In this method of appeal also wide powers are given to the Judge hearing the appeal (section 225).

Provision is made in each method of appeal for dealing with the position where an appellant fails to prosecute his appeal. Furthermore, provision is made in section 241 for the arrest of an absconding appellant.

There is now a right of appeal open to both parties in respect of any fine, penalty, forfeiture, or punishment imposed by justices. Previously the only power to alter the punishment imposed by justices was in the case of a re-hearing by a Judge on an appeal by a defendant by way of the procedure where an appeal formerly lay to a District Court.

R.F.C.

EQUITY

Charitable trusts.

Apart from some such epoch-making decision as *Re Diplock*[43] the section of equity most affected by current decisions is that dealing with charitable trusts.

The two most important decisions of general significance in this sphere are undoubtedly those of *Re Strakosch*[44] and *Gilmour* v. *Coats*.[45] In the former case there was a direction to trustees to apply a fund for any purpose which in their opinion was designed to strengthen the bonds of unity between South Africa and the Mother Country and would incidentally conduce to the appeasement of racial feeling. The gift if it was to be charitable would have to come within Lord Macnaghten's fourth class, *viz.*, trusts for purposes beneficial to the community. It was pointed out, however, that the gift must be not only for the benefit of the community, but beneficial in a way that the law regards as charitable, that is, it must be within the "spirit and intendment" of the Statute of Elizabeth. Here the gift left a very great latitude of possible application. There were many modes of application which would tend to attain the objects of the gift which were not charitable within such technical sense. Hence the gift was held void. The case emphasizes that the primary test is the Statute of Elizabeth and that the possibility of modes of application which are not charitable is fatal to a gift. It is one of a line of recent authorities which have clarified the scope of the fourth class in Lord Macnaghten's famous classification.

Gilmour v. *Coats*, following the older case of *Cocks* v. *Manners*,[46] stresses the necessity of the element of public benefit in the case of a charitable trust. Here the trust was for the purposes of a Roman Catholic priory which consisted of a community of cloistered nuns who devoted their lives to prayer and contemplation. It was held not to be charitable as the element of public benefit was essential to render a purpose charitable. The House of Lords took a materialistic view of the word "benefit," holding that the elements of edification by example and assistance by intercessory prayer were too vague and intangible to satisfy the test.

Gibson v. *South American Stores*[47] is worth mentioning for the conclusion of Harman J. that the public element was as necessary in the case of trusts for the relief of poverty as in the case of other charitable

43. [1948] Ch. 465.
44. [1949] Ch. 529.
45. [1949] A.C. 426.
46. (1871) L.R. 12 Eq. 574.
47. [1949] Ch. 572

trusts. He regarded the often expressed view to the contrary as explainable on the basis that in this type of charitable trust a much narrower object than in the other categories might be considered to effect a public benefit.

Queensland Trustees Ltd. v. *Halse*[48] represents an application of the principle of *Dunne* v. *Byrne.*[49] The gift was to the Anglican Archbishop of Brisbane to apply the income as he should in his discretion think fit for the benefit of the diocese. In *Dunne* v. *Byrne* it had been held that a thing could be conducive to the good of religion and yet not be charitable. So in the present case something could be for the benefit of the diocese and yet not be charitable in the sense of being for the advancement of religion within the spirit and intendment of the old Statute. It was endeavoured also to support the gift on the ground that it was a trust for the benefit of the inhabitants of a particular area, *viz.*, the diocese, and therefore valid under Lord Macnaghten's fourth class of charitable trusts. On this aspect Macrossan C.J. and Mansfield S.P.J. took opposing views, but the matter was clinched by the view of Stanley J. that the trust was rendered invalid in any event by the discretion given to the Archbishop to apply the fund to non-charitable objects.

Certainty in relation to trusts.

Where a trust is non-charitable it is necessary to show that the beneficiaries can be ascertained with certainty. This requirement was held to be lacking in *Re Wood deceased*[50] where, it being the custom of the B.B.C. to broadcast an appeal for "the week's good cause" (which was not necessarily a charity in the legal sense), the testatrix gave a certain fund to trustees in trust to pay the income to the cause for which an appeal should have been transmitted by the B.B.C. on the Sunday in the respective week. It being conceded that the gift was not charitable it was held to be void as there was no certain *cestui que trust.* The power of giving certainty was placed in somebody else's hands, which meant that there had been an invalid delegation of the testamentary power.

Trustees' duty not to derive profit.

The rule that a trustee must not derive remuneration in respect of his labours or of his trust office is a well known one, but it of course does not apply where the testator has expressly or impliedly authorised remuneration. A rather indirect application of this occurred in *Re Llewellin's Will Trusts.*[51] Here the testator who was director of a company empowered his trustees to make such arrangements with the said company "for the appointment of my said trustees as a director or managing director of the said company in my place . . . upon such terms and conditions as they think fit." Two of the trustees became directors, and it was held that they were not accountable for remuneration received as directors because the testator having authorised them to make arrangements for the appointment of themselves (or other persons) to offices which to the knowledge of the testator were offices which normally carried a remuneration, had impliedly authorised them to make arrangements for the payment of a remuneration to themselves. Another case

48. [1949] St. R. Qd. 270.
49. [1912] A.C. 407.
50. [1949] Ch. 498.
51. [1949] Ch. 225.

where the executors were held to be entitled to retain commission was *Re Northcote's Will Trusts.*[52] This did not depend upon any principle of authorisation, but arose from the fact that the executors derived commission in respect of the collection of certain American assets so that the remuneration came to them without their volition from a source which had nothing to do with English assets at all. Lastly, in *Re Mulholland*[53] it was shown that the relationship of trustee and *cestui que trust* does not affect contracts which sprang into existence before the commencement of that relationship. Thus where a person had been given a lease by the testator with an option to purchase the freehold, the fact that on the testator's death such person was appointed as a trustee under the will did not prevent him from exercising the option.

Resulting Trusts.

A resulting trust for the donor will arise where he places property in the name of himself and another on joint account, but where he intended to benefit that other (for example, in cases where there is a presumption of advancement), that other will be entitled to the beneficial as well as the legal interest in one moiety and on death will be entitled to the whole fund. In the case of *Young* v. *Sealey*[54] the question was raised as to the position where the disposition was really testamentary. In this case the donor, a spinster, had opened an account in the joint names of herself and her nephew on the terms that in the event of death the balance should be paid to the survivor. The position therefore was that the gift would not be effective till death, so that no beneficial interest was intended to pass till then. It was held that this constituted a good gift notwithstanding that it did not comply with the *Wills Act*, so that the nephew as surviving joint holder was entitled to the balance in the joint account.

Rights of Legatees.

Re Kellner's Will[55] is an illustration of the principle that the right of a residuary legatee is not a right to any specific asset, but merely a right to have the estate administered and the balance remaining paid to him.

The Limits of the Injunction.

In *Pedler* v. *Washband*[56] the plaintiff proceeded for an injunction restraining the defendant from trespassing upon the land of the plaintiff. It appeared, however, that the plaintiff was not merely suing in respect of some alleged act of repeated trespass ; she was out of possession and her action was in substance a claim to the possession of land which the plaintiff claimed to hold by virtue of a tenancy. Philp J. held that where the substance of the claim is ejectment an equity suit claiming an injunction against trespass was inappropriate. This had been held in New South Wales in *Hawdon* v. *Khan*,[57] but it was suggested that the enactment of the Judicature Act in Queensland made a difference.

In any event, there would seem to be strong ground for contending on the facts of this case that the defendant's possession was originally lawful and his " holding over " therefore was not trespass.

E.I.S.

52. [1949] 1 All E.R. 442.
53. [1949] 1 All E.R. 460.
54. [1949] Ch. 278.
55. [1949] Ch. 509 ; see at p. 515.
56. [1949] St. R. Qd. 116.
57. [1920] 37 N.S.W.W.N. 131.

EVIDENCE

Evidence of Similar Acts in Criminal Cases.

An important statement of the law governing the admission of evidence at a criminal trial to show that the accused person has committed other criminal acts similar to those with which he is charged, was made by the Judicial Committee in *Noor Mohamed* v. *The King*.[58] In that case the accused (who was a goldsmith and used potassium cyanide in the ordinary course of his trade) was charged with the murder by potassium cyanide poisoning of a woman who had lived with him as his wife, and at his trial evidence was admitted to show that his lawful wife had died of potassium cyanide poisoning in similar circumstances two years earlier. The Judicial Committee (coming to a different conclusion from that which the Court of Criminal Appeal had reached in very similar circumstances in *The King* v. *Armstrong*[59]) held the evidence to be inadmissible and quashed the conviction. It is well accepted that the basic principles to be observed in cases of this kind are those stated in *Makin* v. *Attorney-General for N.S.W.*[60] where Lord Herschell L.C. said in effect, firstly, that evidence of similar criminal acts is not admissible if it is tendered to show that the accused is a person likely from his conduct or character to have committed the offence charged, but, secondly, that "the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." The second of these principles had been restated and applied with a somewhat remorseless logic by the Court of Criminal Appeal in *The King* v. *Sims*.[61] The view of the Court of Criminal Appeal, expressed in that case by Goddard L.C.J., in language perhaps wider than he intended, was that all evidence which is logically probative is admissible, and since a plea of not guilty puts everything in issue in a criminal trial, evidence that the accused has committed similar criminal acts is admissible if it is in any way relevant to a matter which is technically in issue at the trial because of the plea of not guilty, even though as a matter of substance and common sense it is clear that the matter is not really in dispute at all. For example, such evidence would be admissible if it tended to identify the accused as a person present at the scene of the crime, although at his trial the accused person expressly admitted that he had been present when the crime occurred.

This approach was rejected and certain of the dicta of Goddard L.C.J. were disapproved in *Noor Mohamed* v. *The King*, where the Judicial Committee emphasised that the general rule excludes evidence of prior offences, and that the utmost vigilance should be maintained in restricting the number of cases in which a disclosure of the prior offences of the accused is allowed. It is suggested that this decision does not impair the principle that evidence of this kind is admissible if it is relevant in any other way than as showing a propensity of the accused to commit crimes of the kind charged. It does, however, decide that the relevance must be to something really and not merely technically

58. [1949] A.C. 182.
59. [1922] 2 K.B. 555.
60. [1894] A.C. 57 at p. 65.
61. [1946] K.B. 531.