1944

* Oct. 24, 25.
* Dec. 20.

THE CITY OF SASKATOON..... APPELLANT;

AND

EMILY JANE SHAW..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Husband and Wife—Application by testator's widow under The Dependants' Relief Act, R.S.S. 1940, c. 111—S. 8 (1) (2)—On finding that reasonable provision not made by will for her maintenance, question as to effect of s. 8 (2) as to extent of allowance to be awarded.

On an application, under *The Dependants' Relief Act,* R.S.S. 1940, c. 111, by the widow of a testator for an order making reasonable provision for her maintenance, if the widow has satisfied the Court of the condition stated in s. 8 (1) of the Act, namely, that the testator has by will so disposed of real or personal property that reasonable provision has not been made for her maintenance, she is entitled, under s. 8 (2), to an allowance which, in the opinion of the Court, is not less than the share of the testator's estate which she would have received if he had died intestate leaving a widow and children (i.e., one-third of the estate). Rand J. dissented.

Per Rand J., dissenting: The underlying purpose and conception of s. 8 (1), which is reasonable provision for *maintenance,* is carried through into s. 8 (2), and what is envisaged is a determination "in the opinion of the Court" of what the actual maintenance of the widow—the pecuniary dimensions of her actual living—in the circumstances of intestacy would have been and to take the amount so found as the measure for determining the supplementary or original allowance called for by s. 8 (1). The Court is to exercise its judgment upon the resources that would go into actual maintenance under intestacy and to determine to what extent that would be received from the intestate share. The minimum allowance for maintenance should be what the reasonable maintenance of the widow, under the circumstances of intestacy, would have drawn from her share of the estate.

APPEAL by the City of Saskatoon from the judgment of the Court of Appeal for Saskatchewan (1) rendered on an appeal by the said appellant and others from the judgment of Anderson J. (2) on an application of the present respondent under *The Dependants' Relief Act,* R.S.S. 1940, c. 111.

Elmer Shaw, late of Abernethy in the province of Saskatchewan, died on April 6, 1941, leaving his widow (the present respondent) and no children. He left a large estate. By his will, he gave to his wife a sum of money,

(1) [1944] 1 W.W.R. 433; [1944] 2 D.L.R. 223.
(2) [1943] 2 W.W.R. 567; [1943] 4 D.L.R. 712.

*PRESENT:—Rinfret C.J. and Hudson, Taschereau and Rand JJ. and Thorson J. *ad hoc.*

his household furniture, etc., his motor car, the dwelling house on his farm for her lifetime, and an annuity. These and other provisions in his will are described in the judgments in the Courts below (above cited). His widow (the present respondent) applied in the Court of King's Bench, Saskatchewan, for relief under the said Act.

From the judgment given on the first hearing of the application an appeal was taken to the Court of Appeal and from its judgment an appeal was brought to this Court (1). This Court agreed with the construction of the Act by the Court of Appeal to the effect that s. 8 (1) of the Act sets out a condition as a basis for the jurisdiction which enables the Court to intervene and that condition requires the Court to be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates. This Court also agreed with the Court of Appeal in finding that, on the evidence before the Court, it could not be said that the deceased had by his will so disposed of his real or personal property that reasonable provision had not been made for the maintenance of his widow. This Court, however, held that leave should be given to file further material and remitted the matter to the Court of King's Bench, Saskatchewan.

Further material was filed, and the application came on for rehearing before Anderson J. in the said Court of King's Bench (2), who found on the evidence that the applicant had discharged the onus cast on her of proving that the testator had by his will so disposed of real and personal property that reasonable provision had not been made for the applicant's maintenance; and held that, by force of s. 8 (2) of the Act, the applicant was entitled to a one-third share in the estate; the will was to stand in full force and effect (including, *inter alia,* the provision for the payment of succession duties, etc., which by the will were payable out of residue) save with the variation that for the annuity given to the applicant by the will there was substituted one-third of the estate, as at the time of the testator's death, free from deductions or one-third clear. As a

(1) [1942] S.C.R. 513, where the judgments below are cited and their holdings described.
(2) [1943] 2 W.W.R. 567; [1943] 4 D.L.R. 712.

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further reason for his order, Anderson J. held that, in the exercise of his discretion under s. 8 (1) and s. 8 (2), the applicant was entitled to the allowance made as being maintenance "reasonable, just and equitable in the circumstances".

On appeal to the Court of Appeal for Saskatchewan (1), that Court found that reasonable provision for the applicant's maintenance was not made by the terms of the will, and held that, the Court being obligated to comply with s. 8 (2) of the Act, the applicant should be awarded as an allowance under the provisions of the Act one-third of the estate after payment of debts, funeral and testamentary expenses, that the award should be paid out of the residue of the estate and stand in lieu of all the benefits provided for the applicant under the will, including the provision relieving her from payment of succession duty but excluding the bequests to her of the car, the household furniture and use of the house. (The Court found that such award would amply provide reasonable maintenance).

The appellant limited its appeal to this Court to the question of whether the Court, having found the testator did by his will so dispose of real and personal property that reasonable provision was not made for the maintenance of the applicant, was bound under said s. 8 (2) of the Act to award her one-third of the estate.

G. H. Yule K.C. for the appellant.

E. L. Leslie K.C. for the respondent.

The judgment of the Chief Justice and Hudson and Taschereau JJ. was delivered by

HUDSON J.—This controversy arises out of a claim by the respondent under *The Dependants' Relief Act* of Saskatchewan, to a share of her deceased husband's estate.

The late Mr. Shaw was a prosperous farmer residing in Saskatchewan and died there, leaving an estate of a value of over $300,000. By his will he provided for his widow a life annuity of $3,600 per annum, in addition to some small specific bequests.

(1) [1944] 1 W.W.R. 433; [1944] 2 D.L.R. 223.

The Dependants' Relief Act, 1940 (c. 36), R.S.S. 1940, c. 111, provides that a dependant, i.e. wife, husband or child of a testator, may make an application to the Court for an order making reasonable provision for his or her maintenance. Section 8 defines the relief which may be granted on such application:

> 8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.
>
> (2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

Mrs. Shaw, the respondent, applied to the Court for relief. The application was heard by Mr. Justice Anderson who held that under the will the testator had failed to make reasonable provision for the maintenance of his widow and that she thereby became entitled under subsection 2 to a one-third of the estate of the deceased, free from all deductions. Mr. Justice Anderson also held, in exercise of the discretion given to him by subsections 1 and 2 of section 8, that because of the mode of accumulation of the estate of the deceased as well as other relevant facts and circumstances he was of the opinion that an allowance of one-third of the estate for the widow was reasonable, just and equitable.

On appeal, the Court of Appeal sustained the judgment of Mr. Justice Anderson in holding that the allowance provided by the will was inadequate and that the applicant was entitled to one-third of the estate under subsection 2 of section 8, but held that she was not entitled to receive this free of deductions specified in the judgment. The point as to whether or not one-third was just and equitable under all of the circumstances was not dealt with.

The appeal to this Court was brought on behalf of one of the residuary beneficiaries. It was conceded here that the amount allowed by the will was insufficient and the

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appeal was expressly limited to a question of the construction of the Act. There was no cross-appeal in respect of the deductions.

Before giving consideration to the relevant language of the statute, it will be helpful to look at the law as to the rights of widows in Saskatchewan prior to the passing of this statute.

In early territorial days the common law right of a widow to dower was abolished, but in 1910-11 the Saskatchewan Legislature amended *The Devolution of Estates Act* providing that the widow of a man who died leaving a will by the terms of which his widow would, in the opinion of the judge before whom an application was made, receive less than she would have if he had died intestate leaving a widow and children, might apply to the Supreme Court for relief, and on such application the Court might make an allowance out of the estate as should in the opinion of the judge be equal to what would have gone to such widow under *The Devolution of Estates Act.*

These provisions, with slight alterations, were reenacted in 1918-19 and in several subsequent years, lastly by a separate Act entitled *The Widows' Relief Act.* In 1919 they came before the Saskatchewan Court of Appeal for consideration in a case of *In re Baker Estate* (1), and the statement of the late Mr. Justice Lamont at pp. 112 and 113 as to the purpose and effect of the statute is worthy of quotation at some length:

> The language of secs. 11*a* and 11*g* clearly indicates an intention on the part of the Legislature to restrict the right of a man to dispose of his property by will to the exclusion of his wife.
>
> From the abolition of dower by the Territories' *Real Property Act* to the enactment of the above sections, a man living in the territory now forming this province had the power to dispose by will of all his property without making the slightest provision for his wife and children. Cases arose in which men willed away their property without making any, or sufficient, provision for the widow and cases of such hardship arose that the Legislature took steps to prevent the injustice being continued.
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> The Legislature had previously provided that in case a man died intestate leaving a widow and child, or children, one-third of his real and personal property should belong to the widow. The Act as it now stands gives the Court jurisdiction to place the widow in as favourable

(1) 13 Sask. Law Rep. 109.

a position where her husband has made a will but in which he has not left her as large a share of his property as would have been hers had he died without a will.

The first question therefore is: Did the deceased Baker by his will leave his widow one-third of his real and personal estate?

A perusal of the will shows that he did not. He left her only the income until she remarried, (if she should remarry) and even then she was directed to use that income for the maintenance of the children as well as herself. If she remarried, she lost it all.

The learned trial judge was of opinion that if a man made ample provision for the needs of his widow until she married another, whose duty it would be to provide for her maintenance, that she did not stand in need of "relief". With deference, I think he misinterpreted the language of sec. 11*a*. The "relief" for which a widow may apply to the Court is not the procuring of such a sum of money as will be sufficient to provide her with the necessaries of life according to her station. It is relief against the provisions of a will by which she has been left a lesser share of the property of her late husband than she would have received had he died intestate. If the will does not leave her the equivalent of what she would have received upon intestacy, she need not be bound by its terms but may apply to the Court for that equivalent. This is what the widow has done here, and in my opinion she is entitled to one-third of the estate.

I do not see that either she or the children would be placed in any better position if the Court gave her that share in any of the ways provided by the Act other than by way of a lump sum. I think, therefore, she should be given a lump sum.

The decision in the *Baker* case (1) was followed in subsequent cases: *In re Bursaw Estate* (2), and *Williams* v. *Moody* (3), so that it was the accepted law in that province until the Act of 1940 that a widow had an absolute right to a one-third share in her late husband's estate, save where there was available to the executors or administrators of the husband an answer or defence in any suit for alimony.

The Dependants' Relief Act, passed in 1940, is an Act to provide relief for dependents including not merely a wife but also a husband and children. Section 8 (1) includes any dependant and authorizes the Court to make an order for such maintenance as the Court thinks reasonable, *"subject to the following provisions* * * *."

The first following provision is subsection 2 which relates only to a dependant who is a wife and, in her case, provides that no allowance shall, in the opinion of the Court, be less than she would have received if the hus-

(1) 13 Sask. L.R. 109. (2) (1924) 19 Sask. Law Rep. 137.
(3) [1937] 2 W.W.R. 316.

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band had died intestate, etc. This language is the language of the provision in *The Widows' Relief Act* until then in force, as is subsection 3 of section 8.

Mr. Yule in a very careful argument contended that from section 3 and section 8 (1) it was perfectly clear that what the Legislature had in mind was to provide reasonable maintenance for the dependant, whether such dependant was a wife or otherwise, that subsection 2 could not be reconciled with a number of other sections of the Act, and that if it were given the construction of the Courts below it would create a most unreasonable situation, particularly in the case of large estates, that for these reasons the provision of subsection 2 of section 8 should be disregarded.

It does not seem to me that the Court should accede to these arguments. The language of subsection 2 of section 8 is clear. It does not create a new or unknown right but recognizes, subject only to the provisions of section 8 (1), a state of things that had existed under the law of Saskatchewan as repeatedly stated by the Legislature and the Courts over a period of thirty years. It would not be right to attribute to the Legislature an intention to reduce the pre-existing provision for the benefit of the widow, unless expressed in clear and definite language. Here the language is an affirmation and not a denial of the right.

In respect of the conflict with other sections of the Act, as pointed out by Chief Justice Martin, it may well be that these provisions are not applicable to a case where a widow is allotted one-third of the estate. But these provisions are still applicable to cases where a periodic allowance is directed, and the fact that the provisions of the statute are not applicable to an order made under section 8 (2) cannot affect the plain meaning of the words used in that section and which constitute an exception in favour of the widow.

It may be that the statute will sometimes produce unreasonable results, particularly in the case of large estates, but in enactments of this character unreasonable or unfair instances are bound to occur. The Legislature was, no doubt, legislating with an eye to the average case, and it does not appear that in such an average case in the Prov-

ince of Saskatchewan the present statute would create any undue hardship, particularly in view of what the widow would have got in that province at any time during the preceding thirty years.

I agree with the Court of Appeal. Having come to this conclusion, it is unnecessary to deal with the finding of Mr. Justice Anderson, that in any event a one-third interest would be reasonable considering the way in which the estate had been accumulated. If it had been necessary to decide this question, then I think the matter should be referred back to the Court of Appeal because we have not here the evidence upon which Mr. Justice Anderson's finding is based.

I would dismiss the appeal, costs of all parties to be paid out of the estate.

RAND J. (dissenting)—This appeal raises a question of the interpretation of *The Dependants' Relief Act*, 1940, of Saskatchewan. That Act is designed to assure provision for a minimum maintenance for dependants notwithstanding contrary testamentary disposition. Dependants include husband, wife, and children either under twenty-one years of age or unable, by reason of either physical or mental disability, to earn a livelihood.

The pertinent sections are as follows:

3. Where a person dies domiciled in Saskatchewan, leaving a will and leaving a dependant or dependants, an application may be made to the Court of King's Bench by or on behalf of any dependant for an order making reasonable provision for his or her maintenance.

8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.

(2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

13. (1) Where an order is made under this Act, then for all purposes, including the purposes of enactments relating to succession duties, the will shall have effect, and shall be deemed to have had effect as from the testator's death, as if it had been executed, with such variations as are specified in the order, for the purpose of giving effect to the provision for maintenance made by the order.

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(2) The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order, but no larger part of the estate shall be set aside or appropriated to answer by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision.

(3) A certified copy of every order made under this Act shall be filed with the clerk of the surrogate court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be indorsed on, or annexed to, the original letters probate or letters of administration with the will annexed, as the case may be.

16. No dependant for whom provision is made pursuant to this Act shall anticipate the same, and no mortgage, charge or assignment of any kind whatsoever of or over such provision made before the order of the court shall be of any force, validity or effect.

From the language of section 8 (1) it will be seen that the condition of jurisdiction to make an order is that the Court, by reason of the dispositions of the will, should find that reasonable provision has not been made for the maintenance of the dependant. With that finding made, the scope of the Court's duty as well as discretion is clearly indicated. Subsection 5 of the same section requires the Court, in addition to the other considerations laid down, to have regard to the pecuniary resources of the dependant. The legislation, therefore, is intended to operate on the estate by permitting the Courts to supplement the means of the dependant, whether arising from the will or existing *dehors*, so as to secure to him a maintenance that in the opinion of the Court will be reasonable, just and equitable in the circumstances.

The applicant here was the widow. The Court found that the will did not make an allowance to her sufficient to satisfy the requirements of section 8 (1). It then proceeded to make an order under that subsection. At this point subsection (2) entered and, in its construction of that provision, the Court held that it was bound, as a minimum sufficient in the circumstances, to award to the widow the undivided share she would have received had the husband died intestate leaving children. This, under the intestate statute, would be one-third of the net estate. The question is whether or not the Court, in so construing the provision, was right.

In its ascertainment of the preliminary question, the Court came to the conclusion that an annual allowance of $5,559.40 would have satisfied the subsection. The

will made provision for annual payments to the widow of $3,600. She enjoyed a private income of $1,200; and, disregarding certain other bequests to her, the difference between these two amounts, $5,559.40 and $4,800, was found to represent the sum by which her reasonable maintenance exceeded what, by the effect of the will, was available to her. The estate was of a gross value of $332,712.30. In addition to the annuity, there was bequeathed to the wife a legacy of $1,000, a life interest in the home, furniture valued at $750 and a motor car valued at $750. All succession duty was payable out of the residue. The award to the widow of one-third of the corpus did not, by the judgment below, displace the life interest in the home, the furniture or the automobile.

Prior to the enactment of this legislation, there had been what was known as *The Widows' Relief Act* under which the Court could and was bound to make such an award to the widow as would make up a share of the estate equal to what she would have received had the husband died intestate leaving children. There was in this statute nothing to indicate any other mode of division than that of a fractional share of the corpus, nor was there any power to make an award that would give her anything beyond that share.

It should be remarked that relief legislation of the nature of that in question, which in recent years has appeared in various parts of the world, is not intended to convert courts into will-making or will-destroying bodies. The principle that the distribution of property at death should lie not only in the right but also in the discretion and judgment of the owner, is trenched upon only within well-defined limits. What these statutes do is to enable the Court to subtract from the estate appropriated to others, sufficient to secure to certain dependants certain benefits: subject to those overriding interests, the original dispositions remain.

In the case of large estates, the construction given the subsection leads admittedly to absurdities. In the present instance, if instead of $3,600 the annuity to the widow had been fixed at $4,500, a difference which, considering her age at the husband's death, 79 years, would have had an insignificant effect upon the total distribution, the

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statute would not have become operative. And the absurdity rises as the independent means of the widow are greater. The difference of opinion between the testator and the Court as to the sufficiency of those means might be a paltry sum but it would automatically disrupt what might otherwise be considered a wise distribution of benefits. And other anomalies are disclosed in many combinations of circumstances quite within the reaches of probability.

Consistently with section 3, the controlling language in subsection (1) of section 8 is unequivocal. It is reasonable provision for *maintenance* of the dependant, whether that dependant is the widow or a child, that is the desideratum. Maintenance of a dependant does not, however, reach to that enjoyment of property which consists solely of the exercise of rights of ownership, even though, as in the case of a widow, it might be property in the accumulation of which she should consider herself to have shared. The allowance contemplated looks essentially to the living needs, in a broad sense, of the dependant and not to the creation of a rôle of owner.

The construction of the preliminary question already laid down by this Court in this same estate (1) excludes the view that, in the case of a widow, the reasonable provision must, as a minimum, be what is required by subsection (2); but it is this fact that, in applying subsection (2), leads to the seeming logical hiatus in the theory underlying the first subsection. What appears as anomalous is that provision conditioned in maintenance in subsection (1) should be followed by a discrete absolute under subsection (2). But I have come to the opinion that this apparent incommensurability lies not so much in the intention of the legislation as in misconception in the interpretation of subsection (2).

What the Court below in effect holds is that, upon the preliminary ground being established, *The Intestate Succession Act* automatically applies as a minimum for the benefit of the widow. Now, if that were so, why in the subsection should we have the language, "No allowance ordered to be made to the wife of the testator shall,

(1) [1942] S.C.R. 513.

in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children"? Why, "in the opinion of the court"? Certainly the opinion of the Court is not called into action to declare academically the unquestioned effect of the intestate law; and whatever subsection (2) may mean, it cannot, in my opinion, intend only that automatic recognition. We must give some meaning to these words but I cannot find in the judgments below that that has been done.

What, then, is the matter upon which the judging faculty of the Court is to be exercised? This involves, I think, an examination of the word, "received." It has been taken that that word means simply and exclusively "been entitled to by law"; but in a context calling for the exercise of opinion or judgment by the Court, I must attribute to it a less rigid signification.

What, under the subsection, the Court must do is to contemplate the widow in relation to her maintenance under an intestacy. The share which in those circumstances the law awards her may, and generally will, be the source of her maintenance; but it is by no means necessary that the whole of it would, in fact, serve that end. Its application to maintenance would have its limit in the total exhaustion of her share during her lifetime. The statute is dealing, however, with probabilities and these are to be forecast by the Court to which the question is submitted.

In the case of intestacy we may have the widow being "maintained" in her actual needs and requirements and even indulgences by the share the law awards her; these may be free or restricted depending upon her total resources; and, in advance, to estimate judicially the actual pecuniary measure of that maintenance is of the sort of task daily accepted in our Courts. Over and above that maintenance, however, the intestacy may have placed within her control, to do with by way of disposing or otherwise as she might please, property far in excess of what she would actually use or need. But this statute, intended to realize the substance of the widow's just and legitimate rights to security, is not concerned

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to furnish her with a substratum through which to gratify a desire to exercise formal rights of ownership or to share in the distribution of her husband's property.

The "opinion of the court" may be said to be exercised if a substantial equivalent of the widow's share under intestacy should be ascertained and granted as an allowance under subsection (1): or even if specific assets should be set aside as that equivalent. That is not, of course, what the court below did. The former would ordinarily involve the conversion of a share of bulk into periodic payments. But could the mathematics of a life annuity to be purchased by a bulk share, to be charged upon the estate, and to be paid as maintenance, be the matter of the "opinion"? I do not think so. And the moment we go beyond the undivided intestate share as such we are at large upon the proper construction of the subsection.

An analysis of subsections (1) and (2) raises a doubt as to the precise signification of the word, "allowance". That may be either the total sum which the Court finds the will should have given to complete the reasonable provision for the dependant or the amount by which the actual allowance of the will falls short of that figure. In the former sense, the full allowance being provided by order would, in cases where there is partial provision by the will, necessarily involve a substitution for what is given by the will. In the latter sense, the will is maintained *in toto* in its provision for the dependant and the supplementary allowance would be charged upon the distribution outside of that.

The condition of the application is that the Court should be of opinion that the testator "has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant". Now, there is nothing in the Act dealing with substitution and, in view of section 13, the language just quoted—where there is no question as between dependants—means essentially disposal of property to persons other than the dependant; there is no reason to touch allowances to the dependant and the failure of reasonable provision takes into account what may have been so

given. But this makes significant to the order the difference between inadequate provision in the will for the dependant and provision in the will for non-dependants.

Then, in passing to subsection (2), to ascribe to the word, "allowance", the meaning of a supplementary provision may at first sight appear to present a difficulty, but I think a closer examination dispels it. Whether the order operates with a supplementary effect or as a substitutional or original provision for the whole amount, the total allowance is in fact "ordered"; it exists by reason of the order; "ordered to be made" means made by reason of the order; the total allowance is what it is because of the order. The language is to be interpreted as if the subsection read:

> No (total) allowance (for maintenance) ordered to be made to the wife of the testator shall, in the opinion of the court, be less than (the total allowance for maintenance) she would have received if the husband had died intestate leaving a widow and children.

From this consideration of the section, it is clear to me that the underlying purpose and conception of subsection (1) are carried through into (2) and that what is envisaged is a determination "in the opinion of the court" of what the actual maintenance of the widow—the pecuniary dimensions of her actual living—in the circumstances of intestacy would have been and to take the amount so found as the measure for determining the supplementary or original allowance called for by the first subsection. The Court is to exercise its judgment upon the resources that would go into actual maintenance under intestacy and to determine to what extent that would be received from the intestate share. It would be received because it would proceed from that share to absorption in the maintenance.

Such a construction not only reconciles subsections (1) and (2) but gives meaning to all of the language of (2) and brings it within the theory that underlies the statute as a whole: it escapes the anomalies and absurdities of the alternative construction: and it carries out the intention and purpose of the legislative language of guaranteeing to the widow, in such a case, as a minimum as ample a maintenance under a will as if the husband's property had been distributed by law.

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I would, therefore, allow the appeal and send the matter back to the judge of first instance to have it ascertained by him what the reasonable maintenance of the widow, under the circumstances of intestacy, would have drawn from her share of the estate. That amount will be the minimum allowance for maintenance, and for the difference between that and the provision made by the will, an order for a supplementary allowance should be made, charged upon property otherwise disposed of, as the judge may determine. The costs of both parties in all Courts should be paid out of the estate.

THORSON J. (*ad hoc*)—The effect of *The Widows' Relief Act,* R.S.S. 1930, chap. 91, and previous legislation to the same effect was that a man could not by his will validly leave his widow in a worse position than she would have been in if he had died intestate leaving a widow and children, and that if he attempted to do so, the Court, on her application for relief from the terms of the will, would make an allowance to her equal to one-third of his estate, since this would be the amount, according to the intestacy law of the province, that would have gone to her if he had died intestate leaving a widow and children. The only fact which the widow had to prove was that her deceased husband by his will had left her less than one-third of his estate. This state of the law gave the widow an absolute right to one-third of her husband's estate notwithstanding the terms of his will. This right existed whether the husband had made reasonable provision for his wife's maintenance or not, and whatever the means of the widow might be. On the other hand, the Court had no power to allow the widow more than one-third of the estate even if this was inadequate to provide reasonable maintenance for her, no matter what the size of the estate was. Moreover, the only dependant of the testator to whom relief could be given was his widow.

The defects in this social legislation were largely met by *The Dependants' Relief Act,* 1940 (c. 36), R.S.S. 1940, chap. 111, which repealed *The Widows' Relief Act,* extended the right to relief to other dependants of the testator than only

his widow and established a new test of entitlement to relief. The nature of the test and the power of the Court to grant relief appear from section 8 (1), which reads as follows:

8. (1) If upon an application the court is of opinion that the testator has by will so disposed of real or personal property that reasonable provision has not been made for the maintenance of the dependant to whom the application relates, then, subject to the following provisions and to such conditions and restrictions as the court deems fit, the court may, in its discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as it deems proper, with payment of an allowance sufficient to provide such maintenance as the court thinks reasonable, just and equitable in the circumstances.

Two fundamental changes in the law were made. It is no longer possible for a widow to obtain relief from the terms of her husband's will merely on proof that he has left her less than one-third of his estate. She must now satisfy the Court that the testator has by will so disposed of real or personal property that reasonable provision has not been made for her maintenance. Until the Court is of opinion that such is the case, it has no power to interfere with the terms of the will or order the payment of any allowance to her. The test of her entitlement to relief is a new one, namely, proof that reasonable provision has not been made for her maintenance. This is one change in the law. There was also another change, for when the Court, on the evidence before it, is of opinion that reasonable provision has not been made for the maintenance of the widow, it is not restricted to allowing her one-third of the estate, but may order the payment of an allowance sufficient to provide reasonable maintenance for the widow "as the court thinks reasonable, just and equitable in the circumstances". Such allowance may greatly exceed one-third of the estate and may conceivably in a given case exhaust it. In this respect also there is a radical change in the law.

It is admitted that the respondent satisfied the onus cast upon her by section 8 (1) and that the Court below had the right to order the payment of an allowance to her. This appeal is limited to the construction of section S (2) which provides as follows:

8. (2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

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CITY OF SASKATOON v. SHAW

Thorson J. (*ad hoc*)

The Court of Appeal ordered payment to the respondent of one-third of the estate of her deceased husband as a reasonable provision for her maintenance. The estate was a large one, amounting to over $332,000.

The amount provided by the will, apart from certain specific bequests, together with her own means gave the respondent an annual income of $4,800. She gave evidence in support of her application under the Act that the annual amount required for reasonable provision for her maintenance was $5,559.40. The amount received was, therefore, approximately $63 per month less than the amount required.

Counsel for the appellant contended that the Court, having acquired jurisdiction to order the payment of an allowance, the respondent having proved that reasonable provision had not been made for her maintenance, had no jurisdiction beyond making an order for payment of an allowance sufficient to provide such maintenance as the Court thought reasonable, just and equitable in the circumstances and had no authority to do more than order the payment of an additional allowance of $63 per month, since that would meet the needs of the respondent and remove her cause of complaint; that section 8 (1), together with section 3 (which gives a dependant the right to apply to the Court for an order making reasonable provision for his or her maintenance), is the governing section of the Act and that section 8 (2) must be brought into line with it; and that the interpretation placed upon section 8 (2) by the Court below makes the section inconsistent with and repugnant to section 8 (1), section 3 and several other sections of the Act.

The answer to this argument, as I read the Act, is that section 8 (2) is an exceptional section. The broad scheme of the Act is that a man's freedom to dispose of his estate by will is made subject to his duty to make reasonable provision for the maintenance of his dependants, and that if he fails in such duty the Court will intervene and give such relief from the provisions of his will as the necessity of the case demands. Section 3 allows any dependant, as defined by the Act, to apply to the Court for an order making reasonable provision for

his or her maintenance, but each dependant applicant must comply with the test of entitlement established by section 8 (1), for this is a condition of the jurisdiction of the Court to intervene. When the onus of proof imposed upon the applicant has been discharged and the Court has acquired jurisdiction to act, the applicant is entitled to the order contemplated by section 8 (1)—an order for payment of an allowance sufficient to provide such maintenance as the Court thinks reasonable, just and equitable in the circumstances. Every successful dependant is entitled to this order, whether it be the widow or any other dependant. The power conferred upon the Court by section 8 (1), once the condition for its exercise has been complied with, is, however, made *"subject to the following provisions"*, one of which is section 8 (2). That section puts the widow who has met the statutory test of entitlement in an exceptional position, not enjoyed by any other dependant of the testator, and imposes an exceptional obligation upon the Court which does not rest upon it when it is dealing with any dependant applicant other than the widow. When the widow has proved her entitlement to relief, the Court is required by section 8 (1) to order the payment of an allowance sufficient to provide such maintenance as the Court thinks reasonable, just and equitable in the circumstances, but the Court is also required by section 8 (2) to see to it that the allowance ordered by it shall not, in the opinion of the Court, "be less than she would have received if the husband had died intestate leaving a widow and children", that is to say, that it shall not be less than one-third of the estate.

Effect must be given to both section 8 (1) and section 8 (2). To contend that section 8 (1) is the controlling section and that section 8 (2) must be brought into line with it involves the elimination of the words "subject to the following provisions" from section 8 (1) and the rejection of section 8 (2) altogether in every case where, because of the size of the estate, one-third of it would exceed the requirements of the widow for her maintenance. This would make the construction of section 8 (2) depend upon the size of the estate. There is no need to strain

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the words of section 8 (2) to force it into line with section 8 (1), and full effect can be given to both sections if section 8 (2) is regarded as putting the widow in an exceptional position as compared with that of other dependants. That was, in my opinion, the intent of section 8 (2), expressed in clear and explicit terms in which I see no ambiguity. Once a widow has proved her entitlement to relief, the Act gives her the benefits of both section 8 (1) and section 8 (2), whichever are the greater. She is entitled to such allowance as the Court has power to order under section 8 (1) to make reasonable provision for her maintenance, and, if that is less than one-third of the estate, she is entitled under section 8 (2) to an allowance that is not less, in the opinion of the Court, than one-third of the estate, even if such allowance, by reason of the size of the estate, exceeds the amount required for reasonable provision for their maintenance. The allowance ordered by the Court may be greater than one-third of the estate, but it must not be less.

Counsel for the appellant also argued that the respondent was not entitled by section 8 (2) to one-third of the estate and that the Court below had failed to consider the effect of the words "in the opinion of the court" contained in the section. His contention was that these words meant that the Court must consider what the respondent would have had to maintain herself if one-third of the estate had gone to her on the death of her husband, and that it must form an opinion as to how much she would reasonably spend for her maintenance if one-third of the estate had gone to her. This contention involves importing into the section words that are not there and different from those that are there. What would the respondent have received if her husband had died intestate leaving a widow and children? The answer is that she would have received one-third of the estate, with no restriction upon her rights in respect of it. Section 8 (2) is, therefore, a direction to the Court that the allowance ordered by it shall, in the opinion of the Court, not be less than one-third of the estate. It is not a direction that it shall not be less than something else, such as what the widow would spend for her maintenance if she had one-third of the estate. The Court is required to measure the respective

amounts involved, the amount of the allowance proposed on the one hand, and the amount of one-third of the estate on the other, and form an opinion as to their equivalency. The allowance need not necessarily take the form of one-third of the estate so long as it is not less than one-third would be. It may take various forms, as section 8 (3) indicates, but if an allowance other than one-third of the estate, such as an allowance of periodic payments, is ordered, the Court must be sure that such allowance is not less than one-third of the estate. How could the Court more precisely determine the amount of the allowance ordered, to ensure that it will not be less than one-third of the estate, than by ordering that one-third of the estate should be paid? And how could it be said that in so doing the Court has disregarded the judicial function required to be performed by the words "in the opinion of the court" contained in the section, even if these words are not specifically referred to in the reasons for judgment of the Court below?

The Court was faced with a problem similar to that which faced the Court under *The Widows' Relief Act* and similar previous legislation. The language of section 8 (2) of the present Act is similar to that of section 8 of *The Widows' Relief Act,* from which it appears to have been substantially borrowed. Under that and similar previous legislation the Court was directed, in effect, to make such allowance as shall, in the opinion of the Court, be equal to one-third of the estate, and the Court, in such cases as *In re Baker Estate* (1), met the direction of the section by allowing the successful widow one-third of her husband's estate. I see no reason why the Court should not follow a similar practice under section 8 (2) of the Act under review.

I agree that the appeal should be dismissed. The costs of the parties throughout should be payable out of the estate.

Appeal dismissed. Costs of all parties to be paid out of the estate.

Solicitor for the appellant: *G. H. Yule.*

Solicitors for the respondent: *MacPherson, Milliken, Leslie & Tyerman.*

(1) (1919) 13 Sask. L.R. 109.