New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXIV TUESDAY, FEBRUARY 18, 1958 No. 3

THE NEW COURT OF APPEAL.

ON February 17, legal history was made when the new Court of Appeal, Sir Kenneth Gresson, President, and Mr Justice North and Mr Justice Cleary, sat for the first time.

The large attendance of members of the Bar was proof of the profession's great appreciation of the constituting of the new Court by the Judicature Amendment Act 1957, and of the widespread good wishes for its future in the administration of justice at the highest level.

On their Honours taking their seats in the newly-arranged Court-room, the Attorney-General, the Hon. H. G. R. Mason Q.C. said :

> " I move that it be recorded that, today being the first sitting of the newly-constituted Court of Appeal, the members of the Bar have attended to pay their respects to the Court."

In reply, the President said :

> " It is surely a milestone in the administration of justice in this country. I desire to express our appreciation, Mr Attorney, of your attendance and that of so many members of the Bar, which is a recognition that without proper co-operation between Bench and Bar the administration of justice would be very imperfect indeed."

A photograph of the new Court appears on another page.

The profession throughout the Dominion, which was represented at the inaugural sitting of the new Court by the President of the New Zealand Law Society, Mr A. B. Buxton, derives great satisfaction from the fact that the Court is now in being. Over many years, several generations of practitioners have advocated the setting up of the Court. The lawyers of to-day wish it well for the years to come.

FAMILY PROTECTION: SOME RECENT JUDGMENTS.

WE continue our selection of recent judgments in relation to applications for further relief, made under the Family Protection Act 1955.

WIDOW.

In *In re Twidle* (Auckland, December 6, 1957, G.R. 3595), Finlay J. said that the claim of the widow was typical of many with which the Courts had in recent years been presented. The testator died at Morrinsville on or about August 29, 1955. By his will, he bequeathed to Mrs F. " all money and bank-account deposits of which he might die possessed and all (his) clothing and effects of a purely personal nature ". The residue of his estate he devised and bequeathed to his trustees upon trust to permit Mrs. F. to occupy, free of charge, his residential property at Morrinsville, and to " use the furniture and chattels therein, she paying all rates and insurance premiums to become due in respect thereof ". (For the purposes of this paragraph, His Honour adapted the language of the will.) Mrs F. was relieved of liability for waste. For the rest, the will directed that, upon the death of Mrs F., the residue of the estate should be realized and divided into two equal parts. One part was bequeathed to the Crippled Children Fund for the general purposes of that fund ; the other half was bequeathed equally among such of the children of Mrs F. as lived to the age of twenty-one years. There was provision that, in case of the death of any child before the age of twenty-one, the other or others should take the share of the deceased child, and equally if more than one survived.

One of the executors and trustees died some ten months after the testator, and the surviving executor and trustee therefore appeared alone as the first defendant. The other defendants were Mrs F., her two children, the New Zealand Crippled Children Society (Inc.), and a son of the marriage of the testator to the plaintiff. That son, however, made no claim. It was unnecessary to consider whether the bequest to Mrs F.'s children was limited to her existing children, or whether any future children born to her would be entitled to share under the will.

The estate of the testator was small. It consisted of a house at Morrinsville valued for death-duty purposes at £2,500 and furniture, similarly valued, at £20 2s. 6d. The property is subject to a mortgage to the State Advances Corporation for £220 2s. 6d. The only creditor of the estate was Mrs F., who paid the funeral expenses, the death duties, the medical and

other expenses, and some instalments on the State Advances mortgage. On all accounts, her debt aggregated £202 7s.

The testator was married to the plaintiff on May 14, 1919, and there was issue of the marriage one son, born on August 23, 1919.

The parties built recriminatory cases. The plaintiff widow alleged that, in March, 1939, she was compelled to leave the testator by reason of his cruelty to her. She had lived separate and apart from him since that time. During this period of separation, she received from the testator neither maintenance nor assistance in any form. During the separation, the plaintiff worked to maintain herself, and, at the date the proceedings were commenced, was employed as a machinist at a net wage of £6 14s. per week. Of that sum, she paid £1 15s. a week for rent. She was possessed of assets valued at £675.

Apart from her general right to maintenance as the widow of the testator, the plaintiff claimed to have made available to the testator as an advance a sum of £300 received by her from her mother's estate. This money she said was used by the testator to purchase a motor-car, he promising repayment upon receipt of his share in the distribution of his mother's estate. As the plaintiff's mother died in September, 1936, this alleged advance was doubtless made in or about 1937.

Mrs F. built her case for the retention of the interests bequeathed to her upon a dual basis. She claimed to have inherent merits in the nature and circumstances of her association with the testator. She was employed by him as a housekeeper in 1940 for a period of some months at a salary of £1 per week. That period of employment having ceased, she was re-employed as housekeeper in 1941. The testator was then earning, she says, too little to maintain a home and pay wages. It was therefore, she said, arranged that she was to render her services gratuitously in return for a promise that the testator would provide a permanent home for her and her two children, not only in the home he was then occupying, but also in the home which he had in mind to purchase on his retirement from work. That arrangement, she said, subsisted from June, 1941, until the death of the testator. During that period, although she received no wages, she said she herself maintained herself and her children, of whom she had two. This, she said, she did in earlier years out of her deserted wife's benefit and in later years out of her family benefit. Her services were, she claimed, onerous and, in the later stages of the testator's life, exacting and exhausting. In this latter respect, she had the support of the evidence of the testator's medical attendant, who deposed that the testator suffered from cancer of the carotid-salivary gland as well as from other complaints during the last year of his life, and that Mrs F. patiently and efficiently nursed him during his illness, her duties, as the testator was often delirious, involving very broken hours and involving work of a trying nature.

His Honour said:

> In this definition of the basis of Mrs F.'s claim to consideration, too distinguishable rights are involved.
>
> There are first the legal rights she might enforce under the Law Reform (Testamentary Promises) Act 1949. Then, there are the moral rights accruing to her apart from that Act from the gratuitous services she rendered the testator over a period of some sixteen years. In addition, Mrs F. claims to have advanced to the testator a sum of £200 in cash towards the purchase of the house, the life interest in which has been bequeathed to her. In addition, she claims to have personally done work upon the property—exterior painting, interior renovations, and the maintenance and improvement of the garden and surroundings. Apparently, the property was bought in early 1950, and remained the common residence of the testator and Mrs F. from then until the testator's death.

The learned Judge added that, the testator being dead, it was very difficult to determine where the rights and wrongs lay so far as the disruption of the matrimonial relationship between the plaintiff and the testator was concerned. After considering the evidence, he said that any suggestion that the separation was due to infidelity must be dismissed from consideration.

The assertion of the plaintiff that the separation was due to the cruelty of the testator was equally unacceptable.

His Honour said that at least a glimmer of understanding of the plaintiff's attitude to her husband at the commencement and during the period of separation could be gathered from her second affidavit. There, after asserting that she was asked to return to cohabitation on one occasion, and then merely as a housekeeper—which, incidentally, was negatived by the terms of the letter from the testator's solicitors—she went on to say that another reason for her not taking any Court proceedings was that she was "thoroughly fed up with her husband's treatment and wanted to have little to do with him". In fairness, it must be said that she added to that statement the statement that she was able to earn her own living. She also added, however, that during the separation there were long periods when she had no idea of her husband's whereabouts. This, His Honour said, served to emphasize the completeness of the separation, both in fact and, so far as the wife was concerned, in interest.

The learned Judge continued:

> In the light of the unconvincing nature of the evidence available as to the causes of the separation and the responsibility of the respective parties for those causes, it can only be said that, despite the assertion of the plaintiff and the support of the testimony of her son, there is no satisfactory evidence that the testator was guilty of misconduct as a husband. It may be, as was suggested, that the plaintiff was dissatisfied with the circumstances to which life with the testator constrained her, and that she left without provocation and without compulsion and against the testator's wishes. However, there is no satisfactory evidence upon which I could, at this time, base a conclusion either way.
>
> I am in that respect left very much in the situation in which Callan J. found himself in *Black* v. *Owen* [1936] G.L.R. 168, in that I am not able to find with any degree of confidence precisely where blame for the separation lay. That being so, all I am left with is the fact that the spouses were parted in 1939: that, from then until the testator's death, they had no communication with each other except during 1939 through solicitors: that the separation was, in consequence, complete and that that state of affairs accorded with the wishes and desires of the plaintiff, who, on her own admission, wanted little to do with the testator, and presumably had no interest in him.
>
> By what principle I should be guided in respect of the claim in those circumstances invites consideration.
>
> Meantime, it will be as well to dispose of the respective monetary claims.

His Honour, having disregarded both the claim of the plaintiff to have lent the testator £300 and the claim of Mrs F. to have lent him £200, continued:

That leaves me to deal with the plaintiff's claim on the basis of her character merely as a widow who had been living apart from her husband for sixteen years before his death, and who had no association and no communication with him during that period. Having reached the conclusions I have with respect to the existence or absence of blameworthiness for the estate of separation which existed, the authority of *In re Green*; *Zukerman* v. *Public Trustee* [1951] N.Z.L.R. 135; (1951) G.L.R. 50, 52, has only limited application. It is, however, apposite to this extent, that, in determining whether or not a plaintiff has discharged the primary onus of satisfying the Court that there has been a failure of moral duty on the part of the testator, the Court must give consideration to all the circumstances including such circumstances as must have induced the testator to exclude the plaintiff from participation in his estate or to do so only to a modified degree and that, in doing so, the Court must—in considering the sufficiency or otherwise of such reasons—endeavour to decide upon the truth or otherwise of such circumstances as presumably have affected the testamentary dispositions.

It is to be noted that the original discretion under s. 33 (2) of the Family Protection Act 1908 to refuse to make an order in favour of any person whose character or conduct

" is such as in the opinion of the Court disentitles him or her to thebenefit of an order under the Act "

is or was intended to be widened by s. 11 of the Family Protection Act 1955. It ostensibly provides a new subject of consideration in that the Court may have regard to the deceased's reasons so far as they are ascertainable for making the dispositions made by his will or for not making any provision or any further provision as the case may be, for any person. The fact that the Court is given power to accept such evidence of those reasons as it considers sufficient whether or not the same would be otherwise admissible in a Court of law is immaterial for present purposes.

Section 33 (2) of the Family Protection Act 1908, which is reproduced in s. 5 (1) of the Family Protection Act 1955, authorizes the Court to consider the character or conduct of an applicant. Section 11 specifically empowers the Court to consider the reasons of the deceased for making the dispositions he did or for not making any or any sufficient provision for any person.

His Honour proceeded:

In relation to the specific topics to which the two statutory provisions relate, the later of them is undoubtedly the wider. But whether it adds anything for present purposes in respect of the sum of the subjects the Court has to consider, is not so clear. The reasons which inspire a testator to do or not to do anything—and, be it said, there is a negative element in not doing sufficient—must, of necessity, it seems to me, enter into the question of the existence and degree of moral duty. In other words, a testator's reasons seldom, if ever, I apprehend, amount to anything more than the expression of his judgment on the factors which go to create a moral duty or to qualify or negate the existence of such a duty.

The reasons which actuated the testator in this case are easily ascertainable as they seem of this character; and I feel constrained to deal with the case on that footing: in other words, upon the basis of the moral duties (if any) to which the testator was subject in respect of his wife on the one hand and Mrs F. on the other.

It has long since been held that there may exist a moral duty on a deceased spouse to make provision for the other, despite separation. *Colquhoun* v. *Public Trustee* (1912) 31 N.Z.L.R. 1139; 14 G.L.R. 432: *Toner* v. *Lister* [1919] G.L.R. 498 is to the same effect. There, the parties lived together for only three months and then lived apart for thirty years, not even communicating with each other. During this time, the wife maintained herself. Sim J., relying upon *Colquhoun* v. *Public Trustee* said:

> I am not satisfied that the plaintiff was to blame entirely for the separation, and the fact of her having lived for so many years separated from her husband does not of itself deprive her of any right to relief if in other respects her claim is meritorious (*ibid.*, 498).

The reference to the qualification imported by the phrase " if in other respects her claim is meritorious " is striking.

On the general question, the judgment of Chapman J. in *Paxton* v. *Nicholson* [1918] G.L.R. 393 is also in point. This conception was carried somewhat further by Turner J. in *In re Jackson*, *Jackson* v. *Public Trustee* [1954] N.Z.L.R. 175 where, postulating the question at issue as being " was the separation between the parties brought about by misconduct of sufficient gravity to disentitle her to further provision? ", he held that a wife whose application for a maintenance and separation order was dismissed and whom, for the purposes of his judgment, he treated as a deserting wife, was nevertheless entitled to an order.

Incidentally, it will be noted that the case of *Re H. F. Parr* (1929) 30 S.R. (N.S.W.) 10 which Turner J. elected not to follow has since been overruled by the High Court of Australia in *Delacour* v. *Waddington* reported in (1953) 27 A.L.J. 485. In that case, the Court enunciated the principle that a wife's conduct which might have disentitled her to an order for maintenance under what is in Australia the Deserted Wives' and Children's Act may well constitute a material factor in considering whether an order should be made under the Australian Act, which is the analogue of our Family Protection Act. It, however, went on to say that her conduct should not be regarded as disentitling her to an order unless it has been of such a character as to induce a Court to hold that, in the circumstances, there was no moral obligation on the deceased to make any testamentary provision for her.

This is in conformity with *In re Greene's Estate* (1930) 25 Tas. L.R. 15, 27, with the judgment of Fullagar J. in *In re Sinnott* [1948] V.L.R. 279, 281 and with the judgment of Sholl J. in *In re Paulin* [1950] V.L.R. 462, 473. In the earlier of the last two cases, Fullagar J. expressed the view that the extent of the moral claim may be affected by conduct not amounting to disentitlement, while in the latter, Sholl J. held that, though the moral claim may not be fully rebutted, there may be circumstances warranting a reduction in the provision. Despite *In re J. J. Dingle* (1921) 21 S.R. (N.S.W.) 723, I respectfully agree with Fullagar and Sholl JJ. In that view, I have the concurrence of Cooke J. in *In re Williams*, *Williams* v. *Cotton* [1953] N.Z.L.R. 151, 153.

That principle seems to me to be directly applicable to the present case. In the circumstances of this case as I have been able to find them, there did exist a moral duty on the testator to provide adequate maintenance for the plaintiff so far as his means and circumstances would allow. But there were obvious reasons which inspired him not to do so, and those reasons the Court, apart from s. 11 of the Act of 1955, can take into consideration because they affect the moral duties to which the testator was subject. His reasons were that he was bound by the promises to Mrs F. to which reference has been made. They may well have been enforceable at law. He would, no doubt, and quite properly, apart from that consideration, regard them as binding on his conscience. Apart from that legalistic and moral consideration, he would necessarily feel that Mrs F. had a moral claim upon him in virtue of sixteen years of gratuitous service, including at least one year of solicitous and exacting nursing. In the circumstances, I cannot resist the conclusion that the testator did not disregard any moral duty to his wife when he left the house at Morrinsville to Mrs F. for life on the terms disclosed in the will.

But the same considerations do not apply to the Crippled Children Society and Mrs F.'s children. The society had no moral claim upon him. The children having been brought up in the testator's house in circumstances which doubtless induced a mutual conception of quasi-parenthood, he may well be thought to have had a duty to them approaching the parental. He apparently felt and gave expression to some such duty.

The moral claim of the plaintiff was, on the other hand, limited. She was away from the testator earning her own living through the years when his physical powers were deteriorating, and his need of her was greatest and her attitude towards him was that she wanted little to do with him.

In conclusion, His Honour said:

In my opinion, the moral duty of the testator to the plaintiff would have been adequately discharged if he had left her the sum of £300 to be paid out of the proceeds of realization of the assets of the estate after the death of Mrs F. and I make an order to that effect accordingly. Of this sum, £200 is to be deducted from the half share of residue bequeathed to the New Zealand Crippled Children Society (Incorporated) and £100 from the half share of residue bequeathed to Mrs F.'s children.

The question of costs is something of a problem. The only assets in the estate are the house and some furniture of negligible value. Any order for costs in favour of the plaintiff would, in effect, be at the cost of Mrs F. personally and in derogation of her probable legal rights under her arrangement with the testator. Then, she is already a creditor of the estate with no available fund from which to get payment. Otherwise it might make administration difficult and force a sale of the house, which would again offend against Mrs F.'s probable rights. For these and other reasons, I make no order as to costs.

In *In re Parker* (Auckland: November 29, 1957. M. No. 1794), T. A. Gresson J. said that it was well established that a claim of a widow was paramount under the statute, more particularly where the estate was very small. He said he was satisfied that there had been a clear breach of moral duty towards the widow, who reared the testator's three children and worked hard whenever possible for the family's general advantage. The evidence also satisfied him that she contributed to the purchase and maintenance of the house out of her own earnings. In addition, she nursed the testator through the latter years of his life; and His Hounour found it difficult to understand why he made the will in the terms he did. He continued:

The children of the marriage have stated, through counsel, that they can see no good reason why their mother should not have the whole estate, and in all the circumstances, and in particular because of the small size of the estate involved, I am satisfied this would be the appropriate order. Counsel should confer and submit a draft order giving effect to this decision and including their own reasonable estimates of their respective costs.

Widow of Intestate.

In *In re Christie* (Auckland, September 13, 1957, M. 391/56), an oral judgment by Shorland J., there were two applications before the Court, the first an application by the widow under the Family Protection Act 1955, the second an application by the trustee for the leave of the Court to postpone realization and distribution and carry on for a period the farming business hitherto carried on by the deceased in his lifetime.

As to the application under the Family Protection Act 1957:

The deceased was survived by the applicant, his widow, aged forty-nine years at the date of his death, and by five children, two girls and three boys. Both girls were married, and supported the application of their mother. The eldest boy was a mental patient not likely to recover, and the remaining children were two boys, one aged fourteen, and the other five.

The deceased died intestate, and his widow took the shares and interests provided by law in such a case. She had some small means of her own which provided her with a capital sum, and appeared to provide her with some income so far as her father's estate was concerned, said to be a life interest, which was allowing her about £170 per annum.

The deceased left a substantial estate which appeared to be of a value of not less than £27,000. The main asset was a farm which was at present being carried on by the administrator. Another asset in the estate was a dwellinghouse situate on land which comprised sections subdivided for sale in addition to the section on which the house itself was built.

Shorland J. said:

The widow has been occupying the house, and her first application is in respect of securing to her the right to continue occupying the dwellinghouse. She asks also for further provision out of the estate, either by way of a life interest in the whole of the net income, or alternatively, for an annuity at present, and so long as the estate remains undistributed she will receive the one-third of the net income yielded by the farming business. On present figures that appears to yield an income to her, for the year just past at all events, of £470. It is said, and the accounts confirm, that the prospects in respect of income are that it is likely to improve somewhat unless there is a material fall in ruling prices.

The two elder daughters appear to be in reasonably good circumstances, and in any event they support the provision of further maintenance being provided out of the estate for their mother.

Counsel representing the eldest son under a disability, and counsel representing the infant children, have very properly pointed out that the widow receives the income which the one-third interest at present yields, and have drawn attention to the assets which she holds in her own name and her personal income, and in the interests of their clients suggested that, except perhaps for further provision in respect of the occupancy of the dwellinghouse, that no proper basis in law for further provision exists in all the circumstances.

It is relevant to this application to state that on the other application heard with it, leave will be granted to the trustees for the administrator to carry on the farming business in terms of an order that will provide for it being carried on until the further order of the Court, the order being subject however, to leave being reserved to any party to those proceedings or the present proceedings, to have liberty to apply for a review of that order.

The result would appear to be that in all probability the farm will be carried on at least for a substantial period of time, with the result that the share of capital which on immediate realization would accrue to the widow applicant is not likely to come to her possession in the immediate future.

The affidavits established that the widow had played her full part as the wife of the deceased and the mother of the children comprising their family. The affidavits further showed that it was indisputable that she worked hard on the farm, making as much contribution to its wellbeing, and to some extent to it being increased, as a wife could reasonably make.

His Honour continued:

In view of those factors, and having regard to the size of the estate, I do think that proper provision for the widow in this case requires more than the income, at all events, which she draws under the present intestacy, and further provision for her maintenance is accordingly made in the following terms:

That during her widowhood she have the right for life or widowhood to occupy free of all outgoings the dwelling-house at present occupied by her, subject to her remaining in personal occupation thereof and permitting and caring for therein the two youngest children of the marriage until each shall have attained the age of eighteen years, or shall sooner wish to leave the home. Together with the house, the same rights of occupancy in respect of the section on which the house is built.

In addition to the right of occupation of the house and in lieu of the one-third share of net income which she would take under intestacy until realization of the estate, there will be an annuity of £650 per annum free of all tax.

The incidence of the order in respect of the annuity is to fall first on the share of income of the eldest son except for the first £100 thereof, the balance to fall rateably and in equal shares upon the shares of income of the other children.

Save for these variations, the distribution provided for by law on intestacy both as to capital and income, and as to the payment of £1,000 to the widow, and as to the right to personal chattels, and as to ultimate capital distribution, is not intended to be affected by this order.

The annuity of £650 free of tax is in lieu of one-third share of income, and if in any year there should be a surplus after appropriation of two-thirds of net income to the children and £650 free of tax to the widow, such surplus shall fall into capital and be distributable accordingly.

SUMMARY OF RECENT LAW.

ARCHITECT.

Fee for Preparation of Plans and Specification—Fee Claimed according to Scale of New Zealand Institute of Architects—Direction to Jury that Architect should get "Usual Fee"—Effect of Direction to deny Defendant the Right to have the Reasonableness of Plaintiff's Fee determined and fixed by Jury—Misdirection—New Trial granted and restricted to Assessment of Proper or Reasonable Fee recoverable.—Practice—New Trial—Motion for New Trial—Amendment—Amendment of Motion to add New Ground sought during Hearing of Argument thereon—Existence of Such Ground known to Mover from Moment of Verdict—Amendment refused. The plaintiff, a practising architect, sued for fees in respect of the preparation of plans and specifications for the addition of a second story to business premises owned by the defendant, and for damages for breach of contract alleged to have been made between the parties for supervision by the plaintiff of the construction of the additional story. The Plaintiff claimed also in *quantum meruit* in respect of the alleged use of plans and specifications prepared by him in the building of the additional story which work was in fact carried out by the defendant. At the trial, there was evidence that all architects charged fees in accordance with the scale of fees of the New Zealand Institute of Architects, and there was evidence from which a strong inference could be drawn that the defendant was aware of the percentage basis of charges fixed by the scale, although the defendant denied that there was any discussion as to the architect's fees. The jury found for the plaintiff and awarded the full amount of damages as follows: Claimed fees in respect of preparation of plans and specifications, £1,000; Loss of supervision, £500; Total, £1,500. In the course of his summing-up the learned Judge, after referring to the plaintiff's claim for the reasonable fee for preparing plans and specifications, and to his evidence as to what were the ordinary or standard fees charged by architects for such work (which evidence was uncontradicted), said:

"Of course, if you engage an architect to prepare plans on the simple basis of, 'Please prepare me full plans,' and nothing is said as to fee, it is understood that the architect will get the usual fee that architects charge for that work, and that you will pay the usual fee for the preparation of such plans and specifications."

No objection to the summing up was taken at the trial. The defendant moved for a new trial on the ground, inter alia, that there was misdirection on a material point of law in respect of the claim for loss of supervision. *Held*, 1. That the direction given would have been a correct direction if it had been made subject to the jury's first being satisfied that the evidence had established that there was a usual or customary fee for the particular class of work, and that the defendant company was aware of the fee; but the effect of the direction was such that it failed to put clearly before the jury that it was required to determine what was the reasonable fee for the work performed, and that while it was entitled to have, and should have due regard to the scale universally adopted by the architects' profession, it was free to adopt it or to fix some other fee according to whether it considered the scale fee to be reasonable or unreasonable. 2. That, as it could not be said with certainty that no miscarriage of justice resulted from the error, the defendant had established a material misdirection. 3. That there was evidence on which the jury could find for the plaintiff in respect of damages for alleged breach of contract for supervision. 4. That an application for an amendment of the notice of motion for a new trial to enable the defendant to add a further ground—that the damages awarded were excessive—to its notice of motion, made at the hearing of the motion and outside the time for moving for a new trial, should not be granted as the existence of that ground had been within the full knowledge of the defendant from the moment of verdict. (*Cannons* v. *Sparrow* [1955] N.Z.L.R. 33 and *De Courte* v. *Bouvy* (1899) 18 N.Z.L.R. 392; 2 G.L.R. 85, distinguished.) 5. That the new trial should be restricted to assessment of the proper or reasonable fee recoverable for the preparation of the plans and specifications in question. *Porter* v. *Montrose Limited.* (S.C. Auckland. 1957. December 20. Shorland J.)

(*Concluded on p. 48.*)

The New Court of Appeal. *Evening Post Photo.*

The new Court of Appeal on the occasion of its inaugural sitting in Wellington this month. From left to right: His Honour Mr Justice North, Sir Kenneth Gresson P., and His Honour Mr Justice Cleary. Seated at his desk below the Bench is the Registrar of the Supreme Court, Mr G. R. Holder.

THE LAW OF TRUSTS AND ADMINISTRATION.

Statutory Changes in 1957.

By J. G. HAMILTON, LL.M.

(*Concluded from p. 27.*)

The Public Trust Office Act 1957.

This Act consolidates and amends the Public Trust Office Act 1908 and its amendments. Many of the special powers formerly given only to the Public Trustee were made of general application by the Trustee Act 1956. Other special provisions in the Public Trust Office legislation were transferred to the general law by the Trustee Amendment Act 1957, the Property Law Amendment Act 1957, and the Administration Amendment Act 1957. The new legislation still contains many provisions special to the Public Trustee; but, in view of the changes made and of the manner in which the provisions have been administered for many years, no objection to the legislation was raised during the course of its passage through Parliament.

Much of the Public Trust Office Act 1957 is of interest mainly to those within the Department; but the Act has some provisions of general interest, especially the revised provisions in Part V relating to unclaimed property.

Parts I and II relate to the constitution of the Department, the keeping of its accounts, and the investment of the money comprising the Common Fund of the Public Trust Office. It is useful to remember that ss. 39 and 40 enable the Public Trustee to make advances from the Common Fund to estates in the Public Trust Office and to beneficiaries in such estates.

Parts III and IV contain special provisions governing the acquisition by the Public Trustee of the right to administer estates in a wide class of cases; the filing by the Public Trustee of elections to administer estates not exceeding £1,000 in value; and the issue by the Public Trustee of certificates of administration. In these Parts and in various other sections throughout the Act powers of a judicial nature are entrusted to the Public Trustee in respect of small estates and minor matters. It is useful to remember that the Public Trustee may apply for a grant of administration in any registry of the Supreme Court.

Part VI repeats many of the existing powers and provisions designed to facilitate the administration of estates in the Public Trust Office.

PART V—UNCLAIMED PROPERTY.

This Part provides machinery for the appointment of the Public Trustee as manager of unclaimed property, and for the exercise by him of wide powers to manage the property and to apply it for the maintenance or education or advancement or benefit of the wife or husband or children or any dependant of the owner. The new Part V amalgamates the provisions as to unclaimed lands now contained in Part II of the Public Trust Office Act 1908, and the provisions as to unclaimed property now contained in Part III of that Act.

This legislation represents only part of the statutory law relating to unclaimed property. There are, for example, special provisions in s. 72 of the Law Practitioners Act 1955 under which unclaimed money in solicitors' trust accounts may be paid into the Consolidated Fund, and in s. 74 of the Public Revenues Act 1953 under which unclaimed money in the Public Trustee's Account and in certain other accounts must be paid into the Consolidated Fund.

Subsection (1) of s. 79 provides that the Public Trustee may be appointed as manager of unclaimed property in accordance with Part V in the following cases:

(a) When, after due inquiry, it is not known who the owner of the property is, or where he is, or whether he is alive or dead:

(b) When the owner of the property is absent from New Zealand or dead and, after due inquiry, it is not known whether he has any agent or administrator in New Zealand with authority to take possession of and administer the property, or where any such agent or administrator is, or whether he is alive or dead:

(c) When the property would vest in the Crown under section three hundred and thirty-seven of the Companies Act 1955 or otherwise if it were not subject to a trust for any other person, and after due inquiry it is not known whether it is subject to any such trust.

The provision does not apply to Maori customary land and unalienated lands of the Crown. In practice the Public Trustee takes no action in respect of unclaimed property unless he is asked to do so by someone who wishes the Public Trustee to exercise the powers conferred by Part V of the Act.

Section 80 provides for the Public Trustee to be appointed or become manager of property where this is advisable in the interests of the owner of the property or in the interests of any other person or to secure the development or better utilization of the land. The Public Trustee may be so appointed by the Court on application made *ex parte* by him, in which case notice of the appointment must be published in the *Gazette*; or the Public Trustee may elect to be the manager of the property in cases where the value of the property does not exceed £2,000. Property of which the Public Trustee becomes manager after the commencement of the new legislation does not vest in the Public Trustee, unless there is an order of the Court expressly so vesting it.

PROVISIONS AFFECTING SQUATTERS AND OTHER OCCUPIERS OF UNCLAIMED PROPERTY.

Section 82 provides that the Public Trustee may make such payment or allowance as to him may seem just or reasonable in respect of money expended or improvements made by any person on or in respect of any property of which the Public Trustee is manager.

Section 83 meets the quite common case where squatters (frequently adjoining owners) have entered into possession of unclaimed Land Transfer land and have improved and developed the land. Under the Land Transfer system they cannot acquire a legal title to the land, but they can maintain and transfer a right to possession which is effective against everyone except the true owner. To encourage these squatters to put their title in order, the section provides that

they may be given credit for improvements that they have done or bought or inherited, and the Public Trustee is relieved from liability for failing to recover any money or damages payable in respect of the occupation of the land.

Section 82 also provides that in any case where the Public Trustee is manager under Part V of any land, and it is proved to his satisfaction that the registered proprietor of the land has sold the land and received payment of all amounts to which he is entitled on the sale, the Public Trustee may transfer the land to the person who is in equity entitled thereto without requiring any payment to the registered proprietor.

Section 90 provides that in any case where the Court or the Public Trustee is acting under Part V, the Court or the Public Trustee may accept and act upon and be satisfied with any evidence, whether the same is strictly legal or not.

The Administration Amendment Act 1957.

Attention is directed especially to ss. 2 and 6 of this Act which relate to certificates of administration and the priorities for payment of debts where estates are being administered under Part IV.

Certificates of Administration.

Before an administrator can register transmission of land or shares, or establish his authority to draw on a deceased's bank account or administer certain other assets, it has previously been necessary for him to produce the grant of administration to each person who has to be satisfied that the grant has been made. This procedure takes time, and where there are many separate holdings it can delay the winding up of an estate. There has long been provision for the Public Trustee to get round the difficulty by issuing certificates of administration.

Section 2 introduces an analogous procedure under which, at any time after the release of the relevant probate or letters of administration, the Registrar of the Supreme Court may, at the request of the administrator, issue under his hand and seal such number of certificates of administration, in the prescribed form, as may be required. A fee of 10s. is payable in respect of each such certificate. Every such certificate is, in the absence of proof to the contrary, sufficient evidence for all purposes of the death and the date of death of the testator or intestate, and of the grant of administration to the administrator; and is sufficient for the purpose of registering the administrator as proprietor of any estate or interest in any land under the Land Transfer Act 1952, or of any mining privilege under the Mining Act 1926, or of any shares or stock or property in any bank or company or body or association. No District Land Registrar or Mining Registrar or bank or company or body or association to which any such certificate is produced is concerned to inquire concerning the trusts on which the administrator holds any such land or mining privilege or shares or stock or property, or as to his authority to transfer or deal with the same.

Priority of Debts Under Part IV.

Section 6 transfers from the Public Trust Office legislation and makes of general application certain rules in respect of the priority of payment of debts in estates that are being administered under Part IV of the Administration Act 1952. Paragraph (*b*) of s. 75 of that Act is repealed, and the following provision is substituted:

> (b) The deceased debtor's estate shall be distributed in accordance with the following priorities:
>
> (i) Payment shall first be made of all proper costs, charges, and expenses attending the due administration of the estate, whether incurred before or after the making of the order:
>
> (ii) Payment shall then be made of funeral expenses proportioned, as the appointee thinks proper, to the position of the deceased in his lifetime:
>
> (iii) Payment shall then be made of medical expenses, and (so far as they are lawfully recoverable) of reasonable hospital and maintenance expenses in any institution or separate institution or licensed hospital within the meaning of the Hospitals Act 1926, being medical, hospital, and maintenance expenses incurred during the three months immediately before the date of the death of the deceased:
>
> (iv) Payment shall then be made of other claims in accordance with the priorities prescribed by section one hundred and twenty of the Bankruptcy Act 1908.

The Mental Health Amendment Act 1957.

In an article in this Journal of June 19, 1956, at p. 170, attention was directed to the difficulties that arose where any assets of a person who developed a disability had been specifically devised or bequeathed by a will made by him while he had full capacity, and it became necessary to sell or mortgage or otherwise dispose of those assets while he was under the disability. The question of preserving the notional character of assets in such cases has since received careful consideration, and the necessary changes in the law have been made by s. 16 of the Mental Health Amendment Act 1957 and s. 2 of the Aged and Infirm Persons Protection Act 1957. The new provisions have been enacted in respect of mentally defective persons by the former section which inserts, in the Mental Health Act 1911, seven new sections numbered 119A to 119G. These are applied by reference to the estates of protected persons.

The new s. 119A provides that where capital money is raised by any sale, mortgage, charge, or other disposition of property pursuant to powers conferred by or under the Mental Health Act 1911 or conferred under any inherent jurisdiction of the Court in respect of the estates of mentally defective persons, the original owner of the property and his administrators, beneficiaries, and assigns shall have the same interest in any unexpended balance of the money as they would have had in the property, and that unexpended balance shall be deemed to be of the same nature as the property. The provision is to apply whether the money was raised before or after the commencement of the new section, but not where the person died before the commencement of the section, unless the Court has in the lifetime of the person made an order which would have been authorized by the new s. 119C. The section is based on s. 123 of the Lunacy Act 1890 of the United Kingdom and s. 210 of the Lunacy Act 1928 of Victoria.

The new s. 119B provides that the Court shall have power to order that the whole or any part of the money of a mentally defective person expended or to be expended for the improvement of any of his property or for repaying money secured by a mortgage thereon shall be a charge upon the property.

The new s. 119C provides that the Court shall have power to make such orders as it thinks fit for preserving the nature, quality, tenure, and devolution of the property of a mentally defective person. For this

purpose money may be ordered to be carried to a separate account. Compare subs. (8) of s. 2 of the Lunacy Act 1922 of the United Kingdom and subs. (3) of s. 123 of the Lunacy Act 1890 of the United Kingdom.

The new s. 119D provides for the termination of the notional preservation of the character of assets as aforesaid either twelve months after the mentally defective person recovers, or upon his making a fresh testamentary disposition, or a payment or transfer, of the money or property concerned.

The new s. 119E contains provisions similar to those in force in the United Kingdom and Victoria enabling the Supreme Court to settle property of a mentally defective person. The John Donald Macfarlane Estate Administration Empowering Act 1918 is a New Zealand private Act for a similar purpose.

The new s. 119F makes it clear that the principal Act does not restrict the general jurisdiction of the Court in relation to the property of mentally defective persons.

The new s. 119G authorizes the Court, whenever it considers it expedient to do so for any of the purposes of the principal Act or in connection with the exercise of its inherent jurisdiction in connection with the estates of mentally defective persons, to compel information to be furnished respecting, and production of, testamentary dispositions, and the lodgment thereof in Court.

P.A.Y.E. AS IT AFFECTS THE LEGAL PROFESSION.

By C. B. Boock, LL.B.

By the Income Tax Assessment Act 1957, which is deemed to be part of the Land and Income Tax Act 1954, the method of levying and collecting income tax and social security charge is radically altered. Nearly all classes of taxpayers are in varying degrees affected by the change to the P.A.Y.E. system.

The following is an outline of the P.A.Y.E. scheme as affecting practitioners and their staffs. Detailed information can be obtained from various offices of the Inland Revenue Department.

The scheme comes into operation as at April 1, 1958. As from that date, for assessment purposes, social security charge and income tax will be combined into one tax payable on income as it is derived, although the identity of each remains, social security charge becoming known as social security income tax.

Income tax in respect of the year ended March 31, 1957, fell due on February 6, 1958, and income tax in respect of the year ending March 31, 1958, ("the transitional income year") has been remitted in the case of most taxpayers.

Practitioners should, if not for personal reasons, then in anticipation of potential briefs, study carefully ss. 65 to 73 (inclusive) of the Income Tax Assessment Act 1957, dealing with remission of tax in respect of the transitional income year. Section 66 provides that, if the Commissioner is of the opinion that income derived in the transitional income year is greater than might be expected normally to be derived by the taxpayer in that income year, the excess income shall be deemed to be income derived in the year ending March 31, 1959.

Section 67 (1), seemingly all-embracing, lists matters which the Commissioner may take into account in determining whether the transitional year's income is greater than it might normally be expected to be. There is provision in s. 69 for an appeal against the Commissioner's decision to the Transitional Income Tax Appeal Authority established by s. 70.

The position regarding social security charge in respect of income derived in the year ending March 31, 1958, has been much publicized. Wage and salary earners will of course have had deducted from their wages or salary social security charge thereon until March, 31st 1958, (and afterwards under P.A.Y.E.). However, social security charge on income derived by self-employed persons or income other than salary or wages derived by employees has in the past been payable in two instalments on June 7 and November 7. These payments have comprised social security charge on income derived during the year ended the previous March 31. Thus, in the ordinary way, as at April 1, 1958, persons in these categories would be liable to pay on June 7 and November 7, 1958, social security charge on income derived in the year ending March 31, 1958. As a result of the Land and Income Tax Amendment Act 1958 this social security charge is payable in three equal instalments on December 7, 1958, June 7, 1959, and June 7, 1960, subject to the following qualifications :

(*a*) a rebate of £7 10s. is deducted from the assessment

(*b*) where the taxpayer dies before any of the instalments has become due and payable or been paid, that instalment shall be payable on February 3, 1959, or on the date which is three months after the taxpayer's death, whichever is the later.

(*c*) where the taxpayer leaves New Zealand, any unpaid instalments become payable on a date to be specified by the Commissioner.

(*d*) If the amount of the assessment is paid before December 7, 1958, (except where it is paid under (*b*) or (*c*), there shall be allowed a rebate of 5 per cent. of the total assessment.

We shall now consider the position as from April 1, 1958.

I. Salary and Wage Earners :

Employers must deduct from salary and wages each pay day amounts as set out in tables to be obtained by employers from the department. The tables take into account exemptions for dependants. Every employee must each year or whenever he changes his principal employment furnish his principal employer with a "tax code declaration", or, if secrecy is desired, "a tax code certificate", to enable the employer to ascertain which column in the tax table is applicable to the employee. If the employee also has secondary employment, he must furnish a "secondary employ-

ment notice" to the secondary employer. Categories in the salary and wage earning group include:

(a) *Pay period taxpayers*: Those whose earnings do not exceed £1,040 p.a. plus interest and investment society dividends of not more than £12 per annum.

Income and social security income tax is calculated on the basis of a *pay period*, and deducted each pay day. Such deduction is final and no tax returns require to be filed by the employee, nor is there any annual tax assessment. The finality is qualified to the extent that in the case of hardship or where the taxpayer has someone partly dependent on him or pays more than £25 per annum in life insurance premiums the department will make an adjustment at the end of the tax year.

(b) *Partial pay period taxpayers*: those whose total income comprises salary or wages not exceeding £1,040 per annum and other income (excluding business incomes) totalling not more than £400 p.a. (excluding the first £12 p.a. of interest and investment society dividends).

The position as regards deductions from salary or wages is the same as that in regard to pay period taxpayers, but partial pay period taxpayers must file a return with the department each June and pay one or more instalments of provisional tax (in general calculated on the basis of the previous year's income) on the other income (excluding the above-mentioned £12) where it is assessable, with an adjustment at the end of the year. However, as with pay period taxpayers, the deductions from salary or wages remain final.

(c) *Taxpayers whose earnings exceed* £1,040 *p.a.*

Deductions are made each pay day, as with other employees, but these are not final. A return must be furnished and an adjustment made at the end of the year.

(d) *Overtime.*—If overtime pay brings the total weekly earnings above £20, tax on the excess over £20 is assessed at special rates. Tax deductions from the total earnings of that pay period are made by the use of overtime tables.

(e) *Bonuses, etc.*

Annual bonuses, gratuities, share of profits and retrospective increases in salary or wages are treated as an extra week's remuneration. If the amount exceeds £20, the first £20 is assessed at the ordinary rates applicable to the particular taxpayer, and the excess is taxed at special rates as indicated in the tables. Bonuses or other incentive payments made at less than yearly intervals are fully taxed as overtime.

(f) *Husband and wife*:

There is an aggregation of income if the income of each exceeds £520 p.a. in which case they are both required to furnish returns.

II. EMPLOYERS:

(a) *As regards employees*:

(i) Obtain every year or when employee commences work tax code declaration or certificate.

(ii) Deduct tax every pay day as above as per tables to be supplied by department (If code not supplied by employee, "no declaration" rate to apply).

(iii) Each calendar month's tax deductions to be paid with monthly remittance slips to the department or Post Office by the 20th of the following month. (Note: Social Security stamps cannot be used.)

(iv) Keep records of wages paid and tax deductions made for each employee for seven years.

(v) Furnish to department each year (in 1959, by May 15) statement reconciling deductions for previous year and accounted for to the department with amounts shown in copies of tax deduction certificates to accompany statement.

(vi) Furnish each each employee by April 20 each year, or within 7 days of his leaving employment, certificate showing tax deductions and earnings during year ended March 31, or period from previous April 1 to date of leaving.

(b) *As regards their own tax*:

Returns must be furnished by June 7 each year and provisional tax (i.e. combined income and social security income tax) on income for the current year is due in three instalments on June 7, November 7, and February 7. In general, the provisional tax is assessed by the taxpayer on the basis of the previous year's income as returned, and at the end of the income year an adjustment is made by the department.

III. WITHHOLDING PAYMENTS:

These are payments for special services not within the ordinary employer-employee relationship—e.g. commissions, directors' fees, fees for LAW JOURNAL or newspaper articles. The deductions are made at the time of payment and are in most cases provisional only, the recipient being obliged to include them in a return. Taxc odes are not required, but tax deduction certificates must be completed by the payer. The rates for various classes of withholding payments are set out in the Income Tax (Withholding Payments) Regulations 1957, (S.R. 1957, 280).

If a self-employed person desires that the tax be not deducted at the source (such as by the owner of a newspaper which publishes articles by him), he may, under Reg. 4 of those Regulations, apply for an exemption certificate specifying the expected source of payment. On the Commissioner's granting him such a certificate, he can produce it to the expected payer, who is thereby authorized to pay him his fees or payments free of tax deduction during the period specified in the certificate. In such a case, on inclusion of such payments in his tax return, he will be assessed for income tax in the ordinary way on such payments as part of his taxable income.

. . . . . .

Finally, it is worth noting that as a result of social security charge and income tax being assessed as one tax, social security income tax will cease to be payable on, inter alia, income derived from another country in the British Commonwealth and chargeable with income tax in that country and by way of dividends from companies not trading in New Zealand. On the other hand, children under 16 will now be liable for social security income tax.

DEVIATING FROM A TRUST.

By E. J. Somers, B.A., LL.B.

Since the decision in *Chapman* v. *Chapman*[1], there has been a spate of articles and notes on this topic,[2] as well as a number of reported cases.[3] Nevertheless it is thought that a further note may not be out of place, both because New Zealand has some statutory provisions peculiar to itself, and also because the provisions of the Trustee Act 1956 effect a substantial change in the law as from January 1, 1957.

The duty of a trustee is to adhere strictly to the terms of the instrument creating the trust, except so far as the directions therein contained are modified, or the terms thereof are varied, by the consent of all the beneficiaries collectively, or by the Court. A trustee who ventures from the letter of his trust does so at his peril.[4]

It is the purpose of this note to consider the jurisdiction of the Court, inherent and statutory, to authorize a variation or deviation from the terms of a trust. It is convenient first to consider the position before January 1, 1957.

Before January 1, 1957.

The general principle is clearly stated by Farwell J.:

> I decline to accept any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible.[5]

Apart from statutory powers to be mentioned later, the exceptions to the rule that a trust may not be deviated from, so far as concerns the inherent jurisdiction of the Court, are variously stated by Lord Simonds and Lord Morton of Henryton to be four, and by Lord Asquith of Bishopstone to be three.[6]

Under the head of inherent jurisdiction are embraced cases of salvage and emergency (usually considered together), conversion, maintenance, and compromise.

Salvage cases. The Court has power " in the administration of trust property to direct that by way of salvage some transaction unauthorized by the trust instrument should be carried out ".[7] For example, the Court may sanction the sale or mortgage of part of an infant's estate in order to preserve or benefit the remainder where this course is absolutely necessary. The leading case under this head (which seems somewhat narrower than that of emergency)[8] is *In re Jackson*.[9] In that case an inquiry was directed as to what repairs were absolutely necessary before the Court would sanction the mortgaging of it. Mere benefit is not enough ; there must be absolute necessity. " If the buildings were falling down it would be a case of actual salvage. . . ."[10] This jurisdiction is jealously exercised.

Emergency cases. The principle in cases such as these is best set out in the words of Romer L.J., in the leading case of *In re New* :[11]

> In the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to.

Romer L.J. went on to give instances of this part of " the general administrative jurisdiction ", such as empowering the postponement of sale where a sale at the time directed would be ruinous. In *In re New* itself, trustees were authorized to take up shares in a reconstructed company in place of certain shares held by them. This particular situation is now covered in New Zealand by s. 12 of the Trustee Act 1956.[12] It seems that the requirements in the emergency cases are less stringent than under the head of salvage. Absolute necessity is not required. *In re New* has been described as " the high watermark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts "[13] but has the approval of the House of Lords.[14] In the salvage and emergency cases there is no question of any alteration of the beneficial interests.

Conversion cases. The Court has always had the power " to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve rights of testamentary disposition and of succession ".[15] It was sometimes considered of advantage to the infant beneficiary to change the nature of the trust property and this trustees could not do themselves. The difficulties arose from the distinction between realty and personalty, the former descending at law

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[1] [1954] 1 All E.R. 798 (H.L.).

[2] See e.g. (1954) 70 L.Q.R. 473 ; (1954) 17 M.L.R. 420, 473 ; (1954) C.L.J. 184 ; 98 Sol. J. 296, 312, and 328 ; (1956) C.L.J. 18 ; (1956) 19 M.L.R. 298 ; (1954) 217 L.T. 174, 270 ; (1956). 106 L.J. 228.

[3] E.g. *Re Lord Hylton's Settlement* [1954] 2 All E.R. 647 ; *Re Forster's Settlement* [1954] 3 All E.R. 714 ; *Re Powell-Cotton's Resettlement* [1956] 1 All E.R. 60 ; *Re Heyworth's Settlements* [1956] 2 All A.E.R. 21 ; *Re Cockerell's Settlement Trusts* [1956] 2 All E.R. 172 ; *In re Gray* [1956] N.Z.L.R. 764 ; and, as to charitable schemes, *Re Royal Society's Charitable Trusts* [1955] 3 All E.R. 14.

[4] *Underhill's Law of Trusts and Trustees*, 10th ed., 251, 252.

[5] *In re Walker* [1901] 1 Ch. 879, 885.

[6] *Chapman* v. *Chapman* [1954] 1 All E.R. 798, 802, 807-808 and 818-819 respectively.

[7] *Chapman* v. *Chapman* (*supra*), 802, per Lord Simonds L.C.

[8] Cf. *Nathan's Equity Through the Cases*, 3rd ed., 278.

[9] (1882) 21 Ch.D. 786.

[10] Per Lopes L.J. in *In re Montagu* (1897) 2 Ch. 8, 11.

[11] [1901] 2 Ch. 534, 544.

[12] Formerly s. 4 of the Trustee Amendment Act 1933.

[13] Per Cozens-Hardy L.J. in *In re Tollemache* [1903] 1 Ch. 955, 956. In that case, trustees sought power to enter into an unauthorized change of investment. The proposed change was advantageous, but, as there was no emergency, the Court refused its sanction. For reference to some New Zealand cases on the *In re New* principle see *McCrostie* v. *Quinn* [1927] G.L.R. 37.

[14] *Chapman* v. *Chapman* (*supra*), e.g. at 807, 809.

[15] Per Lord Simonds L.C. in *Chapman* v. *Chapman* (*supra*), 802.

to the heir and not capable of being devised by infants, the latter passing to the personal representatives and at one time capable of being disposed of by the will of certain infants. The Court in a proper case would direct such a change or conversion for the infant's benefit, but to protect both the infant and others, the property was regarded as notionally unconverted, and, of course, no change in beneficial interest occurred. This jurisdiction is referred to, with certain of the leading cases, by Lord Morton in *Chapman* v. *Chapman*.[16]

Maintenance cases. The principle is clearly set out by Pearson J. in *In re Collins* :[17]

> . . . where a testator has made a provision for a family . . . but has postponed the enjoyment, either for a particular purpose or generally for the increase of the estate, it is assumed that he did not intend that these children should be left unprovided for or in a state of such moderate means that they should not be educated properly for the position and fortune which he designs them to have, and the Court has accordingly found . . . that . . . maintenance ought to be provided.

The exercise of this jurisdiction, the basis of which is doubtful,[18] was considered by Lord Morton to result in an alteration of the beneficial interests since income was applied to maintenance notwithstanding a direction to accumulate or pay off incumbrances.[19] The provisions of ss. 40 and 41 of the Trustee Act 1956[20] relating to maintenance and advancement are now likely to cover most cases.

Compromise cases. Whenever there is dispute or doubt as to the rights of beneficiaries under a trust the Court has jurisdiction on behalf of all parties whether infant, adult, or unborn, to sanction a compromise. This was the rule under consideration in *Chapman* v. *Chapman*[21] where the Court was asked to approve a variation of a trust in order to avoid the incidence of heavy duties in certain events. The proposal was undoubtedly beneficial but since there was no dispute in the real sense of that term the House of Lords declined to sanction the scheme. The limits of this jurisdiction are stated by Lord Morton :

> If . . . there is no doubt as to the beneficial interests, the Court is, to my mind, exceeding its jurisdiction if it sanctions a scheme for their alteration, whether the scheme is called a " compromise in the broader sense " or an " arrangement " or is given any other name.[22]

This view was not reached unanimously. At first instance, the narrow use of the word " compromise " was adopted while all three Lords Justices in the Court of Appeal[23] (Evershed M.R., Denning and Romer L.JJ.) and Lord Cohen in the House of Lords took the wider view. Nor were the views of the majority of the House of Lords unanimous, for Lord Morton considered that to sanction a compromise was not to alter the settled interests, since, ex hypothesi, those interests were not ascertained. Viscount Simonds L.C., and Lord Cohen on the other hand thought that beneficial interests were altered, for, although not yet defined, " the right of the beneficiary is a right to that which, on its true construction, the will or settlement entitles him ".[24]

The foregoing classification sets out the occasions on which the Court, in the exercise of its inherent jurisdiction in relation to ordinary trusts, whether created by will or settlement, may authorize a divergence from the terms of the trust. In relation, however, to charitable trusts, which will not be further considered, the Court may exercise a special inherent jurisdiction to amend a scheme.[25]

Statutory Jurisdiction.

In addition to its inherent powers, the Court had (before January 1, 1957) certain statutory powers, some of which overlapped the inherent jurisdiction.

(*a*) *Statutes Amendment Act* 1936, *s.* 81.[26] Subsection (1) of this section read as follows :

> (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

The remaining subsections dealt with the rescinding, varying and making of new orders, and the persons who could apply to the Court.

The section contemplates :[27]

(i) a transaction unauthorized by the trust,

(ii) which is to be effected by the trustees,

(iii) in the management or administration of the trust property,

(iv) which the Court may authorize,

(v) if the Court considers it expedient.

Re Downshire's Settled Estates[28] is the leading authority on the corresponding (and identical) English section, and in that case its scope was carefully examined and certain limitations noticed. The words " management or administration of any property vested in trustees " confine the application of the section to matters of " managerial supervision and control of trust property on behalf of beneficiaries "[29] and those words cannot " by any legitimate stretch of the language include the equitable interests which a settlor has created in that property ".[29] These views were emphasized in *Downshire's* case[27] by considering the

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[16] *Chapman* v. *Chapman* (*supra*), 808, and see *Re Downshire's Settled Estates* [1953] 1 All E.R. 103, 133 per Denning L.J.

[17] (1886) 32 Ch.D. 229, 232.

[18] *Chapman* v. *Chapman* (*supra*), 810 ; and see *In re Walker* [1901] 1 Ch. 879 at 885 ; and *Re Downshire's Settled Estates* [1953] 1 All E.R. 103, 134.

[19] *Chapman* v. *Chapman* (*supra*), 810.

[20] Formerly contained in ss. 4 and 5 of the Trustee Amendment Act 1946. See also s. 33 Administration Act 1952.

[21] [1954] 1 All E.R. 798.

[22] *Ibid.*, 814.

[23] Sub. nom. *Re Downshire's Settled Estates* [1953] 1 All E.R. 103.

[24] *Chapham* v. *Chapham* (*supra*) 820, per Lord Cohen.

[25] *Re Royal Society's Charitable Trusts* [1955] 3 All E.R. 14.

[26] See article in (1948) 24 N.Z.L.J. 95. The equivalent English legislation is s. 57 of the Trustee Act 1925 (*26 Halsbury's Statutes of England*, 2nd ed., 138).

[27] *Re Downshire's Settled Estates* [1953] 1 All E.R. 103, 117 (cf. the argument in *Chittick* v. *Chittick* [1940] G.L.R. 235).

[28] *Supra.* The views of the Court of Appeal on s. 57 of the Trustee Act 1925 (U.K.) were not challenged and were not the subject of comment in the House of Lords on appeal, sub. nom. *Chapman* v. *Chapman* (*supra*).

[29] *Re Downshire's Settled Estates* (*supra*), 118.

examples given in the section itself, all of which are instances of management in the ordinary sense. The transactions which may be authorized are those proper to be undertaken by trustees and not by beneficiaries. Then too, the word " trustees " in the section includes personal representatives and " one can scarcely suppose that Parliament was intending, by a side wind . . . to enable an executor even with the authority of the Court, to depart from the dispositions of his testator's will " for :

> in our judgment, the object of [s. 81] was to secure tha trust property should be managed as advantageously as possible in the interests of the beneficiaries. . . .[30]

It is clear therefore, and has been so held. that the proposed transaction must be for the benefit of the whole estate and not merely some part of it.[31]

It will be apparent from what has been said, that the scope of the jurisdiction conferred by s. 81 was not co-extensive with the inherent jurisdiction.[32] Thus, the approval of a compromise of disputed beneficial rights was not within the purview of s. 81 for beneficial interests are affected.

In *In re Mair*[33] it was held that when the Court sanctions a transaction under the provisions of (s. 81), it must be taken to have done it as though the power which is being put into operation had been inserted in the trust instrument as an overriding power. In *In re Fell*[34] the Court authorized an immediate sale despite a limited prohibition in the will.

One New Zealand case, *In re Bayley*,[35] may be referred to as it is not without its present importance. In that case, Fair J. authorized a gift to charity by trustees for the sake of the reputation of the family and the estate and because it might smooth the path of the trustees in business transactions.

(*b*) *Administration Act* 1952, *s.* 33 :[36]

> The administrator of an estate or any person beneficially interested therein may from time to time apply to the Court, which may, upon such terms as it thinks fit, make any such orders and directions as it thinks proper with respect to :—
>
> (a) The time and mode of sale or lease of any real estate belonging to the estate administered :
>
> (b) The maintenance or advancement or otherwise of minors out of their shares or interests in the estate :
>
> (c) The expediency or mode of effecting a partition or the mortgaging of any such real estate :
>
> (d) The administration of the estate for the greatest advantage of all persons interested.
>
> Provided that nothing in this section shall render it compulsory for the administrator to apply to the Court for leave to exercise the powers of sale or lease given by this Act.

Discussing the effect of this section and particularly para. (*d*) thereof, Sir Michael Myers C.J. in *Hatrick* v. *Bain*[37] said :

> I should feel inclined myself to adopt the view . . . that the jurisdiction conferred by the section ought not to be exercised to sanction a deviation from the strict letter of the trust unless the case comes within the rule laid down in *In re New*.[38]

It appears that the Court regarded what may be " proper " as governed by the limits set on the inherent jurisdiction. Apart from the fact that it touches on administrative matters only, the section appears to set no bounds to the Court's discretion, and, as the inherent jurisdiction and the statutory jurisdiction are quite separate and distinct,[39] it may be that the views set forth in *Hatrick* v. *Bain*[37] are unnecessarily restrictive.

As with s. 81 of the Statutes Amendment Act 1936, the jurisdiction is not to be exercised unless the transaction is to the advantage of the whole estate.[40] It may also be that the section is confined to the case of executors and administrators stricto sensu.[41]

(*c*) *Divorce and Matrimonial Causes Act* 1928, *s.* 37. This section authorizes the Court on the occasion of a divorce to alter or vary the terms of any ante or post-nuptial settlement. The word " settlement " in this section has a very wide meaning,[42] extending well beyond that placed on the word by conveyancers, but for the present purposes it suffices to say that the trusts of what is normally referred to as a marriage settlement are clearly embraced.

(*d*) *The Settled Land Act* 1908. As the powers contained in this Act have so seldom been exercised (at any rate in a reportable form) and as the Act is now repealed,[43] no comment need be made upon it.

(*e*) *Family Protection Act* 1955. Obviously the effect of an order under this Act in respect of a testable estate operates to vary trusts created by a will.

(*f*) *National Expenditure Adjustment Act* 1932, *s.* 42. This enactment must be read together with s. 5 of the Finance Act 1933. The Court is empowered on application by a trustee or any person taking benefit or incurring obligation under any deed, will or settlement, to modify the provisions thereof in so far as they provide for payment of any interest or other periodical payment, if the Court is satisfied that the terms cannot be complied with or cannot be complied with without causing undue hardship or for any (other) reason that the Court deems sufficient. In *F.* v. *F.*[44] the Court exercised jurisdiction in respect of a covenant relating to maintenance. The Act applies to deeds, wills, and settlements whether made before or after the enactment, which, in this respect, is permanent.[45]

Apart from the statutory powers relating to charitable trusts contained in the Charitable Trusts Act 1957 (formerly the Religious, Charitable and Educational Trusts

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[30] *Ibid.*, 119.

[31] *In re Craven's Estate* (1937) 3 All E.R. 33, 42, followed in *In re Gray* [1956] N.Z.L.R. 764, 769.

[32] *In re Gray* (*supra*), 768-769.

[33] [1935] Ch. 562, 565. See also *Re Downshire's Settled Estates* [1953] 1 All E.R. 103, 120-121 and *Riddle* v. *Riddle* 85 C.L.R. 202, 223 and cf. *Re Salting* (1932) 2 Ch. 57, 64.

[34] [1940] N.Z.L.R. 552.

[35] [1944] N.Z.L.R. 868. Cf. *In re Walker* [1901] 1 Ch. 879. The view expressed by Fair J. in *In re Bayley* was regarded as " very liberal " by Gresson J., in *In re Gray* [1956] N.Z.L.R. 764, 766.

[36] Reenacting s. 9 of the Administration Act 1908, but omitting the direction as to procedure. A number of cases on this section are set out in *Garrow's Law of Wills and Administration*, 2nd ed., 538.

[37] [1930] N.Z.L.R. 490, 494 ; and see also *McCrostie* v. *Quinn* [1927] G.L.R. 37 at 38.

[38] [1901] 2 Ch. 534.

[39] See per Gresson J. in *In re Gray* [1956] N.Z.L.R. 764, 768.

[40] *Ibid.*, 769.

[41] Cf. *In re Long* [1951] N.Z.L.R. 661, 669. This point was not adverted to in *Hatrick* v. *Bain* (*supra*), (note 37) nor in *In re Gray* (*supra*).

[42] See, e.g., *Smith* v. *Smith* [1945] 1 All E.R. 584, 586, on the corresponding English section.

[43] Section 89 (1) and Second Schedule of the Trustee Act 1956.

[44] [1955] N.Z.L.R. 244.

[45] *Ibid.*, 246.

Act 1908), and the inherent jurisdiction in relation to the cy-pres doctrine, it is thought that the above list is exhaustive so far as concerns the power of the Court to authorize deviations from a trust or variations of its terms.[46]

It remains now to consider the provisions of the Trustee Act 1956.

After January 1, 1957.

Except to the extent they may overlap or increase the Court's power, it would not seem that the provisions of the Trustee Act 1956 affect the inherent jurisdiction already described. "The inherent jurisdiction and the statutory jurisdiction are quite separate and distinct."[47]

So far as the statutory powers already mentioned are concerned, those contained in s. 33 of the Administration Act 1952, s. 37 of the Divorce and Matrimonial Causes Act 1928, the Family Protection Act 1955, and s. 42 of the National Expenditure Adjustment Act 1932 are unaffected. As has been mentioned, the Settled Land Act 1908 has been repealed.

It is to the altered form of s. 81 of the Statutes Amendment Act 1936 (now s. 64 (1) of the Trustee Act 1956), the new s. 64 (2) and the new s. 65 that attention must be directed. It will be convenient first to consider briefly s. 65, which reads:

> (1) Notwithstanding anything to the contrary in the instrument (if any) creating the trust, and notwithstanding the wishes of any trustee or person beneficially interested, the Court may, in any proceedings in which all trustees and persons who are or may be beneficially interested are parties or are represented, direct a sale or lease of any property subject to the trust on such terms, and subject to such provisions and conditions (if any) as the Court may think fit.
>
> (2) Nothing in this section shall restrict any other power of the Court.

Two observations may be made upon this section. First, although by virtue of the definition of property in s. 2 of the Act it covers both realty and personalty, it is probably to a considerable extent a measure designed for the benefit of any land subject to a trust and so has the same relation to realty as did Part II of the Settled Land Act 1908. (Section 88 of the Trustee Act 1956, which gives the lifetenant the powers of a trustee in certain cases, is complementary to s. 65.) Secondly, it is likely that the draftsman considered that a case such as *In re Fell*,[48] in which Ostler J., acting under s. 81 of the Statutes Amendment Act 1936, authorized the sale of land despite a limited prohibition in the will of the testatrix, stood in need of additional authority for, as will be seen, such a prohibition may now exclude resort to s. 64 (1).

Section 64 (1) of the Trustee Act 1956 reads as follows:

> (1) *Subject to the provisions of subsections four and five of section two of this Act,* where in the management or administration of any property vested in a trustee, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, *retention,* expenditure, or other transaction, is in the opinion of the Court expedient, but *it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or* the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument, if, any, or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

It may also be noted at this point that an application under this section may be made by the trustees or any of them or by any beneficiary (subs. (4)).

The italicized words did not appear in s. 81 of the Statutes Amendment Act 1936 nor was there any provision corresponding to s. 2 (4) and (5). Their effect must now be considered.

In re Fell[48] an immediate power of sale was conferred upon trustees despite a limited prohibition in the will. This indicates that under s. 81 of the Statutes Amendment Act 1936, the Court, in matters of administration or management, was concerned only with expediency and would disregard if necessary the directions of a settlor. There are no English authorities which go so far. In *Re Municipal and General Securities Co. Ltd's. Trust*[50] the instrument gave a power of sale should a fundamental change at any time be made in rights attaching to ordinary shares, and it was held that this express power of sale precluded the Court from conferring a further power of sale. If the principle in *In re Fell*[48] is correct then the new opening words of s. 64 (1) of the Trustee Act 1956 effect a change in the law for s. 2 (4) reads as follows:

> The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by the instrument, if any, creating the trust; but the powers so conferred, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of the instrument.

Section 2 (5) contains similar provisions which are applicable in the case of a corporate trustee.

A power conferred on trustees under s. 64 (1) is a power conferred *under* the Act[51]. It is clear therefore, that the Legislature intended to permit a settlor or testator to exclude the operation of s. 64 (1) although of course the inherent jurisdiction will remain.

The difficulty which will arise under s. 64 (1) will be the question of what is a "contrary intention" within the meaning of s. 2 (4). The words "if and so far only as a contrary intention is not expressed in the instrument," which appear in s. 69 (2) of the Trustee Act 1925 (Eng.), were held in *Re Warren*[52] to mean "unless expressly prohibited." But this case related to statutory powers of investment and the principles relating to the interpretation of a consolidating Act were applied, as the statute previously permitted the authorised investments unless expressly forbidden. It seems at any rate clear that an express prohibition of a transaction will preclude the Court from conferring a power under s. 64 (1), although the method of interpretation used in *Re Warren*[52] is hardly applicable to s. 64 (1).

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[46] It does not appear that the provisions of R. 538 of the Code of Civil Procedure (in particular cls. (*e*) and (*f*) thereof) are other than procedural.

[47] Per Gresson J. in *In re Gray* [1956] N.Z.L.R. 764, 768.

[48] [1940] N.Z.L.R. 552.

[49] [1940] N.Z.L.R. 552 and cf. *In re Mair* [1935] C.L. 562, 565 and note in (1935) 51 L.Q.R. 580.

[50] [1949] 2 All E.R. 937 and see *Re Pratt's Will Trusts* [1943] 2 All E.R. 375.

[51] The English section equivalent to s. 2 (4), namely s. 69 (2) of the Trustee Act 1925 omits the words "or under."

[52] [1939] 2 All E.R. 599 and see *In re Lowry's Trust* [1948] N.Z.L.R. 738, 771 et seq.

The other changes from the former s. 81 of the Statutes Amendment Act 1936 may now be briefly noticed. The addition to the enumerated transactions of "retention" seems convenient. Each of the other matters appears to involve a positive step, while in practice a negative attitude may be a desirable one. Here, too, a question will arise whether a direction for immediate sale, or a sale within a specified time, is such an expression of a "contrary intention" within the meaning of s. 2 (4) as to prevent a power of retention being conferred on trustees.

To invoke s. 81 of the Statutes Amendment Act 1936 it was necessary to show both expediency and the absence of any power to effect the particular transaction.[53] The words "it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court" which now appear in s. 64 (1) may have been added as alternatives to absence of power in order to avoid the difficulty which arose in *Re Municipal and General Securities Co. Ltd's. Trust*,[54] where the presence of a power of sale exercisable in certain circumstances under the instrument deprived the Court of jurisdiction. If as seems not unlikely they do not affect that purpose then it may be doubted whether the new words extend the occasions on which the Court may exercise its jurisdiction for either trustees have power to carry out a transaction or they have not. If it is inexpedient or difficult or impracticable to do so without the assistance of the Court, it is suggested it can only be because trustees lack the power to do so as they wish. It may of course be difficult to determine whether the power exists but that, it is thought, is a question of construction and interpretation.

The purpose of s. 64 (2), which is entirely new, is quite different from that of s. 64 (1). The latter deals with managerial and administrative questions, the former with beneficial interests. Section 64 (2) may be said to be the legislative response to *Chapman* v. *Chapman*.[55] The section permits the Court to approve a rearrangement of trusts in which infants or unborn or unascertained or unknown persons or persons under a disability take or may take a beneficial interest if the rearrangement is not to their detriment. The subsection then sets forth matters to which the Court may have regard in determining the question of detriment. These are all benefits which may accrue to the infant etc., directly or indirectly, in consequence of the rearrangement, including (shades of *In re Bayley*),[56] the welfare and honour of the family to which he belongs. The approval of the Court binds all persons on whose behalf it is given.

It seems likely that considerable use will be made of this section to invoke which it appears necessary only to show unanimity as to the desirability of the rearrangement and that it is not detrimental to those on whose behalf the Court's approval is sought.

It is suggested that the power of the Court under s. 64 (2), unlike that under s. 64 (1), cannot be excluded by the settlor or testator. This seems a reasonable conclusion from the very nature of the power given the Court, for it would seem that approval to a rearrangement of the trusts imposes a duty on the trustees to hold or distribute the trust property for new objects or purposes, and not a mere power.

Apart from limited statutory provisions and the inherent jurisdiction relating to maintenance and compromise (*pace* Lord Morton)[57] cases, it has never before been possible to rearrange trusts or alter beneficial interests where there are persons interested who are under disability. The sanctity of the trust has always come before the interests of the beneficiaries and while there is no doubt that a body of case law will evolve about s. 64 (2), the fundamental alteration in policy relating to the law of trusts should not be overlooked. Even the most careful settlor or testator is now subject to the "hindsight" of his beneficiaries and the Court. In *Chapman* v. *Chapman*, Lord Simonds L.C. said:[58]

> It was, I thought, significant that learned counsel [for the appellant] was driven to the admission that, since the benefit of the infant was the test, the Court had the power, though in its discretion it might not use it, to override the wishes of a living and expostulating settlor, if it assumed to know better than he what was beneficial for the infant. This would appear to me a strange way for a Court of conscience to execute a trust.

It will be observed that, while under s. 64 (2), the Court's power is discretionary, it is not the possibility of benefit but the absence of detriment that must be regarded.

SUMMARY.

1. The Court has an inherent jurisdiction in cases of salvage and emergency, conversion, maintenance, and compromise cases to sanction a deviation from the terms of a trust. Such deviations in the maintenance and compromise cases affect the beneficial interests.
2. The Court has a separate and distinct jurisdiction under miscellaneous statutes (as s. 33 of the Administration Act 1952, s. 37 of the Divorce and Matrimonial Causes Act 1928, the Family Protection Act 1955, and s. 42 and the National Expenditure Adjustment Act 1932) to authorize deviations from the terms of a trust.
3. Subject to a contrary intention expressed by the settlor or testator the Court has a wide power to authorize transactions and dispositions relating to managerial or administrative matters where it is expedient to do so: Trustee Act 1956, s. 64 (1).
4. The Court may direct a sale or lease even against the wishes of the testator or settlor or beneficiaries: Trustee Act 1956, s. 65.
5. The Court has a new and extensive statutory jurisdiction to rearrange trusts under s. 64 (2) of the Trustee Act 1956.
6. It may not be too much to say that in New Zealand as from January 1, 1957, a trust may no longer be that which is declared by a testator or settlor but that which is so declared and remains acceptable to all beneficiaries and the Court.

[53] *Re Municipal and General Securities Co. Ltd's Trust* [1949] 2 All E.R. 937.
[54] [1949] 2 All E.R. 937.
[55] [1954] 1 All E.R. 798 (H.L.)
[56] [1944] N.Z.L.R. 868.
[57] *Chapman* v. *Chapman* [1954] 1 All E.R. 798, 811.
[58] *Ibid.*, 802.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Permanent Court of Appeal.—The address by the Attorney-General to the newly-constituted permanent Court of Appeal on the occasion of its first assembly at Wellington was remarkable for its brevity, but was nonetheless effective in conveying to the Court that the large gathering of members of the Bar paid its respects to that Court and wished it well. Accustomed as he is to the juxtapositional vagaries of the Press, the Hon. Mr Mason must in all probability have experienced a slight sense of deflation on seeing the following day an excellent photograph of the Court and its Registrar occupying in a local newspaper almost a full page spread over a large-size heading, "The Everlasting Crazy Gang", of whom Flanagan, the gang's spokesman, once said: "We never go over the heads of our public." It was fitting that the Attorney-General should have himself appeared since he gave vigorous encouragement, over a long period of years, to the concept of a permanent Court of Appeal. It was also fitting that counsel for the Court's first appellant was L. T. Burnard, of Gisborne, whose name will be found associated with the Court of Appeal forty-five or more years ago. The appeal (*The Queen* v. *Bell*), moreover, was successful. It concerned the action of the trial Judge, after the full panel of twelve jurors had taken their places, in inviting any juryman who for any good reason considered that he was disqualified from trying the case impartially to state his position, with a result that two of the jurymen had themselves exempted and two others on the panel took their place. One lesson that may be drawn from it is that, apart from an inquiry as to its verdict, the only really safe question to put to a jury is whether they would like a free meal.

Antipodean English.—R. E. Megarry, scholarly author (with H. W. R. Wade) of *The Law of Real Property*, was once (27 N.Z.L.J. 227) unwittingly referred to by Scriblex as "the late R. E. Megarry of the *Law Quarterly Review*", although "considerably resuscitated a few weeks later" (27 N.Z.L.J. 399). A further source of justifiable irritation is provided by G. D. Wright, who, speaking at the Tenth Legal Convention of the Law Council of Australia of the advantages of law reform committees working initially through sub-committees rather than as a whole, said:

> "It saves the common lawyer, and I quote from Mr Megarry, 'from listening to a long discussion on the rule against perpetuities to which discussion, by the very nature of it, is uninteresting to him and accordingly to which it is unlikely that he will be able to make a significant contribution'."

This has provoked Megarry into observing: "To one who tries to write English, and at times even to achieve lucidity and a touch of elegance, such a sentence can only give pain. Its grammar is at best suspect; beyond question its style is execrable." And, after comparing the extract with the prints of his paper (34 Can. Bar. Rev. p. 694), he makes the good-humoured observation: "I must disclaim the sentence that Mr Wright ascribes to me. Its sentiment, indeed, I fully accept; but its form? I believe you have a word for it in Australia. Its true paternity? Perhaps the Stud Book reads 'By Printer's Gremlin out of Typist's Folly'."

Hazards of the Profession.—"I have just been reading an account of a gentleman named Grant who more than a hundred and fifty years ago was sentenced to transportation for life to New South Wales. Grant is said to have been a musician and a poet, and it was doubtless in a fit of poetic frenzy that he committed the offence for which he was sentenced. This is said to have been nothing less than the firing of a 'harmless charge of swan-shot into the breeches of a solicitor' who had frustrated Mr Grant's ambition to marry a very eligible young lady. The account I have read does not reveal the vital information whether, at the crucial time, the breeches were inhabited by the solicitor concerned, or whether the accusation was based upon damage to clothing as distinct from damage to anatomy. A good deal could, of course, turn upon the range at which the firearm was discharged, but if swan-shot is anything like what the word suggests to me (halfway between duck-shot and buck-shot) I cannot help feeling that the word 'harmless' is something of an understatement. It appears that after leading a very tough life for a considerable period of time, Mr Grant was finally pardoned, but I do not know what happened to the breeches or their wearer. If the Law Society ever instituted a museum for objects of interest to the legal profession, I would suggest that the swan-shot breeches, provided, of course, that they are still in existence, might well qualify for inclusion."—Charles Greenwood in the *Law Journal* (13/12/57).

Hints on the Facts.—In T. E. Crispe's *Reminiscences of a K.C.*, it is stated that County Court Judge Bailey, "an excellent Judge," was at the age of 89 still trying cases at Westminster County Court, and was, moreover, in full possession of his faculties. He had a deputy named Scott, who at the age of 88 gave the following rather perfunctory summing-up in a case attended by Crispe: "Gentlemen, I do not know what *you* think, but if you think as I think, *I* think you will find a verdict for the plaintiff." The foreman of the very common jury immediately responded: "We does, Your Honour, unanimously."

From My Notebook.—"Inertia rather than malice was the moving force behind the method practised by Judge Bridlegoose, the hero of one of Rabelais' satires. He decided four thousand cases during his judgeship and all of them by casting lots. Twenty-three hundred and nine of these were appealed and in every instance on appeal the judgment was affirmed."—Benjamin Cardozo in *The Growth of the Law*.

"A case which was expected to last all day was in progress at Oldham Police Court today when the Chairman, Mr G. Gleeson, exclaimed: 'It is not fair. There are three colleagues on the Bench, and one is asleep.' Alderman E. Bardsley, who was on the chairman's right, retorted: 'I was not asleep.'

Mr Gleeson: It is not the first time it has happened.

Ald. Bardsley: Because I lean back it does not mean that I am asleep.

Mr Gleeson: You were snoring. You did it the other week. It is not fair to the defendant."—*Daily Telegraph*, per the *New Statesman and Nation*.

SUMMARY OF RECENT LAW.

(*Concluded from p. 37.*)

COPYRIGHT.

Photographs—Agreement between Customer and Photographer, for Valuable Consideration, that Copyright on all Photographs taken owned by Photographer—Agreement Effective to make Photographer First Owner of Copyright in Such Photographs—Injunction against Infringement thereof—Defence of Non Est Factum rejected—Copyright Act 1913, ss. 8 (1) (a), 27. The plaintiff company, in the business of " at home " photography, required each customer to sign a special form of contract which contained details as to name, address, date, and particulars of the appointment and fees payable. It contained the following paragraph: " *Copyright:* In consideration of your supplying me with proofs of at lease 80% of the photographs taken by your photographer, which proofs shall be BLACK AND WHITE FADELESS PRINTS INSTEAD OF RED DAYLIGHT PROOFS, I agree that the copyright in all photographs taken or supplied by you shall be owned by you. I understand that the term copyright means that only you have the right to print, copy or reproduce in any shape, form, or colour, any of the photographs taken or supplied to me by you." The contract was signed by each customer, who acknowledged that he had received a duplicate of it. In an action against the defendant company claiming an injunction restraining it from reproducing in any form whatever, without the consent of the plaintiff company, photographs taken by the plaintiff company in which it owned copyright, *Held*, granting the injunction sought, 1. That cl. 7 of the appointment contract was not a transfer or assignment of an existing copyright, but it was an agreement for valuable consideration whereby the person who ordered the photograph agreed that the plaintiff company, as the holder of the negative, should be the first owner of the copyright in all photographs taken by it, thus excluding the operation of s. 8 (1) (*a*) of the Copyright Act 1913, which would otherwise make the person ordering the photograph the first owner of the copyright. 2. That the defence of *non est factum* failed, as there was no element of fraud, machination, or misrepresentation, and cl. 7 of the contract related to the subject-matter of the contract (the photographs) and could not be said to be accepted by the customer in the belief that it related to a different transaction from what was expressed therein. 3. That by virtue of cl. 7 of the appointment contract, the plaintiff company became the first owner of the copyright of the photographs in all cases where the contract had been effectually signed by the customer and the company's representative. *Christopher Bede Studios Ltd.* v. *United Portraits Ltd.* (S.C. Auckland. 1957. September 20. T. A. Gresson J.)

COMPANY LAW.

Restoration to Register. *107 Law Journal*, 747.

CONVEYANCING.

What is a Settlement? *101 Solicitors' Journal.*

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance—Social Security—Maintenance agreed on between Parties to allow Former Wife to receive Full Age Benefit—Agreement inimical to Public Interest—Application for an Order for Payment of Agreed Amount refused—Quantum of Proper Maintenance fixed by Court—Divorce and Matrimonial Causes Act 1928, s. 32 (2)—Divorce and Matrimonial Causes Rules, R. 41. A former husband whose means are sufficient to enable him to maintain his former wife should not be relieved of his obligation to pay maintenance to her at the expense of the Social Security Fund. (*Hyman* v. *Hyman* [1929] A.C. 601, applied.) Where, on an application to make an order for a former wife's permanent maintenance under s. 32 (2) of the Divorce and Matrimonial Causes Act 1928, it is made to appear to the Court that the parties have agreed to a limitation of the amount which the former husband is to pay in order that the former wife may continue to enjoy to the full extent an age benefit under the Social Security Act 1938, the Court, notwithstanding R. 41 of the Matrimonial Causes Rules, should not lend its aid to an agreement which is inimical to the public interest. *McGill* v. *McGill* (*No. 2*). (S.C. Wellington. 1957. December 16; 19. Gresson J.)

INTERNATIONAL LAW.

International Commission of Jurists, 35 *Canadian Bar Review*, 898.

Responsibility of States. *107 Law Journal*, 731.

MINING.

Water-race Licence—Warden—Jurisdiction—No Jurisdiction to Entertain Application for Water-race Licence over Land outside Mining District in Favour of Land (not being Maori Land) Outside Mining District for Purposes Unconnected with Mining—Mining Act 1926, ss. 58, 171. The Warden has no jurisdiction to entertain an application for a water-race licence pursuant to s. 58 of the Mining Act 1926, or under any other provisions of that statute, over land outside a mining district, in favour of land (not being Maori land) outside a mining district for purposes unconnected with mining. (*Skeet and Dillon* v. *Nicholls* (1911) 30 N.Z.L.R. 611; 13 G.L.R. 591, applied. *In re Fletcher* (1900) 18 N.Z.L.R. 485, and *Bell* v. *Baker* [1934] N.Z.L.R. 554; [1934] G.L.R. 525, distinguished.) *So held* by the Court of Appeal upon a Case Stated for the opinion of the Supreme Court moved into the Court of Appeal for argument. Per F. B. Adams J. That, in respect of lands outside a mining district, water-race licences may not be granted under s. 58 of the Mining Act 1926, save only for mining purposes or for the use of water within a mining district. (*Skeet and Dillon* v. *Nicholls* (1911) 30 N.Z.L.R. 611; 13 G.L.R. 591, applied.) *Semble*, per Shorland and T. A. Gresson JJ. The jurisdiction conferred upon the Commissioner of Crown Lands is exclusive over land outside a mining district in regard to mining privleges in respect of water under s. 171 of the Mining Act 1926 in favour of lands wholly outside a mining district, which are not Maori lands. *In re Cameron's Application.* (C.A. Wellington. December 12, 1957. F B. Adams J. Shorland J. T. A. Gresson J.)

PRACTICE.

Originating Summons—Claim for Possession of Mortgaged Property on Mortgagor's Default—No Material Conflict of Fact—Remedy available to Mortgagee by Originating Summons to Evict Person " claiming under or through " Mortgagor—Code of Civil Procedure, R. 550—Land Transfer Act 1952, ss. 106, 108. Y. was the registered proprietor of an estate in fee simple of certain land upon which a two-storied house was erected. The stories were separate flats, in one of which Y. and his wife lived during their marriage. On June 23, 1948, the marriage was dissolved by decree absolute. On June 30, 1948, Y. and his former wife executed a deed, which contained the following clause:

> " The said Annie Eleanor Kathleen Yeatts shall be entitled to the free use and occupation until her death or re-marriage of the top floor of the house property heretofore occupied as a matrimonial home at 6 Khyber Road, Seatoun Heights, Wellington, and the said Annie Eleanor Kathleen Yeatts shall be entitled to the free use and possession of the furniture and chattels now situated in the said house property until her death or re-marriage as aforesaid."

Clause 6 provided that Mrs Y. would pay all outgoings (including rates, insurance premiums, and interest and principal payments under any mortgage, and repairs). She remained in occupation of the upper flat. On November 4, 1953, Y. executed a memorandum of mortgage, subject to a first mortgage to a bank, in favour of the plaintiff company over, inter alia, the house property and the mortgage was duly registered. Y. made default under the mortgage, and notice in proper form was given to him and to Mrs Y. that unless the default was remedied, the mortgagee would exercise the powers conferred on the mortgagee by the mortgage and by statute. As such default continued, the plaintiff company entered into possession of the downstairs flat by receiving the rents and profits therefrom. By originating summons, the plaintiff company sued Y. and Mrs Y. claiming possession of the upper flat. *Held*, 1. That, under R. 550 of the Code of Civil Procedure, the plaintiff mortgagee was entitled to seek by originating summons to obtain " delivery of possession by the mortgagor "; and, as no opposition had been offered by Y., the plaintiff mortgagee was entitled to an order against him. 2. That, as the plaintiff mortgagee was purporting to exercise its powers under ss. 106 and 108 of the Land Transfer Act 1952 (the combined effect of which gives a mortgagee the right to evict persons claiming through or under the mortgagor) the remedy sought against Mrs Y. by way of originating summons was, by virtue of the concluding words of R. 550, available to it in the circumstances of this case; but, if there had been any material conflict of fact, that procedure would have been inappropriate. (*Beamish* v. *Whitney* [1908] 1 I.R. 38 referred to.) *Ruapekapeka Sawmill Company Ltd.* v. *Yeatts.* (S.C. Wellington. 1957. November 12; December 5, 13. Haslam J.)