ditions of ocean transport in the present age justified their disturbing of the ninety years' old decision in *The Parana* (1877) 2 P.D. 118. "In principle," it seemed to Lord Morris, "that the rule in *Hadley* v. *Baxendale* (*supra*) must in these days be applied in cases of carriage of goods by sea": *ibid.*, 402G (see also Lord Reid, 392G; Lord Hodson, 408F; Lord Pearce, 420A; Lord Upjohn, 428G).

The Law Lords have failed to lay down a unanimous rule as to the breadth or narrowness of the word "probability". Contrary to Lord Reid's assertion that *Hadley* v. *Baxendale* was not being departed from, the impression gained from the other judgments seems to be that the degree of probability required is not as great as was contemplated in *Hadley* v. *Baxendale*, and that the degree of remoteness of damage has in fact been enlarged by this decision.

Legislation

Minors' Contracts Act 1969. The effect of this Act may be briefly stated as follows:

(1) A minor who is or has been married shall have the same contractual capacity as if he were of full age.
(2) Where a minor has attained the age of 18 his contract shall have effect as if he were of full age; with the proviso that the Court may cancel or decline to enforce it, either in whole or in part where it thinks just, if the consideration accruing to the minor was inadequate or unconscionable, or if the contract imposed harsh or oppressive terms on the minor at the time of contracting.
(3) Every contract entered into by a minor who has not attained the age of 18 shall be unenforceable against the minor, but otherwise shall have effect as if the minor were of full age.
(4) Every contract entered into by a minor shall have effect as if the minor were of full age if, before the contract is entered into by the minor, it is approved by a Magistrate's Court.
(5) A guarantor of a minor's contract is fully liable as if a guarantor of an adult's contract.
(6) The Court is given a discretion to approve any money or damages claimed by or on behalf of a minor in certain circumstances.

J. R. Laidlaw

EQUITY AND THE LAW OF SUCCESSION

Powers and Duties of Trustees

Ex Gratia Payments by Charity Trustees

It was held by Cross J., in *In re Snowden* (*deceased*) [1969] 3 W.L.R. 273 that the court and the Attorney-General have the power to authorise *ex gratia* payments by charity trustees out of funds held by a charity or on charitable trusts, in pursuance of what the trustees consider to be a moral obligation. He qualified this by adding: "It is, however, a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment."

In this case it appeared that the testator never intended the charity to receive as large a gift as it did receive. Cross J. pointed out that there may well be a considerable difference between such cases and cases where the testator intended the charity to receive what it has received, but the testator's relatives consider that he was not morally justified in leaving his money to a charity rather than to them. Cases in which an *ex gratia* payment would be justified would probably be rarer in the second category than in the first.

Exercise of Discretion

Two aspects of this were dealt with by Plowman J. in the case of *In re Gulbenkian's Settlements (No. 2), Stephens and Another* v. *Maun and Others* [1969] 3 W.L.R. 450 in which it was held:—

1. That there was no reason why the object of a discretionary trust or power should not release the trustees from the duty of considering whether or not to exercise their discretion in his favour, and that if he did so he thereupon ceased to be an object of the trust or power. Plowman J. said a person cannot be compelled to accept a gift against his wish and so he should be equally free to refuse to accept the exercise of a power which the donor has conferred on the trustees to make a gift in his favour. It was emphasised that the release here was a release for valuable consideration.
2. That while it was the duty of trustees to exercise their discretion within a reasonable time of the receipt of the income, what constituted a reasonable time depended on the circumstances of each case. In this case doubts arose whether the trusts were void for uncertainty and so the trustees began to accumulate the income. These special circumstances justified the postponement of the exercise of the discretion, and so the trustees' discretion was held to be still exerciseable and could be exercised retrospectively.

Implied Intention to Exercise Powers

In re Pennant's Will Trusts, Pennant and Another v. *Ryland and Others* [1969] 3 W.L.R. 63. This case concerned a conveyance by trustees of certain land comprised in a testamentary settlement to a person who was herself one of the trustees. Since the conveyance was made without applying to the Court for any order, it could properly be carried out only by the use of certain statutory powers, and it was clear from the terms of the conveyance that those powers were not in the minds of the parties. However in *Mogridge* v. *Clapp* [1892] 3 Ch. 382, Kekewich J. had applied an old rule "that where you find an intention to effect a particular object, and there is nothing to exclude the intention to effect it by a power which is available, and there are no means of effecting it except by that power, then you conclude that the intention was to effect it by means of that power, because otherwise it would not be effected at all." Buckley J applied this rule and held that as the conveyance had been made in the utmost good faith and for full value, and could have been made in exercise of the statutory powers, the intention to exercise those powers should be implied despite the fact that the trustees were unaware that such powers existed.

Trusts

Constructive Trusts

In *Carl Zeiss Stiftung* v. *Herbert Smith and Co. and Another (No. 2)* [1969] 2 W.L.R. 427, the plaintiffs alleged that the defendants, acting in their capacity as solicitors for their clients, knew that the

plaintiffs had a claim against the clients and therefore knew that moneys they had received from their clients in costs belonged to the plaintiffs or were being held on trust for them. The defendant solicitors admitted that they knew of the plaintiffs' claim of a trust against their clients. The Court of Appeal held that a solicitor, acting honestly in his capacity as a solicitor for his client, was not to be imputed with knowledge of a trust merely because in acting for his client he knew of a claim against his client that there was a trust. Such knowledge could not be notice of a trust or notice of misapplication of trust funds.

It was also held that a solicitor had no duty to assume that facts assessed against his client were true, and no duty to make inquiries as to whether such facts were true.

Construction

The case of *Re Balkind* (*deceased*) [1969] N.Z.L.R. 669 concerned conditions in a will and codicil requiring that beneficiaries of certain trusts should be members of the Hebrew Congregation. It was argued that stipulations requiring such membership were void for uncertainty, as had been held in *Clayton* v. *Ramsden* [1943] A.C. 320, a House of Lords decision, and in New Zealand in *Re Biggs* (*deceased*) [1945] N.Z.L.R. 303 where Callan J. followed the decision of Smith J. in *Re Lockie* (*deceased*) [1945] N.Z.L.R. 230. Wilson J. pointed out that in both *Clayton* v. *Ramsden* and *Re Lockie* (*deceased*), the conditions attached to the gifts were clearly conditions subsequent. In *Re Biggs* (*deceased*) Callan J. was of the opinion that the same strictness of interpretation was applicable where the condition attached to the gift was precedent, but this view has been rejected by English courts and it was also rejected here. It was held that since the conditions were conditions precedent, the ratio for the strict test applied in such cases as *Clayton* v. *Ramsden* and *Re Lockie* (*deceased*) did not apply, and the words of the conditions were to be interpreted in the ordinary way. Thus their meaning was held to be clear and certain.

In re Baden's Deed Trusts, Baden and Others v. *Smith and Others* [1969] 3 W.L.R. 12. Here the language of the deed in question was highly ambiguous and it was not clear whether it created a trust or a power. If a trust, it would fail for uncertainty but if it was a power the disposition was valid. Two of the three members of the Court of Appeal were of the opinion that the considerations in favour of a trust or power were evenly balanced. As it may be assumed that a settlor intends his dispositions to take effect they held that in such a case the court should lean towards that which might effectuate the settlor's intention rather than risk destroying that intention: *ut res magis valeat quam pereat.* With this consideration lifting the scales the deed was held to create a power.

Confidential Information

The question of the measure of damages for loss of confidential information was dealt with in *Seager* v. *Copydex Ltd.* (*No. 2*) [1969] 1 W.L.R. 809. It was held that they are to be assessed at the value of the information which was taken. If it is the sort of information which could be obtained by employing a consultant, then the value of it is the fee which a consultant would charge for it. But if the information involves an inventive step or something so unusual that it could not be obtained from a consultant, then the value of it is much higher. In

such a case it is the value as between a willing seller and a willing buyer. It was also held that any assessment of the market value should take into account any special circumstances of the seller and the novelty of the information. Here there was a special circumstance in that the plaintiff had an existing business which would be adversely affected by the defendants' use of the information. Therefore he would ask for a higher price to compensate for this.

Charities

A testator gave the residue of his estate to a named charity and so there was no general intention. The charity was dissolved before he died and its funds were transferred to another charity. The question was whether or not the gift of residue lapsed and this depended on whether the charity had ceased to exist at the time of the testator's death. The case was *In re Stemson's Will Trusts, Carpenter* v. *Treasury Solicitor and Another* [1969] 3 W.L.R. 21, and Plowman J. held that "where funds come to the hands of a charitable organisation . . . which is founded, not as a perpetual charity but as one liable to termination, and its constitution provides for the disposal of its funds in that event, then if the organisation ceases to exist and its funds are disposed of, the charity or charitable trust itself ceases to exist and there is nothing to prevent the operation of the doctrine of the lapse."

Family Protection

In the case of *In re Preston (deceased)*, *Preston* v. *Hoggarth and Others* [1969] 1 W.L.R. 317 it was held that the powers of the court under the Inheritance (Family Provision) Act 1938 (U.K.) to vary the provision of a testator's will were wide enough to apportion the burden of any award made thereunder not only between the classes of beneficiaries, but also unequally between members of the same category or class.

Succession

By the Wills Amendment Act 1969 it is provided that every minor after either becoming married or attaining the age of 18 years shall be competent to make a valid will in all respects as if he or she were of full age. Further, that every minor who is over the age of 16 years but has never been married and has not attained the age of 18 years may, with the approval of the Public Trustee or of a Magistrate's Court, make or revoke a will, and all such wills and revocations shall be valid and effective as if he or she were of full age.

In *Re Pechar (deceased)*: *Re Grbic (deceased)* [1969] N.Z.L.R. 574 a man had killed his wife and one of the issues was whether he was entitled to succeed to any property held by him and his wife as joint tenants. Principles of public policy precluded him from obtaining any benefit from his wife's death, but here it was argued that since they were joint tenants the wife's death had not increased the husband's interest. However Hardie-Boys J. pointed out that the husband had enlarged his rights by removing the joint tenant whose interest was equal with his own. Therefore it was held that although the legal title to any property held by the husband and wife as joint tenants passed to the husband by survivorship, half the property was to be held by him as a constructive trustee for his wife's estate.

In re Groffman [1969] 1 W.L.R. 733 was concerned with an acknowledgement of the testator's signature as required by section 9 of the

Wills Act 1837. In this case the testator acknowledged his signature while the will was in his pocket. Sir Jocelyn Simon P. held that " . . . if there is to be acknowledgement within the statute the attesting witnesses must either see or be capable of seeing the signature; or at the very least must see or be capable of seeing a will on which there is a signature."

R. C. Pearson

FAMILY LAW

Perhaps the most interesting development in this field during 1969 was the passing of the Status of Children Act 1969. It seems to have been intended that this Act should remove the concept of illegitimacy from our law. The main effect of the Act is to be found in s. 3 (1) where it is provided that the relationship between every child and its parents "shall be determined irrespective of whether the father and mother are or have been married to each other."

The Act came into effect on 1 January 1970 and will apply to wills and settlements made after that date. The rule of construction whereby reference to "children" was deemed to mean only legitimate children, has by s. 3 (2) been abolished and in future, by virtue of s. 3 (3) the use in a will, etc., of the words "illegitimate" and "lawful" will not prevent the relationship being determined in accordance with s. 3 (1).

The general implication to be drawn from the Act is that the discrimination and disabilities which previously applied to some children because of the legal relationship of their parents, are to disappear.

Rights of Action at Common Law

It seems that there still exists in New Zealand a right of action against a person who has enticed a wife to leave her matrimonial home and who harbours her against the will of her husband. This was the decision of Wild C.J. in *Spencer* v. *Relph* [1969] N.Z.L.R. 237, and his ruling was affirmed by the Court of Appeal, *ibid.*, 713. It was emphasised in an action for enticement the plaintiff husband must show that his wife would not have left but for the actions of the defendant. Similarly an action for harbouring will not succeed where there is proof that the wife had reasonable cause to leave her husband. These rights of action, relics from a time when the position of wife had strong overtones of servitude, have something in common with the action for damages for adultery. This action may now be further limited in its effect in that damages may be regarded as appropriate only where the co-respondent deliberately set about breaking up the marriage which was shown to have been reasonably happy and stable and would otherwise have continued—*Harlen* v. *Harlen and Price* [1969] N.Z.L.J. 674.

Matrimonial Proceedings

The common law rule against the use of interrogatories in proceedings where adultery is alleged was applied by Haslam J. in *C.* v. *C. and Another* [1969] N.Z.L.R. 852. The seventy-three questions in the interrogatories given in that case were said to amount to a cross-examination of the defendants and were categorised as being "fishing" in their nature. His Honour considered that the motion was unnecessary and expensive and accordingly dismissed it.