DEPENDANTS' RELIEF ACTS

I

INTRODUCTION

"In the history of societies we may see moral convictions gradually taking more and more definite shape in the public mind, and, as they chrystalize, becoming recognized as factors in the legal system and being strengthened with the law's coercive sanctions. Sometimes the law shows an excessive timidity in taking its cue from advancing morality."[1]

A large and ever increasing department of legislation in the twentieth century has consisted of the process of converting moral duties into legal obligations. Year after year, as legislatures in modern democracies continue to grind out new and more complex laws of this character, there rapidly becomes apparent the fact that the State is, first in one field, and then in another, gradually assuming the position of the guardian of the morals of its citizens, gradually invading the innermost details of their lives, seeking to regulate and direct the same. Departments of human relations which were formerly regarded as sacred to the name of morality, from which the legislature was tacitly understood to be excluded, to-day form the subject-matter of complex legislation. John Stuart Mill might perhaps have looked with displeasure upon this process. He who extolled the virtues of individuality and the liberty of the individual, and the benefits in character-building that might accrue therefrom, would probably have warned the legislature away from interference, for example, with a man's "right" to give to whomsoever he pleases the things that he owns. But time passes on, and the old order yields place to a new. The age of Benthamism gave way eventually to that of collectivism. To-day the legislature scarcely hesitates to exercise its omnipotence merely because another stronghold of individualism stands in its way. In the "progressive" march of legislation, no obstacles are so big as to be insurmountable.

The philosophy of legislation in the twentieth century has become a science of human relations, the ideal striven for being to render more equitable the relationships of man to man. In this march of legislation, the field of testamentary disposition has not been left untouched.

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[1] C. K. Allen; *Legal Duties*, 40 Yale L.J. 331 at pp. 366 - 7.

Sir Henry Maine has told us that "few legal agencies are, in fact, the fruit of more complex historical agencies than that by which a man's written intentions control the posthumous disposition of his goods.[2] Early historians commonly asserted the power of testation to be a right conferred by the law of nature. "Their teaching, though all persons may not at once see the connection, is in substance followed by those who affirm that the right of dictating or controlling the posthumous disposal of property is a necessary or natural consequence of the proprietary rights themselves."[3] Archaic law recognized no right of testamentary disposition. "It is doubtful whether a true power of testation was known to any original society except the Roman."[4] The early Roman testament appears to have been the origin of the modern will, but it differed so much from it to be scarcely recognizable as such. Maine goes on to tell us that

> the evidence, however, such as it is, seems to point to the conclusion that testaments are at first only allowed to take effect on failure of the persons entitled to have the inheritance by right of blood genuine or fictitious. Thus, when Athenian citizens were empowered for the first item by the laws of Solon to execute testaments, they were forbidden to disinherit their direct male descendants. So, too, the will of Bengal is only permitted to govern the succession so far as it is consistent with certain overriding claims of the family. Again, the original institutions of the Jews having provided nowhere for the privileges of testatorship, the later rabbinical jurisprudence, which pretends to supply the casus omissi of the Mosaic law, allows the power of testation to attach when all the kindred entitled under the Mosaic system to succeed have failed or are undiscoverable. The limitations by which the ancient German codes hedge in the testamentary jurisprudence which has been incorporated with them are also significant, and point in the same direction.
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> It is the peculiarity of most of these German laws, in the only shape in which we know them, that, besides the *allod* or domain of each household, they recognize several subordinate kinds or orders of property, each of which probably represents a separate transfusion of Roman principles into the primitive body of Teutonic usage. The primitive German or allodial property is strictly reserved to the kindred. Not only is it incapable of being disposed of by testament, but it is scarcely capable of being alienated by conveyance *inter vivos*. The ancient German law, like the Hindoo jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members. . . . ."[5]

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[2] ANCIENT LAW, 10th, ed., 1927, at p. 189.
[3] *Ibid.*, at p. 190.
[4] *Ibid.*, at p. 208.
[5] *Ibid.*, at p. 209 - 10.

The Twelve Tables laid down :

Pater familias uti de pecunia tutelave rei suae legasssit ita jus esto.[6]

Thus was conceded the utmost liberty of testation in the only case in which it was thought possible that testaments could be executed, viz., on failure of children and proximate kindred. Later, we find the praetor coming in to lay down rules limiting the power of disinheriting one's children.

> When modern jurisprudence first shows itself in the rough, wills are rarely allowed to dispose with absolute freedom of a dead man's assets. Whereever at this period the descent of property was regulated by will—and over the greater part of Europe movable or personal property was the subject of testamentary disposition—the exercise of the testamentary power was seldom allowed to interfere with the right of the widow to a definite share, and of the children to certain fixed proportions of the devolving inheritance. The shares of the children, as their amount shows, were determined by the authority of Roman law. The provision for the widow was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands,—winning, perhaps, one of the most arduous of its triumphs when after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in engrafting the principle of dower on the customary law of all western Europe. Curiously enough, the dower of lands proved a more stable institution than the analagous and more ancient reservation of certain shares of the personal property to the widow and children. A few local customs in France maintained the right down to the Revolution, and there are traces of similar usages in England; but on the whole, the doctrine prevailed that movables might be freely disposed of by will, and, even when the claims of the widow continued to be respected, the privileges of the children were obliterated from jurisprudence.[7]

Finally we arrive at the stage of almost complete liberty of testation. How the law of England came to recognize this power of unrestricted testamentary disposition has been regarded by some historians as the product of mere accident. Pollock and Maitland have said :

> Had our temporal lawyers of the thirteenth century cared more than they did about the law of chattels, *wife's part, bairn's part and dead's part* might at this day be known south of the Tweed.[8]

Be that as it was, by an Act passed in the year 1692 entitled *An Act that the Inhabitants of the Province of York may dispose of their Personal Estates by their Wills, notwithstanding the Custom of that Province,*[9] it was declared

[6] For a very complete review of the Roman law on this whole subject, see BUCKLAND, A TEXT BOOK OF ROMAN LAW, 1921, pp. 318 *et seq.*

[7] ANCIENT LAW, 10th ed., 1927, at pp. 239 - 40.

[8] HISTORY OF ENGLISH LAW, 2nd ed., 1911, Vol. II p. 356.

[9] 4 William and Mary, c. 2.

> THAT from and after the Six and twentieth Day of March, One thousand and six hundred ninety and three, it shall and may be lawful for any Person or Persons, inhabiting or residing, or who shall have any Goods or Chattels within the Province of York, by their last Wills and Testaments, to give, bequeath, and dispose of all and singular their Goods, Chattels, Debts, and other Personal Estate, to their Executor or Executors, or to such other person or persons as the said Testator or Testators shall think fit, in as large and ample a manner, as by the Laws and Statutes of this Realm any Person or Persons may give and dispose of the same within the Province of Canterbury or elsewhere; AND that from and after the said Six and twentieth Day of March, One thousand six hundred ninety and three, the Widows, Children and Other the Kindred of such Testator or Testators, shall be barred to claim or demand any Part of the Goods, Chattels, or other Personal Estate of such Testator or Testators, in any other manner than as by the said last Wills and Testaments is limited and appointed; any Law, Statute, or Usage to the contrary in any wise notwithstanding.[10]

At this stage the will is regarded as conferring practically complete power to divert property from the family, or to distribute it in such uneven proportions as the fancy or good sense of the testator may dictate. This power is still subject, in some jurisdictions, to the wife's right to dower in real property, while, in other jurisdictions, this latter right has been abolished, leaving complete unrestricted power of testamentary disposition.

But, just as in ancient Rome following what at that time seemed to be the drastic change brought about by the Twelve Tables, whereby a testator might disinherit his family there arose rules limiting such disinherison, so in modern times, by virtue of Dependants' Relief Acts, the legislature has intervened to limit, in certain respects, the absolute liberty of testamentary disposition.

Dependants' Relief Acts is a term which signifies in the field of testamentary disposition the process above referred to which is now at work in the realm of legislation converting moral duties into legal obligations. It started in New Zealand, when there was enacted in that Dominion *The Testator's Family Maintenance Act*,[11] and has continued to spread thereafter to other jurisdictions. Under the legislation thus enacted there is invariably placed on the shoulders of a judicial tribunal the burden of deciding certain moral issues. This is to some extent a novel role to be played by courts of law, and has not been accepted by the latter without some misgiving in some quarters.

[10] *Ibid.*, Sec. 2.
[11] 64 Vic., c. 20 (N.Z.)

Section 2 of *The Testator's Family Maintenance Act, 1900*, which has since been carried into the Family Protection Act, 1908[12] as Section 33 thereof, provides that

> Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband or children, order that such provision as to the said Court shall seem fit shall be made out, of the estate of the said deceased person for such wife, husband or children; provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section.[13]

The duty which devolves upon the courts under this legislation has been variously described. As one judge has put it,

> The Legislature has intrusted to the Court the duty of seeing that a Testator does not sin in his grave by leaving those whom nature has made dependent upon him unprovided for.[14]

A similar duty devolved upon the courts in ancient Rome, when the *Querela Inofficiosi Testamenti*, "the Plaint of an Unduteous Will", was devised, for the purpose of bringing about a reinstatement of the issue in inheritances from which they had been unjustifiably excluded by a father's testament.[15] Another court, speaking of its duty under the New Zealand Act, has stated

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will.[16]

And again, by another member of the same court,

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[12] 1908, New Zealand Statutes, No. 60.
[13] 64 Vic. c. 20 (N.Z.), s. 2.
[14] *In Re Rush, Rush* v. *Rush* (1901), 20 N.Z.L.R. 249.
[15] See ANCIENT LAW, 10th ed., 1927, at p. 231.
[16] *In re Allardice, Allardice* v. *Allardice* (1909), 29 N.Z.L.R. 959, at 972 - 3.

> the duty cast upon the Court by this Statute is one of extreme difficulty and delicacy, in the discharge of which the most careful and impartial men may well differ.[17]

In the beginning, the courts consistently regarded such legislation as particularly extraordinary, and were very loathe to extend by "judicial legislation" the jurisdiction granted to them by statute, as they were so often wont to do in other fields. Thus it was early decided that the statute would be construed quite strictly,[18] and that the powers granted by it to the court must not be used for the purpose of recasting a testator's will,[19] but purely for the narrow purpose of securing a sufficient provision for the proper maintenance and support of those persons enumerated in the Act, who have been left by the testator without proper and adequate means of support.[20]

All subsequent Dependants' Relief Acts have been either patterned along the lines of the New Zealand Act or have received their inspiration therefrom. So that the judicial interpretation of that Act can be and has been resorted to for assistance in the interpretation of similar Acts in other jurisdictions. It is therefore proposed in this article to review briefly the manner in which the courts have proceeded in the interpretation and administration of the New Zealand Act, and in subsequent articles to discuss similar legislation elsewhere, particularly in Canada, and to conclude with a critical evaluation of the legislation as a whole.

II

New Zealand

When *The Testator's Family Maintenance Act, 1900*,[20A] was enacted in New Zealand, the courts were not altogether unacquainted with the problems which would be likely to confront them in the application of the provisions of the statute. As far back as 1877, there had been on the statute books of that dominion an Act entitled *"The Destitute Persons Act"*[21], by virtue of which the courts were empowered to make orders

[17] *Ibid.* at 973.
[18] See *Handley* v. *Walker*, *infra*.
[19] See *Munt* v. *Findlay*, *infra*.
[20] *Ibid.*
[20A] See Wiren, *Testators' Family Maintenance in New Zealand* (1929), 45 L.Q.R. 378.
[21] 1877, New Zealand Statutes, no. 44, later revised in 1894, by 58 Vict., no. 22.

against certain defined classes of people for the maintenance of destitute persons.[22] Tucked away in that Act, and later extended by subsequent statutes, were to be found sections empowering the courts to make such orders against the executor or administrator or other legal representatives of a deceased person's estate.[23] Be that as it was, nevertheless, *The Testator's Family Maintenance Act, 1900*, was a much more definite departure from the then existing principle of absolute liberty of testamentary disposition than anything that had gone before it. When it was attempted to be argued that this statute was merely an extension of the provisions contained in *The Destitute Persons Act*, such contention was promptly rejected by the court.[24] The far-reaching and radical character of the changes involved in and contemplated by the Act were not to be minimized in such a backhanded manner. The courts were clearly aware of the serious and somewhat onerous nature of the powers granted to them and received their new duties somewhat unenthusiastically. Common law courts, using that term in its broadest sense, bred upon the distinction between law and morals, and the separation of one from the other in the interpretation and administration of the law by judicial tribunals, could not very well be expected to react in any other fashion. Thus, we find that some of the utterances respecting the duties devolving upon the courts under the Act are perhaps tinged with a secret wish that the courts had been left to their 'proper' field of applying 'strict law.'[25]

Perhaps the first application to come before the courts under *The Testator's Family Maintenance Act* was that of *In re Rush: Rush* v. *Rush*.[26] In that case a testator left an estate valued at not less than £1,500 net. He left him surviving a widow and six adult children by a former marriage. Of the latter the youngest was forty years of age; two were sons and four daughters; three of the daughters were married, one a widow, several of them were in poor circumstances, but none was destitute. The testator's widow was sixty-one years of age, and there was medical evidence that she was not capable of earning her living by manual labour. She was possessed of about £95, but had no other property. The only provision made for her by the will was a legacy of £200. On an applica-

[22] 58 Vict., no. 22, sections 4 - 40.
[23] *Smiley and Another* v. *Murray* (1897), 16 N.Z.L.R. 327.
[24] See per Stout C.J. in *In re Allardice, Allardice* v. *Allardice* (1909 - 10), 29 N.Z.L.R. 959 at p. 969.
[25] See, for example, the language used by Chapman J. in *In re Allardice, Allardice* v. *Allardice, supra*, at p. 964.
[26] (1901), 20 N.Z.L.R. 249.

tion by her under *The Testator's Family Maintenance Act, 1900*, the court had no hesitation in finding that it had been clearly established by the evidence that the testator had not made adequate provision for the maintenance of his widow, the applicant. That was a relatively simple task. The real difficulty arose, however, when the court was required to decide and do what the testator ought to have done. The situation in this case was that the testator had reduced what the widow's legacy might have been by increasing the legacies to the children of his first marriage. The application here was therefore contested by these children. It was argued on their behalf that the protection of the statute was intended to apply as much to the testator's children as to his widow (a contention which, it is submitted, appears to have been quite sound, having regard to the wording of the sections as enacted) and as some of these children were in poor circumstances, they ought to be considered equally with the widow in determining whether the testator had made adequate provision for the maintenance and support of the latter. The court however tackled the question from another angle; Edwards J., declared :—

> The position of the widow differs, however, from that of the testator's adult children both in morals and in law. During the testator's lifetime he was bound by law to support his wife in a manner suitable to their station in life. If he had deserted her, and had refused to support her, an order to the extent of £1 per week could properly have been made against him by a magistrate under the provisions of "The Destitute Persons Act, 1894". By appropriate proceedings in this Court she might in such case have obtained such allowance as this Court thought just. On the other hand, the testator was not under any legal obligations to support his adult children unless they came within the provisions of "The Destitute Persons Act, 1894"—and that is not the case here. Under that Act an order could be made in favour of the widow, if destitute, against the executors of the deceased, if they had assets of the testator in their hands as executors. The difficulty however of obtaining such an order was made apparent in the case of *Smiley* v. *Murray* (16 N.Z.L.R. 327). I think that the Act of 1900 should be treated, in practice, at all events, as being primarily for the benefit of those who had a claim[27] against the testator if he were living. I do not say whether or not the statute is limited in its application to these persons, but, however this may be, I certainly consider that where the provisions of the statute of 1900 are invoked such persons are entitled to preference over those who may possibly come within the statute, but who would have had no claim against the testator if he were living. The Legislature has intrusted to the Court the duty of seeing that a testator does not sin in his grave by leaving those who nature has made dependent upon him unprovided-for; and this duty is properly

[27] Moral or legal?

> discharged by providing in the first place for those who were dependent upon the testator, and to whom the law gave rights against him in his lifetime. Adult children capable of supporting themselves may come within the statute of 1900. As to this I express no opinion. It would however, I think, require a very strong case to justify the Court in making an order under that statute in favour of such a child overriding the will of the testator. The testator's widow had therefore the first claim upon him.[28]

In discussing the extent of the widow's claim upon the testator, the court declared

> that that claim must be considered to be at least as great as she would have had against him if he had failed to perform his duty of maintaining her in his lifetime.[29]

The court goes on to find that in a situation such as this, were the testator alive, a magistrate would have ordered payment to the applicant of the full sum within his jurisdiction — namely £1 per week.

> To that extent, therefore, the applicant must be provided for out of the testator's estate.[30] The testator's duty, however, was merely to provide for an adequate maintenance for his wife during her lifetime. It did not extend to providing her with a fund which she could give to others at her death. I shall therefore make it a condition that the legacy of £200 given to the applicant by the testator's will shall be applied towards providing the annuity for her.[31]

In re Rush marked the first excursion by a court into the field of interpretation of the new Act. If comment is justifiable at this point, it might perhaps be submitted that, while in one breath the court reaffirmed its allegiance to the principle of the absolute liberty of testamentary disposition and the inviolability of the will, yet in the following breath it proceeded by a mighty flourish of its power to take away a specific legacy given by the testator to the very person whom the statute is designed to assist and to substitute therefor an annuity. Secondly, it is doubtful whether the court drew any very clear line of demarcation between legal and moral duties. This is rather a serious error in a situation such as this, where the court is called upon to sit in judgment upon moral issues. Thus, when deciding that the court must give preference to those persons who would have had a "claim" against the testator if he were living, the court is definitely referring to a *legal* claim, not necessarily a

[28] (1901), 20 N.Z.L.R. 249, at pp. 253 - 4.
[29] *Ibid.*, at p. 254.
[30] *Ibid.*, at p. 254.
[31] *Ibid.*, at p. 254.

moral claim, and is declaring that, if need be, it would give preference to a person backed with a legal claim over another who has no more than a moral claim, however great it may be, behind him. As a definition of a principle to be followed this might perhaps have been quite a satisfactory manner in which, in many cases, to avoid the difficulty of deciding upon the relative moral value of contending claims upon a testator's bounty.

But the court immediately goes on to speak of the duty intrusted by the legislature to the court of seeing that a testator does not sin in his grave by leaving those who nature has made dependent upon him unprovided for; (thus clearly referring to moral claims). Nevertheless the court proceeds to say that that duty is properly discharged by providing in the first place for those who were dependent upon the testator *and to whom the law gave rights against him, in his lifetime;* (a curious combination of legal and moral claims). If the statute contemplates, as it appears to do in very unmistakeable language, the prospect of the court deciding upon moral issues, then it would seem to be erroneous to hamper its unfettered judgment by a series of priorities between legal and moral claims.

It may be, of course, that the judgment of the court in the situation referred to *In re Rush* was perfectly right and proper on the grounds of pure ethics. It is submitted, however, that the reasons advanced by the court are not entirely convincing. The difficulty probably arose from the fact that the court was seeking reasons in law for its judgment, whereas under the statute, and rightly so, the only reasons that need have been adduced were moral reasons. To give priority to a claimant merely because during the testator's lifetime his claim would have been enforced by law, is clearly not necessarily good morals. It postulates far too confident a presupposition that the law is morally right than any lawyer will care to admit in the present state of the development of the law.

To sum up, it is submitted that the court was given by the statute in question an unfettered discretion to decide upon certain issues, namely,—(1) Having regard to all the circumstances, including the character and conduct of the survivors, has the given testator made adequate provision in his will for the proper maintenance and support of his or her wife, husband or children? (2) If not, what provision shall now be made by the court out of the estate of the deceased?

Each of these issues necessitates the weighing of moral values, moral rights and moral duties, and, it is submitted, that the answer to either of these questions has nothing whatever to do with whether the law would enforce a claim against the testator if he were living.

In the next reported case to be noted, *Handley* v. *Walker, et al*,[32] we find the court again affirming, per Stout C.J.,

> that the statute is not an Act to modify or set aside unjust wills, but is meant only to provide for maintenance of persons the testator was bound to maintain.[33]

That was a case where a daughter of the testator had a husband who had not in fact maintained her and she was herself in ill health and unable, apparently, to maintain herself. The testator left her nothing out of an estate of about £1,050, leaving it all to three other children, all being however of small means.

The court, in purporting to declare the law, proceeds to whittle down the principle and spirit of the Act :

> *The Testator's Family Maintenance Act* was, no doubt, designed to enable this Court to make proper provision for those a testator was bound to maintain— the wife or husband or children. The applicant comes within the terms of the Act; and there may be cases in which, a wealthy father dying and leaving a will, but not making any provision for his children, if they were poor and unable to support themselves the Court would order that a proper provision be made for them out of his estate, even if they were adults. If, however, the estate is small, and the child or children are adults, and have other persons on whom they can rely for maintenance if they are unable to maintain themselves, I doubt if the Court should interfere.[34]

But it is interesting to note that in spite of this declaration the court finally ordered that in view of a list of "special features" in this case[35] certain provision should be made for the applicant. The nature of the exact terms of the order is not apparent from the report.

In the case of *Munt* v. *Findlay*,[36] it was attempted to be argued that the testator was not domiciled in New Zealand at the date of his death and that therefore *The Testator's Family Maintenance Act, 1900,* could not apply. But the court found that the testator was actually domiciled in New Zealand.

[32] (1903), 22 N.Z.L.R. 932.
[33] *Ibid.*, at p. 933.
[34] *Ibid.*, at p. 933.
[35] *Ibid.*, at p. 933.
[36] (1905), 25 N.Z.L.R. 488.

> If, therefore, the right of this Court to make an order depended on the testator being domiciled in New Zealand, I am of opinion that there is evidence of his New Zealand domicile. Further, I repeat that the will was proved here, and this Court has, therefore, full control over the disposition of the testator's property."[37]

In this case, the testator had died leaving five sons as his only survivors, the three plaintiffs and two sons whose whereabouts were not known. He left property in New Zealand of the value of between £4,000 and £5,000 and about £1,600 of property in England. Under his will and codicil the whole of his property was left to nephews and nieces, and nothing was left to his children. Two of the plaintiffs (sons) had received from the testator in his lifetime property valued at between £750 and £1,000. They were comparatively young men and did not have large families. But the third son had received nothing from the testator in his lifetime. He was a man of forty-five with a family of five children to support. He was a partial invalid through being ruptured, and was not able to work at his trade, that of a cabinet maker, as well as an ordinarily strong man could.[38] The court declared that

> the evidence shows that George Henry Munt (the third son) was in a position to require assistance, and that he comes within the terms of the Act.[39]

As to the other two sons, they were both young and vigorous men in constant employment. They each had shares in a business which was paying dividends.

> Under such circumstances I do not think that they come within terms of the Act. They have provision for their maintenance now, and unless this Act is to be so construed as to enable the Court to grant maintenance to children whatever their means may be, they do not come within the terms of the statute. The will may be, and no doubt is, unfair to them, but, as has been said on more than one occasion, this Court has not the authority to interfere within the decision of a testator in his power of disposing of his property, save only if his wife or children require maintenance.[40]

In the result the court gave to George Henry Munt an allowance of £1,000, and dismissed the applications of the other two sons.

By the time the case of *In re Cameron*[41] fell to be decided New Zealand judges had commenced to ponder rather seriously

[37] *Ibid.*, per Stout C.J., at p. 492.
[38] *Ibid.*, at p. 490.
[39] *Ibid.*, at p. 492.
[40] *Ibid.*
[41] (1905), 25 N.Z.L.R. 907.

the question of what standards ought to be followed in exercising the judicial discretion under the Act. Here the testatrix had left to be distributed about £550, less costs of administration. She left her surviving two daughters. In her will she mentioned only nephews and nieces. The instant case was an application by one of the surviving daughters. She showed by affidavits that she was in bad health, that her husband was in receipt of only about £2 2s. per week wages, that she had two children, and that it was impossible for her to get medical attendance and comforts which were necessary in her then state of health, and that she was not even able to do her work. The court made an order allowing the applicant the sum of £350, about two-thirds of the estate. In explaining how this figure was arrived at, the court pointed out :

> To those who are acquainted with the Scottish law it will be seen that this is giving what is called the dead man's part in accordance with the dispositions of his will. Of course, that is no guide under the *Testator's Family Maintenance Act*, but I am only pointing out that that would be a fair distribution of the testator's estate in Scotland, where his domicile of origin was. Our law says, "The Court may at its discretion . . . . . order that such provision as to the said Court shall seem fit shall be made out of the estate of the said deceased person," etc. I think, under all the circumstances, that this a proper allowance to make her daughter.[42]

In *In re Bleasel (Deceased)*,[43] the testator had died leaving him surviving a widow and six children. He left an estate worth about £6,000, yielding a revenue of £320 per annum. By his will the testator left nothing to his wife, but left the whole of the income from his estate to a certain Miss Ellis. At the death of Miss Ellis, or her marriage, the property was to go to the testator's children in equal shares. Thus each child would get £1,000. Upon a previous application by the widow she was allowed the sum of £2 per week during her life. This was an application by a daughter and a son, both of very weak health, the son labouring under a permanent affection of the chest. Both were unable to do anything but very light work, and even the latter, only at intervals. The court (per Stout C.J.) came to the conclusion that relief should be granted and proposed to allow each of the applicants an immediate income out of the estate. To the son, however, the court appears to have acquired a dislike, by reason of the fact that "in the past his character has not been above reproach. He has apparently

[42] *Ibid.*, per Stout C.J. at p. 908.
[43] (1906), 25 N.Z.L.R. 974.

been fond of attending race-meetings, and on several occasions has been drunk."[44] In consequence thereof it is interesting to note the contents of the order of the court as finally issued :

> The income of the estate is estimated to be £320 a year. Deducting from that sum the sum of £104 a year, which is payable to the widow, £216 is left. I propose that Miss Ellis should have the next charge on the estate, for the sum of £150 per annum, and that balance of £66 a year should be paid as follows: £36 a year to the daughter and £30 a year to the son, in monthly payments. This will give the daughter £3 per month, and the son £2.10s. per month. With this assistance they should be able to maintain themselves. As to the son, I propose that there should be a charge not exceeding £250 on his remainder in favour of Miss Ellis if such sum shall have been paid to him in monthly payments. If such sum shall not have been paid, then there should be a charge for the amount that has been paid. I do not think it would be equitable to make any charge on the daughter's remainder, because it seems to me that she is weakly. Though she may grow stronger than she is now, she is of a weak constitution, and £1,000 will not be too large a sum to provide for her maintenance in later life.
>
> I may add that if the income of the estate should through any cause be reduced below £320 the sums payable to the claimants must, proportionately with Miss Ellis' allowance, be reduced. If the estate yields a larger income, the increase will go to Miss Ellis alone.[45]

One interesting point illustrated by this case is the manner in which the court exercised its power to weigh an applicant's character and conduct and reward him more or less in line with his deserts.

In the case of *Nosworthy* v. *Nosworthy*,[46] the court summarily cut down the operation of the Act by declaring that the *Testator's Family Maintenance Act, 1906*, gave no power to the court to deal with property bequeathed by a testatrix to her own children under a special power of appointment limited to her children.

In *In re Brown (deceased), Brown* v. *McCarthy, et al.*,[47] the court, per Edwards J., practically recast the testatrix's will when they ordered that the trustees of the will should stand possessed of the whole of the real estate and the whole of the residuary personal estate in trust to permit the plaintiff to use, occupy, and enjoy the same during his natural life, subject to his paying and discharging the interest on the existing mortgage, rates, etc., and to use the residuary personal estate for the

[44] *Ibid.*, at p. 975.
[45] *Ibid.*
[46] (1906), 26 N.Z.L.R. 285.
[47] (1906), 26 N.Z.L.R. 762.

purpose of carrying on the business of the farm, and maintaining and educating the infant children. While thus recasting the testatrix's will, the court seeks (unnecessarily, it is submitted) to find some justification for doing so, and Mr. Justice Edwards declares :

> It is satisfactory to me that in making that order there is every reason to suppose that I am not reversing the intentions of the testatrix, but I am doing what there is practically no doubt the testatrix would herself had done if she had made a will under competent advice, shortly before her death.[48]

It is submitted that this utterance is diametrically opposed to declarations made by the court on several previous occasions,[49] that the court would not use the statute to recast a testator's will. What the court in this case is saying is : "True, we are recasting the testatrix's will, but we feel justified in so doing because this will more correctly carry out the intentions of the testatrix than did the will which she actually signed, and which it is to be presumed she understood and intended to be her last will." This argument rings with obvious inconsistency. Except where affected by statute, and certain other well-defined rules, our law of Wills is still based on the principle that posterity will carry out its sacred trust to a testator and will, after his death, enforce his directions as contained in his last will. The testator's intentions are to be gathered from the will, and where the wording is clear, and unambiguous, the same will govern, regardless of whether a subsequent court is of the opinion that the words used do not carry out the testator's intentions.

In the present case there was no suggestion of ambiguity in the words used. Nevertheless, the court, in the apparent exercise of its powers under the *Testator's Family Maintenance Act* proceeded formally to recast the testatrix's will. Now, it is to be admitted that any exercise of the court's discretion under the aforementioned statute is, in effect, a modification or a recasting of the testatrix's will, and to that extent is an interference with the testamentary wishes of the testatrix. On the other hand, the principle laid down by the courts from the very beginning was such as to convey the impression that, first and foremost, the rules of unrestrained testamentary disposition and of the strict inviolability of the will, were still the dominant rules, notwithstanding the statute. Upon these dominant rules

[48] *Ibid.*, at p. 764.
[49] See, for example, Stout C.J., in *Handley* v. *Walker*, *supra*, at p. 933.

the legislature had engrafted by the statute in question a certain limited discretion given to the courts in those certain exceptional cases contemplated by it. That discretion was not to be exercised with a view to recasting the will of the deceased, but simply to rectify a failure to provide maintenance for certain persons.

But, at the date of *In re Brown*, it would appear that the courts had gradually become accustomed to the new statute and less fearful of the consequences. So, in effect, though perhaps not in words, they proceeded to throw overboard the dominant rules by which they had originally tried to cut down the scope of operation of the statute, and often swung to the very opposite extreme of writing new wills for testators after their decease.

In *Rowe* v. *Lewis, et al.*[50] the testator had left property to the value of £25,900 and gave his daughter, the applicant, a life estate in a property let for £150 per year, but such life estate was made subject to a life estate in favour of the widow of the testator. No provision was made for the present needs of the applicant. The court (per Chapman J.) in view of the applicant's position, her past requirements, and the testator's fortune, and other circumstances, ordered that the daughter should be made an allowance at the rate of £1 10s. per week until the death of the testator's widow. In delivering judgment, Chapman J. refers to the fact that the "plaintiff and her husband had both reached the time of life when it became the duty, morally speaking, of the testator to consider her case, and this he has not adequately done."[51]

A curious result of the exercise of the discretionary power of the court on moral issues came out in the case of *Worthington* v. *Ongley and Kelly*,[52] where a testator left an estate valued at £500, and by his will demised £100 each to his two illegitimate children, and the residue to his widow and legitimate children. Application was made by the widow on behalf of herself and her children for an order that the £200 should be taken away from the illegitimate children and paid to her and her children. It was argued in support of her claim that legitimate children have a prior claim to support than illegitimate children. But the court declared that the testator had a moral duty to support his illegitimate children.[53] In the absence of proof that the illegitimates had support from some other quarters the court declined to make an order.

[50] (1907), 26 N.Z.L.R. 769.
[51] *Ibid.*, at p. 772.
[52] (1910), 29 N.Z.L.R. 1167.
[53] Ibid., per Stout C.J. at p. 1167.

In 1909–1910 there came before the New Zealand courts the case of *In re Allardice, Allardice* v. *Allardice*.[54] The matter first came before Judge Chapman on an application by way of an originating summons under section 33 of *The Family Protection Act, 1908*.[55] A considerable estate was left by the testator, and the contest here was as between children of a first marriage and the wife and children of a second marriage. The testator by his will left all to the latter to the exclusion of the former. The present application was therefore made on behalf of the former, consisting of three married daughters and two unmarried sons, all above the age of thirty and under the age of thirty-eight. The question before the court was "whether the Act has any application whatever to able-bodied sons who are capable of supporting themselves in the condition in which they have hitherto lived, and who have done so ever since they came to man's estate, or to married daughters who never have been dependent on their father since they were married, whose husbands are capable of supporting them in the future as they have supported them in the past."[56] Chapman J. proceeded as follows :

> In determining the question I must take my guidance exclusively from the statute, to the terms of which I will presently refer. In the first place I must point out that no system of law confides to or imposes upon its Courts the task of attempting to make a just distribution or redistribution of the estates of testators or intestates among beneficiaries chosen by itself. In some systems the State has denied, limited or withdrawn testamentary authority, but only to replace it by some fixed law. There are advocates for the maintenance of parental control by means of the English rule of plenary testamentary authority, and there are those who prefer a system which secures a preference to the first-born male, or one which enacts equality of distribution, but there is no system that I know of that is not guided by some certain law. Even the Czar of Russia in his absolute rule limits his authority over the property of his subjects to a power to substitute his will for theirs within the Imperial family only: *In the Goods of Prince Oldenberg*, 9 P.D. 234. On this question I agree with the observations of the Chief Justice in *Wilkinson's Case* (24 N.Z.L.R. 156) adopted by Williams, J. in *In re Russell, Russell* v. *Dunn* (9 Gaz. L.R. 509).
>
> Now it seems to me quite plain that I am asked either to redistribute this man's estate according to my ideas of justice, to be derived from a mere consideration of the positions in which I find the several children, or to embark on the far more difficult task of doing so after duly weighing this mass of evidence. I do not think

[54] (1909 - 10), 29 N.Z.L.R. 959.
[55] 1908, New Zealand Statutes, no. 60.
[56] (1909 - 10), 29 N.Z.L.R. 959 at p. 964.

> that the statute contemplated that I should undertake this by either of these means. . . . . This claim relates to children; but in what sense does the statute refer to children? I can only conceive that it refers to children for whose proper support there is at the time of the testator's death no adequate provision. On this subject I agree with the observation of Sir R. Stout, C.J., in *Munt* v. *Findlay* (25 N.Z.L.R. 488, 492). As to the testator's sons, I dispose of their claims by saying that they are at least able-bodied labourers, as their father was before them, that they have no burdens, and that they are able to maintain and support themselves in the future exactly as they have done in the past. As to the daughters, my natural inclination would be to try and rectify what I consider to be an injustice that has been done to them, but as I have to consider not my inclination but the meaning of the statute, I can find no excuse for so doing. I find nothing in the decided cases which leads me to think that I have to consider what the father ought in justice to have done beyond the standard which I derive from the statute.[57]

An order was accordingly refused. The applicants appealed to the Court of Appeal. On the appeal, Skerrett K.C., arguendo, in reply, used the following language :

> The foundation of the statute is the moral obligation a parent owes to children to provide for them out of his estate, unless there is some valid reason for not so doing.[58]

In the reasons for judgment given by the judges of the Court of Appeal, we find some very useful observations upon the statute. Stout C.J. declared :

> There have been many cases decided under the Acts prior to the Consolidation Act of 1908 in which rules have been laid down by the Supreme Court. In my opinion these rules may be summarized as follows: 1. That the Act is something more than a statute to extend the provisions in the Destitute Persons Act. 2. That the Act is not a statute to empower the Court to make a new will for a testator. 3. That the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of "wife, husband, or children" where adequate provision has not been made for their proper maintenance and support by the will of the testator. 4. 'That—in the case of a widow, at all events if not in the case of a widower—the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves.
>
> . . . . . When should children be given maintenance and support? I do not know if any attempt has been made to formulate a rule for the Court's guidance, or if a rule can be formulated. The Act has laid down no rule, and left the decision in every case to the discretion of the Court. What, then, has the Court to consider? Firstly, I think, the means of the children. "Support", it has been held—at

[57] *Ibid.*, at pp. 964 *et seq.*
[58] *Ibid.*, at p. 968.

all events, in the case of a widow—does not mean merely having a supply of food and clothing. It means, it has been held, such kind of maintenance as the widow during the life of her husband has been accustomed to. The matter that should be considered, both as to widow and children, is how she or they have been maintained in the past. A child, for example, that has been living on a father's bounty could not be expected to begin the battle of life without means. A child, however, who had maintained her or himself, and had perhaps accumulated means might well be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid. The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left.[59]

The Chief Justice came to the conclusion that the daughters should have provision made for them out of the testator's estate, but the sons being physically able to look after themselves, should not. Edwards J. concurred :

In the present case I am satisfied that it has been established that the testator has been guilty of such a breach of the moral duty of a just, if stern, father towards his daughters, as to warrant the order which the Court now makes.[60]

Cooper J. stated :

. . . . . But the Court has no jurisdiction to do more than to secure an adequate provision according to the condition in life of the children, measured to some extent by the estate left by their parents, and guarding also the interests of those who have an equal claim upon the particular testator but who have been provided for in the testator's will. I repeat that we have no power to recast the testator's will or to redress inequalities or fancied injustice, but only to secure sufficient provision for the proper maintenance and support of those children of the testator who have been left by him without proper and adequate means of support. This general rule is, I think, the governing principle. Its application depends upon all the circumstances of each particular case.[61]

On appeal to the Judicial Committee of the Privy Council, the judgment of the Board was delivered by Lord Robson :

Their Lordships see no ground upon which it can be said that the Court of Appeal have not properly exercised the discretion with which they are entrusted. . . . . Nor do we see any reason to differ

[59] *Ibid.*, at p. 969.
[60] *Ibid.*, at p. 973.
[61] *Ibid.*, at p. 975.

from the learned Judges of the Court of Appeal in the general view they take as to the proper scope and application of the powers conferred upon them by the Act.[61A]

In *Colquhoun* v. *The Public Trustee*,[62] Chapman J. declares :

> Under our law the owner of property retains the testamentary liberty which has so long existed as one of our traditional institutions, except so far as it is cut down by the statute in question. The powers conferred by that statute are to be exercised for the purpose disclosed by it only. The case of *Allardice* v. *Allardice* decided by the Court of Appeal, which stood the test of a further appeal to the Privy Council, shows that consideration must be extended to the claims of those who have not been dependent on the testator in the past, and could not have claimed relief from him in his lifetime. Here the testatrix was separated from her husband. I prefer not to go into the reasons for that separation . . . . . they do not make out a clear case of misconduct such as to wholly deprive him of all right to relief. I am not sure that even if these reasons were more fully made out to the disadvantage of the plaintiff, I ought to consider that that circumstance had placed him beyond the scope of the Act. In the judgment of the testatrix his conduct was such, or the plaintiff's earning powers were such, that she left him £100. out of a total estate of about £1,500., and considered that she had in so doing discharged her whole duty to her husband. I do not think that she has by so doing made adequate provision for his proper maintenance and support.
>
> . . . . . I cannot say that the Plaintiff has shown any immediate relief, but the statute is not limited to that. If the Court finds that in all probability, owing to conditions already apparent, he will require assistance at a future time, it cannot be said that the testatrix has made adequate provision for his proper maintenance and support.[63]

In *Plank* v. *Plank*,[64] Cooper J. pointed out :

> The duty, however, which I have to consider, under the statute is that which her deceased husband owed to her. It does not mean merely a provision for a supply of food and clothing, but it was a duty to provide for some such kind of maintenance as the widow during the life of her husband had been accustomed to, bearing in mind, of course, the value of the property owned by the husband, and the means of the husband at the time of his death. Taking these circumstances into consideration, the deceased clearly did not make adequate provision for the proper maintenance and support of his wife.[65]

In *Geen* v. *Geen*,[66] a married woman died leaving an estate valued at about £400, which she divided by her will amongst

[61A] *Allardice* v. *Allardice* [1911] A.C. 730 at p. 734.
[62] (1912), 31 N.Z.L.R. 1139.
[63] *Ibid.*, at p. 1139.
[64] (1913), 32 N.Z.L.R. 898.
[65] *Ibid.*, at p. 900.
[66] (1913), 33 N.Z.L.R. 81.

her children and grandchildren, and excluded her husband. The husband, who was 68 years of age, was in receipt of an old-age pension and also was receiving maintenance from some of his sons under the provisions of *The Destitute Persons Act*. He had three sons, all of whom were unmarried and in good health. He had been living apart from his wife for six years, and there was ample evidence of positive misconduct on his part. On an application by the husband for an order under *The Family Protection Act, 1908*, Williams J. refused to grant the same, on the ground that he could not "see that there has been a breach of any moral duty by the testatrix in excluding her husband from any benefit under her will. The Act was passed with a view of enabling the Court, where a testator had been guilty of a moral wrong in not providing for a near relative, to rectify that wrong. I do not think anything of that kind occurs in the present case. If the husband has a number of sons who can be called upon by law to provide for him he is enabled to maintain himself. If he cannot maintain himself his remedy is to get his sons to maintain him, and he has no claim on the assets of the wife.[67]"

On the other side of the line wa the case of *Golightly* v. *Jefcoate*,[68] which was also an application by a husband for an order against the estate of the testatrix, his wife. Here the husband was bedridden, and except for an old age pension was in receipt of no income whatsoever. He had five children by a previous wife, of whom three sons were alive but were married. The only child of the marriage between the testatrix and her husband was a son who was 21 years of age at the date of his mother's death. The husband had been living apart from his wife for over two years prior to her death, during which time he received no assistance from her. The beneficiaries under the will were all in fair circumstances. Williams J. distinguished the *Geen* case and held

> that it was the duty of the testratrix to make some slight provision for her husband out of her estate. The case is not, of course, one where the husband and wife had been living together and the wife had been maintaining him during her lifetime. In such a case the duty of the wife to provide for her husband after her decease would be greater than in the present circumstances. . . . . No doubt the sons— one of them, at any rate— should contribute to the father's maintenance, and probably the other sons can. However, if they are married they have other obligations to take precedence of the obligation to maintain their father.[69]

[67] *Ibid.*, at p. 82.
[68] (1913), 33 N.Z.L.R. 91.
[69] *Ibid.*, at p. 93.

His Honour accordingly made an order allowing the applicant 6s. a week for his life, to be charged on the property of the testatrix.

In *In re Gair, Davidson* v. *Sundstrum and Others,*[70] Williams J. made an order in favour of the married daughter of the testator who had left her out of an estate of almost £1,500, an annuity of £12 and a life interest in a small house in which she was living. By his will the residue went to a religious body known as the Church of Christ.

> As far as the Church of Christ is concerned, the claim of the daughter is a good one. She is in distressed circumstances and is entitled to consideration in preference to strangers. Looking at all the circumstances of the case I do not think the daughter has been adequately provided for. I think that she should get the reversion of the property in which she has a life interest. If that is done I do not think that it can be said that a proper provision has not been made for her, and consideration must be given to the fact that she has a husband whose primary duty it is to maintain her.[71]

By the time the case of *E.* v. *E.*[72] came before the court, it was possible for one judge to say :

> The general principles on which the Court acts have been well settled; the difficulty lies in the application. We have to look at the amount of the estate and the position of the parties interested.[73]

In that case the judge who heard the application ordered the payment of £600 to each of two grown-up daughters by his first wife) of the testator, who had by his will left his whole estate to his second wife, "trusting that she will make adequate provision for my daughters." The testator also left a son by his second wife born illegitimate. This illegitimate son lived with the widow, who was the respondent to this application, which was launched by two grown-up daughters of the testator for relief under *The Family Protection Act.* The daughters were aged twenty-four and twenty-two, were well educated, and had for some years been earning their own living. They resided in England. From the order of the trial judge an appeal was taken to the Court of Appeal, upon which the court divided evenly, two judges in favour of allowing the appeal and two in favour of dismissing it. This would have had the effect of dismissing the appeal. Therefore the two judges in favour of

[70] (1913), 33 N.Z.L.R. 212.
[71] *Ibid.*, at p. 214.
[72] (1915), 34 N.Z.L.R. 785.
[73] *Ibid.*, per Denniston J., at p. 789.

discharging the order agreed to an amended order to be substituted for that of the trial judge, the result being, in effect, a compromise. The substituted order was as follows:

> That there be paid out of the estate of the deceased two sums of £600 each to the Public Trustee upon trust for investment in the Common Fund, and to pay the income from both sums to the widow of the deceased during her life until her son attains the age of twenty-one years or dies, whichever event shall first happen, to pay the income from one of those sums to A, a daughter of the testator, during her life so long as she remains a spinster, and the income from the other of those sums to B, a daughter of the testator, during her life so long as she remains a spinster; and on the foregoing trust of income ceasing in respect of either daughter, to pay the whole income to the other daughter during her life so long as she remains a spinster; Subject to the foregoing trusts with regard to the income to hold one of the said two sums in trust for the said A and the other of them in trust for the said B, reserving power to the Court if it thinks fit, on the application of any party, to vary or suspend any of the terms of this order.[74]

In *In re Heagerty : Heagerty* v. *Considine and Another*,[75] Stout C.J. made an order allowing a widow an additional £100 a year, where the testator had left an estate valued at £22,000, had left no issue, and by his will had bequeathed to children of his brother the whole of his estate with the exception of household furniture, a legacy of £100 and during widowhood a house and land of the annual value of £50 and £300 a year. Stout C.J. stated:

> I have to see that the widow does not have her mode of living reduced by the death of the testator. She is now over fifty-five years of age. The cost of living has gone up. I consider she is entitled to an allowance not of capital but of income, and I give an additional £100 a year.[76]

The Public Trustee v. *Brown et al.*[77] is an interesting example of a court barefacedly recasting a testator's will, under the authority of the legislation in question. The testator left three sons, aged respectively twenty, ten and five and a half years. By his will made before the birth of his youngest son he left farming and other property worth £1800 in trust for his two elder sons, and nothing for his youngest son. Upon an application on behalf of the youngest son, Edwards J. had this to say:

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[74] *Ibid.*, per Hosking J., at p. 803.
[75] (1915), 34 N.Z.L.R. 905.
[76] *Ibid.*, at p. 907.
[77] (1915), 34 N.Z.L.R. 951.

> In the present case the Court is called upon to remedy a neglect, which obviously is not really the neglect of the testator, although it must be treated as such, but a blunder of the draughtsman of the will, for it is obvious that the youngest of the two sons who take under the will could not have established such claims upon the testator's affection as to induce him to leave his offspring who might be born in the future wholly unprovided-for in order to make a larger provision for this babe, then three years of age. . . . .
>
> Upon the whole I am satisfied that the best way, in the interest of all parties affected, to rectify the blunder which has been made is to make an order which will have the effect of making the will operate as it would have operated if the attention of the testator had been called to the necessity of making provision for his possible future offspring.[78]

It was therefore ordered that the infant son should take the same interest in the estate of the testator as he would have taken under the will of the testator if the trusts of the will of the testator in favour of his two other sons had extended to and included the said infant son.

In *In re Bell : Bell* v. *Hunter et al No. 2*)[79] the court intervened to alter the allowance to the widow by increasing the size of the periodic payments, to the extent even of encroaching upon capital, as the income alone of the amount set aside by the testator would not have been sufficient to keep the widow in the position in which she was during her husband's life.

Parish v. *Valentine et al.*[80] exemplifies a further extension by the courts of the spirit of the Act. A testator left his property to trustees in trust for the plaintiff (widow) for her life and thereafter £50 to each of his two daughters, and the residue to his three sons. At the date of the application the estate yielded about £1 per week to the plaintiff, who was seventy-eight years of age and unable to work. She had £140 of her own, and was living with one of her daughters. Chapman J. declared :

> . . . . . Here the applicant has some means, and it is not part of the scheme of the Legislature that the dependent should be enabled to save her means for the benefit, perhaps, of legatees. It is, however, evident that, though the plaintiff has some means, she may at a future date find herself without adequate maintenance and support. . . . . The Court has been obliged in this way to make orders which contemplate a change for the worse in the position of the applicant which may reasonably be apprehended: *Colquhoun* v. *Public Trustee.* Indeed, in dealing with the case of women still young and capable of earning their living, but described as delicate and of poor physique

[78] *Ibid.*, at p. 952.
[79] (1915), 34 N.Z.L.R. 1068.
[80] [1916] N.Z.L.R. 435.

> the Court of Appeal has taken upon itself to look as far into the future as the testator should have looked to meet such contingencies as might be expected to affect them: *E.* v. *E.*
>
> I do not find it necessary in this case to make any order for an immediate allowance out of the capital of this small estate. . . . . I must, however, recognize that the plaintiff has the right to come to this Court now to save her claim from being barred by limitation.[81]

The court therefore placed a charge upon the property of the estate to secure any future order the court might make, reserving leave to the plaintiff to move as occasion should require.

Parish v. *Valentine* with its countenancing of anticipatory applications and consequent suspensory orders was open to some doubt. Salmond J., in the subsequent case of *Welsh* v. *Mulcock*,[82] which will be more fully discussed below, delivers a scathing denunciation of suspensory orders, which he says are "contrary to the purposes, the policy and the provisions of the Act."[83] Certainly a power of this nature must be very carefully exercised. The dangers of an indiscriminate exercise of such a power are obvious.

In *In re John Preist (deceased) : Severn* v. *Public Trustee*,[84] a married daughter was allowed a further allowance of £2 15s. per month out of the testator's estate, where it was shown that she was 42 years of age and in poor circumstances, her husband being often out of work and not robust. Except for a legacy of £250 to each of his two children by his first wife (the applicant being one of such children), the testator had left his estate, the net value of which was about £5,470, to his second wife during widowhood, and thereafter to her child. In these circumstances the court had no difficulty in making the further allowance above mentioned.

In *Sinclair and McKenzie* v. *Sinclair and Sutherland*,[85] the court refused to give any relief on the ground that to do so in the circumstances of that case "would be practically making a will for the deceased."[86] The court goes to great pains to discover a system in the testator's will and to ascertain the reasons for the testator's intention in giving the applicant a smaller portion than he did his other children.

If the declaration in the *Sinclair case* was intended to sound a warning against a too liberal interpretation and exercise of the

[81] *Ibid.*, at p. 456.
[82] [1924] N.Z.L.R. 673.
[83] *Ibid.*, at p. 687.
[84] [1916] N.Z.L.R. 710.
[85] [1917] N.Z.L.R. 146.
[86] *Ibid.*, at p. 147, per Stout C.J.

powers conferred by the Act, it does not appear to have been heeded, for in the very same volume of the New Zealand Law Reports there is reported the case of *Public Trustee* v. *Denton*,[87] which is an interesting example of a situation where the exercise by the court of the powers conferred by the Act had the effect of making a new will for the testator. The testator who separated from his wife three months after marriage and died in an insane asylum some few years later, directed by his will that a certain freehold property should be sold and the proceeds given "to an institution for incurables in the Dominion." He further left £70 to a sister and £1 to his wife. The remainder of his property was undisposed of. The widow at the time of the testator's death was in poor health, incapable of earning her own living, and of scanty means. Upon an application by the widow, the Court, per Stout C.J., declared :

> It is not denied by any evidence that the widow is suffering from grievous weakness. She is unable to earn her living. All the property she has is £86. The doctor states that she is incapable of earning her own living. Why, then, should she not be provided for out of the estate? . . . . I have heard no good reason why her support should be put upon the State and not on this estate. I therefore order and direct *that the gift to an institution for incurables should be set aside and given to her.* (Italics mine)[88]

On the other hand, in the case of *Ray* v. *Moncrieff et al.*[89] the court refused relief in the following circumstances. The testator, whose estate was valued at £10,000, left to the plaintiff, who was his only son, the interest on £1,000 for life, to which he was to succeed on the death of his mother, the testator's widow. The will also made provision for the plaintiff's children (the testator's grandchildren). The plaintiff was a chronic drunkard, forty-four years of age. He applied for an order under *The Family Protection Act,* but the court refused the application, holding that it would be an unwise and unjust application of the powers of the court to take away from others property which belonged to them in order to assist an able-bodied man with the habits of the plaintiff. Habitual drunkenness was not to be regarded as a fixed condition as maimedness or insanity. To the possible argument that relief should be given for the sake of the dependents of the applicant himself, as for example, his wife or children, Chapman J, replied :

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[87] [1917] N.Z.L.R. 263.
[88] *Ibid.*, at p. 268.
[89] [1917] N.Z.L.R. 234.

> The statute does not contemplate assistance to a daughter-in-law or to grandchildren, though the Court often considers them when ascertaining the needs of a son, but it would be a novel use of the powers of this Act to relieve the son of his burdens when the only result would be to set free his resources to be spent in drinking. The Court in these cases is asked to make good some failure on the part of the testator to perform his duty. It seems to me that he has most thoughtfully endeavoured to do his duty towards the applicant.[90]

In *Blackburn* v. *Mapp et al.*,[91] it was argued on behalf of a widow that she ought not to be called upon to work for her living when the estate of her deceased husband is there to assist her. The testator left the income of his estate, the capital value of which was about £1,200, to his widow, and the residuary estate to a daughter and a son. The widow, who was forty-five years of age and was earning £1 a week as a domestic servant, applied under *The Family Protection Act*, for further provision from the corpus of the estate. The court held, per Chapman J.:

> I most decidedly think that she ought to do something within her physical powers, and that I ought not to trench upon the property of the testator's children while she is quite capable of working. That she can work for wages is attested by the fact that she is now earning £1 per week, which, with her income from the estate, should put her in a position to save money. It certainly is not a case in which the testator has failed to do his best to treat his widow with justice.[92]

Nevertheless, following the example set in *Parish* v. *Valentine*, the court made an order charging the residuary estate, in order to secure any future order that the court might make, should the widow's earning power fail her later on.

In *Milne* v. *Cunningham*,[93] it was not necessary for the court to deal with the merits of the application, but Sim J. made the following significant remarks :

> The case as presented appears to raise the question whether a claim for relief must not be based on the claimant's condition at the date of the testator's death, or whether ill health that has arisen afterwards can be made the foundation of a claim. The case also raises the question of how far the plaintiff's claim to relief would be entitled to prevail against the claim made by the residuary legatees that the farm, after paying the debts and legacies, really belonged to them, although they might not have been able to establish their right to it in a Court of law. In exercising the jurisdiction conferred by the Act the Court is repairing what Mr. Justice Edwards described

[90] *Ibid.*, at p. 235.
[91] [1917] N.Z.L.R. 565.
[92] *Ibid.*, at p. 566.
[93] [1917] N.Z.L.R. 687.

> in his judgment in *Allardice* v. *Allardice* as "a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be." A just father would not be entitled to provide for one child out of a property which morally, if not legally, belonged to another child, there is considerable force, therefore, in Mr. Adams' argument that in the circumstances the plaintiff would not be entitled to any relief at the expense of the residuary legatees.[94]

Both of these questions are very important in the matter of weighing moral duties by the courts under the authority granted to them by the legislation under discussion. The mere statement of the latter question particularly is sufficient to create possibilities beyond number, so much so that the lawyer might be justified in entertaining some apprehension as to the limits to which the courts may go in exercising their powers under the Act.

When we come to the case of *Cook et al.* v. *Webb and Matson*,[95] we find the courts, far from being loath to interfere with the testator's will, actually going out of their way to rectify what in their opinion was an injustice worked upon his dependents by the testator during his lifetime. The testator whose estate was valued at £26,000 had been separated from his wife for the last 14 years of his life, allowing her for the maintenance of herself and their infant daughters £2 5s. a week and the use of a dwelling house and the furniture therein. Being compelled to work for their livelihood, the daughters received no proper education, and at the date of the testator's death they were earning 35s., 25s. and 20s. a week respectively, their respective ages being 24, 19 and 19 years, but the oldest was in poor health, which unfitted her for continuous work. By his will the testator continued the provision which he had previously made for his wife, but each of the daughters received £500 and a share of the residue which was estimated to produce about £550 more. Approximately two-thirds of the estate was left to strangers in blood, consisting of members of a family with whom the testator had been living. On an application by the widow and daughters under *The Family Protection Act*, the judge hearing the application increased the widow's allowance to £5 5s. a week. Herdman J. had this to say :

> I think I am justified in considering her application for relief in the light of the circumstances in which she would have been placed had she been living under her well-to-do husband's roof as his wife

[94] *Ibid.*, at p. 692.
[95] [1918] N.Z.L.R. 665.

> and managing his domestic affairs, and to make such an allowance to her as will raise her income to an amount which will enable her to live in reasonable comfort and free her from anxiety.[96]

The trial judge however refused to increase the shares of the daughters out of the estate. Upon appeal by them to the Court of Appeal, Stout C.J., who presided over the court, adopted the following rather curious method of reapportionment. He started off by ascertaining the total amount that was left to the testator's family as a whole, £9,500. The amount left to the strange family was £16,400. After addition of the increase of the widow's allowance made by the trial judge, the figures stood as follows: Testator's family, £11,255; Strange family, £14,652. After finding that the oldest daughter was sick and weakly, and that the other two daughters were under age, the court proceeded to increase the oldest daughter's allowance to £750 and that of each of the others to £500 each. This would leave the position as follows: testator's family, £13,000; strange family, £12,900; thus striking an even balance between the two families. One of the judges, Stringer J., explained the reason for the court's action as follows:

> In the present case I have no hesitation in finding that the testator has been guilty of a breach of such moral duty (i.e.—of a just but not loving husband or father), and that "having regard to the existing facts and surrounding circumstances", the provision made for the applicants under his will is inadequate for their proper maintenance and support. Although he was at all times in a prosperous condition, he by his parsimony deprived the applicants of the means of obtaining a liberal education, and forced them quite early in life to resort to manual labour, thus cramping their mental and physical development and leaving them very poorly equipped for the battle of life. He has, moreover, left approximately two-thirds of his estate to strangers in blood who had no legal claims upon him, and whose moral claims whatever they may have been, were certainly not superior to those of his own children, to whom during his life, he denied any share in or any benefits derivable from his prosperity.[97]

In *In re Allen (deceased), Allen* v. *Manchester et al*,[98] the court was called upon to weigh the moral duties of a wealthy husband and father to his wife and children. The judgment of Salmond J., which, incidentally, contains an interesting restatement of the purpose of *The Family Protection Act*, to which reference will be made below, is very enlightening, for it is an example of the carefully reasoned exercise by a sound judge of

[96] *Ibid.*, at p. 666.
[97] *Ibid.*, at p. 671.
[98] [1922] N.Z.L.R. 218.

the powers conferred by the Act upon the court. The testator had left an estate worth about £80,000. To his widow he left an annuity of £500 a year and the free occupation of two houses, and the right to let one or both of them, and also the whole of his furniture and personal effects. The widow was, apart from the will, in receipt of a pension of £169 a year by reason of her husband's death as well as of an income of £200 a year from property of her own. The bulk of the estate the testator left to his two sons, £37,000 having been devised to the eldest son if and when he attained the age of 25, and land worth £22,000 having been devised to the younger son. To his only other child, his daughter, the testator left £2,000 in certain shares if and when she attained the age of 25 as well as one-third of the residuary estate, which estate was worth about £20,000, on her attainment of the age of 25 years; this residue however being charged with the widow's annuity of £500 so long as the widow lived. An application was made by the widow and daughter on the ground that the provision so made for their maintenance was inadequate having regard to the substantial fortune left by the testator. Salmond J, delivering judgment, declared that the purpose of the Act was

> to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to, his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.[99]

It is submitted that the foregoing statement was the first really accurate exposition of the purpose and tests for the operation of the statute. It is interesting to note that by this time the court no longer had any compunction against placing the same on a purely moral basis, which it is submitted is contemplated by the statute. The court speaks of "moral claims," "moral duty" without mitigating the effect of the same by superadding a test of a legal duty or a duty imposed outside of morality. Salmond J. continued :

> Applications under *The Family Protection Act* for further provision of maintenance are divisible into two classes. The first and by far the most numerous class consists of those cases in which, owing to the smallness of the estate and to the nature of the testamentary

[99] *Ibid.*, at p. 220.

dispositions, the applicant is competing with other persons who have also a moral claim upon the testator. . . . . In such a case all that the Court can do is to see that the available means of the testator are justly divided between the persons who have moral claims upon him in due proportion to the relative urgency of those claims. . . . .

The second class of cases is that in which, owing to the largeness of the estate or the nature of the testamentary dispositions, the applicant for relief is complaining not of the unjust distribution of an inadequate fund among dependants all of whom had a moral claim upon the testator, but of the failure of the testator to make out of the abundance of his resources a provision sufficient for the proper maintenance of the claimant. In such a case, of which the present is an example, the function of this Court is not, as in the first class of case, that of distributing an insufficient fund, as far as it will go, among various dependents in accordance with their relative needs and deserts. It has the more difficult function of determining the absolute scope and limit of the moral duty of a wealthy husband or father to make testamentary provision for the maintenance of his widow and children. In the first class of case the Court has to judge between the competing claims of different dependents; in the second class of case it has to judge between the claim of a dependent to be maintained by the testator and the claim of the testator himself to do as he pleases with his own.[100]

Dealing with the claim of the widow, the learned judge said:

I am of opinion that in these circumstances no further allowance to the widow is necessary or justifiable. It may probably be said with truth that the proper maintenance which a testator owes to his widow in cases where there are no competing moral claims of other dependents is such maintenance as will enable her, taken in conjunction with her own means, to live with comfort and without pecuniary anxiety in such state of life as she was accustomed to in her husband's lifetime, or would have been so accustomed to if her husband had then done his duty to her. . . . . (In this case) . . . . . I do not think that the testator has in any manner failed in his duty to make adequate provision for her maintenance.[101]

Dealing with the claim of the daughter, Salmond J. granted some relief by increasing the provisions made for her maintenance before she should attain the age of twenty-five.

(To be continued)

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[100] *Ibid.*, at p. 221.
[101] *Ibid.*, at p. 222.

THE CANADIAN LAW OF CIVIL AVIATION*

At the annual meeting of the Association held in Toronto, in August, 1937, I was honoured and privileged to address the Association on the Canadian Law of Civil Aviation (see annual proceedings, Canadian Bar Association, 1937, at page 140). I then attempted a statement of the law of Canada pertaining to the civil side of aviation. With almost no Canadian case law at the time it was perhaps a bold endeavour. The commercial law section, since formed, includes aviation law, and I have been asked to deal with the more important developments in the Canadian law of civil aviation in the intervening two years. In comparison with the rate at which this branch of the law progressed or became crystallized in Canada in the years preceding 1937, the advance since has been substantial and important. Although matters, which may perhaps be termed "minor" have been dealt with in other cases, I propose here to discuss only two decisions, both of which I think are important, together with the single but significant legislative change.

Both the cases to which I refer come from the Province of Manitoba. Each is a decision of the same learned Judge, Montague J. of the Court of King's Bench. Both were claims in negligence, the first that of a dependant of a gratuitous passenger against the pilot of the plane; the second that of a passenger for hire against the owner. In each case the doctrine of *res ipsa loquitur* as it applies to aviation accident cases was discussed.

The first decision is *McInnerny et al.* v. *McDougall* [1937] 3 W.W.R. 625, 47 M.R. 119. McDougall, the pilot (who had apparently flown sufficient solo time to entitle him to carry passengers), had, in the morning of the day of the flight in question, passed the required tests. One may question, therefore, the relevancy and admissibility of certain evidence which was introduced, indicating that some six weeks before McDougall had failed to pass and that the inspectors considered his flying then very unsatisfactory and that he required more dual instruction. The accident happened on the 24th of September, 1933, and the defendant had held a pilot's certificate in the United States since 1931. His dual control machine had been signed out as airworthy, but after it had been in the air only

* Summary of recent developments therein as reported to the Commercial Law Section of The Canadian Bar Association at the Annual Meeting of the Association, Quebec City, Thursday, the 17th of August, 1939.

about 20 minutes it developed engine trouble and began to slow up noticeably. The pilot decided to land. He picked out a field which was found on the evidence to be in all respects suitable, flew over it and examined it, noted from nearby water the direction of the wind, and prepared to land. As his machine was not then into the wind he began a turn which, of course, required him to bank. To quote the judgment: "Something then happened. The plane went straight down, crashed, and McInnerny died shortly from the injuries he received." Several explanations as to how the accident happened were made at various times by the pilot. The truth probably is that he did not know. On one occasion he said he was side-slipping into the field when he suddenly felt the machine go limp on him; at another time, that he thought he was going to over-shoot the field, started to bank the plane, lost air speed, one wing dropped and the plane turned over; that he had lost speed and when he attempted to make the turn he had not sufficient momentum to carry the plane around. On his examination for discovery he said he felt the rudder go sluggish and that the only explanation he could give was that the passenger must have put his foot on the rudder bar. Now it should be mentioned that the regulations required him to cut off the dual control and that he had not done so. This, however, was found, and rightly I think, not in itself to constitute negligence. At the trial he said that in the turn he hit an air bump or downward current which shot him up and the craft came down again and seemed to quiver. He cut off the motor just before the crash. There was no evidence to support the theory that the passenger had interfered with the controls. The court did not accept the suggestion about the air bump but found that the area was not a bumpy one and that it was not unreasonable for a bump to occur at a low altitude. Without suggesting that the finding that a bump had been the cause of the mishap in this case was erroneous, I make bold to suggest that expert evidence would show that it is near the ground that a bump is likely to occur. The Court found that the pilot had allowed his plane to lose the necessary speed at an altitude where it was impossible to regain control. This may have happened while the pilot was engrossed in watching his landing rather than his instruments. The pilot intimated that he was attempting a cross-wind landing. The Court found that there was no excuse for his making such an attempt. It must be remembered, however, that by this time he was quite close to the ground and in an emergency because of his defective motor.

The finding was that the cause of the plane falling was that the defendant did not maintain proper flying speed. One wonders whether, having regard to the engine trouble and the close proximity to the ground, this was not demanding too high a degree of care.

The Court then held that the doctrine of *res ipsa loquitur* applied; that the accident itself was sufficient proof of negligence and that "while he was making a simple landing an accident happened, which would not, in the ordinary course of things, have happened without negligence." One might ask whether in fact the pilot was making "a simple landing." It was an emergency landing, commenced, presumably from necessity, close to the ground, with a failing engine. The Court said "the defendant has not rebutted the *prima facie* case made out by the application of the above rule of evidence. He has not satisfied the onus placed upon him." The statement in respect of onus could not have been intended as a statement that the onus was on the defendant from the first, because, of course, it was not. Both on the question whether negligence had been proved (as found) and whether the doctrine of *res ipsa loquitur* should have been applied in the circumstances it would have been more satisfactory if a Court of Appeal had confirmed the verdict.

The second case is that of *Galer* v. *Wings (Limited)*, [1938] 3 W.W.R. 481. It is surprising, that with so few reported Canadian aviation cases where written judgments have been given, that these two cases with carefully reasoned opinions of a Judge of a High Court have not been reported in other Canadian law reports. In this case the accident happened on the 10th of April, 1936, while winter flying conditions still existed. The take-off was made from ice. When the plane was only a short distance up one of the blades of the propeller broke, resulting immediately in the engine being torn away from the plane which caught fire and fell on the ice. The learned trial Judge found in this, as in the case already discussed, that ordinary principles of the law of negligence must be applied. In the instant case it was conceded by counsel for the defendant company that the defendant was in the legal position of a common carrier of passengers by air. Such an admission carries with it sundry implications, for every common carrier is, in the absence of a special contract, liable in tort for negligence. In the United States, as I pointed out in my previous address, a common carrier of passengers by air

cannot limit its liability but this is not the law of Canada and liability can be limited, at all events until The Carriage by Air Act, 1939, (hereinafter referred to) comes into force. Here it was contended by the defendant that there existed a special contract relieving the carrier from liability, contained in apt language endorsed on the ticket made out by the defendant company for the plaintiff and the two other passengers. The tickets, however, were never delivered. The passengers were not asked to sign in the place left for that purpose and were not given the usual duplicate carbon copies. The passengers were told that they might pay at the commencement of the trip or on their return. They agreed to pay on their return. The plaintiff had made many trips in the plane of the defendant company. He admitted that he had on some of such occasions read the ticket and had sometimes signed it and that he knew that the tickets contained a release, and was also aware that all Canadian air transport companies had release clauses on their tickets. He understood that they were not binding on a passenger, whether signed or not. This erroneous impression, which may have some foundation in fact in the United States, seems to be quite generally held in the north country. The Court held that if the releases were a part of the contract, that alone would seem to dispose of the plaintiff's action. On the evidence the Court found it impossible to hold that a special contract had been distinctly declared and deliberately accepted. The Court held it as a fact that the ticket was never issued to the plaintiff and that he did not expressly or impliedly assent to the release appearing thereon.

At trial the defendant amended its pleadings and set up that it was a custom and usage in Manitoba, and in Canada generally, for passengers to assume all risk of injuries while being carried by air. The Court found that the evidence failed to establish the notoriety and certainty of such custom as would be required, and made no finding as to whether such a usage could be held to be reasonable; that the contract to carry in this case was made by the booking of passage by the plaintiff with no conditions attached; and that there was an implied obligation upon the defendant to use all reasonable care and diligence to carry the passenger safely to the agreed destination.

On the question of negligence the Court pointed out that the onus lay first with the plaintiff; that it does not appear that a higher degree of care is demanded of a common carrier

than of a private carrier; that carriers of passengers are not insurers of the safety of passengers whom they carry nor do they warrant the soundness or sufficiency of their vehicles; that their undertaking is to take all due care and carry safely so far as reasonable care and forethought can attain that end; and the care required is of a very high degree; that while they do not warrant the soundness or sufficiency of their vehicles they are answerable for any defects that careful and reasonable examination would reveal; that periodical testing and examination is a duty and that the fact that an aircraft breaks down, as it did in this case, is *prima facie* evidence of negligence; that if they have taken all reasonable care and used the best of precautions in known practical use for securing safety, carriers are not liable for accidents due to latent defects in their vehicles which precaution does not discover (see page 488). The Court held that the plaintiff having shown that a propeller blade broke, which is something that in the ordinary course does not happen if proper care is exercised, had satisfied the initial onus which rested upon him and the defendant was called on for an explanation.

The propeller had been manufactured in the United States. The type had the approval of the Department of Transport at Ottawa (but it was proved that licence to manufacture that type of propeller had been cancelled by the Government Department in the United States). The propeller had been in use by the defendant and previous owners since August, 1932, but, of course, not continuously. In July, 1935, the propeller had been overhauled and the blades etched. As already stated the accident happened on April the 10th. On April the 8th the plane had been flown from Sioux Lookout in Ontario to Winnipeg in Manitoba. The pilot who flew it reported roughness in the machine to the defendant's chief engineer, and someone from the defendant company advised the local agents for the propeller manufacturer that the propeller was being sent in, presumably for checking. The party in charge of the checking suggested to the defendant company that the blades from their appearance required smoothing out. He was told that the propeller was wanted almost at once and that there was not time for that, and the propeller was sent to the defendant. The supervisor of the works, himself a pilot, said there was nothing to justify him in saying that the blades were not airworthy; that he would not have returned them if he had thought so and that they were in fair serviceable condition; that he would have been prepared to use them himself without hesitation. The defendant's

chief engineer said that the instructions given by him to the propeller company's agent were to check the pitch and balance and to remedy anything which might cause roughness. The propeller was found slightly out of pitch and slightly out of balance. It was taken apart to balance it and one blade (the unbroken one) loaded a little by adding lead in the hole in the shank. The pitch was re-set and the balance again checked and found satisfactory. It was returned to the defendant after 3½ or 4 hours' work. The plane was signed out on the day in question by an air engineer. It was then sent off for a 2½ or 3½ hour trip and, according to his evidence, the pilot found it then to be satisfactory in every respect. On behalf of the plaintiff, passengers on trips several days just prior to the accident swore that the engine vibrations seemed excessive. Mechanics had worked on the motor, including the propeller, for an hour or more just before the plane started on the fatal trip.

There was also considerable evidence given respecting the condition of the spark plugs, which had been found to be oiling up, a possible cause of roughness. After this last work was done, and before the passengers were taken on, there was no air test. However, on the day in question, the same pilot who was at the controls at the time of the crash had flown the machine on a routine trip for 2½ hours in which he had made five stops. He had no trouble except on the return trip when he noticed a roughness due, he added, to the plugs, which were then examined and two replaced. Just prior to the take-off it was found on ground test that the engine was perfectly normal in every respect. It was established through expert testimony at the trial that the break was a fatigue failure. The conclusion of the expert which the court accepted was that the failure was rapid, a matter of minutes at the most.

Weighing a great mass of evidence the Court found these facts. "The cause of the blade failing was that it was inherently defective in design. As a result the stresses operating on it at the point were too high and impaired the margin of safety intended to be provided. The normal service of a blade superimposed on the original weakness caused the break. The material was flawless; it was broken by fatigue." The evidence showed that the roughness in operation could be caused either by a defective propeller, by oily spark plugs, or in other ways. The evidence had established that roughness was reported on the return of a trip taken on the 8th of April; again on the 9th. The pilot had found roughness again in the earlier trip on the

10th. The court found that on each occasion it was a temporary condition probably caused by foul spark plugs and that this was on each occasion corrected. The Court also found that the scientific knowledge as to the failure of propellers due to fatigue could not reasonably be expected of the defendant company's officials; that the company had no doubt as to the airworthiness of the propeller and no reason to suspect that the blade was in any way defective; that it was not reasonable to expect the company to install a new or other propeller; that the company was not negligent in not having the machine tested in the air before the final flight, pointing out that the air regulations did not call for this being done after spark plugs have been changed. Dismissing the action, the court did so without costs, stating, "I see no reason why experience in commercial aviation should be purchased solely at the expense of passengers."

It would seem that both these cases to which I have referred might have been decided differently had the learned judge in the first case not required an exceptional degree of skill from a pilot faced with an emergency for which he was not responsible; had he been able to satisfy himself in the second case that the defendant had omitted to do something or know something which would have enabled it to prevent the accident. It is understood that neither case will go to appeal but that another passenger in the plane last referred to is proceeding to trial before a jury. The verdict of that tribunal should prove interesting.

Then as to statute law. In my address in 1937 it was pointed out that there were two important international conventions subscribed to by many, if not most, of the countries of the world, but to which Canada had not yet adhered. I referred to the Warsaw Convention, of the 12th of October, 1929, and the Rome Convention of 1933, the first dealing with the rights of passengers, the second with the rights of third parties on the earth's surface. I suggested that Canada ought to give immediate consideration to becoming a party to these two conventions and making them a part of the law of Canada, for otherwise Canadian aviators and aircraft owners might, under certain circumstances, find themselves in a less fortunate position than were aviators and aircraft owners of countries participating in the conventions. By The Carriage by Air Act, 1939, the necessary legislation was passed by Parliament to enable the Governor-in-Council by proclamation to bring into force in whole or in part the Warsaw Convention and for

the application of the rules contained in the convention (subject to certain exceptions, adaptations, and modifications), to carriage by air which is not international carriage within the meaning of the convention. At the time of writing the Act has not been proclaimed either in whole or in part. No legislative action has yet been taken respecting the Rome Convention.

The Carriage by Air Act, 1939, provides that as from such day as the Governor-in-Council may by proclamation certify to be the day on which the convention comes into force, the provisions thereof as set out in a schedule to the Act shall so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees, and other persons, and subject to certain provisions as found in subsections (2) to (5) of section 2 of the Act, have the force of law in Canada in relation to any carriage by air to which the convention applies, irrespective of the nationality of the aircraft performing that carriage.

Chapter 3 of the convention imposes certain liabilities on the carrier. Subsection (4) of section 2 of the Act provides that such liability shall be in substitution for any liability of a carrier under any law in force in Canada in respect to the death of any passenger.

Dealing but briefly with the more important provisions of the convention it should be pointed out that it applies to all international carriage of persons, luggage or goods performed by aircraft for reward or gratuitously (Article 1). It provides that for carriage of passengers the carrier must deliver a passenger ticket containing certain particulars and that if the carrier accepts the passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of the provisions of the convention which exclude or limit his liability (Article 3). The convention also provides that for carriage of luggage other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket containing certain particulars, and again, the carrier accepting luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the required particulars, shall not be entitled to avail himself of the provisions of the convention which exclude or limit his liability (Article 4). There are other provisions in respect to "air consignment notes" and detailed regulations in respect to the carrying and disposal of consigned goods (Articles 5 to 16).

Still speaking of international carriage and for the moment of carriage of persons, the carrier is not liable if he proves that he and his agent have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (Article 20, subsection (1)). Further, if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability (Article 21). Again, the liability of the carrier for each passenger is limited to the sum of 125,000 francs (Article 22) and is enforceable for the benefit of such of the members of the passenger's family as sustain damage by reason of his death. The expression "members of a family" means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, stepchild, grandchild. (See second schedule).

As to international carriage of goods and luggage, the carrier is not liable if he proves that the damage was not occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage (Article 20, Subsection (2)). Further, the liability of the carrier is limited to 250 francs per kilogram unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery (Article 22 (2)). As to objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger (Article 22 (3)).

The carrier is not entitled to avail himself of the provisions of the convention which exclude or limit his liability if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct. Similarly, the carrier is not entitled to avail himself of such provision if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment (Article 25). Any provision tending to relieve the carrier of liability or to fix a lower limit than that laid down in the convention is null and void (Article 23). There are certain limitations for giving

notice of claims respecting luggage (Article 26). And all rights to damages are extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Article 29).

As to carriage by air not being international carriage by air as defined by the convention, section 4 of the statute empowers the Governor-in-Council to make orders or regulations applying the provisions of the convention to such "non-international carriage" subject to such exceptions, adaptations and modifications, if any, as may be so specified, so that the same shall have the force of law in Canada.

As to the constitutional aspect of this legislation (see 1937 address under subheading Constitutional Aspects) it is obvious that some of the foregoing provisions cut across a field as yet exclusively dealt with by provincial laws. Various provincial acts deal with compensation to relatives of deceased persons where the circumstances disclose negligence on the part of some person or persons. This Dominion legislation will supersede those Acts on occasion. Nevertheless it would appear to be valid legislation within the rule laid down by the judicial committee of the Privy Council in the Aeronautics Reference ([1931] 3 W.W.R. 625) as explained by the Committee in the Weekly Rest Reference ([1937] 1 W.W.R. 299, at 309). Since the present enactment has been passed to carry out international obligations of a similar nature to those on which the Aeronautics Act was founded its validity can be justified on the same grounds.

Aviation is tending to make the world grow smaller. More and more is aviation law a matter affecting the rights and liabilities of carriers, passengers, consignees and consignors of different countries and justifying, almost requiring, uniformity of aviation laws between nations. Most of the other countries have adopted the international conventions which would bring this about. Canada is apparently, as the Carriage by Air Act, 1939, indicates, giving immediate attention to this condition.

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Since the above was written it has been suggested to me that reference might be made to The Transport Act, 1938, being an Act to establish a board of transport commissioners for Canada with authority in respect of transport by railways, ships and aircraft. The Act empowers the board to license

aircrafts to transport passengers and/or goods between specified points or places in Canada, or between specified points or places in Canada and specified points or places outside Canada. The board may in the licence prescribe the route or routes which the aircraft may follow and the schedule of services which shall be maintained (section 13). Subject to the provisions of the Act no goods or passengers are to be transported by air by means of any aircraft other than an aircraft licensed under the Act.

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