as to whether or not a proposed work could be carried out in pursuance of an occupier's common law right, or whether it fell within the licensing provisions of the Act. But the whole framework of the Act is directed toward preventing litigation with respect to water rights. It would entirely defeat this purpose if the applicability of the licensing provisions of the Act to a particular work, was to be decided on the basis of pre-existing and uncertain common law rights.

How else could the Commission exercise its rights? Possibly the fact that there is a Water Conservation and Irrigation Commission constituted under the provisions of the Irrigation Act, 1912 (N.S.W.),[35] and having and exercising certain powers under the Water Act, 1912 (N.S.W.), would itself be an exercise of its rights under s. 4A (1) of the latter Act. In this case, the Commission would presumably, from its inception, have exercised its rights over all rivers and streams in New South Wales. In this case, the difference between Fullagar, J.'s interpretation and the previously accepted interpretation of the section would be purely academic, since the rights of private riparian owners would have been long since superseded.

At the other extreme it could well be argued that Fullagar, J.'s view would lead to the conclusion that it is only in those cases where the Commission has actually exercised its other powers under the Act, for example by constructing works, or by constituting Trust Districts under Part III of the Act, that it can be said to have exercised its superior rights in derogation of private riparian rights.

It will be seen that it is a matter of very considerable difficulty to say what is to be regarded as an exercise of the Commission's rights within the meaning of Fullagar, J.'s rule. It is not improbable, on Fullagar, J.'s view, that it has, in fact, never exercised its rights in respect of many streams over which it has acted as if it had rights, in derogation of the rights of private riparian occupiers, for many years. Fullagar, J.'s view, if accepted, could place the exercise of many of the Commission's functions on a doubtful basis, and would defeat the presumed intention of the legislature in enacting the section.

It is to be hoped that future litigation in this field will clarify the position, and in the light of the above considerations the further hope may be expressed, with respect, that the clarification will consist in a rejection of Fullagar J.'s views. The opposing view that s. 4A (1) of its own force completely divests the special rights of riparian owners is clearer and more certain in its application. Moreover, there can be no doubt that Fullagar, J.'s remarks were *obiter* and that, therefore, a Court approaching the matter in the future will be free to give effect to the countervailing authority in New South Wales and to the countervailing policy considerations.

M. J. McKEOWN, Case Editor—Fifth Year Student.

POWER TO VARY TRUSTS

CHAPMAN v. *CHAPMAN*

Since it was considered by the Court of Appeal in *In re Downshire Settled Estates*,[1] the power of a Court of Equity to vary a trust instrument in exercise of its inherent jurisdiction has been reviewed and its scope defined by the House of Lords in *Chapman* v. *Chapman*.[2] The decision of the Court of Appeal in *In re Downshire Settled Estates*[3] involved three appeals, one of which was dismissed by that Court and the other two allowed. The appeal which was dismissed was the subject of the House of Lords' consideration in *Chapman* v. *Chapman*.[4] The House concurred in the dismissal of this appeal by the Court

---

[35] Act No. 73, 1912—Act No. 27, 1955.

[1] (1953) Ch. 218. For a note on this case see G. J. Needs, "Power to Vary a Trust: *In re Downshire Settled Estates*" (1954) 1 *Sydney L.R.* 253.

[2] (1954) A.C. 429. [3] (1953) Ch. 218.

[4] (1954) A.C. 429.

of Appeal, but held that its decisions in the other two appeals[5] went too far.[5a] These latter cases were also reviewed on the House's concluding that the present case could not be distinguished from them.[6] The Court of Appeal's interpretation of s. 57 of the Trustee Act, 1925 (Eng.)[7] and of *In re New*[8] was not challenged by the appellants and was adopted by the House.

The main speech in the House was delivered by Lord Morton of Henryton.[9] His Lordship's reasons and conclusions were accepted and adopted by the others of their Lordships constituting the majority, namely, the Lord Chancellor, Viscount (then Lord) Simonds[10], Lord Oaksey[11], and Lord Asquith of Bishopstone[12]. The only dissentient was Lord Cohen.[13] Of the reasons for the application to alter the trusts of the Chapman settlement, which his Lordship said were the same in the *Downshire* and *Blackwell* cases,[14] Lord Morton said:[15]

> The trustees and the adult beneficiaries realized that if the trusts of the settlement remained unaltered, the burden of taxation would be very heavy, whereas if the trusts were altered in certain respects that burden would or might be greatly reduced. They therefore applied to the court for an order sanctioning a scheme carrying out these alterations, on the ground that the adult parties approved the scheme and that it was for the benefit of the infant beneficiaries and of any after-born beneficiaries.

His Lordship agreed[16] with the majority of the Court of Appeal's rejection of the argument of counsel for the appellants (which Denning, L.J. in the Court of Appeal accepted) that the Court had power to alter a trust on these grounds. All of the learned Lords, including Lord Cohen, were unanimous on that point. They reaffirmed the general principle that, in the words of Lord Cohen[17], "the court will give effect, as it requires the trustees themselves to do, to the intentions of the settlor or testator as expressed in the trust instrument." To this general principle their Lordships said that there were certain exceptions. These were expounded by the Lord Chancellor as follows:[18]

> There is no doubt that the Chancellor (whether by virtue of the paternal power or in the execution of a trust, it matters not) had and exercised the jurisdiction to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve rights of testamentary disposition and of succession. Equally, there is no doubt that from an early date the Court assumed the power, sometimes for that purpose ignoring the direction of a settlor, to provide maintenance for an infant, and, rarely, for an adult, beneficiary. So, too, the Court had power in the administration of trust property to direct that by way of salvage some transaction unauthorised by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the Court that mere expediency was not enough to found the jurisdiction. Lastly, and I can find no other than these four categories, the Court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the court is in course of executing a trust.

These four exceptions were accepted by all their Lordships, except Lord Asquith who listed only the last three.[19] However, as his Lordship concurred

---

[5] *In re Downshire Settled Estates*; *In re Blackwell's Settlement Trusts* (1953) Ch. 218.
[5a] (1954) A.C. at 462.
[6] *Ibid.*
[7] 15 Geo. V, c. 19; *cf.* s. 81, Trustee Act, 1925 (N.S.W.) Act No. 14, 1925—Act. No. 26, 1942.
[8] (1901) 2 Ch. 534.
[9] (1954) A.C. at 448.
[10] *Id.* at 442.
[11] *Id.* at 447.
[12] *Id.* at 469.
[13] *Id.* at 471-74.
[14] (1953) Ch. 218.
[15] (1954) A.C. at 448.
[16] *Id.* at 451.
[17] *Id.* at 471.
[18] *Id.* at 445.
[19] *Id.* at 469.

in the speech of Lord Morton he must be taken to differ not on the correctness of the principle of the first exception but as to whether it is strictly an exception as opposed to a principle in itself. It was on the scope of the fourth exception, the power to approve a compromise on behalf of infants and possible after-born beneficiaries, that the House disagreed with the majority in the Court of Appeal and that Lord Cohen dissented. With respect to this power, Lord Cohen said:[20]

> My Lords, like the majority of the Court of Appeal, I think that this jurisdiction is not limited to compromises of disputed rights but extends to compromises in the wider meaning of that word, and had it not been that some of your Lordships take a different view, I should have been content to express my agreement with the reasoning of the Master of the Rolls and Romer, L.J. on this point.

The majority of their Lordships thought that the power to approve a compromise was limited to a compromise of disputed rights. Lord Morton, and the other Lords of the majority by adoption, explained this principle as follows:[21] "Where rights are in dispute, and the court approves a compromise, it is not altering the trusts, for the trusts are, ex hypothesi, still in doubt and unascertained."

His Lordship thought that a power to alter ascertained and undisputed beneficial interests under a settlement had only been claimed in the maintenance cases and frequently denied in any other case. The "salvage" cases, his Lordship said, relate to administrative acts by trustees and not to the alteration of beneficial interests.[22] The decision in *In re Trenchard*[23] (relied upon by the majority of the Court of Appeal as the basis for its views on the jurisdiction as to compromises) was viewed by his Lordship as being no more than the sanctioning by the court of a purchase by the trustees of the widow's rights. "It may be", he said[24] "that Buckley, J. stretched the jurisdiction to approve a compromise beyond its proper limits; but I cannot regard him as claiming a new and extensive jurisdiction, the existence whereof had so recently been denied by the judges of the Chancery Division and by the Court of Appeal."

Lord Cohen[25] found himself unable to accept this view of *In re Trenchard*[26] and thought Buckley, J. in that case was not using the term "compromise" in the strict sense, for the legal rights involved had already been decided. "He was, I think, sanctioning a re-arrangement of rights as between tenant for life and remaindermen which could not be carried out without the sanction of the Court because infants were interested".[27]

The writer respectfully agrees with Lord Cohen and the majority of the Court of Appeal that *In re Trenchard*[28] does extend the limits of the "compromise" jurisdiction beyond the approving of a compromise of disputed rights, for as Lord Cohen pointed out,[29] the legal rights involved there were not in dispute. The explanation of Lord Morton that the decision was no more than the sanctioning of a purchase by the trustees of the widow's rights, seems, with respect, to be insufficient and the writer would respectfully adopt Lord Cohen's interpretation of it.[30] The language used by Lord Morton in the passage cited above with respect to that decision, indeed, suggests that his Lordship himself was not entirely content with his own view of it. Viscount Simonds felt no doubt about the effect of *In re Trenchard*.[31] He said:[32] "I should myself regard it as an isolated case in which the court went further than it had hitherto done in giving to the word 'compromise' an unnatural meaning and to itself a juris-

[20] *Id.* at 472.
[21] *Id.* at 457.
[22] *Id.* at 466.
[23] (1902) 1 Ch. 378.
[24] (1954) A.C. at 464.
[25] *Id.* at 472-73.
[26] (1902) 1 Ch. 378.
[27] (1954) A.C. at 473.
[28] (1902) 1 Ch. 378.
[29] (1954) A.C. at 472-73.
[30] *Ibid.*
[31] (1902) 1 Ch. 378.
[32] (1954) A.C. at 446.

diction never before exercised." As *In re Trenchard*[33] cannot, as it seems to the writer, be regarded as a decision approving a compromise of disputed rights, the position must be, it is submitted, that Buckley, J. was in fact purporting to exercise some kind of wider jurisdiction. Whether Buckley, J. was right, however, is another question.

The majority of the Court of Appeal seems to have had some doubts as to whether *In re Trenchard*[34] was consistent with *In re New*.[35] However, it thought it most undesirable to throw doubt on the validity of many past decisions where the principle of *In re Trenchard*[36] had been applied.[37] The House of Lords as the final court of review is, of course, much freer from such inhibitions.

Lord Cohen[38] states the arguments of the majority of their Lordships against the jurisdiction to approve compromises in the wider meaning of that word as follows:

> I. The court's sanction of a compromise in the true sense, when the beneficial interests are in dispute, is not the exercise of a jurisdiction to alter those interests, for they are still unascertained.
>
> II. *In re Trenchard*,[39] which is the foundation of the majority judgment of the Court of Appeal on this point, is not a case of compromise in the broad sense, but is 'no more than the sanctioning by the court of a purchase by the trustees of the widow's rights'.
>
> III. It is impossible to draw a line at which the jurisdiction to sanction a compromise in the broad sense ends or, put otherwise, it is impossible to draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights and alleged unlimited jurisdiction to alter beneficial rights to any extent provided that every person who is sui juris consents and the change is shown to be for the benefit of infants and after-born beneficiaries.

With respect to the first argument Lord Cohen said:[40]

> My Lords, I am not satisfied that the court, in sanctioning a compromise in the strict sense, is not exercising a jurisdiction to alter beneficial rights. It is true that in such a case the right has not been defined, but the right of the beneficiary is a right to that to which, upon its true construction, the will or settlement entitles him. The very essence of a compromise is that it may give each party something other than that which the will or settlement would, on its true construction, confer on him.

The writer would respectfully adopt this passage of his Lordship's speech which seems to dispose of the majority's first argument. Lord Asquith of Bishopstone appears to have held somewhat the same views. When speaking of a compromise of rights which are the subject of doubt or dispute he said:[41]

> It is then often to the interest of all interested parties, adult or infant or unborn, to have certainty substituted for doubt, even if the supersession of a dubious right by an undoubted one may be doing beneficent violence to the terms of the trust: though it is perhaps inappropriate to speak of violence to terms to which different persons attribute a different meaning.

The second argument has already been dealt with and the conclusion reached that it is unsound.

As regards the third argument, Lord Cohen said:[42]

> My Lords, a distinguished member of this house once said, in another connexion, that while he might have difficulty in drawing a line, he had never had any difficulty in deciding on which side of it a particular case fell. I think that a comparison of the facts in *In re Downshire Settled*

---

[33] (1902) 1 Ch. 378.
[34] *Ibid.*
[35] (1901) 2 Ch. 534.
[36] (1902) 1 Ch. 378.
[37] (1953) Ch. at 243.
[38] (1954) A.C. at 472.
[39] (1902) 1 Ch. 378.
[40] (1954) A.C. at 472.
[41] *Id.* at 469.
[42] *Id.* at 473.

> *Estates*[43] and *In re Blackwell's Settlement Trusts,*[44] on the one hand, and the facts in *In re Chapman's Settlement Trusts*[45] which is now before your Lordships, illustrate where the line might be drawn.

His Lordship went on to say[46] that in the former cases, the court was dealing with compromises in the broad sense between tenants for life, on the one hand, and remaindermen, on the other hand; they were not varying the rights *inter se* of the parties whom the testator had placed on an equality. "In *In re Chapman's Settlement Trusts,*[47] on the other hand, there was no question of compromise between tenants for life and remaindermen; the court was being asked to vary the rights *inter se* of a class which the testator had directed should be treated in a particular way." [48]

The writer would, as to this argument, respectfully agree with Lord Morton[49] that the case of *In re Chapman's Settlement Trusts*[50] is indistinguishable from those of *In re Downshire Settled Estates*[51] and *In re Blackwell's Settlement Trusts.*[52] It follows that if the latter cases were rightly decided, the Court of Appeal should have allowed the appeal in the former case. It is true, as Lord Cohen points out above, that the class in *In re Chapman's Settlement Trusts*[53] had been placed on an equal footing and it must be presumed from the reports that at the time of the proceedings before the Court of Appeal and the House of Lords, it was still on such a footing, but it was at all times subject to a contingent inequality on the exercise, for example, by the trustees of the discretionary maintenance trusts in favour of one so that more than his due proportion of the income would be appropriated for his benefit. To this extent, the shares of the others of the class in the accumulated income fund when the time for distribution arose and the income to be paid to each of them after they had respectively attained their majorities, would be depleted. As the maintenance trusts are discretionary, it may be that the trustees will not apply them to the others of the class at all or only to a lesser degree. In the writer's opinion, there was therefore a compromise of the type considered in *In re Trenchard*[54] in the *Chapman* scheme for which approval was sought, in that each beneficiary surrendered his or her prospect of receiving more than the others under the discretionary maintenance trusts in exchange for an unalterable share in the trust income not subject to the obverse prospect of diminution because of the exercise of such trusts in favour of another or others of the class. If the principles of *In re Trenchard*[55] could be applied to the facts of *In re Downshire Settled Estates*[56] and *In re Blackwell's Settlement Trusts*[57] then logically they are capable of application to the facts of *In re Chapman's Settlement Trusts.*[58]

As to those principles, the writer had formerly thought (and this seemed to him to follow from the discussion of that case by the Master of the Rolls in the Court of Appeal[59]) that the compromise contemplated by *In re Trenchard*[60] was one where each party surrendered some interest, right or privilege in property in exchange for some greater or more certain and secure benefit in the same or other property. However, in view of the remarks of Lord Morton[61] that he found it impossible to "draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights, and the alleged unlimited jurisdiction to alter beneficial interests to any extent, provided that every person interested who is *sui juris* assents and the change is shown to be for the benefit of infants and after-born beneficiaries", a closer examina-

[43] (1953) Ch. 218.
[44] *Ibid.*
[45] *Ibid.*
[46] (1954) A.C. at 473-74.
[47] (1953) Ch. 218.
[48] (1954) A.C. at 474.
[49] *Id.* at 462.
[50] (1953) Ch. 218.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] (1902) 1 Ch. 378.
[55] *Ibid.*
[56] (1953) Ch. 218.
[57] *Ibid.*
[58] *Ibid.*
[59] *Id.* at 239-240.
[60] (1902) 1 Ch. 378.
[61] (1954) A.C. at 461.

tion of the problem has been made and the writer now feels compelled to agree with his Lordship that it is impossible to draw such a line and as the existence of the latter jurisdiction was, with respect, rightly denied by the House of Lords and the Court of Appeal, then the existence of a jurisdiction to approve of a compromise, not being one of disputed rights, must likewise be denied.

In both the House of Lords and the Court of Appeal, there was some brief discussion on the extent to which a court should lend a hand in the mitigation or avoidance of taxes with respect to trust property. At the commencement of its judgment, the majority of the Court of Appeal stated[62] 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). Then towards the end of their consideration of the facts of *In re Chapman Settlement Trusts*[63] their Lordships said:[64]

> . . . although, as we have previously said, the fact that a scheme will result in the saving of death duties or income tax is, in itself, no ground for its rejection, the acceptance of the scheme now under consideration might well be followed by the presentation of further proposals of a similar character whenever it should be considered desirable in the future to avoid or mitigate the effect of such changes as may occur hereafter in the existing fiscal legislation. We would point out, therefore, that it is no part of the functions of Her Majesty's courts to recast settlements from time to time, merely with a view to tax avoidance even if they had the power to do so which, in our opinion, they have not.

Lord Morton of Henryton, amplifying this latter quotation from the majority judgment in the Court of Appeal, said:[65] "that if the court had the power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery Division and the legislature."

The effect of these passages, particularly having regard to the reference[66] by the Master of the Rolls and Romer, L.J. to the case of *In re C.W.M.*[67], seems to the writer to be that the court may approve, if necessary, and enforce a scheme whereby property is settled and disposed of and a trust constituted although "its object or effect is or may be to reduce liability for tax (including death duties)", but will not, once property has been properly settled or disposed of, approve of a scheme to re-cast the original settlement or disposition "merely with a view to tax avoidance", when that scheme might or could be followed by other schemes of a like nature to take account of changes made from time to time in the existing fiscal legislation. However, the fact that a scheme re-casting or altering the original trusts *incidentally* results in a saving of tax or death duties, is not a ground for its rejection if it may otherwise be approved. The objection of the courts is therefore, it seems, not so much to the objects of the game of chess as to the game itself and the moves and counter-moves which make it up.

In *Thomson* v. *Thomson and Whitmee*,[68] subsequent to the dissolution of a marriage, the issue of which consisted of a boy and girl, on the grounds of the wife's adultery, the husband made application to the court under s. 25 of the Matrimonial Causes Act, 1950 (Eng.)[69] for a variation of a certain post-nuptial declaration of trust by extinguishing the wife's interests as if she were dead and conferring on the trustees power during the minority of the son to apply a certain proportion of the income to arise from his shares in the capital funds for his maintenance education or benefit and also a power during his minority to apply a further proportion of the said income in effecting and maintaining

[62] (1953) Ch. at 233.
[63] (1953) Ch. 218.
[64] *Id.* at 266.
[65] (1954) A.C. at 468.
[66] (1953) Ch. at 233.
[67] (1951) 2 K.B. 714.
[68] (1954) P. 384.
[69] 14 Geo. VI, c. 25. "The court may, after pronouncing a decree for divorce or for

during his minority a certain endowment policy for his benefit. It was further sought to impose trusts on the trustees under which they should accumulate the balance of the said income during minority. Similar powers and trusts with the exception of the power to effect and maintain an endowment policy, were requested with respect to the daughter's shares in the trust income limited to her minority and spinsterhood.

The matter came before Davies, J. on an application for confirmation of a registrar's report. The application was not opposed except as to costs and although his Lordship on that account at one stage thought it desirable to invite the Queen's Proctor to argue the case, the invitation was not made.[70] These facts seem to explain the absence of any analysis of those parts of the speech of Lord Morton of Henryton in the House of Lords and of the judgment of the majority of the Court of Appeal in *Chapman* v. *Chapman*[71] relative to a proposed variation of a trust with the object of avoiding tax or death duties, the approval of which is sought from a court on behalf of infants and after-born beneficiaries.

As is stated by Mr. Registrar Russell[72] and Davies, J.[73] in this case, it was candidly admitted that the variations sought herein with reference to the children's interests in the trust property were for the avoidance of tax. It is obvious that the application to extinguish the wife's interests in the trust property was not made with this object. For that reason that application has not been considered in connection with and does not enter into the discussion which now follows.

There can be no doubt that s. 25 confers upon the court jurisdiction to make the orders sought. However, as the jurisdiction is a discretionary one, the question arises as to whether the court ought to entertain an application the object of which is the mitigation of taxation or death duties. Regarding this problem, Mr. Registrar Russell said:[74]

> Whether or not it is right that the jurisdiction should be exercised for the avoidance of tax is another matter; but, in my submission, when children are concerned, the jurisdiction, whether in variation of a settlement or in the ordering of maintenance, is exercised so as to adjust or redeploy the financial assets available, so far as can reasonably be done, to the best advantage of the children of the disrupted marriage; and in my submission, where the untimely disruption of the marriage would adversely affect the children on taxation the court would not hesitate to make any reasonable variation of a settlement for the preservation of their interests.

As was noted by Davies, J.[75] there was no dispute that the proposed variations were wholly beneficial to the children. In considering this problem of tax avoidance his Lordship first asked himself the question:[76] "Is this court to hesitate to exercise the power" (under s. 25) "by reason of the fact that one of the incidents of the exercise of the power will be a reduction in the amount of tax which would otherwise be payable to the Crown, consequent on treating the wife as having died?" In view of the admissions of Counsel referred to above, his Lordship's use of the word "incidents" seems, with respect, rather inadequate. He answered his question by saying:[76] "It seems to me that it would be absolutely wrong that this court, if it has the power to resettle these funds, should be deterred from exercising that power on some ground of public policy of this kind. The proposed variation will preserve for the benefit of the

nullity of marriage, enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court may think fit . . . " . *Cf.* s. 56 of the Matrimonial Causes Act, 1899 (N.S.W.).

[70] (1954) P. at 392.

[71] (1954) A.C. 429; (1953) Ch. 218 (C.A.).; dealt with *supra.*

[72] (1954) P. at 389.

[73] *Id.* at 391-92.

[74] *Id.* at 390.

[75] *Id. at* 392.

[76] *Id.* at 393-94.

beneficiaries some of the funds which would otherwise be paid away in tax; and I cannot see that the express power given to the court by s. 25 ought to be abandoned for that consideration."

In the result then both his Lordship and the Registrar appear to have considered (and as it seems to the writer, rightly so) that the fact that an application under s. 25 has for its object the avoidance of tax, is no bar to its success and the determining factor is one of benefit, in this case, to the children of the marriage. However, in their discussion of *Chapman* v. *Chapman*[77] neither his Lordship nor the Registrar made any reference to or analysis of the passages in the reports of that case, referred to above, relative to an application of this type. One would have thought that some consideration would have been given to these passages particularly in the light of the statement of the majority in the Court of Appeal[78] "that it is no part of the functions of Her Majesty's courts to re-cast settlements from time to time merely with a view to tax avoidance *even if they had the power to do so . . .*" .

It might at first have been thought that this passage from their Lordships' judgment would have been a bar to the success of the present proceedings. However, as was pointed out in the discussion of *Chapman* v. *Chapman*[79] above, the disfavour of the courts is directed not against the mitigation of taxation as an object in itself but against the possibility of their being resorted to for relief every time an adverse change is made in the fiscal legislation, so that where that possibility does not exist, a scheme to avoid tax which is otherwise in order may be approved.

The jurisdiction conferred by s. 25 must be exercised once and for all. There can be no reservation in an order under that section for further review, with the possible exception that provision may be made for the eventuality that facts which *then existed* were not brought to the notice of the court when the order was made.[80] That being so, the present scheme is not subject to variation to mitigate the effect of future taxation legislation, and therefore, not being tainted by the evil condemned in *Chapman* v. *Chapman*[81] was rightly approved.

G. J. NEEDS, LL.B., University of Sydney 1952, Solicitor of the Supreme Court of New South Wales.

RECENT CASES ON CONTRIBUTION BETWEEN CO-TORTFEASORS

BITUMEN AND OIL REFINERIES (*Aust.*) *LTD.* v. *COMMISSIONER FOR GOVERNMENT TRANSPORT*

(*With some related cases*)

Since its inception almost every phrase of s.5(1) (c) of the Law Reform (Miscellaneous Provisions) Act, 1946 (N.S.W.)[1] has been the subject of considerable judicial controversy. This sub-section, transcribed from the identical English provision, s.6(1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, (Eng.)[2] provides: "Where damage is suffered by any person as a result of a tort . . . (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .". Intended to remedy the position where one tortfeasor was sued at the plaintiff's discretion and had no right of contribution against the other, it has in its short history demonstrated that it is capable of causing considerable confusion and hardship. In the words of the High Court in *Bitumen and*

---

[77] (1954) A.C. 429. [78] (1953) Ch. at 266.

[79] (1954) A.C. 429.

[80] *Gladstone* v. *Gladstone* (1876) 1 P.D. 442, 444; *Benyon* v. *Benyon and O'Callaghan* (1890) 15 P.D. 29, affirmed on appeal (1890) 15 P.D. 54, 58; *Coutts* v. *Coutts* (1948) N.Z.L.R. 591, 605, 611, 617; and see s. 28, Matrimonial Causes Act, 1950 (Eng.) which makes no reference to s. 25.

[81] (1954) A.C. 429. [1] Act No. 33, 1946 — Act No. 59, 1951. [2] 25 & 26 Geo. 5, c. 30.