REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

WORLADGE AND ANOTHER . . . APPELLANTS;
RESPONDENTS,

AND

DODDRIDGE AND OTHERS . . . . RESPONDENTS.
APPLICANT AND RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1957.

MELBOURNE, *May* 24, 27;

SYDNEY, *July* 2.

Williams, Fullagar, and Kitto JJ.

Testator's Family Maintenance—Will—Testator—Application by widow—Power to make order "towards the maintenance and support of such widow"—Form of provision—Lump sum—Payments during life as distinct from widowhood—Whether court has jurisdiction to make order for—Or should as matter of practice do so—Meaning of "maintenance and support"—Principles applicable to application—Discretion of trial judge—Principles governing appeal from—Testator's Family Maintenance Act 1912 (*Tas.*), *ss.* 3, 7.

Section 3 of the *Testator's Family Maintenance Act* 1912 (Tas.) provides: "(1) If any person disposes of his property, either wholly or partly, by will in such a manner that upon his death the widow or any child of the testator is left without sufficient means for her or his maintenance and support, the Court or a judge, in its or his discretion, may, upon the application by or on behalf of such widow or child, order such provision as to the Court or judge seems proper, having regard to all the circumstances of the case, to be made out of the estate of such deceased person in or towards the maintenance and support of such widow or child. (2) The Court or judge may make such other order in the matter, including any order as to costs, as the Court or judge may think fit." Section 7 provides: "In granting or refusing any application, and in fixing the amount of the provision to be made under the Act for the widow or any child, the Court or judge shall have regard, *inter alia*, to—(II) Whether the widow or any such child is entitled to independent means, whether

H. C. OF A. 1957. WORLADGE v. DODDRIDGE.

secured by any covenant, settlement, transfer, or other provision made by the deceased person during his life or derived from any other source whatsoever".

Held that there is jurisdiction under the Act to make an order for payment of a lump sum in favour of a widow.

In re Bennett (1954) Tas.S.R. 67, approved; *Re Greene's Estate* (1930) 25 Tas.L.R. 15, disapproved.

Held, further, by *Williams* and *Fullagar* JJ., *Kitto* J. expressing no opinion, that there is jurisdiction under the Act to make an order in favour of the widow of a testator for life as distinct from during widowhood.

D'Antoine v. *Field* (1923) 19 Tas.L.R. 21, disapproved.

Held, further, that the reasoning in *Bosch* v. *Perpetual Trustee Co. (Ltd.)* (1938) A.C. 463 decided on the corresponding New South Wales statute is applicable to the *Testator's Family Maintenance Act* 1912 (Tas.).

In re Norris (1953) Tas.L.R. 32, approved; *Re Greene's Estate* (1930) 25 Tas.L.R. 15, disapproved.

Held, further, that in the circumstances the exercise of discretion by the trial judge had miscarried.

Observations on whether as a matter of practice lump sums should be awarded and in what circumstances and whether orders should be made during widowhood or for life.

Decision of the Supreme Court of Tasmania (*Morris* C.J.), varied.

APPEAL from the Supreme Court of Tasmania.

Donald Gordon Doddridge who died on 13th March 1955 by his last will dated 19th August 1948 appointed Sydney George Doddridge and Alexander Worladge as his trustees and after bequeathing to his wife Minnie May Doddridge, from whom he was separated, an annuity of £104 until her death or remarriage and a legacy of £300 to a Mrs. Pedder left the residue of his estate between his nephews Brian Worladge and Raymond Paul.

By summons dated 18th October 1955 the above-named widow of the testator applied to the Supreme Court of Tasmania for further provision out of the estate of the testator. The respondents to this application were the two residuary beneficiaries and the two trustees of the estate. In support of her application the applicant swore an affidavit which was substantially as follows:—2. That I am sixty-five years of age. 3. That I was married to the testator at the Congregational Church, East Melbourne, Victoria on 25th February 1925 and there is not any issue of the said marriage. 4. That prior to my marriage to the testator I was a divorcee having been previously married to Edwin John Howell of Hobart, Tasmania.

5. This marriage was dissolved in November 1923 on the petition of myself this deponent on the grounds of desertion. The following is the state of the assets and liabilities of the estate of the testator as supplied by the defendants:—

Assets	£29,056	12	5
Liabilities	363	8	4
Balance for duty	£28,693	4	1

The real estate included in the assets which was valued at £13,010 for probate purposes was actually sold by public auction for £18,200 thus increasing the assets of the testator by £5,189 a total of £34,245 12s. 5d. 6. That by his last will and testament dated 19th August 1948 the testator appointed Sydney George Doddridge and Alexander Inglewood Worladge to be trustees and executors of his will and probate of the said will was granted by the Supreme Court of Tasmania to the said executors on 12th September 1955. 7. That from the date of our marriage the testator and I lived happily together on his farm at Carlton until about April 1945. 8. That at about that date the testator brought on to his farm at Carlton a Mrs. Beasley and her daughter who were to help milk and assist me in the housework. 10. That Mrs. Beasley and her daughter lived in the farm cottage rent free and the testator used to cart and cut up wood for the cottage. 11. That the testator spent almost every evening with the Beasleys at the farm cottage. 13. That the presence of the Beasleys at the farm caused domestic difference between the testator and myself. The testator left my bedroom and slept in the sleep-out with the door locked. 14. That early in January 1946 the testator ordered me to leave the home stating that he had sold the farm and I would have to get out. The testator stated he would pay me thirty-two shillings and sixpence per week that being the amount of pension payable to a widow at that time. I refused to leave until he had given me a memo in writing undertaking to pay to me the above-mentioned sum weekly. 15. On the farm I helped with the milking, bred and kept poultry, made up to fifty pounds of butter each week and grew vegetables in addition to my house-keeping duties. Most of the proceeds derived from the sale of butter and poultry were given to the testator. 16. I left the house at Carlton on 15th January 1946. 17. On 1st July 1946 I caused a complaint under *The Maintenance Act* (Tas.) to be filed against the testator claiming that he had left me without adequate means of support. 18. This complaint was heard before the Court of Petty Sessions at Hobart on 26th July 1946. After hearing

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

evidence from myself and the testator the presiding police magistrate ordered that the testator should pay two guineas per week as from 14th June 1946 for my maintenance and support. 19. The testator was frequently in arrears with his maintenance payments and at the date of his death was twenty-five pounds four shillings in arrears which amount has since been paid to me by the solicitors for the said respondents. 20. At the date of the maintenance order I was employed as a teacher at St. Margaret's Collegiate School Hobart and was paid a salary of thirty shillings per week. 21. That after I left the home at Carlton I went to live with my parents at Bellerive both of whom were pensioners. 22. That after the death of my father on 4th March 1948 my mother sold to me the house in which we were living at Bayfield Street, Bellerive for the sum of £900, that being the value placed on the property by E. H. McDevitt, valuer. 23. That on 10th May 1951 I sold this house for the sum of £3,000 and removed to Victoria. 24. That I used this money in addition to what I had saved to purchase a partly furnished house situate at 290 Williams Road, Toorak for the sum of £5,050. I paid £4,050 in cash and borrowed the balance of the purchase money from the Commercial Bank of Australia on mortgage. 25. That I let the main portion of this house to Mr. and Mrs. Williams at a rental of five pounds per week retaining two rooms for my own use. 26. That rental received by me for this house is absorbed in the payment of bank interest, rates and taxes, insurance and repairs. The furniture in the house is valued at £1,000. 27. That at present I am employed as housekeeper for a Mr. E. Clive Miller who is over eighty years of age. My wages are five pounds per week and my board and this position is most uncertain. I have no other assets. 28. I am in very bad health.

The application was heard before *Morris* C.J. who, on 16th April 1956, ordered that the trustees of the estate pay to the applicant by way of further provision towards her maintenance the sum of £1,800 and by way of annuity the further sum of £1,000 per year.

From this decision the residuary beneficiaries appealed to the High Court.

R. C. Wright, for the appellants. There is no jurisdiction to award a lump sum under the *Testator's Family Maintenance Act* 1912 (Tas.). [He referred to *Re Greene's Estate* (1).] Of the cases in States other than Tasmania *In re Osborne* (2) is the only one where by virtue of language almost the same as that used in the Tasmanian Act power was considered to arise to award a lump sum. The fact

(1) (1930) 25 Tas.L.R. 15, at p. 29. (2) (1928) Q.S.R. 129.

that in the other States and in New Zealand the relevant statutes contain an express power to award a lump sum shows that the respective Parliaments were of opinion that such a power would not be implied in the absence of express words. [He referred to *Twentyman* v. *Twentyman* (1); *Mills* v. *Mills* (2).] Alternatively the Tasmanian Act would authorise the setting aside of a lump sum to be applied in the discretion of a trustee for extraordinary contingencies such as illness of the widow etc. Such a fund would form part of the estate of the testator after the death of his widow. [He referred to *Roper-Curzon* v. *Roper-Curzon* (3).] There is no jurisdiction to make provision for a woman longer than her widowhood. [He referred to *D'Antoine* v. *Field* (4); *In re Collett (Dec'd.)*; *Collett* v. *Public Trustee* (5).] The reasoning in *Bosch* v. *Perpetual Trustee Co. Ltd.* (6) is not applicable to the *Testator's Family Maintenance Act* (Tas.) which contains the words "maintenance and support". The words used in the New South Wales Act in question in that case were "maintenance, education or advancement in life". The approach of *Clark* J. in *Re Greene's Estate* (7) is the same as that of the Privy Council in *Dillon* v. *Public Trustee of New Zealand* (8). It is submitted that the notion of the just testator finds no place in the latter case. [He referred also to *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (9).] The order made below is so generous as to be beyond the exercise of the discretion if properly exercised.

R. C. Jennings (with him *R. Wood*), for the respondent widow. There is power under the *Testator's Family Maintenance Act* 1912 (Tas.) to award a lump sum. The reasoning of *Green* J. in *In re Bennett* (10) is correct. See also *Plimmer* v. *Plimmer* (11). The decision of the majority in that case turned on the proposition that it is not the intention of the Act to provide for those who may share in the applicant's estate on his or her death. It is submitted that that reasoning goes not to jurisdiction but to the occasion for its exercise. While it is proper for the Court to order the setting apart of a lump sum to be used for specific purposes and to fall back into the testator's estate on the death of the applicant it is in the discretion of the Court to make such an order or an order for payment of a lump sum outright.

(1) (1903) P. 82.
(2) (1940) P. 124.
(3) (1871) L.R. 11 Eq. 452.
(4) (1923) 19 Tas.L.R. 21.
(5) (1936) N.Z.L.R. 9.
(6) (1938) A.C. 463.
(7) (1930) 25 Tas.L.R. 15.
(8) (1941) A.C. 294, at p. 301.
(9) (1956) 95 C.L.R. 494.
(10) (1954) Tas.S.R. 67.
(11) (1906) 9 N.Z.Gaz.L.R. 10, at pp. 15 et seq.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

[WILLIAMS J. referred to *Ellis* v. *Leeder* (1).]

The Court should construe this legislation liberally. There is jurisdiction to make an order to operate for life as distinct from during widowhood. This is an appeal from an exercise of discretion and on the principles governing such appeals this Court should not interfere in the present case. The reasoning of the Privy Council in *Bosch* v. *Perpetual Trustee Co. Ltd.* (2) is applicable to the *Testator's Family Maintenance Act* (Tas.). In all the circumstances the order made by *Morris* C.J. was proper.

F. C. Mitchell, for the respondent trustees. The trial judge treated the applicant as a wronged wife and thereby took into account an irrelevant matter. The order below is to be explained only on the basis of reparation to a wronged wife. The applicant was awarded maintenance against the testator in 1946 in the sum of £2 per week. The fact that she never afterwards applied for an increase was a relevant consideration in determining whether or not she had become settled in her way of life.

Cur. adv. vult.

July 2.

The following written judgments were delivered:—

WILLIAMS AND FULLAGAR JJ. This is an appeal by Brian Worladge and Raymond Paul, the residuary beneficiaries under the will of the testator Donald Gordon Doddridge deceased, from an order of the Supreme Court of Tasmania made on 16th April 1956 in favour of his widow the respondent Minnie May Doddridge under the provisions of the *Testator's Family Maintenance Act* 1912 (Tas.). The testator died on 13th March 1955 without issue. By his will made on 19th August 1948, the testator after bequeathing to the applicant widow an annuity of £104 during her widowhood and a pecuniary legacy of £300 to Mrs. Wallace Pedder which lapsed, bequeathed and devised his residuary personal and real estate to the appellants, upon their respectively attaining the age of twenty-one years in equal shares. Mr. *Wright* conceded that both appellants are young men in good health, well able to earn their own living and not in need of maintenance or support. The net value of the estate, after payment of death duties, testamentary and funeral expenses, debts and all other liabilities is about £25,800 and it is expected by the respondent executors that this sum when invested will produce an income of about £1,500.

The testator and the applicant were married on 25th February 1925 and went to live on a farm owned by the testator at Carlton in

(1) (1951) 82 C.L.R. 645, at pp. 652, 659.

(2) (1938) A.C. 463.

Tasmania. They lived there happily until about April 1945 when the testator became enamoured of a young woman whose mother was working on the property and on 12th January 1946 he ordered the applicant to leave the farm stating that he had sold it and that she would have to get out. On 26th July 1946 the applicant obtained a maintenance order in the court of petty sessions at Hobart ordering her husband to pay two guineas per week for her maintenance and support from 14th June 1946. This order continued in force until his death. The payments were then slightly in arrears and these arrears totalling £25 4s. 0d. were paid to the applicant by his executors. At that time the applicant was employed as housekeeper to a man eighty-one years of age for which she received £5 per week and board and lodging valued at £3 per week. She owned a house at Toorak in Melbourne which she had purchased for £5,050 in November 1954, and which was still subject to a mortgage of £500. She owned the furniture in the house valued at £1,000, but two rooms in the house were still unfurnished and it is estimated that it would require £300 to furnish them. She had let the furnished part of the house to tenants for £5 per week, but had retained the two unfurnished rooms for her own use. She was then about sixty-five years of age. Upon the death of the testator she acquired by survivorship a sum of £708 in an account in their joint names.

Morris C.J. who heard the application considered that because of the applicant's age and health and because of the advancing years of her employer it was unlikely that this employment would continue. He estimated the net rent from the house at £3 per week. He said that the separation between the applicant and her husband was not her fault. It was apparent that she was a wronged wife because of his attachment to the daughter of his housekeeper. He said that he proposed to follow *Crisp* J. in *In re Norris* (1) in holding that the Privy Council's decision in *Bosch* v. *Perpetual Trustee Co. Ltd.* (2) required a revision of the view of *Clark* J. in *Re Greene's Estate* (3) that the court could not order a provision in excess of what was sufficient in the circumstances of the particular case to provide for the needs of the applicant as regards fit maintenance and support and in no case could the court exceed that measure. He made an order that further provision be made for the applicant by paying to her out of the estate of the testator the sum of £1,800 and an annuity of £1,000 from the date of his death.

It will be seen that this order does not in terms provide that the annuity of £1,000 for the life of the applicant should be paid in

(1) (1953) Tas.S.R. 32.
(2) (1938) A.C. 463.
(3) (1930) 25 Tas.L.R. 15.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

Williams J. Fullagar J.

substitution for the annuity of £104 during her widowhood bequeathed to her by the will although this was presumably intended. But even then the order could not be characterised as other than very generous.

The first contention raised by Mr. *Wright* before us was that the Supreme Court of Tasmania under the local Act has no jurisdiction either to make provision for a widow during her life as opposed to her widowhood or to award her a lump sum. Section 3, the main section of the Act, is in the following terms: " (1) If any person disposes of his property, either wholly or partly, by will in such a manner that upon his death the widow or any child of the testator is left without sufficient means for her or his maintenance and support, the Court or a judge, in its or his discretion, may, upon the application by or on behalf of such widow or child, order such provision as to the Court or judge seems proper, having regard to all the circumstances of the case, to be made out of the estate of such deceased person in or towards the maintenance and support of such widow or child. (2) The Court or judge may make such other order in the matter, including any order as to costs, as the Court or judge may think fit." Section 2 (1) provides *inter alia* that " widow " includes widower. Section 7 provides that in granting or refusing any application, and in fixing the amount of the provision to be made under the Act for the widow or any child, the court or judge shall have regard, *inter alia*, to—" (II) Whether the widow or any such child is entitled to independent means, whether secured by any covenant, settlement, transfer, or other provision made by the deceased person during his life or derived from any other source whatsoever ". The jurisdiction to make an order providing for an estate for life or a lump sum must be found in this section. The Tasmanian Act, unlike the New Zealand Act and the Acts of some of the Australian States, does not expressly authorise the court to award a lump sum. Section 3 makes it a condition of jurisdiction that the widow or child should be left without sufficient means for her or his maintenance and support. Once this has been established, the court or judge in its or his discretion may order such provision as to the court or judge seems proper, having regard to all the circumstances of the case, to be made out of the estate of the deceased person in or towards the maintenance and support of such widow or child. " Provision " is a word of very wide meaning. It occurs not only in s. 3 but also in s. 7, and in the latter section it would obviously be wide enough to include a life estate and a capital sum. No distinction is drawn in s. 3 between the nature of the provision the court has jurisdiction to make upon the

application of a widow or a child, and a life estate whether protected or not or the award of a lump sum would often be an appropriate way of making provision for the maintenance and support of a child. In the case of a widow a lump sum might be required to purchase a boarding house or some other business suitable for a woman to undertake, and in the case of small estates the purchase of a business might be the only way of giving a widow an opportunity of maintaining and supporting herself. There is nothing in the Act to indicate that the jurisdiction of the court to make an order for a life estate or a capital sum to provide for the maintenance and support of a widow is narrower than the jurisdiction of the court to provide for maintenance and support of a child. The jurisdiction is the same in the case of every application. The jurisdiction is to make such provision for this purpose out of the estate as to the court or judge seems proper, having regard to all the circumstances of the case.

The provision can be made out of any part of the testamentary estate so that the whole of the estate corpus or income is available for the purposes of the Act. The jurisdiction is conferred in very wide terms and no court or judge would be justified in attempting to define it otherwise than in accordance with the ordinary natural meaning of the words of the section. In *Holmes* v. *Permanent Trustee Co. of New South Wales Ltd.* (1), *Rich* J. said of the corresponding ordinance in the Northern Territory, with the concurrence of *Evatt* J. and *McTiernan* J., that the legislation "is remedial in its character and 'must be so construed as to give the most complete remedy which the phraseology will permit'" (2). The Tasmanian Act unlike the New Zealand Act and the Acts of some of the Australian States does not expressly authorise the court subsequently to rescind or alter a provision made under it but this does not supply a reason for narrowing the meaning of the language of s. 3. A widow who did not subsequently remarry might inherit a fortune soon after an award in her favour but this would not cause her to forfeit the provision made for her under the Act. The question whether the applicant has been left without sufficient means for her or his maintenance and support must be determined as at the death of the testator: *Coates* v. *National Trustees Executors and Agency Co. Ltd.* (3). Ordinarily a widow could not be said to have been left by her husband without sufficient means for her maintenance and support just because the will provided for her only during her widowhood and this would be a circumstance to which

(1) (1932) 47 C.L.R. 113.
(2) (1932) 47 C.L.R., at p. 119.
(3) (1956) 95 C.L.R. 494.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

Williams J. Fullagar J.

it would be the duty of the court to have very serious regard before making an order for her life. The fact that under the Tasmanian Act an order once made could not be rescinded or altered would also naturally cause the court to hesitate before it made an order in favour of a widow extending beyond her widowhood. But it is clear that in the case of many estates, particularly small estates, a direction to pay even the whole of the income of the estate during widowhood would be quite insufficient to provide for the maintenance and support of the widow. Only a capital sum would be of any use for this purpose. And where the court has to adjust the competing claims of a widow and children a division of the corpus between them might be the only solution. The fact that in some other Acts it has been found advisable expressly to provide that the court may award a capital sum does not indicate that this is necessary to confer jurisdiction upon the court to do so. It merely indicates that the legislatures concerned have thought it advisable to place the question beyond judicial doubt. In *Sampson* v. *Sampson and Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (1) this Court said of the Western Australian Act, where such an express provision occurs, " The substantive power is given by sub-s. 1 " (that is of s. 3 (1) which corresponds to s. 3 (1) of the Tasmanian Act) " and it is to order that such provision as the court thinks fit shall be made out of the estate. The alternatives stated by sub-s. 4 " (that is a lump sum or periodic or other payments) " are to make it clear that, within the power conferred by sub-s. 1, there is enough authority to make a lump sum order as well as enough authority to make an order for periodic or other payments. The intention of sub-s. 4 might have been as well expressed if it had said that it should be no objection to the exercise of the power under sub-s. 1 that the order was for a lump sum or periodic or other payments "(2).

For these reasons we cannot accept the opinion of the majority of the Full Court of Tasmania in *D'Antoine* v. *Field* (3) that under the Tasmanian Act there is no power for the court to make an order to provide for the maintenance and support of a widow after she has ceased to be the widow of the testator. We also cannot accept the doubt of *Clark* J. in *Re Greene's Estate* (4) as to whether the court has power to order a lump sum. On that point we agree with the opinion of *Green* J. in *In re Bennett* (5) that the court has power to do so. We are therefore of opinion that the order of *Morris* C.J. in the present case awarding a lump sum and an annuity for life to the applicant cannot be impeached for want of jurisdiction.

(1) (1945) 70 C.L.R. 576.
(2) (1945) 70 C.L.R., at p. 584.
(3) (1923) 19 Tas.L.R. 21.
(4) (1930) 25 Tas.L.R. 15.
(5) (1954) Tas.S.R. 67.

There remains the question whether we are justified in reviewing the exercise of the discretion conferred upon his Honour by the Act which led him to make the order under appeal. It is clear that a court of appeal will not review the exercise of such a discretion unless it is satisfied that it is erroneous: *Coates* v. *National Trustees Executors & Agency Co. Ltd.* (1). There it is stated in the judgment of the Chief Justice that " The discretionary judgment of the primary judge in matters of this kind will not be reviewed upon appeal unless the court is satisfied that the exercise of the discretion has been erroneous " (2). The reports in New Zealand and Australia afford many illustrations of the way in which courts have approached the problem of how to exercise the discretion conferred upon them by the relevant Acts. They are at most illustrations of the manner in which the discretion has been exercised in the particular circumstances. It is clear that the claim of a widow, where the estate is of considerable value, and there are no competing claims of children, should not be disposed of in any niggardly manner. She is entitled to such a provision for her maintenance and support as the court or judge thinks proper and " proper " is a word which, as the Privy Council pointed out in *Bosch's Case* (3) lets in all the considerations there adverted to. We are unable to accept the opinion of *Clark* J. in *Re Greene's Estate* (4) that the power of the court under the Tasmanian Act to make proper provision for the maintenance and support of an applicant is to be measured solely by the needs of the applicant as regards fit maintenance and support. There is no distinction in substance that we can find between the New South Wales Act that was before the Privy Council in *Bosch's Case* (5) and the Tasmanian Act and their Lordships say that the amount to be provided is not to be measured solely by the need of maintenance (6). The gloss that has been put upon the words of such Acts, and which received the approval of the Privy Council in *Bosch's Case* (5), that in every case the court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father is as applicable to the Tasmanian Act as to any of the other Acts. Applying that test, it is clear that the present testator would have been guilty of a breach of his moral duty unless he had provided for his widow out of his ample estate a sufficient allowance to free her from reasonable fear of insufficiency in her

(1) (1956) 95 C.L.R. 494.
(2) (1956) 95 C.L.R., at p. 511.
(3) (1938) A.C., at pp. 476-479.
(4) (1930) 25 Tas.L.R. 15.
(5) (1938) A.C. 463.
(6) (1938) A.C., at p. 478.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

Williams J. Fullagar J.

advancing age. As was said by *Cleland* J. in *In re Harris* (1): " Proper maintenance is (if circumstances permit) something more than a provision to keep the wolf from the door—it should at least be sufficient to keep the wolf from pattering round the house or lurking in some outhouse in the back yard—it should be sufficient to free the mind from any reasonable fear of any insufficiency as age increases and health and strength gradually fail " (2). But in deciding the extent of this moral duty the style in which the widow lived during the life of the testator should not be left out of account. They appear to have lived comfortably but frugally during the twenty years they lived together on the farm. After the separation the applicant was able to live in reasonable comfort on about £13 per week, and even to save a considerable sum because she was able between November 1954 when she purchased the house and the death of the testator to pay £500 off the outstanding purchase money. The greater part of this sum of £13 was earned by her own labour. With an estate of the size left by the testator she should not be forced to work in her old age to earn a living. But provision of an annuity of £520 during her widowhood and of a capital sum sufficient to enable her to pay off the mortgage on the house and to furnish the two rooms she has reserved for herself would appear to be the most that could be ordered as proper provision for her maintenance in all the circumstances of the case. The likelihood of some additional expense due to sickness or some other need as she grows older should not be overlooked, but she is entitled to the sum of £708 in the joint account and she will have a valuable capital asset in the house at Toorak fully furnished and free of debt. In all the circumstances it would appear that the husband as a just husband would have completely fulfilled his moral duty to provide for his widow if he had provided for her to this extent. The provision made by his Honour appears to us to be so liberal that we are satisfied he must have exercised the discretion conferred upon him erroneously. One thing the court should not do is to attempt to make a new will for the testator. The court is only authorised to alter a testator's disposition of his property so far as it is necessary to provide for the proper maintenance and support of his widow or children where insufficient means have been provided for this purpose. He appears to have considered that he could take into account the fact that the applicant was, to use his own words, a " wronged wife " but this is not a circumstance which should have influenced him in deciding what would be proper maintenance and support. His Honour also does not appear to have given sufficient

(1) (1936) S.A.S.R. 497.

(2) (1936) S.A.S.R., at p. 501.

weight to the requirements of s. 7 (II) of the Act. After awarding £800 to enable her to pay off the mortgage on her house and to furnish the two unfurnished rooms, he awarded her an extra £1,000, to quote his own words, " having regard to her age and the comforts, medical and hospital expenses etc. which she may need in the future and to give her security." But without this sum her income and assets should be sufficient to give her reasonable security. It was contended that we should in the case of the Tasmanian Act follow the principles enunciated by *Clark* J. in *Re Greene's Estate* (1) in deciding what would be a proper provision for the maintenance and support of an applicant. But that case was decided before *Bosch's Case* (2) and we are unable to find any real difference in the language of the Tasmanian Act and that of the New Zealand Act and the Acts of the other States of the Commonwealth or to hold that the gloss placed upon the language of these Acts in the passage cited from *Bosch's Case* (2) is inapplicable to the Tasmanian Act. That test is one which should be used with considerable caution but the learned Chief Justice was right in our opinion in preferring the reasoning of *Crisp* J. in *In re Norris* (3) to that of *Clark* J. in *Re Greene's Estate* (1). The latter case was, of course, decided before *Bosch's Case* (2).

For these reasons we are of opinion that the appeal should be allowed, that the order of the Supreme Court below should be set aside except as to costs, and that in lieu thereof an order should be made varying the will of the testator by substituting for the annuity of £104 an annuity of £520 during the widowhood of the applicant, the later annuity to be subject to the power of appropriation contained in the will of the testator and also by directing the executors to pay to the widow £1,000 out of the corpus of his residuary estate. The costs of all parties of the appeal as between solicitor and client should be paid out of the estate of the testator.

KITTO J. The judgment under appeal draws attention to a difference of judicial opinion in Tasmania as to the construction of s. 3 of the *Testator's Family Maintenance Act* 1912 of that State. That section gives the Supreme Court of Tasmania jurisdiction in certain cases to order that provision for the widow or a child of a testator shall be made out of his estate. Its terms, however, are not identical with those of corresponding sections in similar Acts in force elsewhere, and divergent views have been held as to whether the difference is only verbal or goes to matters of substance.

(1) (1930) 25 Tas.L.R. 15.
(2) (1938) A.C. 463.
(3) (1953) Tas.S.R. 32.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

KITTO J.

A widow or child applying for an order under the Tasmanian section must show that at the testator's death she or he was left without " sufficient means for her or his maintenance and support ". That being proved, the power of the court is to order such provision to be made out of the testator's estate for the " maintenance and support " of the applicant as seems to the court " proper ", having regard to all the circumstances of the case. In the present case *Morris* C.J. held, following a decision of *Crisp* J. in the case of *In re Norris* (1), that in interpreting and applying these expressions it is right to treat as applicable to the Tasmanian Act all that was said by the Privy Council in *Bosch* v. *Perpetual Trustee Co. Ltd.* (2) in reference to the *Testator's Family Maintenance Act* 1916 (N.S.W.). In *Re Greene's Estate* (3), decided some eight years before *Bosch's Case* (2) reached the Privy Council, *Clark* J. held that the principles which had been evolved under the New Zealand Act in *Allardice* v. *Allardice* (4) and other cases and were to be applied to the New South Wales Act in *Bosch's Case* (2) were inapplicable to the Tasmanian Act. Before us it was contended on behalf of the appellants that this was correct. It was pointed out that the New Zealand Act prescribes as the condition of jurisdiction that the testator shall have died leaving a will without making " adequate provision for the proper maintenance and support " of his wife, husband or children, and that the New South Wales Act prescribes that the testator shall have disposed of his property by will in such a manner that his widow, husband or children are left without " adequate provision for their proper maintenance, education, or advancement in life "; whereas the Tasmanian Act prescribes only that the testator shall have disposed of his property by will in such a manner that his widow or child is left without " sufficient means for her or his maintenance and support ".

It is true that the reasoning in the Privy Council's judgment in *Bosch's Case* (2) depends largely upon the use in the New South Wales Act of the word " proper " to qualify " maintenance, education, or advancement in life ". " The use of the word ' proper ' in this connection is of considerable importance ", their Lordships said. " It connotes something different from the word ' adequate '. A small sum may be sufficient for the ' adequate ' maintenance of a child, for instance, but, having regard to the child's station in life and the fortune of his father, it may be wholly insufficient for his ' proper ' maintenance. So, too, a sum may be quite insufficient

(1) (1953) Tas.S.R. 32.
(2) (1938) A.C. 463.
(3) (1930) 25 Tas.L.R. 15.
(4) (1910) 29 N.Z.L.R. 959; (1911) A.C. 730.

for the ' adequate ' maintenance of a child and yet may be sufficient for his maintenance on a scale that is ' proper ' in all the circumstances " (1).

The Tasmanian formula, with its omission of " proper ", was copied from the first Victorian Act of this kind, the *Widows and Young Children Maintenance Act* 1906. That Act, though inspired by the *Family Protection Act* 1900 (N.Z.), deserted the formula " adequate provision for the proper maintenance and support ", preferring " sufficient means for their maintenance and support ". This example has been followed not only in s. 3 of the Tasmanian Act but also in s. 111 of the *Administration and Probate Ordinance* 1929 of the Australian Capital Territory. In all other States of the Commonwealth and in the Territory of North Australia the New Zealand formula has been used; and in 1937 Victoria reverted to it by the amending Act No. 4483, using in a section which it substituted for s. 139 of the *Administration and Probate Act* 1928 the expression " adequate provision for the proper maintenance and support ".

But when the Victorian draftsman of 1906 chose the expression " sufficient means for their maintenance and support " in preference to the New Zealand form of words was he turning to a different conception ? There is no distinction to be drawn between " sufficient " and " adequate ", and the use of " sufficient means " instead of " adequate provision " may be ascribed to a desire to put it beyond argument that the question of sufficiency is to be considered by reference to the applicant's total resources, and not only to what he or she has been left by the testator. But is there a difference in this context between what is sufficient for " maintenance and support " and what is sufficient for " proper maintenance and support " ? The Privy Council did not say so. They distinguished only between the notions of " adequate maintenance and support " and " proper maintenance and support ". Emphasis was laid upon " proper " because by using that word the Act expressly prescribed the standard of maintenance and support by reference to which it was necessary to judge of the sufficiency of the provision available to the applicant. The only relevant difference under the Victorian Act of 1906 was that no express indication was given, in the words describing the condition of jurisdiction, of the standard of maintenance and support for which the sufficiency of the applicant's means was to be considered. But such an indication was to be found, nevertheless, in the fact that the order which the court was empowered to make if the condition of jurisdiction were

(1) (1938) A.C., at p. 476.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

KITTO J.

satisfied was that such provision should be made as might seem " proper having regard to all the circumstances of the case . . . in or towards the maintenance and support ". That implied, clearly enough, that the jurisdiction was not confined either to the case where the applicant's means were insufficient for bare subsistence, or even to the case where they were insufficient for " adequate " maintenance and support, but was to exist if the applicant had been left without means sufficient to constitute such " proper " provision. A valid distinction can hardly be suggested between a provision sufficient to be proper for an applicant's maintenance and support and a sufficient provision for the applicant's proper maintenance and support. The notion in either case is that of a standard of maintenance and support which is proper because appropriate to the circumstances of the particular case.

This applies equally, of course, to the Tasmanian Act, and it means that in a case under that Act the principles laid down in *Bosch's Case* (1) must apply. In *Re Greene's Estate* (2), as I have said, *Clark* J. took a different view. Instead of treating the words " proper having regard to all the circumstances " as indicating how wide was the connotation of " maintenance and support ", the learned judge treated them as limited by reference to " sufficient means for her or his maintenance and support ", paraphrasing this expression as " sufficient in the circumstances of the particular case to provide for the needs of the applicant as regards fit maintenance and support ". What his Honour meant was further explained in his statement that the court had to apply itself to " the practical question of determining what is a reasonably sufficient provision for the fit maintenance and support of the applicant, that is to say, what is sufficient for his or her maintenance having regard to those factors which in the particular case reason requires to be considered ". He seems to have thought that the New Zealand cases offered a choice between an "economic " view of the Act, that it was concerned with a sufficient provision for the reasonable maintenance and support of the applicant, and an " ethical " view, expressed, for example, by *Edwards* J. in *Allardice* v. *Allardice* (3), in a passage approved in *Bosch's Case* (1) that the Act was concerned with the provision which the testator, as a just but not a loving husband or father, was under a moral duty to make for his wife or children. *Clark* J. thought that the " economic " view, and not the " moral " view, should be accepted in relation to the Tasmanian Act. He was largely influenced in adopting this view by the word

(1) (1938) A.C. 463.
(2) (1930) 25 Tas.L.R. 15.
(3) (1910) 29 N.Z.L.R. 959, at pp. 972, 973.

" sufficient". This points, I think, to the source of some of the trouble which arose in discussions of Testator's Family Maintenance legislation before *Bosch's Case* (1). The idea of sufficiency (or adequacy) was sometimes carried over from the " provision " to the " maintenance and support", with the result that " proper " or " fit " maintenance and support to which the Act referred was considered by some to be that which was sufficient. The choice between the " economic " and the " ethical " views was thus made a choice between two possible meanings of " sufficient " (or " adequate "). Witness the laconic statement of *Salmond* J. in *Welsh* v. *Mulcock* (2) to which *Clark* J. referred (3), that " ' Adequate ' is what is just or what is sufficient " (4). In *Bosch's Case* (1) the Privy Council corrected this misconception by insisting that proper maintenance is not to be translated as adequate maintenance, and that a judgment as to the maintenance which is " proper " for a particular applicant in the circumstances of his case is necessarily a judgment as to what maintenance the applicant *ought* to have in those circumstances, and not what he or she needs. It is only in that sense that it is correct to say that *Bosch's Case* (1) adopted an " ethical " rather than an " economic " view. The hypothesis of a just but not loving testator is resorted to, not for the purpose of determining what would have been the ideally fair manner of disposing of the testator's estate, but only for the purpose of determining what was sufficient for the maintenance and support which the circumstances make it right that the applicant should have, as distinguished from what was sufficient for the maintenance and support which the applicant may be considered to need. The use of the hypothesis is not open to the objection which *Clark* J. seems at some points in his judgment to be making to it, that it carries the mind beyond maintenance and support to fair participation in the testator's bounty.

For these reasons I agree in the opinion which *Crisp* J. maintained in *In re Norris* (5). I would reiterate, however, as a comment on the headnote to that case, that courts exercising jurisdiction under *Testator's Family Maintenance Acts* have constantly to remind themselves that the power confided to them is not to order such provision generally for applicants as it thinks their testators ought to have made. It is confined to provision for their maintenance and support, or maintenance, education or advancement in

(1) (1938) A.C. 463.
(2) (1924) 43 N.Z.L.R. 673.
(3) (1930) 25 Tas.L.R., at p. 23.
(4) (1924) 43 N.Z.L.R., at p. 678.
(5) (1953) Tas.S.R. 32.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

KITTO J.

life, as the case may be. What is proper is to be tested by reference to the provision which in all the circumstances of the case satisfies, but does not exceed, the requirements of moral justice in regard to those particular purposes. This leads me at once to the first of three submissions which were put on behalf of the appellants in addition to their broad contention that the principles of *Bosch's Case* (1) have no application under the Tasmanian Act. The submission was that under that Act there is no power to order the payment to an applicant of a lump sum, because a lump sum is outside the concept of maintenance and support as contrasted with such wider concepts as advancement, preferment and benefit: cf. *Lowther* v. *Bentinck* (2); *In re Peel*; *Tattersall* v. *Peel* (3); *In re Heyworth's Contingent Reversionary Interest* (4); *In re Patterson* (5). In some Acts, such as the Western Australian Act which was under consideration in *Sampson* v. *Sampson and Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (6), specific provision has been inserted for the awarding of lump sums, but there is no specific provision on the point in the Tasmanian Act. Such provisions may be traced historically to the fact that some of the judges who took part in deciding the case of *Plimmer* v. *Plimmer* (7) considered that under a power limited to providing for maintenance and support the court could not in any circumstances give a lump sum. *Edwards* J., with whom *Denniston* J. agreed " though not without hesitation " (8), gave as his reason that to give capital of a testator's estate would be to provide the applicant not only with maintenance and support but also with a fund or an estate which he or she might leave to others on his or her death (9). *Cooper* J. seems to have agreed (10); and *Chapman* J. also agreed, saying that a lump sum did not fulfil " the generally accepted meaning of the expressions maintenance and support " (11). *Stout* C.J. dissented, expressing the opinion that to limit the discretion of the court to a weekly, monthly or yearly allowance would be, in many cases, " to render this beneficial statute futile or inoperative " (12). Some of the difference of opinion on the point may be a result of using the expression " lump sum " to refer without discrimination to all kinds of non-recurring payments. The payment of a sum to trustees to be held upon trusts for an applicant's maintenance and support

(1) (1938) A.C. 463.
(2) (1874) L.R. 19 Eq. 166.
(3) (1936) Ch. 161.
(4) (1956) Ch. 364, at p. 370.
(5) (1941) V.L.R. 233.
(6) (1945) 70 C.L.R. 576.
(7) (1906) 9 N.Z.Gaz.L.R. 10.
(8) (1906) 9 N.Z.Gaz.L.R., at p. 19.
(9) (1906) 9 N.Z.Gaz.L.R., at p. 20.
(10) (1906) 9 N.Z.Gaz.L.R., at p. 30.
(11) (1906) 9 N.Z.Gaz.L.R., at p. 32.
(12) (1906) 9 N.Z.Gaz.L.R., at p. 17.

out of income, or out of income and capital, and provide for any ultimate surplus to be restored to the testator's estate, would doubtless be generally recognised as within power. On the other hand, an award of a gross sum to be paid once for all, if it were by way of capitalisation or commutation of periodical amounts which otherwise would be ordered, might be difficult to justify under the Acts. But the question is apt to arise more often with respect to non-recurring payments of other kinds, which may be open to the objection that the purpose they serve is, not to provide for the recipient's maintenance or support, but to add to his disposable assets, and so to enable the Act to be turned to the indirect benefit of other persons. But it is not true that a single out-and-out payment can never have the character of a provision for maintenance and support. A payment to discharge some pressing debt, or to meet the cost of a surgical operation, or to purchase furniture for a home, or to provide a fund to meet eventualities of everyday life which are considered likely to occur, may well be of this kind in some cases. It is less often, I think, that such a purpose as the discharge of a mortgage on the applicant's home will fall within maintenance and support, but it is not incapable of doing so. In the present case, for example, the mortgage debt is small, and its discharge may fairly be treated as an affair of current maintenance. This is not the occasion to consider matters involving substantial capital investment, such as the purchase for an applicant of a business or an income-producing property or a home. The provision of assets such as these is more likely to be within the power of the court under statutes which speak of advancement in life than under Acts like the Tasmanian and New Zealand which refer only to maintenance and support; but I am not prepared to say that such a provision is never within the power conferred by the latter Acts. The fact that a payment may produce an incidental effect going beyond maintenance and support cannot put it beyond power, I think, if its substantial character is that of a provision for maintenance and support. On the broad question I have been discussing it remains only to say that the fact that some statutes have been amended to give explicit authority to award lump sums affords no reason for concluding that the view taken in the majority judgments in *Plimmer* v. *Plimmer* (1) was right. In my opinion what was said in those judgments went too far, and under the Tasmanian Act it cannot be maintained as an absolute proposition that a lump sum, in the sense of a non-recurring amount, cannot be ordered.

(1) (1906) 9 N.Z.Gaz.L.R. 10.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

KITTO J.

Then it was said that if, for the proper maintenance of a testator's widow, it is considered fit that recurring payments should be ordered, there is no jurisdiction to order them without limiting them to the period of the applicant's widowhood. So it was held by a majority of the Tasmanian Full Court in *D'Antoine* v. *Field* (1) on the ground that the jurisdiction is to provide for the testator's widow and not for the wife of another man. See also *Winder* v. *Public Trustee* (2); *In re Collett (Dec'd.)* (3). The opposite view is that, since the only limits which the Act sets to the maintenance and support that may be ordered are those which are connoted by " proper ", there is no warrant for saying that in no case can provision be made for a testator's widow to extend beyond her remarriage. It may be urged, and I should be inclined to agree, that the ground taken in *D'Antoine* v. *Field* (1) confuses the applicant's title to apply with the nature of the relief that may be given her, and that whether a provision made for a widow should be confined to her widowhood is a matter going to discretion and not to jurisdiction. I do not think it is necessary to decide the question in this case, and I have formed no final opinion on it. In New Zealand the Court of Appeal has held that, even if the jurisdiction is not subject to the suggested restriction, the defined *cursus curiae* is to limit a widow's provision to the period of widowhood: *In re Crewe (Dec'd.)*; *Crewe* v. *Corbett* (4). Whether or not one is justified in making a similar assertion in regard to Australia I hesitate to say in view of observations made by *Long Innes* J. in *Re Collin* (5); but I entirely agree in the statement of that learned Judge in *In re Jonathan Howard* (6), that in most cases the maintenance ordered for a widow should be confined to continuance of widowhood. It is enough in the present case to say that there are here no circumstances so special as to justify a departure from that sound general rule, even if there is jurisdiction to do so.

Finally, it was contended that, if all other grounds of appeal should fail, at least it should be held that *Morris* C.J. fell into the error of recasting the testator's will so as to make for the widow the provision which he thought was required by considerations of justice in a general sense, instead of confining himself to ordering the provision which was proper for her maintenance and support. His Honour ordered that she be paid a lump sum of £1,800 and an annuity of £1,000 for life. I do not propose to review the facts of

(1) (1923) 19 Tas.L.R. 21.
(2) (1931) N.Z.Gaz.L.R. 459.
(3) (1936) N.Z.L.R. 9.
(4) (1956) N.Z.L.R. 315.
(5) (1929) 29 S.R. (N.S.W.) 548; 46 W.N. 169.
(6) (1925) 25 S.R. (N.S.W.) 189, at p. 193; 42 W.N. 34, at p. 35.

the case, for they are sufficiently discussed in the judgment of my brethren. In all the circumstances, and having regard particularly to the widow's station in life and the property which she has independently of the estate, I agree that the order made below was too generous to be reconciled with a due exercise of the statutory discretion. His Honour expressed himself as taking into account the fact that the widow was a wronged wife. Of course if he intended to go beyond providing for maintenance and support, and to give something by way of reparation for her past wrongs, he would have been exceeding his jurisdiction. *Bosch's Case* (1), as applied to the Tasmanian Act requires that effect be given to the demands of wisdom and justice with respect to maintenance and support, and with respect to nothing else. But perhaps his Honour's reference to the widow as a wronged wife meant no more than that he had in mind the consideration adverted to in the concluding words of a passage in the judgment of *Salmond* J. in *In re Allen* (*Dec'd.*); *Allen* v. *Manchester* (2). The passage, which was recently approved by the Court of Appeal of New Zealand in *In re Crewe* (*Dec'd.*); *Crewe* v. *Corbett* (3) is applicable to the present case: "It may probably be said with truth that the proper maintenance which a testator owes to his widow in cases where there are no competing moral claims of other dependants is such maintenance as will enable her, taken in conjunction with her own means, to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime, or would have been so accustomed to if her husband had then done his duty to her" (4). But even so, the order under appeal is to be explained only, I think, as an attempt by his Honour to give effect to general considerations of fairness in the disposition of the testator's estate. As such it cannot stand. The order which has been proposed makes as favourable a provision for the widow as the jurisdiction under the Act can well permit in the circumstances of the case.

For these reasons I am of opinion that the appeal should be allowed, and that the order proposed should be made.

Appeal allowed. Order of the Supreme Court discharged except as to costs. In lieu thereof order that Sydney George Doddridge and Alexander Inglewood Worladge as executors of the will of Donald Gordon Doddridge deceased pay to Minnie May Doddridge from the date

(1) (1938) A.C. 463.
(2) (1922) N.Z.L.R. 218.
(3) (1956) N.Z.L.R. 315, at p. 323.
(4) (1922) N.Z.L.R., at p. 222.

H. C. OF A. 1957.

WORLADGE v. DODDRIDGE.

of his death during her widowhood an annuity of £520 *by equal quarterly payments in lieu of the annuity of* £104 *bequeathed to her by the said will the annuity of* £520 *to be subject to the power of appropriation contained in the will, and also pay to her the sum of* £1,000 *out of his residuary estate. The costs of all parties of this appeal as between solicitor and client to be paid out of his estate.*

Solicitors for the appellants, *Crisp & Wright.*
Solicitor for the respondent widow, *J. P. Clark.*
Solicitors for the respondent trustees, *Butler, McIntyre & Butler.*

R. D. B.