giving him a power to delegate to persons interested the task of defending on his behalf. Such a procedure would be more expeditious than that suggested in *Birch's Case*[42] and *Hayek's Case*[43], but of course would involve, as an attendant evil, the advent of yet another administrative department.

M. FOSTER, LL.B. (University of Sydney, 1952)

POWER TO VARY A TRUST: *IN RE DOWNSHIRE SETTLED ESTATES*

Following upon the important decision of the High Court of Australia in *Riddle* v. *Riddle*[1] as to the meaning of s. 81 of the Trustee Act, 1925 (N.S.W.)[2], the Court of Appeal in England has recently considered the meaning of s. 57 of the Trustee Act, 1925[3] (Eng.), which is in similar terms to s. 81[4]. The Court actually dealt with three appeals the facts of which are complex and will not be set down here. The importance of the decision may be gathered from the words of Denning, L.J., who delivered the dissenting judgment, the majority of the Court consisting of Evershed, M.R., and Romer, L.J. His Lordship said: " . . . the rejection of the schemes in the present cases has taken Lincoln's Inn by surprise, so much so that many proposed schemes have been held up pending our decision"[5]. The Master of the Rolls delivered a lengthy judgment on behalf of the majority and it will not therefore be possible in this case-note to consider the dissenting judgment.

The Court of Appeal "for the first time for half-a-century", to use the words of Evershed, M.R.[6], reviewed the inherent jurisdiction of the Court in relation to trusts and practitioners and students will find this review very useful.

At the outset his Lordship pointed out that the consideration of the questions raised by the appeals involved the consideration of whether the Court had the jurisdiction to make the order sought; not whether, assuming the jurisdiction exists, the Court should exercise its discretion in favour of the Appellants. He also made two general observations. His Lordship firstly observed that the Court, in the present case, did not propose to depart from the well-established practice of the Court of not attempting precise definitions of its powers in relation to its peculiar or "extra-ordinary" jurisdiction including the "inherent jurisdiction" invoked in the present case, and thereby running the risk of imposing undue fetters upon their future application. His Lordship's second observation is rather interesting in the light of the comments of Viscount Simon in *Latilla* v. *Commissioners of Inland Revenue*[7]. He said[8] that it is not an objection to the sanction by the Court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties).

Counsel for the Appellants argued that the jurisdiction of the Court to modify or vary trusts and to direct the trustees accordingly was unlimited provided: (i) that all persons interested who were *sui juris* assented, and (ii) that it was clearly shown to be for the advantage or convenience of all persons interested who were not *sui juris*, including persons unborn or not presently ascertainable; in other words, that the Court has unlimited jurisdiction in relation to the property of infants, including the beneficial interests of infants and unborn *cestuis que trustent* under a settlement, and will exercise jurisdiction

---

[42] (1951) 51 S.R. (N.S.W.) 345.
[43] (1930) 48 W.N. (N.S.W.) 11.
[1] (1952) A.L.R. 167. See "Investments not permitted by a Trust Instrument. *Riddle* v. *Riddle*" (1953) 1 *Sydney L.R.* 116.
[2] Act No. 14, 1925 — Act No. 26, 1942. [3] 15 Geo. 5, c. 19.
[4] *In re Downshire Settled Estates* (1953) 2 W.L.R. 94.
[5] (1953) 2 W.L.R. at 139.
[6] *Id.* at 98.
[7] (1943) A.C. 377, 381-384.
[8] (1953) 2 W.L.R. at 99.

so as to secure any benefit or advantage for the infants or unborn persons which they could have themselves secured had they been *in esse* and *sui juris*, even to the extent of sanctioning a departure from the beneficial trusts of the trust instrument from which the interests in question are derived.[9]

His Lordship rejected this broad and general jurisdiction as inconsistent with the Court's decisions in *In re New*[10] and *In re Tollemache*[11]. He said that the general rule is that the Court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts. He said that there had been cases in which the Court has made orders which did undoubtedly result in a departure from the trusts declared by the settlor but pointed out that, in the majority's opinion, these cases did not establish new rules but only exceptions to the general rule.

Thus, in regard to property belonging beneficially to an infant including "property" of all kinds, his Lordship said that the Court has power to direct persons in whom such property is vested (as trustees) or persons having the management of such property (as guardians) on the infant's behalf respectively, so to deal with the property as will be in the infant's best interests. But he observed that it is not legitimate (in the light of *In re New*[12] and *In re Tollemache*[13]) to proceed thence to the conclusion that the Court has an unlimited jurisdiction where property is subject to trusts under which classes, for example, consisting of infants or unborn or unascertainable persons, are interested, to authorise and direct trustees to participate in or give effect to schemes modifying or "remoulding" the trusts because it is shown that the trusts so modified or "remoulded" will be, or are likely to be, for the better advantage of such classes.

The majority, he said, was of opinion that, without departing from the principle stated in their first general observation above, the inherent jurisdiction or the aspect of the jurisdiction invoked in *In re New*[14] and sought to be invoked in these appeals is of a more limited character. They thought that it is a power or jurisdiction to confer upon trustees *quoad* items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may be fairly called an "emergency" — that is a state of affairs which has to be presently dealt with, by which they did not imply that immediate action then and there is necessarily required — and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. The power or jurisdiction does not, in their view, extend to changes or re-arrangements of the beneficial interests *inter se* under the trusts as distinct from re-arrangements or reconstructions of the trust property itself[15].

His Lordship cited[16] well-known passages from the judgment of Romer, L.J., in *In re New*[17] and then went on to say:

> It was contended before us that the judgment of this Court in *In re New* and the passages which we have quoted do not qualify, but are merely illustrative of the broad generality already formulated and sought to be derived from the earlier cases. We have been unable to accept this argument. It is true that the jurisdiction invoked and exercised in *In re New* was stated by Romer, L.J., to be a part of the general administrative jurisdiction of the Court. But that is not the same thing. The argument is for a general power, not to administer trusts, but (where it is shown to be advan-

---

[9] *Ibid.*
[10] (1901) 2 Ch. 534.
[11] (1903) 1 Ch. 457.
[12] (1901) 2 Ch. 534.
[13] (1903) 1 Ch. 457.
[14] (1901) 2 Ch. 534.
[15] (1953) 2 W.L.R. at 100-101.
[16] *Id.* at 101-102.
[17] (1901) 2 Ch. 534.

tageous so to do) to override them. And the argument is, in our judgment, inconsistent with the later case of *In re Tollemache*[18].

His Lordship then reviewed the judgment of Kekewich, J., in that case and also those of the members of the then Court of Appeal and showed how these judgments disproved the general proposition contended for. He added that "if the scope of the 'inherent jurisdiction' was as wide as the appellants would have it, the statutory provisions of the Trustee Act, 1925, and the Settled Land Act, 1925 . . . must have been otiose or, at best, declaratory."[19]

His Lordship then said:

> To the principle that the Court's inherent jurisdiction does not extend to sanctioning generally, modification or remoulding of the beneficial trusts there are two exceptions. They are: (i) where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance the Court—which has shown dislike for trusts for accumulation—will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation. . . . (ii) It must also now be taken in our judgment (at any rate since the decision of *In re Trenchard* . . .)[20] that the Court has a further power and jurisdiction (again without prejudice to the general observation first above stated) to approve, on behalf of persons interested under the trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are *sui juris*, and to direct and protect trustees accordingly; and the word "compromise" should not be narrowly construed so as to be confined to "compromises" of disputed rights[21].

His Lordship's analysis of *In re Trenchard*[22] makes the meaning of the word "compromise" in this sense clear, and should be referred to.

Appellants' Counsel relied on *In re Wells*[23] to support their contention for a broad and general jurisdiction to depart from the terms of a trust instrument. His Lordship discussed this case at length[24] and said that he thought the decision in it might be explained on the basis of the jurisdiction of the Court to approve of a compromise in the sense used in *In re Trenchard*[25]. "In any case, too, *In re Tollemache* (*supra*) in the Court of Appeal, where the limits of *In re New* were emphasised, followed *In re Wells* though the latter case does not appear to have been then mentioned."[26]

His Lordship seemed to entertain some doubt as to whether *In re Trenchard*[27] is consistent with *In re New*[28]. He said: "Whether in strictness the principle underlying the latter case is consistent with the reasoning in *In re New* it seems to us too late now usefully to debate."[29]

Regarding s. 57 of the Trustee Act, 1925 (Eng.), his Lordship said: "It was presumably the intention of Parliament, in enacting that section, to confer new powers on the Court rather than to codify or define existing powers, though it may well be that the new extended jurisdiction does in some degree overlap the old. . . ."[30] This statement of his Lordship is interesting in view of the assertion of Fullagar, J., in *Riddle* v. *Riddle*[31] that s. 81 of the Trustee Act, 1925 (N.S.W.) is addressed to an existing jurisdiction.

He went on to say, "It was argued before us that, whatever may have been the position before the passing of the Trustee Act, 1925, the Court now has

---

[18] (1953) 2 W.L.R. at 102. [19] *Id.* at 103-104. [20] (1902) 1 Ch. 378 (50 years ago).
[21] (1953) 2 W.L.R. at 104-105. [22] (1902) 1 Ch. 378.
[23] (1903) 1 Ch. 848. [24] (1953) 2 W.L.R. at 106-107.
[25] (1902) 1 Ch. 378. [26] (1953) 2 W.L.R. at 108.
[27] (1902) 1 Ch. 378.
[28] (1901) 2 Ch. 534.
[29] (1953) 2 W.L.R. at 108.
[30] *Ibid.*
[31] (1922) A.L.R. 177.

jurisdiction, by virtue of s. 57, to sanction the alteration or re-arrangement of the dispositions declared by a trust instrument, if it is satisfied that it is to the substantial advantage of infants and unborn issue who are beneficially interested thereunder so to do. . . ."[32]

Sub-section 1 of this section is substantially identical with s. 81 (1) of the Trustee Act, 1925 (N.S.W.), with one important difference. Section 81 enables the Court to confer the power "subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit. . . . " The important addition is the words "including adjustment of the respective rights of the beneficiaries". This, together with s. 81 (2), which does not appear in s. 57 of the English Act, will be considered later.

His Lordship thought that s. 57 envisages:

> (i) An act unauthorised by a trust instrument, (ii) to be effected by the trustees thereof, (iii) in the management or administration of the trust property, (iv) which the Court will empower them to perform, (v) if in its opinion the act is expedient. It is, we think, mainly on the proper interpretation of the phrase "management or administration", in the context in which it appears, that the question at issue primarily depends.[33]

He said that Counsel for the Appellants submitted that although certain acts of trustees might equally well be described as either managerial or administrative, a broad distinction ought properly to be drawn between the management of trust propetry on the one hand and its administration by the trustees on the other. Under the head of management would come, it was argued, the general care and control by trustees over the property of which, so far as legal title went, they were the absolute owners; and an act of management would be one referable to that ownership — for example, the sale or purchase of trust investments. Administration, on the other hand, it was contended, covered all the activities of a trustee which derived from the fiduciary character of the position which he held; for example, the payment of income to beneficiaries or the execution of a discretionary trust.[34]

In answer to this submission his Lordship said[35] it was clear, in the majority's judgment, that the subject matter both of management and of administration in s. 57 is trust property which is vested in trustees; and in their opinion trust property cannot by any legitimate stretch of the language include the equitable interests which a settlor has created in that property. They thought that the reason for the appearance of the word "administration" as an alternative to "management" in the section is that, although the words do largely overlap, it was thought possible that an unduly narrow interpretation might be adopted if only one word were to be used without the other. "Be that as it may, we are satisfied that the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries."[36]

In the majority's judgment, his Lordship said[37] that the object of s. 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and with that object in view to authorise specific dealings with the property which the Court might have felt itself unable to sanction under the inherent jurisdiction either because no actual emergency had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the Court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction[38]. He thought the decision

---

[32] (1953) 2 W.L.R. at 108.
[33] *Id.* at 109.
[34] *Id.* at 111.
[35] *Id.* at 111-112.
[36] *Ibid.*
[37] *Id.* at 112.
[38] *Id.* at 112-113.

in *In re Salting*[39] and *In re Mair*[40] did not affect the position, but found support in Wynn-Parry, J.'s, judgment in *Municipal and General Securities Co. Ltd.* v. *Lloyds Bank Ltd.*[41]

The Court also considered s. 64 of the Settled Land Act, 1925 (Eng.), which has no counterpart in the Trustee Act, 1925 (N.S.W.). Section 57 does not apply to settled land by virtue of ss. 4 of that section and s. 64 is intended to fill up the gap but it is expressed in different terms.

It remains now to consider whether the majority's view of s. 57 applies to s. 81 of the Trustee Act, 1925 (N.S.W.). As already pointed out, s. 81 (1) authorises the Court to confer the necessary power "subject to such provisions and conditions, *including adjustment of the respective rights of the beneficiaries*, as the Court may think fit. . . . " . The italicized words do not appear in s. 57 (1). Do these words enable the Court to vary the beneficial interest of *cestuis que trustent* contrary to the Court of Appeal's ruling in this case? In the writer's opinion they do not. In his opinion their meaning is necessarily governed by the words which precede them. Before the Court can make an order under the section it must be of opinion that one or more of certain specified transactions is expedient but cannot be effected by reason of the absence of any power for that purpose vested in the trustees. Only then can it make an order which must be one conferring on the trustees the power which is lacking, to effect the desired transaction. If the trustees desire to vary the beneficial interests under the trust they must bring their proposition within one of the descriptions of transactions specified. However, the Court of Appeal in this case has decided that the varying of beneficial interests does not lie within any of these descriptions of transactions by reason of the limiting effect of the words at the beginning of the section, namely, "where in the management or administration of any property vested in trustees . . . " . The italicized words above are, in the writer's opinion, directed at enabling the Court to adjust the rights of beneficiaries which will be affected as a result of the exercise by the trustees of the power or powers conferred. It might, for example, under this incidental and ancillary power, in an order conferring a power of leasing real estate, provide for the apportionment of rent as between capital and income to give effect to the respective rights of a life-tenant and remaindermen. In the writer's opinion the legislature added these words to make it quite clear that the Court, although it has jurisdiction to confer a power on terms and subject to provisions and conditions (and presumably this would be sufficient without more), may also make provision for the adjustment of the rights of beneficiaries. In the writer's opinion, they were added *ex abundantia cautelae*.

Section 81 (2) seemingly presents greater difficulty[42]. It might be thought that the word "trusts" is here used in the same sense in which it is sometimes used in the majority judgment in this case[43], i.e., in the sense of beneficial provisions or dispositions, thus empowering the Court to vary beneficial interests. Its separation by the word "or" from the word "powers" may give rise to this thought. However, in the writer's opinion, it is used in the sense of administrative directions. The reference back at the beginning of the sub-section to subs. (1) which is confined to authorising orders conferring administrative powers[44] is significant. In the writer's opinion this reference back in the opening

[39] (1932) 2 Ch. 57. [40] (1935) Ch. 562.

[41] (1950) Ch. 212, 223.

[42] This provides as follows: "The provisions of sub-section one of this section shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the instrument, if any, creating the trust, or by law is expedient to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorization of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees . . . " .

[43] (1953) 2 W.L.R., e.g. at 99 and 109.

[44] "Administrative" being here used in the sense in which the majority used it. See *supra* at 111-112.

words of the sub-section operates only to enable the Court to permit alterations in the provisions made in the trust instrument for the administration of the estate and not to vary beneficial interests. It will also be seen that the legislature has in the latter part of the sub-section particularised four acts which the Court may authorise and which are all of an administrative character. By the use of the words "in particular" the legislature has indicated that these acts are instances of the general variety of acts which the Court may authorise the trustees to do or abstain from doing. The maxim "*noscitur a sociis*" should be applied. Hence the conclusion may be drawn that the sub-section as a whole is confined to empowering the Court to authorise the trustees to do or abstain from doing acts or things of an administrative character only. Therefore the Court of Appeal's interpretation of s. 57 of the Trustee Act, 1925 (Eng.), in this case is in the writer's opinion equally applicable to s. 81 of the Trustee Act, 1925 (N.S.W.). The section does not enable the Court to authorise variations or re-arrangements of beneficial interests. Section 81 (2) was probably inserted to enable the Court to deal with administrative acts which the legislature thought might not be covered by s. 81 (1).

In conclusion, the writer would like briefly to refer to several references in the majority judgment to the power of the Court to direct trustees in relation to powers and schemes[45]. It would seem that the Court may entertain an application under its inherent jurisdiction for the conferment of powers on trustees, not only by the trustees themselves but also by beneficiaries, and may direct the trustees in relation thereto. It would also seem that a compromise[46] may be approved on the application of any interested party and that trustees may be directed to implement it. Section 57 (3) is not enacted in s. 81, but s. 92 (1) of the Trustee Act, 1925 (N.S.W.), provides that an order under the Act concerning any property subject to a trust, may be made on the application of any person interested in the property. No doubt the Court having made an order under s. 81 has inherent jurisdiction to give the trustees directions in relation to the powers conferred.

G. J. NEEDS, LL.B. (University of Sydney, 1952)

COMPANIES AND ESTOPPEL: *RAMA CORPORATION LTD.* v. *PROVEN TIN AND GENERAL INVESTMENTS LTD.*

Under the rule in *Royal British Bank* v. *Turquand*[1], any person who knows of the existence, in a company's Articles of Association, of a power to delegate may assume that that power has been appropriately exercised, since he is not put on notice as to the internal management of the company. The importance of the present case lies in Mr. Justice Slade's decision that the requisite "knowledge" of the power cannot be imputed as a result of the further rule that persons dealing with a company have constructive notice of its registered documents.

By the Articles of Association of the defendant company, the directors had power to delegate certain powers "to such members of their body as they think fit". Without having in fact such delegated authority, a director, G. E. Titley, purported to contract on behalf of the defendant company with one Wedderburn, an agent of the plaintiff. The material facts, as Slade, J., found them, were: Wedderburn trusted Titley completely; and he had never heard of the defendant company before March 21, 1949. The whole bargain was concluded, or believed

[45] *Id.* at 99, 100 and 105.
[46] As defined. *id.* at 104-105.
[1] (1856) L.R. 6 E. & B. 327.