

Aiding and Abetting

In *Sweetman v. Industries and Commerce Dept.* [1970] N.Z.L.R. 139, a company and its manager were both charged with similar offences. The company was acquitted while the manager was convicted. On appeal the main question was whether the manager could be convicted as the principal or an aider and abettor. The facts indicated that there had been a contravention of Regulation (6) of the Hire Purchase and Credit Sales Stabilisation Regulation 1957. The manager who had full knowledge of the facts, was held to have been properly proved by the evidence to be guilty as an actual offender or else as an aider and abettor of an offence committed by the company.

Richmond J. pointed out that no general rule of law in New Zealand required a person who is prosecuted as an aider and abettor to be acquitted in all circumstances if some other person named as the actual offender is acquitted. Consideration was given to cases such as *R. v. Hamson* [1941] N.Z.L.R. 354 and *Thornton v. Mitchell* [1940] 1 All E.R. 339 where it was held that the acquittal of the principal offender and the conviction of an aider and abettor could not stand together. But in those cases there had been conflicting findings of fact as between the person charged as principal offender and the aider and abettor. In the present case this question did not arise because the Magistrate had found rather that as a matter of law the company was entitled to an acquittal.

D. G. Holloway

EQUITY AND THE LAW OF SUCCESSION

Variation of trusts

Re Bodle's Trust, Stratton v. Bodle [1970] N.Z.L.R. 750 arose from an originating summons for an order under section 64A of the Trustee Act 1958, seeking approval of the court to a variation of the terms of a deed of trust. By accelerating and fixing the date of vesting as at 31 August 1971 instead of at the death of the testator, substantial death duties could be avoided, giving a distinct advantage to those sharing in the fund.

The issue to be decided was whether in terms of section 64A the scheme was "to . . . [the] detriment" of the contingent beneficiaries on whose behalf the court was asked to approve, taking into account all indirect benefits and moral-social advantages to the family units involved.

Woodhouse J. in allowing the variation, was of the opinion that complete justice could be done by requiring that all who took an interest on that date, immediately re-transfer one half of what they got to a new trust. This was for the protection of interests of those who would have taken under the original terms of the deed.

In *Re Remnant's Settlement Trusts* [1970] Ch. 560 a novel variation was approved. The use of the English equivalent of section 64A Trustee Act 1958 was extended from allowing variation merely where the trust has been considered to be disadvantageous from a revenue point of view. Here a forfeiture clause conditioned on religious affiliation was deleted. The clause provided that the beneficiaries were to forfeit their rights if at the time their interests were to vest, they were practising Roman Catholicism. There was no attack for uncertainty since the clause stated

that a person was deemed to be practising Roman Catholicism if he was a member of the Roman Catholic Church, or attended it once a year, or was the husband or wife living with a person of Roman Catholic faith.

The court held that a broad view should be taken of what is meant by benefit in 51(1)(a) Variation of Trusts Act 1958 (U.K.), and that the interpretation of the word should not be restricted to financial, educational and social benefit. Thus the court approved an arrangement for a variation of trust which defeated the intention of the testator. They found that the forfeiture provisions were undesirable in themselves and that the proposed arrangement was in all respects fair and proper, being for the benefit of all persons born and unborn whose interests were before the court.

Distribution of charitable trust fund

Re West Sussex Constabulary's Widow, Children and Benevolent (1930) Fund Trusts [1970] 2 W.L.R. 848. In 1930 the West Sussex Constabulary Widows, Children and Benevolent Fund Trusts were established to provide for the widows and orphans of deceased members of the West Sussex constabulary. As from 1968 this constabulary was amalgamated with other police forces. There being no provision for applying the fund in such circumstances, doubts arose as to the distribution of its \$70,000, which culminated in Goff J. holding that part of the fund representing contributions from former members and surviving members was *bona vacantia*. The surviving members and personal representatives of deceased members may have rights in contract on the ground of frustration of purpose. Outside contributions including moneys raised by entertainments, raffles, sweepstakes and collection boxes were also *bona vacantia*, the donors' intentions being to part with their money in all circumstances. However, moneys representing donations and legacies were to be held on resulting trusts for the donors and their estates since the gifts had been made for a particular purpose which had failed.

Appointment of executors

Re Horgan Decd. [1970] 2 W.L.R. 393 is important in giving judicial approval to a formula by means of which a testator can appoint a firm of solicitors as his executors, leaving it open to two of the persons who are partners at the time of his death to take out the grant of probate. This will provided:

I appoint the firm of Rodgers, Horsley and Burton . . . who may act through any partner or partners of that firm or their successors in business at the date of my death not exceeding two in number to be executors and trustees of this my will.

Latey J. held that this appointment was not void for uncertainty and although the testator contemplated and intended the appointment of all the partners, a grant to two and power reserved to others, the court could construe it as appointing the sole surviving partner as executor.

Mistake

In *Re Morris Decd.* [1970] 2 W.L.R. 865 there was a successful action by the executors of a will and codicil for a grant of probate in solemn form with the omission of the numeral '7' from the codicil. The testatrix's intention had been to revoke by codicil, clauses 3 and 7(iv) of

her will, and not clauses 3 and 7, as phrased by her solicitor in the codicil. The court found that although the testatrix was competent, had in a literal physical sense read the codicil and did duly execute it, it was clear from the evidence that she did not in fact know and approve the contents. A slip had been made by the draftsman without his knowledge and approval, and the testatrix was not bound by it.

Construction

Re Baden's Deed Trusts [1970] 2 W.L.R. 110 concerned a deed which recited that a settlor would transfer to trustees shares in a company to form the nucleus of a fund for the benefit of the staff of a company, their relatives and dependants. Clause 9(a) provided "The Trustees shall apply the net income of the fund in making at their absolute discretion grants . . . in such amounts, at such times and on such conditions (if any) as they think fit . . ."

The House of Lords held by a majority that the clause in question constituted a trust. Lord Reid, Viscount Dilhorne and Lord Wilberforce agreed that the test to be applied in determining the validity of trust powers was that propounded in *Re Gulbenkian's Settlements* [1970] A.C. 508 for powers; namely that the trust was valid if it could be said with certainty that any given individual was or was not a member of the class. This validity test does not however involve the complete assimilation of trust powers with powers. As to powers, the court will not normally compel their exercise, although it will intervene if the trustees exceed their powers and possibly if they exercise them capriciously. As to a trust power, if the trustees fail to exercise it, the court will do so in the manner best calculated to give effect to the intention of the settlor or testator.

Disposition of surplus income

Re Clothier Decd. [1970] N.Z.L.R. 689. Here the court considered the disposition of surplus income held by trustees after they had allocated amounts from time to time in favour of the deceased's adopted daughter. The disposition contained no express direction as to what should be done with undistributed income.

The court found that where there was such a discretionary trust charged upon income, which was not qualified by a limitation of distributions to particular years, the disposition did not imply the accumulation of income in the sense that retention would offend the Accumulations Act 1800 (U.K.) (Thellusson Act), then in force in New Zealand. Even if some possible argument in favour of an implied power to accumulate were accepted the retention would then be saved by section 21(4) Perpetuities Act 1964.

The Age of Majority Act 1970

This Act which came into force on 1 January 1971, provides in section 4 that:

4. (1) For all the purposes of the law of New Zealand, a person shall attain full age on attaining the age of 20 years.
- (2) In the absence of a definition or of any indication of a contrary intention, the expressions "adult", "full age", "infant", "infancy", "minor", "minority", "full capacity", "majority", and similar expressions in any enactment or instrument shall be construed in accordance with subsection (1) of this section.
- (3) This section shall not affect any reference in any enactment or instrument to an age expressed in years.

Thus any trustee who is empowered or directed to pay income to the parent or guardian of any minor, or to apply it for the maintenance, education, advancement, or benefit of any minor, has the power to pay it to that person when he attains the age of 20 years.

Ainsley Elliott

FAMILY LAW

Interrogatories

The Court of Appeal in *A. v. A. and Another* [1970] N.Z.L.R. 1054, in approving the recent decisions in *S. v. S.* [1968] N.Z.L.R. 698 and *C. v. C.* [1969] N.Z.L.R. 852, appears to have firmly established in New Zealand the general practice in divorce proceedings of disallowing leave to administer interrogatories where the answers will or may tend to prove the adultery alleged. The Court held that the rules of the Code of Civil Procedure as to interrogatories, as applied by R. 68 of the Matrimonial Proceedings Rules 1964, must be read subject to the Matrimonial Proceedings Act 1963 and to established divorce practice. As section 69 of this Act neither expressly nor impliedly indicates an intention to relax in interlocutory proceedings the protection which that section gives to witnesses, and as no other valid reason for any relaxation had been advanced to the Court, the appeal, from a decision of Roper J. refusing an application for leave to administer interrogatories, was dismissed.

Assessment of Damages

The case of *Warren v. Fry and Another* [1970] N.Z.L.R. 781 concerned an appeal from a judgment of Roper J. awarding \$1,500 damages against the appellant as co-respondent in a divorce petition brought by the husband. The Court of Appeal held that the main principles of assessment had been correctly stated by Roper J. but that in the circumstances of the case the actual amount awarded was excessive. The Court attached most weight to the fact that the marriage was a comparatively short and unhappy one: the husband and the wife were married in March 1964, they entered into a separation agreement in December 1968, and the husband was granted a decree nisi in March 1969, his petition being based upon his wife's adultery with the appellant. Thus small damages only could be awarded for the loss of consortium.

Wild C.J. accepted the words of Scarman J. in *Pritchard v. Pritchard* [1967] P. 195, as laying down the principles to be considered with regard to the amount of damages as compensation for injury to the husband's feelings and pride:

The sum must be reasonable so that the solatium offered is no mere empty show. It is to be a genuine balm to injured feeling, yet it must be modest; it is not intended as punitive or exemplary, and cannot, however large or small, ever pretend to reflect accurately the injury inflicted (*ibid.*, 216).

In the present case too much emphasis was attached by the Judge at first instance to the prospect of reconciliation running right up to the hearing for damages; such a prospect disappeared upon the appellant's petitioning for divorce some six months previously, the Court of Appeal held.