Judgment 3 6, 1971

No. 14 of 1971

In the Privy Council

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS EQUITABLE JURISDICTION IN APPLICATIONS INSTITUTED BY ORIGINATING SUMMONS IN PROCEEDINGS:

No. 1519 of 1967 (Applicant—CATHERINE EILEEN SEERY)
No. 1210 of 1967 (Applicant—MARY JANE FAY LOUSICK)
No. 1211 of 1967 (Applicant—EILEEN ELIZABETH SCHUHMANN)
No. 1212 of 1967 (Applicant—MAUREEN JOAN WILLIAMS)

IN THE MATTER of the Estate of Edward Seery deceased
AND IN THE MATTER of the Testator's Family Maintenance and Guardianship of Infants Act 1916—1954 (Consolidated pursuant to Decretal Order of 26th September, 1969)

BETWEEN

ELIZABETH SCHAEFER . . . . . *Appellant (Intervener)*

AND

ELLEN ELIZABETH SCHUHMANN, MARY JANE FAY LOUSICK, MAUREEN JOAN WILLIAMS and CATHERINE EILEEN SEERY . . . . . *Respondents (Applicants)*

AND

CORNELIUS PATRICK SEERY . . . . . *Respondent (Respondent)*

AND

WILLIAM JOHN SEERY . . . . . *Respondent (Intervener)*

CASE FOR APPELLANT

G 44897—1

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BETWEEN

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AND

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MAUREEN JOAN WILLIAMS,
and CATHERINE EILEEN SEERY .. .. *Respondents (Applicants)*
CORNELIUS PATRICK SEERY .. .. *Respondent (Respondent)*
WILLIAM JOHN SEERY .. .. *Respondent (Intervener)*

CASE FOR APPELLANT

HISTORY OF PROCEEDINGS

1. This is an appeal as of right to Her Majesty in Council from a decretal order pronounced on 26th September, 1969, by the Honourable Mr Justice Street sitting as a Judge of the Supreme Court of New South Wales in Equity.

2. The proceedings before the Supreme Court consisted of four applications by daughters of one Edward Seery deceased (herein called "the deceased") for further provision out of his estate pursuant to the provisions

of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954 (herein called "the Act"). This Act is broadly similar to the Inheritance (Family Provision) Act, 1938–1966.

3. The four applications under the Act were consolidated by order of *Street,* J., and were heard together. The first respondent to this appeal, as the sole executor of the deceased, was the sole respondent to the proceedings in the Supreme Court.

Record
p. 2 line 32
p. 3 line 21

4. The deceased made his will on the 23rd November, 1962, and on 28th June, 1966, he made a codicil which so far as material was as follows:

> NOW I HEREBY DECLARE that if my housekeeper ELIZABETH SCHAEFER shall still be employed by me as a housekeeper at the date of my death THEN but not otherwise I GIVE DEVISE AND BEQUEATH . . . unto her absolutely my house and land known as Number 124 Nuwarra Road, Chipping Norton . . . together with all my furniture and household effects contained therein."

He died on the 16th November, 1966, without having further revoked or altered his will and the codicil. The balance of his estate other than the assets referred to in the codicil passed to his three sons subject to legacies of $2,000 each in favour of his four daughters, the applicants.

5. When the consolidated proceedings came on for hearing the housekeeper referred to in the codicil (the appellant before the Board) applied for and was given leave to intervene. A similar application was made by William John Seery a son of the deceased, and was also granted.

6. The appellant's case before *Street,* J., was broadly as follows:

(a) The deceased had entered into a contract with her that if she continued to serve as his housekeeper for the rest of his life, he would leave his house and its contents to her by his last Will.

(b) The Codicil constituted a sufficient memorandum of the contract to satisfy the requirements of s. 54A of the Conveyancing Act, 1919–1954 (N.S.W.) (the equivalent of s. 40 of the Law of Property Act, 1925).

(c) The appellant duly performed her part of the contract.

(d) The contract and its performance by the appellant constituted the deceased's executor a constructive trustee for her of the house and its contents.

(e) The house and its contents did not form part of the estate of the deceased which could be dealt with by orders under the Act. Successful applicants for such orders are volunteers, and the equitable proprietary rights of the appellant under the

constructive trust would prevail over the rights of such persons. Accordingly, orders in their favour out of the property comprised in such trust would be futile and should not be made. See *Leeder* v. *Ellis* (1953) A.C. 52.

7. *Street,* J., held that such a contract had been made and performed by the appellant and that the codicil constituted a sufficient memorandum of its terms. He held that he was precluded by the decision in *Dillon* v. *Public Trustee of N.Z.* (1941) A.C. 294 from giving effect to the appellant's submission that the constructive trust in her favour prevented effective orders being made in respect of the subject property. He further held that differences between the New Zealand Act and the New South Wales Act were not sufficient to distinguish *Dillon's* case. Record p. 25 line 16 p. 26 line 22

8. Accordingly *Street,* J., held that he had jurisdiction to make orders under the Act which would cut down the benefits taken by the appellant under the codicil and under her contract with the deceased. Record p. 29 line 42 p. 30 line 2

9. The appellant challenges this conclusion in the present appeal.

10. *Street,* J., dismissed one of the applications by a daughter of the deceased, and made orders in favour of the other three applicants. Pursuant to his finding that the benefits taken by the appellant under the codicil and the contract were liable to be defeated by orders made under the Act, he made an order pursuant to s. 6 (1) of the Act directing that the orders in favour of the successful applicants should be satisfied out of the interest taken by the appellant in the estate but so as to leave her at least $2,300 and that thereafter the orders should be satisfied out of the interests taken by the three sons of the deceased. Record p. 31 lines 40–45

BASIS OF APPEAL

11. The appellant does not challenge the propriety of the orders made by *Street,* J., in favour of the successful applicants.

12. The appellant's case is that a constructive trust exists in her favour which renders the order under s. 6 (1) ineffective against her, and that such order being futile should be set aside. In the alternative the discretionary power under s. 6 (1) should be exercised so as to throw the burden of the orders in favour of the applicants on to the balance of the estate so as to exonerate the property passing to the appellant.

13. In *Dillon* v. *Public Trustee of N.Z.* (1941) A.C. 294 the Privy Council held that under the Family Protection Act 1908 (N.Z.) (which broadly corresponds to the New South Wales Act in question in this appeal) the Court could make orders in favour of the dependants of a deceased person out of property which that person had contracted to dispose of by Will, whether he died having performed his contract or not. Accordingly the Board upheld orders made at first instance in New Zealand in favour of a second wife of the testator out of property which he left by Will to the children of his first marriage pursuant to a contract to that effect.

14. It is submitted that the bases of the decision are to be found in two statements, the first of which appears in 1941 A.C. at pp. 302–303:

> "There can be no dispute or doubt that the lands left to the children form part of the testator's estate."

and the second at p. 305:

> ". . . their Lordships cannot entertain any doubt that in principle, the Family Protection Act affects the unqualified operation of a contract to make a Will in a particular form, whether the contract is fulfilled or whether it is broken."

15. The appellant submits that both these statements are erroneous in principle and should not be followed. The Board is free to depart from its prior decisions. [*Gideon Nkambule* v. *The King* (1950) A.C. 379.]

16. In the alternative the appellant submits that *Dillon's* case is distinguishable in relation to the New South Wales Act. This submission is based primarily upon s. 4 (1) of the Act which reads:

> "Every provision made under this Act shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the Will of the deceased person executed immediately before his death."

There was no corresponding provision in the New Zealand Act which was before the Board in Dillon's case.

CRITICISM OF DILLON'S CASE

17. It is commonplace that assets may form part of the deceased's estate for one purpose but not for another. Such a situation could arise under the general law as well as by statute. Thus equitable assets were assets available for the payment of the testator's debts but were not available for distribution among the beneficiaries. Similarly since 1862 the statute law of New South Wales, and more recently of the Commonwealth of Australia has protected the proceeds of life policies from the claims of the creditors of a deceased person. (See Appendix A.) In such a case the proceeds of a protected policy form part of the deceased's estate for the purpose of payment of death duties, testamentary and administration expenses, and crown debts and for distribution among the beneficiaries, but not for the purpose of payment to the ordinary creditors of the deceased.

18. The statement from the advice in *Dillon's* case quoted in par. 14 is somewhat cryptic. Presumably their Lordships meant that the lands formed part of the testator's estate for all purposes. Without doubt they formed part of the estate for the purpose of the payment of debts etc. [*Coverdale* v. *Eastwood* (1872) 15 Eq. 121, 133; *Jervis* v. *Wolferstan* (1874) 18 Eq. 18],

and doubtless the legal title was vested in the executor. But it does not necessarily follow that the same assets formed part of the estate available for distribution among the beneficiaries, or available to be dealt with under the statute in question. That was one of the critical questions in the case.

19. The appellant submits that the statement in question from the advice in *Dillon's* case, in so far as it means that the assets formed part of the deceased's estate for the purpose of distribution among the beneficiaries and for the purposes of the statute is erroneous and inconsistent with the long line of decisions which hold that a contract to leave property by will creates obligations which are specifically enforceable in equity, and vests equitable proprietary interests in the person in whose favour it was made.

20. It is submitted that where such a contract capable of specific performance has been made, the deceased's executor, as soon as the claims of creditors are satisfied, becomes a bare trustee of the subject property for the other party to the contract. At that stage the only property which forms part of the deceased's estate is the bare legal title.

21. These propositions are supported by the decisions in *Synge* v. *Synge* (1894) 1 Q.B. 466 (C.A.), *Central Trust* v. *Snider* (1916) 1 A.C. 266 (P.C.), *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, and *In re Edwards* (1958) Ch. 168 (C.A.). See also *Jarman on Wills* 8th Ed. p. 27, and *Theobald on Wills* 12th Ed. p. 72.

22. The Board in *Dillon's* case do not appear to have been referred during argument to the pre-1941 authorities on the availability of specific performance in such cases, and these authorities were not adequately dealt with in the Courts below.

23. It is further submitted that even where the deceased dies having performed his contract to leave property by will, equitable proprietary rights nevertheless arise, pursuant to the contract, in favour of the other party. This is the position in the case of ordinary contracts to transfer interests in property where specific performance is available to the purchaser. In such cases equitable proprietary rights arise whether the vendor breaks his contract or not, and even before the time for performance arrives. There appears to be no authority which deals with the position in the case of contracts to leave property by will where the testator dies having performed his contract and indeed such authority could scarcely exist prior to the introduction of the Family Provision legislation. There is no reason however why the general principle should not equally apply in this type of case.

24. The appellant further submits that the second statement from the advice of the Board in *Dillon's* case quoted in par. 14 hereof is also contrary to principle and in any event is distinguishable in relation to the New South Wales Act. In support of these general propositions, the appellant submits:

(a) The New South Wales Act (like all similar legislation in Australasia and the United Kingdom) empowers the Court

in cases where a deceased person dies testate to vary the provisions of his Will in favour of his dependants, and where he dies intestate, to make a Will for him. See *Dun* v. *Dun* (1959) A.C. 272 at 280, 290.

(b) The Act is concerned to provide a remedy in cases where a testator fails to exercise his Will making power justly and wisely in the interest of his dependants. See *Bosch* v. *Perpetual Trustee Co. Ltd* (1938) A.C. 463 at 478–479.

(c) The Act therefore should be construed as empowering the Court to deal only with that property which the testator himself could lawfully and effectively have disposed of by his Will. The reference in s. 3 (1) of the Act to the "property" of a deceased person, and "the estate of the testator" should be construed as referring to the property which the deceased himself was free to dispose of by Will. S. 4 (1) supports this construction.

(d) Proposition (c) above is supported by the decision in *Re Keen* (1967) 86 W.N. (Part 1) 317, which was approved on appeal to the High Court of Australia. See *Cope* v. *Keene* (1968) 118 C.L.R. 1. It is also supported by the decision in *Re Carter* 44 S.R. (N.S.W.) 285 where it was held that property subject to a general power of appointment exercisable by Will was available to satisfy an order under the Act.

(e) There is nothing in the Act which supports the view that the Legislature of New South Wales authorized the Court to dispose of property which the deceased himself could not have effectively disposed of at the time of his death, or that the Statute was concerned to place dependants in a better position that they would have been if the deceased had made a Will in their favour, or that it was concerned to provide a remedy for dependants against persons in whose favour the deceased had, improvidently or otherwise, created interests for value.

25. Moreover there is nothing in the Act which clearly or expressly authorizes the Court to over-reach and destroy interests acquired by third parties *bona fide* and for value in the testator's estate pursuant to a contract to leave property by Will. This legislation was originally enacted in 1916 substantially in its present form, and if the Court was intended to have the power to defeat interests so acquired by third parties one would have expected the Legislature to say so in clear and explicit terms. The Legislature of New South Wales has generally been careful to safeguard the interests of *bona fide* purchasers for value and in Appendix B will be found sections from the Bankruptcy Act, 1898, the Matrimonial Causes Act, 1899, and the Conveyancing Act, 1919–1930, comparable with similar English legislation which protects the rights of such purchasers.

26. A contract to leave property by Will does not deprive a testator of his legal power to make a will inconsistent with the contract. It is submitted that the legal position is correctly stated by *Dixon,* J., as he then was in *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666 at 683

> "It is true that he (the promisor) cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property."

10 27. Therefore if the orders made by *Street,* J., in favour of the three successful applicants had been embodied in a second codicil to the will of the deceased executed by him immediately before his death, the appellant's rights under her contract would not have been defeated and she would have taken the subject property under the constructive trust in her favour.

28. The Act treats revocation effected by order of the Court as equivalent to revocation by the testator (s. 4 (1) quoted in par. 16) and therefore revocation or variation by order of the Court should be no more effective than a revocation or variation by the testator in destroying the equities arising under the contract.

20 **DILLON'S CASE DISTINGUISHABLE**

29. It is further submitted that the reasons given by *Street,* J., for refusing to distinguish *Dillon's* case in relation to the New South Wales Act, are erroneous, and that *Dillon's* case has no application to the New South Wales Act.

30. His Honour said: Record p. 28 lines 36–46

> "The Privy Council has stated a general proposition. I do not consider that there is any justification for reading that general proposition down or qualifying it so far as concerns the New South Wales statute merely upon the ground that s. 4 (1) did not appear
30 in the New Zealand legislation there under consideration. Indeed in the case of an intestacy the decision in *Dillon's* case would be directly applicable in a claim under the New South Wales Act. It would be prima facie absurd to contemplate a contract to make a will as having no effect on the Court's jurisdiction in this State in the case of an intestacy, but as excluding the subject assets from its reach in the case of a testate estate".

31. However, the New Zealand statute that was under consideration in *Dillon's* case did not enable the Court to make orders in respect of property which passed on intestacy. The situation in such a case was not considered
40 by the Board at all.

32. When the New South Wales Act was passed in 1916, the Court was given no power to intervene in cases of total intestacy. The original

Act contained s. 4 (1) as it now stands. This provision indicated quite clearly the nature of the jurisdiction given to the Court. When therefore the Act was amended in 1938 to authorize the Court to make orders in cases of total intestacy, without any amendment being made to s. 4 (1), the Legislature must be taken to have intended to confer on the Court a new jurisdiction of the same nature as that originally conferred in the case of testate succession in 1916.

33. Moreover in effect the provisions of the Act giving the Court power in cases of total intestacy authorize the Court to make a will for the intestate. Accordingly the nature of the Court's powers is the same whether the deceased died testate or wholly intestate. It is therefore submitted that the Court's power in the case of total intestacy provides no basis for holding that *Dillon's* case applies in New South Wales, in the face of the express provisions of s. 4 (1).

Record p 29 lines 1–21

34. Finally, *Street,* J., said:

> "The effect of the decision of the Privy Council is but an instance of the general proposition enunciated by *Giffard* L.J. at p. 192 of his judgment in *In re Brookman's Trust* L.R. 5 Ch. Ap. 182. 'If a testator is bound to make a will in a certain form, the law says there is no breach provided he makes a will in due form and it is not owing to any act of his that the child does not take' . . . a promisee's rights under a contract to leave property by will may, without any breach on the part of the testator, be subject to an inroad upon the property being made without thereby giving any consequential right, either to damages or otherwise, to the promisee under that contract. An order under the . . . Act is an instance of such an inroad. There are other instances."

35. This is of course an analysis of the legal position which arises once it is decided or assumed that an order under the Act is "an instance" of an inroad being made by law on the rights taken by a promisee under a contract to leave property by Will. In the present case however the question for decision is whether the Act is such an instance.

36. In order to determine whether the Act is such "an instance" one must have regard to its terms. It is submitted that there is nothing in the Act which empowers the Court to overreach the interests taken by persons under contracts made by the testator to leave property by Will. On the contrary, s. 4 (1) shows that the Act does not do so.

WHETHER STARE DECISIS APPLICABLE

37. Dillon's case has never been discussed or followed in any reported case under the Inheritance (Family Provision) Act, 1938–1966.

38. As far as can be ascertained *Dillon's* case has not previously been followed or applied by any Australian Court on any point relevant to the present appeal.

39. In *Lieberman* v. *Morris* (1944) 69 C.L.R. 69 the High Court relied upon certain passages in the advice in *Dillon's* case (not in issue in this appeal) in holding that a wife could not contract out of her right to make an application to the Court under the Act. This decision is in line with decisions both in England and Australia on comparable legislation relating to the maintenance of wives during their husband's lifetime.

40. As far as can be ascertained *Dillon's* case has only once been followed or applied in the New Zealand Courts on any point relevant to the present appeal, namely in *Kensington* v. *Pearson* (1948) N.Z.L.R. 695. In that case *Gresson,* J., held that property the subject of a general power of appointment exercisable by will was within the powers of the Court under the New Zealand Act. He further held that a covenant by the testator in a voluntary settlement to exercise his power of appointment by his will in favour of the trustees of the settlement, and the execution of a will in performance of such a covenant did not prevent the Court from making orders in respect of the appointed property. However the covenant in that case being voluntary, could not have been enforced in equity.

41. Passages from the advice in *Dillon's* case which are not in issue in this appeal have been cited in a number of other reported cases in New Zealand, see for example *In re Barclay* (1957) N.Z.L.R. 919 (C.A.), but these authorities are not material to the present appeal.

42. Similar legislation has existed in the Canadian provinces for many years. Passages from the advice in *Dillon's* case which are not in issue in this appeal have been cited in a number of reported Canadian cases, but with three exceptions referred to below these are not material to the present appeal. A number of such cases for example decide that an applicant cannot validly contract out of a right to make an application to the Court under the statute.

43. As far as can be determined there are only three reported Canadian cases in which *Dillon's* case has been referred to which may be relevant in the present appeal. In *Re McNamara* (1943) 3 D.L.R. 396, a decision of the Court of Appeal of British Columbia, *McDonald,* C.J., said at p. 398:

> "I am aware that this decision (*Dillon*) has been the subject of some severe criticism, nevertheless there it is and so long as it stands no Court in the Empire need hesitate to go as far as it sees fit toward making provision for a testator's family".

The case contains nothing else of relevance and it did not involve a contract to leave property by will.

In *Olin* v. *Perrin* (1946) 2 D.L.R. 461 a case on all fours with *Dillon's* case came before the Court of Appeal of Ontario. The Court was unanimous in dismissing the widow's appeal on other grounds, but two of the three Judges expressed views on *Dillon's* case. *Gillanders,* J.A., at p. 464–466 quoted at length from the advice in *Dillon* and followed it, but *Laidlaw,* J.A., at p. 470–471, said:

> "The learned judge (below) held that there was a binding agreement made between the deceased and Hester Perrin (his housekeeper) and that such agreement was substantially carried out by the deceased in the making of the Will. I think that judgment is right. Both in law and in equity Hester Perrin became entitled to all the net assets of (the deceased)at the time of his death by reason of the contractual obligation assumed by him. He was bound to dispose of those assets in accordance with his binding promise . . . In consequence there were no assets of the estate out of which the Court can make an allowance for maintenance to the applicant."

Finally in *In re William Estate* (1951) 4 W.W.R. (N.S.) 114 *Egbert,* J., of the Supreme Court of Alberta said in reference to *Dillon's* case at p. 134:

> "It was held that the Court might make an order for the proper maintenance and support of the widow even though such order would have the effect of causing a breach of his prior valid and otherwise enforceable agreement. Apart from this somewhat startling finding . . ."

That case did not involve a contract to leave property by will, and the judgment contains nothing else of relevance.

44. It is submitted therefore that the lapse of time since *Dillon's* case was decided has not reinforced its authority, and provides no proper ground for declining to review the correctness of the decision on points relevant to the present appeal.

45. *Dillon's* case was criticized at the time by D. M. Gordon Q.C. in the Canadian Bar Review 19 Can B.R. 603, 756, 20 Can B.R. 72. It is also criticized in the current edition of *Theobald on Wills* 12th Ed, pp. 97–98.

46. Moreover *Dillon's* case is out of line with the decision of the Court of Appeal in *Re Edwards* (1958) Ch. 168, and the decision of the Supreme Court of New South Wales in *Re Keene* (1967) 86 W.N. (Part 1) 317, and of the High Court in *Cope* v. *Keene* 118 C.L.R. 1, and these decisions furnish positive grounds for reviewing *Dillon's* case.

47. *Dillon's* case is anomalous. The Act does not otherwise interfere with the legal or equitable rights of persons acquired voluntarily or for value otherwise than by Will or on intestacy. Orders under the Act cannot prejudice

the rights of creditors whether they take for value, under voluntary deeds, or under guarantees. Nor can such orders prejudice the rights of persons who take under gifts *inter vivos* or settlements whether voluntary or for value, or even under a *donatio mortis causa*.

48. In any event the presence in the New South Wales Act of s. 4 (1) provides a clear basis for distinguishing *Dillon's* case, and the lapse of time since *Dillon* was decided is irrelevant on this aspect of the appeal.

49. The appellant therefore submits that the appeal should be allowed for the following (amongst other)

REASONS

1. His Honour correctly held that the deceased had contracted with the appellant to leave property to her by will, that the codicil constituted a sufficient memorandum of such contract, and that the appellant had performed her part of the bargain.

2. *Dillon* v. *Public Trustee of N.Z.* (1941) A.C. 294 was wrongly decided and should not be followed.

3. In the alternative, *Dillon's* case is distinguishable in relation to the New South Wales Act.

4. An order under the Act cannot override or destroy equitable proprietary rights acquired by a third person under a contract in which the deceased promised to leave property to such person by will.

5. An order under s. 6 (1) of the Act purporting to cast any part of the burden of orders for provision out of the estate of a deceased person on to property which the deceased had contracted to dispose of by Will to a third person is ineffective and futile, and should not have been made. See *Leeder* v. *Ellis* (1953) A.C. 52.

6. In the alternative His Honour erred in exercising his discretion under s. 6 (1) so as to throw the primary burden of the orders in favour of the applicants on to the property passing to the appellant. His Honour should have exercised his discretion so as to exonerate the property passing to the appellant from the burden of the orders, especially as the estate was large enough to enable this to be done.

K. R. HANDLEY.

APPENDIX A.

Life Fire and Marine Insurance Act 1902–1938 (*N.S.W.*)

"Section 4. The property and interest of every person who has effected, or shall hereafter effect, any policy for an insurance *bona fide* upon the life of himself or any other person in whose life he is interested, or for any future endowment for himself or any other such person, and the property and interest of the personal representatives of himself or such other person in such policy, or in the moneys payable thereunder or in respect thereof, and in the contributions made towards the same, shall be exempt from any law now or hereafter in force relating to insolvency or bankruptcy, or from being seized or levied upon by or under the process of any Court whatever, and shall not on the death of such person be assets for the payment of his debts, unless in his will or in any codicil thereto he declares an intention to make such property and interest assets for the payment of his debts by words expressly referring to the policy or policy moneys, or expressly referring to this Act and excluding the protection afforded thereby. . . ."

Life Insurance Act 1945–1961 (*Commonwealth*)

"Section 92.—

(2.) In the event of a person whose life is insured dying after the commencement of this Act, the moneys payable upon his death under or in respect of a policy effected upon his life shall not, subject to the Bankruptcy Act 1924–1933, be liable to be applied or made available in payment of his debts by any judgment, order or process of any court, or by retainer by an executor or administrator, or in any other manner whatsoever, except by virtue of a contract or charge made by the person whose life is insured, or by virtue of an express direction contained in his will or other testamentary instrument executed by him that the moneys arising from the policy shall be so applied.

(3.) A direction to pay debts, or a charge of debts upon the whole or any part of the testator's estate, or a trust for the payment of debts, shall not be deemed to be such an express direction."

APPENDIX B

Bankruptcy Act, 1898 (*N.S.W.*)

55. (1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within one year after the date of the settlement, be void

against the official assignee or trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the official assignee or trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any convenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the official assignee or trustee in the bankruptcy.

(3) "Settlement" shall for the purpose of this section include any conveyance or transfer of property.

(4) Nothing in this section shall be deemed to affect or invalidate the rights of any person deriving title to any property in good faith and for valuable consideration through or under any person taking or claiming as a donee of any settlement.

56. (1) Every alienation, transfer, gift, surrender, delivery, mortgage, or pledge of any estate or property, real or personal, every warrant of attorney or judicial proceeding made, taken, or suffered by a person being at the time insolvent or in contemplation of surrendering his estate under this Act, or knowing that proceedings for placing the same under sequestration have been commenced, or within sixty days before the sequestration thereof, and, whether fraudulent or not, having the effect in any such case of preferring any then existing creditor to another shall be absolutely void.

(2) For the purpose of this section the word insolvent means the inability of a person to pay his debts as they become due from his own moneys.

(3) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Matrimonial Causes Act, 1899 *(N.S.W.)*

58. (1) Where it is proved to the satisfaction of the Court that any deed conveyance instrument or agreement has been executed or made by or on behalf of or by direction of or in the interest of a respondent husband or wife in order to defeat the claim of the petitioner in respect of costs or alimony or in respect of money payable for the maintenance of children the

deed conveyance instrument or agreement may on the application of the petitioner and on such notices being given as are directed be set aside on such terms as the Court thinks proper.

(2) If the Court on the hearing of the application so order and declare any money or property real or personal dealt with by such deed conveyance instrument or agreement as aforesaid may be taken in execution at the suit of the petitioner or charged with the payment of such sums for the maintenance of the petitioner or of the petitioner and children as the Court directs.

(3) On the hearing the Court may make such order for the protection of a *bona fide* purchaser as it thinks just.

(4) The respondent or anyone acting in collusion with the respondent may be ordered to pay the costs of the petitioner and of a *bona fide* purchaser of and incidental to the execution of the said deed conveyance instrument or agreement and of setting the same aside.

59. (1) Where it appears to the Court that a sale of real estate is about to be made with intent to defeat a petitioner's claim in respect of costs alimony or the maintenance of children or damages on the ground of adultery the Court may by order restrain the sale or order the proceeds of the sale to be paid into Court to be dealt with as the Court directs.

(2) Any sale made after an order of the Court restraining the sale as aforesaid has been served on the person selling or his auctioneer or agent for sale shall be null and void.

(3) The Court may consider the claim of any person interested and may make such order in the premises as appears just.

Conveyancing Act, 1919–1930 *(N.S.W.)*

37A. (1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the Conveyancing (Amendment) Act, 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property aliened to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.