LX McL McLINDEN, J.V.B. Revocation of a will in favour of "My fiancee" by marriage — Public Trustee v. Crawley.

LX McL

VICTORIA UNIVERSITY OF WELLINGTON

FACULTY OF LAW.

LEGAL WRITING REQUIREMENT.

REVOCATION OF A WILL IN FAVOUR OF "MY FIANCEE" BY MARRIAGE - PUBLIC TRUSTEE V. CRAWLEY. 1974.

J.V.B. MCLINDEN.

Since the Wills Act 1837 a will made before marriage has been revoked by a subsequent marriage by the provisions of section 18 of that Act which state,

> "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions)."

These provisions replaced the situation at Common Law (as exemplified in Marston v. Roe (1)) where a will made before marriage was only revoked if there were issue from the marriage, this rule being to protect the issues' rights as heirs from being deprived of property that the father may have assigned before his marriage that should have been rightfully theirs.

That the Statute should bring the time of the revocation of the will forward to the time of marriage is unusual in that it represents a growing protection of a woman's rights by ensuring that her marriage and her position as a potential inheritor as a wife were formally recognised in the law, and that any pre-marital disposition her husband had made had no effect. Thus if her husband had given his entire estate away to beneficiaries other than his wife before his marriage such dispositions now became void and the possibility that the widow would be left penniless became remote. Yet this protection came at a time when a woman's will was automatically revoked by marriage because of the Common Law rule that a married woman could not make a will.

In England as time progressed the Law eventually recognised the right of a woman to receive property and the possibility that some wills were made in contemplation of marriage and by section 177 of the Law of Property Act 1925 finally permitted the testator greater freedom in the ante-nuptial disposition of his property. Section 177 stated that a will made in contemplation of marriage was not revoked by the solemnisation of the marriage contemplated but the will had to state that it was expressly made in the contemplation of a marriage.

A similar provision was added to the New Zealand law by section 7 (1) of the Law Reform Act 1944,

now section 13 (1) of the Wills Amendment Act 1955. The section reads,

> " Notwithstanding anything in section eighteen of the principal Act (which provides that every will made by a man or a woman shall be revoked by his or her marriage) or any other enactment or rule of law, a will expressed to be made in contemplation of a marriage shall not be revoked by the solemnisation of the marriage contemplated."

THE FACTS IN PUBLIC TRUSTEE V. CRAWLEY (1973) 1 N.Z.L.R. 695.

The case was a recent action for probate in solemn form of Mr. Crawley's will. Mr. Crawley had made a will on the 20th of November 1959 devising all his property to " my fiancee Bunny Rameka of Opua aforesaid." The testator married Miss Rameka on the 19th of May 1960. The marriage lasted for 10 years and was dissolved on the 27th April 1970. Mr. Crawley died on the 21st of June 1970 some two months after the marriage had been dissolved.

The issue which the Court had to decide was whether the bequest " to my fiancee " was a will expressed to be made in contemplation of a marriage.

The importance of the validity of the will to Mrs. Crawley can be seen; if the will was invalid because of automatic revocation Mr. Crawley would die intestate and Mrs. Crawley would not succeed to any of his property because she was no longer his wife, whereas if the will stood she would inherit all her ex-husband's property.

AUTHORITY PRIOR TO PUBLIC TRUSTEE V. CRAWLEY:

In Re Langston (2) in 1953 the facts were that the testator had left all his property " to my fiancee M.E.B." and had appointed her as sole executrix to his estate. The testator's will had been made on November 7th 1935 and his marriage with his fiancee was solemnised on the 7th January 1936. Davies J. in opening his judgment said,

> " Counsel has cited to me three cases on which I am satisfied that as a matter of law I can some to a decision which I feel gives effect to what the testator would undoubtedly have desired." (3)

The first of these cases which had been cited was Pilot v. Gainfort (4). The facts in this case were that the testator's wife had disappeared. In her absence he set up house with another woman and after three years had made out a will in her favour, the material part of which was,

> " I hereby bequeath and leave to Diana Featherstone Pilot my wife all my worldly goods."

Four years after making this will he married her. Lord Merrivale in holding the will valid said,

> " I do not think it can be doubted that the will

was in contemplation of marriage and practically expresses that contemplation and is good." (5).

The next case Davies J. considered was Sallis v. Jones (6) in which it was held that general words at the end of a will expressing it to have been made in contemplation of a marriage were insufficient to relate it to the particular marriage contemplated and were thus insufficient to save the will from revocation on the solemnisation of the marriage. This case he concluded was correctly decided on the point that section 13 (1) only operated when the will was expressed to be made in contemplation of a particular marriage, and in that case there had been a declaration that the will had been made in contemplation of marriage and nothing more.

The final case he considered was an unreported decision in 1944 in England, In Re Knight. In this case the testator had left all his estate to " my future wife " and it had been held that the will was not revoked by the solemnisation of the marriage. Davies J. used this decision as a direct supporting authority for holding Mr. Langston's will to be valid.

From the three above-mentioned cases Davies J. drew the following test: Does the testator express the fact that he is contemplating marriage to a particular person? He then held that in leaving his estate to " my fiancee M.E.B." the testator had done so. This is the law as it stands today in England.

We move now to two Australian decisions. In Re Taylor (7) the facts were almost identical to those in Pilot v. Gainfort (supra). The testator had left his property to his wife at a time when they had not yet been married. O'Bryan J. refused to follow Pilot's case saying,

> " It is not an uncommon thing for a man to describe a woman with whom he is living as ' my wife ' and attribute to her his name."

If extrinsic evidence could have been admitted the testator's contemplation of marriage would have been proved but O'Bryan J. would not permit extrinsic evidence to be admitted and reluctantly held the will revoked, and suggested an amendment to the law.

---

(1). Marston v. Roe (1838) 112 E.R. 742.
(2). In Re Langston (1953) P. 100.
(3) Supra
(4). Pilot v. Gainfort (1931) P. 103.
(5). Supra
(6) Sallis v. Jones (1936) P. 43.
(7) In Re Taylor (1949) V.L.R. 477.

CL McLINDEN, J.V.B. Revocation of a will in favour of "My fiancee" by marriage — Public Trustee v. Crawley.

In In Re Chase (8) the testator left his property by will " to Miss Valerie Gore-Yeo my fiancee at present travelling to Australia on board the ss Stratheden due in Fre mantle on the 8th June 1948." The will was executed on the 6th June 1948, and the marriage was solemnised on the 24th of June 1948. Miss Gore-Yeo took approximately two-thirds of the testator's estate.

Sir Edmund Herring C.J. after counsel had presented thorough reviews of the above cases said,

> " I have been referred to a number of authorities but none of them is of any assistance in the decision of this case which has to be made on the language used by the testator in this will. There is a difference between wife and fiancee in that the use of the latter term necessarily connotes an intention, and amounts to describing the person in question as a person whom the testator intends to marry." (9).

The fact that the will was made in favour of a fiancee who was due in Fremantle in two days time provided enough evidence to the learned judge of an early intention to marry, so the will was therefore valid as it was expressed as being in contemplation of a marriage.

Before we turn to the two New Zealand cases we may at this point consider another reported Commonwealth decision on the matter. In the Canadian case of In Re Pluto Estate (10) the testator left his house and contents " to my wife M.B. Pluto." As in Pilot's case the testator was not married to the person whom he referred to in his will as his wife. However the marriage took place on the next day. The relevant Canadian section is section 16 of the Wills Act RSBC, 1960, Ch. 408 which reads in part,

> " 16. A will is revoked by the marriage of the testator except where
> (a) there is a declaration in the will that it is made in contemplation of marriage."

The Court held that the will was revoked by the subsequent marriage because although an inference was to be drawn that the will was made in contemplation of marriage the inference was not enough to satisfy the words of the Statute, which in the opinion of Hinkson L.J.S.C. was more stringent than its English counterpart. Whereas in the English Statute the will had to be expressed to be in contemplation of a marriage, in the Canadian Statute there had to be a declaration in the will that it was made in contemplation of marriage.

The first New Zealand case on section 7 (1) of the Law Reform Act 1944 came in 1953 in Burton v. McGregor (11). The facts in that case were that the testator left all his property " unto my fiancee Valerie Richards," and appointed her as sole executrix of his will. F.B. Adams J. said in his judgment,

" the purpose of the law as to revocation by

> marriage is to let in the claims of wives and children and it is reasonable to suppose their claims are protected properly and adjusted by the law as to intestacy. To maintain a will made before marriage may result in injustice to children or even to the wife herself, and there are good reasons why it should not be done unless the intention is clearly expressed on the face of the will." (12).

In Burton's case if the widow did not take under the will she would by virtue of her rights as a widow take the whole estate under intestacy provisions which are now embodied in section 77 (1) of the Administration Act 1969.

In holding the will invalid as not being expressed to be in contemplation of a marriage Adams J. based his decision on the view taken in Theobald on Wills, and also advanced by O'Bryan J. in Taylor's case namely that when the testator used the word " fiancee " he did no more than apply to her the name and description which she had acquired by repute and that it was impossible to say anything was expressed in the will with reference to an intention to marry. Adams J. said,

> " By using the word fiancee it is possible the testator intends to provide for her in the interval while she continues to be his fiancee and before she acquires the status of his wife and the rights of a widow on his death intestate. If it is possible on the wording of the will that the testator's intention was such as I have described then it cannot in my opinion be said that the will is expressed to be in contemplation of the intended marriage within the Statute." (13).

Adams J. made mention of Lord Merrivale's words in the Pilot v. Gainfort case, that if the wording of the will " practically expressed the contemplation " of a marriage then the will would not be revoked. Adams J. then said that he could not rely on the words because they only appeared in the Law Reports and the Law Journal Reports, but not in any of the other law reports, which simply quote Lord Merrivale as saying there could be no doubt the will was made in contemplation of marriage, with the result that it was not revoked by the solemnisation of the marriage.

An interesting point can be raised here over the existence of the words " practically expresses," in some reports. It is possible Lord Merrivale may have om itted these words when he gave judgment orally in Court, but on examination after the case included the words in his written judgment before releasing it to the official reporters after realising that his oral judgment as it stood was outside the statute in that the statute required the will to be"expressed to be made in contemplation of a marriage," whereas all he had said in his oral judgment was that the will had been made in contemplation of marriage, omitting reference to the need for the will to express that fact.

---

(8) In Re Chase (1957) V.L.R. 477.
(9) Supra 477 - 478.

If this is so then it is understandable why the words " practically expresses " are not included in the unofficial reports because these are usually based on a transcript of the oral judgment given at the hearing, and are published earlier than the official reports.

Adams J. conceded this possibility when he said,

> " the words "practically expresses" which are the only words referring to expression in the will, may perhaps be a correction, intended to indicate that the learned President did have the point in mind. But, even in the two reports in which those words appear, the quotation of the statute in the judgment omits the words " expressed to be." (14).

It would appear to be quite clear from the above excerpt that Adams J. thought the decision in Pilot v. Gainfort was given per incuriam based on Lord Merrivale's omission to consider the essential words of the statute.

As an additional ground for his decision in Burton v. McGregor Adams J. held that section 7 of the Law Reform Act 1944 was directed to the continued operation of the will after a subsequent marriage, and if it followed that if what the testator said in the will was inconsistent with a possible intention that the will should not operate after the marriage then the will was not one made in contemplation "of" the marriage within the meaning of the section. Adams J. said that the devise " unto my fiancee Valerie Richards " was susceptible of the interpretation that the testator had intended to provide for his fiancee only while she was his fiancee, and so the subsequent marriage revoked the will.

THE REASONING IN PUBLIC TRUSTEE V. CRAWLEY:

In Crawley's case Mahon J. described the issue as " the question whether this will containing a gift ' to my fiancee " is a will expressed to be in contemplation of marriage so as to be saved from revocation by section 13 (1) of the Wills Amendment Act 1955, which incorporates section 7 of the Law Reform Act 1944."

The learned Judge then proceeded to review the history of the section and the English, Australian and New Zealand cases on the section. After drawing attention to the conflicting cases of Burton v. McGregor and In Re Langston he then decided to adopt the reasoning of Adams J. in the former case.

---

(10) In Re Pluto Estate (1969) 69 W.W.R. 765.
(11). Burton v. McGregor (1953) N.Z.L.R. 487.

Mahon J. said,

> " To my mind, a disposition in favour of ' my fiancee ' only establishes that a marriage is contemplated. It does not necessarily represent that the will is being made in contemplation of that marriage, with the concurrent intention that the will is to survive the marriage." (15).

Mahon J. said it was easy to infer the will had been made in contemplation of marriage because of the fact that the testator had left the whole of his estate to his fiancee. But even so he did not think the inference strong enough to hold the will valid. He said,

> " The probabilities would favour the application of section 13 (1) of the Wills Amendment Act 1955. But I do not think that the section is drawn so as to give effect to the probabilities of intention. On the contrary, the section envisages in my opinion an unequivocal declaration of the testator, the purpose of the Legislature being to exclude the admission of extrinsic evidence to prove a testamentary intention that the will should survive the marriage." (16).

Mahon J. said that in the few decided authorities on the revocation of a will by marriage it had been easy to infer that the will had been made in contemplation of marriage because the testator had left the whole or greater part of his estate to his intended wife.

However Mahon J. saw a danger in applying inferences of this kind, and gave the following example as an illustration,

> " Suppose, however, by way of example, that a testator with assets of $100,000 left $1,000 to a woman described as ' my fiancee ' and left $90,000 to his brothers and sisters. Here, the inference would be the other way. It would be impossible to infer from the contents of the will that the testator intended the will to operate after marriage. Yet if cases such as Re Langston and Re Knight are rightly decided, the mere use of the phrases " my fiancee ' or ' my future wife ' would be decisive of the question, and the will in its entirity would be saved from revocation. In such a case the widow would no doubt be constrained to argue for an intestacy, submitting that extrinsic evidence should be received to establish that the testator only intended his bequest to her as a provision for the interval between execution of the will and marriage. The probabilities would certainly be in favour of that construction. But this is the type of enquiry which in my view the statute intended to exclude." (18).

---

(12). Burton v. McGregor (1953) N.Z.L.R. 487, 490.
(13). Supra 492.

So, in disapproving of the Re Langston decision and supporting Adams J.'s holding that the controlling requirement of the section was not that the will be made in contemplation of marriage but that it be expressed to be made in contemplation of marriage, and also that the testamentary expression must convey the intention or contemplation of the testator that his will should operate after marriage, and by leaving his property " to my fiancee Bunny Rameka " the testator had complied with neither of these requirements, Mahon J. pronounced against the will and held it to have been revoked by marriage.

WAS THE DECISION IN THE PUBLIC TRUSTEE V. CRAWLEY CORRECT?

As a starting point in the examination of Mahon J.'s reasoning it would seem logical that we determine the exact definitions of the words " fiancee " and " expressed " as essential prerequisites to an analysis of the problem.

" Fiancee " is defined by the shorter Oxford English Dictionary as " a betrothed person."

"To betroth" is defined as " to engage (a woman) in contract of marriage, to affiance, to pledge or espouse."

" Express " is defined as " to portray or represent, to represent in language; to set forth, to give utterance to; to mention or specify; to state or mention explicitly; opp. to imply."

The shades of meaning of the verb " to express " illustrate how equivocal the interpretation of the section could be.

On the one hand the section could be interpreted as " a will portraying or representing that it is made in contemplation of marriage," which would probably cover the use of the term"fiancee" but on the other hand the section could be construed as " a will specifying or stating explicitly that it was made in contemplation of marriage," which would probably exclude any connotation the word fiancee might reflect even although a fiancee might be considered as a contractual partner to marriage.

On an etymological basis there is support for the judgments of both Adams and Mahon JJ. Their interpretation of the word " expressed " in the statute has been a strict one, holding that the will must specifically state that it is made in contemplation of marriage. Their reasons for adhering to such an interpretation have been quoted already but briefly they have been based on the assumption that even if the will has been held to be invalid the wife will be taken care of by the Court under the intestacy provisions of the Administration Act, but unfortunately in the Crawley case the presumption that the parties would still be married at the date of the testator's death was erroneous.

---

(14). Burton v. McGregor (1953) N.Z.L.R. 487, 489.
(15). Public Trustee v. Crawley (1973) 1 N.Z.L.R. 695, 700.
(16). Supra 700.
(18). Supra 700.

Although Mahon J. took this factor into account he decided that it was wiser to keep the law as it stood by holding the will invalid rather than creating an exception in the Crawley case because of the possible difficulty married women would have if wills to " my fiancee " were held valid, and the original intention of the testator had been only to provide for his fiancee during the interval of their engagement and so had made large bequests to persons other than his fiancee intending to make another will after marriage, which the wife would then have to contest after his death if there had been no other will made.

Is this the way in which the section was meant to operate, in purely black or white terms in which the beneficiary under the will either takes or loses according to the wording of the devise without regard to the testator's intention?

The New Zealand Parliamentary Debates offer little more than a discussion of the general terms of the section. The Attorney-General, the Honourable Mr. H.G.R. Mason stated that the section might help remedy the situation where spouses had suffered because of their omission to execute a new will immediately after their marriage. He said,

> " Clause 7 will be of considerable practical convenience to any person contemplating marriage as it does away with the old provision that marriage revokes all wills then in existence. It follows the English provision and enables a person contemplating marriage to make a valid will before the ceremony takes place, and such will then remains of full force and effect after the particular marriage is solemnised. Up to the present time parties either had to execute a new will immediately after the marriage ceremony or take the risk. The great majority preferred to take the risk, sometimes with disastrous results." (19).

THE COURSE TAKEN IN THE WILL OF FOSS:

If the interpretation of the word " expressed " in section 13 (1) of the Wills Amendment Act 1955 is equivocal there is one other measure left open to the Court to do justice between the parties. This measure is the examination by the Judge of the facts in each particular case. The weighing up of the extrinsic evidence to see if the " fiancee " was contemplated as a wife at the time of the execution of the will.

This course was followed by Helsham J. in In the Will of Foss. (20).

The facts in this case were that the deceased had made a will at his employer's request on the 2nd of March 1956 containing the dispositive provision:

> " I give devise and bequeath all my personal belongings money, shares in companies, insurance policies, and property to my wife (Mrs. P. Foss)."

At the time of the will's execution the testator had not yet married the woman he had termed as his wife in the will, however the testator married the woman 8 days later on the 10th of March 1956.

The will was challenged under a similar provision in the Australian legislation to section 13 (1) of the Wills Amendment Act 1955.

In outlining the issue concerning evidence Helsham J. said,

> " There can be no dispute that evidence is admissible as to the marital state of the deceased and any interested party at the date the will was made, and of the subsequent marriage of the deceased. That brings up the matter for decision. But can the Court consider any other factors, as for example, that the deceased was engaged to be married, whether or not he was living with a person whom he describes in his will as his wife and whom he subsequently married, what time elapsed between will and marriage and so on? On this matter of evidence views have differed." (21).

His Honour then outlined the distinction between reading a meaning into a will by extrinsic evidence, and interpreting the construction of an expression in the will by extrinsic evidence.

> " Whilst it is correct to say that the fact that a marriage was contemplated must appear by some expression in the will itself, it is also correct to say that whether the will contains such an expression must depend upon the construction of the will. If the will clearly contains such an expression, then there is no problem. If it does not, but there are some words which may or may not amount to such an expression, then the will must be construed so as to find its true meaning. In order to ascertain the meaning of the words used by the testator it is permissible to construe the document in the light of the surrounding circumstances. This is the law in relation to ambiguities of language used in a testamentary document, and applies no less to the aspect of whether a testator has expressed the fact that his marriage was contemplated as to any other.
>
> For limited purposes the Probate Court has always been a court of construction, one purpose being to ascertain whether a will should be admitted to Probate. (22).
>
> If the question is a matter of construction, then as Lord Cairns said, " The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application he uses,

> and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty applied." (23)

The only reported instance of a Judge in New Zealand accepting extrinsic evidence in this area is in Re Natusch, Pettit and Others v. Natusch (1963) N.Z.L.R. 273.

In this case the testator by his will had given the whole of his estate to trustees for sale and conversion, and apart from two small legacies payable only on certain contingencies, had directed his trustees to stand possessed of the residue for his " intended wife Peggy Moir Ford." There followed in the will a declaration that the will was made " in anticipation of my intended marriage to the said Peggy Moir Ford."

At the date of the testator's death Mrs. Ford was still married to Mr. Ford but had been separated from him for sufficient time to give grounds for divorce. No divorce had been obtained however.

Counsel for the defendants (who were beneficiaries under an earlier will) contended that the will was a conditional or contingent will, the purpose of the will being to effect a benefit to Mrs. Ford only if and when the contemplated marriage eventuated. In the course of his judgment McGregor J. said,

> " There do not seem to me to be any other indicia in the will to assist in its construction. Both counsel requested me to hear extrinsic evidence to assist in ascertaining the intention of the testator. In view of the agreement on this matter, although I had doubts as to the admissibility of such evidence I agreed to accept evidence of this nature." (25).

The existence of an agreement between counsel and McGregor J.'s hesitancy in admitting the evidence does not make Natusch a strong supporting authority for a New Zealand Court to go further and follow the course taken in Foss's case.

COMMENTARY:

The present New Zealand authorities hold that a will expressed to be made in contemplation of a particular marriage is not revoked by the marriage concerned, but that a will made in contemplation of marriage expressed to be made in favour of " my fiancee " is revoked by the marriage. This dichotemy in my view does not have a justifiable foundation in fact, law or in the element of public policy concerned.

FACT:

Any student of etymology would recognise that words may have different connotations. " Fiancee " is a word to which can be attached two important shades of meaning. Firstly it may be a name colourlessly attributed to a person after the manner of the words " sister, mother etc." purely as a matter of description. Secondly the use of the word " fiancee " by the testator would readily be taken by most people to be tantamount to an affirmation that the testator proposes to marry the woman so described.

It would appear that in both Burton and Crawley the testators included the word " fiancee " as an indication that they were making their wills in contemplation of their respective marriages. Should the Court have recognised this fact?

LAW

As a matter of law Sim J. in the Court of Appeal felt he was bound to recognise the use of words in their popular sense by a testator (26). Two women contested a will in which the testator had left his property to his wife. One of the women was the testator's de facto wife, the other was his de jure wife. Sim J. received evidence which,

> " makes it clear that in the later will he (the testator) used the expression " my wife " in its secondary or popular sense to denote his de facto wife, and not the person who might claim to be his de jure wife." (27).

In admitting a will to Probate the Court may act as a Court of construction. If all the aspects of a will indicate that the testator used the expression " fiancee " as indicating he was making a will in contemplation of marriage the Court should set about construing the will by receiving evidence to see if this was the testator's undisputed intention. As expreesed by Lord Cairns,

> " The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty applied." (28).

If the facts show that the testator made the will in contemplation of marriage, ie that he used the term " fiancee," left his fiancee the bulk of his estate, and subsequently married her, the Court should be prepared to accept extrinsic evidence in support of the expressed terms of the will to show that the will was made in contemplation of marriage, and should be allowed to operate after marriage.

L. McLINDEN, J.V.B. Revocation of a will in favour of "My fiancee" by marriage — Public Trustee v. Crawley.

PUBLIC POLICY:

As Adams J. said, the provision in the Wills Act revoking all wills on marriage was inserted,

> " to let in the claims of wives and children and it is reasonable to suppose their claims are protected properly and adjusted by the law as to intestacy. To maintain a will made before marriage may result in injustice to children or even to the wife herself, and there are good reasons why it should not be done unless the intention is clearly expressed on the face of the will." (29).

It may be pointed out that at Common Law the claims of children were already provided for by the rule that a pre-marital will was revoked on there being issue from the marriage. The provision was actually for the greater protection of a wife's rights. By refusing to follow the testator's expressed intention in the " fiancee " wills, the Courts are opening the way to serious possible effects on a wife's rights to inherit.

If the wife cannot take under a will because it is invalid, the intestacy provisions of the Administration Act 1969 usually govern the distribution of the testator's estate. Section 77 of the Administration Act provides that when a person dies intestate, leaving issue, the surviving spouse takes the personal chattels and $12,000 out of the estate, and then takes one third of the rest of the estate. The provisions of the Administration Act are totally different to the provisions of a testator who leaves his whole estate, as in Burton and Crawley, to his fiancee. In the Crawley case Mrs. Crawley could receive nothing under the intestacy provisions because she was not longer Mr. Crawley's wife, although the original will was still in existence.

If the estate is one of reasonable size and the issue of the marriage are adult then it is possible a wife may find herself reduced to a financial status never intended by her deceased spouse. For example if the estate was worth $100,000, the wife would receive a total of about $40,000 under the intestacy provisions, which does not take into account any death duties payable on the estate. She has barely enough to buy a house and maintain herself for 5 years on this figure. This is hardly a situation which protects the wife's rights as intended by the statute. If on the other hand the pre-marital will was held valid the surviving spouse would be gaining the bulk of the estate in accordance with the testator's wishes. Yet of the two alternatives the Courts have opted for the former in New Zealand.

It is my submission that when the Legislature enabled testators to make wills to be expressed to be in contemplation of a marriage they intended the provision only for a testator's convenience, and intended the provision to operate where the testator indicated that he had made the will in contemplation of marriage. I submit that in both Burton and Crawley the testators did evidence such intentions, and did express their intentions in their use of the word " fiancee." I submit that the decisions in In Re Chase and In the Will of Foss

are preferable to the New Zealand authorities because the former do more justice to the intention of the section and to the parties involved.

CONCLUSION

Section 18 of the Wills Act 1837 states:

> " Every will made by a man or woman shall be revoked by his or her marriage.."

Section 13 (1) of the Wills Amendment Act 1955 states:

> " Notwithstanding anything in section 18 of the principal Act or any other enactment or rule of law, a will expressed to be made in contemplation of a marriage shall not be revoked by the solemnisation of the marriage contemplated."

The New Zealand authorities of Burton v. McGregor and Public Trustee v. Crawley hold that a will made by a testator before his marriage to " my fiancee " is not expressed to be made in contemplation of a marriage, and is therefore revoked on the solemnisation of the marriage.

It is my submission for the reasons outlined in this paper that such wills should come within the meaning of section 13 (1) and should be valid after that marriage.

ADDENDA.

(19). 267 New Zealand Parliamentary Debates 424

(20). In the Will of Foss (1973) 1 N.S.W.R. 180.

(21). Supra at page 182.

(22). Supra at page 183. Taken from In the Estate of Fawcett (Dec'd) (1941) P. 85.

(23). Charter v. Charter (1874) L.R. 7 H.L. 364, 377 per Lord Cairns.

(25). Re Natusch, Pettit and Others v. Natusch (1963) N.Z.L.R. 273,276

(26). Collins v. Day (1925) N.Z.L.R. 280,

(27). Supra 301.

(28). Charter v. Charter (1874) L.R. 7 H.L. 364, 377 per Lord Cairns

(29). Burton v. McGregor (1953) N.Z.L.R. 487, 490.

4000

CL McLINDEN, J.V.B. Revocation of a will in favour of "My fiancee" by marriage — Public Trustee v. Crawley.