Criminal offences—Transport Act 1962

The question of random investigations by officers was raised with respect to "breathalyser" tests for drunken driving in two recent cases, *Police* v. *Anderson* [1972] N.Z.L.R. 233 and *Ministry of Transport* v. *von Hartitzch* [1972] N.Z.L.R. 928, where the notion of a traffic officer having to have "good cause to suspect" that an offence had been committed was discussed. It was held, first, that the question of whether the traffic officer did have "good cause" was a question of fact, and, secondly, that the "good cause to suspect" which led the officer to administer the breath test does not have to be proved by the prosecution as an ingredient of the charge; proof beyond a reasonable doubt of this factor is therefore not required. In *von Hartitzch's* case it was held that "good cause to suspect" means no more than "a reasonable ground of suspicion upon which a reasonable man would act". It is not necessary that evidence of an actual driving fault be adduced in order to establish that the officer had "good cause".

Police powers—search

The impact of the Court of Appeal's decision in *Macfarlane* v. *Sharp* [1972] N.Z.L.R. 838 is bound to be extensive in the controversial fields of police powers, the right to privacy, the acquisition of evidence, and criminal procedure. In this case, the Court upheld its own decision in *Barnett and Grant* v. *Campbell* (1902) 21 N.Z.L.R. 484: the seizure of the documents which were in question was ruled unlawful, because the search warrant was issued in respect of other items, and the appellant was not arrested at the time of the seizure. Here, the law in New Zealand seems to differ from the English decisions in, for example, *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 2 Q.B. 299. Perhaps the difference may be explained by the fact that search warrants are generally easier to obtain in New Zealand than in England. The Court of Appeal, however, upheld White J.'s ruling at first instance that the proper remedy in a case of unlawful seizure was damages, and ruled that the appellant was not entitled to have the documents returned nor a writ of prohibition against criminal proceedings in which those documents would be presented as evidence.

In deciding this issue, the Court made it clear that the documents "unlawfully" seized might still be used in evidence in court (subject to the usual rules of unfairness etc.), and White J.'s dictum that "The principle to be applied as to the admissibility of the evidence, is whether it is relevant to the matters in issue, . . . not how the evidence was obtained," was apparently upheld.

J. J. Waldron

EQUITY

Implied trust

The far-reaching nature of implied trusts arising by operation of law was recently illustrated by decisions of the New Zealand and

English Courts of Appeal. In *Efstratiou, Glantschnig and Petrovic* v. *Christine Glantschnig* [1972] N.Z.L.R. 594 the essential facts were that the husband bought a house in his name, half the deposit of which was provided by his wife. The husband later sold the house while under an injunction restraining him from entering the house. The Court of Appeal held that apart from any rights the wife had under the Matrimonial Property Act 1963 she had an equitable interest in the house. Because she paid half the deposit "a resulting trust arose from this payment, whereunder her husband held the matrimonial home so purchased in trust for himself and his wife jointly" (598). The house was sold by the husband through a land agent at nearly half the market value. The court found that the agent had full knowledge of the fraud on the wife's equitable interest, and the purchaser apparently also knew the facts. On this basis the Court held, 599:

> If three persons by their joint action do those things which amount to a breach of trust by one of them, knowing of the breach of trust which their actions are bringing about, we have no doubt that if the trustee is liable to make restoration the joint wrong-doers may be held liable jointly with him.

The facts of *Hussey* v. *Palmer* [1972] 3 All E.R. 744 were as follows:— Mrs Hussey went to live with her son-in-law, Palmer, and her daughter. A bedroom extension for her to use was built on to the house, and Mrs Hussey paid for this by payments made directly to the builder. Nothing was said about repayment of the money by Palmer, though it was clear that Mrs Hussey was to live in the house for her remaining years. In the event, the "old lady" argued with her daughter and went to live elsewhere. She brought an action against Palmer which was first heard before a Registrar, claiming that the money she had paid to the builder was paid as a loan. The Registrar held that it was a family transaction and not enforceable. Then in the County Court Mrs Palmer claimed the money as due under a resulting trust. The County Court judge considered that it was a loan and not a trust and as the plaintiff had abandoned any claim for a loan because of the opinion of the Registrar in the earlier hearing she failed once again.

The plaintiff then appealed against the finding that this was not a resulting trust. The appeal was upheld. Lord Denning M. R. considered that the money was not a loan but was recoverable under a trust:

> If there was no loan, was there a resulting trust? . . . I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust; but this is more a matter of words than anything else. The two run together. By whatever name it is described it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it . . . . It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution . . . . Thus we have repeatedly held that, when one person contributes towards the purchase price of a house, the owner holds it on a constructive trust for him, proportionate to his contribution, even though there is no agreement between them and no declaration of trust to be found, and no evidence of any intention to create a trust (747).

Mrs Hussey was held to have such an equitable interest. This case makes an interesting comparison with the *Glantschnig* case extending as it does the principle applied there from money spent on purchasing a house to money spent on improving it.

Secret Trusts—validity

A clear, concise description of the requirements for a secret trust to be valid was given by Brightman J. in *Ottaway* v. *Norman* [1972] Ch. 698. A secret trust was created when the testator left by his will his house to his housekeeper on the understanding that by her will she would leave the house to the testator's son. This promise was not kept. In argument, an attempt was made to restrict the operation of the secret trust doctrine to situations where the immediate donee had deliberately and consciously misled the testator—fraud in the true sense. Brightman J. adopted the language of Viscount Sumner in *Blackwell* v. *Blackwell* [1929] A.C. 318 (a case dealing with half secret trusts) and accepted that the essential elements for all secret trusts are:— "(i) the intention of the testator to subject the primary donee to an obligation in favour of the secondary donee; (ii) communication of that intention to the primary donee; and (iii) the acceptance of that obligation by the primary donee either expressly or by acquiescence."

In *Re Baden's Deed Trusts (No. 2)* [1972] Ch. 607 the executors of Baden's estate had asked Brightman J. to find that the House of Lords in *McPhail* v. *Doulton* [1971] A.C. 424 were evenly divided as to the appropriate test for certainty of object to determine the beneficiaries in a discretionary trust. Brightman J. was satisfied that a new test had been created by the House of Lords to determine whether objects of a discretionary trust were defined with sufficient certainty and that was the test clearly explained by Lord Wilberforce in his judgment in that case, viz. "that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class". Brightman J. went on to apply that test to find that there were no uncertainty about the words "dependent" and "relative" so that a discretionary trust for those persons was valid.

The executors appealed against this latter finding but the appeal was dismissed, the decision being reported as *Re Baden's Deed Trusts (No. 2)* [1973] Ch. 9. Regarding the word "dependent" it was held that there was no semantic or linguistic difficulty in determining who was and who was not a dependent bearing in mind the commonly accepted meaning of that word as a person wholly or partly dependent on the earnings of another. Any difficulty involved is merely evidentiary, and difficulty of proof is not sufficient to render a provision uncertain. The word "relative" created a greater problem. The executors argued that for the purposes of the *McPhail* v. *Doulton* test a trustee must be able to say that a person is *not* a relative with just as much certainty as he can say that a person *is* a relative, and that as the commonly accepted meaning of the word "relative" means a person related to some common ancestor it would never be possible for an executor to say with certainty that any given person is not a relative.

This persuasive argument was rejected but for different reasons.

Sachs L. J. emphasised the difference between conceptual and factual difficulties. He claimed that Lord Wilberforce in laying down the new test was referring to conceptual uncertainty and felt that the word "relative" had caused no conceptual difficulties in practice. Any difficulties pointed to by counsel were factual or evidential difficulties.

Megaw L. J. seemed to substitute a new test altogether. He said: "To my mind the test is satisfied if, as regards at least a substantial number of objects, it can be said with certainty that they fall within

the trust." He thus excludes the troublesome words "is not" because in his view too much emphasis on this aspect would require the same element of certainty which he considered the House of Lords had endeavoured to dispel in *McPhail* v. *Doulton.*

Stamp L. J. considered that removing the words "is not" would be to depart from the test adopted by the House of Lords in *McPhail* v. *Doulton,* for certainty in respect of powers. He upheld the bequest because the deceased in using the term "relative" did not mean to include all persons descending from a common ancestor, but rather to include the nearest blood relatives—construed in this way he found no difficulty in applying the test. This more restricted view of the word "relatives" could possibly cause further difficulties in the administration of the trust.

Although the reasons given for upholding the provision are irreconcilable, at least the decision is unanimous, and as the class of "relatives" is perhaps uniquely difficult to determine because of the possibility of remote or even unknown relatives being in existence, it is hoped that the difficulties are more academic than practical and that the test will not cause similar difficulty in the future. It was certainly not designed to do so.

Variation of trust—charitable trusts

An interesting recent New Zealand case dealing with the practicabilities of administering charitable trusts was decided recently in *Baptist Union of New Zealand* v. *Attorney-General* [1973] N.Z.L.R. 42. In 1904 a trust had been established to provide a home to be called "The Remuera Children's Home" for poor and indigent children. Since its inception such a home had been maintained as an orphanage; but the trustees considered it now to be more satisfactory to replace the large existing home by a number of smaller family type units. An application was made under s. 64 Trustee Act 1956 for an order enlarging the trustees' powers so that the purpose could be carried out. The application was opposed by the Attorney-General not because he disapproved of the nature of the modification but because he considered that the application should be brought under s. 32 Charitable Trusts Act 1957. The Attorney-General's main concern was probably that an unchecked extension of s. 64 Trustee Act may tend to undermine his control and supervision of charitable trusts. The court upheld the Attorney-General's objection, finding that there is no jurisdiction under s. 64 to approve a modification of trust powers when the modification is to "modify the basic purpose of the charity" and where the modification is contrary to the intention expressed in the instrument. The basic purpose of the charity as found by the court was the establishment of a single home as an orphanage, not the more general purpose of providing relief for poor and indigent children. The court could therefore not make the desired order.

D. D. Twigg