of each case. The same considerations of policy as gave rise to the common law rules governing the granting of new trials for the discovery of fresh evidence may sometimes, indeed often, provide valuable guides in the exercise for the discretion. The fact that a party had or but for lack of reasonable diligence might have had an opportunity of adducing the “further” evidence in the first instance may in some descriptions of case weigh against admitting the further evidence and prove a decisive consideration. See the observations in *Nash v. Rochford*, 1917 1 K.B. 384, which however are stated perhaps too widely and too strongly. *Sinanide v. La Maison Kosmeo*, 1928 44 T.L.R. 574 : 139 L.T. 365, provides an example of a case where it was thought proper to admit evidence simply because it appeared just to do so. As Viscount Reading C.J. said in *R. v. Robinson*, 1917 2 K.B. 108 at p. 110, it is quite clear that the court of appeal would in civil matters have the power to admit fresh evidence which the Court thought might throw material light upon the matter before it. His Lordship added that the jurisdiction must always be exercised with great care.

But with all respect to the learned judges forming the Full Court the considerations affecting the admission of further evidence for the purpose of retrying a disputed issue of fact in the court of appeal have little application to an appeal of the present nature and the kind of evidence tendered. On such an appeal the important consideration is whether the evidence if admitted would be likely materially to assist the court in the discharge of its duty. The Full Court had before it an appeal where it was quite clear that the appellant was entitled to an order unless it was impossible to make an effective order in her favour. The fresh evidence was directed to showing that an effective order could be made. It was essential that the Full Court should know the true value of the cottage if the statutory discretion was to be properly exercised. It was clear that an injustice had been done if the cottage was anything like the value of £2,500. In the present case special circumstances existed. A plain injustice had to be remedied. In our opinion the Full Court should have admitted the evidence. We cannot act on the affidavits because, if they had been admitted, the respondent must have been given an opportunity of rebutting them. It is sufficient to say that if we thought that the widow’s rights depended upon

the value of the cottage being in the vicinity of £2,500, we would remit the the case to the Full Court for rehearing. But it is unnecessary to do so because in our opinion on the evidence before Sugerman J. he ought to have made an order.

During the hearing we were informed that the appellant had been evicted from the cottage after the appeal had been dismissed by the Supreme Court and before this Court granted special leave to appeal, and that in the interval the respondent had expended moneys in repairs preparatory to selling the cottage. It may be that the respondent may have some claim
 10 against the estate for these moneys. It is a matter into which we cannot go and there is of course no evidence before us as to what the facts are. But we shall reserve liberty to either party to apply to the Supreme Court.

As to costs, it was necessary for the appellant to apply to the Supreme Court for an order under the Testators' Family Maintenance Act if she was to benefit from the estate of the deceased and the Act required that notice of such application should be served on the respondent as the executrix of the will. The respondent should, we think, have her costs of the application before Sugerman J. as between solicitor and client out of the estate. But the costs of the appeal to the Supreme Court and this Court
 20 are in a different position. Under the Testator's Family Maintenance etc. Rules made on 13th December 1946 it is provided (rule 5) that the executor or administrator, as the case may be, when entering an appearance, shall file and serve an affidavit setting out *inter alia* the nature and amount of the estate. The fresh evidence made it appear that the respondent had failed properly to set out the amount of that estate and that failure had resulted in a miscarriage of justice. But the respondent opposed the admission of the fresh evidence and it is clear that she was then acting in her capacity not as executrix but as beneficiary. She adopted the same attitude in this Court. She was contesting both appeals in her own interest.
 30 They should be dealt with as hostile litigation and she should be ordered to pay the costs of both appeals.

(b) McTIERNAN, J.

This was an application under Section 3 of the Testators Family Maintenance and Guardianship of Infants Act 1916-1938. The circumstances were such as to entitle the appellant to make the application and to make it very proper for her to bring the application. The application was, however, dismissed by the learned primary judge. His Honour said nothing in derogation of the appellant's right to bring the application on its merits. These were indeed recognised by His Honour's order making her costs as
 40 between solicitor and client payable out of the estate.

The application was dismissed for reasons which do not imply either any demerit in the appellant or merit in the respondent entitling her to priority over the appellant. The reasons depend upon the findings which His Honour made as to the financial position of the estate. According to

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these findings the estate is bankrupt. Taking that view, His Honour considered that it would be futile to make an order providing for the appellant's maintenance and that no order should therefore be made. The Full Court agreed with this view. In my opinion it was not erroneous to decline to make an order if there were no property in the estate out of which the appellant could be provided with maintenance.

It appears that the question whether there would be any surplus after liabilities were met depends upon the value of the testator's house, in which he and the appellant resided. The evidence of the value of the house was that according to a valuation made for probate purposes by the Valuer General as at 28th July 1949, the improved capital value of the house was £1,000. This evidence is contained in the appellant's affidavit made on 8th March 1950 and in an affidavit made on 3rd July 1950 by the executrix. The application was heard on 28th and 31st July 1950. 10

The Commonwealth Regulations under which the price at which the house could be lawfully sold were in force on the date as at which the Valuer General valued the house. This control had been ended before the application came on for hearing. The learned trial judge said: "On probate values, the estate is clearly insolvent. It is possible, and perhaps likely, that the cottage would now realise more than the probate valuation which was made while land sales control was still in force. How much more does not appear and there is no evidence that it would be so much as to leave a surplus." His Honour here took no notice of a notorious fact that the consequence of terminating the control of the sale of land was that the market price of cottages rose, and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. The amount which it was necessary to add to the valuation to give a true valuation of the cottage was obviously a matter of the utmost importance. It governed the question whether there would be a surplus after the payment of debts. The appellant's right to an order depended upon that question; for, taking all the circumstances of the case, it would be just to order that she should be paid any surplus that exists, as a provision for her maintenance. 20 30

As the evidence stands, the valuation of the cottage at £1,000 is *prima facie* less than its true value. While the value of the cottage is not determined there cannot be a presumption that the estate is bankrupt. Taking all the circumstances of the case, justice requires that an order should be made unless there is proof that there is no surplus of assets to meet it. In the absence of any definite evidence that the order would be futile, I think it should be made. 40

In my opinion it was erroneous, while acting upon the presumption that the valuation of the cottage was less than its true value, to find that there would be no surplus in the estate after the payment of liabilities, in the absence of any evidence as to what was the true value of the house. In my opinion it would be right to order that any surplus that may be realised should be paid to the appellant by way of a provision for her maintenance.

This conclusion renders it unnecessary to consider the question whether the fresh evidence of value should be admitted.

I should allow the appeal with costs. The appellant should also have the costs of the appeal to the Full Court.

(c) WEBB, J.

I agree that this appeal should be allowed.

10 Sugerman, J., refrained from making an order in the appellant's favour because if he did so it might disturb the arrangement by the testator. But this arrangement was founded in part on the testator's moral obligation to
15 the respondent. With respect, I do not think that his Honour should have refused for this reason to make an order in the appellant's favour. As against the appellant the testator's moral obligation, if any, to the respondent and the arrangement made by him to discharge it, should, in my opinion, have been disregarded. If it had been disregarded His Honour must, I think, in the proper exercise of his discretion, have made an order giving the appellant the whole of the estate for what it might be worth, leaving the respondent to enforce whatever rights she might have against the estate as a creditor. She was not, I think, entitled to be in any better
20 position as against the appellant. The debts due to the respondent and other creditors might well prove so considerable as to leave nothing for the appellant, but there was no certainty of that, even on the evidence before His Honour.

It becomes unnecessary for me to decide the point as to the tendering of fresh evidence of the value of the cottage.

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No. 22.
Order.

No. 22. Order, 3rd August, 1951.

Full Court No. 14 of 1951.

IN THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY.

30 ON APPEAL from the Full Court of the Supreme Court of New South Wales.

Between

NANCE ELLIS *Appellant*

and

EDIE MAUDE LEEDER *Respondent.*

Before Their Honours Mr. Justice DIXON Mr. Justice McTIERNAN
Mr. Justice WILLIAMS Mr. Justice WEBB and Mr. Justice KITTO.

Friday the third day of August One thousand nine hundred and fifty-one.

40 THIS APPEAL pursuant to special leave granted on the 12th day of April 1951 from the Order of the Full Court of the Supreme Court of New South Wales made on the 1st day of November 1950, whereby the Full

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Supreme Court dismissed the appeal of the Appellant against the order made on the 4th day of August 1950 by the Honourable Bernard Sugerman, a Judge of the Supreme Court of New South Wales, sitting in Equity, dismissing the application numbered 170 of 1950 made to that Court by the Appellant in pursuance of the Testator's Family Maintenance & Guardianship of Infants' Act 1916-1938, coming on to be heard on the 18th day of July 1951, WHEREUPON AND UPON READING the transcript record of proceedings herein transmitted by the Deputy Registrar in Equity of the said Supreme Court to the District Registrar of this Court at Sydney, AND UPON HEARING Mr. Wallace of King's Counsel, with whom was 10
Mr. Lynch of Counsel for the Appellant, and Mr. Barwick of King's Counsel, with whom was Mr. Lusher of Counsel for the Respondent, THIS COURT DID reserve judgment AND the appeal standing in the list for judgment this day in the presence of Mr. Lynch of Counsel for the Appellant and Mr. Lusher of Counsel for the Respondent, THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH ORDER that the order of the Full Court of the Supreme Court of New South Wales appealed from be and the same is hereby set aside AND THIS COURT DOTH FURTHER ORDER that the said Order of the Honourable Bernard Sugerman be and the same is hereby set aside except as to costs 20
AND THIS COURT DOTH FURTHER ORDER that provision be made for the Appellant out of the Estate of the Testator Herbert Ellis deceased by directing that in lieu of the beneficial dispositions of the Will of the said Testator the Executrix named in the said Will be directed to hold the whole of the real and personal estate of the said Testator on trust for the Appellant absolutely AND THIS COURT DOTH FURTHER ORDER that it be referred to the respective proper officers of the said Supreme Court and of this Court to tax and certify the costs of the Appellant of and incidental to the Appeal to the said Full Supreme Court and this Appeal AND that 30
such costs when so taxed and certified be paid by the Respondent to the Appellant or to Mr. R. W. Hawkins Public Solicitor the Appellant's Attorney AND THIS COURT DOTH FURTHER ORDER that the Respondent do within fourteen days after service upon her of an office copy of this Order produce to the proper officer of this Court Probate of the Will of the said Testator with a true copy of this Order endorsed thereon and lodge with the said proper officer a separate copy of this Order AND THAT the said proper officer do endorse on each of the said copies his Certificate that the same is correct and do forthwith transmit the said separate copy so certified as aforesaid to the Registrar of Probates of the Supreme Court of New South Wales. 40

By the Court,

F. C. LINDSAY,
District Registrar.

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Order in Council granting Special Leave to Appeal to His Majesty in Council.

In the
Privy
Council

AT THE COURT OF BUCKINGHAM PALACE.

The 14th day of November, 1951.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.

SIR ALAN LASCELLES.

EARL MOUNTBATTEN OF BURMA.

SIR WILLIAM MCKELL.

LORD ISMAY.

THE EARL OF HOME.

No. 23.
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special
leave
to Appeal
to His
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WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 1st day of November 1951 in the words following, viz. :—

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“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Edie Maud Leeder in the matter of an Appeal from the High Court of Australia between the Petitioner (Respondent) Appellant and Nance Ellis (Applicant) Respondent setting forth (amongst other matters): that on the 28th July 1949 Herbert Ellis (thereinafter called the deceased) died having first made his last Will and Testament dated the 27th June 1947 : that the deceased was married once only and left him surviving his Widow Nance Ellis (the Respondent) and three children Herbert Claude Ellis, Floria Patricia Magazinovic (a married woman) and Anne Maureen Ellis aged 33, 27 and 17 years respectively at the time of the application thereinafter mentioned : that on the 15th February 1950 Probate of the Will of the deceased was granted to the Petitioner by the Supreme Court of New South Wales in its Probate Jurisdiction : that the Estate of the deceased was sworn by the Petitioner for Probate at the net sum of £113 6s. 9d. ; that on the 8th March 1950 the Respondent as Widow of the deceased issued a Summons against the Petitioner as Executrix of the Will aforesaid out of the Supreme Court of New South Wales in its Equity Jurisdiction under and by virtue of the provisions of the Testator's Family Maintenance and Guardianship of Infants' Act 1916-1938 claiming that she had been left without adequate provision for her proper maintenance education or advancement and that such provision should be made out of the Estate of the deceased and that an Order be made *inter alia* specifying the amount and nature of such provision : that on the 4th August 1950 the Supreme Court refused to make any order and dismissed the Application : that the Respondent appealed by virtue of Section 82

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In the
Privy
Council

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Order in
Council
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of the Equity Act 1901–1947 to the Full Court of the Supreme Court of New South Wales which unanimously dismissed the Appeal with costs : that the Respondent appealed to the High Court of Australia which on the 3rd August 1951 unanimously allowed the Appeal and ordered that the Order of the Full Court of the Supreme Court be set aside and the Order of the Supreme Court be set aside except as to costs and ordered that provision be made for the Respondent out of the estate of the deceased by direction that in lieu of the beneficial dispositions of the Will the Executrix be directed to hold the whole of his real and personal estate on trust for the Respondent absolutely : 10
that the Petitioner submits that the questions raised by this Appeal are questions of great public importance in connection with the Administration of the Testator's Family Maintenance and Guardianship of Infants Act 1916–1938 and generally : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court dated the 3rd August 1951 or such other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His Late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof (no one appearing in 20
opposition thereto) Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the High Court of Australia dated the 3rd day of August 1951 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs :

“ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before 30
Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern 40
themselves accordingly.

F. J. FERNAU.

"D"

No. A

Form of affidavit to be lodged with application for administration.

NEW SOUTH WALES

TO WIT.

* Strike out whichever is unnecessary.

If more than one applicant, the form to be filled up accordingly.

† State whether married, bachelor, spinster, widower, widow, divorcee, or minor. * State whether domiciled in or out of New South Wales.

Words in full.

Strike out clause if not applicable.

Regulation form to be used.

* Widow and/or children

Strike out clause if not applicable.

Regulation form to be used.

* Widow and/or children.

Regulation form to be used.

Strike out clause if not applicable.

Strike out clause if not applicable.

Strike out clause not applicable.

Sworn by the deponent on the day first abovementioned at

KOGARAH before me,—

A. W. KING, J.P.

A Commissioner for Affidavits (or) Justice of the Peace.

84 2501

In the estate of HERBERT ELLIS

late of HURSTVILLE in the State aforesaid,

Electrical Engineer deceased, *Testate Intestate

ON the Ninth day of February

one thousand nine hundred and forty nine EDIE MAUD LEADER

of Bondi in the State of New South Wales Spinster

being duly sworn, maketh oath, and saith as follows:—

1. I am/we are the party/parties making application for the purpose of obtaining administration of the estate of the abovenamed deceased and the party/parties liable for the payment of the duty, if any, on the estate herein included.

2. The abovenamed deceased who died on the 28th day of July 1949, aged 71 years, was at the time of death † Married and was domiciled * in the State of New South Wales

3. The annexed inventory contains a true statement of all and singular the real and personal estate of or to which the abovenamed deceased was possessed or entitled and all property liable to duty under the Stamp Duties Act, 1920-1940, and of the values thereof, and includes the whole of the accruing income in the estate up to the date of death. The debts therein stated were actually due and owing at the date of the death of the deceased, and are such as may be deducted under section 107 of the Stamp Duties Act, 1920-1940.

4. The final balance of the estate of the abovenamed deceased is One hundred and thirteen pounds 6/9 (£113/6/9)

5. In the event of any additional assets being discovered, I/we will advise the Commissioner of Stamp Duties, and will pay any further duty found to be payable.

~~6. The deceased having been domiciled in the State of New South Wales and the amount of the dutiable estate when aggregated with the value of the foreign assets after deducting all debts due and owing other than debts referred to in sub-section 2 of section 107 being under the sum of five thousand pounds I/we claim an assessment of the duty payable at concession rates set forth in Section 112 B (2) of the Stamp Duties Act, 1920-1940 on the properties set out in the annexed schedule marked "A" after deducting the proportion of the debts chargeable thereon as the said properties pass to the lawful of the deceased.~~

~~7. The deceased having been domiciled in the State of New South Wales and the amount of the dutiable estate when aggregated with the value of the foreign assets after deducting all debts due and owing other than debts referred to in sub-section 2 of section 107 being under the sum of One thousand pounds I/we claim exemption from duty on the properties set out in the annexed schedule marked "B" after deducting the proportion of the debts chargeable thereon as the said properties pass to the lawful* of the deceased.~~

8. The annexed Schedule marked "C" contains a true statement of all and singular the real and personal estate and the values thereof of or to which the abovenamed deceased was possessed or entitled outside the State of New South Wales at the time of death other than real and personal estate liable to duty under the Stamp Duties Act, 1920-1940.

9. The deceased was not possessed of or entitled to any property in New South Wales or elsewhere at the date of his death other than the property set out in the annexed inventory.

10. The annexed Schedule marked "D" contains a true statement of the persons entitled to the property included in the dutiable estate, their relationship, if any, to the deceased, the description and value of such property and how same was derived.

11. The annexure hereto marked "E" is a certified copy of the will of the deceased.

E. LEADER.



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Inventory referred to in

FULL particulars and value of the estate and effects at the date of the death of the deceased chargeable with duty under the Stamp Duties Act, 1920-1940.

Assets.	Value.		
	£	s.	d.
REAL ESTATE.			
Real estate possessed by the deceased at the time of his death, and Real Estate liable to duty under section 102 of the Stamp Duties Act, 1920-1940, as per Schedule No. _____	1000	--	--
PERSONAL ESTATE.			
Voluntary disposition. <i>Vide</i> section 103 of the Stamp Duties Act, 1920-1940, as per Schedule No. _____	NIL		
Specialty debts. <i>Vide</i> section 103 (1) (a) of the Stamp Duties Act, 1920-1940, as per Schedule No. _____	NIL		
Shares in companies as per Schedule No. _____	NIL		
Dividends declared but unpaid, as per Schedule No. _____	NIL		
Landed property held under lease, as per Schedule No. _____	NIL		
Live stock, as per Schedule No. _____	NIL		
Crops, as per Schedule No. _____	NIL		
Farming implements, as per Schedule No. _____	NIL		
Motor Cars, Vehicles, etc., as per Schedule No. _____	NIL		
Harness and Saddlery, as per Schedule No. _____	NIL		
Furniture, as per Schedule No. _____	NIL		
Watches, trinkets, jewellery, &c., as per Schedule No. _____	NIL		
Rents accrued but unpaid, as per Schedule No. _____	NIL		
Money in hand or house	NIL		
Money on current account—Bank of _____	NIL		
Money in banks or financial institutions on deposit } as per Schedule No. _____ {	NIL		
Interest accrued on same	NIL		
Government Stock, as per Schedule No. _____	NIL		
Debentures } as per Schedule No. _____ {	NIL		
Interest accrued on same	NIL		
Mortgages } as per Schedule No. _____ {	NIL		
Interest accrued on same	NIL		
Life Policies (including Settlement Policies) } as per Schedule No. _____ {	NIL		
Bonuses	NIL		
Policies for payment of Death Duty, as per Schedule No. _____	NIL		
Plant, &c., as per Schedule No. _____	NIL		
Tools, as per Schedule No. _____	NIL		
Debts due to Estate, as per Schedule No. _____	NIL		
Stock (as per stock sheets) in shop or business, as per Schedule No. _____	NIL		
Goodwill	NIL		
Interest in a partnership, as per Schedule No. _____	NIL		
Interest in a deceased person's estate, as per Schedule No. _____	NIL		
Gifts of any kind whatever, made within three years preceding date of death, as per Schedule No. _____	NIL		
Funeral donations or other payments from any Lodge or Society, as per Schedule No. _____	NIL		
Other personal property not coming under any of the above headings, as per Schedule No. _____	NIL		
Dutiable estate	£ 1000	--	--
Total debts that may be deducted (Section 107)	£ 886	13	3
Final balance upon which duty is payable	£ 113	6	9

To be signed here by executors } H. LEBDER.
 or administrators making } _____
 the affidavit. } _____

(Date) _____

NOTE.—In any cases where no asset exists corresponding to the above headings, the word "Nil" must be written against each of them. Property coming under each of the above headings must be particularised in Schedules. If there are any assets not coming properly under any of the above headings, such assets must be included in the statement under a special heading describing the same.

Schedule 1.

All that piece or parcel of land situate in the Municipality of Hurstville Parish of St. George and County of Cumberland being lot pts. 2 and 3 (D) on d.p. 2793 having a frontage of 98'2" to Woids Avenue and being the whole of the land in Certificate of Title Volume 4093 Folio 249 £1000.

Furniture not yet valued will be disclosed later.

This is the schedule mentioned and referred to in the annexed affidavit of Edie Maud Leader Sworn at Kogarah the ninth day of February 1950 before me :

A. W. KING. J.P.



Certificate No. 66937

Application No. 41392

CERTIFICATE OF VALUATION

(Under the Valuation of Land Act 1916)

This is to Certify that the following were the values of
the property herein described :

Valuation District of Kogarah Ward or
Riding East Valn.No.3008

Owner's Name The Estate of the late Herbert Ellis

Address Hurstville

County Parish Estate Bellevue

Street Wolds Avenue Side E House No. or Name 2 "Thellis"

Portion Sec.9 Lots pts.3/2(d) D.P.2793 Area/or
Dimensions 98'2x88'2
33'4 109'5

Date of Valuation Twenty-eighth day of July 1949

Unimproved Value one hundred and forty ----- Pounds £140

Improved Value one thousand ----- Pounds £1000

Assessed Annual Value Seventy ----- Pounds £70

Improvements comprise Double Fronted Brick on Stone Cottage, Four Rooms
Kitchen and Office. Tile Roof. Verandah.

V. G. Rush.

Valuer General.

Department of the Valuer General,
Sydney 16th August 1949.



57.

“ C. ” Letter, Redmond & Daley to Rand & Drew.

T. C. Redmond & Daley,
Solicitors.

Telephone : LW 5552.

T. C. Redmond (Priv. LW 5552).

C. W. J. Daley, LL.B. (Priv. FL 4428).

P. O. Box No. 11,
4 Regent Street,
Kogarah.

23rd June, 1950.

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TCR/BS

Messrs. Rand & Drew Villeneuve-Smith & Dawes,
Solicitors,
2 Hunter Street, Sydney.

Dear Sirs,

re Leeder and Estate late H. Ellis. Without Prejudice.

We refer to our telephonic conversation with you when we advised you that Miss Leeder was claiming against the Estate the sum of £497 13s. 7d. made up as follows :—

20	To amount owing to her on Promissory Notes	£200	0	0
	amount owing to her for payments by her to War Service Homes Commission as instalments on the house on behalf of the deceased	205	10	0
	amount owing to her on different advances and amounts paid on behalf of the deceased receipts for which are held by her	92	3	7
		<hr/>		
		£497	13	7
		<hr/>		

In view of this claim which Counsel's advice was would all be owing to her by the Estate we should be glad if you would let us know if your client
30 wishes to proceed with the Testators Family Maintenance Application.

Yours faithfully,

T. C. REDMOND & DALEY.
T. C. REDMOND.

“ C. ”
Letter,
Redmond &
Daley to
Rand &
Drew.
23rd June,
1950.

In the Privy Council.

No. 11 of 1952.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA IN ITS APPELLATE JURISDICTION.

IN THE MATTER of the ESTATE of HERBERT ELLIS late of
Hurstville in the State of New South Wales, Electrical
Engineer deceased.

IN THE MATTER of the APPLICATION of NANCE ELLIS of
Hurstville in the said State, Widow.

and

IN THE MATTER of the TESTATOR'S FAMILY MAINTENANCE
AND GUARDIANSHIP OF INFANTS ACT 1916-1938.

BETWEEN

EDIE MAUD LEEDER ... *Appellant*

AND

NANCE ELLIS *Respondent.*

RECORD OF PROCEEDINGS

FARRER & CO.

66 Lincoln's Inn Fields,
London, W.C.2,

Appellant's Solicitors.

LIGHT & FULTON,

24 John Street,

Bedford Row,

London, W.C.1,

Respondent's Solicitors.