ADMINISTRATION OF TRUST ESTATES IN WESTERN AUSTRALIA IN 1963.*

For many purposes a trust may be regarded as a means of separating the management of property from its enjoyment, whereby the trustee manages the property and the beneficiary enjoys the normal benefits flowing from ownership of it. For some time the tendency has been, whether manifested in trust instruments or in legislation, to free the trustee from the fetters which formerly restricted his powers of management and to confer upon him more and more direct control over the property so that it would no longer effectively be withdrawn from the ordinary market—a variety of *res extra commercium*—but would instead be dealt with by the trustee as he would deal with his own property and without the need for any more formalities than would be required in such dealings. This tendency has been greatly accelerated by the Trustees Act 1962 and by its associated Acts. Indeed, there is perhaps now some justification for the view that insufficient importance is being attached to the intentions and desires of the donors of trust property.

Some of the modifications effected by this legislation are of minor importance only, but a number are of the greatest significance. No attempt has been made to deal with all these modifications for it is obviously impossible within the scope of a paper such as this to do more than touch upon a few of what appear to be the more important and interesting of the changes introduced into the law of Western Australia.

Delegation.

The old rule of equity was that trustees who took upon themselves the management of property for the benefit of others had no right to shift their duties on to the shoulders of others.[1] This rule was not absolute, however, for it was well established that trustees were permitted to delegate where it was reasonably necessary or where it was "conformable to the common usage of mankind."[2]

Section 22 of the Trustees Act 1900 probably extended trustees' powers of delegation by providing that a trustee might appoint a solicitor to receive and give a discharge for any money or property

* *A paper read at the 1963 Law Summer School of the University of Western Australia.*

1 Turner v. Corney, (1841) 5 Beav. 516, 49 E.R. 677.

2 *Ex parte* Belchier, (1754) Amb. 218, 27 E.R. 144.

receivable by the trustee under the trust. A trustee was also authorized to appoint a banker or solicitor to receive and give a discharge for any money payable to the trustee under a policy of assurance. In neither instance was the trustee to be chargeable with breach of trust by reason only of his having made any such appointment. Section 53 of that Act provided for complete or partial delegation of the trust in cases where the trustee resided out of Western Australia or was about so to reside.

Sections 53 and 54 of the 1962 Act confer much wider powers of delegation on trustees. Indeed, of the English provision equivalent to section 53 Maugham J. said, "It is hardly too much to say that it revolutionizes the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not."[3]

Section 53 (1) enables a trustee, instead of acting personally, to employ an agent to do any act required to be done in the execution of the trust or the administration of the trust property and provides that the trustee shall not be responsible for the default of any such agent employed in good faith and without negligence. The reference to absence of negligence distinguishes this provision from the English and goes some way—if not the whole way—towards meeting a particular criticism which was directed at the English legislation. That criticism was expressed by Professor W. S. Holdsworth, writing after the decision of *In re Vickery*[4] in the following way:— "We think that a trustee should be liable for the defaults of an agent employed by him—not only if he employs the agent in bad faith, and not only if the loss is traceable to his own wilful default, but also if he is careless in selecting the agent, and if he is careless in continuing to employ him, in spite of warnings which would have put a reasonable man on inquiry as to his competence."[5]

Subsection (2) of section 53 enables a trustee to appoint any person to act as his agent for the purpose of administering any property subject to the trust in any place outside the State, or executing or exercising any discretion or trust or power vested in him in relation to that property. A trustee is not, by reason only of his having made any such appointment, responsible for any loss arising thereby.[6] This

3 *In re* Vickery, [1931] 1 Ch. 572, at 581.

4 *Ibid.*

5 (1931) 47 L.Q. Rev. 465.

6 *Cf.* the final words of sec. 53 (1).

subsection goes further than subsection (1) in that an agent appointed under it may properly be authorized to exercise discretions. It is apparent, however, that the trustee must still exercise proper supervision over the conduct of any such agent, for the trustee's protection is patently less than that in the previous subsection.

Subsection (3) of section 53 gives particular powers of delegation to banks and solicitors which might be regarded as coming within section 53 (1). The later subsection, however, is expressed not to limit the generality of the powers conferred by subsections (1) and (2). As with an appointment under section 53 (2) a trustee making an appointment under this subsection is not chargeable with a breach of trust by reason only of his having made the appointment; but the subsection does not protect the trustee if he leaves any valuable property in the hands of the bank or solicitor for longer than is reasonably necessary to enable the bank or solicitor to transfer it to him.[7]

The slightly curious form of the section can be explained, if not excused, in the light of its history. The starting point is the (United Kingdom) Trustee Act 1888 which, by section 2, enacted what is, in effect, subsections (3), (4) and (5) of the 1962 Act of Western Australia. This was carried over into the (United Kingdom) Trustee Act 1893 (section 17) which in turn was incorporated into the (Western Australian) Trustees Act 1900 (section 22). In 1925 the (United Kingdom) Trustee Act, by section 23, extended the power of delegation but, instead of redrawing the whole section, the draftsman merely added what are now subsections (1) and (2) of section 53 and retained the narrower old provisions as later subsections in the same section, prefacing them with the words "without prejudice to such general power of appointing agents as aforesaid." Section 53 adopts the English section 23 with minor amendments only.

The new section 54 goes beyond the old section 53 and will undoubtedly prove to be a most useful provision. It enables a trustee who is out of the State or is about to depart therefrom or who is a member of Her Majesty's Forces or who is or may be about to become by reason of physical infirmity temporarily incapable of performing all his duties as a trustee to delegate by power of attorney the execution or exercise during his absence from the State or during his incapacity of all or any trusts, powers, authorities, and discretions vested in him as trustee. One might be excused for concluding on a

7 As to whether this reservation is of any real significance, see *infra*.

reading of this section that the draftsman was of the opinion that membership of Her Majesty's Forces constituted an incapacity. Nevertheless it would seem that a delegation by such a trustee will operate only during his absence from the State.

A prerequisite to the exercise of the power of delegation under section 54 is the consent of any co-trustee and of any person empowered by the trust instrument to appoint trustees (subsection (2)). A power of attorney granted under this section only operates whilst the donor is out of the State or is incapable of performing all his duties as a trustee and is revoked by his return or by his recovery of that capacity (subsection (6)). This could prove inconvenient in the case of a trustee who finds himself having to make a number of trips out of the State. Apparently he will have to execute a fresh power of attorney each time he proposes going away, because the revocation of the power is automatic upon his return to the State. The section gives protection to persons dealing with donees of powers of attorney, whilst the trustee is protected against any default of the attorney if he made the appointment in good faith and without negligence. This apparently makes quite clear, what section 53 (1) does not, that the trustee is not required to supervise the work of the attorney once he has properly made the appointment.

The last section requiring consideration in this context is section 70 (the old section 29) which provides that a trustee is chargeable only for money and securities actually received by him, and that he is answerable only for his own acts, receipts, neglects, or defaults and not for those of any other trustee nor for those of any bank, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities nor for any other loss unless the insufficiency, deficiency or loss occurs through his own wilful default. There have, of course, been a few verbal changes from the old section, principally, the repetition of the words "the insufficiency, deficiency or loss" in place of the former "the same", but it is by no means clear that this amendment has achieved what was apparently intended, namely, to make a distinct break in the section after the provisions exempting the trustee from liability for defaults of other persons. The amendment has, perhaps, been a little too subtle, for any possible liability in the trustee in the circumstances envisaged in section 70 must predicate some insufficiency, deficiency or loss and the word "unless" would seem to refer back to all the phrases following "and not for those of any other trustee."

Other difficulties of interpretation arise when an attempt is made to read sections 70 and 53 together. Perhaps the principal cause of the trouble is *In re Vickery*,[8] but even if that be so and even if that case was wrongly decided, it is a pity that the legislature did not take this opportunity of putting the matter beyond any doubt.

The particular difficulty is that, unless it be considered that the phrase "employed in good faith and without negligence" in section 53 (1) refers not merely to the initial appointment of the agent but also to the continuation of that employment, there appears to be no operation left for the latter part of section 53 (4) which provides that nothing in subsection (3) exempts a trustee from any liability under which he would otherwise have been if he permits any property to remain in the hands of a bank or a solicitor for a longer period than is reasonably necessary. The reason for this is that subsection (3) is expressed to be without prejudice to the powers conferred by the earlier subsections, and it would seem that any of the persons mentioned in subsection (3) can be appointed under subsection (1) and by virtue of that subsection, provided that the appointment was made in good faith and without negligence, that would be an end of the matter and the trustee would be protected. Some support for the wider interpretation of the phrase suggested above is indeed provided by section 54 (4) which more specifically refers to a donee having been "appointed in good faith and without negligence." Nevertheless the similar section in the (United Kingdom) Act, although without the additional words "and without negligence", was dealt with by Maugham J. in *In re Vickery*[9] and his view quite obviously was that "in good faith" qualified only the act of employment. On this reasoning the addition of the words "and without negligence" would not extend the phrase to cover the continuation of the employment of an agent.

Furthermore, if a trustee is protected from liability under section 53 (1) in the event of his employing an agent in good faith and without negligence, how can he be liable under section 70 for the acts of that agent, if he has been guilty of a wilful default, bearing in mind that Maughan J. in the case mentioned held the latter phrase to mean either a consciousness of negligence or breach of duty, or a recklessness in the performance of an act?

Another possible reconciliation is to regard section 53 (1) as simply empowering a trustee to delegate but not enabling him thereafter to leave the matter in the agent's hands without active super-

[8] Note 3, *supra*.
[9] *Ibid.*

vision. Such an interpretation, however, like the other possibility, involves a finding that *In re Vickery* was wrongly decided.[10]

Remuneration.

The general rule is that a trustee should not profit from his trust. This principle was most clearly enunciated by Lord Herschell in *Bray v. Ford*[11]:— "It is an inflexible rule of a Court of Equity that a person in a fiduciary position . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

There grew up, of course, the inevitable well recognized exceptions to this rule. Obviously a trustee could be allowed remuneration where it was expressly or impliedly provided for in the instrument of trust. Furthermore, if the beneficiaries (being *sui iuris*) were so minded, they could agree to remunerate the trustee. The trustee companies were empowered under their own Acts to make a charge for their services, as was the Public Trustee. In very special circumstances, as, for example, when the trustee was put to exceptional trouble, the Court could direct that the trustee should be remunerated.[12]

The Trustees Act 1900 did not provide for the remuneration of trustees, although such provisions are to be found in the Administration Act 1903-1962 (section 143) and (formerly) in the Settled Land Act 1892 (section 51). By section 98 of the new Act, however, on the termination of the trust (or at such other time as the Court orders) the Court may allow a just and reasonable commission or percentage by way of remuneration to a trustee for his services. The aggregate commission or percentage is not to exceed five per cent. of the gross value of the trust property.

The old unsatisfactory rule as to solicitor-trustees, which has operated since at least 1833,[13] has now gone and we are no longer

10 See generally on this question Gareth H. Jones, *Delegation by Trustees*, (1959) 22 MOD. L. REV. 381.

11 [1896] A.C. 44, at 51.

12 Marshall v. Holloway, (1820) 2 Swans. 432, 36 E.R. 681.

13 New v. Jones, (1833) 1 Mac. & G. 668n., 41 E.R. 1424.

confronted by the subtleties of *Cradock v. Piper.*[14] Section 98 (5) for the first time permits a person engaged in any profession or business for whom no benefit or remuneration is provided in the trust instrument, without reference to the Court to charge all usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts that a trustee not being in any profession or business could have done personally. The operation of this subsection is conditional upon the absence of a direction to the contrary in the trust instrument and also upon the trustee not being provided with any benefit or remuneration in the trust instrument. There is here no reference whatever to inadequacy so that, presumably, if the trustee is given £1 by the trust instrument, he cannot claim under this subsection—although he would, of course, still be entitled to normal remuneration under subsection (1).

Imperfect trust provisions.

The inclusion of non-charitable and invalid purposes in a trust in this State will now no longer necessarily be fatal to that trust. Section 102 of the Trustees Act follows similar legislation elsewhere, which usually seems to have been precipitated by particular hard decisions. Thus, the Victorian provision followed after *In the Will of Forrest,*[15] in which a trust of £100,000 was held void, and the United Kingdom Charitable Trusts (Validation) Act 1954 (which applies only to trusts created before 16th December 1952) followed the well-known cases of *Chichester Diocesan Fund v. Simpson*[16] and *Ministry of Health v. Simpson.*[17]

Section 102 provides that a trust is not to be held invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision. An imperfect trust provision for this purpose means any trust under which some non-charitable and invalid as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust property is by the trust directed or allowed. By subsection (3) every trust under which property is to be held or applied in accordance with an imperfect trust provision is to be construed and given effect in the same manner in all respects as if no holding or application of

14 (1850) 1 Mac. & G. 664, 41 E.R. 1422.
15 [1913] Victorian L.R. 425.
16 [1944] A.C. 341.
17 [1951] A.C. 251.

the trust property to or for any non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.

The application of this type of legislation to particular trusts has raised considerable problems; but any satisfactory alternative answer to the problem is hard to find. The solution is simple where the form of the trust is such that the wielding of a blue pencil, striking out the non-charitable purposes and leaving the charitable, would lead to validity (as in *Re Griffiths*,[18] *Re Bond*,[19] and *Re Thureau*[20]). Unfortunately, in the majority of cases these problems are not presented in so simple a form. Formerly the courts alternated between a generous and a restrictive interpretation of similar sections. An illustration of the former approach is provided by *In re Meads Trust Deed*,[21] where Cross J. applied the English Act (which, it is to be observed, differs in important respects from the Western Australian provision) to prevent the return of trust property to a society which had contributed it. He said, "The truth is that the society, in order, I suppose, to obtain fiscal advantages, sought to dress up what was for practical purposes to remain part of its own property as an independent charitable trust. The so-called trust as declared was invalid but the society can hardly complain if Parliament steps in and validates it by twisting its provisions into something which is clean contrary to the society's wishes. The society is fairly hoist with its own petard."[22]

In the application of the section at the present time, however, great assistance can be obtained from the advice of the Privy Council in *Leahy v. Attorney-General (N.S.W.)*[23] (which slightly varied the decision of the High Court, reported under the name *Attorney-General (N.S.W.) v. Donnelly*[24]). This case made it quite clear that the application of the section is not dependent upon there being a clear cut alternative between charitable and non-charitable purposes in the trust, but that it can apply to a composite expression. However, a clear warning was given that not every expression which might possibly justify a charitable application is brought within the section. It is in this field that much future litigation will undoubtedly flourish. Their Lordships approved *Re Hollole*[25] where the gift in question

18 [1926] Victorian L.R. 212.
19 [1929] Victorian L.R. 333.
20 [1948] 2 Argus L.R. 487.
21 [1961] 1 Weekly L.R. 1244.
22 *Ibid.*, at 1252.
23 [1959] A.C. 457.
24 (1957) 98 Commonwealth L.R. 538.
25 [1945] Victorian L.R. 295.

was to a trustee "to be disposed of by him as he may think best." Of this gift it was said, "This was a clear case because the testator did not designate any purpose at all but in effect delegated his testamentary power in a manner that the law does not permit." Their Lordships then continued: "Greater difficulty will arise where the permissible objects of choice are described in a composite expression which, though not so vague and general as to amount to a delegation of testamentary power, does not very clearly indicate a charitable intention on the part of the testator . . . Thus whether the gift be to Orders of Nuns an object so predominantly charitable that a charitable intention on the part of the testator can clearly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable purposes, the section will apply. Inevitably there will be marginal cases, where an expression is used which does not significantly indicate a charitable intention, and their Lordships do not propose to catalogue the expressions which will or will not attract the section. It may be sufficient to say that in the chequered history of this branch of the law the misuse of the words "benevolent" and "philanthropic" has more than any other disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts."[26]

This was along the lines of the joint judgment of Dixon C.J. and McTiernan J. in the High Court[27]:—"It appears to us that what must be found in order to justify an application of the provision is a distinct or sufficient indication of an intention to authorize the application of the income or corpus of the fund or other property to what is clearly a charitable purpose, even although the description which embraces the purpose is so wide that it may go beyond charitable purposes or there is associated with the description a description of non-charitable purpose or purposes capable of going beyond the legal conception of charity."

A more liberal approach is perhaps indicated in the joint judgment of Williams and Webb JJ.[28] where they said, "The application of the trust funds or any part thereof need not be directed to a charitable purpose. It is sufficient if the trust allows them to be used for such a purpose. If some non-charitable or invalid purpose is also included in the purposes to or for which an application of the trust funds or any part thereof is directed or allowed, the trust shall not be held to be invalid."

26 See [1950] A.C. 457, at 475-476.
27 (1957) 98 Commonwealth L.R. 538, at 560.
28 *Ibid.*, at 572.

As an example of one situation in which the English Act was applied reference may be made to *In re Wykes deceased.*[29] That case concerned property given to the directors of a company to be used at their discretion as a benevolent or welfare fund or for welfare purposes "for the sole benefit of the past present and future employees of the company." The one way in which this trust could be sustained as a valid charitable trust was by limiting it to a trust for the relief of poverty, because failing this the trust lacked the essential public element. Buckley J. was prepared so to limit the trust.

One entertaining sidelight on the United Kingdom legislation is provided by the running battle between two English judges. In the *Gillingham Bus Case*[30] Denys Buckley was counsel; but his forceful argument found no favour with the judge, Harman J. Then, with the passing of time, Denys Buckley became Buckley J. and in *In re Wykes*[31] with ill concealed relish, he declined to follow Harman J. and gave the force of law to his argument, thereby illustrating once again the adage that it is not what you say that counts, but whether you are sitting down or standing up when you say it. The pleasure of Buckley J. was shortlived, however, for his rival was then promoted to the Court of Appeal and quickly gave notice of his continued interest in the matter (*In re Harpur's Will Trusts*[32]).

The limits to the application of the section have yet to be delineated and its use in particular cases will be of considerable interest. Great scope may well be given to lawyers of fertile and imaginative minds to spell out of vague and uncertain trusts a possible application of the trust property for the benefit of some charitable purpose as a means of saving them from failure.

Variation of trusts.

The decision of the House of Lords in *Chapman v. Chapman*[33] laid down in precise terms the limited circumstances in which courts would sanction deviations from the terms of a trust. It established no new rules, but served to emphasise that merely because it was beneficial to the beneficiaries to alter what the settlor had ordained was an insufficient basis for the courts to sanction any re-arrangement. At first sight one may well wonder why it should be that such

29 [1961] Ch. 229.
30 *In re* Gillingham Bus Disaster Fund, [1958] Ch. 300.
31 Note 29, *supra.*
32 [1962] Ch. 78, 95.
33 [1954] A.C. 429.

attempts to depart from the apparent wishes of a settlor should even be contemplated, but it must be remembered that if all the beneficiaries were in being and *sui iuris* they would be entitled to do with the trust whatever they wished, including the right to remould completely the beneficial interests.

Prior to 1900 the powers of the Court to sanction departures from a trust with regard to management were limited to cases of salvage, emergency, and conversion for the benefit of infants or lunatics. The Trustees Act 1900, section 45, significantly extended the Court's powers in this regard but trustees still laboured under a considerable handicap unless the trust instrument had been carefully drawn to confer upon them wide powers. So far as the remoulding of beneficial interests was concerned, the Court's jurisdiction was limited to certain cases of maintenance and to the approval of compromises—the latter term being, after *Chapman v. Chapman,*[34] to be taken in its strict sense.

Section 89 of the new Act in effect introduces section 57 of the United Kingdom Trustee Act 1925. That section envisages an act unauthorized by the trust instrument to be effected by the trustees thereof in the management or administration of the trust property which the Court will empower them to perform if in its opinion the act is expedient (see *In re Downshire Settled Estates*[35]). The Western Australian section goes rather further than the English provision in that, in addition to the Court being empowered to make an order if it should deem it expedient, it may also make an order where it would be inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the Court provided that it would be in the best interests of the persons (or the majority of the persons) beneficially interested under the trust.

The reason for wishing to vary trusts is usually to save taxation. From certain quarters there has been opposition to the courts' concerning themselves with such matters. Thus Lord Morton said in *Chapman v. Chapman,*[36] "If the court had power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery Division and the legislature. The alteration of one settlement for the purposes of avoiding taxation already imposed might well be

34 *Ibid.*

35 [1953] Ch. 218, at 244 *per* Lord Evershed M.R.

36 [1954] A.C. 429, at 468.

followed by scores of successful applications for a similar purpose by beneficiaries under other settlements. The legislature might then counter this move by imposing fresh taxation upon the settlements as thus altered. The beneficiaries would then troop back to the Chancery Division and say, "Please alter the trusts again. You have the power, the adults desire it, and it is for the benefit of the infants to avoid this fresh taxation. The legislature may not move again." So the game might go on."

These sentiments did not prevail in the United Kingdom, for it was not long before the game was given formal approval by the legislature, and its rules established, in the Variation of Trusts Act 1958. Not surprisingly one of the first variations approved was in *Re Chapman's Settlement Trusts (No. 2)*.[37] Now these sentiments no longer prevail in Western Australia. Section 90 confers power upon the Court to authorize variations from the trust on behalf of (a) any person having an interest under the trusts who is under an incapacity; (b) any person who may become entitled to an interest under the trusts as being at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; (c) any unborn or unknown person; and (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined.

Under the English Act, except in the case of approval under (d) above, the Court is prohibited from approving an arrangement on behalf of any person unless the carrying out of it would be for his benefit. In the Western Australian Act the Court has been given a much wider field in which to operate for the prohibition there is only against approving an arrangement where it is to the detriment of the person concerned. In deciding the latter question the Court is empowered to have regard to all the benefits that may accrue to him directly or indirectly in consequence of the arrangement "including the welfare and honour of the family to which he belongs." This is a nice phrase, but it describes a situation which, perhaps surprisingly, can often arise.

It was at one time suggested that the "arrangement" to which the Act refers must be an arrangement between two or more persons and that suggestion found favour with Harman J. in *In re Steeds Will Trusts*.[38] The Court of Appeal, however, differed on this point,

[37] [1959] 1 Weekly L.R. 372.
[38] [1959] Ch. 354, at 361.

and held that "arrangement" covers any proposal which any person may put forward for varying or revoking the trusts.[39]

In the normal type of case it would seem that beneficiaries under the trust should be the applicants in proceedings under the section, and not the trustees, for the Court should look to the trustees as watchdogs to see that the interests of all persons who might become interested under the trust are safeguarded. (On this point and on the question of parties generally, see *Re Druce's Settlement Trusts*[40] and *In re Munro's Settlement Trusts*[41]).

The principal use made of the Variation of Trusts Act 1958 has been to increase the powers of trustees (*e.g.*, their investment powers) and to effect a saving in tax — for it is not an objection to the sanction by a court of any proposed scheme that its object or effect is to reduce liability to tax (*In re Devonshire's Settled Estates*[42]). It has, however, also been employed to convert an English trust into a Canadian trust, to expunge a trust for accumulation, to add to trustees' powers of advancement, and to blend two identical trusts into one. Although the new Act incorporates a wide list of investments it may in exceptional circumstances still be open to the Court under section 90 to extend that list (see *Riddle v. Riddle*[43]).

Undoubtedly the increased powers conferred upon the Court by this part of the Act will prove most useful in practice.

Distribution of trust property.

Part VI of the Trustees Act has rationalized many of the old rules relating to the distribution of trust property and has effected some greatly needed reforms.

By section 63 a trustee is empowered to advertise for creditors in each locality where claims are likely; the form is set out in the second schedule to the Act. He is no longer required to apply to the Court to have the advertisement settled, although, by virtue of subsection (6), he may do so when he is in doubt as to the advertisement which he should publish. Upon a distribution duly made after such advertisement, a trustee is protected against any claims of which he did not then have notice. Even if a creditor is prevented by section 63 from proceeding against the trustee, however, his rights against

39 [1960] Ch. 407, at 419.
40 [1962] 1 All E.R. 563.
41 [1963] 1 Weekly L.R. 145.
42 [1953] Ch. 218.
43 (1952) 85 Commonwealth L.R. 202.

other persons are not affected so that, *inter alia,* his right to follow the trust property is preserved.

The claims to which this section relates are claims against the estate or the trust property and those claims against the trustee personally where he is entitled to reimburse himself out of the property. The section does not extend to claims under the Testator's Family Maintenance Act 1939 or to claims to entitlement as next of kin or as beneficiaries.

Section 64 is the complementary section, enabling the trustee to apply to the Court for an order barring claims. This necessitates giving three months' notice to the claimant and then, if the claimant does not satisfy the Court that he has commenced proceedings and is prosecuting them with all due diligence, it may either make an order extending the period or an order barring the claim or an order enabling the trust property to be dealt with without regard to the claim. The Court may on making any such order impose such conditions as it thinks fit. This section extends to those claims referred to in section 63 as well as to claims made to entitlement as next of kin or as beneficiaries.

Section 65 adds to and varies the established rules for following trust property laid down in the line of cases culminating in *Ministry of Health v. Simpson.*[44] This section may be resorted to by creditors, next of kin, beneficiaries or persons claiming under the Testator's Family Maintenance Act 1939. Under this section, following upon the distribution of any assets forming part of a deceased's estate or being subject to a trust, the Court may order any person to whom they were distributed to pay either to the persons making the claim or to the trustee a sum not exceeding the value of those assets. It goes on further to provide that a similar order may be made against any person who has received, otherwise than in good faith and for valuable consideration, any interest in any assets from the person to whom they were distributed. It is to be noted that the section refers to "assets" in the first case and "interest in assets" in the second case. It is made quite clear that the normal rules of limitation are not to be evaded by means of the section. Particular attention should be directed to subsection (7) which provides that where a trustee has made a distribution, a person may exercise the remedies given to him by the section and all other rights without first exercising the rights and remedies (if any) available to him against the trustee, and then goes on, strangely, to say that a person shall not exercise any remedy that

[44] [1951] A.C. 251.

may be available to him against the trustee in consequence of the making of the distribution until he has exhausted all other remedies available to him.

Relief is to be denied wholly or in part under section 65 and at general law where the person from whom relief is sought received the assets in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full. The position of these unfortunate persons is further alleviated in that any payment directed to be made may be ordered to be made by periodic payments and the Court may from time to time vary, suspend or discharge any such order.

Section 66 sets out comprehensively, if not concisely, the method by which application can be made to the Court for an order granting leave to distribute trust property where there are missing beneficiaries. Formerly, of course, the normal procedure was to apply for a Benjamin order granting leave to distribute trust property upon a specified footing (*In re Benjamin*[45]). Such an order protected the trustee, but did not prevent any missing person from subsequently following the trust property. Now, by section 66, when the trustee does not know

(a) whether any person who is, or may be, entitled to the property is (or at any material date, was) in existence; or

(b) whether all or any of the persons who are members of any class that is, or may be, entitled thereto are (or at any material date, were) in existence; or

(c) whether any of the foregoing persons are alive or dead or where they are to be found;

he is empowered to advertise for those persons or persons claiming through them. If desired, the advertisements may be settled by the Court. In the event of the trustee receiving a claim or notice of a possible claim and not being satisfied that it is valid, he may serve notice calling on that person to enforce his claim. He is not, however, compelled to take this action, for the Court is empowered to proceed notwithstanding the fact that no such notice has been given. On an application under the section, which will normally be *ex parte,* the Court can grant leave to distribute the property as if every person or every member of any class of persons specified in the order is not in existence or never existed or has died before a specified date or

[45] [1902] 1 Ch. 723.

event. The Court may also make a consequential order where, as a consequence of the order, it is not possible or practicable to determine whether or not any condition or requirement affecting a beneficial interest in the property has been complied with or fulfilled, that the condition or requirement had or had not been complied with or fulfilled.

Wide powers are given to the Court in making an order under this section. It may, for example, exclude from the operation of the order any person whom the Court thinks should be so excluded, and may suspend the operation of the order (see subsection (6)). The fact that a distribution has been made pursuant to an order under this section does not prevent any genuine beneficiary from following the trust property.

This legislation has overcome the problems which arose in consequence of the decision of the Court of Appeal in New Zealand in *In re Sheridan.*[46]

Sections 72 and 73 protect trustees who hand over chattels to life tenants and to infants.

Charitable Trusts Act 1962.

"Be thy intents wicked or charitable,
Thou com'st in such a questionable shape."

Hamlet, I.iv.39.

The Charitable Trusts Act covers only a small, if important, part of the law of charities. No attempt has been made, as with the (United Kingdom) Charities Act 1960, to cover the major portion of the field. The complexity of the subject is perhaps best illustrated by the fact that the English statute repealed either in whole or in part 28 Acts as being obsolete, made consequential amendments in 18 more, and superseded 47. No attempt has been made to define "charity" so that one must still revert to Lord Macnaghten's classification in *Commissioners of Income Tax v. Pemsel*[47] or, if one is a purist, to the preamble to 43 Eliz. I, c. 4.

The question of whether a trust comes within the description of a charity is not a matter of pure intellectual exercise, for the characterization of a purported trust as a charity may well determine the question of its validity. It is trite law that in the case of charitable

[46] [1959] N.Z.L.R. 1069. On this subject generally see G. P. Barton, *The Ascertainment of Missing Beneficiaries,* (1961-63) 5 U. WEST. AUST. L. REV. 257.
[47] [1891] A.C. 531.

trusts there is no failure for uncertainty and that some of the perpetuity rules do not apply. However, probably the most important advantages enjoyed by charities are fiscal benefits. Thus the (Commonwealth) Income Tax and Social Services Assessment Act 1936-1962, by section 23 (e), exempts from income tax the income of a religious, scientific, charitable or public educational institution.[48] Neither the Administration Act 1903-1962 (section 134) nor the (Commonwealth) Estate Duty Assessment Act 1914-1957 (section 8 (5)) specifically refers to charities but each singles out certain charitable organisations for benefit.

(i) *Recreational charities.*

Part II of the Act deals with recreational charities. It is taken almost word for word from the United Kingdom Recreational Charities Act 1958 which was itself a result of the House of Lords' decision in *Inland Revenue Commissioners v. Baddeley.*[49] It is accordingly useful to recall the facts of that case. The trustees there were directed to permit the trust property to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission for the promotion of the religious, social, and physical well-being of the persons resident in the County Boroughs of West Ham and Leyton by the provision of facilities for religious services and instruction and for the social and physical training and recreation of those persons who were in the opinion of the leaders members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by the trust, and by promoting and encouraging all forms of such activities as were calculated to contribute to the health and well-being of those persons. The House of Lords by a 4-1 majority held that the trust did not fall within the heads of charities set out in *Pemsel's Case.*[50] The main consideration was whether the trust fell under the fourth head; but it was decided that it did not because it was expressed in language so vague as to permit the property to be used for purposes which the law did not regard as charitable and which did not satisfy the necessary element of public benefit. One would not have thought that this decision in itself laid down any novel principles but the speeches of the Law Lords cast grave doubts upon the charitable status of many organizations, including, in particular, women's institutes and miners' welfare trusts. The result was the Recreational Charities Act 1958.

48 See too Local Government Act 1960-1962, sec. 532 (3) (c).
49 [1955] A.C. 572.
50 Note 47, *supra.*

Section 5 of the Western Australian Act provides that it is charitable to provide, or to assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare. Fortunately an effort is made to define "the interests of social welfare." It cannot be claimed that the attempted definition is a success; but then it is difficult to envisage how any definition of such a phrase can be successful. Subsection (2) provides that the requirement that the facilities be provided in the interests of social welfare are only satisfied if the facilities are provided with the object of improving the conditions of life of the persons for whom the facilities are primarily intended, and, either those persons have need of those facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances, or the facilities are to be available to members or to male or female members of the public at large. It is gratifying to see that in this country there is no distinction between the sexes for the English Act only made special reference to facilities for female members and not for male members of the public. That was intended to ensure that women's institutes were included in the bodies which the Act declared to be charitable; but it resulted in the view that facilities provided for men only were necessarily unable to come within the protection of the Act.

Subsection (3) gives examples of bodies which now become charitable and refers to the provision of facilities at public halls,[51] community centres, and women's institutes and to the provision and maintenance of grounds and buildings to be used for the purposes of recreation or leisure-time occupation. Subsection (4) maintains the position that a trust or institution, to be charitable, must still be for the public benefit.

It may well be that the application of this part of the Act will have the effect of saving a great number of trusts, particularly when it is coupled with the provisions of section 102 of the Trustees Act.

(ii) *Schemes in respect of charitable trusts.*

Part III of the Charitable Trusts Act, entitled "Schemes in respect of Charitable Trusts," has effected radical changes in the former rules relating to the application *cy-près* of trust funds.

Section 7 provides that where any property is given upon trust for any charitable purpose, and—

[51] *Cf.* the United Kingdom "village halls."

(a) it is impossible, impracticable or inexpedient to carry out that purpose; or

(b) the amount available is inadequate to carry out that purpose; or

(c) that purpose has been effected already; or

(d) that purpose is illegal or useless or uncertain,

then (whether or not there is any general charitable intention) the property shall be disposed of for some other charitable purpose in the manner thereinafter directed. Similarly, if the property is more than sufficient for the charitable purpose, any excess is to be disposed of in the same way.

The former rules required two conditions to be satisfied before property would be applied *cy-près*. Firstly, it must have been impossible to carry out the donor's intentions literally, although the word "impossible" was always generously construed. Secondly, there must have been a paramount intention of charity. So far as the first condition is concerned, subsections (1) and (2) are much wider than the former rules. In particular the word "inexpedient" gives a considerable degree of latitude to the Court which the Court may or may not be disposed to utilize. The words in parentheses, "whether or not there is any general charitable intention," have superseded the second of the conditions altogether.

It is interesting to compare section 7 with the English Act. The only modification effected to the ordinary rules by the Charities Act 1960 is to the requirement of a failure of the original purpose. There is still the necessity for a paramount intention of charity.

The Nathan Report[52] sets out well the reasons prompting these amendments to the law: " . . . a vast number of trusts which may broadly be called 'social welfare trusts' which are by no means useless but are not serving the community as they might if some relaxing of the *cy-près* doctrine were introduced, together with the administrative machinery to make it a reality. The trusts may be devoted to objects which are relatively well provided for elsewhere while others are crying out for more support; or the objects themselves may not be open to criticism but the benefited area may need to be changed or enlarged; or the qualification of beneficiaries may need to be broadened if fuller use is to be made of these trusts."[53]

52 Report of the Committee on the Law and Practice relating to Charitable Trusts, (1952) *Cmd.* 8710.

53 *Ibid.*, at 53.

Nevertheless, the far-reaching nature of this legislation prompts the question whether the legislature has not now gone too far, to the neglect of the persons actually providing the trust property. Formerly, if the particular purpose could not be carried out, the property concerned would, for example in the case of a will, fall into residue, and be applied in accordance with the testator's wishes. Now, however, all this is beyond his control for if the testator's prime wish fails, he does not have a second chance. It is then for the Court to select a charity on which to bestow the testator's largesse. If a future testator's second choice in these circumstances should also be a charity, it is to be hoped that the scheme will take his wish into account.

The powers of trustees of charitable trusts may be extended by the Court, which may also vary the mode of administering the trust (section 8). This provision is slightly wider than section 90 of the Trustees Act; but when the latter Act can be availed of, no doubt it will be, to avoid the necessity for preparing a scheme which is required when trustees wish to avail themselves of sections 7 and 8.

All schemes have to be submitted to the Attorney-General together with full information as to all the facts upon which it is proposed to make the disposition set out in the scheme. The Attorney-General can suggest amendments and will finally report on the scheme to the trustees, who may thereafter apply to the Court for approval of it (section 10); the Attorney-General's report is filed with the application. The application is to be advertised to enable any person desiring to do so to oppose the scheme. The Court has power to decide who shall be heard in support of or in opposition to the scheme and is given jurisdiction to hear and determine all matters relating to the scheme (section 15). The scheme is not to be approved by the Court unless it is satisfied that the scheme is a proper one that should carry out the desired purpose, and that is not contrary to law or public policy or good morals, that the scheme can be approved under the Act, that every proposed purpose is charitable and can be carried out, and that the various formalities have been complied with (although under section 17 the Court has power to dispense with such formalities[54]). Notice of approval of the scheme or of the refusal of the Court to approve the scheme is to be published in the Government Gazette (section 16). There is power given to the Court to vary any scheme after it has been established.

(iii) *Supervision of charitable trusts.*

Part IV of the Charitable Trusts Act provides for the supervision

[54] Sec. 18.

of charitable trusts. The Attorney-General may, in his discretion, examine and inquire into any trust for charitable purposes. He is given power to appoint an officer of the Public Service to make the examination or enquiry and every trustee and every person concerned in the management and administration of the trust is required to give all possible assistance in connection therewith (section 20).

The Attorney-General (or an officer of the Public Service, or any other person) may apply to the Court in respect of any property subject to a trust for charitable purposes, whether or not a scheme in respect of that property has been approved by the Court, to compel the trustees to carry out the trusts and to comply with the provisions of any scheme, to require any trustee to meet his liability for any breach of trust, to exclude any purpose from the purposes for which the property, money or income may be used, applied or disposed of, to give directions in respect of the administration of the trust or to direct that property subject to the trust shall not be used, applied, or disposed of otherwise than in accordance with a scheme to be approved. Copies of the application are required to be served on the trustees and on the Attorney-General who is, apparently, still required to serve himself when he makes the application.

Conclusion.

Perhaps the most surprising omissions from the new legislation are the provisions still to be found in the often overlooked Trustees Powers Act 1931. Section 3 of that Act is along the same lines as section 27 (1) (f) of the Trustees Act 1962. It provides that a trustee may, either with or without consideration in money or otherwise, vary, release, waive or modify, either absolutely or otherwise, the terms of any lease of land comprised in the trust property. The earlier Act made clear what is probably implicit in the present legislation, namely, that every lease after variation is required to be such a lease as might have been lawfully and properly granted if the lease had been surrendered or otherwise determined.

Moreover, although certain powers of apportionment between capital and income are now given to the trustee,[55] it must not be forgotten that by section 5 of the earlier Act "a trustee in whom any settled property is vested shall have power to determine in case of doubt whether any monies (being part of or arising from the settled property) which may come to his hands are capital or income, or whether any loss which has been suffered in connection with the

[55] See, for example, sec. 30 (1) (b) of the Trustees Act.

property is a loss of capital or income, and every such determination shall be binding upon all beneficiaries interested or to become interested in the settled property as if it had been made under the authority of a judge." The latter is a most useful provision which it would have been advantageous to incorporate in a codifying statute.

Whatever criticisms may have been made above are small. The profession will undoubtedly welcome the benefits flowing from the new legislation. There can be no doubt that it will greatly ease the burdens of trustees, reduce the costs of administration, and in these and other ways confer great benefits on beneficiaries.

G. A. KENNEDY.*

* *B.A., LL.B. (Western Australia), B.C.L. (Oxon.); Barrister and Solicitor, Western Australia.*