THE ASCERTAINMENT OF MISSING BENEFICIARIES: THE NEW ZEALAND EXPERIENCE.

It is one of the primary duties of a personal representative or trustee to distribute the estate or trust fund to the persons entitled to it. In an important sense it is his *raison d'être*. He is not justified in adopting a passive role; "wait and see" should find no place in his vocabulary. Since the main purpose of the exercise is to ensure that the estate or the trust fund is eventually paid to the persons entitled, the personal representative or trustee is under a legal obligation to take active measures to ascertain who those persons may be. How is he to go about that task? What rules guide him in his search? What assistance may he expect from the Court? These and related questions may well puzzle the professional trustee corporation; they would flummox the private individual who, in an unguarded moment, has undertaken the responsibilities of personal representative or trustee. The average solicitor lacks the experience, the time, and often the inclination to embark upon the massive enquiries which such a search may sometimes involve. It is here that the want of a highly experienced and qualified group of solicitors skilled in the problems involved in such enquiries is most obvious in the smaller Commonwealth countries. Such a lack would be less serious if there were counsel with specialized knowledge to whom solicitors would naturally and justifiably turn for advice and assistance. In England there is a select band of barristers and solicitors who specialize in the esoteric mysteries of enquiries for missing beneficiaries. In most Commonwealth countries, and certainly in New Zealand, many practitioners are never confronted with a problem of ascertaining the persons entitled to an estate or a trust fund. Specialization has not yet reached the stage where such questions are automatically referred to the expert. An indirect consequence of this lack of familiarity with the issues and the procedures involved is that the judges usually approach a missing beneficiary problem as *terra incognita*. The pattern of judicial organization in New Zealand makes it unlikely that a judge may acquire experience in depth of such topics. Nor is there a readily accessible body of professional literature to guide the practitioner. Surprisingly little has been written about the problems involved in the ascertainment of the persons entitled to an estate under a will (or on intestacy) or to a trust fund. It is almost as difficult to find the law as it is to find the beneficiaries.

This article is written in the belief that a survey of the whole question within one jurisdiction might be helpful. A study of the New

Zealand experience may afford some guidance in other parts of the Commonwealth where the pattern of the administration of estates and trust funds follows the same broad principles. In theory the Supreme Court of New Zealand acquired all the jurisdiction of the Court of Chancery[1]; in theory its attitude should have been the same as that of the English Courts. It is proposed first of all to examine the attitude of the English Courts, and especially the Court of Chancery, to the performance by the personal representative or trustee of his task of ascertaining beneficiaries. The discussion will then deal with the New Zealand experience from the earliest days of its independent existence to the most recent development in this field, the enactment of the Trustee Amendment Act 1960.

THE JURISDICTION AND PRACTICE OF THE COURT OF CHANCERY.

Towards the close of the reign of Charles II it was finally established that the Court of Chancery had jurisdiction, concurrently with the spiritual courts, to superintend the administration of the assets in the estate of a deceased person and to decree a final distribution among the persons entitled either as legatees or as next-of-kin under the Statute of Distributions 1670.[2] With the progressive weakening of the jurisdiction of the spiritual courts the Court of Chancery acquired, in practice, a jurisdiction in the administration of estates that was almost exclusive.[3] For its ultimate dominance in this sphere the Court of Chancery owed much to its superior machinery. It had effective means of compelling discovery, of securing the interests of parties pending the outcome of proceedings, and of making a decree which bound all interested parties.[4] But more important still was the existence of a body of officials, all ultimately responsible to the Chancellor, who were competent, at least in theory, to assist the Court in the exercise of its jurisdiction. If the need arose for the taking of accounts or the making of inquiries for the working out of a decree in Chancery, it was a matter of form for the Chancellor to refer the accounts or inquiries to the officials of the Court, known as Masters, for their consideration and report. Those officials were no underlings, but important state officials, the chief of whom, the Master of the Rolls, had by the sixteenth century become the Chancellor's deputy.

1 Supreme Court Act 1860, sec. 5 (now sec. 16 of the Judicature Act 1908).

2 Matthews v. Newby, (1682) 1 Vern. 133, 134, 23 E.R. 368.

3 1 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (13th ed., 1886), 554.

4 1 SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY (1846), 582-583.

The existence of this administrative machinery, which was not to be found at all in the common law courts, was due to the diversity of the functions of the Chancellor. Not only was he a judge but he was also the head of an executive department of state, the Chancery. As Lord Bowen pointed out extrajudicially:—

> "The Court of Chancery was both a judicial tribunal and an executive department of justice for the protection and administration of property."

This duality is a feature of fundamental importance to an understanding of the way in which the Court of Chancery exercised its jurisdiction in the administration of estates. Notwithstanding the trappings of contentious litigation which evidenced the work of the Court in the administration of an estate, its function in that respect was essentially executive. It superintended or supervised the administration of the estate, although, as Lord Bowen again observed:—[5]

> ". . . its procedure in contentious business served as a basis of its administrative operations, and persons between whom there was no dispute of fact at all found themselves involved in the delays and embarrassments of a needless law suit."

One of the chief purposes of the repeated intervention by Parliament throughout the nineteenth century in the various legislative reforms of the Court of Chancery was to allow persons to invoke the administrative or executive jurisdiction of the Court without setting in motion a protracted and costly law suit. It is in that light that all the relevant statutes must be viewed. The ancient jurisdiction of the Court to decree a general administration remained unimpaired, but the need to seek the comprehensive superintendence by the Court became less frequent. At the beginning of the twentieth century Augustine Birrell Q.C. was able to say:—

> "It is now a feat of great difficulty to obtain in the Chancery Division a general decree for the administration of the estate of a deceased person."[6]

Costly and protracted though the procedure of general administration under the supervision of the Court of Chancery may have been, the Court never lost sight of the theory that its jurisdiction was administrative in nature and intended to assist or relieve personal representatives. Without the benevolent jurisdiction of the Chancellor the lot of the personal representative would have been intolerable.

5 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907), 523-524.
6 A CENTURY OF LAW REFORM (1901), 195-196.

Since he was liable on the one hand to account, so, on the other hand, he might for his indemnity apply to the Court of Chancery to administer the estate amongst the parties interested. Once the estate was administered in accordance with such a decree the personal representative was relieved of personal liability. In that legitimate desire he was encouraged by the Court, which interpreted its function as one of helping rather than hindering the administrator. The attitude of the Court of Chancery was never better expressed than by Leach M.R. in *David v. Frowd*[7] when he said:—

> "The personal property of an intestate is first to be applied in payment of his debts, and then distributed amongst his next of kin. The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A Court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator."

Such a motivation runs through the vast majority of reported decisions on questions relating to the administration of estates.

The field in which the personal representative would most frequently need the assistance of the Court of Chancery was where the identity of persons who had claims against the estate (whether as creditors, heirs-at-law, legatees, or next-of-kin) was unknown. It was to meet that difficulty that an administrator would often invoke the superintendence of the Court. In response to the administrator's application and within the framework of the general administration of the estate the Court would direct an inquiry for heirs, next-of-kin or other unascertained persons.[8] The Court referred the inquiry to one of the Masters in Chancery, who were the Chancellor's deputies, and from that stage the parties to the reference placed all available information touching upon the subject-matter of the inquiry before the Master, invariably by affidavit or deposition. After the Master had considered all the relevant material he made his report to the Chancellor and, unless any person made exceptions to the report, it was the Master's finding that was conclusive.[9]

7 (1833) 1 My. & K. 200, at 208; 39 E.R. 657, at 660.

8 See 2 SMITH'S CHANCERY PRACTICE (7th ed., 1862), 206-208 (orders for various inquiries).

9 See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926), 360-365, 374-375, 438-440.

The manner in which the Court of Chancery applied the machinery of reference, inquiry, and report may be observed in many reported decisions. For instance, in *Middleton v. Messenger*[10] the substantial question for decision was whether a bequest to testator's wife of a life interest in certain property with remainder, subject to certain minor exceptions, to be divided equally among the children of the testator's brothers and sisters included those nephews and nieces who died after the testator's death but before his widow. A bill in equity was filed by the executors *inter alia* to have the claims of the parties ascertained, and by a decree of the Master of the Rolls accounts were directed. As the report indicates:—[11]

> ". . . an inquiry who were the brothers and sisters of the testator [was directed]; whether they had any and what children living at the time of his death; if any were dead who were their personal representatives; and whether any of them . . . were living at the death of the testator's widow.
>
> The Master's report specified the brothers and three sisters of the testator; and stated, that several of their children were living at the testator's death; and some of them died before the death of his widow. None were born after the testator's death.
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> . . . Some inquiries were directed as to James Messenger, a brother of the testator; who went to sea in 1785; and had not since been heard of. Advertisements were published for his children; but none came in."

That kind of procedure was common where persons entitled to an estate under a will or on an intestacy were unascertained.[12]

It is obvious that in many cases there must be great uncertainty about the existence of persons entitled under a will or on an intestacy. The personal representative's knowledge may be meagre and he may be unable to obtain any positive information in response to his own inquiries. In that situation the Master invariably caused advertisements to be published in the quarters where the persons entitled were most

10 (1799) 5 Ves. Jun. 136, 31 E.R. 511.

11 *Ibid.*, at 137-138 and 511.

12 See, for illustrative examples, Sawyer v. Birchmore, (1836) 1 Keen 391, 392, 48 E.R. 357, 358; Fisk v. Norton, (1843) 2 Hare 381, 382-383, 67 E.R. 156, 157; Godkin v. Murphy, (1843) 2 Y. & C.C.C. 351, 353, 63 E.R. 155, 156; Wood v. Wood, (1843) 3 Hare 65, 66-67, 67 E.R. 298, 299; Reeve v. Attorney-General, (1843) 3 Hare 191, 193, 67 E.R. 351, 352; Johnston v. Todd, (1845) 8 Beav. 489, 490-491, 50 E.R. 192, 193; and Hunt v. Peacock, (1848) 6 Hare 361, 365-366, 67 E.R. 1205, 1207.

likely to be found, calling upon them to come in and make their claims before the Master within a stated reasonable time. The practice was for the Master to approve the form of the advertisement and the area in which it should be published. In actual fact the solicitor for the personal representative would present a draft advertisement for approval together with an indication of the desired scope of publication.

The practice of advertising for claimants under wills or on intestacy is very long established. Pollock and Maitland[13] refer to a case in the reign of Edward I where Archbishop Peckham (in whose Court the estate of the Bishop of Exeter was being administered) ordered advertisements to be issued[14] calling on all creditors of the late Bishop to appear within a certain period, about six weeks, and telling them that if they did not send in their claims within that time, they would have to show some reasonable cause for their delay or go unpaid. The Court of Chancery clearly inherited the practice of the courts spiritual in this respect.

The form of advertisement became stereotyped and the relevant portions were as follows:—

> "Pursuant to a decree or order of the High Court of Chancery made in the matter of the estate of ———— . . . the persons claiming to be next-of-kin to ————, are by their solicitors, on or before ———— to come in and prove their claims at the Chambers of the Master of the Rolls . . . or in default thereof they will be peremptorily excluded from the benefit of the said decree or order."[15]

Early New Zealand advertisements were to the same effect.[16]

13 1 HISTORY OF ENGLISH LAW (2nd ed., 1892), at 343.

14 In the days before printing the main methods of publishing such advertisements would seem to have been to read them aloud in some suitable public place or to affix a manuscript advertisement to some wall for the information of the few who could read. The contents would then be circulated by word or mouth, possibly, in a relatively small close-knit community, as effectively as by the insertion of advertisements in large metropolitan newspapers today.

15 See 2 SMITH'S CHANCERY PRACTICE (7th ed., 1862), 307.

16 See 1856 *New Zealand Gazette* 66, 84, 274 (Estate of John Commons) as follows:—

> "Pursuant to a decree in this cause the creditors of John Commons . . . are on or before ——— to come in and prove their debts before ——— the Registrar of the said Court . . . or in default thereof they will peremptorily be excluded from the benefit of the said decree."

Without an exhaustive search no early New Zealand notice calling on next-of-kin to come in and claim has been found; no doubt they followed the English form.

The closing formula common to the English and New Zealand notices is a logical consequence of the Chancery procedure. There was little point in ordering advertisements, unless persons who failed to claim within the prescribed time were barred. For that reason the Court's practice in this respect was governed by a rule under which the persons in default were excluded.[17] By Rule 263 of the New Zealand Regulae Generales 1856, it was provided:—

> "Where a decree or rule is made directing . . . an inquiry for next-of-kin or other unascertained persons, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the decree or rule."

The present English rule, Order 55, rule 44, and New Zealand rule, Rule 445, are to the same effect. Although the language of the rule, if literally interpreted, would seem to bar defaulting claimants altogether, it is well settled that they are only barred from suing the personal representative.[18] To supplement its own order the Court of Chancery could by injunction prevent the creditors or other claimants from suing in any other Court.[19]

It needs no saying that a mere advertisement for next-of-kin or other claimants adds nothing positive to the knowledge of the personal representative. Nor does a lack of response to the advertisement. As Leach M.R. pointed out in *David v. Frowd*:—[20]

> ". . . it is obvious, that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances, they may not see or hear of the advertisements . . . ."

That being so, it may with some justification be asked: Why advertise at all? The answer is to be found in the desire of the Court of Chancery to assist the personal representative. That no response had been received from advertising justified the assumption that there were no persons to respond. That was the hypothesis on which the Court

17 See Good v. Blewitt, (1815) 19 Ves. 336, 34 E.R. 542; and Chancery Order 9 made on 18th October 1852 set out in 2 SMITH'S CHANCERY PRACTICE (7th ed., 1862), 441.

18 Harrison v. Kirk, [1904] A.C. 1, at 6.

19 MAITLAND, EQUITY (1936), 249.

20 (1833) 1 My. & K. 200, 209, 39 E.R. 657, 660.

proceeded when it decreed a distribution of the estate without regard to possible claimants who had not come in and proved their claims. Such a procedure, Leach M.R. said,[21] was "wisely adopted with a view to general convenience." But the hypothesis necessarily imparted a provisional flavour to the distribution. The Court's decree could not and was never intended to oust the rights of persons clearly entitled. They had lost their remedy against the personal representative, who had the protection of the Court's decree, but they were entitled to any fund that might still be in Court,[22] or to claim against the persons among whom the estate had been distributed, and whose title remained defeasible.[23]

Hitherto the discussion of the Chancery procedure has proceeded on the basis either that the persons actually entitled make a claim or that no person claims at all. There is a third situation which is very common, namely, where persons make a claim which on investigation they are unable to substantiate. Such claimants, indeed all claimants, were required to "file a written statement of claim and of the facts and circumstances out of which it may arise, verified by affidavit."[24] The present provision, Rule 451, is to the same effect. In England the claims were considered by the Master or his Chief Clerk, who had full power, under the general supervision of the Chancellor or other Judge in Chancery, to conduct the inquiry.[25] It is clear that it was the Master and not the Judge who adjudicated on the claim.[26] He reached his decision and made his report after considering all the material bearing upon the claim. That material would consist of affidavits exhibiting pedigrees and other relevant supporting documents.[27] The Master's report was final unless exceptions were taken to it, as was done in *Johnston v. Todd*[28] and in *Crouch v. Hooper*,[29] though even when that was done the Court had power to direct and frequently did direct a further inquiry before the Master. Once the report was filed, it operated to confer an apparent

21 *Ibid.*
22 Harrison v. Kirk, [1904] A.C. 1.
23 David v. Frowd, (1833) 1 My. & K. 200, at 209, 210, 39 E.R. 657, 660.
24 New Zealand Regulae Generales 1856, R. 269.
25 Court of Chancery Act 1852 (U.K.), 15 & 16 Vict. c. 80, sec. 29, and New Zealand Regulae Generales 1856, R. 244, for the original express provisions on the procedure. The present New Zealand rule, R. 438, is to the same effect.
26 Walsh v. Weigall, (1887) 13 Victorian L.R. 449, at 453-454.
27 DANIELL'S CHANCERY FORMS (7th ed., 1932), 433-449, and 12 ATKIN'S ENCYCLOPAEDIA OF COURT FORMS, 652-659.
28 (1845) 8 Beav. 489, 490, 50 E.R. 192, 193.
29 (1852) 16 Beav. 182, 51 E.R. 747.

but defeasible title upon those whom the Master found to have a prima facie claim.[30] Unless exception were taken, there was no occasion for the Judge to make an independent and fresh assessment of the claim. Although a person who makes an unsuccessful claim as one of the next-of-kin to succeed on an intestacy ought not perhaps as a matter of strict logic to be described as a claimant, the practice of the Court of Chancery both before and after the legislative reforms in its procedure was to describe him as a claimant.[31]

Such then was the position in the early nineteenth century before the winds of change had been felt in the Court of Chancery.

LEGISLATIVE DEVELOPMENTS IN THE PROCEDURE FOR ASCERTAINING BENEFICIARIES.

(a) *England.*

The theory applied by the Court of Chancery in its administration of estates was admirable. The practice was catastrophic and earned general opprobrium. In particular, criticism was levelled at the dilatory and expensive procedure where the Master conducted inquiries for next-of-kin and other claimants. The policy and intent of the legislation in the nineteenth century was to give the personal representative the same protection as he would have received under a decree for general administration, but without the grave disadvantages inseparable from that procedure.

The first reform relevant to this case was effected by section 29 of the Law of Property Amendment Act 1859,[32] commonly known as Lord St. Leonard's Act, described in its preamble as "An Act to further amend the Law of Property, and to relieve Trustees." That section had nothing to do with trustees, but refers expressly to executors and administrators. It provided as follows:—

> "Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named

30 David v. Frowd, (1833) 1 My. & K. 200, at 210-211, 39 E.R. 657, at 660-661.
31 1 SMITH'S CHANCERY PRACTICE (7th ed., 1862), 993-994.
32 22 & 23 Vict. c. 35.

in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

The section does not require the personal representative to make any application to the Court, but covers him with the mantle of its protection if he complies with its conditions. It contemplates reliance upon its terms by a personal representative who is being sued; it refers to a "court in which such executor or administrator is sought to be charged."[33] Before a personal representative could be safe, however, it was essential that he should correctly anticipate the opinion of the Court in which he might be sued as to what advertisements or notices would have been given by the Court of Chancery in an administration suit. The successful forecasting of the opinion of the Court was not as perilous an undertaking for the personal representative as it might at first sight appear. At an early stage the Consolidated Orders of the Court of Chancery created the machinery for persons to settle the form of advertisements, and later the Rules of the Supreme Court of England made provision for that matter.[34] Furthermore, there were sufficient precedents in decisions of the Court to indicate to the personal representative what was required. He would know that advertisements would generally be directed in a London daily newspaper, but not always;[35] that normally at least a month's notice would be necessary; and that in considering where advertisements were to be published, account must be taken of all relevant circumstances, including the deceased's place of residence and position in life.[36] As to the form of the advertisement he was protected if he used the language of the section with such modifications as circumstances dictated.[37] It was settled at an early stage that the

33 Clegg v. Rowland, (1866) L.R. 3 Eq. 368, 372-373.
34 See O. 55, rr. 44-46.
35 In re Bracken, (1889) 43 Ch.D. 1, at 8-9, 11.
36 See Re Ashman, (1907) 15 Dominion L.R. 42.
37 Newton v. Sherry, (1876) 1 C.P.D. 246, at 251, 255-256, 257, 258.

phrase "creditors and others" was apt to cover next-of-kin. As Brett J. said in *Newton v. Sherry*:—[38]

> "It seems to me that the enactment was made for the protection of administrators. Now, the danger to the administrator of a claim by a next-of-kin being preferred after a distribution of assets is equally great as that of a claim by a creditor: . . ."

The phraseology in this respect was changed to "any person interested" and the protection extended to trustees, by section 27 of the Trustee Act 1925, which is the enactment at present in force in England. The tendency in England now is to abbreviate the form of the advertisement to the essential requirements of the Act.[39]

The next signifcant development in England was the creation of the originating summons procedure, first in a limited scope by sections 45 and 47 of the Chancery Procedure Act 1852,[40] and then in more extended form by the Rules of the Supreme Court 1875, as amended by the 1883 Rules. By that procedure it became possible to obtain the opinion and assistance of the Court on any one of certain specified matters that might trouble a personal representative in the administration of an estate, but without submitting to a decree for the general administration of the estate under the supervision of the Court. Among he topics for which the new procedure was expressly stated to be available was:—

> ". . . the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others."[41]

At the same time as the originating summons process was being extended, Order 55, rule 10 (made in 1883) deprived a beneficiary, personal representative, or creditor of the right to obtain a decree for general administration of the estate, "if the questions between the parties can be properly determined without such judgment or order" (*i.e.*, for administration of the estate).

(b) *New Zealand.*

To a certain extent the development in New Zealand was, as might be expected, parallel to the English reforms. The first enactment

38 (1876) 1 C.P.D. 246, at 255.

39 In re Aldhous, [1955] 1 Weekly L.R. 459, at 462, (1955) 220 L.T. 79-80; (1960) THE ANNUAL PRACTICE, 2432-2433; and 6 ENCYCLOPAEDIA OF FORMS AND PRECEDENTS (2nd ed.), 503-504.

40 15 & 16 Vict. c. 86.

41 See now O. 55, r. 3 (b) for the current English Rule.

in point was section 7 of the Trustee Relief Act 1862, which was closely modelled upon section 29 of the Law of Property Amendment Act 1859. The only relevant point on which that section departed from the English prototype was in relation to the type of notice to be advertised. As has already been pointed out, the sufficiency of the advertisements under section 29 of the Law of Property Amendment Act 1859 was not determined in advance by the Court, but after the event and then in the Court in which the personal representative was sought to be charged. Under section 7 of the Trustee Relief Act 1862, however, the protective cover of the statute was thrown over the personal representative only where:—

> ". . . an executor or administrator shall have given such notices as any Judge of the Supreme Court shall upon application by Petition to him direct. . . ."

That section was reproduced in similar language by section 75 of the Trustee Act 1883 and again in section 74 of the Trustee Act 1908.

An Order-in-Council made in 1896 under the Supreme Court Act 1882 made provision for the originating summons procedure. The rules that were made, Rules 519-519N, were based upn the English rules of 1883 and like them expressly included among the matters on which a personal representative might obtain the opinion or determination of the Court:—

> "Rule 519B (b). The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others."

The New Zealand Code of Civil Procedure was subsequently re-cast in 1908, and the foregoing rule now appears in identical language as Rule 538 (b).[42] Althought the New Zealand rules contained, and contain, no provision similar to Order 55, rule 10 making an order for general administration of an estate a matter of discretion rather than of right, it was held by Stout C.J. in *MacFarlane v. Brown*[43] that in New Zealand there was probably never any such right, but if there had been, it was superseded *inter alia* by the introduction of the originating summons procedure. Such a view is tantamount to the provisions of Order 55, rule 10, with the consequence that as Rule 538 (b) is available for the proper determination of questions relating to the ascertainment of classes of beneficiaries the Court will not in its discretion decree the general administration of the estate for the

42 See In re Flanagan, [1929] N.Z.L.R. 746.
43 [1919] N.Z.L.R. 218, 232-235.

purpose of assisting the personal representative to ascertain beneficiaries, except, perhaps, in the most extraordinary case.[44]

The next development in New Zealand which has some bearing on the question was the enactment of section 3 of the Administration Amendment Act 1911. That section assisted an administrator[45] to bar claims against the estate where *known* claimants had failed after notice to prosecute their claim with due diligence. After some difference of judicial opinion the New Zealand Courts finally decided that this section applied to claims by beneficiaries as well as to claims by creditors.[46]

Certain suggestions for extending the scope of section 3 of the Administration Amendment Act 1911 were made by Stanton J. when concluding the judgment of the Court of Appeal in *In re Long*[47] but they were not reflected in the provisions of section 25 of the Administration Act 1952, which was enacted the following year. By that Act section 74 of the Trustee Act 1908 and section 3 of the Administration Amendment Act 1911 were repealed and replaced by a consolidated provision (section 25) which applied to administrators but not to trustees. So the position remained, until section 25 of the Administration Act 1952 was repealed by the Trustee Act 1956, section 89 (1) and Second Schedule.

By the Trustee Act 1956, which is the Act at present in force, there are separate provisions relating to claims by creditors (section

44 In a recent unreported judgment (In re Heenan, Dakers v. Public Trustee, No. A.238$59, Wellington Registry) a decree for the general administration of an estate was made by McCarthy J. Persons whose claim to succeed on intestacy had been rejected by the Public Trustee commenced an action to establish that they were descendants of the intestate's mother's sister. The Public Trustee successfully counterclaimed *inter alia* for general administration, and the plaintiffs' claims were referred for inquiry.

45 Which means any person to whom administration is granted: Sec. 2 (1) of the Administration Act 1908 (now repealed and replaced by the Administration Act 1952).

46 In re Griffin, [1940] N.Z.L.R. 174; In the will of Walker, (1943) 43 State R. (N.S.W.) 305; In re Long, [1951] N.Z.L.R. 661, 670-671.

47 *Supra*, at 672: "We wish to add that we think the remedy under the section is unnecessarily limited and restricted, and that consideration might well be given to amending this section so that it will apply to all trustees as well as to administrators, and that provision should be made giving to a Judge power to extend the time stated in the section, to make conditional orders, and generally to exercise a wide discretion when making claim-barring orders. The powers contained in the Victorian statute are substantially wider than those in our own. Both in England and in New South Wales the trustees have the benefit of a provision corresponding with s. 74."

35) and to claims by all persons which the trustee desires to reject (section 75). The earlier provision clearly does not apply to claimants other than creditors and the later provision clearly applies only to those claimants (whether creditors, beneficiaries, or next-of-kin) of whose existence the trustee is aware. That section 75 is so limited appears from the language of subsection (1), which refers to serving a notice "upon the person by whom or on whose behalf the claim is made or expected" calling upon him to take and prosecute with all due diligence proceedings to enforce his claim. By virtue of the wide definition of the word "trust" in section 2 (1) as extending "to the duties incidental to the office of a personal representative" the provisions of sections 25 and 75 of the Trustee Act 1956 apply to executors and administrators. Those sections therefore go far towards implementing the suggestions of the Court of Appeal in *In re Long*.[48] But in one respect they fail, when read together, to give the personal representative the protection he had received hitherto. Neither section deals with the giving of notice by advertisement calling on unascertained claimants *other than creditors* to send in their claims.

The legislature had not overlooked the case of those other claimants, but it made provision for them by a section[49] which was largely based upon an earlier enactment restricted to the Public Trustee, namely, section 25 of the Public Trust Office Amendment Act 1913. At the time when that last mentioned statute was enacted, the Public Trustee, as the personal representative of the deceased persons whose estates he was administering, was entitled to the protection available to all personal representatives by virtue of section 74 of the Trustee Act 1908 and of section 3 of the Administration Amendment Act 1911. Not only that, but he could also take out an originating summons under Rule 538 (b) for the ascertainment of a class of legatees, devisees, next-of-kin, or others. Furthermore, in exceptional cases he might invoke the historic jurisdiction of the Court, as heir to the Court of Chancery, to decree the general administration of the estate under its supervision. That was the background of section 25 of the Public Trust Office Amendment Act 1913. In subsection (1) it provided:—

> "Where the Public Trustee is administering any estate, and such estate or any part thereof cannot be distributed by reason of the fact that it is not known to the Public Trustee whether any person entitled thereto is alive or dead or where that person

[48] See note 47, *supra*.
[49] Sec. 76.

is, the Public Trustee may apply to a Judge of the Supreme Court by petition for directions in accordance with this section."

Then the remaining subsections made provision for the procedure to be adopted before the Public Trustee could obtain an order authorizing him to distribute the estate disregarding the claim of any person entitled to the estate who had not sent in any claim. There is no reported decision on the effect of section 25 of the Public Trust Office Amendment Act 1913, but it appears from the orders made over a period of years that a uniform practice was followed by various judges in the application of the section. By section 76 of the Trustee Act 1956 the precedent of section 25 of the Public Trust Office Amendment Act 1913 was adapted for general application.

THE CURRENT ATTITUDE OF THE COURTS IN THE ADMINISTRATION OF ESTATES WHERE BENEFICIARIES ARE MISSING.

In England the procedure most frequently applied seems to be by way of originating summons under Order 55, rule 3 (b), equivalent to Rule 538 (b). A similar procedure obtains in most parts of the Commonwealth. The first step where some claimants are known to exist is to direct an inquiry as to the persons entitled.[50] If there is doubt as to the existence or identity of some only of the beneficiaries, it is possible to direct an inquiry limited to them.[51] In this last case the known claimants who have established their rights as beneficiaries are not compelled to wait for payment of their share.[52]

An inquiry having been ordered, the next step is to advertise for claimants.[53] The preparation and publication of the advertisements are the responsibility of the party prosecuting the order, usually the personal representative, though the Court may, it seems, appoint some other person for that purpose if the party prosecuting the order would

50 In re Peppitt's Estate, (1876) 4 Ch.D. 230; In re Fooks, (1882) 30 W.R. 923; 2 SETON'S JUDGMENTS AND ORDERS (7th ed., 1912), 1504-1515; (1960) THE ANNUAL PRACTICE 2458; and 12 ATKIN'S ENCYCLOPAEDIA OF COURT FORMS, 629, 707.

51 See the form of order approved by the Chancery Judges in the Practice Note, [1945] Weekly N. 68.

52 See O. 65, r. 14c, for which there is no equivalent New Zealand rule, and In re Giles, (1886) 55 L.J.Ch. 695, 697; In re Lloyd, [1953] 2 Dominion L.R. 781.

53 0.55, r. 44; unless there is existing uncontradicted evidence on the subject: Mulloy v. Mulloy, (1870) 1 Victorian L.R. (Eq.) 167.

benefit from a failure to answer the advertisements.[54] Sometimes there will be uncertainty about the advertisements that are necessary, in which case there may be a preliminary inquiry on that point.[55] On the other hand, the personal representative might already have published notices but wish to know whether they are sufficient.[56] In any event the personal representative should place before the Court such information as is available to him about the residence and occupation of the deceased prior to death.[57]

Once the advertisements have been published and the time for sending in claims has expired, the inquiry proper is held before the Master,[58] and, in New Zealand, the Registrar.[59] The practice of delegating the conduct of the inquiry to the Master or Registrar does not prevent the Judge himself from making the inquiry, especially if the facts are already in his knowledge from having presided over the proceedings in which the inquiry was ordered.[60] Any party to the inquiry has the right at any time to take the opinion of the Judge on any particular point either before or after the Master or Registrar has adjudicated thereon,[61] but unless the Registrar's report, when filed as a certificate, is discharged or varied within the time limited for that purpose, it is binding.[62]

Both the English and New Zealand rules contain, as has already been shown, a provision dealing with persons who do not prove their claims within the time limited by the advertisement. Thus Rule 445 is in the following terms:—

> "Where a judgment or order is made directing an . . . inquiry for next-of-kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims

54 Low v. Moule, (1879) 5 Victorian L.R. (Eq.) 10, 12-13.

55 12 ATKIN'S ENCYCLOPAEDIA OF COURT FORMS 707, and In re Holden, [1935] Weekly N. 52: "An inquiry as to what advertisements or other notices would be directed by the Court in an action for the administration of the estate for . . . claimants against the estate," *per* Farwell J., and In re Dalton, [1943] N.Z.L.R. 41, 44.

56 In re Letherbrow, [1935] Weekly N. 34, 48; In re Dalton, [1943] N.Z.L.R. 41, 44; In re Bullock, [1945] Victorian L.R. 111; and 12 ATKIN'S ENCYCLOPAEDIA OF COURT FORMS, 707.

57 Re Carvill, (1913) 15 Dominion L.R. 206, 209.

58 See O. 55, r. 16.

59 See rr. 427, 438, 439.

60 Aitchison v. Kaitangata Railway & Coal Co. Ltd. (No. 2), (1900) 21 N.Z.L.R. 149-151; Watt v. Watt, (1904) 25 Aust. L.T. 139.

61 See r. 442 and Practice Note (1927-1928), 1 AUST. L.J. 55.

62 See r. 443.

within the time fixed for that purpose by advertisement shall be excluded from the benefit of the judgment."

Of that rule it can be said that its bark is worse than its bite, because, as Lord Davey pointed out in *Harrison v. Kirk*:—[63]

> "It has long been settled that the language so used was in terrorem only, and that the effect of it was merely this, and nothing more: that any creditor [*sc.* or other claimant] who did not come in and prove his debt before the day fixed ran the risk of some of the assets being administered and disposed of by the Court [*i.e.*, in an administration action] in payment of other creditors."

Any tardy claimant still retained the right, usually on payment of costs or on other terms, to claim an interest in any funds that might still be in Court, or to commence proceedings against the persons among whom distribution had been made,[64] unless he had been guilty of wilful default.[65]

The foregoing discussion has dealt with the question of the conduct of the inquiry before the Master on the basis that some persons belonging to the class of beneficiaries sought for are believed to exist. Sometimes however it is unknown whether there are any members in a particular class of beneficiary. For that, and analogous situations, the English Courts have developed a practice of authorizing the personal representative to distribute the estate upon a particular hypothesis which the available evidence seems to support. For instance, as in *In re Benjamin*,[66] a decision which has given its name to the procedure just mentioned, a testator left a share of his residuary estate to his son, who had disappeared in 1892 at the age of 24 and had not subsequently been heard of. The testator died in 1893. Without making any declaration as to the date of the son's presumed death Joyce J. ordered that the personal representatives should be at liberty to distribute the estate on the footing that the son was unmarried and predeceased his father.[67] The practice of making a *Benjamin* order is not an oddity in the law. Indeed the principle justifying it underlies

63 [1904] A.C. 1, at 6.

64 David v. Frowd, (1833) 1 My. & K. 200, 39 E.R. 657.

65 Sawyer v. Birchmore, (1836) 1 Keen 391, 48 E.R. 357; Mohan v. Broughton, [1899] P. 211; Perpetual Trustee Co. Ltd. v. Permanent Trustee Co. of N.S.W. Ltd., (1941) 41 State R. (N.S.W.) 264.

66 [1902] 1 Ch. 723.

67 The developments in this beneficent practice have been described by Master Mosse, a Master of the Supreme Court in England, in a number of articles: See (1935) 79 L.J. 183-184, (1936) 81 L.J. 163-164, and also (1943) 19 N.Z.L.R. 19-20, for a brief allusion in passing to the same principle.

the time-honoured procedure of allowing distribution of an estate if there should be no answers to advertisements. In such a case the estate is distributed upon the footing that there are no persons in the class advertised for—a hypothesis which may not always correspond with the facts, but for which the lack of response provides some prima facie justification.[68] Although there seems to have been some lack of consistency in Canadian practice, there is a significant line of authority in conformity with the English practice,[69] and such decisions as appear to diverge from it do so, it seems, because of the unsatisfactory nature of the enquiries that have been made.[70] There are two Australian authorities in point, such as *Re Teas*,[71] though an earlier decision of that same Court in *Re Reynolds' Trusts*[72] indicates a certain diffidence about making a *Benjamin* order.[73]

THE DECISION OF THE COURT OF APPEAL IN *In re* SHERIDAN.[74]

After the enactment of section 76 of the Trustee Act 1956, the practice of the Supreme Court followed the earlier precedents which had been established in the previous 43 years under the provisions of section 25 of the Public Trust Office Amendment Act 1913, now repealed. In 1958 however an application by the Public Trustee for an order under section 76 of the Trustee Act 1956, to which he was now compelled to resort along with personal representatives generally, came before North J., a judge of the Court of Appeal, who was relieving congestion in the Supreme Court by dealing with *ex parte* motions to the Court. Notwithstanding consistent practice, North J.

68 See also the formal order of the House of Lords in Saragossa and Mediterranean Railway Co. v. Collingham, [1904] A.C. 159, at 160 (exclusion from benefits of compromise of bondholders' action of those who failed to come within a certain time and accept the agreed sum per bond); re Gess, [1942] Ch. 37 (applying the principle to creditors on death of person with possible debts in enemy occupied territory); and Hansell v. Spink, [1943] Ch. 396 (distribution on footing that available secondary evidence correctly stated terms of last trust deed). The last two decisions were reported on a note prepared by Master Mosse.

69 Re Ramsay, [1943] 2 Dominion L.R. 784, and Re Lloyd, [1952] 2 Dominion L.R. 781.

70 See Editorial Note in [1943] 2 Dominion L.R. 784, and Re Bailey, (1957) 6 Dominion L.R. (2d) 140.

71 [1949] Queensland W.N. 1.

72 [1942] Queensland W.N. 16.

73 Also Re Menday, (1916) 16 State R. (N.S.W.) 442; In re Stone, (1936) 36 State R. (N.S.W.) 508, 523, 533.

74 [1959] N.Z.L.R. 1069.

doubted whether the Supreme Court possessed jurisdiction to make an order under section 76 (2) where the personal representative had received any claims in response to his advertisements under section 76 (1). The proper procedure for disposing of such claims was, in his view, that laid down in section 75 of the Trustee Act 1956. An order was made removing the motion into the Court of Appeal under section 64 (b) of the Judicature Act 1908, which confers a limited original jurisdiction upon the Court of Appeal. The opportunity was thus presented for a thoroughgoing examination of section 76 and of the statutory machinery for the ascertainment of missing beneficiaries.

As the terms of section 76 are of crucial significance, the relevant provisions are set out below:—

(1) Where any real or personal property is held by a trustee and the property or any part thereof cannot be distributed by reason of the fact that it is not known to the trustee whether any person or class of persons who is or may be entitled thereto is in existence or whether any such person or class of persons ever has been in existence or whether any person or any member of any class of persons is alive or dead or where any such person is, the trustee may publish such advertisements (whether in New Zealand or elsewhere) as are appropriate in the circumstances calling upon every such person to send in his claim within a time to be specified in the advertisements, not being less than two months in any case from the date on which the advertisement is published. Where the trustee is in doubt as to what advertisements should be published under this subsection or what notices should be given under subsection two of this section, he may apply to the Court for directions in that regard.

(2) Upon proof by affidavit of the circumstances and of the inquiries that have been made and that such advertisements as aforesaid have been published and that no person to whom the order will relate has sent in any claim, the Court may authorize the trustee to distribute the property or part thereof, subject to such conditions as the Court may impose, as if every person to whom the order relates and every member of any class to which the order relates has died before a date or event specified in the order, whether or not any such person is known to have survived the date or event, and whether or not it is known whether any person or any member of any class has ever been in existence. Any

such order may be made notwithstanding that there has not been strict compliance with any directions as to advertisements previously given by the Court.

(5) Any such order may provide that the Order shall not be acted on for such period as is specified in the order, and may provide that the effect of the order shall during that period be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified therein; and in the event of the Court exercising the jurisdiction conferred by this subsection it may in the order direct that the same shall be of no effect in the event of any person specified therein instituting proceedings in New Zealand to enforce his claim and serving the proceedings upon the trustee within such period as is specified in the order.

The basic argument on which the Court relied to justify its view that the provisions of section 76 of the Trustee Act 1956 could not be invoked turned on the words "no person to whom the order will relate has sent in any claim." That was a theme which was repeated from time to time in the judgment. Thus when dealing with the relationship of subsections (2) and (5) Cleary J. said:—

> ". . . surely if a person is 'specified' in the order and required to institute proceedings the order must 'relate' to him."[75]

In brief, the Court decided that if a claimant replies to an advertisement then it is impossible to say that no person to whom the order will relate has sent in any claim. Such a view however disregards the purpose and intent of section 76, which was yet again to extend the scope of the Court's protection for personal representatives. Section 76 was not a piece of upstart legislation, but the culmination of almost a hundred years of legislative assistance to personal representatives whose normal difficulties of administration are increased because certain beneficiaries are missing.

To which persons will an order under section 76 (2) relate? Not to persons who have sent in claims, as the Court seemed to think. If that were so, then all that it would have been necessary to say would have been simply: "and that no person has sent in any claim." Subsection (2) does not say that but rather: "and that no person *to whom the order will relate* has sent in any claim." The condition

[75] *Ibid.*, at 1076.

which must be satisfied before the Court may exercise jurisdiction under section 76 (2) of the Trustee Act 1956 is not "that no person . . . has sent in any claim", but rather "that no person to whom the order will relate has sent in any claim." At the risk of labouring the obvious, the use of the qualifying clause "to whom the order will relate" limits the generality of the words "no person."

To whom then is the subsection referring when it speaks of a "person to whom the order will relate"? The only answer seems to be this: To the persons who are missing or whose existence was unknown. The subsection itself indicates who those persons are, because it postulates an authorization to the trustee to distribute on the footing that they are still missing, if they have not sent in any claim. The words used are:—

> ". . . as if every person to whom the order relates and every member of any class to which the order relates and every member of any class to which the order relates has died before a date or event specified in the order . . ."

It is, in my view, impossible to say, as the Court of Appeal seems to have done, that if a person is specified in the order under section 76 (5) the order necessarily relates to him. It is impossible because section 76 (5) envisages the service of the order upon a person specified therein, while section 76 (2) authorizes a distribution on the hypothesis that such a person is dead. I should be reluctant to accept the view that Parliament intended an order to be served upon a person whose death was the very assumption on which that order was made.

It may be helpful to illustrate my point by examples. Assume that a testator makes a gift in his will to the children of *X.* and it is not known to the executor whether there are in existence any children of *X.*, or whether there have ever been any children of *X.*, or whether, if there have been children of *X.*, they are alive or dead. The executor applies to the Court under section 76 of the Trustee Act 1956 for an order giving him authority to distribute the property comprised in the gift as if every one of the children of *X.* had died before a specified date. It is clear from the terms of section 76 (2) that the order relates to the children of *X.* It consequently follows that the Court will have jurisdiction to make an order based upon the assumption that every one of the children of *X.* has died, only if none of the children of *X.* has sent in any claim. If therefore a person has sent in a claim believing that he is one of the children of *X.*, but the evidence shows that he is in fact not one of the children of *X.*, the order cannot *ex hypothesi*

relate to that person. Or take another example: A deed provides that after the dropping of certain life interests a fund will be held by a trustee upon trust for such persons as *A.* may by will or deed appoint and in default of appointment to the brothers and sisters of *A.* Because *A.* spent much of his life making and unmaking wills and deeds exercising the power of appointment the one trustee is reluctant on *A.'s* death to distribute on the footing that there has been default in appointment.[76] He therefore applies to the Court under section 76 of the Trustee Act 1956 because he is not sure whether any appointee ever came into existence. If the Court makes an order under section 76 (2) it will do so on the footing that any possible appointee died before a specified date. And it will only make such an order on the footing that no person who establishes his right as appointee has sent in any claim. It is to appointees that the order will relate. These two examples have, it is hoped, been sufficient to show that when section 76 (2) speaks of persons "to whom the order will relate" it is referring to the persons who are mentioned in section 76 (1) and whose notional if not actual death is necessary before the personal representative may safely distribute.

The Court of Appeal found support in section 76 (5) for its opinion on the scope of section 76 (2). Although the argument of counsel for the Public Trustee had relied upon section 76 (5) for support for his contention, the Court of Appeal considered that subsection (5) should not be read so as to conflict with the provisions of subsection (2). The Court found that such a conflict would arise if subsection (5) were construed to apply to persons who had submitted claims. That situation, the Court said, was inconsistent with the words in subsection (2) that "no person to whom the order will relate has sent in any claim". Apart altogether from the interpretation to be given to those words when standing alone the Court looked at subsection (5) to assist. The Court said:[77]

> ". . . surely if a person is 'specified' in the order and required to institute proceedings the order must 'relate' to him."

With respect to the Court there is difficulty in accepting that view. The relevant portion of subsection (5) reads as follows:—

> Any such order may provide . . . that the order be served upon such person or persons as are specified herein . . .

[76] Notwithstanding that the trust fund is vested in those who take in default of appointment, subject to their being divested by a valid exercise of the power of appointment: See In re Greaves, [1954] Ch. 434.

[77] [1959] N.Z.L.R. 1069, at 1076.

One of the purposes of subsection (5) is to enable the Court to give a further opportunity for prosecuting their claims to those persons whose claims have been rejected by the personal representative, and who are therefore in his judgment not persons "to whom the order will relate" in accordance with section 76 (2). In this respect the order under section 76 (2) might be provisional only, because the person on whom the order is directed to be served under section 76 (5) might on a second attempt succeed in establishing his once rejected claim. Another purpose of the subsection may be to enable the Court to bring the order to the notice of interested persons, some of whom may wish to oppose a distribution made upon the footing that certain persons have died. The subsection may even contemplate service upon the Attorney-General.[78] The concluding words of section 76 (5) contemplate that the person specified in the order as being a person on whom it is served may bring proceedings to enforce *his* claim, but the language used is wide enough to empower the Court to direct service upon a person, even although that person may not have a claim to enforce.

The logic of the Court's reasoning compelled it to give a restrictive interpretation to subsection (5) and to limit its scope to those cases where the personal representative knew of a possible claimant who had not in fact made any claim. As Cleary J. said:—

> ". . . the words 'enforce his claim' in s. 76 (5) have reference to a possible claimant whose existence is known to the trustee but from whom no claim has yet been received."[79]

That construction of subsection (5) is difficult to accept. Is it to be supposed that where a personal representative knows of a possible claimant who in fact has not made a claim he will resort to the machinery of section 76 when the simpler process of section 75 is available to him? Under that last-mentioned section it is provided in subsection (1):—

> Where a trustee desires to reject a claim . . . that he has reason to believe may be made, against—
>
> (a) The estate . . . that he is administering . . . the trustee may serve upon the person by whom or on whose behalf the claim is . . . expected a notice calling upon him, within a period of three months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

78 In re Chillagoe Railway and Mines Ltd. Trust Deed, [1930] Weekly N. 41.
79 *Supra*, note 77, at 1076.

Failing any response to such a notice the trustee may apply to the Court for an order under section 75 (3) of the Trustee Act 1956, but by section 75 (2) he is under an obligation to serve a copy of such application upon the persons upon whom he served the notice. In the light of the readily available procedure under section 75 for dealing with possible known claimants who have in fact made no claim, the Court's rationalization of the purpose of section 76 (5) is without foundation. A further difficulty arises out of the words "enforce his claim" in subsection (5). It is true that the word "claim" in various sections of the Trustee Act 1956 is used in contexts which comprehend both claims that have been made and claims that might be made. But the context within which the expression "enforce his claim" is used in section 76 (5) makes it unlikely that the order mentioned in that subsection would call upon a person to enforce his claim when he had made no claim. It is not suggested that the subsection would never cover the enforcing of a claim by a person who in fact had made no claim. The language of section 76 (5) is wide enough to include that possibility, but the more probable situation with which the subsection would deal is where a claimant has come forward in response to the advertisements published under section 76 (1), but has produced insufficient evidence to the personal representative to support his allegations that he is entitled to the estate. The insufficiency of his evidence would indicate that he is not a person to whom the order under section 76 (2) will relate, but the Court may consider that he should be given a further opportunity to establish his claim. He would then be specified in the order, the order would be served on him, and he may be called upon to institute proceedings to enforce his claim. The Court of Appeal considered that if a person is specified under section 76 (5) he must fall within the category of persons to whom the order will relate under section 76 (2). It might reasonably be expected that the Legislature would have used the same language if it had been referring to the same category of persons in the two subsections, but nowhere in section 76 (5) is the expression "person to whom the order relates" used at all. For the reasons earlier expressed the subsections are necessarily dealing with different categories of persons, but if they had been referring to the same category then there would be nothing to prevent the relevant portions of subsection (5) from reading as follows:— "such person or persons [to whom the order relates] as are specified therein" and "in the event of any person [to whom the order relates] instituting proceedings." The use of different expressions supports the view that the two subsections are not dealing with the same category of persons.

Much argument in the Court of Appeal was directed to the proper method of construing consolidating statutes. For the Public Trustee it was contended that the practice of the Courts under section 25 of the Public Trust Office Amendment Act 1913 afforded a guide to the interpretation of the somewhat similar language of section 76 by which it was replaced. The Trustee Act 1956, it is true, consolidates earlier legislation dealing with missing beneficiaries,[80] but, as the Court of Appeal observed, "not only are there differences in phraseology between". the various sections—"but . . . the provisions in the latter Act [Trustee Act 1956] have been recast and expanded." In view of the fact that the relevant expressions in section 25 of the Public Trust Office Amendment Act 1913 ("such person") and section 76 of the Trustee Act 1956 ("every person to whom the order will relate") are not identical, it is not easy however to see why the Court of Appeal regarded as apt the comments of Lord Wrenbury in *Food Controller v. Cork*[81] because those comments dealt with cases of identical language. The principles relating to the construction of consolidating statutes may, however, not be applicable in the present case, since the Trustee Act 1956 is more than a consolidating Act.[82] Nevertheless the principles applied by the Court in the application of section 25 of the Public Trust Office Amendment Act 1913 may well assist in, if they do not control, the interpretation of not altogether dissimilar words in section 76 of the Trustee Act 1956.[83] Those principles show clearly that an order was made under section 25 of the Public Trust Office Amendment Act 1913 even although some persons had advanced, but not established, claims. A reasonable assumption is that by enacting section 76 of the Trustee Act 1956 the Legislature wished to extend that beneficent practice to personal representatives generally. The decision of the Court of Appeal not only presupposes a legislative intention to restrict the earlier practice but also proceeds by implication upn the basis that the earlier practice was wrong. The Public Trustee is left in a worse position under the general provisions of section 76 than he was under the provisions of his own legislation.

The general approach of the Court of Appeal to the interpretation of a statute touching upon its administrative jurisdiction, as section 76 of the Trustee Act 1956 does, constitutes a deviation from the normal attitude of judicial solicitude. The earlier portions of this

80 See sec. 25 of the Administration Act 1952 and sec. 25 of the Public Trust Office Amendment Act 1913.

81 [1923] A.C. 647, 666.

82 Grey v. Inland Revenue Commissioners, [1960] A.C. 1.

83 Schneider v. Dawson, [1960] 1 Q.B. 106.

article have indicated at sufficient length how the Court of Chancery interpreted its role in the administration of estates. But more recent illustrations are not wanting. Thus in *In re Bracken*[84] where the question of the sufficiency of advertisements arose, not only North J.[85] at first instance, but also Cotton L.J.[86] and Bowen L.J.[87] in the Court of Appeal placed great reliance upon the practice of the Court and, in particular, upon what the Chief Clerk, the then equivalent of the former Master, said that practice was. Again, in *Stuart v. Babington*[88] Chatterton V.-C. stated[89] that he had consulted his chief clerk about what the practice was concerning the insertion of advertisements. The English Court of Appeal recognised the force of uniform practice in Chancery matters when in *Re Phillips* it said:—[90]

> "In . . . [another case] North J.—it is true only by way of dictum —expressed the same view. It is fair to observe, however, that the dicta of judges who are accustomed to deal with questions of this kind every day in the Chancery Division ought to have attributed to them considerable force in these matters, embodying, as they do, their knowledge and experience of what the practice is and of the way in which other judges have been in the habit of regarding the application of the rule."

To the same effect are the robust observations of Denning L.J. in—it is true his dissenting judgment—*In re Chapman's Settlement Trusts*[91] where he said:—

> ". . . I am the more ready to [allow the appeal] because I am told that the Chancery judges in chambers have in the past exercised their jurisdiction in similar cases in a very beneficent manner . . . The practice of the profession in those cases is the best evidence of what the law is: indeed it is the law. It would be most disturbing if we were to say that the Chancery judges for many years have been acting without jurisdiction."

Although the subject matter at which those remarks were directed was far removed from the present, and although the judgment of Denning L.J. was not approved on appeal,[92] the considerations ad-

84 (1889) 43 Ch.D. 1.
85 *Ibid.*, at 7.
86 *Ibid.*, at 8-9.
87 *Ibid.*, at 11.
88 (1891) 27 L.R. Ir. 551.
89 *Ibid.*, at 557.
90 [1938] 4 All E.R. 483, at 486.
91 [1953] Ch. 218, at 279.
92 Chapman v. Chapman, [1954] A.C. 429.

vanced in the foregoing quotation apply with considerable force to questions relating to the practice of the Court in the discharge of its administrative jurisdiction. The almost uniform practice of the Court under the somewhat more restrictive provisions of section 25 of the Public Trust Office Amendment Act 1913 was a most significant guide to the manner in which the Court should apply section 76 of the Trustee Act 1956.

A striking feature of the reasoning of the Court of Appeal is the manner in which it was influenced in its interpretation of section 76 by the scope which it felt should be assigned to section 75. Similarly, it approached the interpretation of section 76 (5) by the interpretation it felt should be placed on 76 (2): It was by such a process that it avoided an interpretation of subsection (5) which would conflict with its interpretation of subsection (2). To allow an earlier provision in a statute to dominate a later provision, as the Court of Appeal did, is a reversal of the usual degree of importance attached to sections in an Act of Parliament.[93] A more acceptable approach would, in my opinion, have been to interpret section 76 as it stood without allowing the existence or the terms of section 75 to derogate from it and similarly as between subsections (2) and (5) of section 76 itself.

It is easy to discern in the judgment of the Court a restrictive approach to the interpretation of section 76. The question of jurisdiction clearly raised an issue of serious concern. Apart altogether from the consideration that section 76 represented the culmination of almost a hundred years of legislative developments towards the relief of personal representatives and apart altogether from the fact that section 76 is a machinery provision superimposed upon the ancient jurisdiction of the Court in the administration of estates, such an attitude overlooks the standards laid down by Parliament itself for the interpretation of statutes. By section 5 (j) of the Acts Interpretation Act 1924 the Court is directed to consider section 76 of the Trustee Act 1956 as remedial and accordingly to give to it such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of section 76 according to its true intent, meaning, and spirit. In the judgment of the Court of Appeal the only occasions on which a trustee may invoke section 76 (2) of the Trustee Act 1956 is when "advertising . . . fails to produce any claimant" with the result that a single irresponsible claim without any foundation will force the personal representative to begin again, but this time under section 75.

93 Wood v. Riley, (1867) L.R. 3 C.P. 26, 27.

Such a result leaves a personal representative in no better position than he was under the first legislation passed for his relief on this topic. By section 7 of the Trustee Relief Act 1862 (section 29 of the English Law of Property Amendment Act 1859) a personal representative could avoid personal liability if after advertising for missing beneficiaries he were to distribute the estate having regard only to those claims of which he had notice. Furthermore, as has been mentioned earlier, Rule 263 of the New Zealand Regulae Generales 1856 (modelled upon Order 9 of the English Chancery Rules of 16th October 1852) contained a direction to be implied in all decrees or rules ordering an inquiry for next-of-kin or other unascertained persons. By that direction:—

> "all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the decree or rule."

The present provision is similar in terms.[94] The procedure that had obtained since 1856 in the ordinary administration of an estate under the superintendence of the Court coupled with the provisions for the relief of trustees since 1862 had given personal representatives just as complete protection as they would enjoy under section 76 of the Trustee Act 1956 as interpreted by the Court of Appeal. In a sense the personal representative would be less free from procedural obligations. Under section 7 of the Trustee Relief Act 1862 (later section 75 of the Trustee Act 1883, section 74 of the Trustee Act 1908, and section 25 of the Administration Act 1952) the personal representative who had received no reply to his advertisements was entitled to distribute the estate without an order of the Court. Now under section 76 (2), which the Court of Appeal considers only to apply where no claims are received, the personal representative must in every case apply to the Court for an order authorizing distribution. It is hard to describe such a process of statutory interpretation as giving a fair, large, and liberal construction to section 76.

In order to reach that conclusion the Court was driven into a paradox. First of all it described the rationale of section 76 as providing the machinery for ascertaining the existence or whereabouts of unknown or missing claimants. Upon that hypothesis the Court was compelled to say that section 76 would not be available,

> ". . . if any claim is sent in pursuant to the advertisement, or is otherwise known to the trustee, and upon rejection by the trustee is not prosecuted . . ."[95]

94 See R. 445.
95 [1959] N.Z.L.R. 1069, at 1075.

Now, section 76 says nothing expressly about claims that may be known to the trustee otherwise than in response to his advertisement; if the section can be considered as applying to such persons by implication that interpretation can only be deduced from section 76 (5). But of course that subsection only deals with the case where an order under section 76 (2) *is* made. Furthermore, the section makes no express provision for the rejection of claims; such a step on the part of the personal representative is of course implicit in the section. But does the Court of Appeal imply that if the claim is accepted, as it may well be in respect of certain categories of beneficiaries, or if the rejected claim is prosecuted, then section 76 is still available? It is doubtful whether that would be the Court's view, although such a result would be in accordance with the true intention of the section. But there is a further inconsistency in the Court's reasoning on this point. In delivering the judgment of the Court Cleary J. said:[96]

> "In the result, we are of opinion that s. 76 provides a procedure for the protection of the trustee against possible claimants who remain unknown or unfound at the time of distribution despite advertisements and due inquiries, but not against claimants who are then known to the trustee whether as the result of advertisement or otherwise."

Having made clear beyond all doubt that it considered knowledge of claims (whether by advertisement *or otherwise*) to bar resort to section 76, the Court then said (two sentences later) that section 76 (5), which of course presupposes an order under section 76 (2), referred to "a possible claimant whose existence is known to the trustee." It is impossible to have it both ways. If section 76 (2) does not apply where the trustee knows of a claim, then obviously there cannot possibly be an order to which section 76 (5) could apply.

FURTHER LEGISLATIVE REFORM.

The decision of the Court of Appeal in *In re Sheridan* came as a surprise to the legal profession and particularly to professional trustee corporations in New Zealand. Suggestions for amending the law to overcome the unfortunate consequences of that judgment came thick and fast.[97] Within a year of the delivery of the judgment Parliament

[96] *Ibid.*, at 1076.

[97] Chiefly from private persons interested in the reform of trustee law. For a published suggested alteration in sec. 76 see Buist, *Administration: Barring claims of missing beneficiaries,* (1959) 35 N.Z.L.J. 200.

gave its approval to a complete re-writing of the provisions of section 76 of the Trustee Act 1956 relating to the distribution of the shares of missing beneficiaries.[98]

The new provision is not remarkable for its brevity—it occupies three full pages of the statute book—or for the simplicity of its style. It does appear, however, to cover most, if not all, of the situations that are likely to arise in the administration of estates and trusts. The draftsman has formulated a code of procedure for the guidance of personal representatives and trustees; the steps prescribed are remarkably similar to the steps that a personal representative or trustee would have taken when an estate or trust was being administered in Chancery under the supervision of a Court of Equity. The law has, in one sense, described a full circle.

The first step is to advertise for claimants or for such information as may be appropriate in the circumstances. If a trustee is in doubt as to what advertisements should be published, he may apply to the Court for directions.[99] After having received answers in response to his advertisements the trustee may, if he considers it necessary, serve notices on the claimants or on any persons to whom the advertisements may relate or on any persons who may claim to be in that category calling on them to take and prosecute with all due diligence proceedings to enforce the claim within a period of three months from the date of service of the notice. It is specifically provided that the trustee is under no obligation to serve such notices.[1] The provisions dealing with the service of notices is an importation into section 76 of the provisions of section 75 of the Trustee Act 1956 relating to the barring of claims.

After the trustee has taken such of the foregoing steps as may seem advisable in the circumstances, he applies to the Court for an order under the section giving him leave to distribute the property held by him or any part thereof, subject to such conditions as the Court may impose, as if certain hypotheses, which the information before the Court seems to support, are in fact true.[2] The two usual hypotheses would relate to the death of certain persons or to the compliance or non-compliance with certain conditions upon which beneficial interests under a trust might be dependent. Lest an argument

98 Trustee Amendment Act 1960, sec. 12, substituting a new sec. 76.
99 Sec. 76 (1).
1 Sec. 76 (2).
2 Sec. 76 (3).

constructed upon the line of reasoning applied by the Court of Appeal in *In re Sheridan* should govern the interpretation of the new section 76, it is expressly provided that the Court's jurisdiction under the section may be exercised without regard for persons who may have made claims which appear to be unsubstantial.[3] In disregarding such persons the Court is free to omit express reference to them in the formal order under the section.[4] But the Court may wish to suspend the operation of its order or to have its order served upon persons specified in the order. This is the provision equivalent to section 76 (5) of the Trustee Act 1956, as originally enacted, which provided the keystone for the reasoning of the Court of Appeal in *In re Sheridan.* The legislature has made explicit what was implicit in the original subsection by providing[5] that the order under the section shall have "no effect in respect of any person specified therein in the event of that person instituting proceedings in New Zealand to enforce his claim and serving the proceedings upon the trustee" within a prescribed period. The final release of the trustee is contained in section 76 (6) which exonerates a trustee from any further liability to any person or to any member of a class when the trustee has distributed the property held by him as if every such person and every member of any such class of persons specified in the order is not in existence or never existed or died before a date or event specified in the order. The trustee's personal exoneration from liability is in accord with the ancient Chancery practice. So too is the preservation of the claimant's right against any other person than the trustee.[6]

As a final gesture to the past the section expressly provides that nothing therein shall prejudice the right of the trustee to distribute, if he so desires, under any other law or statutory provision.[7] With such a complete and comprehensive code at hand what trustee would wish to distribute under any other law? The section sounds the death knell of the old Chancery practice of the administration of estates. Few will mourn its passing.

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3 Sec. 76 (4).
4 Sec. 76 (4) (a) (b).
5 Sec. 76 (4) (d).
6 Sec. 76 (6).
7 Sec. 76 (10).

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