Privy Council Appeal No. 14 of 1971

Elizabeth Schaefer – – – – – – – *Appellant*

v.

Ellen Elizabeth Schuhmann and others – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER 1971

Present at the Hearing:
LORD WILBERFORCE
LORD PARKER OF WADDINGTON
LORD HODSON
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA

(*Majority Judgment delivered by* LORD CROSS OF CHELSEA)

This is an appeal by Elizabeth Schaefer against so much of an order of Mr. Justice Street made on 1st December 1969 in proceedings in the Supreme Court of New South Wales under the Testator's Family Maintenance and Guardianship of Infants Act 1916–1954 as imposed a charge in favour of three of the daughters of the Testator Edward Seery on a house Number 124 Nuwarra Road, Chipping Norton, which the Testator had by a codicil to his will devised to the appellant. The appellant contended that the devise had been made to her in fulfilment of a contract binding on the Testator. Two points arose for decision in the proceedings—the first whether the Testator and the appellant had entered into an enforceable contract with regard to the house, and the second whether, if they had, the Court had nevertheless jurisdiction under the Act to interfere with the benefit which the Testator had conferred on the appellant in pursuance of it. The judge decided the first question in favour of the appellant but the second question against her. The effective respondent to the appeal Cornelius Patrick Seery, a son of the Testator and the sole executor of his will, contended before the Board not only that the judge was right on the question of jurisdiction but also that even if he was wrong on that point the appeal should nevertheless be dismissed because he was wrong in finding that there was an enforceable contract between the Testator and the appellant.

The Testator who was a retired market gardener died on 16th November 1966 aged 76. He was a widower with seven children—three sons and four daughters three of whom were married. All the children were over

21 at the date of their father's death. He left an estate worth some 90,000 dollars gross. The net estate remaining after payment of debts, duties and expenses was worth about 68,700 dollars including the house above referred to and its contents worth together 14,500 dollars. By his will which he made on 23rd January 1962 the Testator gave each of his four daughters legacies of 2.000 dollars and left the residue of his estate equally between his three sons. His wife died in 1962. In the same year he retired from business and went to live with his bachelor son Edward and his unmarried daughter Catherine in a cottage belonging to the son. Early in 1966 he decided to live by himself and purchased No. 124 Nuwarra Road as a home to live in. He was in poor health and at the beginning of May he advertised in the local paper for a housekeeper. The appellant who is a married woman with three children answered the advertisement and the Testator engaged her to keep house for him at a wage of 12 dollars a week. Her employment began on 13th May and she continued to look after the Testator who needed constant attention and to keep house for him until his death. Her husband used to visit the house once or twice a week and there is no suggestion that the relations between the Testator and the appellant were other than those between employer and employee. At the end of May the Testator paid the appellant the wages to which she was entitled up to that date. Sometime in June he gave his solicitor instructions to prepare a codicil to his will. The solicitor having prepared the document posted it to the Testator who received it on 28th June. His eyesight was not good and he asked the appellant to read it to him. It was in the following terms " 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 free of all duties payable in consequence of my death unto her absolutely my house and land known as No. 124 Nuwarra Road, Chipping Norton, being the whole of the land comprised in Certificate of Title Volume 5425 Folio 9 together with all my furniture and household effects contained therein." Having read the codicil to him the appellant called a taxi to take the Testator to the Bank where he executed the document that day. Next day or the day after when the time came for the Testator to pay the appellant the wages due to her he told her that he did not propose to pay her any more wages because he had left her the house—adding " If you need any money to help you out, let me know ". The Testator provided the appellant with money to meet such household expenses as were paid for in cash but he paid her no wages after the end of May.

In 1967 after the will and codicil had been proved the four daughters of the Testator applied to the Court under the Testator's Family Maintenance and Guardianship of Infants Act 1916–1954. The only provisions of the Act to which it is necessary to refer are section 3 (1) and section 4 (1) which are in the following terms:

" Testator's family maintenance.

3. (1) If any person (hereinafter called ' the Testator ') dying or having died since the seventh day of October, one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will, in such a manner that the widow, husband, or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education, or advancement in life as the case may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education, and advancement as the court thinks fit shall be made out of the estate of the testator for such wife, husband, or children, or any or all of them.

Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

The court may order such other persons as it may think fit to be served with notice of such application. . . .

4. (1) 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 or her death."

The respondent to the applications was the executor Cornelius Patrick Seery but the appellant and another son William John Seery intervened in the proceedings by the leave of the Court. The third son Edward took no part in them. The judge having considered the evidence given by the four applicants as to their financial circumstances held that one of them Mrs. Lousick had not established that she was left without adequate provision for her proper maintenance but that the other three applicants Mrs. Schuhmann, Mrs. Williams and Miss Seery had made out cases for relief under the Act. He decided that the legacies of 2,000 dollars each given to Mrs. Schuhmann and Mrs. Williams should be increased to legacies of 12,000 dollars each and that Miss Seery should receive a legacy of 4,000 dollars in place of her legacy of 2,000 dollars and in addition a life interest in a fund of 8,000 dollars. Having decided that he had jurisdiction to throw on the property given to the appellant such part as he thought fit of the additional provision which he was making for the three daughters he ordered that upon the appellant by her counsel undertaking not to bring any action against the executor for wages or other services in respect of her employment by the Testator with liberty nevertheless to her to apply to be released wholly or partly from the performance of that undertaking the burden of the orders in favour of the three daughters be met in the first instance by and be a charge upon the property given to the appellant except as to a sum of 2,300 dollars part thereof and that thereafter the remaining burden of the orders in favour of the daughters should fall on the three sons equally. The wages which the appellant would have received, had no other arrangements been made, in the period from the end of May to the death of the Testator would have been nearly 300 dollars. So the effect of the order so far as concerns the appellant is to substitute a gift of 2,000 dollars for the gift of the house and furniture worth some 14,500 dollars. The appellant does not dispute that the Testator failed to make adequate provision for the three daughters in question nor does she quarrel with the amount of the additional provision which the judge decided to award them. Her contention is simply that the judge had no power to throw any of it on the property given to her and that the whole of it should come out of the residuary estate left to the sons.

Logically the first question which arises is that which the judge answered in favour of the appellant—namely whether the Testator at the end of June 1966 bound himself by an enforceable contract to leave her the house by his will. The only evidence on this point is that set out above which was contained in an affidavit sworn by the appellant. It seems most unlikely that nothing more was said on either side at the time in connection with the disposal of the house beyond what was stated in the affidavit; but though the appellant was cross examined at length on other matters she was not asked a single question as to what the Testator said to her about the gift of the house or as to how she reacted to what he said. The judge therefore had to proceed on the footing that what was stated in the affidavit was an accurate and complete record of what passed between the parties. The part of his judgment dealing with this aspect of the case is in the following terms:

" Mr. Handley, who appears for Mrs. Schaefer, has presented a powerful argument to the effect that the production to Mrs. Schaefer of this codicil for her to read, coupled with her subsequent rendering of these services, constituted a contract whereby the testator bound himself to leave this cottage to her if she should still be employed by him at the date of his death. The specific promise as propounded by Mr. Handley was in the following terms:

> " On 28th June, 1966, the testator made a written offer to Mrs. Schaefer that if she would work as his housekeeper until his death he would leave to her by will the property at 124 Nuwarra Road, Chipping Norton, together with furniture and household effects therein at his death."

A number of questions arise in connexion with this argument. The first of these is whether or not what took place between the testator and Mrs. Schaefer was contractual in its nature. Mr. Officer has contended that the facts fall rather within the type of situation described by *Griffith,* C.J. and *Isaacs,* J. at pp. 444 and 445 of the report of their respective judgments in *Wells v. Matthews & Ors* (18 C.L.R. 440). This initial question is itself one of considerable difficulty, due in no small measure to the paucity of evidence from which one might infer that a contract had come into existence. Mr. Handley contends that the testator's asking Mrs. Schaefer to read the codicil aloud was a communication of the offer. Were it not for the conversation at the end of June, deposed to in paragraph 15, I should have had great difficulty in concluding that this was intended to be contractual on the testator's part. The inescapable fact, however, is that the testator was then dependent to a large extent upon Mrs. Schaefer's continuing attention to his needs. The position in which she was employed was not perhaps a very attractive one, and he may well have anticipated difficulty in filling it again. It is quite clear that on any view of the evidence he held out to Mrs. Schaefer the knowledge that he had made this codicil in this way as an inducement to her to continue in his employment. The fact that he intended her to alter her position upon the faith of what was set forth in the codicil is borne out by the conversation towards the end of June to the effect that he would no longer pay her wages. It seems in these circumstances that one is justified in drawing the inference that his submission of the codicil to her for perusal—albeit that it was a perusal associated with it being read aloud to him—was intended by him to bring its contents to her notice, and to induce her to continue to serve him in her then capacity. I am disposed accordingly to regard the communication of this codicil to her as associated with a contractual intention on the part of the testator. The contract came into existence by reason of Mrs. Schaefer having discharged the consideration contemplated in the wording of the codicil, namely, being still employed as the testator's housekeeper at the date of his death. This connotes an element of the continuity in the employment from the date the codicil was shown to her through until the death of the testator.

> It is contended that there was not sufficient memorandum of the contract, being one falling within the Statute of Frauds, to render it the subject of recognition in this Court. I am of the view, however, that the terms of the codicil themselves, being capable of being regarded—as I do regard them—as a written communication of the offer, are sufficient in that behalf."

Counsel for the respondent attacked the judge's finding that there was an enforceable contract on two grounds. In the first place he submitted that it was wrong to treat the communication to her of the terms of the

codicil which he was about to execute as a contractual offer which she could convert into a binding contract by continuing to serve him. His reason for getting her to read the codicil to him was no doubt not simply that his sight was bad. It was a fair inference that by making known to her that he was leaving her the house by will if she remained in his service he was hoping to induce her to remain in an employment which she might well come to find increasingly irksome. But there is, it was argued, a world of difference between saying " See what you will get under my will if you look after me until I die " and saying " If you undertake to look after me until I die I will execute this document and not revoke it." Secondly Counsel submitted that even if there was a contract the codicil was not an adequate memorandum of it. He conceded that the fact it was not executed until after the contract was alleged to have been made was no objection to its sufficiency as a memorandum but he submitted that it was defective first because it did not indicate the existence of any contract and secondly because it did not state any consideration. Their Lordships agree with the judge that it is a fair inference to be drawn from the scanty material available that between 28th and 30th June 1966 a change was brought about in the contractual relations between the Testator and the appellant. The contract of employment at a weekly wage of 12 dollars was changed into a contract to serve for no wages on the footing that she was to become owner of the house and its contents on the Testator's death under his will. That in the event she had to serve for only five months more to secure a house worth over 14,000 dollars and that the Testator left his daughters insufficiently provided for are circumstances which incline one to view the appellant's case with little sympathy; but the result in law of what passed between them between the 28th and 30th June would have been just the same if she had subsequently served for five years without wages, if the Testator had had no family to provide for, and if he had revoked the codicil on his death bed and left the house to some new friend. Their Lordships think that the new contract may well not have come into being until the Testator, after he had executed the codicil which the appellant had previously read, told her that as he had left her the house by will he was not going to pay her any more wages and she acquiesced in this arrangement. Viewed in that way the contract would have been a contract not to revoke the gift provided that she continued to serve him until his death and no memorandum would have been necessary. But it is somewhat unreal to draw a hard and fast line between what happened on the 28th and what happened on the 29th or 30th and though their Lordships feel the force of Counsel's submissions as to treating the reading of the draft codicil as a contractual offer they think that the judge was entitled to consider what was the Testator's intention in causing her to read it in the light of what he said to her next day or the day after. Again if once one views the terms of the codicil as a contractual offer capable of acceptance by conduct it would be an intolerable refinement to say that the executed codicil was not an adequate memorandum. By whichever route the result is arrived at their Lordships are not prepared to differ from the conclusion reached by the judge on the contract point.

Their Lordships turn now to the question of the jurisdiction of the Court under the Family Maintenance Act. The Act contains no definition of the " estate " out of which the Court is empowered by section 3 (1) to make provision for members of the family. It is, however, clear that it cannot mean the gross estate passing to the executor but must be confined to the net estate available to answer the dispositions made by the will. Again if one reads the section without having in mind the particular problem created by dispositions made in pursuance of previous contracts the language suggests that what the Court is given power to do is to make such provision for members of the Testator's family as the Testator ought to have made, and could have made, but failed to make. The view that

the Court is not being given power to do something which the Testator could not effectually have done himself receives strong support from section 4(1) which says that a provision made under the Act is to operate and take effect as if it had been made by a codicil executed by the Testator immediately before his death. That being the apparent meaning of the Act their Lordships pass to consider what are the rights of a person on whom a Testator has agreed for valuable consideration under a *bona fide* contract to confer a benefit by will. If the benefit contracted for is a legacy the Testator is at liberty to dispose of his property during his lifetime as he thinks fit; but on his death, if he has failed to leave the legacy the promisee can claim payment from his estate *Hammersley v. De Biel* 12 C and F 45. Further if he dies insolvent then whether or not he has left the legacy by his will the other party to the contract is entitled to claim as a creditor for the amount of the legacy. This is shown by the decision of the Court of Appeal in Chancery in *Graham v. Wickam* 1. *De Gex Jones and Smith* 474. There a father covenanted on the marriage of his son Charles by his will to give and bequeath to him £2,500 to be held on certain trusts. Under his own marriage settlement the father had a power of appointment amongst his four children over a fund of £10,000 which in default of appointment was to pass to his children equally. By his will he appointed £2,500, part of the £10,000, to Charles saying that it was to be taken in discharge of his covenant; but it was held that this appointment could not satisfy the covenant since the fund of £10,000 did not belong to the Testator but belonged to his children subject to their father's power of distribution. The father died insolvent and it was argued on behalf of his ordinary creditors that the £2,500 covenanted to be left in the form of a legacy was only payable out of assets applicable for payment of legacies and was not a debt coming into competition with other debts. The Lord Justices rejected that argument and held that the covenant to leave £2,500 by will created a specialty debt. The decision would plainly have been the same had the Testator bequeathed Charles a legacy of £2,500 but died, as he did, without assets sufficient to meet it as a legacy. If the covenant had been a covenant to leave a share of residue the decision would, of course, have been different since residue is only ascertained after debts have been paid (see *Jervis v. Wolferstan* 18 Equity 18 at 24). If the contract is to devise or bequeath specific property the position of the promisee during the Testator's lifetime is stronger than if the contract is simply to leave a legacy. If the Testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the Testator from disposing of it in breach of contract (*Synge v. Synge* [1894] 1 QB 466). No doubt if the property is land he could also register the contract or a caution against the title. Their Lordships were not referred to any case which deals with the position which would arise if the Testator under such a contract retained the property in question until his death but died insolvent. It must however follow from *Graham v. Wickham* that the property would form part of the general estate available for the payment of debts but that the promisee would be entitled to rank as a creditor for the value of the property as at the death in competition with other creditors of the same degree. If, therefore, the Testator in this case had died insolvent the appellant would have had a right to be paid a dividend on a proof for 14,500 dollars and if the assets had been nearly sufficient to cover all the liabilities that dividend would have amounted to nearly the whole value of the house. If on the other hand the Testator had left just sufficient assets to meet all his other liabilities without recourse to

the house then, if the respondent is right, the Court would have power to take the house away from the appellant and give it to the daughters. That the promisee might be better off if the Testator died insolvent than if he died solvent would be very odd. Again if the respondent is right the promisee might be better off if the Testator broke his contract by selling the property in question in his lifetime than if he kept it, since in the latter event the property might be taken from the promisee by an exercise by the Court of its powers under the Act. In the case of *Re Dillon*— hereafter referred to—it was suggested that any damages which the promisor was ordered to pay would be assessed in the light of the possibility of the exercise by the Court of its jurisdiction but it is difficult to see how in practice any deduction could be made for this contingency since at the date of the breach sued on it would be quite uncertain whether or not any occasion for exercise of the Court's powers under the Act would arise on the Testator's death. If a Testator having contracted to leave property by will to A leaves it to B and there is no need to have recourse to the property to pay his debts then the executor will be ordered to convey it to A as the person beneficially entitled to it (see *Synge v. Synge* at p. 470/471; *Re Edwards* [1958] Ch. 168 at 175/176. It is not easy to see how on the wording of the Act the Court in some circumstances at least, could have jurisdiction to override this trust arising in favour of the promisee. Suppose for example that the Testator in this case had made a codicil immediately before his death revoking the devise to the appellant and leaving the house to his three daughters for whom he was held to have made insufficient provision and that the appellant claimed to have the house transferred to her under the trust in her favour arising by reason of the contract. If the words " disposes of his property by will " as used in section 3 (1) include property which the Testator has disposed of in breach of contract then the condition precedent to the arising of the Court's jurisdiction would not be satisfied since the applicant's lack of provision would not be due to the dispositions of the will but to the appellant's insistence on her rights under the contract. If on the other hand the property to which the section refers does not include property which the Testator has bound himself by contract to dispose of in a particular way it is hard to see how the Court can have jurisdiction under the section to make orders affecting such property.

Counsel for the respondent faced with these anomalies submitted that at all events if the Testator died solvent having performed his contract the rights of the other party to the contract became as from that moment simply the rights of a legatee or devisee; that notwithstanding that the Testator could not have made any other disposition without breaking his contract the Court despite the wording of section 4 (1) could make a fresh disposition which he could not effectually have made; and that the fact that the promisee might have been better off if the Testator had died insolvent or broken his contract was irrelevant. The only English authority which Counsel cited in support of these submissions was a dictum of Gifford L.J. in *Re Brookman's Trust*, 5 Chancery Appeals 182, where he said at 192 " If a Testator is bound to make a will in a certain form, the law says that 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. . . ." In that case a father covenanted on his daughter's marriage to make a certain provision either by *inter vivos* settlement or by will for his daughter and her family. He made the provision by will and the terms of it followed exactly the wording of the covenant; but as the gift was by will the interest of a beneficiary who predeceased the Testator, and which had the provision been made by deed would have passed to his estate, lapsed. Malins V.C. held that the will ought to have contained a declaration against lapse but the Lord Justice held on appeal that the absence of a declaration against lapse did not amount to a breach of the covenant. In

the context of the actual decision it is their Lordships think impossible to treat the words of Gifford L.J. quoted above as an authority which lends any support to the argument on behalf of the respondent. Counsel for the appellant referred the Board to two cases in Australian Courts which are inconsistent with the proposition that if the estate is solvent and the contract is performed the rights of the other party to the contract become simply the rights of a legatee. The first is a decision of the Court of Appeal in New South Wales (*Coffill and others v. The Commissioner of Stamp Duties* (1920) 20 S.R. (N.S.W.) 278). There a business which had been carried on by a husband and wife in partnership was sold and the wife who had brought considerable sums of money into the partnership applied for her share of the assets. Thereupon an agreement was made betwen them that in consideration of the wife giving up all claims to the assets the husband should make a will leaving her £5,000 and not revoke it to her prejudice. After the husband's death the question arose whether in calculating duty the £5,000 left to the wife was deductible as a debt and it was held that it was. The Chief Justice after quoting *Graham v. Wickham* and an earlier case of *Eyre v. Munro* 3 K and J. 305 which is to the same effect said (at page 285) " It seems to me therefore that it is not open to the Commissioner to treat this particular legatee as if she had no other right than that which appears on the face of the will naming her as legatee. She is a person who could have sued for her share, whatever it was in the moneys realised by the sale of the partnership assets, and on the evidence before us only forbore to sue on the undertaking that the money should be made good to her by the will of her husband ". That decision which seems to their Lordships to be good sense as well as good law is inconsistent with the view that the mere fact that the estate is solvent and the contract performed turns the other party to the contract from a creditor into a mere legatee. The second case is *Re Syme* [1933] V.L.R. 283. The facts are somewhat complicated and their Lordships do not think it necessary to set them out; but they agree with Counsel for the appellant that that decision also is inconsistent with the proposition advanced by Counsel for the respondent. In 1935 the very point which their Lordships have to decide came before the Court of Appeal in Tasmania in the case of *Re Richardson's Estate* 29 Tasmanian Law Reports 149. The facts there were that the Testator had been separated from his wife for some thirty years before his death in 1934. From 1920 until his death, he lived with a Mrs. Henderson. They pooled their resources and agreed that they should make mutual wills in one another's favour. In pursuance of that agreement the Testator left his estate to Mrs. Henderson. His wife and daughter brought proceedings under the Testator's Family Maintenance Act which gave the Tasmanian Court the same powers as are given to the Court by the New South Wales Act and contained in section 9 a provision similar to that contained in section 4 (1) of the New South Wales Act. When he heard the case at first instance Nicholls C.J. while pointing out that if the Testator had broken his contract Mrs. Henderson could have recovered damages accepted the submission of Counsel that as he had performed it the Court had jurisdiction to make an order but he dismissed the application on the merits. The widow and daughter appealed and the appeal was dismissed by the Chief Justice and Crisp J., Clark J. dissenting. In his judgment dismissing the appeal Nicholls C.J. expressed himself as follows:

> " All that I propose to add to what I already have said on this case, is that the respondent's rights do not arise under the will. They arise contractually and exist independently of the will. If the testator had made no will, or had made a will leaving everything to his widow and daughter, he would have made a breach of his contract with the respondent. She then could have sued for damages

> for the breach, and the measure of her damages would have been the value of the testator's estate. Her status afterwards would have been that of a judgment creditor. It is true that the performance of the contract was to be, and actually was, in the form of a will, but, as is proved by the fact that it prevents a cause of action for breach arising, the will operates as the performance of the contract, not as bounty, as it would in the ordinary case of a testator giving, by way of a free gift, property which he had the right to dispose of as he pleased. As against the respondent, he had no right to leave his property to his widow and child. Any interference with respondent's rights now, must amount to wholly or partially setting aside the contract. What we are asked to do is to reduce contractual rights to the level of gifts under a will, and to make the performance of the contract the reason why we can prevent its full performance, and to do that by an order which by section 9 will take effect as if it were a codicil, which as a fact the testator had no right to make. The 'Testator's Family Maintenance Act' is based solely upon the supposition that a free testator has chosen to deprive his wife or children of what he was at liberty to leave to them and upon which they have some moral claim for maintenance. In such a case the Court is given a discretion to do what the testator could and should have done, but no more."

Crisp J. concurred in the dismissal of the appeal on the ground that the Chief Justice was in any case right in exercising his discretion against the appellants. Clark J. on the other hand thought that the Court had jurisdiction and that the Chief Justice had exercised his discretion wrongly. He appears to have recognised that if the Testator had broken his contract Mrs. Henderson would have been entitled to damages but he thought that as the contract had been performed the Court had jurisdiction notwithstanding section 9. Were it not for the decision of the Board in *Dillon v. Public Trustee of New Zealand* [1941] A.C. 294, which is the sheet anchor of the respondent's case, their Lordships would have had no hesitation in preferring the view of Nicholls C.J. in *Re Richardson's Estate* to that of Clark J. supported as it is by a consistent body of authority, earlier referred to, both in England and Australia as to the nature of the rights of persons under a contract to make a bequest by will.

But on the other side, and clearly out of line with this body of authority is *Dillon's* case, the facts of which were as follows:

Henry Dillon senior a widower aged 79 with five grown up children entered into a written agreement on 2nd February 1933 with his two sons. There had been litigation between the parties. The agreement which compromised the litigation provided that the lands belonging to the father and the sons respectively should be farmed in partnership, that one son should be appointed manager and devote his whole time to the work and that the other should work full time in the business as a general hand. Clause 17 was in the following terms:

> "That the said Henry Dillon senior shall by his last will devise and bequeath his own farm lands to his trustees upon trust for his son Henry Dillon junior and his two daughters Mary Kathleen Dillon and Eileen Dillon in equal shares subject however to an annuity or rent-charge of fifty pounds (£50) per annum in favour of his daughter, Elsie Higgins, and shall forthwith execute a will containing such devise and bequest."

On 24th August 1935, when he was 81, Henry Dillon married again. It does not appear whether he had made a will implementing clause 17 of the agreement, but if he had the will was revoked by the marriage. On 17th March 1936 he made his last will devising his farm lands pursuant

to clause 17 of the agreement and leaving his residue to his wife. He died on 29th January 1937 and on 28th July the widow applied to the Court under the Family Protection Act 1908 asking for further provision to be made for her out of her husband's estate. Section 33 (*i*) of the Act—which corresponds to section 3 of the New South Wales Act—is in the following terms:

> "If any person (hereinafter called "the testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children."

The Act contains no definition of "estate" and no section corresponding to section 4 (1) of the New South Wales Act. Northcroft J. before whom the application came at first instance held that the principle of two earlier cases which decided that agreements between husband and wife, whether made before or after marriage, under which she purported to relinquish all rights under the Act and to free her husband from his obligations under it were void covered the instant case, and on the merits he made an order in favour of the widow. That decision was reversed by the Court of Appeal—Myers C.J. and Ostler J., Smith J. dissenting. The Chief Justice in his judgment first said that the two cases on which Northcroft J. relied had no application to contracts made by the husband in the ordinary course of business. He then set out what were the rights of the promisees under the agreement made by the Testator both before and after his death in accordance with the decision in *Synge v. Synge* and said that it would be an extraordinary thing if the fact that the Testator had performed his agreement put the promisees in a worse position than they would have been in had he broken it either by selling the property in his lifetime or leaving it by will to someone else. Finally he said that a person to whom a devise is made in pursuance of an agreement could not properly be regarded as an object of the Testator's bounty and that the power given to the Court by the Act did not extend beyond cancelling or diminishing in favour of his widow and children bequests made by him to other objects of his bounty. The judgment of Ostler J. was to the same effect as that of the Chief Justice. Smith J. in his dissenting judgment said (1) that the agreement gave the promisees no interest in the lands but only a right to have the will framed in a particular way, (2) that the Testator had fulfilled his contract by framing the will in that way, (3) that their right to the lands arose through an exercise of the Testator's testamentary power—albeit he was obliged to exercise it in a particular way—and was therefore subject to the control of the Court in the same way as any other benefit conferred by the will, (4) that if the Testator failed to carry out his contract any right to damages or to specific performance to which the promisees would become entitled would be assessed or granted subject to and in the light of the exercise or possible exercise by the Court of its powers under the Act.

The widow appealed to the Privy Council which allowed the appeal. The reasoning of the Board follows closely the dissenting judgment of Smith J. The Testator's children—it was said—were simply devisees and not creditors; the Testator did what he contracted to do; and if he had broken his contract the children's right to damages or specific performance would have been assessed or granted subject to the possible or actual impact of the power of the Court under the Act. So far as appears the attention of the Board was not drawn either to the cases of *Coffill* and *Syme* which proceed on the footing that the fact that the Testator carries out his contract does not change the character of the promisee's rights or to the case of *Re Richardson's Estate.*

Counsel for the respondent submitted in the Court below that *Dillon's* case could be distinguished from this case because the New Zealand Statute which was then under consideration contained no provision corresponding to section 4 (1) of the New South Wales Act. Street J. refused to draw such a distinction and their Lordships think that he was clearly right to refuse to draw it. The terms of section 33 of the New Zealand Act and of section 3 of the New South Wales Act themselves indicate that the power of the Court extends no further than the power of the Testator. Section 4 (1) of the New South Wales Act only emphasises and makes explicit what would be implicit in the Act if it were not there. Refusing as he rightly did to distinguish *Dillon's* case Street J. naturally followed it in the present case and held that he had jurisdiction to charge the house devised to the appellant with part of the provision which he thought it right to make for the Testator's daughter. In the light of the arguments presented to the Board on behalf of the appellant which were, it would seem, far fuller than those presented to the Board on behalf of the respondent in *Dillon's* case their Lordships, had the matter been "*res integra*", would not have hesitated to hold that the Court had no jurisdiction. But the matter is not "*res integra*" and *Dillon's* case was decided 30 years ago. It is true that it has met with some criticism both judicial and academic. Thus in *Oliver v. Perrin* [1946] 2 D.L.R. 461 a case on all fours with *Dillon's* case which came before the Court of Appeal in Ontario but where all the judges in fact agreed that the claim failed in any case on the merits, Laidlaw J.A. plainly thought that *Dillon's* case was wrongly decided; and in *Re Williams Estate* [1951] 4 W.W.R. (N.S.) 114 Egbert J. said by way of dictum that it was "a somewhat surprising decision". Again it was criticised by Wm. Gordon Q.C. in the Canadian Bar Review Vol. 19, p. 603, and Vol. 20, p. 72 and by the editor of Theobald on Wills (12th ed.) 97–98. On the other hand it may well be that it has been on occasion accepted without argument as correct and that orders have been made in reliance on it (cf. *Re Brown* 105 L.J. 169). In these circumstances their Lordships have considered anxiously whether or not they ought to decline to follow it. The conclusion which they have reached is that they should decline to follow it. It seems most unlikely that those who framed the New Zealand and New South Wales Statutes—or for the matter of that the English Family Inheritance Act 1938—had the problem posed by contracts to leave legacies or to dispose of property by will in mind. The question whether contracts made by a Testator not with a view to excluding the jurisdiction of the Court under the Act but in the normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the Court under legislation of this character is a question of social policy upon which different people may reasonably take different views. In this connection it is not without interest to observe that by the Law Reform (Testamentary Promises) Acts 1944 and 1949 the New Zealand legislature has itself enacted provisions designed to protect persons who have rendered services to Testators in reliance on promises on their part which have not been honoured to leave them benefits by will. If and so far as it is thought desirable that the Courts of any country should have power to interfere with testamentary dispositions made in pursuance of *bona fide* contracts to make them, it is, their Lordships think, better that such a power should be given by legislation deliberately framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies, as flow from the decision in *Dillon's* case. Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed. If the judge had realised that he had no power to throw any part of the provision to be made for the daughters on the property devised to the appellant he might perhaps have made smaller provision for them. Their Lordships will therefore advise that the case be remitted to the Court below for it to decide what additional provision

should be made for the three daughters out of the estate of the Testator on the footing that the Testator had disposed of his property by will in such a manner that they were left without adequate provision for their maintenance, but that the Court had no power to throw any part of any provision to be made for them on the property devised to the appellant.

The costs of the appellant of her appeal to the Board taxed as between party and party will be paid out of the residuary estate. The respondent will be paid his costs taxed on a solicitor and own client basis out of the residuary estate.

(*Dissenting Judgment by* LORD SIMON OF GLAISDALE)

I regret that I differ from the majority of their Lordships on the central issue of this appeal; in my judgment *Dillon's* case was correctly decided. Moreover, I do not think that a contract between the deceased and the appellant was ever established by her. But if this latter were my only matter of disagreement I should not have ventured to express my dissent from the majority of their Lordships, since the issue is, in all its circumstances, peculiar to the instant appeal. But the issue on *Dillon's* case is of profound social importance and of potentially widespread repercussion. The New South Wales Testator's Family Maintenance and Guardianship of Infants Act, in its vindication of rights and duties of maintenance within the family, is concerned with a fundamental institution of society and with basic human rights; the statute has its counterpart in other jurisdictions; and the decision in *Dillon's* case has stood for 30 years. So far as I am aware, there has only been one legislative modification of its effect; and that largely endorses it: the New Zealand Law Reform Act 1944, section 3 (now the Law Reform (Testamentary Promises) Act 1949), though providing that where a claimant proves an express or implied promise to reward him for services or work by making some testamentary provision for him the claim is to be enforceable against the estate of the deceased to the extent to which the deceased has failed to make that testamentary provision, goes on to stipulate that, if no amount is specified or if the promise (as in *Dillon's* case and in the instant appeal) relates to real property or to personal property other than money, the court may order payment to the claimant of such amount as is reasonable having regard (*inter alia*) to the nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise– which would seem to contemplate the statutory claims of family dependants competing with contractual claims, the competition to be resolved so as best to do justice to all concerned, exactly as envisaged by the Board in *Dillon's* case.

In view of the foregoing matters, I have felt bound to overcome my diffidence in expressing dissent.

The effect of overruling *Dillon's* case is that the N.S.W. statute is so construed as to countenance the following situation: a widower is left with two infant children; he proposes marriage to another woman, promising to bequeath her the whole of his estate if she will accept him; she does accept him on these terms; he dies shortly afterwards; the court is powerless to order any provision out of his estate for his infant children. The legislatures of the various jurisdictions concerned may wish to consider this situation.

The Alleged Contract

The contract was alleged by the appellant to have been constituted by a written offer made to her by the deceased on 28th June 1966 through his having asked her to read aloud the draft codicil sent to him by his solicitor, such offer allegedly having been accepted by performance on her part. But the codicil is not framed as a contractual offer; and I

cannot see that it can become one through a purposing testator of failing eyesight asking his housekeeper, the purposed beneficiary, to read it to him. It is not alleged that the contract was constituted otherwise—for example, that the testator promised not to revoke the executed codicil in consideration of the appellant working for him without wages during joint lives, which is the (different) sort of contract the subsequent conversation about wages might have implied, if it were capable of being evidence of any contractual relationship at all. The codicil made no reference to the foregoing of wages. I can see the holding out of an inducement by the deceased, but no contractual offer by him. I can see conduct by the appellant consistent with the expectation of a testamentary reward, but nothing which is only reasonably explicable on the basis that she was accepting by conduct a contractual offer. I cannot believe that if the appellant had left the service of the deceased before his death—say, to remarry—she would have been adjudged to have been guilty of breach of contract.

The sort of testamentary provision with which the instant appeal is concerned is far from uncommon; and there must have been many cases in which the draft or the executed provision has been brought to the notice of the purposed beneficiary. But I know of only one case where it has been suggested that the testator (or purposing testator) was thereby contractually bound to carry out the testamentary disposition in question or that the proposed beneficiary became thereby a creditor of the estate. That one case, *Maddison v. Alderson* (1883) L.R. 8 App. Cas. 467, has striking similarities to the instant one, althought the evidence there in support of a contract was stronger and a jury had found a contract established; yet the House of Lords unanimously held the evidence to be insufficient to support the jury's findings. The appellant in that case was induced to serve the deceased as his housekeeper without wages for many years by his oral promises to make a will leaving her a life estate in his farm; he did in fact sign a will with such a provision, which he read over to her, asking her " whether she was satisfied "; but it was not duly attested. The Earl of Selbourne L.C. discerned (p. 472) ". . . conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time ". Lord O'Hagan, in addition to concurring with the reasoning of the Lord Chancellor, said (p. 486) ". . . there would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract ". Lord Blackburn said (p. 487) ". . . the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties ". Lord Fitzgerald said (p. 492) ". . . the acts of the [appellant] had no necessary reference to any contract such as is relied on, or indeed to any contract whatever, . . . and would be properly accounted for by some expectation of bounty from her master . . . There is not to be found in it [the will] any allusion to any agreement or promise or representation, nor is the intended devise for her benefit said to be as a reward for her services . . ." and (p. 493) ". . . although Alderson probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so ". All these observations seem to me to be cogently applicable to the instant case; indeed, the first, with its reference to " promises ", is *a fortiori.*

Dillon's Case

I do not presume to cover ground already traversed by the Opinion of the Board in *Dillon's* case. What I propose to say is by way of marginal comment.

The "Mischief" of the Statute

Men and women necessarily have different functions to perform in the creation of new members of society and in their upbringing to independent membership. A functional division of co-operative labour generally calls for a sharing of the rewards of the labour. The social function carried out by women in the bearing and upbringing of children puts them at an economic disadvantage. Indeed, it is by the woman's assumption of responsibility as childbearer and homekeeper that the man is freed for his assumption of responsibility as breadwinner. In consequence of this division of responsibility the man incurs an obligation to share the loaf with the woman and the woman acquires a right to share in it. Similarly, their children, who did not ask to be brought into the world and whose upbringing is required by society for its continuity, have a right to support until capable of self-support—primarily from their father, since it is he who has been released to be the breadwinner. The family is the social and legal institution within which these various rights and obligations are worked out.

Moreover, the rights and obligations do not necessarily come to an end on the death of the husband and parent. The wife's needs and, generally, her economic impairment subsist. The children continue to need support until themselves ready to assume independent membership of their society. On the other hand, the means of the husband and father available for the support of wife and child are not necessarily cut off by his death. He may have been enabled to make an accumulation which is available.

Most societies enforce by law the husband and parent's duty to provide for dependants not only during joint lives but after death as well. Many adopt a system whereby a portion of a deceased's estate is reserved from his testamentary power and allocated to the support of his dependants. The Scottish system of *jus relictae* for the widow and *legitim* for the children, leaving only the "dead's part" (a third if there are widow and children) subject to testamentary disposition, is an example. "Whatever may be the nature of the *jus relictae*, whether a claim for division or a claim for debt," said Lord Moncrieff, Lord Justice-clerk, in *Tait's Trustees v. Lees* [1886] R. 1104, 1110, "this at all events is certain, that the testator has no right and no power to test upon it." Such a system obtained in England until the end of the 17th century (and even later by local custom). Then, after an interval of unbridled testamentary licence, English law and its associated systems adopted a discretionary code, first in the New Zealand Family Protection Act 1908 (which fell for construction in *Dillon's* case), and then in similar legislation elsewhere, including the N.S.W. Family Maintenance and Guardianship of Infants Act 1916, with which (as amended) we are concerned in the instant appeal, and the English Inheritance (Family Provision) Act 1938.

The legislative intention cannot therefore be in doubt: it was to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance. This was the "mischief" for which the statute was providing a remedy; and the courts should endeavour so to construe the statute as to advance the remedy and abate the mischief: *Heydon's Case* (1584) 3 Co. Rep. 7b. A construction which permits the sort of situation which I gave as an illustration at the beginning of this Opinion obviously fails to fulfil this requirement.

The Competing Claims on the Estate

We are concerned here with three different sorts of social obligation to which legal effect has been given. The first arises because a system of *quid pro quo* is fundamental to ordered human society. Legal regimes therefore enforce contractual obligations if the promisor himself makes default; and, if the promisor dies in default, will generally make his personal representative do what the deceased should himself have done. The second type of obligation arises where property gets into a person's hands which is not meant for his own benefit and in such circumstances that justice demands that he should use it for the purpose for which it was in fact intended. Obvious examples are the situations of a trustee or of the personal representative of a deceased's estate. I accept that where A covenants to bequeath property to B, A's personal representative will generally be constructive trustee of the property for B, and that the law (as developed in courts of Equity) will generally compel the personal representative to do what the deceased should himself have done. The third type of obligation—that of a deceased to provide for his dependants—arises juristically from the statute, which (like that rule of Equity) empowers the court to order the personal representative to do what the deceased should himself have done.

But I cannot see any reason, social or juridical, which makes the first two types of obligation in any way more potent or overriding than the third. On the contrary, a statutory provision generally prevails over a rule of judge-made law where there is any conflict. But in the instant situation, in my view, none of the three types of obligation overrides any other; they are concurrent. The promisee's contractual or equitable rights fall to be considered along with the dependant's statutory rights. In my judgment the headnote in *Dillon's* case correctly summarises the Opinion of the Board: "The Court, in considering how its discretion should be exercised and how far it is just and necessary to modify the provisions of a will, will pay regard to the circumstances in which the will is drawn as it is, to the interests of the members of the family, and to all relevant circumstances, *among which may be the fact that the testator was under obligation to a third party*" (my italics, and see especially page 301 of the report). On this approach justice will so far as possible be done to all concerned. Certainly, in the instant case Street J's. order seems to me to be an entirely just one.

Even on a narrowly technical approach, the property which was the subject-matter of the alleged covenant passed into the hands of the executor. As Lord Parker of Waddington said in *Central Trust & Safe Deposit Co. v. Snider* [1916] 1 A.C. 266, 270, 271, "The testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust." To apply these words to the instant case, the property allegedly promised to the appellant remained the deceased's up to the moment of his death; the property was part of the estate of the deceased; as such it passed on death to his executor; then, for the first time, the appellant acquired an interest in it; but then, simultaneously, her interest had to compete with that of the deceased's dependants under the statute. (In so far as *Synge v. Synge* [1894] 1 Q.B. 466 appears to decide that a promisee has any interest before the death of the promisor, it not only seems to depend on *Hochster v. De la Tour* (1853) 2 E. & B. 678 being good law, but also to be inconsistent with the line of authorities which establishes that the promisee must survive the promisor in order

to have any remedy: *Jones v. How* (1848–50) 7 Hare 267, (1850) 9 C.B. 1; *Re Brookman's Trust* (1869) L.R. 5 Ch. App. 182).

The authorities

I do not find it necessary to discuss all the many authorities which were cited to us. How difficult of reconciliation is the totality of the case law is to be seen from the article by Mr. W. A. Lee, " Contracts to make Wills ", in (1971) 87 L.Q.R. 358; and in so far as principles of distinction can be discerned it is often difficult to grasp either their logic or their justice. Of the cases cited to us, apart from *Dillon's* case only *Re Richardson's Estate* (1934–35) 29 Tas. L.R. 149 had the instant situation in judicial contemplation—namely, a contractual or equitable claim competing with one under the statute. In *Richardson's* case, Nicholls C.J. held that the promisee's equitable rights prevailed over the dependants' statutory rights (in effect, accepting the argument advanced by the instant appellant). Clark J., dissenting, held that the testator had fulfilled his obligation by making a will in implementation of his covenant; and that the court was not precluded from making family provision out of the estate (in effect, accepting the argument advanced by the instant respondent). Crisp J. concurred in the result with the Chief Justice, but on the ground that " in all the circumstances, . . . the Chief Justice's discretion here was well exercised " (*i.e.* treating the case as if the Chief Justice had *not* held that the statute could not operate at all on the subject-matter of the promise; but as if it could, and the Chief Justice in his discretion had preferred the claim of the promisee to that of the dependants). This is hardly a satisfactory authority; but if anything it is in favour of the instant respondent, only the appellate judgment of Nicholls C.J. being inconsistent with *Dillon's* case.

As for the other cases relied on by the appellant, it may be that if facts similar thereto arose in a situation where a promisee's contractual or equitable claim has to compete with one of a dependant under the statute, the conclusions in those cases might require modification rather on the lines that the Board in *Dillon's* case suggested that damages for breach of contract might have to be modified by the impact of the statute (see pages 304, 305).

Another way of reconciling *Dillon's* case with the authorities relied on by the appellant would be to imply in every covenant to leave property by will a proviso " so far as the law allows ". This would seem to be necessary in those systems which limit a testator's power of disposition to part only of his estate (cf. the passage cited from *Tait's Trustees v. Lees*). In the context of the discretionary code with which we are concerned in the instant appeal, the implied proviso would be spelt out as " subject to the statutory discretion vested in the court to order family provision ". Such an implied proviso would be closely analogous to the refusal of the law to allow any contractual derogation from its discretionary power to order maintenance for an ex-wife (see *Hyman v. Hyman* [1929] A.C. 601), or (to look a little wider) the refusal of those systems which have adopted a regime of rent restriction or security of tenure to allow the powers of the courts to be pre-empted by covenant.

There is an alternative way of approaching the concept advanced in the previous paragraph. Some of the conflict of authorities before *Dillon's* case can be resolved by drawing a distinction (however unjustly it works out in particular instances) between a promise to leave by will a specific sum or asset (*e.g. Graham v. Wickham* (1863) 1 De G. J. & S. 474; *Synge v. Synge*) on the one hand, and a share of the residue (*e.g. Jervis v. Wolferstan* (1874) 18 Eq. 18) on the other. But even where a share of the residue is promised, the testator will not be permitted fraudulently (in the sense used in Equity) to render his promise nugatory by making substantial gifts *inter vivos* or by way of specific legacy (*Gregor v. Kemp* (1722) 3 Swans. 404 n.). In principle, similarly a testator should

not be permitted to render his dependants' statutory rights nugatory by covenants to make bequests by will.

In any event, whatever difficulty the cited cases might raise if the Act limited the powers of the court to the "net estate" of the deceased, statutorily defined, as does the English Inheritance (Family Provision) Act 1938 (on which, however, I must not be taken as expressing a view), only *Coffill v. Commissioner of Stamp Duties* (1920) N.S.W.S.R. 278 and *In re Syme* (1933) V.L.R. 282 need cause any embarrassment in construing the N.S.W. Act, which refers merely to the "estate" of the deceased. For all the appellant's contention, it seems to me unarguable that the subject-matter of her bequest did not form part of the deceased's "estate". If it did not form part of his estate, it could not pass to the appellant under his will, as she claims it did. Moreover, the passage cited from *Central Trust and Safe Deposit Co. v. Snider* is clear authority that it did form part of his estate.

As for *In re Syme*, Lowe J. regarded the claim which competed with the promisee's as that of a "mere volunteer"; and his judgment turned on the contrast, juristically well established, between a promisee's equitable interest and the interest of a "mere volunteer". But that case was in no way concerned with family provision; and "mere volunteer" is to my mind quite inapt to describe the status of a family dependant under the statute. I cannot therefore regard the decision in *In re Syme* as providing any cause for impugning the validity of the subsequent decision in *Dillon's* case. As for *Coffill's* case, I do not find it necessary to hold that it must inevitably be considered to be overruled if *Dillon's* case stands. The covenant in *Coffill's* case was peculiar, and there was no question of any competing statutory provision for dependants. A contract to leave property by will is a most unusual one, in that it can only be performed at the moment of death. It may be that different considerations apply, on the one hand, to a revenue case pure and simple and, on the other, to one where the promisee's claim competes with a claim under the Testator's Family Maintenance Act. It may be significant that there has been no attempt in the supervening 30 years to argue that *Coffill's* case has been, in effect, overruled by *Dillon's* case. If I had to choose between *Coffill's* case and *Dillon's* case, I should unhesitatingly prefer the latter.

The alleged "anomalies"

I have tried to indicate how the alleged anomalies largely disappear if ancient authorities decided in a different social context are not carried forward hypnotically to what may seem their logical conclusions regardless of the impact of a modern statute of clearly ascertainable social purpose, or if there is read into every contract to leave property by will the proviso "so far as the law allows" or "subject to the statutory discretion of the court to order family provision." But even were anomalies to remain, desirable as it is to adopt a construction which does not produce anomalous results, it is still more desirable in my view to adopt a construction which accords with the ascertainable intention of the legislature and which promotes justice between conflicting interests. This, I believe, would be done by following *Dillon's* case.

The Juridical Setting of Dillon's Case

I respectfully agree with Street J's statement in his judgment in the instant case: "The effect of the decision of the Privy Council [*Dillon's* case] is but an instance of the general proposition enunciated by Gifford L.J. at p. 192 of his judgment in *In re Brookman's Trust* ((1869) L.R. 5 Ch. App. 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. . . .' [The promisee's] rights to the property are to be drawn through the will and hence are subject to certain laws affecting testamentary succession. 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 Testator's Family Maintenance Act is an instance of such an inroad."

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In the Privy Council

ELIZABETH SCHAEFER

v.

ELLEN ELIZABETH SCHUHMANN
AND OTHERS

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