1919
*Oct. 21.
*Nov. 10.

JANET McBRATNEY (DEFENDANT) . . APPELLANT;

AND

SADIE McBRATNEY (PLAINTIFF) . . . . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Husband and wife—Will by husband—Relief to wife—Discretion of the court—Intestacy—"The Married Women's Relief Act," Alta. S. 1910, 2nd sess., c. 18, ss. 2 & 8.

The discretion conferred on the court in favour of the widow, who applies for relief under "The Married Women's Relief Act," is restricted, by implication, to the portion of her deceased husband's estate which she would have received on an intestacy. Idington J., contra.

Judgment of the Appellate Division (1919), 48 D.L.R. 29; [1919] 2 W.W.R. 685, reversed

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming upon an equal division of the court, the judgment of the trial Judge, Stuart J.(2), and awarding the respondent a sum of $10,198 by way of relief.

The material facts of the case are fully stated in the judgments now reported.

C. T. Jones K.C. for the appellant.
M. B. Peacock for the respondent.

THE CHIEF JUSTICE.—I have no doubt as to the intent and meaning of the statute in question on this appeal. It reads as follows:—

1. This act may be cited as "The Married Women's Relief Act."

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) (1919), 48 D.L.R. 29; [1919] 2 W.W.R. 685, at p. 690.
(2) (1919) 45 D.L.R. 738; [1919] 2 W.W.R. 685.

the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The legislature of Alberta had decided that under the conditions with which it was dealing in that Province the widow of a man dying intestate was entitled to receive as her share of the distributable estate of her husband one half. The statute now before us for construction seems to me simply to mean that the widow shall not be deprived of this statutory right but that if the husband by his will has attempted so to deprive her she may apply for relief to one of the Justices of the Supreme Court who may grant her such relief as he may determine is "just and equitable in the circumstances."

On such application the question immediately arises whether there is any and what limitation on this power given to the judge. Is he limited in its exercise by the amount of the statutory provision made for the widow in cases of intestacy, namely one half of the distributable estate of the husband or not; may he allow her without any limitation what he determines is "just and equitable in the circumstances" up to the full amount of the husband's distributable estate.

I think the legislature in determining the widow's share of her husband's estate in cases of intestacy has, in this new statute quoted above, imposed that limitation upon the judge's discretion and that he cannot allow her more than this statutory provision in cases of intestacy.

I cannot put the point more clearly or concisely than it is stated by Chief Justice Harvey in the Court of Appeal where he says:—

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Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property. I agree with Mr. Justice Walsh that such an anomaly could scarcely have been intended.

I fully concur with this conclusion of the Chief Justice and am of the opinion the order of the trial judge on this application must be set aside because it ignores the statutory limitation of the widow's rights in cases of intestacy and is in excess of the jurisdiction given to the judge by the statute.

Then the question arises what proportion of the half of the husband's distributable estate should be allowed the applicant. Should she be allowed up to the full amount of her rights in cases of intestacy or a smaller amount and if so what. The trial judge under a mistaken construction of his powers allowed her more than the full amount she would be entitled to in case of intestacy. Two of the learned judges of the Court of Appeal agreed with him alike as to his powers and as to the amount he allowed. In these circumstances I think, without attempting to deal with the evidence and fix the allowance in this Court, full justice will be done by reducing the amount allowed by the trial judge to the statutory provision in cases of intestacy, namely one half of the distributable estate; that being the full amount I conclude the Court is entitled to give under the statute.

I would therefore allow the appeal, set aside the judgment below and allow the widow one half of the distributable surplus of her husband's estate and would refer the case back to the Appellate Division of Alberta to give effect to our judgment.

Appellant's costs throughout should be paid out of the estate.

IDINGTON J.—The Legislature of Alberta in 1910, by an Act entitled "The Married Women's Relief Act" sections 2 and 8 thereof, enacted as follows:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The respondent is the widow of the late Robert Thomas McBratney who by his last will and testament devised and bequeathed unto the appellant Janet McGregor McBratney, all his real and personal estate and declared therein that he had made ample provision for his wife by transferring to her certain real properties in the City of Calgary.

The respondent, after a fruitless and expensive suit instituted by her to set aside the will, made an application under said section 2, quoted above, for such relief as the Act provides may be given.

Mr. Justice Stuart who heard the application, found that the properties held by the said widow produce about $25.00 a month, after deducting expenses; that she got about $1,000 insurance on her husband's life; and that the estate devised and bequeathed was probably worth $18,000. Out of this estimated value of the estate would have to be paid succession duties, the costs of the litigation brought about by respondent alone at least $2,000 and debts and expenses of administration.

Inasmuch as there was only one child, issue of the marriage, surviving, the widow would, in case of intestacy, have received half of the estate.

There is therefore ground for the application under

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the Act even if property held by the widow is to be reckoned with.

On the application the learned judge allowed the respondent $10,198 as a first charge on the estate.

He seemed to estimate she should have an annuity of $720 a year payable half yearly in addition to the revenue from the property and insurance monies she had got.

He proceeded on the theory that she should get a lump sum that would produce such an annuity—being what he says looking at the annuity tables it would cost. I think if we use common knowledge of the rate of interest in that province she thus gets an income of more than the husband's earnings in health, and income from real estate, at the time of the death combined, which had been found sufficient for the support of both of them.

With great respect, that does not seem to me to be the exercise of a reasonable discretion such as we are pressed with by the argument of respondent's counsel that it was.

Nor do I think, if regard is had to the position of the sister who is devisee of the estate and whose earning capacity may terminate ere long and she be left penniless, or nearly so, that such a disposition would, in the language of the statute, be "just and equitable in the circumstances."

If an equal division between those concerned of the estate left after paying all costs and all other expenses and charges, which would be what the widow would have got if her husband had died intestate, had been made, I do not think there would have been much room for successful argument on this appeal.

Or even if the annuity, which the learned judge suggested, had been given the respondent for life, as

a charge upon the estate, I should not have felt disposed to interfere, though possibly I might not, if trial judge, have given respondent as much.

In the first named alternative she would have got what the law has held for ages to be just under any circumstances; and hence, in the circumstances to be dealt with herein, possibly *primâ facie* just and equitable.

That is only after all perhaps a rough measure of justice but it has stood so long as being according to the conscience of our English race just and equitable that I do not think it should be discarded entirely in a case that presents such circumstances as this case does, and protects respondent thereunder in a way that seems ample seeing what she has already got.

I am not prepared to hold as two of the learned judges of the Appellate Division do that the line so drawn is one limiting the jurisdiction.

It is a line that should be given due weight and possibly be adhered to as not inconsistent with what is "just and equitable" when the circumstances are such as exist here, for our consideration.

But in many cases from conceivably an innumerable variety of circumstances such a line would neither be just nor equitable. It would give in many too little and in many more too much. I am not prepared to sanction any such doctrine, as being what the legislature intended as either the limit of this new jurisdiction or a *primâ facie* rule to be adopted.

The far reaching evil consequences of such a doctrine being established as law would, both in a social and economic sense, transcend what I would submit any of us can correctly appreciate.

I doubt if any one possessed of the necessary intelligence and of calm judgment, and the results of

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profound study of the problem, has ever proposed what is now seriously contended to be the established rule.

I say "established rule" for if we hold it is implied in the statute as a limit of the jurisdiction it may be said with equal force by others that it must be held an implication of what is just and equitable in the circumstances in any given case. If that was what the legislature intended it was manifestly easy to have said so. But it has not.

Is the reprobate husband of very small or moderate means entitled to give two thirds, or say a dollar more than the one half of his estate to some undeserving object and leave his wife practically penniless, a widow with children of tender years? Half of such an estate might leave the widow and children in poverty and distress when the circumstances might clearly demand that the entire estate should be given the widow to keep herself and children who depended on her alone. Yet in such a case the judge, according to the pretension put forward could not do that which would be "just and equitable."

Or is the millionaire who may have had the misfortune of being wedded to a dissolute wife bound to leave her half of his estate, or anything, or alternatively to be debarred from bestowing his fortune, on those deserving to receive his bounties, or giving it to public charities to promote the welfare of his fellow men?

I merely suggest these extreme cases to illustrate the possible consequences of interpreting the statute, as furnishing an intention of fixing a hard and fast line as to jurisdiction, and thereby possibly suggesting the implication goes much further than a jurisdictional limit which is not given.

The implication so found for one purpose can be

so easily found for another if the judicial sense would so lean in some case that did not disclose any repulsive features in adopting that innocent looking view.

Any one who has studied how legislation of the simplest and most reasonable character has become by slow steps the instrument of injustice, must feel how dangerous it is to depart from the plain ordinary meaning of the language used in this enactment. Can there be a doubt that the legislature when confronted with the problem of protecting the wife against the harsh conduct of a husband by his will leaving her unprovided for, had decided first to let her abide by the limits laid down in the Statute of Distribution, if the husband died intestate, or if by his will he had given her what she might have got in such a case, and then default either such event to give her means of relief? A husband who made no will or made one that was in accord with what the law as the exponent of the public conscience on the subject, had long held reasonable or the embodiment of the wife's reasonable expectations, clearly was deemed to have so acted in accord therewith as not to permit his conduct being reviewed.

A failure in that regard was evidently deemed by the Legislature such *primâ facie* evidence of ill feeling and evil conduct on the part of a deceased husband as to entitle the wife to apply to the court.

In such a case the entire burden was cast upon the court without restriction, if plain language means anything, of deciding whether or not she had reason to complain; and next if she had, how far she was entitled to the rectification of any wrong done her, by taking out of the husband's estate for her benefit so much as might be "just and equitable in the circumstances."

The burden so cast on the court was one of the

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heaviest conceivable, I imagine, and must be faced in each case as the plain language indicates.

The suggestion that such a complicated subject matter as the distribution of a man's estate "in the circumstances" is to depend wholly on the peculiar views of the learned judge who happens to hear the case and his decision is to be final, would lead to curious results.

I cannot imagine that such was ever the intention of the legislature.

The amount in controversy in this case gives us jurisdiction, in my opinion, freed from any difficulties such as have arisen in other cases as to some orders made, merely as a matter of discretion.

I think the appeal should be allowed with appellant's costs out of the estate and that the appellants may elect and determine whether or not the relief will take the form of an annuity to the widow for her life to be charged on the estate and that form of security to be changed if need be from time to time by leave of the Supreme Court of Alberta, in case in the administration of the estate such a course is desirable; or that the line of relief be the half of the nett residue of the estate after all costs heretofore incurred, or to be incurred, and all other expenses and outgoings in the administration of the estate have been satisfied.

DUFF J.—This appeal turns upon the construction of certain clauses in an Act entitled "The Married Women's Relief Act" which is ch. 18 of the statutes of 1910 of the Province of Alberta. The material clauses are these:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the Judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

9. Any such allowance may be by way of an amount payable annually or otherwise, or of a lump sum to be paid * * *

Two interpretations of this enactment are proposed. According to the first the Act leaves unfettered the discretion of the court as regards the share of the estate to be allotted to the applicant provided the condition of jurisdiction is satisfied by which the authority of the court to intervene only arises when in the opinion of the judge the widow receives under the will less than she would have received if the deceased husband had died intestate. According to the second, assuming jurisdiction to be established, the court is not invested with power to deal with the whole of the estate but only with such aliquot part of it as the applicant would be entitled to in a case of intestacy and to making provision in her relief limited in amount to the value of such part.

The second of these views was adopted by the Chief Justice and Mr. Justice Scott, the first prevailing with Mr. Justice Stuart who presided at the hearing of the application and Mr. Justice McCarthy and Mr. Justice Simmons in the Appellate Division. On the whole I think the weight of argument favours the view of the Chief Justice and Mr. Justice Scott.

The consideration that was most emphatically pressed in favour of the construction which leaves it in the discretion of the court to apply the whole or any part of the estate in satisfaction of the widow's claim, according as justice and equity may appear to dictate, rests upon the words of section 8 which empowers the court to

make such allowance * * * out of the estate * * * disposed of by will as may be just and equitable.

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These words it is said are unambiguous and have the effect of placing the whole of the deceased husband's estate at the disposition of the court for the purpose of providing for the widow in such a manner as the court may think right—leaving it to the court, as regards the property affected by the testamentary disposition, to remake the testator's will.

I am not in agreement with the view that this is the only construction of which section 8 is capable. Section 8 must, I think, be read with section 2 which is imported by the phrase "on any such application"—defined by section 2 as an application to the Supreme Court "for relief." Relief in respect of what? Relief obviously in respect of a greviance of the applicant arising out of the fact that by the will of her husband she has received less than she would have received under a division of his estate resulting from intestacy. The function of the court, therefore, under this statute is to grant relief in respect of this state of facts in such manner and degree as may be just and equitable and that function of the court is restricted to granting relief to the widow. This authority—by its own implications — seems to be one which necessarily becomes exhausted the moment the ground of the widow's complaint is removed, that is to say when the share to which the widow would have been entitled under an intestacy is given to her. Consequently I am, as I have already remarked, unable to agree that the words of section 8 are incapable of a meaning supporting the construction of the act which ascribes to the court the more restricted authority.

It is nevertheless not to be disputed that the rival construction is also a construction of which these provisions are reasonably capable and the point for determination is which of these two is the preferable?

Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it; for as Lord Selborne pointed out in *Caledonian Railway Co.* v. *North British Railway Co.*(1), that which is within the spirit of the statute where it can be collected from the words of it is the law, and not the very letter of the statute where the letter does not carry out the object of it. See *Cox* v. *Hakes*(2); *Eastman Co.* v. *Comptroller General* (3).

Now the second section appears to me to express sufficiently the object of these provisions. That object is clearly implied, I think, in the condition which is laid down as the very basis of the jurisdiction which enables the court to intervene, the condition requiring that the judge who hears the application must be satisfied, that the share of the widow under the husband's will falls short of the share she would have been entitled to under an intestacy. This condition failing, the machinery for relief provided for by the statute does not come into operation and the implication appears to be that, according to the theory of the legislator, where the share under the will does not fall short in value of the share under the rules governing intestacy, justice is satisfied, so far as it is within the function of the legislator to see that justice is satisfied; this

(1) 6 App. Cas. 114. (2) 15 App. Cas. 506 at p. 517.
(3) [1898] A.C. 571, at p. 575.

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condition being observed, further interposition as between the testator and the natural objects of his bounty would be according to the theory of the legislator unwarranted or undesirable. It follows that the allowance made by Mr. Justice Stuart exceeded the limits set by the statute to the power of disposition conferred upon the court.

In deciding what disposition ought to be made pursuant to the statutory direction to make just and equitable provision for the widow, I have discovered no reason for thinking that the respondent should not receive an allowance equivalent to that to which she would be entitled had her husband died intestate; and accordingly I think an order should be made directing that she is entitled to one half of the distributable surplus of the estate.

The case should be referred back to the Supreme Court of Alberta to carry this declaration into effect.

ANGLIN J.—Section 2 of "The Married Women's Relief Act," I think makes it reasonably clear that the intent of the legislature in passing this remarkable statute was to enable the court to relieve a widow from the consequences of her deceased husband having by his will attempted to deprive her, in whole or in part, of the rights she would have had in his estate had he died intestate. That being the mischief to be remedied, I am not prepared to place on the language of section 8—broad and general as it undoubtedly is—a construction which would vest in the courts the extraordinary power of disposing of the deceased husband's estate to any greater extent than is necessary to set right whatever wrong or injustice to his widow would otherwise result from his having made a will instead of allowing the law to effect the distribution of his estate.

In re *Standard Manufacturing Co.*(1); *In re Boaler*(2); *Watney Co.* v. *Berners*(3). As the learned Chief Justice of Alberta says:

> Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property? I agree with Mr. Justice Walsh that such an anomaly could scarcely have been intended.

The discretion conferred on the court in favour of the widow, in my opinion, is restricted to the proportion of her deceased husband's estate which she would have received on an intestacy. The court may, where the circumstances render it just and equitable to do so, give her less: it cannot, in my opinion, give her more.

While I should have preferred to send this case back to the provincial courts to determine what sum, not exceeding one half of the value of the estate, it may be "just and equitable in the circumstances" that the applicant should receive, in order to put an end to this deplorable and wasteful litigation I accede to what I understand to be the view of the majority of my learned brothers that we should now determine this question as best we can upon the material in the present record. Three judges of the Alberta Supreme Court, proceeding under the impression that the discretion of the court was unfettered and unlimited, have determined that it would be just and equitable in the circumstances that the widow should receive an amount exceeding one half of the value of the estate. It is therefore quite apparent that if they had understood the power of the court to be restricted as I incline

(1) [1891] 1 Ch. 627, at p. 646. (2) [1915] 1 K.B. 21.
(3) [1915] A.C. 885, at p. 891.

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to think it is, these learned judges would have exercised that power to its fullest extent and have allowed to the applicant one half of her husband's net estate—the full amount to which she should have been entitled to on an intestacy. We are without any expression of opinion on this aspect of the case from the two members of the Appellate Division who took the view of the construction of the statute which, in my opinion, should prevail. I think our duty will be best discharged by treating what has been done by the learned trial judge and the two judges of the Appellate Division who agreed with him as a determination that in the exercise of a sound judicial discretion it is just and equitable that the applicant should receive one half of her husband's estate. Had the provincial courts actually so determined, under the view of the statute which I take upon the evidence in the record I would not have been disposed to interfere with the discretion so exercised.

I would therefore allow the appeal and direct a judgment declaring the widow entitled to receive one half of her husband's net estate. What that will amount to can best be determined after the administration has been completed and all questions as to the extent of the assets and liabilities have been disposed of.

MIGNAULT J.—I think what I may call the policy of the Alberta statute, "The Married Women's Relief Act," chapter 18 of the statutes of 1910, is that the relief which the court may grant to the widow should not put her in a better position than if she had taken a share in her husband's estate under an intestacy. No doubt the language of section 8 is extremely broad, but I think that section 2 is the controlling section and that in the exercise of a sound judicial discretion

the court should not grant to the widow an allowance exceeding the share she would have taken if her husband had died intestate. In this case, had there been an intestacy, the respondent would have received one half of the net proceeds of her husband's estate, and in my opinion she should not be granted more.

I feel some doubt whether or not the respondent has in fact been allowed more than a half share of her husband's estate. The learned trial judge, who granted the respondent $10,198.00 or an annuity of $720.00, stated that the estate was valued in the probate papers at $25,740.00 including a disputed and still undecided claim of $7,000.00, the value of a number of horses which the testator's daughter pretends belong to her under a bill of sale. He thought that the value of the undisputed estate was probably as much as $18,000.00, probably less than that. This creates a state of uncertainty, and there has been a division of opinion among the learned judges whether or not the court could grant to the widow more than she should receive under an intestacy.

The learned trial judge, however, stated that the general principle which he always felt disposed to adopt was to so decide the matter as to leave the widow in at least as good a position as she was with respect to her maintenance and comfort when her husband was alive, as far as this can be done without unduly interfering with the rights given by will to other persons who may also have strong moral or legal claims upon the testator with respect to maintenance. I think, with deference, that this is not the principle that should govern the exercise of sound judicial discretion under this somewhat extraordinary statute. The principle stated by the learned trial judge would put the court in the position of the testator and permit it to review

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the discretion he exercised when he determined what provision should be made for his wife and other persons having moral or legal claims on him. The statute certainly does not go so far, and merely entitles the wife to relief when she receives less under her husband's will than she would have obtained had there been no will. At the most therefore the measure of relief would seem to be the share she would have received in the case of intestacy, but I do not wish to be understood as holding that that share and no lesser amount should be allowed her. But she certainly should not obtain more.

Under the circumstances, having stated what I deem to be the policy of the Act, and being unable to concur in the principle laid down by the learned trial judge, I think the case should be remitted to the trial court so that the respondent may be allowed one half of the net proceeds of the estate, appellant's costs to be charged against the estate.

Appeal allowed with costs.

Solicitors for the appellant: *Jones, Pescod & Hayden.*
Solicitors for the respondent: *Peacock & Skene.*