[HIGH COURT OF AUSTRALIA.]

LIEBERMAN AND ANOTHER . . . . . APPELLANTS;
RESPONDENTS,

AND

MORRIS . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1944.

SYDNEY, *April* 18, 19; *May* 11.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Testator's Family Maintenance—Right to contract out of Act—Widow—Covenant prior to marriage to make no claim under the Act—Public policy—Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 (*N.S.W.*) (*No.* 41 *of* 1916—*No.* 30 *of* 1938), *ss.* 3, 5, 6, 8-10.

A person is not precluded from making an application under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) by reason of having covenanted with the testator not to do so.

Decision of the Supreme Court of New South Wales (Full Court): *In re Jacob Morris* (*Deceased*), (1943) 43 S.R. (N.S.W.) 352; 60 W.N. 201, overruling *In re T. Doogan* (*Deceased*), (1923) 23 S.R. (N.S.W.) 484; 40 W.N. 121, approved.

APPEAL from the Supreme Court of New South Wales.

Miss Elizabeth Chmelnitzki, also known as Elizabeth Shell, who arrived in Australia in October 1938, met Jacob Morris about December 1939.

At that time Morris was a widower aged 78 years, with one son who was married and the father of a child. Miss Chmelnitzki was 42 years of age.

Miss Chmelnitzki was asked by Morris to marry him and, after she had had independent legal advice, she and Morris, on 7th February 1940, executed a deed in which, after reciting that the parties were about to marry one another and that Miss Chmelnitzki, being fully cognizant of the disparity in the ages of the parties, realized that but for the execution of the deed the marriage would result

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

in the disappointment of other persons who had just claims on Morris' bounty and that the parties with a view to preventing disputes in the future were desirous of then determining certain financial questions between them, contained a covenant by Miss Chmelnitzki that in consideration of the celebration of the marriage and of the mutual agreements set forth in the deed she would not, *inter alia*, make, institute or prosecute any claim of any kind against Morris' estate arising under or by virtue of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.), or any similar legislation that might thereafter be enacted in substitution therefor in lieu thereof or in addition thereto. For the same consideration Morris covenanted that provided at the date of his death the parties were not divorced, judicially separated or living apart he by his last will would bequeath to her property to the value of not less than £500.

The parties were married on 25th February 1940. There was not any issue of the marriage.

During his lifetime Morris transferred to his wife property worth upwards of £3,000.

Morris died on 3rd August 1942.

By his will dated 23rd February 1940, which he declared was made in contemplation of his marriage to Elizabeth Shell, Morris, *inter alia*, gave, devised and bequeathed to "Elizabeth Shell," subject to the proviso as set forth in the deed, the sum of £500. By a codicil made on 14th August 1940, Morris bequeathed to his wife all the household furniture and effects in use by them at their common home for her use absolutely and directed his trustees to pay her the sum of three pounds per week from the date of his death until his wife should die or remarry, both bequests to be in addition to and not in substitution for the bequest of £500 given by him to his wife (then Elizabeth Shell) under the will. By a further codicil made on 14th January 1941, Morris gave, devised and bequeathed to his wife for her own use and benefit absolutely his property known as "Belvoir," Lurline Street, Katoomba, together with the whole of the furniture and effects therein free of any mortgage, charge, probate or estate duty.

Probate of the will and codicils was granted to Permanent Trustee Co. of New South Wales Ltd. and William Lieberman, two of the executors and trustees named therein.

Morris' widow applied under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.) for an order that adequate provision for her proper maintenance be made out of his estate.

Roper J., following the decision in *In re T. Doogan (Deceased)* (1), held that the deed was a bar to the application, which he accordingly dismissed.

This decision was set aside by the Full Court of the Supreme Court, by a majority: *In re Jacob Morris (Deceased)* (2).

Upon the matter again coming before him *Roper* J. made an order in favour of the widow.

From that decision the executors of Morris' will and codicils appealed to the High Court.

Sugerman K.C. (with him *Downing*), for the appellants. The question for determination is not whether the contract evidenced by the deed is against public policy. The only relevant general consideration of public policy is the general policy of the law in favour of the enforcement of contracts freely made (*Fender* v. *St. John-Mildmay* (3)). The problem must be solved on a consideration of the language and policy of the particular statute (*Admiralty Commissioners* v. *Valverda (Owners)* (4); *Salford Guardians* v. *Dewhurst* (5)). Decisions on other statutes afford little help. The real question is whether upon a minute examination of the particular statute it discloses a legislative policy of such a nature that the legislature must be taken to have intended that policy to prevail over the willingness of individuals to forgo benefits which it would confer upon them. In such a case the contract is ineffective not because it is void as against public policy (although that expression is often used in this connection), but because the provisions of the statute take effect notwithstanding the terms of the contract: See *Hyman* v. *Hyman* (6). The answer to the question depends upon a consideration of the whole legislative purpose, in which the conferring of the particular benefit is an element. In addition, as a matter of pure construction, subsidiary provisions of the statute may afford indications whether or not the legislature intended the statute to operate notwithstanding contracting out. Guidance may also be afforded by the absence from the statute of provisions appropriate for the purpose of precluding contracting out. The question, as applied to the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.), is not whether the benefits provided for the individual are intended to enure also for the public benefit, but

(1) (1923) 23 S.R. (N.S.W.) 484; 40 W.N. 121.
(2) (1943) 43 S.R. (N.S.W.) 352; 60 W.N. 201.
(3) (1938) A.C. 1, at pp. 10-14, 22, 23, 37, 38.
(4) (1938) A.C. 173, at p. 185.
(5) (1926) A.C. 619, at p. 626.
(6) (1929) A.C. 601, at pp. 608, 609, 625, 629.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

whether in addition to benefiting individuals the Act is intended to benefit the public in such wise that permitted waiver of individual benefits would frustrate the intention to confer a public benefit, or, in other words, is an end based on public policy sought to be secured by the conferring of individual benefits—is the public benefit consequential upon the individual benefits—so that permitted waiver by individuals would prevent or tend to prevent the attaining of that end or destroy or diminish or tend to destroy or diminish that benefit. All the leading modern cases against contracting out satisfy this test (*Equitable Life Assurance of the United States* v. *Bogie* (1), the only case cited on the point in *Equitable Life Assurance Society of the United States* v. *Reed* (2); *Admiralty Commissioners* v. *Valverda (Owners)* (3); *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co.* (4); *Bowmaker Ltd.* v. *Tabor* (5); *Salford Guardians* v. *Dewhurst* (6)). The matter is not to be determined by asking whether the purpose of the Act is to "secure on grounds of public policy" the benefit to the individual (*Dillon* v. *Public Trustee of New Zealand* (7)—in another context). The very ground of public policy on which the benefit is secured to the individual may also require that he be at liberty to forgo the benefit if he so elects, or it may require otherwise: Cf. *Sale of Goods Act* 1923-1937 (N.S.W.), ss. 16-19, 57. That is the real question. The onus lies on the party who asserts that contracting out is precluded to maintain that proposition (*Fender* v. *St. John-Mildmay* (8); *The Great Fingall Consolidated Ltd.* v. *Sheehan* (9)). The onus is a heavy one in New South Wales, where from 1912 onwards the legislature has followed the practice of making express statutory provision against contracting out where that is intended. The maxim *quilibet potest renunciare juri pro se introducto* is referred to in, amongst other cases, *Great Eastern Railway Co.* v. *Goldsmid* (10), *Wilson* v. *McIntosh* (11), *Graham* v. *Ingleby* (12), and *Griffiths* v. *Earl of Dudley* (13). The *Testator's Family Maintenance and Guardianship of Infants Act*, as shown by s. 5, merely confers individual rights whereof a widow, widower or child may take advantage or otherwise as she or he pleases, and for the pursuing thereof only a limited time is allowed: Contrast *Admiralty Commissioners* v. *Valverda (Owners)* (14) and *Dewhurst* v. *Salford*

(1) (1906) 3 C.L.R. 878, at pp. 891-893, 896, 897, 906, 907.
(2) (1914) A.C. 587.
(3) (1938) A.C., at pp. 185, 197, 202.
(4) (1940) Ch. 638, at pp. 645, 646.
(5) (1941) 2 K.B. 1, at p. 7.
(6) (1926) A.C., at pp. 624, 625, 628.
(7) (1941) A.C. 294, at p. 303.
(8) (1938) A.C., at pp. 12, 37.
(9) (1905) 3 C.L.R. 176, at pp. 186, 194.
(10) (1884) 9 App. Cas. 927, at p. 936.
(11) (1894) A.C. 129, at pp. 133, 134.
(12) (1848) 1 Ex. 651, at pp. 656, 657 [154 E.R. 277, at p. 279].
(13) (1882) 9 Q.B.D. 357.
(14) (1938) A.C., at p. 197.

Guardians (1). The *Testator's Family Maintenance and Guardianship of Infants Act* is not imperative (*Dillon* v. *Public Trustee of New Zealand* (2)). A distinction is referred to in *Bowmaker Ltd.* v. *Tabor* (3) in the case of a statute providing for an application by a mortgagor: See also *Admiralty Commissioners* v. *Valverda* (*Owners*) (4), *Dewhurst* v. *Salford Guardians* (5) and *Davies* v. *Davies* (6). The " right " is merely a right to apply to the court for the exercise of its discretion. The discretion conferred upon the court by s. 3 is a most ample one, both as to the making of provision and the nature and extent of the provision to be made. In granting or refusing the application and in relation to the amount and nature of the provision the court considers not only the position of the applicant, but also that of all other persons who have a moral claim upon the bounty of the deceased (*In re Allen* (*Deceased*); *Allen* v. *Manchester* (7); *Dillon* v. *Public Trustee of New Zealand* (8)). Thus a necessitous person may get nothing because of the superior claims of others. The court, by s. 6 (4) and s. 8, retains control over its order. The jurisdiction to make an order does not depend upon the presence within the State of a needy applicant, but upon artificial considerations of domicile of the deceased and *situs* of the property. Thus an order may be made in favour of a non-domiciled child (*Re F. Donnelly* (9)), but an order may not be made in respect of the local personalty of a non-domiciled deceased person (*Pain* v. *Holt* (10)), or in respect of the foreign realty of a domiciled deceased person (*Re F. Donnelly* (9); *In re Osborne* (11)). An order may be made in respect of the foreign personalty of a domiciled deceased person who had assets in New South Wales, but *quaere* as to the case of a domiciled deceased person who at the time of his death had no assets in New South Wales (*In re J. A. Sellar* (12)). The amount of the provision may be governed by the terms of an agreement for maintenance made *inter vivos* (*In re W. O. Phillips* (*Deceased*) (13)). Provision may be refused altogether where the ordinary relationship of parent and child ceased during the lifetime of the deceased person (*Mastaka* v. *Midland Bank Executor and Trustee Co. Ltd.* (14)). The provision which may be made is not

(1) (1925) Ch. 655, at p. 671.
(2) (1941) A.C., at p. 301.
(3) (1941) 2 K.B., at p. 7.
(4) (1937) 1 K.B. 745, at p. 777.
(5) (1925) Ch., at p. 671.
(6) (1919) 26 C.L.R. 348, at pp. 356, 357.
(7) (1922) N.Z.L.R. 218; 23 G.L.R. 613.
(8) (1941) A.C., at p. 301.
(9) (1927) 28 S.R. (N.S.W.) 34; 45 W.N. 5.
(10) (1919) 19 S.R. (N.S.W.) 105; 36 W.N. 42.
(11) (1928) Q.S.R. 129.
(12) (1925) 25 S.R. (N.S.W.) 540, at p. 545; 42 W.N. 161, at p. 162.
(13) (1929) 29 S.R. (N.S.W.) 191; 26 W.N. 22.
(14) (1941) 1 Ch. 192.

H. C. OF A. 1944. LIEBERMAN v. MORRIS.

limited to maintenance, but extends also to education and advancement in life. Further, it is not merely adequate provision, but adequate provision for "proper" maintenance, and thus may extend much beyond the relief of necessity (*Bosch* v. *Perpetual Trustee Co. Ltd.* (1)). Until 1938, a person might have avoided the possibility of an application under the Act by refraining from making a will, and, e.g., by *inter vivos* settlements, may still place the whole or a substantial part of his property beyond the reach of an order. The Act does not contain any provision analogous to ss. 58 and 59 of the *Matrimonial Causes Act* 1899 (N.S.W.). Under s. 11 of the Act the executors may, after giving the prescribed notice, even within twelve months from the date of the grant of probate or letters of administration, distribute and thus avoid liability, leaving the claimant to such relief as the court may give him against the assets in the hands of beneficiaries. Even if the proviso to s. 5 (1) was inserted merely to facilitate administration, its mere presence in the Act negatives the existence of an intention on the part of the legislature against contracting out. This aspect was not fully appreciated in the Court below. Undue effect was attributed in that Court to s. 9. That section indicates a recognition by the legislature of an unlimited freedom of dealing otherwise existing and is a limited inroad upon such freedom. On its true construction the section applies only to mortgages, &c., made after an application to the court. In any event, the relationship between assignment and contracting out in *Dewhurst's Case* (2) and in this case is entirely different: See the report (3). Obviously what is contemplated by s. 9, requiring the permission of the court, is a check on improvident dealings. The effect attributed to the similar section in *Dewhurst's Case* (4) has no relevance having regard to the proviso to s. 5 (1) as well as to s. 9. Hence assignment does not include contracting out. The "rights" conferred by the Act are entirely new rights. They are not given in substitution for or by way of implementing rights previously or otherwise existing, such as the right of a wife to pledge her husband's credit as agent of necessity. The powers granted to the court are not "to prevent such persons being a charge upon the public" (5). There are no Poor Laws in New South Wales and, in any event, the condition of s. 3 (1) is not that the will does not provide for maintenance but that the widow, &c., are "left" without proper maintenance, that is, from whatever source. In a proper case the fact that the applicant

(1) (1938) A.C. 463; 38 S.R. (N.S.W.) 176.
(2) (1926) A.C. 619; (1925) Ch. 655.
(3) (1926) A.C., at pp. 635, 636.
(4) (1926) A.C. 619; (1925) Ch. 655.
(5) (1943) 43 S.R. (N.S.W.), at p. 358; 60 W.N., at p. 203.

is in receipt of or may be entitled to receive a pension from the State may be taken into consideration by the court (*In re Catmull (Deceased)*; *Catmull* v. *Watts* (1)). The foregoing submissions show that contracting out is contemplated by the Act; that the Act was passed to confer benefits only upon individuals or individuals of a particular class; and in particular that the Act was not passed to relieve the public of a burden. They show that the real policy of the Act is not a policy of affecting the public, but a policy of redressing hardships and grievances within a limited family circle resulting from capricious or thoughtless or lack of exercise of the otherwise unrestricted power of testamentary disposition. In particular they show that this case is clearly distinguishable from *Hyman* v. *Hyman* (2) and *Davies* v. *Davies* (3), both of which cases were relied upon by the majority in the Court below. That Court fell into error in treating the Act as closely analogous to the legislation under consideration in those two cases. The grounds of decision in *Hyman* v. *Hyman* (2) were: (*a*) that the power to grant alimony was given as a condition of the exercise of the power to grant divorce and thus change status (4)—thus destroying the wife's authority as an agent of necessity—and (*b*) that the agreement there in question amounted to the purchase of an indulgence to commit adultery (5). *Davies* v. *Davies* (6) was decided on the grounds: (i) that the provisions as to maintenance are part of the law regulating the status of marriage in which the community is vitally concerned (7), (ii) that as a matter of pure construction of the statute an agreement is no bar (8), and (iii) of the penal provisions by which the duty is enforced (9). In *In re T. Doogan (Deceased)* (10) it was held that parties may contract themselves out of the benefits of the Act, and *Davies* v. *Davies* (3) was distinguished on the grounds that the indications there found that public as well as private interests were considered are not to be found in the present Act, and that the proviso to s. 5 (1) is a clear indication that the provision made by the Act is a matter of the private concern of the beneficiaries. In *Re Jonathan Howard* (11), *In re H. A. Patrick (Deceased)* (12), and *In re Found*; *Found* v. *Semmens* (13) it was held that the respective contracts there concerned did not show an intention of contracting

(1) (1943) 1 Ch. 262, at p. 268.
(2) (1929) A.C. 601.
(3) (1919) 26 C.L.R. 348.
(4) (1929) A.C., at pp. 608, 625, 628, 629.
(5) (1929) A.C., at pp. 621, 622
(6) (1919) 26 C.L.R. 348.
(7) (1919) 26 C.L.R., at pp. 356, 357, 361, 362, 365.
(8) (1919) 26 C.L.R., at pp. 356, 357.
(9) (1919) 26 C.L.R., at pp. 357, 358, 361, 363, 364.
(10) (1923) 23 S.R. (N.S.W.) 484; 40 W.N. 121.
(11) (1925) 25 S.R. (N.S.W.) 189; 42 W.N. 34.
(12) (1936) 36 S.R. (N.S.W.) 156.
(13) (1924) S.A.S.R. 236.

H. C. OF A. 1944. LIEBERMAN v. MORRIS.

out of the Act, and on that ground only *In re T. Doogan (Deceased)* (1), although not doubted as to correctness, was distinguished. In *In re Pearson* (2), *In re Willert* (3), *Re Hatte* (4), *Gardiner* v. *Boag* (5) and *Parish* v. *Parish* (6) there was not an adequate examination of the principles involved. *Dillon* v. *Public Trustee of New Zealand* (7) is not really in point. The question in that case was whether the court's order could reach land which the testator had agreed to devise to a third party, that is, whether the rights taken by the third party under the contract were liable to be cut down by an order under the Act.

Dignam (*Miller* K.C. with him), for the respondent. The contract relied upon by the appellants is void as an attempt to oust the jurisdiction of the court, and, also, as being against public policy. The court will not permit contracting out unless authorized by clear words of the statute concerned (*In re Boaler* (8) ; *Halsbury's Laws of England*, 2nd ed., vol. 8, p. 532). The words used in the proviso to s. 5 (1) of the Act do not clearly show the indication suggested in *In re T. Doogan (Deceased)* (9). The court would be placed in an anomalous and absurd position if, being bound to consider all the circumstances of the case, it were unable, by reason of something done by one of the parties, to give a decision in accordance with its opinion and yet was bound to hold that it had performed its duty under the Act (*Wirth* v. *Wirth* (10)). The existence or otherwise of a contract between the parties is merely one of the circumstances to be considered (*Matthews* v. *Matthews* (11)). There is no general right to enter into a contract which ousts the jurisdiction of the court. A person relying upon such a contract must establish its validity. The *Testator's Family Maintenance and Guardianship of Infants Act* gives a substantive right to widows, widowers and children in appropriate cases to apply to the court. The Act is a remedial statute and should be given a very liberal interpretation (*Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (12)). The Act discloses an intention to clothe the court with the widest discretion and in effect to empower the court to do what the deceased person should have done (*Dillon* v. *Public Trustee of New Zealand* (13)). If there has been on the part of the deceased person a breach of

(1) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.
(2) (1936) V.L.R. 355.
(3) (1937) Q.W.N. 35.
(4) (1943) Q.S.R. 1.
(5) (1923) N.Z.L.R. 739.
(6) (1924) N.Z.L.R. 307.
(7) (1941) A.C. 294.
(8) (1915) 1 K.B. 21, at p. 36.
(9) (1923) 23 S.R. (N.S.W.), at p. 486 ; 40 W.N., at p. 122.
(10) (1918) 25 C.L.R. 402, at p. 408.
(11) (1932) P. 103.
(12) (1932) 47 C.L.R. 113, at p. 119.
(13) (1941) A.C., at pp. 303, 304.

moral duty then the court, after a consideration of all the circumstances, should do what should have been done by that deceased person (*In re Duncan* (1)). Permission to contract out in the manner evidenced by the deed would completely frustrate the scheme and policy of the legislature as appearing from the Act. The fact that the Act provides only a right to apply is immaterial. Section 5 is a machinery section. Section 9 in its terms is imperative and prohibitory and is within the principle enunciated in *Admiralty Commissioners* v. *Valverda (Owners)* (2). *In re T. Doogan (Deceased)* (3) has not been followed ; it has been either not followed or distinguished.

Sugerman K.C., in reply. Covenants in deeds not to sue for restitution of conjugal rights have been upheld by the courts : See *Mackenzie's Divorce Practice (N.S.W.)*, 5th ed. (1935), p. 26, and cases there cited. *In re Boaler* (4) was a case of construction, but in this case no difficulty arises as to the construction of the covenant which is clear in its terms. The point involved in this case is not one of construction in the sense referred to in *Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (5). Generally a condition attached to a gift by will against disputing validity or contesting the will is good with exceptions : See *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 163.

Cur. adv. vult.

May 11.

The following written judgments were delivered :—

LATHAM C.J. The respondent, Elizabeth Morris, at the age of forty-two married Jacob Morris, who was then aged seventy-eight. Before the marriage the parties entered into an agreement under seal whereby the respondent covenanted that she would not institute or prosecute any claim of any kind whatever against the estate of Morris arising under or by virtue of the provisions of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.), or any similar legislation. Morris covenanted that he would, by his last will, devise or bequeath to her property to the value of not less than £500. The wife had independent legal advice before executing the deed.

By his will Morris bequeathed £500 to his widow, and by codicil left to her household furniture and effects and a sum of three pounds per week until death or remarriage. He also during his life transferred to her property worth about £3,000.

(1) (1939) V.L.R. 355.
(2) (1938) A.C. 173.
(3) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.
(4) (1915) 1 K.B. 21.
(5) (1932) 47 C.L.R., at p. 119.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Latham C.J.

Notwithstanding her agreement, Mrs. Morris made an application to the court for an order under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938. The application came before *Roper* J., who held that the deed was a bar to the application, following *In re T. Doogan (Deceased)* (1). Upon appeal to the Full Court the order of *Roper* J. was set aside by a majority, *Jordan* C.J. and *Nicholas* C.J. in Eq., *Davidson* J. dissenting (*In re Jacob Morris (Deceased)* (2)). The matter again came before *Roper* J., and he made an order in favour of the respondent. The executors of the will of Jacob Morris now appeal to this Court.

Jordan C.J. was of opinion that the question which arose was whether the respondent's covenant was unenforceable because opposed to public policy. The question was whether, by a contract, the widow could exclude herself from the benefit of certain statutory provisions. There was no provision in the statute which expressly dealt with this subject, and the matter must therefore be determined upon a consideration of " the scope and policy of the particular statute " (*Admiralty Commissioners* v. *Valverda (Owners)* (3)). Accordingly his Honour asked whether the benefits of the Act were provided solely in the interests of the persons who might make applications under the Act, or whether they were intended to enure also for the public benefit. After an examination of the Act, the learned Chief Justice reached the conclusion that the Act was based upon a general principle of public policy, namely, the making of provision for the maintenance of members of a family who are found to be in need of such maintenance when the family tie has been broken by death. In *Hyman* v. *Hyman* (4) it was held that a covenant in a separation deed not to take proceedings in the future for alimony or maintenance beyond the provision made by the deed could not validly be made (5). Similarly in this Court in *Davies* v. *Davies* (6) it was held that it was contrary to public policy for a wife to make an agreement purporting to relieve her husband of his obligation to support her and the child of the marriage, and that, notwithstanding such an agreement, a court could make an order against the husband for maintenance of the wife and child. The case of *Hyman* v. *Hyman* (4) was founded in part upon a view that the statute in question was designed to diminish the burden upon the poor law guardians (7), and *Jordan* C.J. was of opinion that the statute in question in the present case was enacted partly in the

(1) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.
(2) (1943) 43 S.R. (N.S.W.) 352 ; 60 W.N. 201.
(3) (1938) A.C., at p. 185.
(4) (1929) A.C. 601.
(5) (1929) A.C., at p. 608.
(6) (1919) 26 C.L.R. 348.
(7) (1929) A.C., at pp. 608, 628.

public interest to prevent persons from becoming a charge upon the public. Upon these grounds the learned Chief Justice was of opinion that *In re T. Doogan* (1) should be overruled, and that it was open to the court to make an order under the Act in favour of the widow.

Nicholas C.J. in Eq. agreed with the conclusion of *Jordan* C.J., being of opinion that the *Testator's Family Maintenance and Guardianship of Infants Act* dealt with a subject matter of such a character that it should be held that persons had no power to exclude themselves from the benefit of the Act, and his Honour was also of opinion that the particular language of the Act showed that contracting out of the Act would not be effective.

Davidson J., on the other hand, referred to passages in judgments which indicated the danger of permitting judicial tribunals to roam unchecked in the field of what is vaguely described as public policy. He emphasized that there was no express provision in the Act preventing a widow from binding herself (or, it may be added, a widower from binding himself) not to take advantage of the Act. The Act contained no positive provision requiring a person to make provision for the maintenance of his family, and on this ground his Honour distinguished *Hyman* v. *Hyman* (2) and *Davies* v. *Davies* (3). In those cases there existed positive obligations of the husband, in the one case to support his wife so long as she was his wife, and, in the second case, to provide adequate maintenance for his wife and child. *Davidson* J. was of opinion that the provisions of the Act showed that it was concerned with the protection of individuals rather than with the protection of the public, and, in particular, that the Act had no relation to any diminution or alleviation of any public burden incurred in supporting necessitous persons. His Honour pointed out that the court was authorized to refuse to make an order in favour of any person whose conduct was such as to disentitle him to the benefit of an order. Such a provision looked more towards a private right than towards any principle that necessitous persons should be supported by their relatives rather than by the State. His Honour was therefore of opinion that it had not been satisfactorily shown that the contract was void as against public policy.

I propose first to consider the general character of the Act and then to examine its particular provisions.

The Act is entitled: "An Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate

(1) (1923) 23 S.R. (N.S.W.) 484; 40 W.N. 121.
(2) (1929) A.C. 601.
(3) (1919) 26 C.L.R. 348.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Latham C.J.

of such testator." Section 3 is the principal section of the Act, and it provides that if a testator dying after a certain date 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 are left without adequate provision for their proper maintenance, education, or advancement in life, 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, order that provision be made for such maintenance, education, and advancement out of the estate of the testator. It will be observed that the Act does not adopt the form of conferring rights upon any persons relating to a testator's estate. The Act gives a right to apply to a court, but an order, if made, does not give effect to any antecedent right of the applicant. The Act vests a power in a court. It is urged for the respondent that if a statute provides that a court shall have a particular power, then no private agreement between actual or prospective litigants before that court can operate to deprive that court of its statutory power. But it is put on behalf of the appellant that the agreement made in the present case does not purport to affect the jurisdiction of the court, but only to prevent a person making an application to a court, and that such an agreement may be quite effective. In *Hunt* v. *Hunt* (1) it was held that a husband was entitled to an injunction restraining his wife from breach of an agreement not to take proceedings for restitution of conjugal rights. Notwithstanding the comments upon this case by *Selborne* L.C. in *Cahill* v. *Cahill* (2), the Court of Appeal in the case of *Welch* v. *Welch* (3) stayed proceedings for restitution of conjugal rights because the wife-petitioner had agreed not to institute such proceedings. So in *Aldridge* v. *Aldridge* (4) the court gave effect to an agreement not to institute proceedings for a decree of nullity of marriage.

It certainly cannot be said generally that covenants not to take particular legal proceedings are necessarily void—the case of the ordinary covenant not to sue provides a sufficient answer to any such suggestion. Nor can it be said, in the light of the cases just mentioned, that an agreement not to take proceedings in respect of matrimonial or domestic matters is necessarily void. But the law may contain a general principle or a statute may lay down a general rule, e.g., as to the duty of a husband to maintain his wife, and provision may be made for legal proceedings to give effect to that

(1) (1862) 4 De G. F. & J. 221 [45 E.R. 1168].
(2) (1883) 8 App. Cas. 420, at p. 421.
(3) (1916) 115 L.T. 1.
(4) (1888) 13 P.D. 210.

principle or rule. In such a case it may be easy to conclude that the right to take such proceedings cannot be given up. The *Testator's Family Maintenance and Guardianship of Infants Act*, however, does not impose any duty upon testators—there is no provision which imposes any sanction of any description upon failure to make adequate provision for a testator's family, such as invalidity of a will made in breach of some provision of the statute. If no application is made under the Act the will is not affected by the Act. The Act only gives a right to persons to apply to a court for an order, but an order under the Act is not an order made to give effect to any obligation created by law—as was the case in *Davies* v. *Davies* (1) and in a certain sense in *Hyman* v. *Hyman* (2). The present case therefore appears to me to be distinguishable in principle from these cases.

It was urged, and the argument received some acceptance in the Supreme Court, that the Act was based upon or embodied public policy in being directed towards diminishing what has been called the public burden involved in the public maintenance of necessitous persons. The Act is not limited to such persons, though financial necessity is one of the circumstances which is taken into account by a court in dealing with applications under the Act. On this aspect of the case I agree with *Davidson* J. As was stated in argument, there are no Poor Laws in New South Wales. The statute, which was passed in 1916, enables benefits to be conferred irrespective of illness or age and indifferently upon widowers and widows. I find it difficult to suppose that the statute was designed either to relieve the Commonwealth of possible liability for invalid and old-age pensions, or to diminish expenditure of the State under the *Widows' Pensions Act*, which was not enacted until 1925. It may be added that the Act authorizes provision for " advancement " as well as for necessary maintenance.

I refer to the passages quoted by Lord *Atkin* in *Fender* v. *St. John-Mildmay* (3) to support the proposition that it is not for a court to invent a new head of public policy upon the basis of a speculation or belief that if the legislature had directed its attention to the question whether persons should be allowed to renounce statutory benefits the legislature would have provided that any such renunciation would be ineffective. It is quite easy for Parliament, if it wishes to do so, to provide against what is generally called " contracting out." Mr. *Sugerman* submitted to the Court a list of statutes of the Parliament of New South Wales passed after 1912 in which

(1) (1919) 26 C.L.R. 348. (2) (1929) A.C. 601.
(3) (1938) A.C., at pp. 10 *et seq.*

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Latham C.J.

express provisions were incorporated, the effect of which was to prevent or limit contracting out. I give references to some such provisions in a note hereunder (1). These statutes explicitly express, in each case, the intention of Parliament to control the terms of contracts relating to the subject matter of the statute. In the present case there is no such provision contained in the Act, and the court should not be ready to imply such a provision simply upon the basis that the Act in a general kind of way, as evidenced by its title, its subject matter, or the general character of its provisions, indicates an intention to establish a new general principle of public policy, whereby all widows, widowers and children are to be assured of adequate maintenance and children of advancement from the estates of testators. All general statutes give effect to some public policy and many of them confer benefits or advantages upon individuals in pursuance of the general policy of a statute. In my opinion arguments based upon the general character of this Act, or upon the principal provision of the Act contained in s. 3, do not show with reasonable certainty that the legislature intended to prevent possible applicants under the Act from effectively agreeing to abandon their rights. I refer to Lord *Bramwell's* approval in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (2), of the statement that judges are more to be trusted as interpreters of the law than as expounders of what is called public policy. Accordingly, I am not prepared to decide this case upon any ground of public policy based upon the general character of the Act.

I proceed, therefore, to consider the particular terms of the *Testator's Family Maintenance and Guardianship of Infants Act* for the purpose of seeing whether, apart altogether from any considerations of general public policy, there are any provisions in the Act which indicate any intention of Parliament with respect to the effect of contracts purporting to bind persons not to take advantage of the Act.

(1) *Government Railways Act* 1912-1943, s. 104.
Factories and Shops Act 1912-1943, s. 53.
Rural Tenants' Improvements Act 1916, s. 8.
Conveyancing Acts 1919-1943, ss. 55 (4), 56 (2), 92 (4), 93 (3), 94 (3), 97 (2), 129 (10).
Eight Hours (Amendment) Act 1920, s. 3.
Workers' Compensation Act 1926-1942, s. 45.
Agricultural Lessees Relief Act 1931, s. 22.
Interest Reduction Act 1931, s. 4 (5).
Reduction of Rents Act 1931, s. 5.
Agricultural Holdings Act 1941, s. 35.
Hire-purchase Agreements Act 1941, ss. 26 (3), 28.
Money-lenders and Infants Loans Act 1941, s. 44.
Motor Vehicles (Third Party Insurance) Act 1942, s. 19 (1), (2).
(2) (1892) A.C. 25, at p. 45.

There is a particular provision in the Act which deals with the very subject of agreements not to make applications under the Act. Section 5 provides that no application shall be heard by the court unless the application is made within twelve months of the grant or resealing in New South Wales of probate, or grant or resealing of letters of administration with the will annexed. The section also contains the following proviso :—

" Provided that if all the children and the husband or the wife, as the case may be, shall in writing, at any time before the expiration of the said term of twelve months, agree to be bound by such will and if there be infants such agreement be confirmed by the court, then no application shall be made thereafter for maintenance under the provisions of this Act."

The effect of this section is that in the normal case no application can be heard by the court unless it is made within twelve months from the date of the grant of probate, provided, however, that if all the persons concerned, that is, all the children, and the husband or wife, as the case may be, agree in writing before the expiration of twelve months to be bound by the will (and therefore to make no application to the court) then " no application shall be made thereafter."

No application can be made after the twelve months in any circumstances. If all the parties interested agree within the twelve months not to apply, then no application can be made at all—even within the time limit of twelve months. Thus, in the cases to which the proviso applies, effect is given to the agreement of the parties not to make any application, but only where all the parties so agree. In my opinion this provision necessarily assumes that an agreement by less than all of the parties, with whomsoever made, would not be effective to prevent any application under the Act. If an individual agreement by an individual wife, husband or child could be effective to prevent an application by that person, then it is obvious that agreements by all the persons interested would prevent any application whatever under the Act without any statutory provision to that effect. Accordingly the proviso to s. 5 is necessary only if it is assumed that individual agreements not to take advantage of the Act would not be binding upon the persons who made them. In my opinion, a consideration of the precise terms of the present Act therefore shows that the legislature proceeded upon the basis that an agreement not to make an application under the Act should be binding only where it fell within the proviso to s. 5.

Thus in my opinion the covenant of the widow not to make an application under the Act is void and the appeal should therefore be dismissed.

H. C. OF A. 1944. LIEBERMAN v. MORRIS.

RICH J. The question raised by the present appeal is whether the widow of a deceased testator is bound by a contract entered into by her with him in his lifetime not to make any claim against his estate after his death under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.). By this Act it is provided that if a testator disposes of his property by his will in such a manner that his widow (or, in the case of a testatrix, her husband) and family are left without adequate provision for their proper maintenance, education or advancement in life, as the case may be, the court may order that such provision for them as the court thinks fit be made out of the testator's estate. The Supreme Court of New South Wales, by a majority, decided the question in the negative, and this is an appeal from its decision.

The Act invests the court with a discretionary jurisdiction, and it is clear that no agreement *inter partes* can divest it of that jurisdiction. But the real question is whether, in the proper exercise of its undoubted jurisdiction, the court should give effect to the contract. *Prima facie* it should, because, as a general rule, a court of justice enforces contracts, and therefore treats as no longer available any legal right which has been satisfied or released by contract. There are, however, some contracts which are not enforceable, and a legal right which has been purported to be surrendered or discharged by such a contract remains in full force and effect, and may be put in action notwithstanding the contract. Amongst the contracts which are unenforceable are those which are contrary to public policy. An agreement or promise objectionable only because opposed to public policy is not illegal, it is merely regarded as being so tainted that the law should not lend its aid to its enforcement (*Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (1); *Public Trustee* v. *Dillon* (2)). Speaking generally, public policy may be said to be policy in the observance of which the welfare of the community is involved (*Wilkinson* v. *Osborne* (3)). Whenever a statute creates new rights, public policy in a broad sense is always involved, because the legislature must be assumed to have thought it desirable in the public interest that the rights should be brought into existence. But it does not necessarily follow that an agreement to release or abandon rights so conferred should be regarded as opposed to public policy in general or even to the policy of the particular Act. As was pointed out in *Admiralty Commissioners* v. *Valverda* (*Owners*) (4), " the problem must be solved on a consideration of the scope and policy of the particular statute." That now

(1) (1892) A.C., at pp. 39, 47, 51.
(2) (1940) N.Z.L.R. 874, at p. 881.
(3) (1915) 21 C.L.R. 89, at p. 97.
(4) (1938) A.C., at p. 185.

in question in effect imposes a limitation on the power of testamentary disposition. The subject generally was discussed in an article in the *Commonwealth Law Review*, vol. 5 (1908), at p. 97, by the present Chief Justice of New South Wales. It is one with which the law of Europe and of the countries which have inherited that law has concerned itself for upwards of two thousand years. By the early Roman law, power of testamentary disposition was the exception, not the rule, and although by the Twelve Tables provision was made for absolute freedom of disposition, restrictions were subsequently imposed in favour of, *inter alios*, the family of the deceased. Restrictions for the benefit of the family are to be found in the present European systems of law. In English law, freedom of testamentary disposition was formerly restricted in the case of realty by the widow's right to dower, and in the case of moveables by the rights of the widow and children to succeed to a definite share, the right of disposition by will being limited to the remainder, the dead man's part, a restriction which was not abolished in the city of London until the eighteenth century: Cf. *Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (1); *Blackstone*, 4th ed., Book 2, pp. 12, 374, 491 *et seq.*; *Holdsworth, History of English Law*, 4th ed., (1935), vol. 3, p. 550.

The Act now in question is one of a group the first of which was enacted in New Zealand in 1900. Similar legislation has been brought into force in the Australian States—in New South Wales since 1916—and in England in 1938 by the *Inheritance (Family Provision) Act* 1938 (1 & 2 Geo. VI., c. 45). If these statutes had been designed to effect a return to a system of law by which members of a family are endowed with a proprietary right to receive definite shares of whatever property a member of the family may own at his death, irrespectively of their needs, the right might well be regarded as created solely for the private benefit of the persons concerned, and as therefore capable of being released or discharged by contract without infringing the policy of the legislation or any principle of public policy. But the evident purpose of this legislation in general, and that of New South Wales in particular, is quite different, that of providing for the proper maintenance, education or advancement of members of a family who would otherwise be left without adequate provision, and might, in many cases, become a charge on the community. It is for this purpose, and this alone, that members of a family are invested with the right to invoke the exercise by the court of its discretion. I think that the Act now in question is designed to serve a public purpose as well as that of benefiting

(1) (1932) 47 C.L.R., at p. 119.

H. C. OF A. 1944. LIEBERMAN v. MORRIS. Rich J.

individuals, the purpose being, as it was put by the Privy Council in *Dillon* v. *Public Trustee of New Zealand* (1), " to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for."

It follows, in my opinion, that the widow's agreement was not binding upon her, and did not preclude the Supreme Court, in the proper exercise of its jurisdiction, from making an order in her favour if it thought such an order to be necessary and proper. The appeal should be dismissed.

STARKE J. This appeal depends upon the question whether the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.), whilst conferring upon the widow, widower and family of a testator the right of making application to the court for adequate maintenance, education, and advancement from the estate of the testator, concerns itself also with such maintenance, education and advancement as a matter of public interest and concern which cannot be bartered away.

Under the *Supreme Court of Judicature (Consolidation) Act* 1925 (Imp.) the legislature invested the matrimonial courts with authority to make provision for the future maintenance of a wife upon the dissolution of her marriage. And in *Hyman* v. *Hyman* (2), the House of Lords held that a wife, who covenanted by deed of separation not to take proceedings against her husband for the allowance to her of alimony or maintenance beyond the provision made for her by the deed, was not precluded by her covenant from petitioning the court for permanent maintenance. The authority, it was held, was conferred upon the courts not merely " in the interests of the wife, but of the public " : it was a " matter of public concern " (*Hailsham* L.C. (3) ; Lord *Atkin* (4)).

The *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 of New South Wales is intituled : " An Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate of such testator," which is a decisive indication that the matter is of " public interest " or " concern." No doubt the question " must be solved on a consideration of the scope and policy of the particular statute." But the general considerations that induced their Lordships to declare that the provision for maintenance under the English legislation was a matter of public interest or concern are just as applicable to the New South Wales legislation.

(1) (1941) A.C., at pp. 303, 304.
(2) (1929) A.C. 601.
(3) (1929) A.C., at p. 614.
(4) (1929) A.C., at p. 629.

Nothing is gained in going over the particular provisions of the New South Wales legislation to arrive at a like conclusion when the scope and policy of the statute is plain enough from its title.

It follows that the covenant in this case, on the part of the respondent, that she would not make, institute or prosecute any claim of any kind whatever against the estate of Jacob Morris under or by virtue of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 or any similar legislation did not preclude her from making application to the court under the provisions of that Act. It is unnecessary to consider the argument that the covenant is void as an attempt to oust the jurisdiction of the court.

The appeal should be dismissed.

McTiernan J. In my opinion the wife's covenant in the deed is not a bar to her application to the court under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916-1938 (N.S.W.). I rest this conclusion on the construction of the Act. I think the correct construction is, that by necessary implication such a covenant cannot operate to bar an application for maintenance. In this view the question whether the maxim *quilibet renunciare potest juri pro se introducto* applies to the benefits given by the Act does not arise and I do not deal with that question.

The reasons why I think that by necessary implication the covenant does not operate as a bar are as follows.

It would be a natural provision to see among the provisions headed " Testator's family maintenance ", under which the respondent's application was made, a provision that a person authorized to apply to the court should not contract out of the Act or waive the right to apply. The omission by the legislature to state upon the face of the Act its intention with respect to contracting out or waiver creates a difficulty, but the omission does not by any means signify that either of those things may be effectively done. It is a very natural question in connection with these provisions regarding " Testator's family maintenance " whether the Act does not by necessary implication render ineffective any agreement not to apply to the court, although the Act does not do so in terms.

The Act, to quote from its long title, is " An Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate of such testator." " Testator " means, for the purposes of the Act, a wife as well as a husband : and " maintenance " extends to education and advancement as s. 3 shows. The general nature of the provisions relating to " family maintenance " is

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

McTiernan J.

described in a statement by *Salmond* J. in *In re Allen (Deceased)*; *Allen* v. *Manchester* (1), which is cited by the Judicial Committee in the case of *Bosch* v. *Perpetual Trustee Co. Ltd.* (2).

The question whether the respondent's covenant is an effective bar turns upon the construction of the provisions which are enacted to effectuate the object expressed in the long title. There is much difficulty in supposing it to have been the legislature's intention that a covenant not to apply would preclude an application to the court by a widow left without adequate provision for her proper maintenance by reason of the manner in which her husband disposed by will of the property which passed under it. A widow left in that condition is affected by the very mischief which the Act was passed to remedy: and it would frustrate the object and purpose of the Act to hold her to a covenant not to apply for an adequate provision for her proper maintenance. These considerations apply with equal force to a covenant by a child. A widower is given the same rights as a widow or child and the same considerations would apply to a covenant by him. Further, the powers which the Act confers upon the court are not exercisable by the court except on application by or on behalf of one, or members, of the family of the testator or testatrix, that is to say, widow, widower or child. It is to be presumed that the intention of the Act is not that the powers of the court should remain a dead letter: if they did there would be no remedy for the mischief at which the Act is aimed—See *Banks* v. *Goodfellow* (3). The Act would not be effective to remedy the mischief if the persons affected could preclude themselves by covenant not to apply to the court to exercise its powers. The duty of the court upon such an application is to take into consideration "all the circumstances of the case." If the Act does not by necessary implication render a covenant not to apply ineffective for that purpose, the result would be that, if there is such a covenant in a particular case, no circumstance except that the applicant made the covenant could be considered by the court. It is a more reasonable construction to say that the words "all the circumstances of the case" would in that particular case include, not only the fact that the covenant was made, but also the other relevant circumstances. The Act specifies one ground only upon which the court may refuse to make an order, that is, if the conduct or character of the applicant is such as to disentitle him to the benefit of such an order.

Going from s. 3, upon which the foregoing considerations are based, to the proviso to s. 5, I should say with respect that it is a

(1) (1922) N.Z.L.R., at p. 220. (2) (1938) A.C., at p. 479.
(3) (1870) L.R. 5 Q.B. 549, at p. 563.

probable suggestion which *Jordan* C.J. made in the course of his reasons for judgment in the Supreme Court, that " such a provision may perhaps be significant as intended to preclude doubt whether the rights conferred by the Act could be abandoned even after they had become rights in possession " ; and also, with respect, it is another probable suggestion, that made by *Nicholas* C.J. in Eq. in the course of his reasons for judgment, that the proviso " is merely to facilitate administration where all the members of the family desire it." These suggestions rebut the argument founded on the proviso that generally the Act permitted contracting out or waiver of its provisions. However, it seems to me that it is consistent with the presence of the express provision in the proviso prohibiting any application to the court in the circumstances mentioned therein that the legislature did not consider that any agreement falling outside the scope of the proviso would be effective to preclude an application to the court.

Coming to s. 9, if this section aids the solution of the question, it would lead to the conclusion that the general intention of the Act is against contracting out of it or waiving its provisions.

The appeal should be dismissed.

WILLIAMS J. On 25th February 1940, the respondent married the testator, Jacob Morris. On 7th February 1940, a deed was executed by the respondent in anticipation of the marriage, whereby, in consideration of the testator leaving her property of the value of £500 by his will, she covenanted with him that upon and after his death she would not make, institute or prosecute any claim of any kind whatever against his estate arising under or by virtue of the provisions of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (N.S.W.) as amended. The testator died on 3rd August 1942, having by his last will and codicils appointed the appellants his executors and bequeathed to the respondent the sum of £500, certain household furniture and effects and the sum of £3 per week during her widowhood.

After the death of the testator the respondent, in breach of her covenant, commenced proceedings under the Act. The appellants claimed that the deed was a bar to the proceedings. The application came before *Roper* J. who felt himself constrained to follow a previous decision of *Harvey* J., as he then was, in *In re T. Doogan* (1), that the Act is not intended to be in relief of the public burden but for the private and individual benefit of a testator's dependants who may contract out of the Act, and dismissed the application. The

(1) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Williams J.

respondent appealed to the Full Court of New South Wales which, by a majority, overruled *In re T. Doogan* (1), allowed the appeal, and remitted the application to *Roper* J. for hearing and determination. *Roper* J. thereupon made an order in favour of the respondent. The present appeal, therefore, while in form an appeal from the order of *Roper* J., is in substance an appeal from the order of the Full Court, and the only ground that has been argued is whether that order is right. The appeal raises the question whether, as *Harvey* J. held, the Act is an Act to which the maxim *quilibet renunciare potest juri pro se introducto* applies, or, as the Full Court held, it is governed by the maxim *privatorum conventio juri publico non derogat.*

In *Admiralty Commissioners* v. *Valverda* (*Owners*) (2) Lord *Wright*, in a speech in which all their Lordships concurred, said :—" Wherever there is a question whether there can be contracting out or waiver of statutory provisions, the problem must be solved on a consideration of the scope and policy of the particular statute. Little help can in general be derived from other statutes." I shall proceed, therefore, to an immediate consideration of the true meaning and effect of the present Act. But, in doing so, I wish to state that the Act is, in my opinion, *mutatis mutandis*, closely analogous to the legislation under consideration in *Davies* v. *Davies* (3), *Hyman* v. *Hyman* (4), *Matthews* v. *Matthews* (5), *Cooper* v. *Cooper* (6), and *Morton* v. *Morton* (7), and that an examination of the general principles stated in these cases, and particularly in the first three, has materially contributed to the conclusion which I have reached.

The Act is intituled an Act to assure to the widow or widower and family of a testator an adequate maintenance from the estate of such testator. Section 3 (1) provides that if any person (therein called the testator) 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. Section 4 provides that every provision made under the Act

(1) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.
(2) (1938) A.C., at p. 185.
(3) (1919) 26 C.L.R. 348.
(4) (1929) A.C. 601.
(5) (1932) P. 103.
(6) (1941) 65 C.L.R. 162.
(7) (1942) 1 All E.R. 273 ; 166 L.T. 164.

shall, subject to the Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death.

In *Dillon* v. *Public Trustee of New Zealand* (1) Lord *Simon* L.C., when delivering the judgment of the Privy Council, said that what the corresponding *Family Protection Act* 1908 in New Zealand does " is to confer on the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations out of the testator's estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for wife, husband, or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorizes the court to interpose and carve out of his estate what amounts to adequate provision for these relations, if they are not sufficiently provided for."

The Act therefore places an important limitation upon the right of a testator to dispose of his property by will in any manner that he may think fit. It makes the operation of his testamentary dispositions defeasible to the extent required to give effect to the purposes of the Act. The only real justification for such a statutory intrusion would appear to be that it is in the public interest. The necessity, or at least the desirability, in the public interest, of such legislation, is demonstrated by the way in which, after originating in New Zealand and spreading through the Australian States and territories, it has now been adopted in a modified form in England by the *Inheritance* (*Family Provision*) *Act* 1938, which is described as an Act " to amend the law relating to testamentary dispositions." The legislation has analogies to other powers to override proprietary rights conferred upon the courts in the public interest, as, for instance, the powers given to the court to modify or extinguish easements and restrictive covenants conferred by s. 89 of the *Conveyancing Acts* 1919-1943 (N.S.W.) as amended, and to relieve against the forfeiture of leases conferred by ss. 129 and 130 of that Act.

The Act, s. 3, sub-s. 2, provides that the court may refuse to make an order in favour of any person whose character or conduct is such as to disentitle him to the benefit of an order, so that it is evident that the sole purpose of the Act is not to ensure that families who should be maintained out of the estate of a testator are not maintained at the public expense. Besides, in the case of large estates,

(1) (1941) A.C., at p. 301.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Williams J.

provision can be made for the well-to-do. But this is, in my opinion, part of the purpose, although it is subordinated to the dominant purpose, which is to enable the court to remedy a breach by a testator of his moral duty as a wise and just husband or father to make proper provision, having regard to his property, for the maintenance, education and advancement of his family (*Bosch* v. *Perpetual Trustee Co. Ltd.* (1)). It is because the Act is principally concerned with this dominant purpose that it recognizes that it is not in the public interest that this protection should be extended to those members of the class whose character or conduct is such that a testator is justified in regarding them as having no claim on his bounty.

The scope and policy of the Act, as indicated by the principal section, is, therefore, to empower the court in the public interest to control for an important purpose the distribution of a testator's estate. It is clear to my mind that to allow contracting out would prevent or tend to prevent the Act assuring to the dependants of a testator that full and effective benefit which it expressly states to be its purpose. The contract would have to be made in the lifetime of the testator at a time when it would often be impossible to determine with any certainty what provision an applicant would require at the uncertain future date of the testator's death, and at a time when it would not be known who the other dependants of the testator would be or what would be the value of his estate. The contract could take different forms, and might amount to an absolute bar to the application, or might attempt to limit the events in which the applicant could apply to the court or the amount of the provision which the court could make in his favour. But the Act gives to all persons within the enumerated class an unconditional right to apply within a certain time to the court. It requires the court to consider whether in all the circumstances of the case the testator has left the applicant without adequate provision for his or her proper maintenance, education or advancement. To adopt the words of Lord *Shaw of Dunfermline* in *Hyman* v. *Hyman* (2) : " I do not think it to be competent for us to limit or restrict that power which is thus given unambiguously and definitely . . . In short this is the simple case—over and over again affirmed by this House—that the statute must be taken to mean what it says, and that there is much danger in allowing invasion of its terms followed by subsequent invasions succeeding the first until the virtue of the statute is emasculated." The position is clearly stated, *mutatis mutandis*, by the President, Lord *Merrivale*, in *Matthews* v. *Matthews* (3)

(1) (1938) A.C., at pp. 478, 479.
(2) (1929) A.C., at p. 617.
(3) (1932) P. 103.

where, in dealing with the question whether, under the Imperial *Summary Jurisdiction (Married Women) Act* 1895 and the *Summary Jurisdiction (Separation and Maintenance) Act* 1925, the magistrate was entitled to hold that a husband had been guilty within the meaning of the Acts of wilful neglect to provide reasonable maintenance, his Lordship, upon the question whether an agreement on the part of the wife not to institute proceedings under the Act was a bar, said :—" The language of the Act of Parliament supplies the test. The question before the magistrate was not whether this was an agreement which would be good at common law between independent parties and would exclude subsequent proceedings. What he had to determine was whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and in order to determine that he had, of course, to look at what had taken place between the parties, and to look at the agreement and to see what the husband had done and was doing, but he still had to determine judicially whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife " (1).

Langton J. quoted with approval what the magistrate had said :— " I see what they have done and I quite understand why they did it. I am not saying they did anything wrong, but I have still got to go further than that, and I have got to see whether to-day this man is right or wrong under the statute " (2). To set up a contract as a bar therefore to the court exercising the whole or any part of its jurisdiction under the Act is to attempt to oust or fetter the discretion of the court entrusted with the application of the section.

The Act, s. 5, imposes a statutory limitation of time within which the applications must be made, namely within twelve months from the date of the grant or resealing in New South Wales of probate of the will or grant or resealing of letters of administration with the will annexed, but provides that all the children and the husband or the wife, as the case may be, may agree in writing at any time before the expiration of this term to be bound by the will, and, if there be infants, such agreement may be confirmed by the court. Considerable reliance was placed by *Harvey* J. upon this proviso in *In re T. Doogan* (3) as showing an intention to allow contracting out. But the sub-section does not, in my opinion, throw any clear light on the problem either way. The agreement must be made by all the members of the family and not by an individual member in order to be effective, and it can only be made after the testator's death when the contents of the will and the value of the estate are both

(1) (1932) P., at p. 106.
(2) (1932) P., at p. 108.
(3) (1923) 23 S.R. (N.S.W.) 484 ; 40 W.N. 121.

H. C. OF A. 1944.

LIEBERMAN v. MORRIS.

Williams J.

known. So far as the proviso throws any light at all on the problem it appears to support the view that, since the legislature only expressly authorized contracting out to this limited extent when dealing with the subject, the maxim *expressio unius exclusio alterius* would apply and that any other contracting out would be opposed to the policy of the Act. But the only real purpose of the proviso would appear to be to facilitate an early distribution of the estate, where the whole of the dependants are satisfied to abide by the will. Its presence in the Act is not sufficient, in my opinion, to establish in favour of the respondent that there is a difference in policy between the New South Wales Act and the New Zealand and other Australian Acts on the point under discussion. In the case of these Acts, the local decisions are generally to the effect that it is against their policy to allow a dependant to contract out of their benefits. In *Dillon* v. *Public Trustee of New Zealand* (1) Viscount *Simon* L.C. said :—" The manifest purpose of the *Family Protection Act*, however, is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do. The court, in considering how its discretion should be exercised, and how far it is just and necessary to modify the provisions of the will, will pay regard to the circumstances in which the testator's will is drawn as it is, and the interests of the respective members of the family, but, if the court comes to the conclusion that no adequate provision has been made in the will, such as is called for by s. 33, then the jurisdiction of the court to alter the distribution of the estate in favour of the applicant (widow, widower or children, as the case may be) cannot be doubted " (2).

Further, there are three sections which, in my opinion, when read together, support the view that any contracting out other than that permitted by the proviso would be against the true purpose and object of the Act. Sections 6 (4) and 8 enable the court at any time and from time to time where the party benefited by the order has become possessed of or entitled to provision for his proper maintenance or support to rescind or alter any order making provision under the Act. Section 9 provides that no mortgage, charge or assignment whatsoever over any interest dependent on any order of the court under the Act whether before or after such an order is made shall

(1) (1941) A.C. 294.

(2) (1941) A.C., at pp. 303, 304.

be of any force validity or effect unless made with the permission of the court or the Master in Equity first had and obtained. Section 10 provides that where an order is made by the court under the Act all probate duties payable under the will of the testator shall be computed as if the provisions of the order had been part of the will and that any duty paid in excess of the amount required to be paid under the section shall be returned by the Colonial Treasurer to the executor. To make an order liable to variation by way of reduction or to rescission if the needs of an applicant diminish or vanish is to give effect to the purpose of the Act only to override the operation of the testator's testamentary dispositions in the interests of society to the extent necessary to remedy his breach of duty ; to provide that an applicant cannot without permission alienate his or her right to apply to the court or to the benefit of an order when it is made is an indication that it is against the public interest that rights under the Act should be bargained away (*Salford Guardians* v. *Dewhurst* (1)) ; while to provide that all probate duties payable under the will shall be computed as if the provisions of the order had been part of the will when it is usual to impose duties at a lower rate on that part of the estate which is left to the family of a testator than on that part which is left to strangers, indicates that the Act was passed in the public interest when the consolidated revenue may suffer in order to carry its policy into effect.

For these reasons I am of opinion that the deed is evidential only and that the appeal fails and should be dismissed.

Appeal dismissed. Costs of respondent out of estate.

Solicitors for the appellants, *W. Lieberman & Tobias.*
Solicitors for the respondent, *Abram Landa, Barton & Co.*

J. B.

(1) (1926) A.C., at pp. 625, 627, 635, 636.