New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"Law is not the simple thing that we sought to make it in our legal theory in the last century. It is a highly complex aggregate, arising socially from the attempts of men in politically organized society to satisfy the claims involved in civilized social life so far as they may be satisfied by a systematic ordering of conduct and adjustment of relations."

—DEAN ROSCOE POUND.

VOL. XVIII. TUESDAY, APRIL 7, 1942 No. 6

DEATH DUTIES: THE VALUATION OF SHARES.

III.

IN the first of the recent local cases which have been summarized, *In re Harvey, Public Trustee* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 150, we have seen that Mr. Justice Johnston, while looking at the assets value of shares for which there was no listed market, applied the practical test of ascertaining the attitude towards such shares that would be adopted by the prudent prospective purchaser of shares, influenced by the following factors: the dividends that the company has paid; the return of income that can be reasonably anticipated; the nature and value of the assets; and the business of the company which enable security of capital to be estimated (including the proportion of intangible to tangible assets); and the facility with which shares could be realized, if occasion arose when the purchaser required the money that he had invested.

In the second of such cases, *Tremaine* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 157, Mr. Justice Smith, in considering the shares of a small and youthful private company, analysed the Commissioner's method of valuing such shares on the assumption that there was an informed market, on the analogy—or partial analogy—of the actual market for shares listed on the Stock Exchanges. His Honour criticized this method in relation to shares of the nature of those in issue; and he held that the value of such shares is to be ascertained by estimating what sum would fairly represent the shares if they were turned into cash at the death of the deceased. Thus, if there is an actual market, the best evidence of value is usually that afforded by transactions in the market; but, if there is no actual market, the Court must ascertain what a man desiring to buy the shares would have had to pay for them on the day to the vendor willing to sell at a fair price, but not desiring to sell. In the circumstances of this present case, the analogy of listed limited companies could not be applied to this small and youthful company, and investors would have judged of the prospect and stability of future earnings by reference to the matters enumerated by the learned Judge, which we have set out in full.

The two cases have much in common, and they are valuable in giving, in the circumstances of two companies widely different in earning capacity, a corrective to the views expressed by the Commissioner of Stamp Duties, and applied by him in his valuation for death-duty purposes.

The test of the only available market is applied in the first of the cases which follow for analysis; while, in the second of them, the "capitalization" method is adopted. Both companies concerned were public companies not listed on the Stock Exchange. From a careful consideration of the Court's attitude towards valuation of shares in the different circumstances of these four recent cases, practitioners should now be able to adopt the method of valuation most suitable of application to shares in deceased person's estates, as they now have useful standards bearing judicial approval by which to check any objections or increases of valuation made by the Commissioner of Stamp Duties.

The first case to be considered is *McGregor* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 164.

At the date of his death, September 21, 1940, the deceased was the owner of four thousand ordinary

shares of £1 each in a Trust, Loan, and Deposit Co., Ltd., paid up to 14s. per share. This company was incorporated as a public company in December, 1925, with a capital of £25,000 which was increased in March, 1927, to £50,000 shares, of £1 each. The principal objects for which the company was established were to make loans on mortgage of land in New Zealand or on other property and to receive money on deposit at interest.

The appellant claimed that at the date of death the value of the deceased's shares was 8s. per share and the total value £1,600. The Commissioner disagreed and determined the value to be 10s. 6d. per share and the total value £2,200. The appellant objected and the Court was asked to determine whether the Commissioner's valuation was correct, and, if not, in what manner it should be amended.

The capital of the company had been called up to 14s. per share, though some shares had been paid in advance of calls beyond this. The company's year ended on January 31, but the balance-sheet was not available and the dividend was not declared until March. In 1937, the company paid a dividend of 4 per cent.; in 1938, 4½ per cent.; and in 1939, 5 per cent., all being free of income-tax. The company seems to have paid away most of its profits and had only a small reserve fund; and it appeared from the evidence that, if the assets had to be realized, there would remain for the shareholders after paying the costs of liquidation and all creditors approximately 8s. per share. In His Honour's view, the company's financial position had been reflected in the transactions in the shares in the market. Shares paid to 14s. per share had been sold as follows: In February, 1939, two parcels of one hundred shares each at 10s. per share. In May, 1939, one parcel of two hundred and fifty shares at 9s. per share; in June, 1939, one parcel of two hundred shares at 10s. 6d. per share; and in November, 1940, one parcel of one hundred shares at 8s. per share. In February, 1941, a number of parcels of shares in a deceased estate paid up to 15s. per share were sold at 7s. 6d. per share. Of these sales the one nearest to the date of the death of the deceased (September 21, 1940), was the sale in November, 1940, of one hundred shares, paid up to 14s. per share, at 8s. per share. That was the first sale after the balance-sheet had been made available and the dividend declared for that year. The learned Judge said that, as the market value is generally the best test of the cash equivalent of the shares, it should be adopted unless there is good reason to the contrary: *In re Alfred Louisson*, (*supra*); *Blackwood's Executors* v. *Commissioners for Stamps*, (*supra*).

The Commissioner appears to have rejected the market price in this case for two reasons, the first because the executors of the estate of the deceased shareholder, who died on July 2, 1940, assessed the value of the shares, in the estate accounts, at 12s. per share; the second, because some years ago Mr. Justice Northcroft did not act on the market value in valuing the shares of a private company. As to the first of these reasons, the shares of the deceased estate were sold in February, 1941, at only 7s. 6d. per share. The executors' estimate of value was by no means realized in cash, and His Honour thought this had little weight in determining the value of the shares before the Court.

As to the second reason, His Honour said:

> The Commissioner says that in the case before Mr. Justice Northcroft there were two sales of fairly substantial blocks of shares at a price of 15s. per share, but His Honour rejected these sales as tests of value on account of the trading results of the company (which had suffered in the economic depression, but was improving at the date of valuation) and he therefore valued the shares at 11s. 6d. per share. Prior to this decision, the Commissioner says that he thought he ought to follow the prices realized on sales which had actually taken place. Now he considers that he should only follow such sales if he considers that the market is an informed market. I gather that in his view, an informed market is one which would take account of what he terms the general level of investment value and also the returns from similar companies throughout New Zealand. Some of the Commissioner's conclusions about the general level of investment value derived from his study of companies listed on the Stock Exchange are set out in my judgment in the appeal of *Tremaine* v. *Commissioner of Stamp Duties* (*cit. supra*).
>
> As I am not aware of the special circumstances of the case before Mr. Justice Northcroft I am unable to look upon it as other than a decision in which the Court thought that the special circumstances were such as to render the market value an unreliable guide to the cash equivalent of the shares at the date of death. In the present case I can see no such special circumstances. The evidence shows that the shares are the shares of a small company which is not listed on the Stock Exchange and that its shares have no appeal outside the Palmerston North district. The local market is the only market. The cash equivalent of the shares is only that which the local market will give. The prices offered for the shares must be affected by the possible resale value in that market. There is no suggestion whatever that that market was subject to any panic or to "bearing" or "bulling" tendencies, or that the actual sales were other than perfectly genuine.

Accordingly, the learned Judge saw no reason to go outside that market or to conclude that it was an uninformed market because of inferences drawn from a study of companies with similar objects in other parts of New Zealand which had a larger capital, greater reserves, and wider markets. In his opinion, the test of the only available market should, in this case, be adopted; and he fixed the value of the shares at 8s. per share. The appeal was, therefore, allowed.

The sole question in *In re Crawford, Public Trustee* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 170, was the value of 6,017 shares in a publishing company. In commencing a lengthy judgment, Mr. Justice Fair stated that the principles upon which shares should be valued had been enunciated in *In re Alfred Louisson*, (*supra*) and in *Kirkcaldie* v. *Commissioner of Stamp Duties*, [1933] N.Z.L.R. 241, the effect of which decisions he summarized as follows:—

> 1. In the absence of special circumstances (such as a panic on the day in question) the usual and natural measure of value is the market price; and that should be adopted where available.
>
> 2. Where there is no market at the time, owing to shares being firmly held or other circumstances, the value may be fixed by comparison with other companies, the position and nature of which provide a reliable basis for comparison.
>
> 3. Where neither of these bases is available, the value may properly be ascertained by reference to the value of the company's assets.

His Honour quoted, in support, the view of five Judges of the Supreme Court of Canada in *Untermayer* v. *Attorney-General of British Columbia*, [1929] 1 D.L.R. 315, 320:

> The value with which we are concerned here is the value at Untermayer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least

potent of which is what may be called the investment value created by the fact—or the prospect as it then exists, of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic, or ephemeral, is the best test of the fair market value of property of this description.

In the same case, Mignault, J., said he would not detract anything from the market value of a large holding of shares on the assumption that the whole of them would be placed on the market at the same time, as he did not think that any prudent stockholder would pursue such a course. To make such a deduction, would be to render the " sacrifice value " or " dumping value " of the shares the measure of valuation. The same view as to the valuation not proceeding on the basis of the sale of a large number of shares *en bloc* was taken in *Smyth* v. *Revenue Commissioner*, [1931] I.R. 643, 655.

His Honour considered that the principle of *Myer* v. *Commissioner of Taxes*, [1937] V.L.R. 106, already referred to, was one to bear in mind in estimating the value of shares on the basis of their probable market value; but the disparity of the number of shares in the case before him prevented its being regarded as an authority to be applied in that case.

The learned Judge next discussed the " capitalization " or " cumulo " method of valuation—that is, of estimating the probable future maintainable profits of a company whose shares are not quoted in the market, or of which there had been no recent sales in the open market; and then capitalizing these at what is considered a reasonable rate of return in the particular circumstances. He observed, after application of this method to the facts of the case, how widely the results may vary; and the room given for a wide and honest difference of opinion. He referred to two factors that should be kept clearly in mind when suing this method for the valuation of shares for death-duty purposes: (*a*) The risks which are in a measure imponderable—*e.g.*, of possible future competition and other uncertain factors; and (*b*) the extent to which an ordinary purchaser of such shares acts with the caution and upon the grounds on which a careful accountant would act, and his willingness to accept risks. The test, he said, is this: What would a willing purchaser give to a not unwilling seller. He added:

> Where there have been no sales in the open market, the purpose of the inquiry is to ascertain a value approximate to what would have been the market value of the shares if there had been sales in the open market; and, in determining the second factor, the attitude of mind of the ordinary or average investor—the man who provides the purchase-money, must, I think, be the dominant influence. So far as that differs from the view of the skilled accountant, it must be adopted.

With regard to the basis for estimating future profits, the Commissioner had taken an average of three years of profits, because he had found that, as the result of very extensive tests, an average of three years capitalized at an appropriate rate per cent. gave remarkably good results compared with the market price of shares. After general consideration of the position, His Honour said:

> I think I am bound to take the view that purchasers would exercise reasonable care, and might well look back five years. Finding that there had been a poor year, and that it was due to the general economic depression of the time, a purchaser might well say, " I have to take into account the possibility of a bad year." But it seems to me unlikely that he would say, " I must base my purchase price on the basis of such a bad year occurring every five years." That seems to me to be an unduly pessimistic view, and one which a purchaser would probably not adopt.

His Honour came to the conclusion that, in the circumstances of the company under notice, and in view of the depression from 1931 to 1935, a reasonable course to adopt in the valuation of the shares on the " capitalization " method, would be to take the average of the income over the period of five years before March, 1939 (the shareholder died in August, 1939); but to assume that a purchaser would act on the assumption that there would be only one bad year in ten. He considered that the rate of interest at which future maintainable profits should be capitalized should be 8½ per cent.

His Honour concluded the judgment with a consideration of the " assets " method of computation of value, which, he said, taken on a very conservative basis, results in very much the same value of the shares being reached. This method involved the question for the basis on which the goodwill of a business should be valued; and reference was made to *In re Fulford*, (1908) 10 G.L.R. 515, and *Toogood* v. *Commissioner of Stamp Duties*, (1905) 25 N.Z.L.R. 471. His Honour preferred Mr. Justice Cooper's assessment of the value of the goodwill, in the former case, as being equal to the profits for the last three years, as more appropriate to the facts of the case under his consideration.

In concluding his judgment, Mr. Justice Fair made brief reference to *McGregor* v. *Commissioner of Stamp Duties* (*supra*) and to *Tremaine* v. *Commissioner of Stamp Duties* (*supra*), which, he said, appeared to involve the application of the principles which had been accepted as applicable to the particular facts of those cases. Although, he added, they superficially resembled the case before him, upon a more careful examination it was clear that the position was substantially different in those cases, and that those decisions did not involve a different view from that which he had taken as the principles applicable to such cases, or the weight to be given to the various factors.

After reading the foregoing judgments, and the comments made therein by their Honours on the evidence given regarding value by accountants and others, we are reminded of the observation made by Lord Hobhouse when delivering the opinion of the Judicial Committee in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling and Co.*, [1901] A.C. 373, 391:

" It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an enquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at."

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Timaru. 1941. October 10; December 22. *Blair*, J.

In re **BURNS, NEW ZEALAND INSURANCE COMPANY, LIMITED v. HODGKINSON AND OTHERS.**

Will—Construction—"Heirs"—"Respective heirs" of legatees—Whether next-of-kin entitled—Administration Act, 1908, s. 11 (b).

A clause in a will said: "If any of the above mentioned legatees predecease me the legacies are to go to their *respective heirs.*"

On originating summons for interpretation,

M. J. Gresson, for the plaintiff; *Campbell*, for G. C. A. Hodgkinson; *Rolleston*, for the remaining defendants other than D. A. Dunlop and M. C. Aikenhead; *Ulrick*, for D. A. Dunlop and M. C. Aikenhead.

Held, That, looking to the will, the gift over in the event of the death of any legatee was a gift to the legatees "heirs" and that each legatee having predeceased the testator, the next-of-kin of such legatee according to the law of New Zealand were entitled to the legacy.

In re Fergusson's Will, [1902] Ch. 382, applied.
Macleay v. *Treadwell*, [1937] N.Z.L.R. 230, distinguished.
Gittings v. *M'Dermott*, (1834) 2 My. & K. 69, 39 E.R. 870, referred to.

Solicitors: *Perry, Finch, and Hudson*, Timaru, for the plaintiff.

SUPREME COURT. Wellington. 1942. February 23, 25. *Ostler*, J.

CURTIS v. DEVLIN.

Rent Restriction—Dwellinghouse—Tenant of Six-roomed Dwellinghouse keeping Four Boarders—Whether "Premises used by the tenant exclusively or principally for business purposes"—Fair Rents Act, 1936, s. 2 (b).

A tenant of a six-roomed dwellinghouse who keeps four boarders therein uses the premises "principally for business purposes."

Bethune v. *Bydder*, [1938] N.Z.L.R. 1, [1937] G.L.R. 665, followed.

Counsel: *R. R. Scott*, for the plaintiff; *Meltzer*, for the defendant.

Solicitors: *R. R. Scott*, Wellington, for the plaintiff; *Burton and Meltzer*, Wellington, for the defendant.

SUPREME COURT. Nelson. 1941. November 21; December 22. *Blair*, J.

In re **A MEMORANDUM OF TRANSFER, FRY v. HOCKING AND OTHERS.**

Land Transfer—Certificate of Title—"Right heirs"—Term used in Transfer under the Land Transfer Act, registered before the Administration Act, 1879, came into force—Statutory Next-of-Kin entitled—Administration Act, 1908, s. 4 (2)—Real Estate Descent Act, 1874, s. 18.

A transfer under the Land Transfer Act, registered on July 24, 1880, before the Administration Act, 1879, came into force and therefore when the Real Estate Descent Act, 1874, was in operation, transferred the land comprised therein to a son of the transferor for life, with remainder to his wife for her life, with remainder in fee simple after the death of the survivor of them to the "right heirs" of the son.

Fell, for the plaintiff; *Thorp*, for the defendants; *Rout*, for the executors of the estate of H. Pattie.

Held, That on the death of the survivor of the son and his wife, the son's statutory next-of-kin were entitled to the land.

In re Williams, Campbell v. *Hill*, [1926] N.Z.L.R. 762, G.L.R. 512, and *Rushbrook* v. *Pearman*, (1913) 32 N.Z.L.R. 680, G.L.R. 373, applied.
Macleay v. *Treadwell*, [1937] N.Z.L.R. 230, distinguished.

Solicitors: *Fell and Harley*, Nelson, for the plaintiff; *C. W. Thorp*, Motueka, for the defendants: *Rout and Milner*, Nelson, for the executors of the estate of H. Pattie.

SUPREME COURT. Christchurch. 1942. February 17. *Northcroft*, J.

McNABB v. DIXON.

Industrial Conciliation and Arbitration—Jurisdiction—Effect of s. 97 of the Industrial Conciliation and Arbitration Act, 1925—Award — Wages — Substantial Employment — Conflict between Private Contract of Employment and Award—Whether Doctrine of Substantial Employment applies—Industrial Conciliation and Arbitration Act, 1925, s. 97.

Section 97 of the Industrial Conciliation and Arbitration Act, 1925, does no more than declare that the decisions of the Court of Arbitration are final and may not be taken into the Supreme Court or to the Court of Appeal upon an appeal. It does not coerce those Courts to adopt the opinion of a President of the Court of Arbitration which is the basis of his decision.

A conflict between the terms of a private contract of employment and an award on the question as to the wages to which an employee is entitled who works for his employer in two capacities is to be resolved by determining what is the substantial employment upon which the worker is engaged.

Wilson v. *Dalgety and Co., Ltd.*, [1940] N.Z.L.R. 323, G.L.R. 273, applied.

Smith (Inspector of Awards) v. *Holland*, and *Munro* v. *Shaw*, (1939) 39 Bk. of Awards, 1340, not followed.

Counsel: *Champion*, for the appellant; *Archer*, for the respondent.

Solicitors: *White and Champion*, Christchurch, for the appellant; *Archer and Barrer*, Christchurch, for the respondent.

SUPREME COURT. Auckland. 1942. February 20, 23. *Callan*, J.

RICHARDSON AND COMPANY, LIMITED v. THE KING.

Practice—Trial—Judge and Jury of Twelve—Moneys paid under the compulsion of the Workers' Compensation Act, 1922—Whether "pecuniary damages"—Judicature Amendment Act, 1936, s. 2—Workers' Compensation Act, 1922, s. 50.

Moneys paid under the compulsion of the Workers' Compensation Act, 1922, are "damages" not merely within the meaning of s. 6 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, but also within the meaning of s. 2 of the Judicature Amendment Act, 1936.

John Cobbe and Co., Ltd. v. *Viles (N.I.M.U. Insurance Co. Third Party)*, [1939] N.Z.L.R. 377; G.L.R. 255; aff. on app. [1939] N.Z.L.R. 981, G.L.R. 616. (*Sub. nom. N.I.M.U. Insurance Co. (Third Party)* v. *Viles*), applied.

Union Steamship Co. of New Zealand, Ltd. v. *Chevis*, [1929] N.Z.L.R. 687, G.L.R. 412, considered.

Stevens v. *Collinson*, [1938] N.Z.L.R. 64, G.L.R. 12, distinguished.

Counsel: *G. S. R. Meredith*, for the respondent in support; *Hamer*, for the suppliant, to oppose.

Solicitors: *Russell, McVeagh, Macky, and Barrowclough*, Auckland, for the suppliant; *V. R. S. Meredith*, Auckland, for the respondent.

INVERCARGILL'S NEW COURT-HOUSE.

Opening Ceremony and First Sittings.

At the Old Court-house.

On February 24, the day of the opening of the Supreme Court Sessions at Invercargill, the last sitting of the Court took place in the old Court-house, and, in the afternoon, the new Court building was formally opened by the Minister of Justice, Hon. H. G. R. Mason.

When the Sessions were opened in the morning, His Honour Mr. Justice Kennedy charged the Grand Jury in an address appropriate to the occasion of the last sitting of the Court in a building that had been the scene of the administration of Justice in Invercargill for over sixty years.

In the course of his charge, His Honour said :

" The Supreme Court has been sitting in this building since 1880, although the first sitting of Supreme Court was held in 1863. For very many years the Courts were held in trying conditions and we find Grand Juries, in the 'seventies, making presentments that better accommodation should be provided. The present building was opened in 1880. It has been used for over sixty years ; but, in the course of time, it has proved inadequate, inconvenient, and wholly unsuitable for a Court. In this Court a member of the Bar was injured by a fall of plaster from the ceiling ; and, in 1935, following this, the Grand Jury made a presentment as to the unsuitability of the building and recommended that a new Court-house should be constructed. The foundation of the new Court building was laid in 1938, and the new structure itself is now completed.

" I have mentioned all this because you will observe the Grand Jury is particularly concerned with matters affecting the administration of justice. It not only deals with the specific charges of crime contained in bills of indictment, but it makes, if it wishes, presentments or recommendations upon any matter touching the administration of justice. That, as we know, has been done in this country as well as elsewhere, and it is a right which, while it is not always exercised, is no doubt valued. In normal and ordinary times it may not be exercised ; but one can well conceive of times in which a Grand Jury may feel disposed to exercise it and the community may be jealous of its retention. It should not be forgotten that, as one eminent writer says, there have been times in our history when ' it was very necessary that the shield of the Grand Jury should be interposed between the Crown and the subject.' It is an additional safeguard of individual liberty."

His Honour concluded by outlining the functions of the Grand Jury.

Addressing His Honour, at the conclusion of formal business in the old Court-house, Mr. N. L. Watson, President of the Southland District Law Society, said that at the last sitting of the Supreme Court to be held in that building the Southland Bar felt that it was fitting that they should recall that that historic building had been the home of the Bench and Bar in the District for over sixty years, and, as such had been the scenes of many historic and famous trials and hearings. " It would be inappropriate to allow this occasion to pass without some reference being made to these matters, and it is the occasion for us to recall momentarily that this Court-room has been presided over by many eminent Judges, and that in it also have appeared many able advocates of the past." Mr. Watson continued : " Our profession is not unmindful of these pages of history nor the scenes that have taken place here, nor of the Judges and advocates who have appeared in them, and we will take with us to the new Court building many interesting and instructive memories of our professional activities in this building. The assembled members of the Southland Bar, therefore, take their places today at this last Sitting of the Court in this building in full appreciation of the historical significance of the occasion and as a tribute to the memories it holds."

In reply, His Honour said they were indeed, as Mr. Watson had said, about to leave an historic building, but they should take with them their memories of great Judges and eminent counsel, all that they had learned, and all that they owed to tradition ; and they would, he hoped, leave behind them merely the outworn shell.

The Formal Opening of the New Court-house.

In the afternoon, a procession of members of the local Bar accompanied His Honour Mr. Justice Kennedy from the old Court building to the new Court-house, for the formal opening of the latter by the Minister of Justice. There was a large attendance of the public.

After the Deputy-Mayor of Invercargill, Mr. A. Wachner, who presided in the absence of the Mayor through illness, had expressed the citizens' pleasure that the conduct of judicial proceedings would henceforth take place in a building that was in every way worthy of the Southland Province and the City of Invercargill, the Hon. Mr. Mason addressed the gathering.

In the course of his speech, the Minister said that it was a pleasure to see the Judiciary represented by the Hon. Mr. Justice Kennedy, who had now for many years presided over the Supreme Court in the Southland District. The circumstances of the times, and, in the case of the Hon. Mr. Justice Ostler, the additional fact of illness, had precluded further representation of the Supreme Court Bench. He then welcomed the civic representatives ; and added that, notwithstanding the heavy depletion of the ranks of the legal profession by reason of war-duties, he was particularly glad to see his brethren of the Bar so well represented.

Continuing, Mr. Mason said : " In designing the building, apart from convenience and comfort both from the point of view of the Court staff and from the point of view of the public (including the jurors and witnesses),

special consideration has been given to the acoustics, and the lighting, particularly in the two Court-rooms, and to the provision of heating and ventilation in the form of an up-to-date air conditioning system which will ensure at all times of the year a flow of pure air at a uniform temperature. With regard to the latter, whilst it might not be found necessary to cool the summer air to a very great extent, I am assured that the winter conditions in Invercargill are such at times that a considerable warming of the air will be a very decided advantage. It has been said that the more comfortable the air conditions, the less heated the arguments, and one wag has parodied: 'When draughts come in at the window justice flies out at the door.'"

Mr. Mason went on to say that at the laying of the foundation-stone he had expressed the conviction that Invercargill would possess a Court which for general utility and dignity of design would not be excelled in the Southern Hemisphere. That this hope has materialized would, he thought, be evident upon an inspection of the building after the ceremony. The planning of the building had been a co-operative effort between the Government Architect's Branch of the Public Works Department and the administrative officers of the Department of Justice, who had also collaborated with the Secretary of the Law Society. He added that the completed building reflected great credit on all concerned; and he took the opportunity of extending congratulations to the contractors—Messrs. Wilson Bros.—and to all the tradesmen associated with them, in the fine workmanship manifested throughout the construction of the building.

"It should hardly be necessary for me to emphasize the vital importance of the administration of justice in our democratic social system." The Minister concluded: "It is essential that justice should continue to be administered under all conceivable conditions if chaos is to be avoided and the Rule of Law is to prevail. This applies equally, if not more so, in times of stress such as exist at present. The war has brought with it an inevitable and unavoidable amount of emergency legislation and regulations. Whilst many of these regulations are necessarily drastic in the public interest, it must not be forgotten that in their administration the same rules and principles of justice must be applied by the Courts as in times of peace—in fact by the very drastic nature of some of the regulations it is of the utmost importance that the Courts should be ever on their guard to see that, far reaching as the regulations may be, they are administered fairly and justly.

In keeping with the very serious times through which we are passing, it is not my desire to prolong these proceedings unduly. Mr. Deputy-Mayor and citizens of Invercargill, in this new Court-house you have a beautiful edifice—an ornament to your city: but the Court stands for something more than a mere civic building—it is symbolical of the cherished liberty and justice for which our forefathers fought so self-sacrificingly to acquire, and for which we are at present struggling to maintain."

After Mr. W. R. C. Denham, M.P., had thanked the Minister for providing the new Court-house and for attending the ceremony, Mr. Mason formally opened the building with a gold key presented by the contractors.

In the New Court.

Immediately after the formal opening of the building, His Honour Mr. Justice Kennedy presided over a formal sitting of the Supreme Court in the presence of an assembly that completely filled the new Court-room.

In addressing the members of the Bar, His Honour said that the Chief Justice had asked him to say how much he regretted his inability to be present in Court on that occasion to join with them in the pleasure of entering into their new home.

"I confess to no feeling of regret in leaving the old building, although for more than sixty years justice continued to be administered there," Mr. Justice Kennedy said. "Justice may be done in any surroundings or in any circumstances, but it is neither fitting nor proper that its administration should be attended with difficulties and discomfort for everyone. I had almost said attended with danger; for on more than one occasion, as you, gentlemen, and I well remember, it appeared almost to resent our presence.

"So I am not sorry to leave a building which, however imposing its entrance, was always, as the Hon. the Minister himself said, inadequate, inconvenient, and utterly cheerless. Long before its erection, Mr. Justice Williams had said that right from the earliest times justice was administered in Invercargill in trying conditions. We are well aware that his observations were equally true of the conditions under which Courts functioned and public business was done in the old Supreme Court House.

"Now we find ourselves accommodated in this delightful structure to which so much thought has obviously been given and on which so much care has been taken. Although its external appearance is simple, we find within that we are at last in a building properly designed and planned for Courts and eminently suited for the discharge of our calling. I can imagine how well content my distinguished predecessors who laboured under adverse conditions would have been with this new Court."

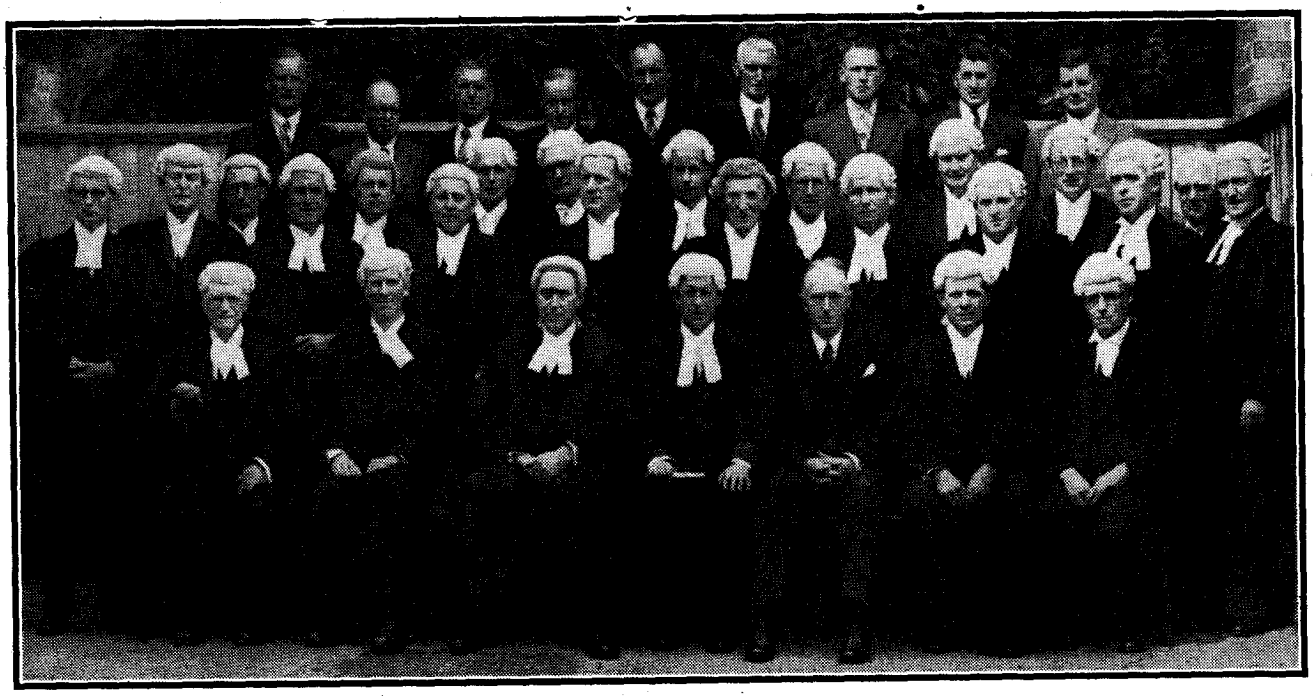
This Court was the latest, and, in His Honour's view, for its purpose, the best Court in New Zealand, marking in so many ways a great advance upon any Court so far constructed in this Dominion. The learned Judge said that he had visited Courts in many countries and, while he had seen larger and grander Courts, he was not using the language of overstatement when he said that he had seen none which he thought more suited for its purpose, and more beautiful in its simplicity, than this Supreme Court at Invercargill.

"We turn over a new page in our history, remembering always that those who sit upon this Bench follow in succession the early pioneers, Mr. Justice Gresson, Richmond, Chapman, and Ward," His Honour continued, "Mr. Justice Williams came here for more than thirty years and then came Mr. Justice Sim. The old Supreme Court has witnessed much that was tragic, much that was sad, and something that was otherwise. There have been heard great men in their day, many of them afterwards Judges. The names, as they then were, occur of Stuart, Wade, Sir Robert Stout, Harvey, Russell, Macdonald, Denniston, Chapman, Hosking, Sim, Adams, Solomon, Macgregor, Hay, John and William Macalister, Hall, and W. A. Stout.

"I am happy still to see as we pass from the old Court to the new, many of the faces that greeted me when I first came here. I miss some of the old practitioners such as William Macalister, W. A. Stout, and D. L. Popplewell. I miss many of the younger members of the Bar who are absent upon military service. I have been supplied with a list of members of the Bar who are absent upon military service. I know that you would like me to mention their names in open Court. Here are the names: Overseas: J. R. Hanan, J. E. Matheson, T. R. Pryde, Alan Smyth, J. D. Paterson, and I. A. Arthur; and in New Zealand: R. B. Bannerman, A. B. Binnie, and H. K. Carswell. I hope we shall see them all safe here again.

"Although we leave the old building for the new, we do not leave behind any of those traditions which have been handed down to us, and particularly we know that we have not left behind us, but we bring with us into the new Court, the cordial relations between Bench and Bar without which neither Bench nor Bar can properly perform its true function. I know I may count upon your assistance. Here within these walls we are in future to work, co-operating in the grand task of administering justice, you struggling to see that right prevails and I to see that justice is done, and, with both is us working together as in the past and with a continuance of mutual forbearance, trust, and confidence, we shall, I hope, attain our high purposes."

OPENING OF THE NEW INVERCARGILL COURT: BENCH AND BAR.



Back Row: G. L. CALDWELL J. G. IMLAY K. G. ROY H. E. RUSSELL S. D. McDONALD (Gore) E. B. PATRICK (Riverton) J. A. C. MacKENZIE (Riverton) E. H. J. PRESTON G. M. BROUGHTON

Second Row: J. H. B. SCHOLEFIELD F. G. O'BEIRNE L. F. MOLLER G. J. REED G. T. BAYLEE (Dunedin) B. W. HEWAT M. H. MITCHEL JAS. ROBERTSON H. J. MACALISTER M. M. MACDONALD W. G. TAIT J. C. PRAIN O. A. B. SMITH (Winton) F. G. HALL JONES W. B. JOHNSTON (Gore) S. M. MACALISTER T. V. MAHONEY G. F. INDER JOHN TAIT

Front Row: J. L. McG. WATSON Hon. H. G. R. MASON His Honour Mr. JUSTICE KENNEDY N. L. WATSON Mr. R. C. ABERNETHY, S.M. G. C CRUICKSHANK EUSTACE RUSSELL.

Mr. N. L. Watson, President of the Southland Law Society, said it was his privilege, on behalf of the Attorney-General and the assembled members of the Southland Bar, to thank His Honour for the welcome he had extended to the Bar in their new surroundings. On their behalf, he cordially reciprocated the good wishes His Honour had extended to them, and expressed their welcome to His Honour. "It is an understatement to say that the members of the legal profession in Southland are gratified to have at last realized their hopes of obtaining surroundings for the administration of justice in this district fitting in dignity and appointment both with the high ideals upon which British justice fundamentally rests and the needs of the growing population of this district," Mr. Watson proceeded, "We appreciate the high significance of this occasion and we celebrate today both the material opening of a structural achievement and the spiritual manifestations of the enduring qualities of the British way of life. It is true that no matter what the surroundings may be the principles of our Code must and will be observed. It is also true that there is in every British subject a mental shrine of respect for the law, but no matter how strongly developed our sense of respect for it may be, it is nevertheless necessary to have a tangible outward edifice to represent the law. This tangible edifice must be decorative without being flamboyant—dignified without being dull. It must be as durable as the standards it epitomizes. It must have in outward appearance the stability and enduring solidity of justice, and in it the administration of the law must proceed in dignity, quietness, serenity and comfort. It has been said 'that the interests of justice require that trials at law should be held where every word spoken can be distinctly heard, where every piece of visible evidence can be clearly seen, and where every witness

can be closely scrutinized by the Court, counsel, and jurymen.'

"Structurally this magnificent building does in fact conform to all these requirements. It is a fitting repository for the law. Inwardly it stands four square as the hallmark of individual justice. To it may come the rich, the poor, individuals, corporations, the Crown, and the subject, to plead their cases before an unbiased and impartial Bench and the juries of their fellows. Today, on all sides, we see justice and law and order trampled underfoot. All those liberties which we British people have fought for in the past are being attacked. Those refinements which we have evolved over centuries of development—our judicial system, individual liberties, free speech, and right of hearing—stand today in danger. This ceremony therefore stands not only as a memorial for the cultural achievements of our predecessors, but also as a symbol of our determination never to relinquish our constitutional privileges, no matter what trials and tests we are put to, whatever may be the cost.

"It is proper to record also on this occasion the fine relationship which exists and has existed, and will, I am sure, continue to exist between Bench and Bar in this district. The true administration of justice can only be carried on by a fearless Bench and honourable Bar, working in perfect harmony. We pay tribute to the memory of the illustrious Judges of this Judicial District who in their time have observed the highest traditions of the Bench and to our learned predecessors of the pioneer Bar, who, often under difficult circumstances carried out here our high tenets of conduct and procedure and maintained at all times the dignity of our honourable profession. Our respect for the pioneer Bench and Bar is unsurpassed."

In conclusion, Mr. Watson said that the Bar saw in their splendid building not only the symbol of their ideals and inheritance and the tribute most justly earned to the famous Judges and lawyers who had preceeded them in the Southland District, but also the incentive, if such be needed, to protect within these walls, the spirit and traditions in which they served.

Mr. J. McL. Watson, the oldest practising barrister in Southland, then moved for an order that the proceedings be entered in the records of the Court; in so moving, he related briefly some of his reminiscences in reference to the Court and the practice of the law in his native town.

The first sittings of the Supreme Court in Invercargill were, he said, presided over by Judge Gresson in 1863 and were held in the Mechanics Institute Hall, Conon Street. The sittings in 1864 were presided over by Mr. Justice H. S. Chapman. Mr. Justice Richmond visited Invercargill in 1865, and held the Supreme Court sittings then. In 1869, Judge Ward, of the District Court, presided at the sittings and continued to do so for a time until Mr. Justice Williams was appointed. The building in which these sittings took place was in the Southland Provincial Council's Chambers situated in Kelvin Street, and later in Ramsay's Hall, Tay Street. By the time Judge Williams visited Invercargill, it had been decided that a proper Court-house should be erected to meet the increasing requirements of the town and district, and so the Supreme Court building in Tay Street was erected and opened in 1880, when His Honour Mr. Justice Williams presided.

His Honour made the order in terms of the motion, thus concluding the historic proceedings.

In the evening, His Honour Mr. Justice Kennedy and the Attorney-General were the guests of the Southland Bar at dinner. An account of the proceedings will appear in the next issue of the JOURNAL, with, it is hoped, a photograph of the new Court building.

SOLDIERS' ALLOTMENT ACCOUNTS.

Deceased Soldiers dying Overseas.

The following information was received from the Director of Accounts, Post and Telegraph Department:

General Information.—The allotment accounts of soldiers *serving overseas* are held by the Director of Accounts, Herd Street, Wellington, C.3., and inquiries should be referred to that office. Where, however, deferred pay is allotted direct to a relative or friend inquiries should be referred to the Director, Base Records, Victoria Street, Wellington, C.1., who also deals with all overseas remittances to soldiers.

The soldier's regimental number and account number if known should be quoted on all inquiries. Pass-books are not issued in respect of soldiers' allotment accounts, but a copy will be supplied to solicitors acting for an estate.

Documents required by the Post and Telegraph Department when submitting claims for the balance at credit of a deceased soldier's allotment account.

(*a*) Where depositor leaves a will which it is not intended to prove.—The original will, a certificate of death (obtainable from the Registrar-General, Dominion Farmers' Institute, Wellington); and Departmental form of claim S.B.6 (obtainable at any Savings Bank Office, to be completed by the person named as executor or executrix).

(*b*) *Where Probate has been granted.*—Probate, and a specimen signature of the deceased depositor.

(*c*) *Where deceased intestate.*—Form of Claim S.B.6 (completed by next-of-kin). Certificate of death (obtainable from the Registrar-General); proof of relationship; and specimen signature of the deceased.

In each case the claim should be submitted through the Accountant, Chief Post Office, or nearest Postmaster.

Payment will subsequently be arranged by money-order direct to the claimant or his authorized agent.

THE POWERS OF TRUSTEES.

And the Court's Emergency Jurisdiction.

By I. D. CAMPBELL.

To meet some unforseen contingency trustees may require powers which have not been conferred on them by the trust instrument or by law. The Court may, indeed, be able to apply the far-reaching principles of construction typified in *Havelock* v. *Havelock*, (1881) 17 Ch.D. 807, and may confer powers on the trustees on the basis of the presumed intentions of the author of the trust. Where this cannot be done, reliance may be placed on various provisions of the Trustee Act, 1908, and its amendments, the Settled Land Act, 1908, or the legislation governing the Public Trust Office. But apart from all these provisions there is authority for granting powers to trustees under what has been termed the emergency jurisdiction of the Court. This article is concerned with the scope of this emergency jurisdiction as exercised (*a*) under the principle of *In re New*, [1901] 2 Ch. 534; (*b*) under the Statutes Amendment Act, 1936, s. 81; and (*c*) under the Administration Act, 1908, s. 9.

The class of cases which might have depended on *In re New* was substantially reduced by s. 4 of the Trustee Amendment Act, 1933, which conferred on trustees wide powers of participating in company reconstructions. Under that section no application to the Court is necessary, and the only limitation is that the exercise of the power is subject to the consent of any person whose consent to a change of investment is required.

The scope of *In re New* is further narrowed by s. 81 of the Statutes Amendment Act, 1936; but, as there are cases which that section does not cover, *In re New* still remains as a possible means for justifying the granting of additional powers to the trustees in appropriate circumstances.

On an application to the Court under *In re New* or under either of the two statutory provisions mentioned, it is clear that the Court may supplement the powers conferred by the instrument. But to what extent may it *contradict* the terms of the instrument? Can powers be granted which the instrument has expressly denied to the trustees? Or is it the rule that the Court cannot alter the terms of the instrument or vary the substantive rights of the beneficiaries?

There appears to be a conflict in the New Zealand decisions on this question. The Supreme Court seems to have applied divergent views on the subject, and, since the statutory provisions (more particularly s. 81) are partly in replacement of the principle of *In re New* it may be that a like divergence of opinion exists in regard to the scope of the powers which these section confer.

The difference of viewpoint appears from the cases of *Wilcox* v. *Wilcox*, (unreported, but summarized in the judgment in *Hatrick* v. *Bain*, [1930] N.Z.L.R. 490) and *In re Jex-Blake, Public Trustee* v. *Jex-Blake*, [1939] N.Z.L.R. 261. In *Wilcox* v. *Wilcox*, an order was made authorizing trustees to sell land which the testator had expressly directed should not be sold. In *In re Jex-Blake*, on the other hand, the Court refused to order payment of annuities out of capital because the will directed that they should be paid out of income and not out of capital. "*The Court*," it was said, "*has no authority to interfere with or disregard the trust.*"

It is submitted that the reasons given in *In re Jex-Blake* are unsound, and are not supported by the authority on which the Court relied, but that the actual decision was right for a reason not stated in the judgment; and further, that *Wilcox* v. *Wilcox* is in accord with the rather slight indications of reported authority on the point. Taking the latter case with *In re Fell*, [1940] N.Z.L.R. 552 (a decision on s. 81 of the Statutes Amendment Act, 1936), and applying the same reasoning to s. 9 of the Administration Act, 1908, it is submitted that on any application to the Supreme Court for the grant of powers to administrators or trustees to meet an unforeseen situation, the jurisdiction of the Court is wide enough to enable it to override the express terms of the will or other instrument.

In re New did not purport to lay down new law. It was only a restatement of a principle long acted upon by the Courts, as was indicated in the judgment of the Court of Appeal. Thus in a case decided shortly afterwards—*In re Wells, Boyer* v. *Maclean*, [1903] 1 Ch. 848—it is not surprising to find a decision in 1762 cited as an illustration of the same principle. In this early case trustees had purchased realty with funds held on behalf of infants, thereby changing the nature of their estates and the devolution of their interests. What the trustees had done in the administration of the trust for the best advantage of the beneficiaries was upheld, and it was said that the Court had given approval to similar transactions in many cases in making compositions, "*and often contrary to the direction of the donor or testator*; as where money is directed to be laid out in freehold land, the Court has, for conveniency, directed part to be laid out in leasehold": *Inwood* v. *Twyne*, (1762) Amb. 417, 419; 27 E.R. 279. Freedom of action was likewise asserted in *Lechmere* v. *Earl Carlisle*, (1733) 3 P.Wms. 211, 220; 24 E.R. 1033, 1037, where it was said that if powers given to the trustees were exerciseable only subject to a person's consent, the Court could direct the exercise of the power without that consent. In later cases the Courts do not appear to have felt themselves hampered in any way. For instance, where a life insurance policy had been assigned to trustees, with whom the assignor had covenanted to keep up the premiums, but he had become unable to meet the liability, the Court not only directed the sale of the policy but also directed that the trustees should not sue the assignor on his covenant: *Hill* v. *Trenery*, (1856) 23 Beav. 16; 53 E.R. 7.

In *In re New* itself it must be conceded that the judgment of the Court of Appeal did not directly assert that there was any power to override an instrument. Much of the judgment is purely in terms of supplementing the existing powers of the trustees. The stress is on circumstances "for which provision is not expressly made by the instrument"; on acts "which in ordinary circumstances [the trustees] would

have no power to do"; on cases "not foreseen or anticipated by the author of the trust."

But the mere fact that the trustees are by the instrument expressly restrained from exercising some power does not mean that the settlor contemplated the emergency which has in fact arisen, in which the absence of the power is proving so embarrassing. Indeed, the point which the Court of Appeal was concerned to stress was the essential feature of emergency, and on the facts of the case the question of overriding the terms of the will did not arise. Moreover, one of the examples of the exercise of this jurisdiction given by Romer, L.J. (at p. 545), was the postponement of a sale which the testator had directed to be made at a particular time. It might be said that to give a power to postpone is merely supplementing the direction for sale. But it is properly to be regarded as an overriding power modifying the direction for sale, and essentially of the same character as an alteration of the terms of the will. Most powers granted by the Court could be framed to appear as mere supplementary appendages, but when their substantial effect is to override some provision of the instrument they are rightly regarded as requiring for their basis a jurisdiction not merely to add to the trustees' powers but to alter those powers.

That the principle of *In re New* is subject to important restrictions is plain, but it seems unlikely that the supposed qualification, if it existed, would not have been clearly indicated in any of the principal cases in which it has been applied. The main qualifications apparent from the decisions are (1) that a state of affairs has arisen calling for an order in the nature of salvage, and (2) that the order is necessary in the interests, not merely of one or more beneficiaries, but of the estate as a whole.

The first qualification is supported by *In re New* itself and by *In re Tollemache*, [1903] 1 Ch. 955. There are *dicta* in *In re Wells* (*supra*) which cannot be reconciled with these decisions, but proof of emergency has been consistently required in New Zealand cases.

In applications under s. 81 of the Statutes Amendment Act, 1936, the necessity for showing unforeseen circumstances of emergency is dispensed with. The section imposes no condition other than expediency.

In regard to s. 9 of the Administration Act, 1908, Chapman, J., in *Quill* v. *Hall*, (1908) 27 N.Z.L.R. 545, expressed the view that the section empowered the Court to authorize transactions by administrators without reference to exceptional emergency. Sim, J., in *McCrostie* v. *Quinn*, [1927] G.L.R. 37, held that the jurisdiction conferred by the section ought not to be exercised to sanction a deviation from the strict letter of the trust unless a case of emergency were shown. Sir Michael Myers, C.J., explained the result of the two cases in *Hatrick* v. *Bain*, [1930] N.Z.L.R. 490, by saying that the Court has powers as extensive as stated in *Quill* v. *Hall*, but will only exercise such powers in case of emergency or other very exceptional case. Thus in *Hatrick* v. *Bain* an order was refused as a case of emergency was not made out.

The second qualification to the principle of *In re New* is that no order will be made unless it will benefit the estate as a whole and not merely some one or more of the beneficiaries. This is well illustrated by contrasting *In re Douglas*, [1922] N.Z.L.R. 984, and *In re Georgetti*, [1933] N.Z.L.R. s. 89, with *In re Bassett*, [1933] N.Z.L.R. s. 166. Where there has been an unforeseen fall in the returns from the trust property—as in the case of farms during the depression—it may become impossible to pay out of income an annuity which the testator has directed should be paid. If the trustees hold the property on a trust for sale and conversion they could sell the property and re-invest in trust securities which would produce an income. But it would be disastrous in view of the state of the market to sell the property in the depths of a depression. The Court in these circumstances can exercise its emergency jurisdiction by authorizing the payment of the annuity from capital, thereby saving the estate for the benefit of all the beneficiaries. This was the course adopted in *In re Douglas* and *In re Georgetti*.

But in *In re Bassett* there was no power of sale during the life of the widow, and there was such a deficiency in the value of the estate that there was not enough to pay in full the specific pecuniary legacies payable on the widow's death, while the residuary beneficiaries would take nothing at all. An income could be provided for the widow only at the expense of the specific legatees, without the least compensating advantage to them. Had there been a power of sale, the exercise of which would have been disastrous in the state of the market, the legatees would have obtained a real benefit from an order—the preservation of the property from sacrifice under the hammer—at the cost of the payment of the annuity from capital. But there being no such power, their interests were not imperilled by the situation. There being no risk of a forced sale an order would secure no benefit to them whatever, but would simply benefit the widow at their expense. The Court cannot apply the principle of *In re New* in this way where it is not for the benefit of the estate as a whole that an order should be made.

It is submitted that the same limitation applies in regard to the statutory powers of the Court. It has been so decided in regard to the equivalent English legislation, the Trustee Act, 1925, s. 57. In *In re Craven's Estate*, [1937] Ch. 431, 436, Farwell, J., said:

> The word "expedient" [in s. 57] clearly must mean expedient for the trust as a whole. It cannot mean that however expedient it may be for one beneficiary if it is inexpedient from the point of view of the other beneficiaries the Court ought to sanction the transaction. In order that the matter may be one which is in the opinion of the Court expedient, it must be expedient for the trust as a whole.

This, it is suggested, is the basis on which *In re Bassett* was decided, and on which the decision in *In re Jex-Blake* ought to be supported. But in the latter case Reed, J., regarded *In re Bassett* as a decision depending on a limitation of the Court's power to override the instrument. Sir Michael Myers, C.J., in *Bassett's* case certainly rested his decision partly on the fact that there was no power of sale. But the relevance of this point was not that the Court could not interfere with the terms of the instrument, but that the absence of a power of sale removed any danger to the other beneficiaries. An order would benefit only the widow, and was not needed *for the benefit of the estate as a whole.* In *In re Jex-Blake*, Reed, J., declined to make an order on the ground that the Court could not disregard the trust and substitute other provisions. It is submitted that in a case of emergency the Court has ample power to do this, but that it cannot do so where an order would benefit only one of those interested in the estate.

Finally it may be observed that Ostler, J., in *In re Fell*, [1940] N.Z.L.R. 552, made an order under s. 81 of the Statutes Amendment Act, 1936, permitting a

sale notwithstanding an express direction to the contrary in the will. He said :

> I am prepared to hold that s. 81 of the Statutes Amendment Act, 1936, gives power to the Court to order a sale if it is expedient, not only where the testator did not give power to sell, but even where he directed that the property should not be sold.

In a similar way, though in less direct terms, the Courts in England have regarded s. 57 of the Trustee Act, 1925, as conferring power to override the terms of the trust. For example, in *In re Beale's Settlement Trusts, Huggins* v. *Beale*, [1932] 2 Ch. 15, where the will empowered a sale subject to a specified consent, and the consent was withheld, the Court directed a sale without that consent.

To summarize the views which have been put forward :

1. The Court in the exercise of its emergency jurisdiction is in no circumstances restricted to an order consistent with the terms of the trust instrument, but may override the instrument if
   (*a*) an order in the nature of salvage is shown to be necessary (except under s. 81 of the Statutes Amendment Act, 1936, where mere expediency will suffice), and
   (*b*) the order is necessary in the interests of the estate as a whole.

2. The reasons for the judgment in *In re Jex-Blake* rest on a misapplication of *In re Bassett*, and ought not to be followed.

PRACTICAL POINTS.

1. Mortgages Extension Emergency Regulations.—*"Instalment" —Flat Mortgage placed on Table-basis by Adjustment Commission—Whether reverting to Flat Mortgage on Date due for Payment of Balance.*

QUESTION : A mortgagor had her property encumbered by way of "flat" mortgage for some ten years. She applied for relief under the Mortgagors and Lessees Rehabilitation Act, 1936, and the principal was reduced to £400, and placed upon a "table" basis of £1 per week, the interest being £4 10s. per cent. with quarterly rests, the balance becoming due in June, 1942. The mortgagor has paid £1 per week. In June, 1942, a sum of say, £300 is due. What is her position under the Mortgages Extension Emergency Regulations, 1940 ? Does she come under Reg. 6 (5), or does the mortgage revert to a "flat" encumbrance and become subject to Reg. 6 (1) and (2) ? If the latter, what rate of interest is the mortgagee entitled to or can demand ?

ANSWER : Whether or not the mortgagor comes within the latter part of Reg. 6 (5) is a very nice question. Reading the regulation literally, it would seem that she does ; but this interpretation of "instalment" as including the balance of £300 and interest is so contrary to the spirit of the regulations that it is unlikely that it would be accepted, but more likely that "instalments" would be restricted to approximately equal payments which finally extinguish the debt. If the foregoing interpretation is correct, then, after June, 1942, the mortgage would run on overdue, and could only be called up with the leave of the Court. It would seem that interest could be recovered on the overdue amount at the rate of £4 10s. per cent.

It is a pity that the exact wording of the Commission's order is not given in the question, as the answer must depend largely on this. For example, if the order was that the balance of principal should be repaid in June, 1942, and until repayment the mortgagor should pay £1 per week, the mortgage would undoubtedly continue to be repayable on this basis. If, however, the order was that the mortgagor should pay £1 per week until June, 1942, when the principal then outstanding with interest until repayment would become payable, then the answer set out above would appear to be correct. Orders of Adjustment Commissions were expressed in an infinite variety of terms.

2. Magistrates' Court.—*Plaint Note and Statement of Claim—Money claim—No stated amount—Refusal by Clerk of Court to issue Summons.*

QUESTION : Can a Clerk of Court refuse to issue a summons because he considers a statement of claim defective ? There was a money claim but no amount stated in a plaint note and statement of claim issued by us, and a Clerk of Court refused to issue a summons. Is he justified in such refusal ?

ANSWER : No. The statement of claim is the concern of the plaintiff and its insufficiency or other defect is a matter for the Court or the other party. The Clerk of Court is not the authority to decide such point.

Provided all statutory requirements are complied with, the Clerk cannot refuse to issue a summons which a plaintiff is entitled to have issued as a matter of right : *Clerk* v. *Bradlaugh*, (1881) 8 Q.B.D. 63, 68, 69.

In view of the decision in *Upton* v. *Farmer*, (1930) 142 L.T. 526, where an amendment was allowed by inserting an appropriate sum within the jurisdiction, the better view would be not to refuse the summons. After all, the plaintiff has stated what he claims—namely, money : see *Hills* v. *Stanford*, (1904) 23 N.Z.L.R. 1061, 1066. A plaint note for the recovery of chattels would not be defective because it did not specify the particular chattels or because the value of the chattels was not set out, although the plaint note calls for such particulars : *Heretaunga Dairy Co., Ltd.* v. *Brownlee*, [1932] G.L.R. 134. A plaint note for the recovery of tenement would not be bad because it does not specify the particular property. The particular forms of plaint note are prescribed in the Rules, and by R. 61, the non-compliance with the Rules does not render any proceedings void ; but such proceedings must be amended under s. 101 : *See*, too, *Von Zedlitz* v. *New Zealand Times Co., Ltd.*, [1919] N.Z.L.R. 729, and *8 Halsbury's Laws of England* 2nd Ed., 162 (*p*).

RULES AND REGULATIONS.

Contraband Proclamation (Finland, Hungary, and Roumania). No. 1942/58.

Contraband Proclamation (Japan). No. 1942/59.

Control of Prices Emergency Regulations, 1939. Price Order No. 70. (Imitation Crystallized Cherries). No. 1942/60.

Emergency Regulation Act, 1939. Contraband Emergency Regulations, 1942. No. 2. No. 1942/61.

Emergency Regulations Act, 1939. Stock Transport Emergency Regulations, 1942. No. 1942/62.

Emergency Regulations Act, 1939. Harbouring of Deserters Emergency Regulations, 1942. No. 1942/63.

Emergency Regulations Act, 1939. Building Emergency Regulations, 1939. Amendment No. 2. No. 1942/64.

Labour Legislation Emergency Regulations, 1940. Defence Works Labour Legislation Suspension Order, 1942. No. 1942/65.

Orchard and Garden Diseases Act, 1928. Nursery Registration Regulations, 1939. Amendment No. 2. No. 1942/66.

Coal-mines Act, 1925. Coal-mines Regulations, 1936. Amendment No. 2. No. 1942/67.

Electricity Emergency Regulations, 1939, and Supply Control Emergency Regulations, 1939. Electrical Equipment Order, 1942. No. 1942/68.

Emergency Regulations Act, 1939. National Service Emergency Regulations, 1940. Amendment No. 9. No. 1942/69.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices District Regulations, 1941. Amendment No. 4. No. 1942/70.

National Service Emergency Regulations, 1940. Registration for Employment Order, No. 1. No. 1942/71.

National Service Emergency Regulations, 1940. Building and Allied Workers Registration Order, 1942. No. 1942/72.

National Service Emergency Regulations, 1940. Metal Trades Workers Registration Order, 1942. No. 1942/73.