or other disposition to a third party taking in good faith for valuable consideration and without notice of the agent's want of authority, *provided the disposition is made by the agent "when acting in the ordinary course of business of a mercantile agent."*[27] The generally accepted view was that the requirement of following the "ordinary course of business" could not be applied to a buyer in possession who did not happen to have a business,[28] and this, it is submitted, is sound in principle, for to insist on this requirement in all cases would impose a wholly fortuitous restriction on the extent of the protection afforded to third parties who have relied on the buyer's possession as evidence of his title, and to that extent would defeat the object of the section.

The Court of Appeal has decided otherwise. Sellers, L. J., pointed out the difference in wording between s. 28(1) and s. 28(2), and relied on the fact that s. 28(2) is taking away a right which the owner had at common law. For these reasons he was not prepared to "enlarge the sub-section more than the words clearly permitted and required."[29] Pearson, L. J.,[30] stated substantially the same reasons for following a literal interpretation, at somewhat greater length, though he admitted to having had doubts.[31] On the facts of the case it was held that the buyer had followed the ordinary course of business—the sale took place in a back street of London, which was recognized as being the site of an unofficial "market" for cash sales of used cars—and the third party was protected.

It is to be hoped that, should the question come before a Canadian Court, the court will give full weight to the arguments against applying the idea of an "ordinary course of business" to a person who does not have a business, before deciding to follow *Newtons of Wembley Ltd.* v. *Williams.*

A. D. HUGHES*

WILLS AND TRUSTS

I

Statutory Enactments

1. Wills Act 1964 c. 57 (R.S.M. 1954 c. 293 repealed and re-enacted).

The provisions relating to the wills of members of the forces, sailors, etc., are amended to enable a certificate given by the appropriate service authority to be accepted as to service. S. 6(2), (3), and s. 90(2) thus, removing the difficulties of deciding whether a testator was actually in military service, etc.

27. Factors Act, R.S.M. 1954, c. 80, sec. 3(1) (italics supplied).
28. See Atiyah, *Sale of Goods*, 2nd. ed. p. 143.
29. [1965] Q.B. 560, at pp. 574-575.
30. *Id.*, at pp. 577-580. Diplock, L. J., concurred with the other two judgments.
31. Especially at pp. 578-579.

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Part II of the Act embodies substantially the recommendations of the Hague Conference on Private International Law as regards the formalities of the execution of wills and the law to be applied to movable and immovable property (sections 38-45). A similar statute has recently been passed in England.[1]

2. Trustee Act Amendment 1964 c. 56.

This amendment adds after section 54 of the Trustee Act[2] a new section 54A, providing jurisdiction to the Court to vary trusts.

A further addition is made at the end of section 76, a new section 77. This provides for the validating of trusts for charitable purposes, where the bequest was for "charitable *or* benevolent purposes", thus counteracting the effect of *Ministry of Health* v. *Simpson.*[3]

3. Trustee Act Amendment 1965 c. 86.

Subsections (1) and (2) of section 63 of the Trustee Act[4] are repealed and a new section 63 substituted. This provides for a wider list of trustee investments including a power to invest in equity investments. The wider powers are to be applied in accordance with the conditions laid down in the additional sections 63A to 63G added to the act. The remaining subsections of s. 63 are repealed.

4. The Devolution of Estates Act Amendment 1964 c. 13.

An addition is made at the end of section 13 of the Devolution of Estates Act[5] which provides for a reduction of the intestate benefits which a widow takes (a) where she has received a benefit under the will (subsection 1) and, (b) any benefits which she takes by reason of the operation of section 33 of the Wills Act 1964 (subsection 2).

Note—Section 1 of the Devolution of Estates Act Amendment Act 1963 increased the benefit which a widow took on the intestacy of her husband to a right to receive the first ten thousand dollars. The amendment is designed to provide under ss. (1) that in computing the $10,000 the value of any benefit which she may have taken under the Will in a case of partial intestacy must be brought into account under ss. 2. Any sums which the widow receives under section 33 of the Wills Act 1964 must also be taken into account.

1. Wills Act 1963, 11 and 12 Eliz. 11, c. 44.
2. R.S.M. 1954, c. 273.
3. [1951] A.C. 251—*The Diplock Case.*
4. *Supra,* at note 2.
5. R.S.M. 1954, c. 63.

5. The Dower Act 1964 c. 16.

This Act repeals the Dower Act[6] and the Act to amend the Dower Act 1960 c. 10, and makes more substantial provision for the surviving spouse.

6. The Testators Family Maintenance Act Amendment Act 1964 c. 55.

Section 6 of the Testators Family Maintenance Act[7] is repealed and the new section provides for a wider discretion to the judge for making an order for maintenance and support of a dependent under the Act.

II

Cases on Trusts

1. Equity will not Assist a Volunteer.

In re Cook's Settlement, Royal Exchange Assurance v. *Cook*,[8] the Court has to consider whether under an after-acquired property clause in a settlement made by his father, Sir H. Cook, for the benefit of Sir F. Cook and his children, the proceeds of sale of the famous picture "Titus" by Rembrandt had to be brought in to the Settlement. Sir F. Cook had covenanted not to sell the picture, but if he did, to bring its proceeds into the Settlement for the benefit of his children, but had subsequently given the picture to his wife who wished to sell it. Held that while the covenant by Sir F. Cook was given for consideration, the children were volunteers, and not being parties to the covenant, could not enforce it as there was no immediate settlement or trust of the obligation of the covenant. The equitable exception in favor of the issue of a marriage, whereby they were not volunteers if within the marriage consideration, could not be extended to a case such as this.

2. Presumption of Resulting Trust—Husband and Wife.

Re Bishop—N.P. Bank v. *Bishop*.[9] In 1946 the husband and wife opened a joint banking account to which they transferred the sums standing to the credit of their separate accounts which were then closed. The joint account was fed by dividends on shares and sales of investments owned by the spouses separately. They drew on the account at will to pay expenses. The husband drew on the account to make investments, some in his own name and some in his wife's name. Money was spent on taking up rights issues offered to shareholders and often money was spent on acquiring shares half or part of which were

6. R.S.M. 1954 c. 65.
7. R.S.M. 1954 c. 264.
8. [1964] 3 All E.R. 898.
9. [1965] Ch. 450.

taken up in one name and the other part in the other name. £270,000 was paid in—£88,000 untraced or due to small payments. There was never any substantial balance at the end of a year and at the death the account was in credit about £2,200. The question arose as to the beneficial ownership of investments made from time to time from money in the account.

The Court held, (1) that where spouses opened a joint account on terms that cheques might be drawn by either, in the absence of indications that the accounts were kept for a specific or limited purpose, each spouse could draw out for his or her own benefit and did so with the authority of the other, and any chattel or investment that was purchased belonged to the person in whose name it was purchased; there was no equity in the other spouse to displace the legal ownership of the one in whose name the investment was purchased; and so also, if one spouse made a purchase in their joint names there was no equity to displace the joint ownership. (2) There was nothing to indicate that the joint account had been opened for a limited or specific purpose or to preclude either spouse drawing money for the purpose of an investment in his or her own name, and, accordingly, any investment purchased, with money drawn from the account, in the name of either spouse, belonged beneficially to that spouse, and, further, on the husband's death the balance standing to the credit of the joint account accrued beneficially to the wife.

Re Young[10] *and Gage* v. *King*[11] followed.

Jones v. *Maynard*[12] *and Rimmer* v. *Rimmer*[13] distinguished.

Per Curiam. If money in the joint account were intended to belong to the spouses in equal shares and investments purchased therewith were intended to be held in trust for them in equal shares it would not be possible to presume on the one hand a trust of moneys invested in the husband's name and not on the other to presume a trust of moneys invested in the wife's name. I cannot presume that a trust was intended when moneys in the joint account are invested in the name of the husband but not when they are made in the name of the wife.

3. Trust and Trustee-Agent liable to account for profits—Constructive Trustee.

Phipps v. ***Boardman.***[14] A testator gave, by his will, his residuary estate to four children in unequal proportions. The three trustees were an Accountant, the testator's daughter and his widow (aged 83 years and senile).

10. (1885) 28 Ch. D. 705.
11. [1960] 3 All E.R. 62.
12. [1951] 1 All E.R. 802.
13. [1952] 2 All E.R. 863.
14. [1965] 1 All E.R. 849.

Among the assets were 8,000 out of a total issued capital of 30,000 shares in L. Ltd. a private company. The will did not authorize the acquisition of further shares in the company. Over a period of years B., the solicitor to the trustees of the will, and P., the second son of the testator, took steps to acquire a controlling interest in L. Ltd. with a view to its re-organization. The steps involved B. and P. making a take-over bid in their own right and acquiring personally 21,986 out of 30,000 shares. They ultimately obtained a very substantial profit on the realization of these shares.

B. and P., with the knowledge and consent of two out of the three trustees, took it on themselves to represent the trust shareholding and by so doing acquired knowledge of the assets of L. Ltd. and information concerning the Company's affairs which enabled them to conduct successful negotiations for acquisition of the shares. The widow's consent was never obtained. In March, 1959, before the majority of L. Ltd. shares were finally acquired, B. wrote to the beneficiaries of the testator's estate enquiring whether they objected to his taking a personal interest in the acquisition of shares in L. Ltd. B. also had an interview with the plaintiff, the testator's eldest son, regarding the proposed acquisition. In fact, as was found at the trial, the information given to the plaintiff was not full enough to enable him adequately to appraise the situation. The plaintiff claimed that five-eighteenths of 21,986 shares were held on a constructive trust for him and claimed an account of the profits made by P. and B. conceding that they were entitled to remuneration on a liberal scale for their work and skill.

Held, P. and B. were accountable for the whole of the profit they had made by acquiring 21,986 shares for they were, throughout, in the position of agents of the trust, using the trust holding to extract knowledge of the affairs of L. Ltd. and, as they had not obtained the consent of the third trustee, or of the trustees as a whole, they were accountable as if they were themselves trustees; accordingly, the plaintiff was entitled to succeed in his claim in respect of his five-eighteenths beneficial interest under the testator's will, his time and informed consent to B. and P. taking a personal interest in the acquisition of the shares in L. Ltd. not having been obtained.

Regal (Hastings) Ltd. v. *Gulliver*[15] followed. Per Denning, M. R.:

> If an agent has been guilty of dishonesty or bad faith or surreptitious dealing he may not be allowed remuneration or reward, but, when, as in this case, the agents acted openly and above board, although mistakenly, then it would be only just that they should be allowed remuneration.

A similar situation has been considered by the Court of Appeal of British Columbia in *Peso Silver Mines Ltd. (N.P.L.)* v. *Cropper*[16] in

15. [1942] 1 All E.R. 378.
16. 54 W.W.R. (Part 6) p. 329.

which the principles of *Regal (Hastings) Ltd.* v. *Gulliver*[17] were discussed. In this case the Court, by a majority, held that the Director of the Company was not liable to account, but it is likely that the case will come before the Supreme Court of Canada.

4. Trust and Trustee—Disclosure.

Re Londonderry's Settlement[18]. In a settlement, trustees held a considerable fund on trust to apply the income, with the consent of certain appointors therein defined, at their uncontrolled discretion, for the members of a class of beneficiaries as they might from time to time determine. The defendant, who was one of the objects of the discretionary trust, and also a beneficiary entitled to a share of the income in default of appointment, had claimed that the trustees were bound to disclose; the minutes of meetings of the trustees at which the discretionary powers were discussed; agenda and other documents prepared for purposes of trustee meetings; correspondence relating to the trust, passing between the trustees and the appointors, and their solicitors; and correspondence between the trustees, the appointors and the beneficiaries. The trustees took the view that in the interests of the family as a whole they ought not to disclose these documents unless they were under a duty to do so.

Held, that in general the beneficiaries were entitled as a matter of proprietary right, to inspect trust documents. This right did not extend to: (a) documents bearing on the deliberation of the trustees in good faith as to their exercise of discretionary powers. These were taken in a confidential role and they were not bound to disclose motives and reasons and, (b) communications between individual trustees and appointors or between any trustee or appointors and an individual beneficiary as these were not trust documents. Correspondence with trustee's solicitors were trust documents.

III

Cases on Wills

1. Revocation—Dependent Relative Revocation—Evidence.

Estate of Bridgewater[19]. A letter stating that a later will was destroyed was admissible in evidence, *Keen* v. *Keen*[20] distinguished, and *Cross on Evidence*[21] considered.

17. *Supra*, at note 15.
18. [1964] 3 All E.R. 855 *reversing in part* [1964] 2 All E.R. 572.
19. [1965] 1 W.L.R. 416.
20. (1872) LR. 3 P. & D. 105.
21. 2nd Ed. at p. 425.

2. Evidence—Privilege.

In the estate of Fuld, deceased (No. 2).[22] In a Probate suit, a witness whose evidence related to the execution of a will or codicil, was on that matter the Court's witness and the existence of legal professional privilege did not avail to prevent the Court, which was concerned in an inquisatorial capacity to reach the truth about the execution of the will or codicil in question, from insisting on seeing documents so privileged if that was necessary or discover the truth concerning execution.[23]

3. Commorientes—Mutual Wills—Testator Feloniously Killed by Legatee—Failure of Gift.

Re Dellow's Will Trusts.[24] A husband and wife made mutual wills leaving all estate to survivor with alternative gifts. Both spouses found dead as a result of coal gas poisoning. Court found, on evidence, that it was not possible to say which died first. Presumption that younger survived applied. Evidence showed that wife had feloniously killed the husband. On the question of the standard of proof in a civil case, it was not so much that a different standard was required, differing with the gravity of the issue, but that the gravity of the issue became part of the circumstances which the Court had to take into consideration in deciding whether or not the burden of proof had been discharged, although the gravity of the issue of felonious killing weighed heavily against a finding that it had occurred. On the evidence the wife had feloniously killed the husband and therefore could not take his estate.

4. Construction—Children, adopted child.

Re Jebb, Ward Smith v. *Jebb.*[25] The only legitimate purpose of looking at previous cases is to use them as a guide toward the meaning of words so as to help in the search for the testator's intention. They should never be used to defeat the intention.

5. Condition Precedent—Restraint on Marriage.

Re Selby's Will Trusts.[26] The will provided as a condition *precedent* that no beneficiary who should marry out of the Jewish faith should take benefit under the will. It was held that the condition was not void for uncertainty, as membership of the Jewish faith was a sufficiently defined concept to make it possible for the Court to say in a given instance that the condition had been fulfilled.

22. [1965] 2 All E.R. 657.
23. This point arose in litigation concerning the Will and four Codicils of a testator, Peter Harry Fuld, a Canadian citizen of German birth who left an estate of some $18,000,000. The hearing lasted for 90 days—the longest recorded English Probate action.
24. [1964] 1 W.L.R. 451.
25. [1965] 3 All E.R. 358 at 361 *per* Denning, M. R.
26. [1965] 3 All E.R. 386.

In the case of a condition *subsequent*, it is well settled that a person liable to suffer forfeiture, must be able to understand precisely what act or acts will be liable to work a forfeiture. Consequently, as illustrated by *Clayton* v. *Ramsden*[27] and re *Blaiberg*,[28] a stricter test is to be applied by the Court in determining whether a vested gift is to be divested in the event of a person "ceasing to be of the Jewish faith", or "ceasing to profess the Jewish faith" and whether such provisions are void for uncertainty.

6. Undue Influence—Onus of Proof.

Re Moore.[29] Where a will is prepared by a solicitor who receives substantial benefits under it, the onus of proving that the testator understood the nature of the transaction and that the will was made with the testator's knowledge and approval, is a very heavy one and was not discharged in the instant case. There was no allegation of undue influence. *Wintle* v. *Nye*,[30] followed.

7. Divesting—Gift Over after Life Interest to Survivors—Rule in *Browne* v. *Kenyon (Lord)*.[31]

Re Stillman.[32] After a life interest there was a gift over to cousins who survived the life tenant. All survived the testator but died before the life tenant. Under the rule their estates took equally.

8. Specific Legacy—Personal Effects.

Re Parrish.[33] Personal effects designates articles associated with the person, therefore a bequest of "My house, garage and lot . . . together with my personal effects" did not include the testator's automobile.

9. Presumption Against Intestacy.

Fast v. *Van Vliet*.[34] Whether a bequest is vested or contingent there is a presumption against intestacy, but the intention of the testator is paramount.

10. Executor—Discretion as to Investments—Duty not to Obtain Private Advantage.

Re Pick.[35] A Trust Company as Executor invested estate funds in its own "Guaranteed Investment Certificates". Held, that not-

27. [1943] 1 All E.R. 16.
28. [1940] 1 All E.R. 632.
29. (1965) 52 W.W.R. 449.
30. [1959] 1 W.L.R. 284.
31. (1818) 3 Madd. 410.
32. (1965) 10 C.C.L., Nov., 120.
33. (1964) 42 D.L.R. 212.
34. (1965) 51 W.W.R. 65 (Man. C.A.).
35. (1965) 52 W.W.R. 136.

withstanding the discretion as to the investment of trust funds given to trustee by s. 4 of the Trustee Act, R.S.S. 1953, the equitable principle that a trustee could not deal with a Trust Fund for his own private advantage had to prevail.

11. Life Tenant and Remainderman—Apportionment of Outgoings.

Re Lotzkar.[36] The British Columbia Supreme Court directed that the very substantial outgoings for debts and estate taxes were to be apportioned between capital and income under the principle of *Allhusen* v. *Whittell.*[37]

12. Gift "at" Specified Age—Contingent or Vested.
Rule in *Phipps* v. *Akers.*[38]

Kilpatrick's Policies Trusts.[39] Certain Life Assurance policies were taken out by a husband on his life under the provisions of the Married Woman's Property Act[40] for the benefit of his wife absolutely if she survived him for one month. The Court held that the wife took a vested interest in the policies from the date they were taken out, which, under the rule was liable to be divested on her death before the expiry of one month from the death of the husband. This vested interest would entitle her to receive any income arising from the policies before they vested indefeasibly, with the consequence that the beneficial interest was not changed in any way by the husband's death. The claim by the English Estate Duty Office that a claim for duty arose by reason of the passing of an interest on the husband's death was therefore defeated.

IV

Other Developments

Perpetuities and Accumulations—the English Act[41] in which followed the recommendations of the English Law Reform Committee made substantial amendments to the law, removing some of the anomalies and technicalities of a very technical branch of the law and also simplified the law regarding accumulations. The Ontario Law Reform Committee has since reported to the Ontario Government recommending similar changes for that province even more desirable as the beneficial provisions of the English Law of Property[42] regarding per-

36. (1963) 40 D.L.R. 843.
37. (1867) L.R. 4 Eq. 295.
38. (1842) 3 CL & Fin. 583 (H.L.).
39. [1965] 2 All E.R. 673.
40. Married Women's Property Act 1882, 51 and 52 Vict. c. 42.
41. Perpetuities and Accumulations Act 1964.
42. 15 & 16 Geo. V., c. 20, ss. 164, 165.

petuities do not apply and accumulations are governed by the law as it has existed since the Thellusson Act.[43] The conclusion of the Ontario Commission with a draft amending Act has been recommended to other provincial Law Reform Commissions with a view to uniform law throughout Canada.

H. G. TREW*

PERSONAL PROPERTY

In *Spurgeon* v. *Aasen*[1] the defendant claimed a gift to her of the contents of the house in which she had been living "common law" with the plaintiff. The claim was rejected, for lack of evidence of any delivery to complete the verbal gift. "In the absence of writing[2] delivery is essential to complete a gift of chattels."[3]

This decision seems to bring the law of Western Canada into line with the position in Ontario[4] and England,[5] which have adopted the regrettable view that if a husband says to his wife,[6] "All the furniture in the house is yours", there is no gift, but if he accompanies this declaration by the "mere formality"[7] of picking up a chair and handing it to her, the gift is completed by "symbolic" delivery.[8]

The bald statement of the rule in *Spurgeon* v. *Aasen*, quoted above, is even more unfortunate, in that the attention of the Court does not appear to have been drawn to two western Canadian decisions which show a more sensible approach to the problem of gifts of "non-manuable"[9] objects between members of a common household. In *Tellier* v. *Dujardin*[10] the Manitoba Court of Appeal upheld a verbal gift of a piano by a father to his daughter, on the basis that, as donor and donee had common *de facto* possession, the words of gift vested the legal possession in the donee and completed the gift.[11] In *Standard Trust Co.* v. *Hill*[12] the Appellate Division of the Supreme Court of Alberta, Clarke, J. A., dissenting, upheld the gift of his automobile by

43. Thellusson Act. 39-40 Geo. III, c. 98.

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1. (1965) 52 D.L.R. 2nd 67 (B.C., Verchere, J.).
2. *i.e.*, a deed. A simple writing is not enough, without delivery.
3. (1965) 52 D.L.R. 2nd 67, at p. 73, quoting 18 Hals., 3rd ed. p. 382.
4. *Kingsmill* v. *Kingsmill* (1917) 41 O.L.R. 238.
5. *Re Cole* (1964] Ch. 175 (C.A.).
6. The same rule applies to all cases where donor and donee are members of a common household, e.g., father and daughter.
7. *Per* Wills J., in *Kilpin* v. *Ratley* [1892] 1 Q.B. 582, at p. 586.
8. *Lock* v. *Heath* (1892) 8 T.L.R. 295. If the donee is already in possession (or, it seems, if possession is subsequently acquired otherwise than from the donor) the gift is good without even symbolic delivery: Re *Stoneham* (1919) 1 Ch. 149. *Kilpin* v. *Ratley, above*, appears to be the only English case where a gift was upheld without either symbolic delivery or prior possession of the donee. There, possession was in a third party.
9. *i.e.*, which are not capable of physical handing over.
10. (1906) 16 Man. R. 423.
11. A contrary conclusion was reached in similar circumstances in *Hislop* v. *Hislop* [1950] W.N. 124 (C.A.) and *Williams* v. *Williams* [1956] N.Z.L.R. 970.
12. (1922) 68 D.L.R. 722.