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FAMILY PROTECTION: SOME RECENT JUDGMENTS.

IN the last few months, claims by daughters for further provision under the Family Protection Act 1955 seem to have been occupying the attention of the Court almost to the exclusion of other claims. There were, of course, some claims by widows.

We include here a summary of some of the judgments delivered during the last three months.

DAUGHTERS' CLAIMS.

In *In re Solyman.* (Hamilton. 1958. May 1, June 18. T. A. Gresson J. (G.R. 3584)) the plaintiff, one of the testator's daughters, applied for further provision out of her father's estate some twenty-five years after his death. The Public Trustee applied on behalf of the other daughter, a mental patient.

The testator, who came to New Zealand from Lebanon in 1900, died at Taupo on May 27, 1932. His wife predeceased him but he was survived by four sons and two daughters, Katie Sessine and Lozworth Cooper. Two sons have since died. It was known that one son left children in Lebanon, but every effort to get into direct touch with them failed. The personal representatives of each of those sons and his children were served and represented under orders of the Court. The grandchildren of one of the deceased sons were poor, and one surviving son was in very modest circumstances; but there was no information before the Court as to the financial circumstances of the other surviving son.

The plaintiff daughter was 56 years of age, and was stated to be a chronic diabetic. In 1925, she married a roadman, whose gross wage was approximately £10 per week. For the purposes of this claim, the learned Judge said that she must be regarded as a daughter who, at the date of her father's death, was supported by an able-bodied husband.

The other daughter, aged 60, had been a mental patient since 1915. She was suffering from schizophrenic dementia and had no prospects of improvement or recovery. She was maintained in the Tokanui Hospital, and the Deputy Public Trustee stated that an amount of £45 per annum would meet her requirements and provide some additional clothing and comforts. She had an expectation of 18.5 years, and it was said that a capital sum of £580 would provide this annual payment.

By his will dated March 22, 1931, which he made for himself in Arabic, Solyman " bestowed the piece of land belonging to him at Taupo unto his four sons, to be divided amongst them equally and no one of my daughters has the right to claim anything of my aforementioned, as I have discounted their inheritance while living." He also appointed his eldest son his executor. Counsel were unable to throw any light on the precise meaning of the reference in the will to discounting the daughters' inheritance while living, but all agreed that the testator had made no financial provision for his daughters in his lifetime. The learned Judge said that the probability was that the terms of the will and the testator's settlement of the bulk of his property upon his eldest son during his lifetime reflected his outlook in regard to primogeniture and male supremacy.

The only estate asset at the date of the testator's death in May, 1932, was a section at Taupo, the Government valuation of which was £200. The eldest son died on October 15, 1943, without having taken out administration of his father's estate; but an order to administer, with will annexed, was granted to the Public Trustee at Hamilton on July 18, 1955. In the course of administration, the Public Trustee sold the Taupo property for £3,000 and there was now the sum of £2,618 7s. 10d. in his hands. His Honour said:

> It is settled law that under the Family Protection Act the Court is not free " to do the fair thing " or correct injustices as such. The Act can be invoked only where the Court is satisfied that the will in question fails to make " adequate provision for the proper maintenance and support " of a claimant. " 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 ? " : *In re Allardice, Allardice* v. *Allardice* (1910) 29 N.Z.L.R. 959; 12 G.L.R. 753. The Court is not free to indulge instincts of equity, generosity or liberality. A testator's will-making power is open to review only to the extent that there is inadequate provision for proper maintenance: *In re Blakey, Blakey* v. *Public Trustee* [1957] N.Z.L.R. 875, 877, per North J.
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> If untrammelled by authority, I would have made an order in favour of the mental patient, more particularly as I directed counsel for the Public Trustee to inquire whether, if an order as suggested were made, the annual sum thus provided would for certain be spent on the daughter's additional comforts, and in due course I was assured that this would be so. Modest though any such further provision would be, it would be not unreasonable to hope that it might bring a little pleasure and additional comfort to a daughter who, through no fault of her own, had been deprived of a life of normal activity and fulfilment and from any participation in her father's estate.

His Honour said that the other daughter's claim was less strong, because since 1925 she had had an able-bodied husband to support her; but, having regard to the total absence of any financial help from her father during his lifetime, it would also seem not un-

reasonable to grant her some provision from his estate if the Act so permitted. He continued :

> The breach of moral duty or otherwise, however, must be treated at the date of death, and at this date I am unable to say that the action of the testator in disinheriting his daughters in favour of his sons involved any breach of moral duty. The approximate value of the whole estate was then only £200, and it is only the phenomenal increase in the value of land at Taupo which gives either daughter the semblance of a claim under the Act.
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> As Gresson J. stated when delivering the judgment of the Court of Appeal *In re Kallil, Kallil* v. *Koorey* [1957] N.Z.L.R. 31 : " The crucial point for considering claims under the Act is the date of the death of the testator. That must necessarily be so, since as was said by Salmond J. in *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673, 687 ; [1924] G.L.R. 168, 178 : " The moral duty of the testator to make provision for the proper maintenance of his family can only be ascertained by reference to the facts as existing at the date of death, including, of course, amongst such facts the reasonable probabilities as to future change of circumstances " (*ibid.*, 36.)
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> To found the jurisdiction of the Court the provision made by the testator must have been inadequate judging it at the date of his death. So, too, the measure of his moral obligation must be determined in the light of his resources at the time of his death. It is upon the state of affairs existing at that time that it must be decided whether or not there was a failure of moral duty ; and when the Court performs its function of remedying the discharge of moral obligation, it is strictly limited to doing no more than remedying his default. *It would be quite illogical and improper to revise the testator's dispositions upon an assessment of what he ought to have done had he lived up to the time at which the matter fell to be considered, in this case ten years later.*"
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> In *Kallil's* case, the Court recognized that a too rigid adherence to the principle stated above would work an injustice, but there were " very special circumstances " involving " grievous hardships."

His Honour said that he was tempted, on sympathetic grounds, to hold that the phenomenal increase in the value of the testator's land at Taupo over the past twenty-six years, which he could not regard as having been a " reasonable probability " at the date of his death, nevertheless constituted a special circumstance entitling the applicants to an order ; but, he said, on reflection he felt constrained by authority to reject both applications. He concluded by saying that after all, there was only an estate of £200 for disposal ; and, at the date of the testator's death in 1932, the plaintiff had an able-bodied husband and the other daughter's maintenance, albeit at an institutional level, was provided for.

In *In re Graham.* (Wanganui. 1958. May 22, 30. Barrowclough C.J. M. 1/58), there was an application by two daughters for adequate and proper provision out of their mother's estate. The estate was not a large one. After payment of debts and death duties, a sum directed to be expended on the erection of a tombstone and the expenses of administering the estate, the value of the remaining assets would be not more than £1,530.

In making her will the mother did not altogether overlook the claims of her daughters. She gave to the elder daughter (Mrs Barnett) a limited right to reside in a dwellinghouse and use the furniture therein ; but this gift was subject to such conditions as to make it quite impracticable for Mrs Barnett to receive any benefit from it and for all practical purposes she gets nothing under the will. If the provisions of the will were to stand, house and furniture, said to be worth £650, would go at once to the Wanganui Hospital Board.

The other daughter (Mrs Naisbitt) received under the will the residue of the estate, and that would not exceed £400.

The following pecuniary legacies were bequeathed by the will : to George William Barnett (husband of Mrs Barnett), £100 ; to the Mother Aubert Home of Compassion, £150 ; to the Wanganui Hospital Board, £100 ; and to the Wanganui Hospital Board, £100 ; and to the Wanganui Orphanage, £100. There were no other dispositions in the will of property of any significance.

Mrs Barnett was now 64 years of age. Her husband was still alive but was retired. Their sole source of income was the Social Security age benefit. They owned " jointly in equal shares " (whatever that might mean) the house property in which they lived and which was worth £800. The husband owned the small amount of furniture therein. That was the sum total of their assets. Mrs Naisbitt was a widow, 60 years of age, whose sole income was an invalidity benefit and her only assets, were her personal clothing and effects. Both the daughters were in poor health.

The learned Chief Justice said :

> In these circumstances, it cannot be doubted that the testatrix failed to appreciate her daughters' moral claims on her bounty. Upon the information before me, I can scarcely think that the Hospital Board and the pecuniary legatees (amongst whom the Hospital Board is again included) could compete very strongly with the daughters. Unfortunately, I have no means of judging the merits of the competing claims of the Hospital Board and the other pecuniary legatees. The Hospital Board was served with a copy of the summons and appeared by counsel. No affidavit was filed on its behalf to show why the testator should have bestowed on it such a large part of her small estate. The Hospital Board merely submitted to the order of the Court. I appreciate its reluctance to oppose the daughters' claims ; but the fact remains that, if there is any room for competition between the Board and them, I have no means of judging it.

The daughters apparently did not desire to disturb the pecuniary legacies other than that bequeathed to the Board. Accordingly, in asking for directions for service of the summons, they suggested that service on the pecuniary legatees be dispensed with. The learned Judge made an order accordingly, but stated that it was made at counsel's risk. The pecuniary legatees were not served, and did not appear. This course, the learned Chief Justice observed, was no doubt followed in a commendable desire to save costs ; but it had its disadvantages. He had no means of knowing to what extent the pecuniary legatees could fairly compete with the applicants or to what extent they might fairly compete inter se. His Honour continued :

> In the result, and on the limited information before me, I can only say that, if I were free to do so, I would charge any provision which I made for the daughters rateably on the devise to the Hospital Board and the legacies. But that I cannot do. Only the Hospital Board is before me. In deciding for themselves that any provision made for them should be charged only on what was given to the Hospital Board, the applicants have usurped the function of the Court. I do not desire to be too critical of them and I appreciate their motives, but their action has placed me in a difficulty. Mr Clayton, who appeared for the applicants, appreciated the difficulty and suggested that it might be overcome by allowing the pecuniary legacy to the Hospital Board to stand—thus treating all the pecuniary legatees alike. With some misgivings, I have decided to accept that suggestion, mainly because there seems to be nothing else that I can reasonably do. I propose therefore to divide between the two daughters the whole of the disposable part of the estate other than what is necessary to pay the pecuniary legacies bequeathed by the will. All of them will stand.
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> As between the two daughters, I think that the claim of Mrs Naisbitt is a little stronger than that of her sister. Mrs Barnett has an interest in the dwelling house which she and her husband own " jointly in equal shares " and she may derive some benefit out of the legacy of £100 that goes to her husband. The disposable estate after payment of legacies will be £1,150 or thereabouts, and it will be reduced a little by

the costs of these proceedings for no part of the costs can be charged upon the pecuniary legacies. What is left should be divided between the daughters ; but so that the share payable to Mrs Naisbitt shall exceed the share payable to Mrs Barnett by £300. The gift of the house and furniture to the Hospital Board will disappear but the legacy of £100 will stand. The share which goes to Mrs Naisbitt under this order will be in excess of the residue which would have gone to her under the will and is, of course, in substitution for the gift of residue.

His Honour did not anticipate that there would be any difficulty in drawing up an order to give effect to this judgment ; but, if any should arise, leave was reserved to apply—by written submissions from counsel if that was more convenient to them. Costs of all parties as taxed by the Registrar are to be paid out of the disposable estate, after payment of legacies.

In *In re Cavey.* (New Plymouth. 1958. May 1, June 9. Shorland J. A. 2993) the widow and daughters of the deceased claimed further provision under the Family Protection Act 1955.

His Honour first recorded the salient facts of the history of the deceased and his family from 1926 to 1952.

The deceased and his wife had five children, comprising two sons and three daughters. In 1926, the deceased purchased a farm at Okato and the family resided thereon until the daughters in turn married. In 1952 he divided his farm into two, selling one comprising about 85 acres to his son George, and the other comprising 83 acres to his son William. At the time of sale the farm was subject to a mortgage of £3,600 which was rearranged on sale, each of the sons giving a mortgage securing £1,800 on the portion purchased by him. No money passed in the purchases, but George, in addition to giving a first mortgage for £1,800 to the New Plymouth Savings Bank, in part replacement of the deceased's mortgage for £3,600 on the farm, gave to the deceased a second mortgage securing £5,200. William, in addition to giving a first mortgage for £1,800 to the New Plymouth Savings Bank, gave the deceased a second mortgage for £4,800, and a third mortgage for £856 10s.

The estate left by the deceased approximated £12,000 odd, of which George's mortgage of £5,200 and William's mortgages of £4,800 and £856 10s. (totalling £5,656 10s.) comprised the bulk, cash, a motor-car, furniture and accrued universal superannuation, making up the balance.

By his will, except for small and unimportant provisions, the deceased directed that his estate be converted and divided into four parts, two of which were to be held in trust for his daughter Violet Sears, and one each of which was to be held in trust for his daughters Grace Putt and Iris Moffitt. Subject to certain conditions, the deceased directed postponement of the calling in of the mortgages given by his sons during the lifetime of his wife, and he further directed that the payment of 30s. per week from each son should be accepted in full discharge of interest liabilities. The deceased directed that the two weekly payments of 30s. per week (totalling £3 per week) be paid to his wife for life. Upon the death of his wife, he gave the respective mortgages executed by his sons to such sons absolutely.

In the result, the deceased gave what turned out to be approximately £662 to his daughter Violet Sears, £331 each to his daughters Grace Putt and Iris Moffitt, a weekly payment of £3 payable from interest payable by his sons on mortgages given by them to him, and, from and after death of the wife, forgiveness of £5,200 of purchase money secured by his son George, and £5,656 10s. of purchase money secured by his son William, together with forgiveness of part interest in each case during the lifetime of the wife.

It was conceded by all parties that the provision made for the widow was inadequate, and that, in lieu of the provision contained in the will she should receive a weekly payment of £7 for her life, the incidence of the payment to fall as to £4 per week upon George, so that £4 per week will be payable and accepted in satisfaction of his obligation to pay interest under his mortgage, and as to £3 per week upon William, so that £3 per week will be payable and accepted in satisfaction of his obligation to pay interest under his mortgages. An order for further provision in favour of the widow by substituting a payment of £7 per week for the provision of £3 per week contained in the will was made accordingly, the incidence of such order to be as above stated.

His Honour then reviewed the position of each of the three daughters and the two sons. He found that the deceased's daughter, Violet Sears, made a substantial contribution to the building of the deceased's farming assets sold by him to his sons before death. She was married to a farmer whose assets exceeded liabilities by about £6,000, and whose income was about £1,000 per annum. She had no assets other than the bequest under her father's will. She had six children, whose ages ranged from five years to eighteen years.

Grace Putt was married in 1938. She left school in 1931 and worked continuously on the deceased's farm from 1931 to 1938. In 1938, the deceased placed one half of his farm in control of his son George. Immediately after marriage Grace Putt and her husband took over control of the farm lands still retained by the deceased. A verbal arrangement was made between the Putts and the deceased under which the Putts were to pay £3 per week to the deceased, farm the property, effect improvements, furnish additional stock, take the proceeds, and ultimately receive the farm. After three years the Putts left because they were unable to secure a satisfactory agreement which would secure their position. . .

Grace Putt claims that she and her husband put back into the farm in improvements everything received over and above actual living expenses ; that her husband spent £250 of his own money on improvements, and after leaving paid from his own resources £238 15s. 4d. in respect of manure, grain and seed put on to the farm. Although the Putts left the farm they remained on good terms with the deceased.

They had three children whose ages ranged from nine years to eighteen years. Before marriage, Grace Putt received no allowance or gifts from her father. Her husband was a farmer owning a 60-acre farm and stock which were subject to a mortgage of £8,500. His income was £900 per annum.

His Honour found that the testator's daughter, Grace Putt, made a substantial contribution to the building of the deceased's farming assets which he sold before death to one of his sons.

The daughter, Iris Moffitt, married in 1934. She worked on her father's farm continuously from the time she left school in 1929 until she married in 1934. She,

too, received no allowance or gifts from her father. She had six children, whose ages ranged from ten years to twenty-two years. Her husband was a farmer owning an equity of about £6,000 in his farm, and presumably owning stock and implements appropriate to his farm. The husband's income was not disclosed as it should have been. On the information supplied, however, His Honour deduced that the income derived by the husband was probably nearly twice the income earned by the husbands of the two other daughters. As Mrs. Moffitt had failed to disclose her husband's income, His Honour said she had only herself to blame if the Court, in endeavouring to deduce her husband's income, arrived at a figure which was higher than the true income. He found that Iris Moffitt made a substantial contribution to the building of the deceased's farm assets, which he sold to his sons before death.

After reviewing the financial position of the two sons, His Honour said :

> The question which remains to be decided is whether or not the deceased fulfilled his moral obligation to his daughters in giving to his daughter Violet Sears a bequest of approximately £662, and to his daughters Grace Putt and Iris Mofitt bequests of approximately £331 each.
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> Violet Sears worked on the farm for ten years without wages or allowance other than keep. Her husband is a modest farmer earning £1,000 per annum, and she has six children.
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> Grace Putt worked on the farm for seven years without wages or allowance other than keep. Her husband is a modest farmer earning £900 per annum, and she has three children. She and her husband worked on the farm for three years after her marriage and may have made some further contribution in this period.
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> Iris Moffitt worked on the farm for five years without wages or allowance other than keep. Her husband is in a better position than are the husbands of her sisters. She has six children.
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> That each of these daughters made a contribution to the building of the estate, most of which will go to their brothers, is clear. That the fact that they made such contribution is an important factor in assessing the moral duty which their father owed to them is likewise clear.

Giving due regard to the principles laid down by such decisions as *Mudford* v. *Mudford* [1947] N.Z.L.R. 837, *Welsh* v. *Mulcock* [1924] N.Z.L.R. 673 ; [1924] G.L.R. 169, and the other authorities cited, and having considered all the relevant circumstances, His Honour concluded :

> I am of opinion that the provision made by the testator for his daughters falls short of the moral obligation owed. In my view, the applicant Violet Sears is entitled to £1,250 in lieu of the bequest given by the will, the applicant Grace Putt to £800 in lieu of the bequest given by the will, and the applicant Iris Moffitt to £500 in lieu of the bequest given by the will. The incidence of such allowances is to fall first, and in proportion to the amount of each award, upon the assets of the estate, other than the mortgages from the sons of the deceased, so far as such assets will extend, and thereafter from the bequests to George and William of their respective mortgages in the proportion that George is to bear £2 for every £1 that William has to bear. Payment of the amounts awarded to the extent that they fall to be borne by the mortgages is postponed until the death of the widow.

In *In re Luke* (Invercargill. 1958. May 20, June 18. Henry J.) two daughters sought further provision from the estate of their father, who died on July 15, 1957, at the age of 89 years. He left a widow, one of the plaintiffs, who was 79 years of age, and three daughters—namely, the plaintiff, Sarah Luke, Matilda McKenzie and Jane Taylor. Two sons, who left no issue, were killed in testator's lifetime. The final balance of the estate was £13,497 16s. The assets in the hands of the trustee, which comprised the trust estate held for the beneficiaries, amounted to £11,688 18s. 4d. By his will and a codicil thereto, the testator gave his widow some personal effects valued at £171 and an annuity of £104. One Catherine Bailey was given a legacy of £100, which may be disregarded. The daughters, Sarah Luke and Jane Taylor, were each given a sum of £10 and the remaining daughter was given the residue upon the termination of her mother's life annuity. It was not really disputed that the testator failed in his duty towards his widow, and all counsel concurred that a proper provision would be the net income with recourse to capital if it fell below a fixed sum, and all that remained, His Honour said, was to fix that sum. This, unless the unlikely event of having to resort to capital materialized, left the whole of the present capital of the estate available for distribution when the life annuity fell in. The case accordingly developed into a contest between the daughters, Sarah Luke and Jane Taylor as claimants, and the daughter Matilda McKenzie as the person whose interest in the estate was the source of further provision if such were ordered.

His Honour said that the legacies of £10 each to the two claimants were an insult to them, and seemed to have been given by the testator with the view of showing his contempt for them. He continued :

> The affidavit satisfies me that this was a most unworthy view for the testator to take. It seems to have had its origin in the dispute between the testator and his wife, and in the fact that these daughters stood by their mother who received very shabby treatment from her husband in her lifetime. It is a great pity that the daughter who was, through wrong motives on the part of the testator, made the principal beneficiary, did not see fit to take steps to remedy the niggardly treatment which the testator has meted out to his other daughters. Not only was no such step taken, but the claim of each was contested by means of raising trivial personal matters that were better left unsaid. However, be that as it may, this Court cannot re-make the testator's will ; it can only give effect to what are the needs of the applicants in accordance with principles now too well-known to require reiteration.

In respect of the claim of Jane Taylor first, His Honour reviewed her circumstances, and summarized them as follows :

> This daughter has no estate of her own except a share in the matrimonial home. Her father did nothing for her and even refused to pay for a secondary schooling, although he was well able to afford to do so. He treated her cruelly and resented the fact that she " stood up to him " in the quarrels with her mother. The sister Matilda McKenzie had left home before these disputes became acrimonious, so she escaped her father's wrath. In view of the size of the estate, the fact that no beneficiary is in want once the widow is provided for, and in view of the fact that this daughter has no cash of her own, she had a moral claim on the testator for some such sum, the amount of which will be considered after the extent of the next claim is determined.

The daughter, Sarah Luke, 49 years old, had never married. She was given two years' secondary education at the Southland Technical College and then took employment. She took employment in Auckland, but, when her two brothers went on active service shortly after the outbreak of war, she returned to Invercargill to be with her mother. Her father was in the home for something like a year before he left and did not return. She had to take a position with the State Advances Corporation since there was no vacancy with the Health Department, in which department she had previously been employed. For the past five years, she had been employed in the Child Welfare Division of the Education Department in Invercargill. Her annual salary was £765. She deposed that she had had opportunities of taking transfers on promotion to

other cities, but had considered it her duty to remain with her mother.

The claimant's mother deposed to the fact that this daughter completely refurnished and carpeted the matrimonial home at her own expense and that she had contributed substantially to the household expenses. It seemed clear to His Honour that the mother would not have been able to subsist on the niggardly maintenance paid to her by the testator—it ranged from £1 15s. to £2 per week, plus a free home which was quite insufficiently furnished as would be seen from the fact that the furniture was, at the date of death, worth only £21. The assets of this claimant were the furnishings and effects in the former matrimonial home, and her interest in the Government Superannuation Fund to which she had been a contributor for twenty-three years. In the year 1965, she would be entitled to retire on an allowance computed in accordance with s. 35 of the Superannuation Act 1956.

The remaining daughter, Matilda McKenzie, was 52 years old and lived with her husband and two children aged 21 years and 14 years. There was another child aged 28 years. The sex and financial status of the two elder children did not appear; nor did the sex of the younger child appear on the file. This defendant had £800 in cash and investments. Her husband owned a house worth approximately £5,000, furniture valued at £300, a caravan valued at £300, tools of trade and equipment valued at £500, and cash and investments to the sum of £900. The earning capacity of the husband was uncertain. He was 54 years old and his health was not good. He had Paget's disease of a generalized type. There was a strong possibility that, if his work proved too heavy, the rate of deformity formation might increase and he would need to adopt some form of light splinting. In occasional cases, the effective working life was severely shortened. It was, however, to his advantage to keep reasonably active, as the disease might "burn out" at any time.

His Honour concluded his judgment, as follows:

> Mrs McKenzie deposes to the early history and claims to have been a source of comfort and help to her father. She certainly helped him and had even got help from him. She lived many miles away, and I think the help she gave is exaggerated. She appears to have "taken sides" with her father in the matrimonial dispute. She was the only one of the two married daughters who got a wedding present—it was in the form of a car worth £200.
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> It is from the legacy of no less than £11,000 payable to Mrs McKenzie that it is sought to get further provision for the other two daughters. I have already found the daughter Jane Taylor to have a claim, and I likewise find that the daughter Sarah has a just claim. She has made substantial sacrifices to maintain and comfort her mother, and relieved the testator from a burden that was justly his, and from a burden which would, if borne, have reduced his estate. The sole question is what are the needs of these two claimants.
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> In my view, in all the circumstances, Jane Taylor should receive a legacy of £500, and Sarah Luke a legacy of £1,250, each free and clear of all succession or other duties. I fix the provision for the widow at the net annual income but not less than £5 per week net, with the right to resort to capital if the income falls below that figure. There has already been a sum advanced to the widow and there may be questions as to the exact form of the order in view of the widow occupying the former matrimonial home. Counsel may therefore include any incidental matters which they agree upon to give full effect or to give working effect to the intention of this order. Leave is reserved to apply further in that behalf. Costs of each party are to be paid from the estate. The further provision shall fall on the residue and neither amount now awarded shall bear interest, but shall be payable without interest on the termination of the widow's annuity.

Other recent judgments under the Family Protection Act 1955 will be considered as opportunity offers.

SUMMARY OF RECENT LAW.

ANIMALS.

Impounding—Bull found wandering at large—Bull returned to Owner—No Actual Impounding—Owner not liable to Fine unless Animal "seized"—Impounding Act 1955, s. 37 (1). Section 37 of the Impounding Act 1955 does not authorize the imposition of a fine upon the owner of cattle wandering at large, unless there has been an actual impounding or a seizure for impounding under s. 37 (1). (*Fleming* v. *Belcher* [1944] N.Z.L.R. 396; [1944] G.L.R. 165, followed.) Observations on the lack of a sufficiently clear expression of a change in legislative intention to alter the law as laid down in *Fleming* v. *Belcher* in respect of ss. 17 (as amended) and 18 of the Impounding Act 1908, by the repeal of these sections and their replacement by s. 37 of the Impounding Act 1955. *Dickson* v. *Lloyd.* (S.C. Auckland. 1958. June 27. North, J.)

BANKRUPTCY.

Discharge—Powers of Court on Application for Discharge—Bankrupt found Guilty of Misconduct—Likelihood of After-acquired Property—Discharge conditional on Consent to Judgment for Part of Unsatisfied Portion of Debts—Bankruptcy Act 1908, s. 127. The Court has power, under s. 127 (a) of the Bankruptcy Act 1908, if it thinks fit, to refuse an application for discharge without making any other order. But the Court has not power both to suspend the order for discharge under s. 127 (1) (b) and, at the same time to impose conditions under s. 12 (c) or (d) or under both (c) and (d), that is to say, the powers conferred by paras. (b), (c), and (d) cannot be exercised concurrently. (*In re Huggins, ex parte Huggins* (1889) 22 Q.B.D. 277, followed. *In re Jones* [1926] N.Z.L.R. 318; [1926] G.L.R 252, considered.) Consequently, on an application for discharge under s. 127, the Court may grant an immediate discharge or refuse the application, or it may suspend without any other order or it may grant a discharge subject to conditions under para. (c) or para. (d). In the present case, where there had been misconduct on the bankrupt's part and there was a likelihood of after-acquired property, a condition was imposed requiring the bankrupt to consent to a judgment being entered against him in respect of a portion of the unsatisfied balance of his debts, and a conditional order for discharge was made accordingly. (*In re Badcock, ex parte Badcock* (1886) 3 Morr. 138, applied.) *In re Atwill (a Bankrupt).* (S.C. Christchurch. 1958. July 16. F. B. Adams J.)

TRANSPORT.

Offences—Cancellation of Driving Licence—Defendant charged with being in Charge of Motor-vehicle while under Influence of Drink—Court's Power to suspend Driving Licence and impose Period of Disqualification on Conviction for Any Offence under Part I or Part II of Statute and "any offence in connection with the driving of a motor-vehicle"—Transport Act 1949, s. 31. The meaning of the words in s. 31 of the Transport Act 1949 relating to offences "in connection with the driving of a motor vehicle" is that the section is to include not only offences under Parts II and III of the statute, all of which are included, but also such other offences as are offences in connection with the driving of a motor-vehicle. (*Brown* v. *Burt* [1954] N.Z.L.R. 1176, followed.) *Bott* v. *Police.* (S.C. Christchurch. 1958. May 29. F. B. Adams J.)

TRUSTS AND TRUSTEES: VARIATION OF TRUSTEE'S POWERS.

Limits of Court's Statutory Authority.

By MALCOLM BUIST, LL.M.

The general intention of s. 64 (1) of the Trustee Act 1956, as of its predecessors, s. 81 of the Statutes Amendment Act 1936 and s. 57 (1) of the Trustee Act 1925 (U.K.), is to provide machinery whereby inadequately drawn trust instruments may be virtually amplified to provide the trustees with powers that, in the opinion of the Court, are needed for the proper carrying out of the purposes of the trust.

Section 64 (2) provides machinery for rearranging trusts notwithstanding that the beneficiaries may include persons whose consent is not available for reasons other than dissent. Section 65 gives the Court power to direct a sale or lease, notwithstanding any contrary provision in the instrument creating the trust or the contrary wishes of a trustee or beneficiary, provided all parties except the settlor are represented in the proceedings.

Recently Mr. E. J. Somers summarized the general position in his comprehensive article, " Deviating from a Trust " (*ante*, p. 42). The present article approaches the abovementioned provisions from a different aspect, and aims to consider to some extent the significance of the legislation, examining a recent case as an illustration.

I: SECTIONS 2 (4) AND 64 (1) AND *In re Allison (Deceased)*.

Section 64 (1), in its present form, reads as follows:

> 64 (1). Subject to the provision of subsections four and five of section two of this Act, where in the management or administration of any property vested in a trustee, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction, is in the opinion of the Court expedient, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

Expectations that the remedial legislation as introduced in England in 1925 would remove all obstacles from the path of trustees in administrative difficulties were shaken by the decision of the Court of Appeal in England in *In re Downshire Settled Estates* [1953] Ch. 218; [1953] 1 All E.R. 103, a decision not questioned, on this point, in the findings of the House of Lords on appeal *sub. nom. Chapman* v. *Chapman* [1954] A.C. 429, [1954] 1 All E.R. 798. Mr Somers has already pointed out that the opening words of s. 64 (1) effected a change in the law, for s. 2 (4) reads:

> The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by the instrument, if any, creating the trust; but the powers so conferred, *unless otherwise stated*, apply if and only so far as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of the instrument.

(A corporate trustee is similarly limited by s. 2 (5).) Whether the words italicized have any practical significance will be considered in Part III of this article, after certain cases have been noted.

A Test of the Subsection.

In *In re Allison (Deceased)* [1958] N.Z.L.R. 678, F. B. Adams J., at Christchurch, minuted in Chambers applications by trustees in respect of certain parallel wills. His Honour's memorandum dealt with the relationship between s. 64 (1) and s. 2 (4) on lines such as Mr Somers had indicated might well apply, to show the inappropriateness of s. 64 (1) in its present form to meet the needs of trustees where the powers desired are contrary to the expressed wishes of the settlor or testator.

Both wills were taken to restrict as follows the sale of specified assets until the youngest grandchild of the testators should attain the age of 25 years—namely, in the will of E. J. A. property " M " was excluded from a power of sale, and in the will of H.A. sales were expressly precluded. For the purposes of the present applications it was assumed that the prohibitions of sale were effective and were still in force.

In reliance on s. 64 (1) of the Trustee Act 1956 the trustees applied for leave:

(a) to sell property " M " in pursuance of an agreement already entered into conditionally on the approval of the Court,

(b) to receive certain proceeds of land compulsorily taken from the estate of H.A., and

(c) to sell other parcels of realty forming part of the estate of H.A.

Concerning the merits, his Honour remarked that the sales would result in substantially better income from the investment of the proceeds, and would relieve the estate of a certain burden. He did not however see his way clear to make the orders sought, but adjourned the application, indicating, in summary, that:

(1) The jurisdiction of the Court under s. 64 (1) is made subject to the provisions of s. 2 (4) and s. 2 (5). Accordingly the Court could not authorize the sales in question if a contrary intention was expressed in the wills, whether the applicants relied on expediency, difficulty, or impracticability, or on the alternative of absence of power.

(2) Counsel's submissions with regard to the proceeds of the land compulsorily taken should be made upon further hearing.

The following further matters were set out in his Honour's memorandum:

(I) Section 64 (1) of the Trustee Act 1956 differ from s. 81 of the Statutes Amendment Act 1936 and from s. 57 (1) of the Trustee Act 1925 (U.K.), under which the jurisdiction of the Court is *not* limited to the making of orders which are only to have effect subject to the terms of the trust instrument and

which can be made only if that instrument does not express a contrary intention.

(II) Subsections (4) and (5) of s. 2 of the Trustee Act 1956 leave open to question any order of the Court under s. 64 (1), by limiting the effect of the order when made.

(III) In New Zealand, the powers referred to in s. 64 (1), discussed in *In re Warren* [1939] Ch. 684, *In re Moir* [1935] Ch. 562, *In re Fell* [1940] N.Z.L.R. 552, *In re Downshire Settled Estates* [1953] Ch. 218, and *In re Gray* [1956] N.Z.L.R. 764, may now not override, when they conflict with, the express provisions of the instrument.

(IV) The proposition in *Municipal and General Securities Co.* v. *Lloyd's Bank* [1950] Ch. 212, where at pp. 224-5, Wynn-Parry J. suggests that the statutory jurisdiction cannot be exercised in England to confer a power of sale if the trust instrument already contains a power of sale exercisable in certain circumstances, but not in those which have arisen, was not considered by his Honour to be warranted.

However, in adjourning the application, for further hearing, his Honour pointed out that counsel might argue that in the circumstances the prohibition of sale was either ineffectual or no longer in force, or might desire, either with or without further evidence, to appeal to the inherent jurisdiction of the Court, or might elect to treat the present application as one made under s. 65 of the Trustee Act 1956 (noting however that under s. 65 all trustees and persons who are or may be beneficially interested must be made parties or be represented).

Limiting the Powers of the Court.

" The words ' or under ', which appear in s. 2 (4) [of the Trustee Act 1956] in the phrase ' the powers conferred by *or under* this Act ', are not to be found in s. 69 (2) [the corresponding provision] of the English statute," said his Honour. He continued, " Without them, s. 2 (4) would be inept with reference to s. 64 (1), as the powers contemplated by s. 64 (1) are conferred, not ' by the Act ' but by the Court ' under the Act.' I imagine that it was for this sole reason that the draftsman of our statute inserted the words ' or under ' into a provision which without them would apply, as the corresponding English enactment still does, only to the powers conferred directly on trustees by the Act itself. In regard to powers so conferred—which are, so to speak, powers implied into the trust instrument by the Act—it is reasonable and proper that they should be limited in such a way as not to override the express terms of the trust. But it is a very different matter so to limit the powers of the Court under s. 64 (1), and, in my opinion, the value of that section may be—and I think it is—reduced very considerably. If I am right in this view, I think there will be general agreement that the Act should be amended by deleting the opening words of s. 64 (1) and the words ' or under ' in s. 2 (4) and (5), and thus restoring the law on this point to the position it was in before the Act of 1956 was passed " (p. 680).

Limiting the Validity of an Order : " Contrary Intention."

Continuing his examination of these sections, his Honour pointed out that the words of the subsections struck at the operation and validity of any order which the Court might choose to make under s. 64 (1). What s. 64 (1) authorized the Court to do was to confer powers on trustees ; and it was at the " powers so conferred " that the subsections of s. 2 were aimed. The powers which the Court had conferred were to apply " if and so far only as a contrary intention is not expressed in the instrument ", and were to " have effect subject to the terms of that instrument." Although the Court might have solemnly held that it possessed the necessary jurisdiction to make an order, its order was still open to question at the instance of any doubter, and would avail the trustee nothing in any subsequent litigation unless he could satisfy the Court again that there was no " contrary intention."

Section 69, he added, would seem to give no protection to the trustee, as an order conferring powers under s. 64 (1) could scarcely be described as a direction of the Court ; and s. 80 seemed on its face to be directed to the protection of persons other than the trustee.

His Honour concluded these comments as follows : " If there be any good reason for limiting s. 64 (1) in such a way as to avoid conflict with intentions expressed in the trust instrument—and for my part I can see none—the proper course would be to limit the jurisdiction of the Court to make the order, and not to limit the effect of the order when made " (p. 681).

II.—The Position in the Australian State Jurisdictions.

Of comparative interest and value are the provisions in Australian State legislation corresponding to ss. 2 and 64 of the Trustee Act 1956. The following are examples :

Victoria :

Section 2 (3) of the Trustee Act 1953 (No. 5770) provides inter alia :

> The powers and discretions conferred and the duties imposed on, and the directions given and indemnities, immunities and protection allowed to, trustees and other persons by this Act shall be in addition to the powers, discretions, duties, directions, indemnities, immunities and protection set out in the instrument (if any) creating the trust, but the powers, discretions, duties and directions provided for in this Act, unless otherwise stated, shall apply if and so far only as a contrary intention is not expressed in the instrument (if any) creating the trust, and shall have effect subject to the terms of that instrument.

Then s. 63 (1) provides as follows :

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power vested for that purpose in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose on such terms and subject to such provisions and conditions (if any) as the Court thinks fit and may direct in what manner any money authorized to be expended, and the costs of any transaction are to be paid or borne as between capital and income.

In *Boyd* v. *Cowell* [1952] V.L.R. 288, which appears to be the main reported authority on the section, O'Brien J. and Coppell A.J. in the Full Court of Victoria considered that in dealing with an application under s. 63 (then s. 57 of the Trustee Act 1928 (No. 3792) a Court should not regard itself as being empowered to confer upon the trustees a general power to invest, in the absence of evidence whether the proposed investments were expedient or not. Sholl J. made it clear on p. 305 that in his opinion the trustees had not made a

case for such an order, but he had already indicated (anticipating the decision of the High Court of Australia in *Riddle* v. *Riddle* (1952) 85 C.L.R. 202, discussed below in relation to the New South Wales legislation) that he saw no objection to general powers of investment as such.

New South Wales:

Section 81 of the Trustee Act 1925 (N.S.W.) contains wide powers. The full provision reads:

> 81. (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court—
>
> (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, *including adjustment of the respective rights of the beneficiaries*, as the Court may think fit; and
>
> (b) may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> (2) The provisions of subsection one of this section shall be deemed to empower the Court, where it is satisfied that an *alteration* whether by extension or otherwise *of the trusts or powers* conferred on the trustees by the trust instrument, if any, creating the trust or by law is expedient, to authorize the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorization of the Court would be a breach of trust, and in particular the Court may authorize the trustees—
>
> (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees or within the terms of the instrument, if any, creating the trust, *or may be forbidden by that instrument*;
>
> (b) to postpone the sale of trust property;
>
> (c) to carry on any business forming part of the trust property during any period for which a sale may be postponed;
>
> (d) to employ capital money subject to the trust in any business which the trustees are authorized by the instrument, if any, creating the trust or by law to carry on.
>
> (3) [Power to rescind etc. orders made.]
>
> (4) The powers of the Court under this section shall be in addition to the powers of the Court under its general administrative jurisdiction and under this or any other Act.
>
> (5) [Retrospective operation.]

It will be seen that no preliminary section, equivalent to s. 2 (4) of the New Zealand statute, would be appropriate, in view of the italicized provisions subordinating the trust to the order, and that even the rights of the beneficiaries may be adjusted.

In *Ku-Ring-Gai Municipal Council* v. *Attorney-General* (1953) 19 L.G.R. 105, Myers A.J. in the Supreme Court of New South Wales considered the rights involved where land had been conveyed on trust to the Council subject to conditions restricting the playing of games thereon on Sundays. He held that the power given by s. 81 (1) (a) to adjust the rights of beneficiaries was not an independent right vested in the Court. It only enabled the Court, in conferring upon trustees power to effect a transaction which arose in the management or administration of property vested in them, to provide for that adjustment of the rights of the beneficiaries which became necessary or proper because of the power the Court had conferred. Subsection (2) merely amplified the Court's power under subs. (1). The order sought, viz. that the Council be empowered to disregard the condition, involved an interference with the beneficial rights of those entitled under the trust. That interference was the sole purpose of the order sought, and not merely a necessary or proper thing to do because of some other power conferred upon the trustee. The Court, he held, had no power under s. 81 to do this. (Report from 1953, Aust. Dig. Suppl. p. 603).

The decision in the *Ku-Ring-Gai* case is on the lines followed by Wynn-Parry J. (as to this point) in *Municipal and General Securities Co. Ltd.* v. *Lloyd's Bank Ltd.* [1950] 1 Ch. 212, 223, and by the Court of Appeal in *In Re Downshire Settled Estates* [1953] Ch. 218, in respect of the same substantive point, viz. that needs of "management or administration" must be the foundation of any change in the trusts by virtue of this legislation.

The leading case on s. 81 is *Riddle* v. *Riddle* (1952) 85 C.L.R. 202. This was a question of powers of investment: whether s. 81 enabled the Court to empower the trustees to invest in a *class* of security wider than the formal list of investments authorized by s. 14. A majority favoured such extension. Kitts J., in dissent, summarized the issue at p. 235: "In my opinion [s. 81] cannot fairly be construed as creating a jurisdiction totally different in kind—namely, a jurisdiction to insert into a trust instrument powers which the creator of the trust has withheld." He supported the view that particular stated investments might be approved, but that to authorize a class of security would bring about the effect of a legislative amendment of s. 14. The contrary view, adopted by the majority of the Court, seems to indicate that s. 81 can be used virtually to modify other provisions of the Act by Court order. This decision will be referred to, in relation to the words "unless otherwise stated" in s. 2 (4) of the Trustee Act 1956, in further comments at the end of Part III of this article

III.—Variation of Trust Instruments.

The foregoing data bring to the forefront the question: Which is to predominate, what the settlor has said, or what the Court considers he should have said? Equity has already set up an artificial, objective standard, the "prudent trustee." The new approach will develop rules whereby the Court delineates the characteristics of a "prudent settlor." (Here it is useful to recall that under the Family Protection legislation, and now under the Aged and Infirm Persons' Protection Amendment Act 1957 and the Mental Health Amendment Act 1957 we already have examples of the rewriting of wills).

The rewriting of a trust instrument may be considered desirable by reason of deficiencies as follows:

(a) *Administrative powers*, whether within the instrument or within the inherent jurisdiction of the Court in supervising administration, may be insufficient to deal appropriately with a situation that has arisen. *Re New* [1901] 2 Ch. 534 is perhaps the locus classicus, and at this point one must refer back to the compendious analysis by Mr Somers: *ante*, p. 42.

(b) *Substantive variations* in the beneficial interests may be desired, to meet changed incidence of taxation, for instance. Unlike the will of a living testator, an executed trust is not ambulatory. Under the rule in *Saunders* v. *Vautier* (1841) Cr. and Ph. 240, an interest "at home" can be claimed by the beneficiaries (being all *sui juris*) and, if they see fit to keep the trust alive

(see *Re Brockbank* [1948] Ch. 206 for the juristic and administrative effect) " the property can then be resettled upon altered trusts ": per Lord Oaksey in *Chapman* v. *Chapman* [1954] A.C. 429, 448. The variation of the rights of the parties, without their competent consent, was in the lastmentioned case declined by the Court in the absence of power under the instrument, or under a statute.

How far deficiencies under (b) should be remedied by statute is problematical. Lord Morton of *Chapman* v. *Chapman* [1954] A.C. 429, 468, drew attention to the undignified game of chess that could result if taxing and taxpaying authorities were constantly revising their respective instruments of claim. It is submitted that the real question lies in the balanced control inherent in the very substance of a trust. It is brought out by loosely defining a trust as " the holding of property by A for the benefit of B on terms laid down by C." The present tendencies seem to suggest a desire that the definition should be altered to read, " the holding of property by A for the benefit, so far as considered desirable by the Court, of B, on terms laid down by C or by the Court." One cannot but feel a move towards mere agency, and an impending break with the original concept of a trusted friend's carrying out the desires of the settlor. (On the other hand, the present-day complex trust is perhaps equally far from the original trust situation.) This highlights the *In re Allison* application, where the settlor had indeed gone so far as to inform his trustee (" trusted one ") what was *not* to be done.

In New Zealand, s. 64 (2) of the Trustee Act 1956 provides as follows :

> Where it is desired to rearrange the trusts to which any property is subject, but the rearrangement cannot be effected because those who take or may take any beneficial interest under the trusts include unborn or unascertained or unknown person or persons under a disability, the Court may approve the rearrangement on behalf of the unborn or unascertained or unknown persons and the persons under a disability *if the rearrangement is not to their detriment*; and in determining whether such rearrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the rearrangement, including the welfare and honour of the family to which he belongs. Any arrangement so made shall be binding on all persons on whose behalf it is approved by the Court.

The comments of Mr Somers (*ante*, p. 46) indicate the potential scope and significance of this new provision.

The subsection has still to be placed in a judicial setting, and the primary question will be whether the Court will treat it as an authority not merely to trim the cargo but even to alter the course. The word " rearrange " appears to be the important term (*cf.* the more detailed words " varying . . .revoking . . . enlarging " in the draft English bill referred to later), and much depends on whether this is interpreted as embracing the substitution of a fundamentally different trust, and not merely an adjustment maintaining the general identity of the existing trust. The question is prompted by the breach sought to be made in the terms of an original trust by applications such as in *In re Allison* [1958] N.Z.L.R. 678, where the parties desired to override an express prohibition by the settlor. The old " high " doctrine of trust is by no means dead, as *Re Brockbank* [1948] Ch. 206 shows. There, beneficiaries fully entitled to call for a distribution of the corpus sought under the Rule in *Saunders* v. *Vautier* (1841) Cr. and Ph. 240, to direct the trustee whom to appoint as his successor, but were unsuccessful. One would perhaps expect this to be treated as a matter of mere management or administration, but the Court viewed it as an attempt to strike at the root of the trust. The line of thought this case suggests is that when, as may well be in the breaking of an express prohibition under the original settlement, there is a step beyond mere management or administration then powers (statutory or otherwise) resorted to amount to a resettlement. This is the stage at which s. 64 (2) may well attract the attention of the Inland Revenue authorities, particularly in the light of the comments in *Re Brockbank* [1948] Ch. 206, concerning the expenses of resettlement.

A further general comment on s. 64 (2) is that it does not fully succeed in putting the beneficiaries into the position achieved under the Rule in *Saunders* v. *Vautier* (1841) Cr. and Ph. 240. The words italicized above in the subsection, viz. " if the rearrangement is not to their detriment ", preclude the Court, as quasi-agent for the beneficiaries whose consents are not otherwise available, from diminishing their interests. The " game of chess " is played under a handicap to this extent. The restriction is of course a proper one, but, like *Re Brockbank*, it preserves the ancient landmarks that separate trusts from agencies, and prevents trustees from becoming mere shadows of their beneficiaries. The apparent malleability imparted to trusts within the Rule in *Saunders* v. *Vautier* is made available to the beneficiaries concerned by notionally discarding the relevant trust and making a constructive distribution. But, by contrast, the statutory innovation may have set up a new class of interest, i.e. not an extension of *Saunders* v. *Vautier*, but a parallel statutory power to remould a trust without first demolishing it. The point is of some concern, for, in relation to cases in the line of *Morrison* v. *Commissioner of Stamp Duties* (1907) 27 N.Z.L.R. 1009, *Thompson* v. *Commissioner of Stamp Duties* [1926] N.Z.L.R. 872, etc., much may depend from a revenue viewpoint on whether or not an order under s. 64 (2) has determined the execution of the original trust. Stated another way, the question appears to be whether the interests of the beneficiaries are being so modified that they have ceased to be takers by virtue of the original settlement, transaction, or descent, and have become " purchasers ", under the rearranged scheme, from themselves as original beneficiaries. A practical test that may commend itself is to nquire whether the relevant Court order provides for, or amounts to, the rearranged vesting of the corpus. If so, it is submitted, the exemption provided under s. 69 (d) of the Stamp Duties Act 1954 is *pro tanto* lost, and conveyance duty is attracted. This would appear to be the position where *Saunders* v. *Vautier* (1841) Cr. and Ph. 240 applies, but whether an order under s. 64 (2) of the Trustee Act 1956 is in fact caught by the precise wording of s. 63 of the same Act, making certain orders liable for conveyance or assignment duty, remains to be tested. It is submitted that if " rearrange " is so interpreted that the original trust is really severed, then in principle the duty should be payable.

(c) *Express prohibitions*, contained in the instrument, are exemplified in *In re Allison* [1958] N.Z.L.R. 678. The New Zealand legislation (Trustee Act 1957, ss. 2 (4) and 64 (1)), as now held by F. B. Adams J., favours the settlor's wishes as stated in the instrument. Section 81 of the Trustee Act 1925 (N.S.W.) favours the needs of administration as seen

by the Court. The English provisions, as implied by F. B. Adams J., appear generally to favour the settlor's [" **unless otherwise stated** "] wishes in respect of powers conferred " by " the statute, but to favour the Court's views in respect of powers conferred " under " the statute, and, at first sight the Victorian provisions seem to have the same effect.

As already noted, the powers conferred may be conferred " by " the Act or " under " the Act. The second portion of s. 2 (4) refers to " the powers so conferred " i.e. conferred " by or under this Act on a trustee." Thus, it may be amplified in either of two ways, according to the mode of conferring the powers :—

(i) " . . . but the powers . . . conferred *by* [the provisions of] this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument," etc. ; and

(ii) " . . . but the powers . . . conferred [by an order of the Court] *under* [the provisions of] this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument," etc.

There appears to be place for a distinction here, so that in respect of powers conferred *under* the Act, i.e. those flowing from an order of the Court and not (at least not directly) from a section of the Act, the *order* is the place in which it should be stated whether a contrary intention expressed in the instrument is to predominate or not. Authority for this approach to the matter may be available in *Riddle* v. *Riddle* (1952) 85 C.L.R. 202, where the majority of the High Court of Australia held, in effect, that the relevant general powers of investment, which were conferred *under* the legislation corresponding to s. 64 (1), were not confined or restricted by the provisions of the Act concerned that related to investments. The almost " sledgehammer " force conferred by this decision on Court orders relating to management or administration should be as effective when applied to provisions in instruments as it is held to be when applied to statutes. Should this line of reasoning be correct, the part of s. 2 (4) concerned may mean :

(i) Powers conferred by the Act are, unless the Act states otherwise (e.g. in s. 65—power of Court to direct sale or lease " notwithstanding anything to the contrary in the instrument . . . "), subject to any contrary intention expressed in the instrument.

(ii) Powers conferred by order of the Court are, unless the *order* states otherwise, subject to any contrary intention expressed in the instrument.

As an example, in *Riddle's* case, the settlor might, for some reason have expressly forbidden all investments in a certain locality. The Court's order authorizing investments in a wider class than those authorized by the statute, would need to state " otherwise " if this ban were to be lifted. A New Zealand example that comes readily to mind would be a prohibition on investments on realty in certain " bush-sick " country. Now that licks to remedy mineral deficiencies of trace elements are largely restoring the eligibility of these areas, an application to the Court under s. 64 (1) to remove the ban from some older instrument might well be desirable if other proper investments were not procurable. On the submission here propounded, it would be proper for the Court to exercise its power to " state otherwise " in terms of s. 2 (4) and to authorize the investment of funds in the locality concerned, on appropriate terms regarding farming and husbandry covenants in the mortgage.

There does not appear to be anything unreasonable in the Legislature's requiring the Court to be as explicit as the statute when what the settlor has laid down is overridden. And it may well be a wise policy for the Legislature to say, " We can plainly see that in general a sale or lease should be directed under the guidance of the Court, and we do not think the Court need be concerned to weigh any prohibition contained in the instrument, so we have enacted s. 65 accordingly. But in other matters we prefer the Court to look into the prohibition first, and to consider why the instrument contains it, and to weigh it against changed circumstances, so we have left s. 64 (1) under the care of s. 2 (4) with this object. If the Court then sees fit to overrule the prohibition, it will have to do so consciously and expressly, just as we have done in s. 65. Otherwise, the contrary intention expressed in the instrument will stand."

IV.—New Proposals in England.

The need for amendment of the present law in England since the decision in *Chapman* v. *Chapman* [1954] A.C. 429 has been considered by the Law Reform Committee, which has recommended in its Sixth Report (Cmd. 310) that new powers be given to the Courts. In 102 *Solicitors' Journal*, p. 58, January 25, 1958 the Report, the general needs, and a private member's Bill, the Variation of Trusts Bill (introduced and given its second reading in the House of Commons, December 6, 1957), are discussed at some length.

The Committee took the point that as persons *sui juris* could vary their trusts in order to reduce tax liability, it was unreasonable that this advantage should be denied to persons not *sui juris*. An intention of the settlor that the settlement should be appropriately varied is gresumed, but the article referred to does not appear to mention the problem of express prohibition by the settlor.

As amended by the Standing Committee of the House of Commons (December 10, 1957) the Bill provides that the Court may if it thinks fit by order assent on behalf of [the stated beneficiaries] " to any arrangement varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trust, if in the opinion of the Court the carrying out of the arrangement would be for the benefit of that person." It is of particular interest to note that there is explicit power to revoke a trust, in view of the discussion earlier in this article (Part III) of the word " rearrange " in our own s. 64 (2). At the time of writing, no further information regarding the progress of the Bill could be obtained.

In the Law Journal of December 27, 1957 (Vol. 107 at p. 819) the Variation of Trusts Bill is analyzed. The Court is in effect to be empowered to represent, as a competent consenting party to the variation of a trust, persons under disability, unascertained persons, and unborn persons. Such jurisdiction, the learned writer notes, would overlap the existing jurisdiction under s. 57 of the Trustee Act 1925. Again, however, the question of express prohibition in the instrument does not appear to have been brought into prominence.

In discussing the topic of *Chapman's* case at the Legal Convention in Australia last year, Lord Morton, who had delivered the principal speech in that case, indicated that he favoured a power of revision of trusts in order

to meet changing taxation burdens (31 A.L.J. at p. 235). The matter is also considered in *224 Law Times*, 298.

V.—CONCLUSION.

It will be seen that in no jurisdiction does the parity between beneficiaries in the two kinds of situation, that under *Saunders* v. *Vautier* (1841) Cr. and Ph. 240 and that exemplified in *Chapman's* case, seem to be achieved or in prospect, notwithstanding the desirability noted by the Law Reform Committee in England. It seems that no trust except that which, under the Rule in *Saunders* v. *Vautier*, is a mere mask upon full ownership, can achieve complete freedom. Throughout, however, there is the overriding shadow of prospective claims for transfer duty should freedom be achieved.

Authority regarding the scope of s. 69 (2) of the Trustee Act 1925 [U.K.] concerning "contrary intention" is sparse: there are "negative" cases such as *Re Warren*: *Public Trustee* v. *Fletcher* [1939] Ch. 684; [1939] 2 All E.R. 599 indicating what is *not* a contrary intention. F. B. Adams J. has held now in *In re Allison* [1958] N.Z.L.R. 678, that the New Zealand legislation will eliminate orders made by the Court, leaving only the statutory provisions. Here we may return to the language of Roper J. in the judgment appealed from in *Riddle* v. *Riddle* (1952) 85 C.L.R. 202. His Honour had expressed the view that to enlarge the investing powers of trustees beyond the statutory limits amounted to bringing about a legislative amendment (see 68 W.N. (N.S.W.) 201). The reversing of this view by the "contrary intention." The possibility that, if pressed far enough, such charges can constitute a new trust, and attract duty, may not be altogether chimeric.

THE SELDEN SOCIETY.

Interest in Legal History.

The Selden Society was founded in 1887, largely by the efforts of the distinguished legal historian, Professor F. W. Maitland, with the object of "advancing the knowledge and encouraging the study of the History of English Law." The name of the Society was chosen by Maitland himself in honour of John Selden (1584-1654) who was one of the earliest scientific exponents of English Legal History.

The objects of the Society have been largely achieved by the publication of the text with translations, explanatory introductions, and copious footnotes, of early English legal records. Perhaps the best known of the Society's publications are the twenty-four volumes of Edward II's Year Books, which are still a living source of English law as is evidenced by the fact that there are at least forty references to the Year Books in the latest edition of Winfield's *Law of Torts*.

The aim of the Society was to publish annually one volume of legal records. To date seventy-four volumes have been published. It will thus be seen that, despite the inevitable interruptions caused by two World Wars, the Society has more than achieved its objective.

The latest volume which has been published is of Select Cases in the Court of King's Bench under Edward II, edited for the Society by Professor G. O. Sayles, Professor of History in the University of Aberdeen. In other volumes in the series, common law, equity, admiralty, and commercial law are represented. The records of various courts from the manor up to common pleas, King's bench, exchequer, star chamber and council have been carefully edited by scholars in Britain and the United States. The publishers of the Society's annual volumes are Bernard Quaritch Ltd. This is an adequate guarantee that these volumes are masterpieces of the printer's and bookbinder's art.

In addition to the annual volumes the Society has issued special publications. This year they include *Selected Historical Essays of F. W. Maitland*, published by the Cambridge University Press in association with the Society, and *Sir James Fitzjames Stephen*, by Dr. Leon Radzinowicz. This was the Selden Society lecture delivered during the 80th annual meeting, held in London, of the American Bar Association. The lecture was the subject of two articles in recent numbers of this JOURNAL.

The Society has been fortunate in its literary directors amongst whom have been Pollock, Vinogradoff, Turner, and Holdsworth. The present director is Professor I. F. T. Plucknett.

The officers of the Society represent many names well known in the law. The President for 1958 is Sir Cecil Carr, for many years Counsel to the Treasury in England. One of the three Vice-Presidents is the Chief Justice, Sir Harold Barrowclough, who succeeded in that office Mr Justice Felix Frankfurter, of the United States Supreme Court. Among the members of the Council are Professor A. L. Goodhart, Lord Justice Pearce, Mr Justice Upjohn, and Mr Justice Vaisey.

The work of the Society has attracted a little attention in New Zealand. The Universities and most of the law libraries have been members of the Society for many years. An early member was the late Sir John Hosking, who left his volumes of the Society's works to the University of Auckland. Interest in the Society's work has increased in recent years with the appointment of Professor A. G. Davis, Dean of the Faculty of Law at the University of Auckland, as honorary Secretary-Treasurer for New Zealand of the Society. Besides the Chief Justice, other members of the Judiciary, as well as some members of the profession, have become members of the Society in recent years. It was as a tribute to this increased membership that the Chief Justice was invited to become a Vice-President of the Society. Professor Davis and the Society would be very pleased to welcome new members. For a very modest annual subscription, members receive all the Society's publications, as well as helping forward the work of the Society.

Legal history has never been a subject which has had a prominent place in the study or practice of the law in this country. Membership of the Selden Society gives an opportunity of repairing that omission. The profession might be reminded of the words of Counsellor Pleydell in *Guy Mannering*: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

PAGES FROM THE PAST.

VIII.—Two Forgotten Judges—Sidney Stephen and Daniel Wakefield JJ.

By R. Jones.

Of the fifty-four members of the Judiciary—Chief Justices and Judges—who have held office in the 106 years since the appointment of Sir William Martin in 1842 (*ante*, p. 118) it may be said of two only that to-day they are either unknown or entirely forgotten. Lacking anything in the form of co-ordinated chronicle or history, the profession in the Dominion continues to build on foundations that have long since been blanketed in a fog of obscurity, but the *Law Reports* and their predecessors of the sixties and seventies have achieved at least an imitation of immortality for all the country's Judges with the exception of Mr Justice Sidney Stephen, sometime Acting Chief Justice, and his contemporary Mr Justice Daniel Wakefield.

They sat in judgment together in the fifties, Stephen J. for seven years, Wakefield J. for two; they sickened together; and almost it could be said they died together. It was a neck and neck business to see who would head the judicial obituary records of the Colony. The decision would have gone to Mr Justice Wakefield by a few days if he had not resigned his commission in November, 1857. He died on January 8, 1858, a brief five days before Mr Justice Stephen. The *Southern Cross* (Auckland) therefore, rightly hailed Stephen J. as the first New Zealand Judge to be gathered to his fathers (Sir William Martin, his predecessor in Auckland, whose retirement through ill-health occasioned Stephen J.'s translation to Auckland and the Chief Justice's chair, survived him by twenty-two years), but the *Wellington Independent* of the day barely paused to mark the passing earlier in the same week of the retired colleague who had predeceased him.

Each in his way left his mark upon a generation for whom life was more compact and leisure more abundant than they are today. The taste for criticism and curiosity about the other fellow was common and inveterate in those times, and both Stephen and Wakefield were so caught up in it that, as Carlyle wrote of James Spedding's Bacon, they were "washed clean down to the natural skin." Neither had the qualities or defects proper to geniuses, and while Stephen J. probably had more friends than detractors, the general view of Wakefield's virtue was so rarefied that the common conscience could scarce endure it.

Unfortunately, it is easier to make good copy of carping than of praising, and consequently there is an undue tendency in contemporary comment to emphasize unnecessarily the aspects of character of these pioneers of the Judiciary that found the readiest publication among their fellows. Details of outlook and conduct would not be convincing unless presented at such length as would be tedious, and to make them intelligible a hundred years after would need a weight of explanation too heavy for them to bear.

What is certain, however, is the basic distinction that separated the two men. Stephen was born to the law almost to the point of being swaddled in a stuff gown, but Wakefield, in a sense, had it thrust upon him. The frequently hypercritical Mr Justice Henry Samuel Chapman, with whom Stephen lodged on his arrival from Australia, called him "a worthy man who was not well-treated in Van Diemen's Land," but he made no secret of his aversion to Wakefield. Writing to his father in England from Homewood, Karori, Chapman presented a catalogue of inadequacies covering a mere Crown Solicitor which left Sir George Grey singularly unimpressed when he was searching for an Attorney-General of New Munster in 1848.

Chapman wrote: "This Dan is in every respect a bad fellow . . . destitute of principle, mendacious, and slanderous . . . His knowledge of law, if he ever had any, has grown rusty from non-use." (*Chapman Letters*).

Sir George Grey, in a letter to the Lieut.-Governor of New Munster, Edward John Eyre, referred to the Wakefield reputation and the fact that he had arrived in New Zealand under an assumed name, but insisted that "to make such a reason as this the ground for lasting exclusion from the Public Service would be to raise up implacable enemies to the Government, who, feeling themselves marked men, could never become reconciled to it." (*New Zealand Archives*).

* * *

Mr Justice Sidney Stephen.

Sidney Stephen was born in 1797 at Somerleage, Somerset, and through his father, a puisne Judge and Acting Chief Justice of New South Wales, he was related to Sir James Stephen, Under-Secretary for the Colonies, and Sir James Fitzjames Stephen, one of the architects of the codification of English Criminal Law. After Charterhouse and Lincoln's Inn, Sidney Stephen joined his father in St. Kitts, in the West Indies, and practised there until the family removed to New South Wales where Stephen senior had been appointed a Judge.

The young barrister of Lincoln's Inn found early in his career in Sydney that he had to fight a powerful legal monopoly of three or four persons who declined to share or distribute business. Others had entered the lists against it and failed; and Stephen, in spite of a vigorous independence of spirit, found progress slow. Among his virtues he had some undoubted faults, of which the chief might well have been a resolution to have his own way. It may be that it could hardly be called a resolution, any more than one might say of a tree that it has a resolution to grow, or of rivers that they are determined to run into the sea. But he was as persistent as a natural force and to that persistence his strengths and his weaknesses were made to contribute. The monopolists recognized him as a danger and set out to destroy him. He had confidence and pride, and dullard monopolists hated such attributes in others.

Stephen's chance came when one of the wealthy members of an Emancipist group found the legal ring unwilling to accept a libel case against a Sydney newspaper. The young practitioner accepted the brief and

in an artfully elaborated address to the jury laid bare the front of legal monopoly. He described how a small group had contrived to monopolize clients and fees, "even more impudently than we find three or four persons monopolizing all Court pickings here in Auckland" said the Auckland correspondent of the *Wellington Independent* (Feb. 24, 1858).

Stephen denounced the Sydney system as "exclusive, unjust, ridiculous, anti-progressive, and un-English," and quoted his own plight as a case in point.

"Your Honour, and Gentlemen of the Jury," he said, "I owe the honour of this day pleading my client's case before you to the simple accident that no member of our monopolizing legal gang would take this brief." He won his case and a reputation. Judge Dowling commended "the lucidity of his argument and the justness of his principles." The jury was convinced; the public was astonished; and the monopoly was doomed. Sydney rang with a parody set to a popular air:

"Law monopoly sat on a wall
Law monopoly had a great fall;
And law monopoly, and monopoly's men
Couldn't put law monopoly up again."

In 1838 Stephen moved to Hobart Town where his brother Alfred (later to be Sir Alfred Stephen, Chief Justice of New South Wales) was Attorney-General. There he found a bitter feud between his brother and Judge Montague. Family loyalty soon had him involved, and there developed a Bench *v.* Bar conflict that was to be repeated in Wellington nearly forty years later in the Prendergast—Barton contretemps. Verbal battles with Montague were almost Stephen's daily fare, with the still young barrister just about a match for the vituperative Judge. Stephen exhibited both obstinacy and enmity. Give way he would not. What he believed he said, and what he said he stood by. And, too often, in expressing his views, he displayed little respect for the notions of others. The inevitable happened. Stephen was confronted with a Rule of Contempt, and the Judge, for good measure, impeached his professional integrity. The outcome was disbarment.

A Disputed Agreement.

Unable to practise in Van Diemen's Land, and fearful of the tardy processes of his appeal to the Home Government, Stephen turned his back on the law and, with a wife and seven children to support, became a squatter at Twofold Bay in New South Wales. He acquired a substantial holding, complete with livestock, "cattle, sheep, and assigned labour (convicts on ticket-of-leave)." But there was little of the husbandman in him, and he shortly entered into an agreement to sell his holding to a syndicate. At the last minute, he repented of his bargain. The buyers stood firm, but Stephen refused to complete the transaction, and the matter was taken to Court.

The case was heard before Judge Willis, an erstwhile friend of the Stephen family, whose regard turned to amazement and disgust when Stephen, as defendant, pleaded the illegality of his own act as a bar to his keeping faith with the plaintiffs. The agreement provided for the sale, with the land, of all livestock, including the assigned labour. But recent legislation had prohibited the trafficking in convict labour.

Stephen argued that the plaintiffs could not compel him to stand by his agreement, since that agreement was illegal and, in law, no illegal contract could be enforceable. Judge Willis admitted the legal soundness of the plea, but marvelled that a defence so "morally rotten" should have been relied upon.

"Never before" he said, "have I known a case similar in kind, or one involving turpitude so contemptible. Here is a lawyer who pleads the illegality of his own bargain as legally sufficient reason for not complying with the terms of it." The Judge gave judgment for the defendant, but never spoke to Stephen again.

Shortly after Stephen disposed of the farm, and, having obtained provisional admission to the Victorian Bar, began to practise in Melbourne. While he was steadily expanding his influence in the Victorian capital, especially in the lower Courts, the machinery of appeal was moving slowly in England. It was now more than five years since his disbarment by Judge Montague, and three since he forsook the soil to return to the law. In Court, he affected a fine courtesy and easy fluency in marked contrast to his generally brusque habit in the Van Diemen's Land Courts, and to a lesser degree in Sydney, and with a good practice, a strong position in the Wesleyan community of Melbourne, and an eminent and voluble place in the councils of a growing anti-transportation policy, he learned that the Privy Council on March 29, 1847, had reversed the order of the Tasmanian Supreme Court and declared that "Mr Sidney Stephen's private character and professional conduct are unimpeached."

An appeal was now made to the Colonial Office to find Stephen suitable employment by way of compensation for the personal and financial loss resulting from his disbarment. Earl Grey, in London, recommended that a judgeship be found for him at Port Philip in South Australia, but there was none available, and it was not until January, 1850, that he was appointed by Royal warrant to be a puisne Judge in New Zealand.

Meanwhile, in New Zealand, Mr Justice H. S. Chapman was casting longing eyes across the Tasman Sea towards Tasmania where he hoped to exchange his £800 a year in this country for "£1,200 a year and circuit allowances" in Van Diemen's Land. Chapman read of Stephen's appointment in a Tasmanian newspaper and also of the end of his hopes of a post there. In a letter to his aunt in Bath, he endeavoured to explain his dissatisfaction with New Zealand and in doing so provided a picture of the judicial scene of the time.

"For the last three years a population of 10,200 in the area of Wellington, Nelson, and all south of Cook's Strait and north to Tongariro, has furnished only three or four civil trials a year and about twenty prisoners . . . Mr Stephen's appointment cuts off Otago with 1,200 people . . . One Judge could more than do all the work of the whole colony, north and south."

Nothing to Do.

Chapman foresaw that Stephen would find nothing to do in Otago, where he was to be directed when he arrived at Homewood in the next few days, and showed the depth of his yearning for a change when he said that "Stephen would no doubt be glad enough to be Judge at Wellington rather than at Otago where there can be nothing whatever for him to do." Chapman was by now negotiating for a post at Port Philip and would have urged Stephen to apply for Wellington

had he not known how keen Sir George Grey was to keep the new Judge in the South.

Charlotte Godley, wife of the Resident Agent in Christchurch of the Canterbury Association in London, in *Letters from Early New Zealand* recounts meeting Stephen in the company of Chapman J. during a six months' sojourn by the Godley family in Wellington in 1850. Of this encounter she wrote: "The first [Chapman] is at least clever and entertaining, though not very agreeable, but the new one [Stephen] does not seem to have much to recommend him. The malcontents here are indeed base enough to insinuate that the whole business of his appointment probably arises from his namesake and relation in the Colonial Office [Sir James Stephen, Under-Secretary for the Colonies, and father of the great codifier, Sir James Fitzjames Stephen].

"In any case, Otago does not seem to want a Judge at all," Charlotte Godley continues. "There are hardly 1,200 people there in all, and the labourers are a singularly well-behaved, orderly set of people, while the offences of the upper classes, much as they all quarrel and dislike each other, always stop short of a breach of the peace. They say there are scarcely three cases in the year that the Magistrates cannot dispose of; and now, instead of chartering a ship to bring them up here for a trial, a Judge is sent down to them, to whom they must pay £800 a year, and £200 more for his staff, out of their small revenue."

Stephen went to Otago within a few days of his arrival. Otago was only faintly interested in the opening of a Supreme Court at Dunedin, but the doughty founders of the province had the strongest views on the appointment of a Judge at £800 a year. Finance had just been arranged for the *Otago Witness* newspaper with an editor at £52 per annum, and an £800 a year Judge was regarded as what Hocken called "a droll and expensive absurdity." But finance was not the only thing. The immaculate character of the Otago people was such that, in the whole of Mr Justice Stephen's term of eighteen months, no prisoner was charged and no civil plaint was heard. Indeed, the only case set down for hearing concerned charges of conspiracy of which the Judge himself was the alleged victim.

But the Stephen resolution was unimpaired. Three times his Court was opened at the due date, and three times there was no business. Each occasion was marked by more circumstance and ceremony than the present Judiciary would countenance at the busiest sitting. A largely attended levee marked the inaugural function and the business concluded with the fining of defaulting jurors. Knowing there was no business, two jurors made no appearance. One was fined £10, the other £2.

For the third Court four policemen, unwontedly spic and span, and armed with wands, were marshalled in front of the Courthouse while the Sheriff, also with a wand, led the Registrar in his wig and gown to the idle precincts. Whatever further dignity was required was furnished by a crier with a sonorous voice that might have wakened the dead.

By this time the people had developed a robust antagonism to the empty show and waste of money. The *Otago News* and the Settlers' Association declaimed against "an extravagant farce" which was dubbed "another example of despotic rule." The Judge, though he had identified himself with local activities to an extensive degree (he was the first president of the Otago Horticultural Society), found himself the reverse of popular, and the Provincial Government was in even worse odour. At a dinner tendered by Dunedin Magistrates to the Judge in June, 1851, the Queen's health was drunk coldly and the Governor's toast was omitted altogether.

The rumblings of discontent in Dunedin were eventually echoed in the Otago Office in Edinburgh and impelled Mr John McGlashan, on June 6, 1851, to address Earl Grey in Downing Street as follows (with enclosures) on behalf of the Otago Association:

"Your Lordship will perceive that the appointment of a judge, with a salary, it is believed, of £800 a year, has occasioned dissatisfaction. In the opinion of the settlers there is no immediate call for that appointment, there not having been any cases, criminal of civil . . . . nor a likelihood of any for a long time to come, that a bench of justices might not competently dispose of. They are apprehensive that the high rate of salary will set a standard . . . . by which the salaries of other functionaries may be fixed . . . . disproportionate to the duties of office, the exigencies of the settlement and to the local revenue."

Mr McGlashan's letter emphasized that the settlers were accustomed to a highly satisfactory administration of justice in Scotland by local judges who were "passing rich" at £350 to £500 a year: (VI N.Z. Papers (1851) 211-212).

In due course Earl Grey took the matter up with Sir George Grey in New Zealand in a despatch which recommended (a) an extension of Mr Justice Stephen's jurisdiction with a wider distribution of the burden of cost or a reduced salary. Stephen J. reacted violently to any suggestion of a smaller emolument and geographical considerations made a wider sphere of influence impossible at that juncture.

Matters came to a head as far as judicial status was concerned when the Judge's name was linked with a particularly noisome local scandal. In the end, Mr Justice Stephen was forced to take action, and he appeared in the Magistrates' Court in the dual role of plaintiff and defendant. Charging W. H. Mansford, Mary Jane Graham, and Henry Webb with circulating defamatory statements and documents about him, he was himself called upon to answer a complaint of assault by the defendant Mansford. Admitting the assault, he pleaded in justification that "he could not wait for the slow and tardy processes of the law." Both judgments went in his favour on the casting vote of the chairman of a large bench of Magistrates, and his antagonists were committed to the Supreme Court for trial on charges of criminal libel and conspiracy.

Public opinion, however, was strongly against the Judge. As he left the Court, a Dr. Manning challenged him to a duel. The fiery doctor was bound over to keep the peace, but in the ensuing days canvassers scoured the small settlement raising funds for the defence of those who were considered to be the victims of an unjust decision. When the due date of the hearing arrived there was no Court, no Judge, and no accuser, and the dilemma was resolved some weeks later when the *Gazette* announced the abolition of the Supreme Court in Otago. It was to be seven years before the Court sat again, on March 25, 1858, when Mr. Justice Henry

(*Concluded on p. 224.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Lord Goddard.—"No Judge has made greater use of the end-of-trial opportunity for a judicial homily. It is in his addresses to convicted prisoners and unsuccessful litigants, in his Divisional strictures on the conduct of erring J.P.'s, that he is at once most pontifical and most newsworthy. Some may question the value as well as the propriety of the prolonged sermon to a prisoner awaiting sentence. (Fuchs had to listen to a commentary on the dangers of harbouring political refugees for more than five minutes before he knew he had got fourteen years.) But it is in these homilies, and other similar *ex cathedra* pronouncements, that the Lord Chief Justice has revealed his qualities and his prejudices to the world."—*New Statesman "Profile."* (2/1/54).

A New Courtroom.—Some concern is expressed by erudite practitioners of the Capital City at the project to create a forum for the Court of Appeal in a portion of the Public Trust building which is opposite the southern aspect of the Supreme Court. Who will carry the books across the road, they ask, and who return them? Books have always been the barrister's bugbear. A. J. Foote ("The Circuit Tramp"), in his *Pie-Powder*, writes that on the Western Circuit in England a huge van was used to transport the "book-boxes" of those barristers who were accompanied as they went from town to town by a large part of their libraries, but, as the emphasis in circuit work upon social activities supplanted the lengthy references to case law, the van was utilized less and less, and eventually became the property of a travelling menagerie. The provision of further room for Court hearings is a welcome sign, even if it has a tendency to urge counsel towards argument of the lighter type. It must be frustrating to Judges, intent to write judgments on days when they are not sitting, to find their Judges' library has been created *pro tem* into a place for defended Chambers applications. The availability of fresh space for the Court of Appeal should go some distance in cutting down overcrowding as a new Price Order for beer is reputed to have done in other, and less refined, surroundings.

A Solicitor's Lien.—The distinction between divorce cases and civil litigation has again been illustrated, on this occasion by the lien which normally a solicitor has upon documents for his costs. In *Hughes* v. *Hughes* [1958] 2 All E.R. 366, the solicitor was discharged by his client during an action and, no misconduct being involved, claimed a right to retain the papers until his costs had been paid. Wrangham J. held that the assertion of an absolute right to a lien would of necessity be calculated to embarrass the full investigation of the matter which public interest required. The general rule, he pointed out, is subject to the qualification that the absolute lien could not be asserted where the cause was one in which other parties were concerned and where those other parties would be embarrassed by the claim for the lien. In such a case, the solicitor must deliver up papers subject to his lien, that is to say, subject to his right to have the papers returned to him at the conclusion of the proceedings for which they were needed, and to such undertakings as might be required to make his lien effective against his former client. At this stage, one must suppose that the former client has lost interest in the papers in the same way as, when the decree nisi is awarded, he rapidly loses interest in the costs.

"**More or less.**"—The bland reply of a land agent in a recent action for misrepresentation—that the evidence of the plaintiff was "more or less" correct—reminds Scriblex that the use of these words caused comment in our Courts nearly fifty years ago. The occasion was that of Edwards J. giving his judgment in *Schmidt and Bellshaw* v. *Greenwood* (1912) 32 N.Z.L.R. 241. "I proceed now," he said, "to an examination of the authorities upon this point, but before doing so I cannot refrain from expressing my complete dissent from the theory that the use of the words 'more or less' in this connection can be supposed to cover the difference between 45 acres and 100 acres . . . After twenty years' experience in practice, during which I had more than ordinary opportunities of observation, that doctrine in connection with dealings in real property strikes me as a complete and dangerous innovation." It would seem that the term is still apt to describe smaller parcels of land. With smaller parcels of foodstuffs and the like, time has rendered them considerably less than more.

Suicide following Accident.—"I do not think that the case of *Polemis* [[1921] 3 K.B. 560] accurately reflects . . . the law of Scotland," says Lord Cameron in *Cowan* v. *National Coal Board* 1958 S.L.T. (Notes) 19. In his view, Scottish law does not accept as a test of remoteness of damage the fact that the damage is a "direct" consequence of the accident. The test to be applied is whether a reasonable man would consider that the damage "naturally and directly" arises from the accident—as a natural and direct consequence of it. This seems a distinction without any appreciable difference. The facts of the case were that the deceased man had not received damage to the skull or the brain or any injury which could physically have impaired his mental faculties; but, as a result of brooding over an injury to his left eye, he became depressed and, less than four months after the accident, he killed himself. Where there has been injury to the skull or some striking of the head, and this has been followed by an acute state of anxiety or depression not present before the accident, the chain of causation with suicide seems easier to establish: *Cavanagh* v. *London Transport Executive* (*The Times*, 23/10/56) and *Pigney* v. *Pointer's Transport Services* [1957] 2 All E.R. 807. An extraordinary divergence of opinion upon the facts is to be found amongst the members of the Court of Appeal in *Murdoch* v. *British Israel World Federation* (*New Zealand*) *Inc.* [1942] N.Z.L.R. 600. In this case, the suicide followed eighteen months after the accident. The Court by a majority held that the nexus was established, but it is the lucid and dissenting judgment of Johnston J. that is the most impressive to read and appears as the most logical to understand.

Tailpiece.—"The other day, your correspondent's client, after defeating his wife's attempt to get a maintenance order, confided why he had so indignantly denied that he had threatened to 'spatter her brains against the wall.' ''I said no such thing,' he said, 'What I did say was that I'd cut her head off and stick it on the railings.' "—R.R. in the *Law Journal* (London) (30/5/58).

PAGES FROM THE PAST.

(*Concluded from p. 222.*)

Barnes Gresson reopened it to deal with the first prisoner to be tried in Otago.

With the closing of the Supreme Court at Dunedin more Justices of the Peace were appointed and the processes of the law in the new province lay all but crushed by their own volume. The fledgling *Otago Witness* protested indignantly that Otago was "now supporting nineteen Magistrates or one Justice for every twenty male adults and one for every thirteen electors. We might as well have retained a Judge." Yet in a brief five years and for twenty years afterwards the business that came before the Supreme Court was "greater and much more important in character than that which occupies the Court in other districts." In 1863, with the Gabriel's Gully gold rush at its height, no fewer than 1,059 civil cases were commenced in Otago, and, although only forty came to trial, the province had awakened legally, and in the following year a total of seventy-eight cases were tried: (1876) (2 N.Z. Jur. Jo. (N.S.) 44, 52).

A Return Northwards.

From Otago, Mr Justice Stephen removed to Wellingtin whence Mr Justice Chapman had withdrawn. Tiring of the chase after an Australian judgeship, he had reluctantly compounded with destiny and accepted the Colonial Treasurership in Tasmania.

Stephen now became Judge of the Southern District of New Zealand, which division emerged following the revocation of the separation of New Munster (the southern portion of the North Island and the whole of the South Island) into two judicial districts. With the coming of a single representative Parliament for the whole Colony, and the proclamation of the six provinces, he was, as the Wellington Judge, responsible for all save the provinces of Auckland and Taranaki. Of his work on the Bench contemporary or subsequent chronicles have little to say. In 1852 he was associated with the Chief Justice, Sir William Martin, in a Commission to inquire into the course of proceedings in civil actions in the Supreme Court, and in the same year he crossed swords with the Governor by declaring illegal a proclamation by Sir George Grey offering land at less than £1 an acre. Grey ignored the judgment as being contrary to law, and was upheld by the Secretary of State in London.

Earlier in the same year Stephen presided over the first sitting of the Supreme Court in Canterbury. For this he went to Lyttelton, at that time a larger centre than Christchurch, and he took his seat on the Bench in a temporary schoolroom-cum-church. Records of cases heard are not easily traceable, but history credits him with at least one distinction. He is said, on one occasion, to have fined a solicitor £20 for giving wrong advice to a client!

There was a general recognition at the still slowly developing Bar of Stephen's clear, vigorous and powerful mind. His charges were for the most part spoken to be understood and seldom failed in their object. Sometimes he still delivered himself snappishly, and not infrequently hastily, but the general soundness of his judgments was seldom in question. He marshalled his reasons with skill and directed them adroitly. (*Wellington Independent*, February 24, 1858). In 1855, the the health of the Chief Justice in Auckland broke down, and he was advised to leave the Colony for a time. It was widely assumed that this was, in effect, Sir William Martin's retirement; and, when Mr Justice Stephen transferred his attentions to the Northern District and assumed the title of Acting Chief Justice, he did so in a mood of high expectation. He acquitted himself well, if not superlatively, in Auckland; but both his work and his outlook were disturbed by the delaying tactics of the Government in the matter of Martin's successor. His health suffered, and the work of the Court began to fall into arrears.

Stephen was a man of substantial pride—something more than the ordinary self-respect that all courageous people have by nature. He set great value on himself, and in consequence was by no means a stranger to self-pity. He felt keenly the Government's obvious reluctance to make him Chief Justice and made no attempt to conceal his chagrin and disgust at the appointment of "some obscure English lawyer called Arney" to succeed Sir William Martin. He died soon afterwards on January 13, 1858. The *Wellington Independent* said: "It may not, as some assert, have broken his heart; but we believe that a profound sense of Government injustice hurried him to his grave."

To call him a genial man may seem a poor tribute. The word has become so debased by common use as to convey little more than "a good fellow" which, without some emphasizing addition, is only a whit better than saying men knew no harm of him. But accessible and generous he certainly was, and it could be that his best epitaph was uttered by the *Southern Cross* at the time of his death: "He was the friend and helper of the poorer classes to whom the processes and technicalities of the law are apparently still an effectual bar to the impartial administration of justice".

A Great Judge.—The distinctive quality of Brandeis is that with immense resourcefulness he found ways to build the ancient ideas we profess into the structure of twentieth-century America. His power derived from a fusion of three traditions: the Biblical tradition, with the moral law of responsibility at the core; the classical tradition, with its stress on the inner check, the law of restraint, proportion, and order, achieved by working against a resisting medium; and not least, the common-law tradition which he learned in this university [Harvard], teaching that the life of the law is response to human needs, that through knowledge and understanding and immersion in the realitity of life law can be made, in Mansfield's phrase, to work itself pure. This harmonious fusion of traditions accounts for the essential simplicity beneath the manifold expressions of his gifts. It explains, too, why his real significance on this centennial anniversary goes beyond this or that measure identified with his name. Like all great teaching, as has been said of history itself, his meaning is not to make us clever for another time, but wise for always. (Paul A. Freund, Mr Justice Brandeis: A Centennial Memoir (1957) 70 Harv. L. Rev. 769, 791-792.)