also appears to ignore the realities of commercial practice. Furthermore, as pointed out by Richmond J. the Courts have granted specific performance of one part of a contract and awarded damages for breach of the remainder—see 36 *Halsbury's Laws of England* (3rd Ed.) 351.

9. *Domestic Proceedings Act 1968*

The question of intention to create legal relations, family arrangements and such may arise as a result of ss. 125 and 54 of the Domestic Proceedings Act 1968. Section 125 (2) raises the question of liability of infants under maintenance agreements.

Cases such as *Balfour* v. *Balfour* [1919] 2 K.B. 571 and *McGregor* v. *McGregor* (1888) 21 Q.B.D. 424 may need re-examination in New Zealand in light of the Act.

K. N. Sharpin.

EQUITY AND LAW OF SUCCESSION

Powers and Duties of Trustees

Purchase of Trust Property by Trustee

In *Holder* v. *Holder* [1968] 2. W.L.R. 237, reversing in part the decision of Cross J. ([1966] 3 W.L.R. 229) which was noted in 1 Otago Law Review 246, the Court of Appeal held that a trustee should not be penalised for purchasing trust property at a public auction in every case. In this case, the trustee's interference with the administration of the estate had always been minimal, his knowledge of the property was acquired as a tenant and not as an executor, the beneficiaries had full knowledge of the facts, and the remaining executors, acting as vendors, had not been influenced by the trustee, in any way, in connection with the sale.

Investment of Funds by a Charitable Association

It was held by Cross J. in *Soldiers' Sailors' and Airmen's Families Association* v. *Attorney-General* [1968] 1 W.L.R. 313 that where a charitable association is incorporated by a charter empowering the association's Council to invest the funds of the association "in such securities as shall be determined from time to time by the Council", then the Council is in the position of a trustee as to those funds. Accordingly, unless a special or unlimited power of investment is given in the trust instrument (the charter in this case), then the Council is restricted to authorised trustee investmens.

Management of a Trust Business

In *Re Luckings Will Trusts, Renwick* v. *Lucking and Another* [1968] 1 W.L.R. 866, the majority shareholder in a private company, by his will appointed the minority shareholder his sole trustee. After the death of the majority shareholder, the minority shareholder carried on the company business with the aid of a managing director, who, over a period of years, made several large over-drawings on the company, and did not substantially repay any of them. The trustee was aware of these over-drawings, and accepted unquestioningly the explanations given for them, and on the subsequent dismissal and bankruptcy of the managing director, it was held by Cross J. that the trustee "had failed in his duty as a trustee to conduct the business of the trust with the same

care that an ordinary prudent businessman would apply to his own business affairs, and that accordingly he was liable to the other beneficiaries for the loss suffered by the trust shareholding".

Variation of Trusts

The court in *In Re Ball's Settlement Trusts, Ball* v. *Ball and Others* [1968] 1 W.L.R. 899 held that it had power only to approve an arrangement where the "substratum of the old trusts remained and the arrangement could, therefore, properly be described as *varying* the trusts of the settlement".

This would necessarily include only the variation of existing trusts, and not the creation of completely new ones. Thus in *Re Davies* (1968) 66 D.L.R. 412, an application for the approval by the court of an arrangement under the equivalent Canadian Statute was dismissed where the will sought to be varied contained no trusts at all.

In another case concerning the courts' discretionary power to approve of variations "on behalf of any person . . . who by reason of infancy or other incapacity is incapable of assenting" (s. 64A Trustee Act 1956), the court assented on behalf of a mentally disturbed woman. This case was *In Re C.L.* [1968] 2 W.L.R. 1275. A proviso to s. 64A states that the proposed arrangement must be for the benefit of the person for whom the court is assenting. The court further held that "benefit" in this context had the same meaning as it would in the context of an advancement to an infant; a financial advantage is not necessary provided the Court is satisfied that the proposed arrangement is what the patient would have done had she been of sound mind.

In the case of *In Re Weston's Settlements, Weston* v. *Weston and Another* [1968] 2 W.L.R. 1155, the Court of Appeal affirmed, but on different grounds, the decision of Stamp J. who had refused to approve a variation because it was made for the sole purpose of avoiding taxation. The court stated that, although there was nothing improper nor contrary to public policy in approving a variation for that purpose (as had earlier been held in New Zealand by McGregor J. in *Re Beetham's Trust, Wardell* v. *Ramsden and Others* [1964] N.Z.L.R. 576), in exercising its discretion, a court must do "truly what is for the benefit of the persons for whom the court is assenting." Lord Denning M.R. was of the opinion that:

> the Court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit . . . There are many things in life worth more than money . . . I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax.

Family Protection

It was held by Henry J. in *Re McDonough (deceased)* [1968] N.Z.L.R. 615 that moneys in a Post Office Savings Bank account in respect of which the deceased had executed a nomination in terms of s. 124 Post Office Act 1959, formed part of the deceased's estate for the purpose of making an order under the Family Protection Act 1955.

A husband and wife agreed at the time of their divorce that the husband should pay his wife £12,000 and in return, she would forgo any further right to claim for maintenance against him or his estate. This case was *In Re M (deceased)* [1968] 2 W.L.R. 459, and when

the wife did later make a claim against the estate, Stirling J. held that the jurisdiction of the court to make an order was not ousted by the wife's undertaking not to claim against the estate.

In *In Re Eyre (deceased)* [1968] 1 W. L. R. 530, a former wife claimed that inadequate provision had been made for her under the will of her husband in the light of a substantial accretion of wealth to his estate after the time that the original maintenance order was made by consent at the time of their divorce. The court in this case held that a mainenance order is not decisive as to what a spouse should receive after the death of a former spouse, but it is an important factor. In this case the woman was allowed to share in the subsequent accretion.

The claimant in *In Re Ralphs (deceased)* [1968] 1 W.L.R. 1522 was a widow who had been provided for under her late husband's estate, but made a claim for further provision from the estate, because that given was unreasonable. The summons was not heard for almost three years, and in the meantime the executors withheld all payments under the will, thereby causing undue hardship to the widow. Cross J. held that in such a case, the executors should form their own view as to what payments should be made—if necessary they may obtain the consent of the affected beneficiaries, and failing that, the consent of the court.

Testamentary Promises

In a claim based on s. 3 Law Reform (Testamentary Promises) Act 1943, in *Re Oliver* [1968] N.Z.L.R. 168, the Supreme Court held that the mere act of selling a house cheaply to one's mother, without more, was not sufficient to constitute a "rendering of services" within s. 3. However, in the present case, because the purpose of the arrangement was to provide a home, and a source of income (through letting some of the rooms) for the deceased, this was a sufficient service on which to base a good claim under s. 3.

Succession

In *Re Lourie (deceased)* [1968] N.Z.L.R. 541 the court was asked to decide if a will in which two vital words as to the disposition of real estate had been omitted could be construed so as to include those words. In holding that the will should be so construed, Tompkins J. summarised the principles of construction applicable to wills:

> (1) If the language of the will is unambiguous and discloses no obvious mistake or omission, the Court must construe it as it stands.
> (2) If on the face of the will there is an ambiguity or an obvious mistake or omission or other difficulty, the Court may consider extrinsic evidence of the circumstances in which the will was made in order to assist it in ascertaining the intention of the testatrix.
> (3) Extrinsic evidence is not permissible to show that words were omitted by mistake in the drafting or engrossment of a will.
> (4) If the intention of the testatrix can be determined with reasonable certainty or by necessary implication from the language of the will, read in the light of the circumstances in which it was made, the Court should give effect to that intention.
> (5) If the Court finds that there was an obvious omission in the will and can determine by necessary implication what was omitted, it may supply the words omitted in order to give effect to the intention of the testatrix.

A woman left the whole income from her residuary estate to her deceased daughter's widower, in *In Re D'Altroy's Will Trusts* [1968] 1 W.L.R. 120, but only for so long as he remained her widower. He

purported to remarry, but after the death of the testatrix, this marriage was declared "null and void to all intents and purposes in the law whatsoever". Accordingly, Pennycuick J. held that except insofar as the found had been affected by completed transactions, the declaration of nullity disentitled the next-of-kin of the testatrix from sharing in the estate at any time between the death and that declaration.

The presumption that a person signing a will does so as a witness, arose with unfortunate consequences for the daughters of the testator in *In The Estate of Bravda (deceased)* [1968] 1 W.L.R. 479. Under s. 15 Wills Act 1837 (U.K.) a person is prohibited from taking any benefit under a will to which he is an attesting witness. Thus, in the present case, the two daughters of the testator, who were to have been the sole beneficiaries under his will, signed the will, at their father's request in addition to two other persons. The testator told them this was "to make it stronger", it being a holograph will. However, when the will was presented for probate, the presumption against them arose, and they were unable to produce sufficient evidence that they had not signed as witnesses to rebut the presumption, and they were thus disentitled by s. 15 from claiming their interests under the will.

T. M. Pryde.

EVIDENCE

Despite assertions to the contrary by some, the writer remains concerned that the public at large has such little protection provided to it by the recent Transport Amendment Act 1968. It is hard to imagine an occasion when the 'good cause' required by the Act before a breath test may be taken could not be found. The mere whiff of alcohol on one's breath is sufficient to give rise to 'good cause'. In *R.* v. *Price* [1968] 1 W.L.R. 1853 a constable having followed a car for half a mile stopped to advise the driver who had stopped of his own accord that his rear light was not functioning. On smelling alcohol on his breath a breathalyser test was taken. It was subsequently held that the broken light gave the constable sufficient cause.

However in *Dorn* v. *The Police* [1968] N.Z.L.R. 988 the necessity for evidence to relate a blood sample count to the offence alleged was emphasised. Dorn was found in an alcoholic state in bed, his damaged car being outside. He was found guilty of driving while under the influence of drink. It was held on appeal that there was no evidence of his condition while driving, his mode of driving, or the time of his driving, evidence of a blood count of 230 was not sufficient to prove the case against him. It is unlikely such a defence could be raised in prosecutions under s. 59A but it will still be available in prosecutions under other sections.

R. v. *Richards* [1968] N.Z.L.R. 1950 in the Supreme Court extends the decision in *R.* v. *Benyon* [1963] N.Z.L.R. 635 to Public Trust officers. Section 17 (1) Public Trustee Act 1957 provides, in terms similar to s. 62 Hospitals Act 1957, that Public Trust staff shall maintain, and aid in the maintenance of, secrecy concerning all matters coming to their knowledge appertaining to the business of the Public Trust Office. Four staff members were called as witnesses and it was