

IN THE ESTATE OF ELMER SHAW, DECEASED
 EMILY JANE SHAW (APPLICANT) APPELLANT;

1942
 * Nov. 2.
 * Nov. 12.

AND

THE TORONTO GENERAL TRUSTS }
 CORPORATION, THE ATTORNEY- }
 GENERAL OF SASKATCHEWAN, } RESPONDENTS.
 AND THE CITY OF REGINA }

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Administration of estates—Application by widow of testator for relief under The Dependants' Relief Act, R.S.S., 1940, c. 111—S. 8 (1) (2)—Construction of the Act—Condition precedent to Court making order for relief.

On an application by the widow of a testator for relief under *The Dependants' Relief Act*, R.S.S., 1940, c. 111, the onus is on the applicant to satisfy the court that her husband's will has not made reasonable provision for her maintenance; and this is a condition precedent to the court making an order for relief.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) setting aside the order of Bigelow J. in chambers in the Court of King's Bench (2) made in favour of the present appellant, and dismissing the latter's motion for relief under *The Dependants' Relief Act*, R.S.S., 1940, c. 111.

(1) [1942] 1 W.W.R. 818; [1942] 2 D.L.R. 439.
 (2) [1942] 1 W.W.R. 613.

* PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.
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The appellant, widow of Elmer Shaw, late of Abernethy, in the Province of Saskatchewan, deceased, moved in the Court of King's Bench of Saskatchewan, before Bigelow J. in chambers, under the provisions of said Act, for relief upon the ground that by the terms of the will of said deceased the appellant received less than if the deceased had died intestate leaving a widow and children, or for such further or other order as to the court might seem proper.

Bigelow J. held that the intention of the Act is to provide that anything less than what the widow would have received if the husband had died intestate leaving a widow and children, viz., one-third of the estate, is not a reasonable provision for the maintenance of the widow; and made an order that the present appellant was entitled to a one-third share of the estate.

The Court of Appeal for Saskatchewan set aside the order of Bigelow J. and dismissed the present appellant's motion. It was held 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; if the condition fails, the provisions for relief do not come into operation; if the court decides that an order should be made, it is then (if the application is made by or on behalf of a widow) that s. 8 (2) (as to amount of allowance to be made to the testator's wife) operates; and from all the facts before the court in the present case the court could not form the opinion 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; and accordingly the condition laid down in s. 8 (1) had not been complied with and the court had no jurisdiction to put in motion the machinery provided by the Act.

According to a memorandum in the record before this Court (set out in the reasons for judgment now reported), the present appellant had, on the hearing before the Court of Appeal, asked for leave to file a further affidavit, and the Court of Appeal made no disposition of that application.

The judgment in the Court of Appeal ordered that the costs of all parties in that Court and in the Court of King's Bench as between solicitor and client, as the same might be taxed, be payable out of the estate of said deceased. The appellant, in her notice of appeal to this Court, stated that she did not complain of such disposition of costs.

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There was a motion by the respondents that the appeal be quashed for want of jurisdiction, which motion was heard at the same time as the hearing of the appeal.

E. C. Leslie K.C. for the appellant.

G. W. Forbes K.C. for the respondents The Toronto General Trusts Corporation (executor and trustee under the will of the deceased) and The City of Regina (as owner and operator of the Regina General Hospital, a beneficiary under the will).

Duncan A. McIlraith K.C. for the respondent The Attorney-General of Saskatchewan.

THE COURT—We agree with Chief Justice Martin as to the construction of *The Dependants' Relief Act* and that, on the evidence before the Court, it cannot be said that the deceased has by his will so disposed of his real or personal property that reasonable provision has not been made for the maintenance of his widow, the appellant. The formal order of the Court of Appeal sets aside the judgment below and directs judgment to be entered dismissing the application made by the appellant under the Act. Counsel for the appellant and for the respondents, the executors and the City of Regina, have filed a memorandum in respect of the hearing before the Court of Appeal reading as follows:—

Counsel for the Respondent asked for leave to file a further Affidavit setting out the expense to which the Respondent would be put in maintaining the standard of living to which she had been accustomed, to maintain the home, the automobile, etc. The filing of such material was opposed by the Appellants and no disposition was made by the Court of the application.

The respondent and appellants mentioned in this memorandum are the respondent and appellants as they appeared in the Court of Appeal but, of course, in this Court their

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roles were reversed. The filing of the material referred to was opposed before us by counsel for the named respondents. We are of opinion, however, that leave should be given to the appellant, if so advised, to file in the Court of King's Bench within sixty days such material and also material relating to anything relevant to be considered by the Court in determining whether the appellant is entitled to any relief under the terms of the statute. The respondents may, of course, file such relevant material in answer as they may be advised.

The proper order would therefore appear to be to declare that the onus is placed upon the appellant to satisfy the court that the will of her husband has not made reasonable provision for her maintenance and that this is a condition precedent to the court making an order for relief; to allow the appeal to the extent that the existing application of the appellant for relief is not dismissed but is kept alive for the purposes mentioned; and to remit the matter to the Court of King's Bench.

The motion to quash fails but the costs of that motion will be costs in the cause. The costs of all parties to this appeal will be paid out of the estate, those of the executors as between solicitor and client. If the appellant proceeds, the court before whom the matter comes will deal with the question of any further costs.

Judgment accordingly.

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

Solicitors for the respondents The Toronto General Trusts Corporation and the City of Regina: *Cross, Jonah, Hugg & Forbes.*

Solicitor for the respondent The Attorney-General of Saskatchewan: *Alex. Blackwood.*
