SCHAEFER v. SCHUHMANN: PROMISEE v. DEPENDANT

The Problem

In 1941 the Privy Council determined that the jurisdiction of the court to make a family provision order under the Family Protection Act 1908 (N.Z.) affected assets disposed of by a testator in his will pursuant to a contract to devise or bequeath.[1] Thirty years later, in 1971, the Privy Council, Lord Simon of Glaisdale dissenting, refused to follow its earlier decision and held that the jurisdiction of the court to make an order under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 (N.S.W.) does *not* affect assets disposed of by a testator in his will pursuant to a contract to devise or bequeath.[2] It is of academic interest to consider the validity of the reasoning of each court but it is, of course, of practical importance to consider the legal and social ramifications of the later decision of the Privy Council with a view to asking whether some amendment of the Testator's Family Maintenance Act 1939-1962 (W.A.) may or may not be desirable.

The problem is, essentially, one of characterisation. How does one characterise the rights of a promisee under a contract to devise or bequeath? Creditors of a deceased's estate are satisfied before family provision orders are made.[3] Family provision orders are made before beneficiaries under a will are finally satisfied. Are promisees named as beneficiaries pursuant to contracts to do so to be regarded as creditors of the testator and his estate or simply as beneficiaries?

The Beneficiary Theory

According to what will hereinafter be referred to as the "beneficiary theory" a promisee under a contract to devise or bequeath has nothing more than a right to be named as a beneficiary in the promisor's will.[4]

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1 Dillon v. Public Trustee of New Zealand [1941] A.C. 294.

2 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82; [1972] 1 All E.R. 621; [1972] 2 W.L.R. 481.

3 Dillon v. Public Trustee of New Zealand [1941] A.C. 294, 303, Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82.

4 See Dillon v. Public Trustee of New Zealand [1939] N.Z.L.R. 550 per Smith J. dissenting in the Court of Appeal, and [1941] A.C. 294. See also Re

Once the promisor, the testator, has gone through the formality of naming the promisee as beneficiary in his will in respect of the asset, the subject-matter of the contract, he has fulfilled his obligation.[5]

> 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 . . .[6]

The promisee having been named as a beneficiary in the testator's will will then be subject to the normal disabilities of one who is a beneficiary under a will. He may be subject to the doctrine of lapse[7] and will certainly be subject to the jurisdiction of the court to make family provision orders.[8] Thus Street J. said in *Re Seery and Testator's Family Maintenance Act*:[9]

> Where that which is promised is the making of a will in a stated form (irrespective of whether the promise is in some such terms as 'I will leave you Blackacre in my will' or 'I will insert in my will a clause leaving you Blackacre') there is no unqualified warranty by the promisor that the gift will take effect. In particular the promisee does not, upon such promise being made to him, thereby acquire such an equity or interest in the property as to render the will a mere further assurance to him. His 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.

If, during his lifetime, the promisor, having contracted to devise or bequeath a particular asset to the promisee, disposes of that asset thereby incapacitating himself from performing his promise, the pro-

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Richardson's Estate (1934-1935) 29 Tas L.R. 149 per Clark J. and, semble, per Crisp J., Re Seery and Testator's Family Maintenance Act [1969] 2 N.S.W.R. 290, Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82 per Lord Simon of Glaisdale dissenting and cf. In re Brookman's Trust (1869) L.R. 5 Ch. App. 182.

5 Ibid.

6 In re Brookman's Trust (1869) L.R. 5 Ch. App. 182, 192 per Giffard L.J.

7 In re Brookman's Trust (1869) L.R. 5 Ch. App. 182, McDonald v. McDonald (No. 2) (1935) 35 S.R. (N.S.W.) 463. The doctrine of lapse may not apply where the promise is not personal to the promisee but is to operate in favour of the promisee's personal representatives in the event of his premature death: Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85.

8 See note 4 above.

9 [1969] 2 N.S.W.R. 290, 295.

misee will have an action for damages for anticipatory breach of contract.[10] The measure of his damages—prima facie, the value of the benefit he should have received under the promisor's will—will be affected by three factors: the damages will be reduced to take into account the acceleration of the benefit[11] and also, if the benefit of the contract is personal to the promisee, to take into account the contingency of his failing to survive the promisor;[12] the damages will also be reduced to take into account the possibility of the application of any relevant Testator's Family Maintenance legislation.[13]

If the testator dies not having disposed of the asset in the promised manner the promisee will be able to sue for damages[14] but, as before, the measure of his damages will be affected by the possibility of a redistribution (had the promise actually been fulfilled) as a result of the application of Testator's Family Maintenance legislation.[15]

If the testator/promisor dies insolvent it follows from an application of the beneficiary theory that the promisee would receive nothing whether the testator has fulfilled his promise or not. If the testator has fulfilled his promise and named the promisee as beneficiary in his will the promisee will have no claim for damages. There is no breach. He, as is the case with other beneficiaries, will be postponed to the estate creditors. If the testator has not fulfilled his promise the the promisee will, prima facie, have a claim for damages but he will have suffered no loss. Had the testator carried out his promise the promisee, it has been seen, would have received nothing anyway.

The latter consequence of the beneficiary theory would seem to be at variance with decisions such as *Eyre v. Monro*[16] and *Graham v. Wickham*[17] wherein it was held that promisees under contracts to devise or bequeath may prove as creditors of an insolvent estate.

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10 Synge v. Synge [1894] 1 Q.B. 466, Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85.

11 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85.

12 Ibid.

13 Dillon v. Public Trustee of New Zealand [1941] A.C. 294, 304-305, Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 92 per Lord Simon of Glaisdale dissenting.

14 Hammersley v. De Biel (1845) 8 E.R. 1312, Coverdale v. Eastwood (1872) 15 Eq. 121, Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85.

15 See note 13. The promisee may also have a right to specific performance but, once again, such decree would be granted subject to the possible or actual impact of the power of the court under the legislation.

16 (1857) 69 E.R. 1124.

17 (1863) 46 E.R. 188.

The Creditor Theory

According to the alternative theory of the nature of a promisee's rights under a contract to devise or bequeath—the "creditor theory" —the promisee has more than the mere formal right to be named as a beneficiary in the promisor's will. He receives under the contract a right to an effectual transfer of the relevant asset under the promisor's will. The promisor is not discharged by a formal performance of his obligation. He must effectively perform it. Thus the promisee is not to be treated as another beneficiary under the will; he is to be treated as a person having rights to the nominated benefit arising independently of the will under a contract to devise or bequeath.[18] The promisee is in the position of a creditor.[19] He will, therefore, be satisfied ahead of applicants under Testator's Family Maintenance legislation.[20] Thus in *Graham v. Wickham* Turner L.J. observed:[21]

> The words give and bequeath contained in this covenant [a covenant to give and bequeath £2,500 on specified trusts in a will] are not free from ambiguity. They may mean to give and bequeath in point of form, or to give and bequeath in point of substance, and, looking to the purpose of this covenant, there can, I think, be no reasonable doubt that the latter and not the former meaning ought to be attached to the words. In my opinion, therefore, this covenant could not be satisfied unless there were assets sufficient to answer the sum covenanted to be given and bequeathed.

If, during his lifetime, the promisor commits an anticipatory breach of his contract by purporting to alienate to another an asset which he has agreed to will to the promisee, the promisee may sue the promisor for damages. The measure of damages will be the value of the asset reduced to take into account the acceleration of the benefit and, if the benefit of the contract is personal to the promisee, to take

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18 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, Re Richardson's Estate (1934-1935) 29 Tas. L.R. 149 per Nicholls C.J., Dillon v. Public Trustee of New Zealand [1939] N.Z.L.R. 550 per Myers C.J. and Ostler J., Eyre v. Monro (1857) 69 E.R. 1124, Graham v. Wickham (1863) 46 E.R. 188, Coffill v. Commissioner of Stamp Duties (1920) 20 S.R. (N.S.W.) 278, In re Syme, Union Trustee Co. of Australia Ltd. v. Syme [1933] V.L.R. 282.

19 Ibid.

20 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, Re Richardson's Estate (1934-1935) 29 Tas. L.R. 149 per Nicholls C.J. Dillon v. Public Trustee of New Zealand [1939] N.Z.L.R. 550 per Myers C.J. and Ostler J.

21 (1863) 46 E.R. 188, 192-193.

into account the contingency of his failing to survive the promisor.[22] Injunctive relief may also be available to the promisee.[23]

If the promisor fails to honour his contractual undertaking and dies without willing the relevant asset to the promisee, the latter will be entitled to sue the promisor's estate for damages calculated by reference to the value of the asset in question.[24] Alternatively the promisee may seek a decree of specific performance and, provided such a decree will be available, will be deemed to have an equitable interest in the asset claimed which interest may, of course, be asserted as against volunteers.[25]

If at the time of his death the promisor is insolvent then, regardless of whether he has purported to leave the relevant asset to the promisee in his will or not, the promisee will be able to claim satisfaction, as a creditor, along with the other estate creditors.[26] If, however, the promise was to leave residue to the promisee the promisee will be able to claim nothing there being no residue after satisfaction of estate creditors.[27]

The Authorities

The leading case in support of the beneficiary theory of a promisee's rights under a contract to devise or bequeath is *Dillon v. Public Trustee of New Zealand*.[28] In 1933 the promisor entered into a compromise agreement with his two sons whereby he agreed (inter alia) that he would by his last will devise and bequeath his farm lands to his trustees upon trust for one son and two of his daughters in equal

22 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85, Synge v. Synge [1894] 1 Q.B. 466.

23 Ibid.

24 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85, Hammersley v. De Biel (1845) 8 E.R. 1312, Coverdale v. Eastwood (1872) 15 Eq., 121.

25 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 86, Synge v. Synge [1894] 1 Q.B. 466, 470-471, In re Edwards, MacAdam v. Wright [1958] Ch. 168, 176, 179, 181.

26 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85, Eyre v. Monro (1857) 69 E.R. 1124, Graham v. Wickham (1863) 46 E.R. 188. See generally the cases collected by Lee, *Contracts To Make Wills,* (1971) 87 Law Quarterly Rev. 358, 358-359.

27 Schaefer v. Schuhmann (1972) 46 A.L.J.R. 82, 85, Jervis v. Wolferstan (1874) 18 Eq. 18, 24. "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 (1772), 3 Swans. 404n.).": Schaefer Schuhmann (1972) 46 A.L.J.R. 82, 92 per Lord Simon of Glaisdale.

28 [1941] A.C. 294.

shares (subject to an annuity or rent-charge in favour of a third daughter). Subsequently the promisor remarried and made a fresh will setting out the promised provisions and disposing of any residuary estate to his wife. The testator/promisor died in 1937 and his widow applied to the court under the Family Protection Act 1908 (N.Z.) asking for further provision to be made for her out of her husband's estate. Section 33(1) of the foregoing enactment provided that—

> 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 problem for solution in the instant case was whether the jurisdiction conferred by section 33(1) allowed the court to redistribute the benefit received under the will by the son and the two daughters pursuant to the contract to devise and bequeath. At first instance Northcroft J. held that the section did allow such a redistribution.[29] The Court of Appeal, Myers C.J. and Ostler J., Smith J. dissenting, reversed Northcroft J.'s decision.[30] The Privy Council agreed, allowing the appeal, with the holding of Northcroft and Smith JJ. that the benefits given under the will pursuant to the contract were subject to redistribution.[31]

In the Court of Appeal Smith J., whose reasoning was closely followed by the Privy Council, made the following statements conformably with the beneficiary theory:

> The agreement creates no rights in the land whatever. It creates only a right to have the last will made in a particular way and the testator has made it in that way.[32]
> Put in another way, the rights of the children under the agreement, whether created for consideration or not, are rights to become devisees or beneficiaries under a will. They are not the rights of creditors or transferees.[33]

The children having received their due and having become beneficiaries under the will were subject to the Act.

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29 [1938] N.Z.L.R. 693.
30 [1939] N.Z.L.R. 550.
31 [1941] A.C. 294.
32 [1939] N.Z.L.R. 550, 565.
33 Ibid.

In the Privy Council Viscount Simon L.C. said:

> There can be no dispute or doubt that the lands left to the children form part of the testator's estate, and the children are bound to accept the position that the provision made for them is liable to be reduced by order of the court in favour of their step-mother, unless, indeed, their claim on the estate could be regarded as constituting a debt which has to be discharged before benefits are distributed. But these devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator's estate. The testator has done what he contracted to do, namely, to make the testamentary provisions defined in . . . the agreement.[34]

It was pointed out, however, that the

> interposition of the court should take place, of course, only after considering all relevant circumstances, and among these circumstances may be the fact that the testator was under obligation to third parties.[35]

The earlier decision of the Supreme Court of Tasmania in *Re Richardson's Estate*[36] seems to support *Dillon's* case.[37] In the former case Clark J. and, it seems, Crisp J., agreed that a contract to devise or bequeath could not have the effect of excluding Testator's Family Maintenance legislation from its subject-matter. Nicholls C.J., however, supported the view that a promisee under a contract to devise or bequeath is to be regarded as an estate creditor having rights independently of any will. His rights must be satisfied before any redistribution can be effected pursuant to the legislation.

> 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.[38]

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34 [1941] A.C. 294, 302-303. It is significant that cases such as Re Richardson's Estate (1934-1935) 29 Tas. L.R. 149, Eyre v. Monro (1857) 69 E.R. 1124, Graham v. Wickham (1863) 46 E.R. 188, Coffill v. Commissioner of Stamp Duties (1920) 20 S.R. (N.S.W.) 278, and In re Syme, Union Trustee Co. of Australia Ltd. v. Syme [1933] V.L.R. 282 were neither cited to nor by the Privy Council.

35 [1941] A.C. 294, 301.

36 (1934-1935) 29 Tas. L.R. 149.

37 [1941] A.C. 294.

38 (1934-1935) 29 Tas. L.R. 149, 155.

In *Schaefer v. Schumann*[39] the Privy Council refused to follow *Dillon's* case[40] and, accepting the creditor theory of a promisee's rights under a contract to devise or bequeath, refused to countenance any possible redistribution of benefits received under a will pursuant to such a contract.

In his will the testator left a legacy of $2,000 to each of his four daughters and then directed that the residue of his estate should be divided equally amongst his three sons. A codicil was subsequently executed in which the testator disposed of his cottage and its contents to his housekeeper. After the testator's death his four daughters made applications to the court under the Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 (N.S.W.) section 3(1) of which provides that

> If any person (hereinafter called 'the Testator') . . . 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 . . .

It was argued on behalf of the housekeeper that she had received her benefit under the will pursuant to an enforceable contract to devise and that therefore the court had no jurisdiction under the legislation to order a redistribution of her benefit. The facts revealed that the codicil had been prepared on the testator's instructions during the month following the first employment of the housekeeper. The solicitor who drafted the codicil sent it by post to the testator for his perusal. The testator, whose eyesight was poor, asked the housekeeper to read the codicil to him. Some short time later when the time came for the testator to pay the housekeeper her wages he told her that he did not propose to pay her any more wages because he had left her the cottage. No further wages were in fact paid and the testator died some five months later.

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39 (1972) 46 A.L.J.R. 82.
40 [1941] A.C. 294.

It was held at first instance[41] and in the Privy Council (Lord Simon of Glaisdale dissenting) that there was an enforceable contract between the housekeeper and the testator.[42] The more interesting question of the application of the legislation then arose.

The primary judge, Street J.,[43] considered himself bound by *Dillon v. Public Trustee of New Zealand*.[44] His Honour refused to distinguish *Dillon's* case[45] on the ground that the legislation in the instant case, unlike the legislation in *Dillon's* case,[46] contained a provision giving the contents of an order under the legislation the same effect as if they had been incorporated in a codicil.[47] Presumably it had been argued that the impact of this provision was to prevent the courts doing what the testator himself could not have done by codicil in breach of contract. The Privy Council considered that Street J. was right in refusing to distinguish *Dillon's* case[48] and held that the latter provision "only emphasizes and makes explicit what would be implicit in the Act if it were not there".[49] Street J. thus felt free to order a redistribution of the benefit represented by the cottage and its contents and directed that the housekeeper should not receive the cottage which was worth $14,500 but $2,000 plus $300 in lieu of unpaid wages.

On appeal, the Privy Council by a majority, Lord Simon of Glaisdale dissenting, considered that no redistribution of the devised benefit

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41 Re Seery and Testator's Family Maintenance Act [1969] 2 N.S.W.R. 290.

42 The majority were prepared to accept Street J.'s view that an enforceable contract to devise existed on the ground that the terms of the codicil constituted a contractual offer which was turned into a binding contract by the housekeeper continuing to serve the testator, the codicil being a sufficient memorandum for the purposes of the Statute of Frauds. Alternatively it was put that the contract did not materialize until the testator, having executed the codicil which was previously read over by the housekeeper, told her that, as he had left her the house by will, he was not going to pay her further wages and she acquiesced in the arrangement; on the latter view the agreement would have amounted to a contract not to revoke a gift provided the promisee continued to serve the promisor until the latter's death and no memorandum would have been necessary.

43 See [1969] 2 N.S.W.R. 290.

44 [1941] A.C. 294.

45 Ibid.

46 Ibid.

47 Testator's Family Maintenance and Guardianship of Infants Act 1916-1954 (N.S.W.), s. 4 (1). Cf. Testator's Family Maintenance Act 1939-1962 (W.A.), s. 6.

48 [1941] A.C. 294.

49 (1972) 46 A.L.J.R. 82, 88.

was possible under the legislation.[50] In reversing the decision at first instance and in refusing to follow its earlier decision in *Dillon's* case[51] the Privy Council held that one who takes a benefit under a will pursuant to a contract to devise or bequeath is to be regarded as being in the position of an estate creditor. As such he or she is entitled to be satisfied ahead of ordinary beneficiaries and applicants under Testator's Family Maintenance legislation.[52] The ramifications of the creditor theory were considered and Lord Cross, who delivered the advice of the majority, suggested that certain anomalies flow from an adoption of the beneficiary theory.

Lord Cross's objections to the beneficiary theory of a promisee's rights under a contract to devise or bequeath were basically two-fold. His Lordship thought that on a strict application of the latter theory a promisee would be better off if the promisor were in breach of contract during his lifetime[53] or if the promisor were insolvent at the time of his death.[54]

If a testator were to die insolvent then, according to Lord Cross's interpretation of the beneficiary theory, the promisee could seek pro rata satisfaction of his claim. If, on the other hand, the testator died solvent the promisee might, prima facie, claim the asset left to him in the testator's will but lose it because of a redistribution under Testator's Family Maintenance legislation. Therefore, Lord Cross suggested, the promisee under the beneficiary theory is better off where the testator dies insolvent. But it is respectfully suggested that the foregoing reasoning is based upon a misconception of the nature of the beneficiary theory. According to that theory the promisee is entitled to be treated only as a beneficiary. If therefore the testator were to die insolvent the promisee, as a beneficiary or being entitled to be treated as no more than a beneficiary, would be postponed to the creditors and would receive nothing. If the testator dies solvent the promisee is entitled as a beneficiary to his benefit under the will but will take it, as will other beneficiaries, subject to the application of the legislation.[55]

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50 (1972) 46 A.L.J.R. 82.

51 [1941] A.C. 294.

52 The Privy Council did suggest that contracts made "with a view to excluding the jurisdiction of the court under the Act" may be treated differently: (1972) 46 A.L.J.R. 82, 88. Cf. Gardiner v. Boag [1923] N.Z.L.R. 693 and Parish v. Parish [1924] N.Z.L.R. 307.

53 (1972) 46 A.L.J.R. 82, 86.

54 Ibid.

55 See The Beneficiary Theory above.

Lord Cross's other objection that, under the beneficiary theory, the promisee is in a better position where the promisor is in breach of his promise is more compelling. Lord Cross argued that the promisee might be better off if the testator were to break his contract by selling the property in question in his lifetime than if he were to keep 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 legislation. The answer provided in *Dillon's* case[56] that any damages which the promisor might be ordered to pay would be assessed in the light of the possibility of the exercise by the court of its jurisdiction is impractical: "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."[57] What if the promisor in breach were a twenty-five year old bachelor?

Next, according to the New South Wales enactment the jurisdiction to make family provision orders arises only where the testator "disposes of his property by will" so as not to make adequate provision for the proper maintenance and support of his dependants.[58] If the testator leaves the property the subject of the contract to his dependants the promisee may be better off than if the testator had left that property in accordance with his contract. The promisee in these circumstances may claim specific enforcement of the contract (and thus an interest in the property) free from any qualification relating to the contingency of family provision orders. The jurisdiction to make such orders cannot, on the given facts, arise because any lack of adequate provision for the dependants arises not from the dispositions of the will which are satisfactory but from the promisee's insistence upon his rights under the contract.[59]

In support of the creditor theory, Lord Cross pointed out that "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

56 [1941] A.C. 294.

57 (1972) 46 A.L.J.R. 82, 86.

58 Testator's Family Maintenance and Guardianship of Infants Act, 1916-1954 (N.S.W.), s. 3 (1). Cf. Testator's Family Maintenance Act, 1939-1962 (W.A.), s. 3 (1).

59 (1972) 46 A.L.J.R. 82, 86.

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 s. 4(1)[60] 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."[61]

Lord Cross cited *Coffill v. Commissioner of Stamp Duties*,[62] *In re Syme, Union Trustee Co. of Australia Ltd. v. Syme*[63] and the judgment of Nicholls C.J. in *Re Richardson's Estate*[64] as authorities in support of the creditor theory of the rights of a promisee under a contract to devise or bequeath and finally declined to follow *Dillon's* case.[65] Thus the housekeeper, Mrs. Schaefer, kept the cottage and its contents free from the effect of the family provision order made by the primary judge.

Lord Simon was not deterred by authorities wherein the question of the conflicting interests of promisees and dependants in the light of Testator's Family Maintenance legislation had not arisen. His Lordship dismissed the view of Nicholls C.J. in *Re Richardson's Estate*[66] as a minority view and followed *Dillon's* case.[67]

In his illuminating judgment Lord Simon dwelt mainly upon the social policy aspects of the dispute. His Lordship argued that the promisee ought not to be placed in a more advantageous position than the testator's dependants who may have equal claims upon estate assets. The promisee's contractual or equitable rights should fall to be considered along with the dependants' statutory rights. 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, should 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. In short the best way to resolve a dispute

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60 See note 47.

61 (1972) 46 A.L.J.R. 82, 85.

62 (1920) 20 S.R. (N.S.W.) 278. In this case the Full Court considered that executors were entitled to deduct the sum of £5,000, the subject of a contract to bequeath, from the estate of the testator as a debt actually due and owing by him.

63 [1933] V.L.R. 282. In this case Lowe J. considered the competing theories and decided in favour of the creditor theory.

64 (1934-1935) 29 Tas. L.R. 149 especially at p. 155.

65 [1941] A.C. 294.

66 (1934-1935) 29 Tas. L.R. 149.

67 [1941] A.C. 294.

as to priority as between purchasers from the testator and the testator's dependants is not to give one party or group automatic priority over the other but to make the dispute the subject of judicial discretion. Undoubtedly Lord Simon's solution provides, in social terms, the most desirable result. As for remaining anomalies Lord Simon said that

> 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.[68]

Thus Lord Simon was content to dismiss the appeal from Street J.'s decision at first instance.

Conclusion

The creditor theory of the rights of a promisee under a contract to devise or bequeath has now become entrenched in the common law. Thus it is not now open to courts to make orders pursuant to Testator's Family Maintenance legislation affecting willed property the subject of contracts to devise or bequeath. The creditor theory commands the weight of authority and has the practical advantage of being easy to apply in the context of the problem discussed in this article. The beneficiary theory is difficult of application, does lead to anomalous results, and is probably not in accordance with the intentions of the contracting parties who would more likely contemplate a substantial or effectual rather than a merely formal conferment of benefits. But the beneficiary theory has one outstanding virtue which is lacking in the creditor theory: it leads to the result that the terms of a dispute as to priority between a promisee under a contract to will and dependants of the promisor are not resolved automatically and perhaps unjustly in favour of the promisee. The dispute is committed to judicial discretion where the circumstances and the merits of each case may be investigated fully with a view to producing a just and socially desirable result.

It is not known how frequently contracts to devise or bequeath are entered into. Perhaps they are not sufficiently frequent to make legislative amendment a matter of urgency. Certainly disputes such as came before the courts in *Dillon's* case[69] and *Schaefer v. Schuh-*

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68 (1972) 46 A.L.J.R. 82, 92.
69 [1941] A.C. 294.

mann[70] would be rare. But a desire to produce a piece of legislation which is productive of satisfactory results as far as is reasonably conceivable, may make the introduction of some amendment to the Testator's Family Maintenance Act 1939-1962 worthwhile. Section 2 should be amended so as to incorporate a definition of "Estate" in, say, the following terms: "shall include any property the subject of any contract entered into by the testator during his lifetime wherein the testator contracted to confer any benefit upon another or others by will: Provided that title to such property shall be vested in the testator immediately before his death."

Finally, it may be that some thought should be given to recasting the pivotal provision of the Act, section 3(1), with a view to widening the jurisdiction of the court to make family provision orders. Thus the court should not be confined to making orders where a testator has made inadequate provision *in his will* but should be free to make orders *in all cases* where, from a deceased's estate, dependants have received inadequate provision. It may be the case that an intestate distribution leads to some inadequate provision being made for a deserving dependant. A testator may himself have made adequate provision for dependants in his will but some outside factor, for example the enforcement, under the current law, by a promisee of the testator's promise to devise or bequeath, may result in a dependant receiving inadequate provision and thus make the availability of the jurisdiction desirable.

IAN HARDINGHAM*

70 (1972) 46 A.L.J.R. 82.

* *Lecturer in Law, Monash University.*