the jury (*Kwaku Mensah* v. *The King* [1946] A.C. 83). On the other hand, in *R.* v. *Malcolm* [1951] N.Z.L.R. 470 at 485 the Court of Appeal said:

> We think . . . where the evidence proves murder or nothing, the presiding judge is entitled to tell the jury that it cannot find a verdict of manslaughter —that is, where the evidence clearly supports a verdict of murder and there is nothing in the evidence to justify the verdict's being reduced to manslaughter. The authorities we have considered go to show that at common law a jury should not be directed that it has power to return a verdict of manslaughter where the evidence, if accepted, proves murder or nothing.

Against this view, the Full Court of Victoria in *R.* v. *Ryan and Walker* [1966] V.R. 553 said that the jury have a constitutional or common law right to return a verdict of manslaughter even in cases where the evidence pointed to murder alone.

The trial judge in the instant case said:

> [Counsel] made mention of manslaughter. It is within the province of a jury, even if it is satisfied that the case has been proved, to bring in an alternative verdict of manslaughter. That is a privilege and is a matter for you. I say no more than that about it.

The view in *R.* v. *Malcolm*, endorsed in *R.* v. *Black* [1956] N.Z.L.R. 204 at 210, was not that taken in *R.* v. *Ryan and Walker*, but it was not necessary to resolve the apparent conflict in *Morrison's* case as the Judge's summing up was favourable to the appellant.

Mrs J. C. Somerville.

EQUITY AND THE LAW OF SUCCESSION

Formation of the trust

(a) Certainty as to obligation to hold property on trust: In *Re Pugh* [1967] 1 W.L.R. 1262 the testator devised and bequeathed his residuary estate subject to payment of debts, funeral and testamentary expenses and legacies

> unto my trustee absolutely and I direct him to dispose of the same in accordance with any letters or memoranda I may leave with this my will and otherwise in such manner as he may in his absolute discretion think fit.

The testator left no letters or memoranda. Pennycuick J. held that the above instruction

> clearly imposes upon the trustee at any rate some degree of fiduciary obligation, and it is impossible to construe the gift as a simple and absolute gift to the trustee . . . one may well use the word trust because that fiduciary obligation is in the nature of a trust.

That the court must look at the whole instrument was also stressed by Goff J. in *Re Baden* [1967] 1 W.L.R. 1457 where the phrase "the trustees shall apply the net income of the fund in making at their absolute discretion grants . . . " was found to create only an illusory trust, from consideration of the whole context.

(b) Certainty as to the beneficiaries: In the following cases the courts have shown themselves prepared to accept a lower standard of certainty in the case of a power than with a trust or a trust power. The

phrase " . . . others whom the company might consider to have a moral claim on you" used in describing a discretionary power was held to be a sufficiently certain description of the potential beneficiaries by Buckley J. in *Re Leek* [1967] Ch. 1061. Similarly, in *Re Gibbard* [1967] 1 W.L.R. where there was a power of appointment provided by will of the residuary estate "to any of my old friends", Plowman J. found that uncertainty was not fatal to the validity of a collateral power, and that there was a sufficient degree of certainty here. Lord Denning M.R. was prepared to go further in *Re Gulbenkian* [1967] 3 W.L.R. 1112 at 1117 where he stated that a power "is not to be held bad for uncertainty unless that uncertainty is such as to make the clause meaningless".

Variation of a Trust

The variation of a trust is made by the beneficiaries, not by the court. The function of the court is merely to consent to variation on behalf of persons under some incapacity. This was stressed by the House of Lords in *Re Holmden* [1968] 1 All E.R. 148, where the House also recognised that a variation was to ease the burden of taxation.

Liabilities and Rights of Trustees

(a) Breach of trust: (i) Mixing of trust funds: Where a trustee mixes trust assets with his own then there is an onus on him to distinguish them, and to the extent to which he fails to do so, the assets belong to the trust. This is the effect of the decision in *Re Tilley* [1967] Ch. 1179. Further, Ungoed-Thomas J. held that there is no presumption that a trustee's drawings from a mixed fund must necessarily be treated as drawings of the trustee's own money where the beneficiary's claim is against the property bought by such drawings (p. 1185).

(ii) Personal liability of trustee: In *Standard Insurance Co. Ltd. (in liquidation)* v. *Sidey* [1967] N.Z.L.R. 86 an estate of which the defendant was executor held shares in the plaintiff company subject to liability for uncalled capital. The executor had dealt with these shares without making allowance for the unpaid amounts. It was held by Woodhouse J. that where some of these shares had been sold for cash and had gone to the beneficial interest of the executor he was personally liable to the extent of such purchase money to the company. He was also personally liable to the extent of distributions made to the benficiaries of dividends on the shares. However, the learned judge applied s. 73 of the Trustee Act 1956 which provides that the court may relieve a trustee from personal liability either in whole or in part if he can show that he "has acted honestly and reasonably and ought fairly to be excused".

(b) Remuneration of trustee: In *Re Murray* [1967] N.Z.L.R. 1 the testator provided that the executor be remunerated at the rate of two per centum on the capital of the estate. Bearing in mind that "the testator intended the percentage to be a fair allowance for the services of the trustee in acknowledgement of the time and trouble involved" McGregor J. construed this charge as being made on the gross estate at the time of death.

(c) Sale of trust property to the wife of the trustee: In this situation the court will apply safeguards similar to those applied in a sale of the trust property to the trustee himself. In holding this, Tompkins J. said

in *Re MacNally* [1967] N.Z.L.R. 521 at 523 that it is essential to provide the court with

> the clearest evidence that the sale is in the interests of the infant beneficiaries and that the consideration being paid is full and adequate and is at the best price obtainable.

Such evidence was not forthcoming in the present case, and the learned judge declined to approve the sale until he received such evidence.

Charitable Trusts

(a) Definition: A charity will fall within the "spirit and intendment" of the Statute of Charitable Uses even where a charge is made for its services, so long as there is a clearly specified object for the public benefit. This was held by the House of Lords in *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation* [1967] 3 W.L.R. 1132, where a cremation society was held to be charitable, Lord Wilberforce finding it analogous to cases of public utility, while Lord Reid and Lord Upjohn found the charity analogous to the lines of burial cases considered by the courts.

(b) Variation: (i) By the court in its inherent *cy-près* jurisdiction: Where a settlor had communicated a trust "for purposes of which I have told you", and after the settlor's death it appeared that other charitable purposes might have been added to the list by the settlor and the trustee which did not appear in the original communication, there was found to be no effective gift to the charities on the list. However, Pennycuick J. found a general charitable intention, directing that the moneys be used in accordance with a scheme to benefit charity generally (*Re Tyler* [1967] 1. W.L.R. 1269).

(ii) By the court under statutory authority: In *Re Goldwater* [1967] N.Z.L.R. 754, T. A. Gresson J. held that Part III of the Charitable Trusts Act 1957 gives the court power to either reject or approve a scheme submitted to it: the court cannot approve an alternative scheme put forward by parties in opposition.

Family Protection

(a) Statutory amendment: New provision is made in the Family Protection Amendment Act 1967 for the claim of grandchildren. Any grandchild may now claim under the Act, but

> in considering the moral duty of the deceased at the time of his death shall have regard to . . . any provision made by the deceased or by the court in pursuance of this Act in favour of either one or both of the grandchild's parents (s. 3(2)).

(b) Evidence as to the deceased's reasons for his dispositions: such reasons, so far as they are ascertainable are admissible in any application under the Act by virtue of s. 11. In *Re Blanch* [1967] 1 W.L.R. 987 the deceased had been irrationally jealous of his wife. It was upheld by Buckley J. that this was inadmissible as a "reason". "Feebleness of mind, whether amounting to or falling short of testamentary incapacity, could never, I think, be a 'reason' ". However, the state of the deceased's mind could be

very material to the weight to be attributed to any reasons he may have given in his lifetime for failing to make provision for a dependant or for making only such provision as he did make for such dependant.

Certainly, in the present case irrational jealousy had no bearing on the amount which the court should order to be made for the plaintiff, except in so far as her moral claim might be said to be enhanced by her endurance of the state of affairs for about a year.

M. J. Grant.

EVIDENCE

Blackie v. *Police* [1966] N.Z.L.R. 910 illustrates a modern development in the scope of expert opinion evidence. The appellant had been convicted of "driving while under the influence" and one of the questions before the Court of Appeal was whether a traffic officer or policeman was competent to give evidence that in his opinion a driver was sufficiently intoxicated to satisfy the charge. A majority of that Court (North P. and McCarthy J.) answered in the affirmative though noted several restrictions. First, the officer must initially establish that he is sufficiently qualified either by training or experience to express such an opinion and secondly such evidence is not rendered inadmissible by virtue of the witness's close association with the prosecution's case, but this may well affect the weight given to such evidence. In his dissenting judgment Turner J. emphasised that the evidence would tend to usurp the function of the Court by answering the very question that the Court is called upon to decide, but little note was taken of this by the majority Judges, and surely this is the effect of an expert opinion evidence.

Daily v. *Police* [1966] N.Z.L.R. 1048. Here the novel contention that a blood sample taken from an intoxicated driver without his consent was analogous to an illegally obtained confession and should accordingly be inadmissible was rejected by Wild C.J. in the Supreme Court. In fact the Chief Justice affirmed the advice given by the Judicial Committee in *Kuruma* v. *R.* [1955] A.C. 197: "If evidence is relevant to matters in issue, it is admissible and the Court is not concerned with how the evidence was obtained". The Committee did make it clear that they were in no way limiting the rules governing the admissibility of confession, but nevertheless it is submitted that this far-reaching advice should be subject to some restrictions.

However support for the Privy Council's view can be found in *Fraser* v. *Police* [1967] N.Z.L.R. 447 where McGregor J. held that an implied consent to a blood sample being taken existed if it was taken in such circumstances that the persons must have known he was under arrest and the nature of the offence alleged and where the only reasonable inference is that he did consent to the sample being taken. In this case the appellant alleged the sample was taken without his clear unqualified consent.

Both *Fraser* v. *Police* and *Talbot* v. *Police* [1967] N.Z.L.R. 879 illustrate the great weight which attaches to the certificate of a qualified analyst as to the alcohol content of the blood of an intoxicated driver. In the former case it was held irrelevant that there was a three day