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Nature has placed before us a model of procedure. A good Judge is only a good father, acting upon a much larger scale. The means which are adopted to guide a father in the search after truth ought equally to be good for a Judge. It is this model of procedure upon which justice began, and from which it ought never have departed.

—BENTHAM, *Theory of Legislation*, 419.

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THE EXECUTOR'S YEAR: CREDITORS AND BENEFICIARIES.

AS a general rule, legacies need not be paid within a year after the death of the testator. This year—commonly termed "the executor's year"—is allowed so that the executor may have full opportunity to obtain information of the state of the property, and he cannot be compelled to pay a legacy within that period, even in a case where the testator expressly directed it to be discharged within the year: *Benson* v. *Maude*, (1821) 6 Madd. 15, 56 E.R. 994. He is not, however, bound to wait for twelve months before he pays over a legacy: *Re Palmer*, [1916] 2 Ch. 391, 401.

The immunity that is given an executor against being compelled to pay a legacy within a year after the testator's death appears to derive from an analogy with s. 5 of the Statute of Distribution, 1670 (22 & 23 Car. 2, c. 10), which provides that:

> to the end that a due regard be had to creditors, no such distribution of the goods of any person dying intestate be made until after one year be fully expired after the intestate's death.

This section is obviously for the benefit of the creditors of the intestate: it is the beneficiary, not the creditor, who must be resigned to a year's delay; and it would appear that the purpose of the section is to provide for a speedy discharge of debts with a view to the estate being sufficiently free of debt at the end of the year to justify distribution being then made to the persons entitled to payment.

So far as intestate estates are concerned, the Statute of Distribution is in force in New Zealand.* It has been held that the rule as to the executor's year is also part of our law. Section 5 of the Administration Act, 1908, provides that the real estate of every deceased person shall be assets in the hands of his administrator for the payment, *inter alia*, "of his debts in the ordinary course of administration." In interpreting these words in *Bell* v. *Courtney*, [1919] N.Z.L.R. 170, 174, Edwards, J., said:

> Now, it is a rule of law that an executor cannot be compelled to pay a legacy before the expiration of one year from the testator's death, during which it is presumed that the executor may fully inform himself of the state of the property. Within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be paid within six months of his death.

The learned Judge went on to find that this rule, with the necessary modification due to the nature of the property, applies to real estate specifically devised, and that "in the ordinary course of administration" a devisee of land may not claim a conveyance until after the expiration of one year from the testator's death, and the value of the land devised must be determined as on that date.

This rule cannot prejudice creditors, as their claims are paramount over those of the beneficiaries, since the executor is sworn, according to our form, "to pay the debts and legacies of the said deceased so far as the property will extend and the law binds." And, in any case, the creditors of the testator are not subject to any time-limit within which payment cannot be asked for.

There is, however, no rule of law that it is the duty of an executor to pay the debts of the estate within a year after the testator's death. His duty is to pay them with "due diligence." The general nature of such duty of an executor is clearly set forth in the recent judgment of Uthwatt, J., in *Re Tankard*, *Tankard* v. *Midland Bank Executor and Trustee Co., Ltd.*, [1941] 3 All E.R. 458, 463, where His Lordship says:

> Apart from any provisions contained in the will of a testator which expressly or impliedly deal with the payment of the debts, it is the duty of executors as a matter of the due administration of the estate to pay the debts of their testator with due diligence

* The Statute of Distribution was replaced in England by s. 44 of the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), which is as follows: "Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death."

having regard to the assets in their hands which are properly applicable for that purpose, and, in determining whether due diligence has been shown, regard must be had to all the circumstances of the case.

And at p. 464, he adds :

With respect to the period within which debts should be paid, there is, in my opinion, no rule of law that it is the duty of executors to pay such debts within a year from the testator's death. The duty is to pay with due diligence. Due diligence may, indeed, require that payment should be made before the expiration of the year, and the circumstances affecting the estate and the assets comprised in it may justify non-payment outside the year, but, if debts are not paid within the year, the onus is thrown upon the executors to justify the delay. No case was cited to me which states the rule in these direct terms, but it appears to me to be implicit in the statements as to the duties of conversion of assets incumbent on the executors which are made in *Grayburn* v. *Clarkson*, (1868) L.R. 3 Ch. 605, 606. That, in my view, is the position, apart from any provision contained in the will of the testator. As against creditors, the provisions of the testator's will which relate to the realization of his assets, or which otherwise bear upon the payment of debts, are irrelevant. As against beneficiaries, the position is different. Beneficiaries take their interest under the will only upon the terms of the will. As respects them, full effect has to be given to any provisions which either in express terms or by implication modify the executor's duty of paying debts with due diligence.

These passages show clearly the position of an executor towards the beneficiaries and the creditors when their respective interests conflict, and also demonstrate his rights and limitations in respect of his actions towards them respectively in relation to the period known as the executor's year.

The action in *Re Tankard* was brought by beneficiaries against an executor company for damages consequent upon loss in postponing, beyond a year from the testator's death, the realization of certain shares the proceeds of which were required to discharge debts. The learned Judge refused to accept the contention of the beneficiaries that the executor's duty to pay debts arose out of duty to prevent avoidable loss. The executor's duty, he said, is to administer the estate, and included in that duty is the obligation to all concerned to pay debts :

The duty is owed not only to creditors, but also to beneficiaries, for the ultimate object of the administration of an estate is to place the beneficiaries in possession of their interest, and that object cannot be fully achieved unless all debts are satisfied.

The executor's duty to pay debts is, therefore, immediate and absolute ; unlike the beneficiary a creditor is not bound by any condition affecting realization contained in the will. This distinction is stated by Uthwatt, J., at p. 464, as follows :—

As against creditors, the provisions of the testator's will which relate to the realization of his assets, or otherwise bear on the payment of debts, are irrelevant. As against beneficiaries the position is different. Beneficiaries take their interest under the will only on the terms of the will. As respects them, full effect has to be given to the provisions which, either in express terms or by implication, modify the executor's duty of paying debts with due diligence.

In this connection the inclusion in the will of the common form of power of postponement, which appeared in the will under notice, drew the following observation from His Lordship, at pp. 464, 465 : " Assets as respects which the power is for the time being duly exercised are excluded from the assets which, under the testator's scheme, need, *so far as beneficiaries are concerned*, be applied in payment of debts. Beneficiaries cannot complain if the directions given by the testator are adhered to." In many cases, however, it may be most inconvenient and imprudent, not to say improvident, to realize so as to make a distribution within the year ; all that is necessary to say here is that authority is conclusive in showing that in such instances personal representatives will not be held liable for any such loss that may result from an honest exercise of the discretion to postpone. The decision in *Re Tankard* adds to this immunity by demonstrating that an executor does not lose protection against his beneficiaries if a loss results as a consequence of a proper exercise of the power of retention, even though, as a result of the postponement, the payment of debts is also extended beyond the year from death.

Such being the legal position, what is the executor's duty with regard to debts that are interest-bearing ? His Lordship answers that question by saying that where the debt is an interest-bearing debt, the executor's duty to pay so as to relieve the estate of the burden of interest is clear beyond dispute.

Where interest-bearing debts are not paid and assets are in hand properly applicable for that purpose, the loss occasioned the estate by non-payment may, on a comparison of the rate of interest payable on the debt and the rate of interest earned by the estate, be obvious. Where the debt does not carry interest, or where, in the case of an interest-bearing debt, the interest earned by the assets which might properly be applied in paying the debt exceeds the interest payable on the debt, there may still be a loss to the estate in other directions : for example, in the costs occasioned by the executor defending proceedings brought by a creditor at common law to recover his debt. On this aspect of an executor's duty, His Lordship said at p. 464 :

However, it appears to me that the question as to whether or not damage has in fact resulted from non-payment of a particular debt is independent of the question as to whether or not there has been any maladministration involved in non-payment. It would be incorrect, in my opinion, to state the executor's duty to pay debts as arising out of a duty to prevent avoidable loss. His duty is to administer the estate, and included in that duty is the obligation to all concerned to pay debts. Naturally the question is not mooted unless loss in some form is suggested, and no doubt the general rule is that the loss stated to be due to a breach of the executor's duty should be alleged and proved at the trial, but, if the Court is satisfied that there has been a breach of duty, then it is open to the Court in a proper case to make a declaration as to the breach of duty by the executor and to direct an inquiry as to damages : *Re Stevens, Cooke* v. *Stevens*, [1898] 1 Ch. 162, 172, per Chitty, L.J.

The duty of the executor to use " due diligence " accordingly applies alike to all debts, whether interest-bearing or not, and is owed to the beneficiaries and creditors alike ; but it does not arise from a duty to prevent avoidable loss, but from the duty to administer the estate.

From this very useful and informative judgment, it is clear that, from the standpoint of the creditor himself, there is no such thing as an executor's year, or, indeed, a time-limit of any sort : the personal representative can be sued as soon as the grant of probate has been obtained. As regards the beneficiary, the position is entirely different, and must be approached from two distinct angles. The primary duty of the personal representative is to pay the debts as an ordinary incident of administration ; he must clear the estate with " due diligence," and in this connection is expected to do so within a year. If he fails in this respect, the onus is upon him to justify the delay—in other words, the period of a year is to be regarded as the normal *maximum* for the payment of debts. On the other

hand, from the aspect of distribution, the personal representative is allowed a year as a *minimum* period, for he cannot, as we have seen, be compelled to pay legacies within the year, though he may if he chooses. But this period of a year is only a *prima facie* and not a fixed rule, and beneficiaries cannot complain if the circumstances of the estate justify a longer period; and if, in the honest exercise of a power to retain, the payment of debts, as well as distribution, is postponed beyond a year, beneficiaries cannot successfully object, even though the postponement of realization results in a loss owing to the depreciation of capital assets meanwhile. They take under the terms of the will, and must submit to any conditions that may be imposed by it.

An executor has no right to prefer creditors: *In re Brooke, Official Assignee* v. *Brooke* (to be reported). In his judgment in this very recent case, Northcroft, J., said that it had been argued that the defendant as executrix was entitled to prefer creditors *inter se*; but no New Zealand authority had been cited for that proposition, and it had been acknowledged that no such authority could be found for it. In His Honour's opinion, an executor in New Zealand has no right. He continued:

> By s. 64 (*e*) of the Administration Act, 1908, fraudulent preferences by the deceased in his lifetime are liable to be set aside at the instance of the Official Assignee, as if the deceased had been alive. Inasmuch as the order under Part IV speaks from the date of death and has the effect thereafter of placing the estate within the rules relating to bankruptcy, this, in my opinion, prevents preferences among creditors by an executor even before the order under Part IV is made. That the policy of the Administration Act, 1908, is to prevent preferences is seen in s. 59 of the Administration Act, which permits a creditor to petition for administration under Part IV where "the administrator has preferred, or is about to prefer, any creditor." No hardship results from this state of the law, as s. 65 of the Administration Act protects payments made in good faith.

As the executrix in this case was not, on the facts, entitled to the protection of s. 65, and as payments had been made by her with a deliberate intention to prefer some creditors to the disadvantage of other named creditors, the learned Judge said there must be an inquiry as to the effect of this preference, and the executrix must pay to the Official Assignee as administrator under Part IV of the statute such a sum as was necessary to provide an equal dividend to the named creditors as would have been payable to them had the defendant not preferred the other creditors.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
1941.
October 18, 29.
Ostler, J.
COURT OF APPEAL.
1942.
Mar. 19, 20, 23, 24;
May 22.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

BEST AND ANOTHER
v.
NEWTON KING, LIMITED.

Company Law—Shares and Shareholders—Preference Shareholders—Reserves Created and Profits Carried Forward—Relative Rights—Memorandum—Construction—Whether Articles of Association to be Read in Conjunction therewith.

Where a clause in the memorandum is silent or ambiguous on the question of the right of the company to create reserves or to carry profits forward the memorandum and articles of association as contemporaneous documents may be read together, the articles serving to explain that which is ambiguous in the memorandum or to supplement it as to that in which it is silent.

Angostura Bitters (Dr. J. G. B. Siegert and Sons), Ltd., [1933] A.C. 550; *De Vall* v. *Wainwright Gas Co.*, [1932] 2 D.L.R. 145; and *Re Walter Symons, Ltd.*, [1934] 1 Ch. 308, applied.

Per *Myers*, C.J., and *Blair*, J. 1. That in the absence of any provision to the contrary there is an inherent implied power in a company incorporated under the Companies Act to set aside a reserve fund out of profits prior to division or to carry profits forward.

Burland v. *Earle*, [1902] A.C. 83, applied.

2. That such power continues where the rights attaching to preference shares are declared in the company's memorandum of association by a clause which declares the rights of the preference shareholders against the ordinary shareholders but does not take away either by express words or necessary implication such inherent power.

Paterson v. *R. Paterson and Sons, Ltd.*, (1916) 53 Sc.L.R. 404, on app. (1916) 54 Sc.L.R. 19; *Evling* v. *Israel and Oppenheimer, Ltd.*, [1918] 1 Ch. 101; and *In re Holben, Hubbard, and Co., Ltd.*, [1938] N.Z.L.R. 54, [1937] G.L.R. 23, applied.

Judgment of *Ostler*, J., affirmed.

Counsel: *Sim*, K.C., and *Loughnan*, for the appellants; *Spratt*, for the respondent.

Solicitors: *Izard and Loughnan*, Christchurch, for the appellants; *Nicholson, Kirkby, and Sheat*, New Plymouth, for the respondent.

Case Annotation: Angostura Bitters (Dr. J. G. B. Siegert and Sons), Ltd. v. *Kerr*, E. and E. Digest, Supp. Vol. 9, para. 4023a; *DeVall* v. *Wainwright Gas Co., Ltd., ibid.*, p. 50, *n.* 3958 ii; *Re Walter Symons, Ltd., ibid.*, Supp. Vol. 10, para. 6988d; *Burland* v. *Earle, ibid.*, Vol. 9, p. 536, para. 3526; *Paterson* v. *R. Paterson and Sons, Ltd., ibid.*, p. 98, *n.* g.; *Evling* v. *Israel and Oppenheimer, ibid.*, p. 592, para. 3959.

COURT OF ARBITRATION.
Wellington.
1942.
June 9.
Tyndall, J.

COLLINS (INSPECTOR OF AWARDS)
v.
BURLACE.

Industrial Conciliation and Arbitration — Award — Wages — "Alternative course"—Whether Award provided for "any alternative course to be taken by any party"—Industrial Conciliation and Arbitration Act, 1925, s. 89 (2).

Clause 12 of an award was as follows:—

"12. (*a*) All wages shall be paid in full not later than four days after completion of each fortnight.

"(*b*) In order to prevent workers leaving without giving notice employers may retain four days' wages in hand for each employee."

Clause 18 of such award was as follows:—

"18. One week's notice given on either side shall be sufficient to terminate the engagement, but this shall not prevent immediate termination by either side for good cause: in either case, all wages shall be paid forthwith."

Held, That cl. 12 (*b*) of the said award did not provide for "any alternative course to be taken by any party" within the meaning of that phrase in s. 89 (2) of the Industrial Conciliation and Arbitration Act, 1925; and that, therefore, the termination of a servant's engagement by his employer, both of whom were subject to such award, without notice and without good cause, constituted a breach of cl. 18 of that award.

Wilson v. *Oaonui Co-operative Dairy Co., Ltd.*, (1939) 39 Bk. of Awards, 1587, applied.

STAMP DUTY ON AGREEMENTS GENERALLY.

And Disqualified Person acting as Agent in Sale of Land subject to Provisions against Aggregation.

By E. C. Adams, LL.M.

Few recent cases are of greater interest to the New Zealand conveyancer than *Harper* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 18. It deals with two important points: *first*, the "economic legislation designed to enforce the policy of the Legislature against aggregation" of certain lands which have been alienated from the Crown since November 20, 1907, or from Natives since March 31, 1910—Land Act Amendment Act, 1907, and the Native Land Act, 1909 (now respectively contained in Part XIII of the Land Act, 1924, and Part XII of the Native Land Act, 1931); *second*, the freedom from *ad valorem* stamp duty of agency agreements (called in this case an instrument of guarantee) which cannot be fairly brought within the category of instruments of agreement of sale.

As to the *first* point, the aggregation of land principle, the Supreme Court appears to have decided inferentially that an agreement in the form in this case is not in breach of Part XIII of the Land Act, 1924, or of Part XII of the Native Land Act, 1931, even though the agent may be a "disqualified person" within the meaning of these statutory provisions. This appears to the writer a most important point, for such an agreement undoubtedly confers on the vendor and the agent many of the respective advantages of a vendor and purchaser under the ordinary agreement for sale and purchase.

A remarkable characteristic of contracts and alienations in breach of Part XII of the Native Land Act, 1931, or Part XIII of the Land Act, 1924, is that although illegal they are valid and therefore the Courts must enforce them, if otherwise in order: *Official Assignee of Bowen* v. *Watt*, [1925] N.Z.L.R. 896, 906, [1926] G.L.R. 53, 58. As His Honour Mr. Justice Ostler said:

> If a contract is valid it is enforceable, subject to all the defences which may be pleaded to a valid contract. It may be voidable on the ground that it was induced by fraud, or, being executory, by innocent misrepresentations.

In this respect they resemble transactions prohibited by the Finance Emergency Regulations, 1940 (No. 2) (Serial No. 1940/118), and the Aliens Land Purchase Regulations, 1942 (Serial No. 1942/77). Nevertheless a certain degree of compliance with these statutory provisions against aggregation of land is secured in practice by the Legislature's command to District Land Registrars not to register an instrument of alienation, unless the alienee supplies a statutory declaration to the effect that he is not a "disqualified person"; in the case of instruments executed by Natives affecting Native land, the necessary evidence is adduced to the Native Land Court before it confirms the alienation, and the certificate of confirmation is conclusive evidence that the alienation is not in breach of the Act: *Rosevear* v. *District Land Registrar* (*Gisborne*), [1916] N.Z.L.R. 482, G.L.R. 365.

As to the *second* point—the stamp duty aspect—it seems opportune in view of this latest case to summarize the liability of *agreements* to stamp duty in New Zealand. The facts of this case will be set out in that part of this article where agreements for sale and purchase are contrasted with contracts of agency.

For the purposes of *stamp duty*, agreements may be classified as follows:—

1. Agreements of *sale* of any property: s. 88 of the Stamp Duties Act, 1923.
2. Agreements for a *lease* of land: s. 130, *ibid.*
3. Agreements for an *easement*, for a *profit à prendre* or for a *license* over land: s. 130, *ibid.*
4. Agreements within the definition of *guarantee*: s. 20 of the Stamp Duties Amendment Act, 1924.
5. Agreements which are really *bills of exchange* or *promissory notes* and therefore stampable under Part VII of the Act.
6. Agreements by *deed*, not coming within the classification of 1 to 5 above and not otherwise chargeable, and therefore stampable under s. 168.
7. Agreements *not* by deed and not coming within the classification 1 to 6 above, and not otherwise chargeable, and therefore stampable under s. 154 of the principal Act as amended by s. 13 of the Stamp Duties Amendment Act, 1924.

I.—Agreements of Sale of any Property.

Before November 1, 1915, agreements of sale of property were exempt from *ad valorem* stamp duty: they were liable to the fixed not otherwise charged duty as a deed, or simple agreement duty.

The Finance Act, 1915, made agreements of *sale* of *land* (including any estate or interest in land) liable to the same duty as a conveyance on sale. The leading case on these provisions which (subject to certain amendments) remained in force until the coming into operation of the Stamp Duties Act, 1923, on January 1, 1924, was the *Zealandia Soap and Candle Co., Ltd.* v. *Minister of Stamp Duties*, [1922] N.Z.L.R. 1117, G.L.R. 505.

Section 88 of the Stamp Duties Act, 1923, purports to make every instrument of agreement of sale of *any* property (other than shares) liable to the same stamp duty as if it were an instrument of the actual conveyance on *sale* of that property. Thus the ambit of the charge has been considerably enlarged—for example, an agreement to transfer a license from one hotel to another for pecuniary consideration would be liable to *ad valorem* conveyance duty under the present Act—but not under the 1915 Act; similarly an agreement to transfer a mere *chose-in-action*.

A conveyance on *sale* is defined as a conveyance (which means the *transfer* of any property from one person to another) of property for *valuable* consideration, whether by way of sale, exchange, or otherwise howsoever. Valuable consideration means valuable consideration in money or money's worth. A "voluntary conveyance" is a conveyance of property otherwise than for valuable consideration. Therefore an agreement to make a voluntary conveyance is not liable to *ad valorem* conveyance duty.

It is most important to bear in mind that said s. 88 charges only *bilateral* transactions: there must be a contract binding on the owner to sell and on the other party to buy: there must be correlative obligations on each side: if only one party is bound that will not

suffice: *Seymour* v. *Commissioner of Stamp Duties*, [1937] N.Z.L.R. 9, G.L.R. 23. Thus the grant of an option to purchase property is not liable to conveyance duty, however much the optionee may have given for the option: *West London Syndicate* v. *Inland Revenue Commissioners*, [1898] 2 Q.B. 507. *Seymour's* case was the converse of the usual option, it being a binding offer to purchase, unaccompanied by a binding promise to sell: consequently *ad valorem* conveyance duty was not payable. An option is liable either to 1s. 3d., as an agreement not by deed, or to 15s., if in the form of a deed: it becomes liable to *ad valorem* conveyance duty, when it is transformed into a contract of sale, by the acceptance of the offeree. Presumably for stamp-duty purposes the acceptance may be by parol, and need not be in writing: see s. 88 (4).

But, although there must be a bilateral contract, it has been held that a *conditional* agreement of sale is liable to *ad valorem* duty: *Standard Porcelains (N.Z.), Ltd.* v. *Commissioner of Stamp Duties*, [1928] N.Z.L.R. 138, G.L.R. 103. Thus an agreement for sale and purchase is none the less an agreement for sale and purchase, although it may be made subject to a third person's consent: *Murray* v. *Bonis*, [1917] N.Z.L.R. 850, G.L.R. 448. The point frequently arises in practice in connection with agreements of sale and purchase of a leasehold interest under the Land Acts, which require the consent of the Minister and/or of the Land Board. Practitioners often incur fines by not presenting the agreement for stamping until after it has been consented to. The difficulty can be surmounted in practice by presenting the agreement to the Stamp Office within one month of its execution: that will prevent a fine accruing and it is not necessary to pay the duty when the instrument is presented.

But, although a *conditional* agreement of sale and purchase is liable to conveyance duty, there must of course be a *concluded* contract; *G. Scammell and Nephew, Ltd.* v. *Ouston*, [1941] 1 All E.R. 14. There must be *consensus ad idem* between the intended vendor and purchaser; an agreement may fail because the language used by the parties is too vague and uncertain, or because the agreement is inchoate and expresses no concluded contract between the parties. As Lord Dunedin said in *May and Butcher, Ltd.* v. *The King*, reported in a note to *Foley* v. *Classique Coaches, Ltd.*, [1934] 2 K.B. 1, 17:

> To be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which has still to be determined but then that determination must be a determination which does not depend upon the agreement between the parties.

This must be read subject to the rule that in *commercial* documents the Court will imply reasonable and usual terms, if satisfied that the parties thought they had made a binding contract: *W. N. Hillas and Co.* v. *Arcos Ltd.*, (1932) 147 L.T. 503, as explained by Viscount Maugham and Lord Wright in *G. Scammell and Nephew, Ltd* v. *Ouston* (*supra*).

A *recital* in an instrument—*e.g.*, a deed of release by beneficiaries to a trustee—will be sufficient to constitute an agreement of sale and purchase for the purposes of stamping, if signed by the party to be bound—that is, by the vendor: *Hulse* v. *Minister of Stamp Duties*, [1920] N.Z.L.R. 869, G.L.R. 493. An instrument which at first sight is only a receipt will be liable to *ad valorem* conveyance duty, if it discloses the existence of the agreement of sale and purchase: *Fleetwood-Hesketh* v. *Inland Revenue Commissioners*, [1936] 1 K.B. 351. The definition of instrument of agreement of sale in subs. (4) shows that it is not necessary that the document should contain all the terms of the contract so as to comply with the Statute of Frauds or the Sale of Goods Act, as the case may be.

To sum up, although there must be an instrument and an actual contract of *sale* (as defined) in existence (whether unconditional or conditional), it is not necessary that such contract should be one enforceable in our Courts. The fact that it may be an illegal contract will not exempt it from stamp duty: *Mann* v. *Nash*, [1932] 1 K.B. 752.

An instrument of agreement of sale by a Native of Native land is not liable to stamp duty until it has been confirmed by the Native Land Court: s. 272 of the Native Land Act, 1931.

An agreement to transfer the *legal ownership* of chattels or other property transferable by delivery merely is exempt from *ad valorem* conveyance duty: other exemptions are also set out in s. 81.

Agreements of Sale contrasted with Agency Agreements.

A mere agency agreement is not liable to *ad valorem* duty: it is liable to 1s. 3d. if not by deed, or to 15s. if by deed.

The line of demarcation between an agency agreement and an agreement of sale is not always easy to draw, as witness the two New Zealand cases, *Tiki Paaka* v. *Maclarn*, [1937] N.Z.L.R. 369, G.L.R. 78, 214, and *Harper* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 18, and the Privy Council case *Hutton* v. *Lippert*, (1883) 8 App. Cas. 309, which His Honour the Chief Justice distinguishes in *Harper's* case but does not dissent from. In future therefore instruments which come within the principle of *Harper's* case will be exempt from *ad valorem* duty, but those which come within *Hutton* v. *Lippert* will be liable. The two cases must therefore be closely examined. But it is not out of place to examine first *Tiki Paaka* v. *Maclarn* (*supra*). His Honour the Chief Justice said (*ibid.*, 395; 217):

> In my opinion, on the true construction of the document, the relationship between the parties is that of vendor and purchaser of the standing timber on a royalty basis. Or, adopting *Lord Tomlin's* words, though the deed in some respects savours of the relationship of principal and agent and in others of the relationship of vendor and purchaser, its provisions are conflicting in such a manner and to such an extent as to show that, though called an agency agreement, it is not a *bona fide* agency agreement but is merely a cloak to conceal a different transaction—that is to say, a sale and purchase of the standing timber.

The instrument in *Tiki Paaka* v. *Maclarn* would be assessable as a "license" under Part VI of the Act, in accordance with *Scott* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 293, G.L.R. 191, for the Court of Appeal rejected the plea that it was in substance only an agency agreement.

The contents of the instrument in *Harper* v. *Commissioner of Stamp Duties* (*supra*) are summarized in the judgment as follows:—

> One G.L.R.H. (therein, and hereinafter, called "the owner") in consideration of the sum of £500 paid to him by the appellant T.W.H. (referred to in the agreement as "the agent") agreed to confer on the appellant the exclusive agency to sell the owner's leasehold interest in a certain property and the leasehold interests of two other persons in other properties together with the right to the purchaser or respective purchasers to purchase certain live and dead stock. The appellant undertook and agreed for such consideration to

find on or before January 20, 1939, a substantial purchaser or purchasers for the said lands and live and dead stock at the prices mentioned or provided for in the agreement and further undertook and guaranteed the due and punctual payment of the purchase-moneys. The appellant was authorized by the agreement to complete any contract for the purpose of effecting any such sale or sales, and for that purpose to sign such contract as agent for the owner and to accept any sum or sums not exceeding in the aggregate £500 by way of deposit, and on payment of the balance of the purchase-money to the owner the appellant was to be entitled to retain as his own the sum of £500. In the event of the appellant succeeding in effecting a sale or sales for a greater aggregate sum than the aggregate of the prices as set forth in the agreement he was to be entitled by way of commission to retain such surplus but otherwise he was not to be entitled to any commission or reward for his services.

It may be added that there was the usual provision that time should be deemed to be strictly of the essence of the contract; it will be observed that on payment of the balance of the purchase-money the agent was to retain as his own property the sum of £500, which was precisely the sum which the agent had already paid the owner for the advantages conferred on him by the instrument. Of course the fact that the agent was to receive as his "commission" everything above the stipulated price was not sufficient in itself to make the agreement one of sale and purchase: *Ex parte Bright, In re Smith,* (1879) 10 Ch.D. 566, per Jessell, M.R., although this was one of the factors which induced the Court of Appeal to hold a sale in *Tiki Paaka* v. *Maclarn.*

Then the judgment proceeds to contrast the instrument with the one in *Hutton* v. *Lippert,* (1883) 8 App. Cas. 309.

> Up to a point the provisions of the agreement in the present case are very similar to those in the agreement which were under consideration by the Judicial Committee in *Hutton* v. *Lippert,* and the question there was, as it is here, whether stamp duty was payable as on an agreement of sale. A contract had been made between the defendant, Lippert, and one, E., in terms purporting to be one of guarantee or agency, the defendant guaranteeing the sale of E.'s property in whole or by lots at a fixed price, E. giving the defendant a power of attorney to deal with the property as he thought fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee. It was held by the Privy Council that the effect of the transaction was to give E. every right which a vendor could legally claim, and to confer on the defendant every right which a purchaser could legally demand, and that the defendant was liable to pay duty on the amount of purchase-money. But an examination of the facts in *Hutton* v. *Lippert* discloses some very material distinctions between that case and the present. Lippert was to have the sole control and management of the property and of the sale or sales, and for that purpose E. granted to him an irrevocable power of attorney granting him the fullest powers over the property so as to enable him to deal with it as he thought fit. There was also another document, a power of attorney, by which E. nominated and appointed Lippert his lawful attorney to transfer all and singular the estate, and so on, unto the various purchasers from time to time, and to give good and valid and effectual receipts, &c. But there was even more than that. Lippert guaranteed, agreed, and undertook that if the land was not sold, or if any part thereof should remain unsold, by the date mentioned in the agreement, December 31, 1881, he should be bound himself to take over the land for the price mentioned in the agreement—£9,000—or any portion thereof remaining unsold at a proportionate value. The point is made in the judgment that Lippert obtained the complete control of the property, not only such control as would have been necessary for him if he acted as agent or guarantor (as he was called in the agreement) to sell portions of the property to other people, but the full possession and control of it. The judgment proceeds: "There could not be wider words than these: 'deal with it as he thinks fit: Lippert might sell or let any 'portion of it, or he might retain the whole in his own hands; 'he might cultivate it or let it run to waste: he might sell 'any portions of the woods and copse; in fact, he was, to all 'intents and purposes, the owner of it, and this in consideration of a fixed price to be paid on or before a fixed day'." In the present case there is no power of attorney. There are no such powers of control and management of the property conferred upon the appellant, and, most important of all, there is no similar provision as in *Hutton* v. *Lippert* that the agent was to be bound himself to take over the land at the agreed price if it was not sold by January 20, 1938, the date mentioned in the agreement. It seems to me that in *Hutton* v. *Lippert,* if the so-called agent did not sell the land by the agreed date at the agreed price, he was bound to take the land himself at the fixed price and the owner of the land could have specifically enforced that agreement. I can see no warrant for suggesting in the present case that a failure by the appellant to find a purchaser by the agreed date would give to the owner as against the appellant any remedy by way of specific performance because, as it seems to me, there was no agreement to purchase. The owner's only remedy as against the appellant would have been an action for damages.

It may be added that in *Harper's* agreement the owner undertook and agreed for himself and the registered proprietors of the other leasehold lands that he would not nor would the said registered proprietors or either of them sell or attempt to sell before January 20, 1939, the said leasehold lands or either of them and/or the live and dead stock except in the ordinary course of business of the owner. Therefore the essential difference between the two agreements appears to be that, whereas in *Hutton* v. *Lippert* the owner could have sued for specific performance, in *Harper's* case he could not, his only remedy being an action for damages.

2.—Agreements for a Lease of Land.

From time immemorial (so to speak) agreements for a lease have been liable to the same *ad valorem* duty as actual leases; this is necessary because of the well known doctrine of *Walsh* v. *Lonsdale,* (1882) 21 Ch.D. 9, which it would be superfluous to repeat. Lease is defined as an instrument, wherever executed, whereby a leasehold interest in land *situated in New Zealand* is created, whether at law or in equity. Section 88, which we have just discussed, is unfortunately not expressed to be restricted to property situated in New Zealand, leaving it a debatable question as to the precise extra-territorial application, if any, of s. 88—a topic beyond the present scope of this article.

3.—Agreements for an Easement, or Profit a Prendre.

These are liable to the same *ad valorem* duty as leases or actual easements or *profits à prendre,* both of the latter coming within the statutory definition of *license*: s. 118.

> "License," means an instrument, wherever executed, creating at law or in equity any easement over land [situated in New Zealand], or any right, privilege, or license entitling the grantee to enter upon land [situated in New Zealand] or to use the same, or to take timber, minerals, or other profits therefrom.

This is a very comprehensive definition, and appears to embrace every class of instrument which creates a legal or equitable servitude, according to Roman, English, or New Zealand law, and includes certain instruments which are not true servitudes, but which are properly classified as agreements for sale of goods—*e.g.*, grant of timber rights, where there is an obligation on the part of the grantee to cut the timber: *Egmont Box Co., Ltd.* v. *Registrar-General of Lands,* [1920] N.Z.L.R. 741, G.L.R. 446; *Howe* v. *Waimiha Sawmilling Co., Ltd.,* [1922] N.Z.L.R. 339, [1921] G.L.R. 35.

An agreement to grant an easement or a *profit à prendre* will be enforced in equity: *Mayor, &c., of Wellington* v. *Public Trustee,* [1921] N.Z.L.R. 1086, [1922] G.L.R. 84. Hence the need for levying the same *ad valorem* duty as in the case of an actual legal grant.

(To be concluded.)

OBITUARY.

Mr. Spencer R. Mason, President of the Auckland Law Society.

The death occurred in Auckland, on June 22, after a brief illness of Mr. Spencer Rex Mason, who was at the time of his death the President of the Auckland District Law Society, and had been present at the meeting of the Council of the New Zealand Law Society at Wellington, on June 19. He was the second son of Mrs. and the late Mr. H. B. Mason, and a brother of the Hon. H. G. R. Mason, the Attorney-General.

Mr. Mason was educated at the Terrace School and Wellington College, and studied law at Victoria University College. While he was a student he was a keen yachtsman, being a member of the crew of the *Ailsa* when she was owned by the Hamill brothers. He played hockey for the Victoria College Club. On qualifying as a solicitor, he commenced to practice at Waiuku as the partner of his elder brother; but a few years later, during the last War, he joined the R.N.V.R., and with the commission of sub-lieutenant saw several years' arduous service in motor-boats, drifters, and minesweepers in the North Sea and the Mediterranean. A few years after the cessation of hostilities, he moved from Waiuku to Auckland and had practised there ever since.

From almost the foundation of the Auckland Aero Club till a few years ago Mr. Mason was an officer of it, being chairman of the executive for several years. More recently he had held office in the Auckland Society for the Prevention of Cruelty to Animals. Much of his time over many years was devoted to activities of the Masonic craft. He was a Past Master of Combined Forces Lodge, and this year was Grand Registrar of the Grand Lodge.

The late Mr. Mason had been a member of the Council of the Auckland Law Society since 1934; from March, 1940, to March, 1942, he was Vice-President, and took office as President in March of this year.

There was a large attendance of members of the profession at the funeral. All the members of the Council of the Law Society were present, and Mr. A. H. Johnstone, K.C., represented the New Zealand Law Society at a service, conducted by the Rev. A. Mitchell, past grand chaplain. The Grand Lodge, of which Mr. Mason was grand registrar, was represented by the grand master, Mr. C. L. MacDiarmid, of Hamilton, the past grand master, Mr. F. Bullock, of Waikato, the president of the Board of General Purposes, Mr. Norman Spencer, the president of the Board of Benevolence, Mr. W. W. Wright, the grand secretary, Mr. H. A. Lamb, and all members of both boards. The service at the crematorium was conducted on behalf of the Combined Forces Lodge by the past grand director of ceremonies, Mr. W. C. Finnis.

At a special meeting of the Council of the Auckland Law Society, held on June 25, the following resolution was passed:

"That the Council of the Law Society of the District of Auckland, on behalf of its members, expresses sincerest sympathy with the widow and relatives of the late Mr. Spencer R. Mason in their sad bereavement, and records deepest appreciation of the very valuable services rendered to the Society and to the legal profession in the Auckland District by the late Mr. Mason during the many years in which he acted as a member of the Council and more recently as the President of the Society."

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on June 19, 1942.

The following Societies were represented: Auckland, represented by Messrs. A. H. Johnstone, K.C., S. R. Mason, J. B. Johnston, and W. H. Cocker; Canterbury, Mr. J. D. Hutchison (proxy); Gisborne, Mr. L. C. Parker; Hamilton, Mr. H. M. Hammond; Hawke's Bay, Mr. H. B. Lusk; Nelson, Mr. G. Samuel; Otago, Mr. A. N. Haggitt (proxy); Southland, Mr. H. E. Russell; Taranaki, Mr. I. W. B. Roy; Wanganui, Mr. A. A. Barton; Westland, Mr. J. K. Patterson; and Wellington, Messrs. H. F. O'Leary, K.C., A. B. Buxton, and G. G. G. Watson. Mr. A. T. Young, Treasurer, was also present.

Apologies were received from Messrs. A. W. Brown, R. L. Ronaldson, G. L. Baylee, and W. F. Forrester, who were unable to attend the meeting on account of transport difficulties.

The President, Mr. H. F. O'Leary, K.C., occupied the chair. He welcomed those members who were attending the Council meeting for the first time.

Obituary: The late Mr. P. Levi.—Prior to commencing the business of the meeting, the following motion by the Chairman was carried, members standing as a tribute of their respect:—

"The Council expresses its deep regret at the death of Mr. Phineas Levi and places on record its high appreciation of the valuable services rendered by Mr. Levi as the Society's treasurer for fifteen years and also of the great amount of other useful work which he performed for the profession over many years. That a copy of this resolution with a suitable letter be sent to his daughter, Mrs. L. Stephenson."

Solicitors Mobilized in the National Military Reserve.—The Standing Committee after conferring with the Management Committee of the Solicitors' Fidelity Guarantee Fund recommended that the following proviso be added to Ruling 72:

"Provided that notwithstanding the foregoing at least one contribution must be paid in respect of every legal practice independently carried on."

It was unanimously agreed that an amended ruling, reading as follows, should be adopted:

"Notwithstanding the previous rulings with reference to payment of contributions to the Guarantee Fund by practitioners engaged in military service, it is now decided that no such contribution be collected from any practitioner engaged in full-time military service, whether in New Zealand or overseas, and that this present ruling take effect as from the beginning of the year 1941. Any practitioners affected by this ruling and who have paid their contributions for the year 1941 shall be entitled to a refund of the whole or part thereof, provided that notwithstanding the foregoing at least one contribution must be paid in respect of every legal practice independently carried on."

War Damage Act, 1941.—The Chairman reported that the Standing Committee interviewed Mr. J. S. Reid (now of the Treasury) who was on the staff of the Minister of Finance when the War Damage Act was passed and had a great deal to do with the drafting of the Act and the regulations and who also acts with the War Damages Commission.

A letter had subsequently been received from Mr. Reid conveying his comments on the points raised by the Committee. A copy of his letter and also a copy of correspondence received from various members of the profession together with the report of the Standing Committee had been circulated to all the District Societies.

The Wellington Society had since forwarded the following report asking that the matters referred to therein be considered by the New Zealand Council:

"I am instructed to bring to the attention of your Society the following matters arising out of the War Damage Act and Regulations.

"1. It is suggested that Reg. 13 (1) (*e*) imposes an undue hardship on mortgagees. War damage premiums added to a mortgage under this regulation should bear interest if the mortgage provides for the payment of interest on outgoings paid by the mortgagee on a mortgagor's behalf.

" 2. On the repayment of a mortgage no provision is made for apportionment of a portion of a war damage premium paid by the mortgagee. This may obviously cause great injustice in the case of a mortgage being discharged shortly after a premium has been paid.

" Mr. Reid suggests that this difficulty is covered by 'ordinary conveyancing practice.' Apportionment under 'ordinary conveyancing practice' appears to be based on contract between vendor and purchaser. In the case of apportionment between a mortgagee releasing his security to either a new mortgagee or to a mortgagor there can obviously be no such contractual relationship to carry the usual and customary apportionment as between a vendor and purchaser. It is suggested that statutory or other provision should make a war damage premium paid by the mortgagee apportionable on the discharge of his mortgage.

" 3. Practical difficulty arises in obtaining usual undertakings from insurance companies to hold covered mortgagees pending the payment of overdue premiums. The Commission requires insurance companies to account at short periods of time for war damage premiums collectable by the company. It is suggested that such latitude be granted by the commission to the companies to enable the companies to more conveniently continue the cover that they have long given to mortgagees.

" 4. The definition of 'mortgage' under the regulations excludes statutory land charges relating to income and land tax and for arrears of rates. This leaves as a contributing party to an insurance premium liens registered by Power Boards and many other authorities. It is suggested that all liens should be excluded from the definition.

" In the memo. and correspondence attached there are two points to which a member of my Society has drawn attention.

" 1. In paragraph 1 (*j*) of his letter to Mr. O'Leary, K.C., of April 1, Mr. Reid uses the expression 'unusual conditions' in relation to cases in which a registered mortgage exists, but the principal moneys are nil. Mr. Reid has entirely overlooked the fact that the situation in question is of frequent occurrence in the case of current accounts with banks and similar institutions, and that another situation of a similar kind, namely, the existence of a registered mortgage by way of floating security over valuable property, coupled with an overdraft seldom bearing more than a small proportion to the limit, is of even more frequent occurrence. The point has been represented to the War Damage Commission by the banks and the stock and station agents, and my impression is that the Commission regarded it as one of primary importance.

" 2. In their letter of February 20, Messrs. Duncan, Cotterill, and Co. state that under the Emergency Regulations Act, 1939, s. 3 (4), full powers are given to amend an Act by regulations. This power is, however, not now unqualified, because by s. 2 of the Emergency Regulations Amendment Act, 1940, it is provided that in subs. (4) of s. 3 of the principal Act the expression 'enactment' means any enactment passed before the commencement of the amending Act—*viz.*, May 31, 1940. Section 2 of the amending Act of 1940 was replaced by s. 3 of the Emergency Regulations Amendment Act, 1941, which provided that in s. 3 (4) of the principal Act the expression 'enactment' should mean any enactment passed before the passing of the Amending Act of 1941—*i.e.*, before September 17, 1941. The War Damage Act, 1941, was passed on October 13, 1941, and it therefore appears that it cannot be amended otherwise than by Act unless a further amendment of the Emergency Regulations Act, 1939, along the lines of the two amendments referred to is passed."

Mr. Ball, Solicitor to the State Advances Corporation, also wrote as follows :—

" Our Branch Manager at Dunedin advises that the practice has arisen amongst the Dunedin legal firms of apportioning war damage insurance on transfer. This is understandable, since agreements for sale and purchase usually contain provision for the apportionment of outgoings (of which war damage insurance appears to be one) as at the date possession is given and taken.

" The Branch Manager goes on to instance a case, however, where a second mortgagee whose mortgage has been repaid recently declined to meet more than his proportion of war damage insurance.

" A number of similar questions can well arise on the repayment of a mortgage, nor am I sure what principles can be applied, since there is seldom, if ever, any provision, *e.g.*, that on repayment a mortgagee who has paid half a war damage can recover a proportionate part, or that, if the mortgagor has paid the premium, he can deduct the half, or only a proportionate part of the half, on repayment of his mortgage.

" Some principle seems necessary that a mortgagee's share of a war damage premium should be apportionable from day to day so long as the mortgage subsists.

" It seems to me desirable that your Society lay down a uniform practice which should be followed by the profession, and I should be glad to learn if this is proposed."

Delegates referred to many practical difficulties that had arisen between mortgagor and mortgagee. The view was expressed that the Act placed a liability for the prescribed amount on those who were mortgagees on the date fixed by the Act, and that therefore the position was one which could only be remedied by legislation.

It was decided that the Standing Committee should again interview the authorities and take whatever action was considered necessary.

Protection of Land Transfer Documents.—Mr. Watson reported that he interviewed the Right Hon. the Prime Minister who readily agreed that appropriate measures should be taken. At his request Mr. Watson further discussed the matter with the Attorney-General who took the same view and promised to go into the question with the Head of the Department to ensure that adequate steps were taken both to duplicate by photography the existing records of the Land Transfer Office and also to endeavour to ensure the safety of the original records.

Mr. Buxton stated that when interviewing the Secretary of Land and Deeds on another matter the question of the protection of Land Transfer documents had been discussed. The Secretary had stated that the matter was under consideration, but that the difficulty was that there were only two suitable micro-film cameras in New Zealand and that the photographing of the records would necessitate the full-time use of one camera for 12 months. Precautionary measures had already been taken by the Department to remove to the country all field books containing past records. The Secretary had also stated that for many years a draft of the certificate of title had been prepared and with a view to preserving records these drafts had been also placed in safe custody.

It was decided that inquiries should be made from time to time as to the position.

Legal Education.—The following letter was received from the Registrar of the University of New Zealand :

" I am now able to advise in regard to your letter of September 8, 1941, as to the qualification for barristers and solicitors that the Senate has agreed to endorse your view and that of the Council of Legal Education that the provision contained in the Law Practitioners Act of 1935 enabling a solicitor to be admitted as a barrister after practising on his own account, or being employed as managing clerk to a solicitor, or in legal work in a Government Department for a period of five years, stands in the way of any satisfactory scheme of legal education.

" The Senate expressed its willingness to join with the New Zealand Law Society and with the Council of Legal Education in making representations to the Government for the repeal of that provision. The motion of the Senate included a proviso that the matter of making such representations be left in the hands of the Executive Committee of the Senate. Will you please advise me in due course of the steps you are taking, so that the Executive Committee, which is also to make other representations regarding the degree in Law, may, as mentioned above, make the necessary representations to the Government."

The Chairman reported that the necessary representations were made by the Vice-Chancellor and himself to the Hon. the Minister of Justice who was favourable to the proposed amendment. The University accordingly placed the request in writing to the Hon. the Minister of Education in the following terms :—

" In 1938 the conditions for admission to the legal profession were modified in such a way as to require for those intending to practice only as solicitors the same examinations as are required for those who desire to qualify as barristers. This means that the course is a relatively heavy and long one ; even the best students cannot complete in fewer than five years.

" Experience of the new plan has shown that this long course for all who desire to enter the profession is not in the best interests of the country and representations have been

made to the University by both the Council of Legal Education and the New Zealand Law Society that a shorter course is desirable for those who aim to practice merely as solicitors. The University is anxious to meet this need but finds it impossible to do so in the present state of the law which allows a solicitor of five years' standing to become a barrister without further examination provided he has certain kinds of practical experience.

"The University therefore asks that s. 45 of the Law Practitioners Amendment Act, 1935 (which amended s. 4 (2) (e) of the 1931 Act), be repealed. In the event of this section being repealed the University will consult with the various bodies concerned with a view to providing a simpler and shorter course of training for those who desire to practice merely as solicitors."

The view was expressed that although it was recognized that war legislation must necessarily receive primary consideration the suggested amendment of the Act and the subsequent alteration to the law course was of vital importance to law students at present serving with the Forces who would eventually desire to resume their studies. The shorter course of training suggested for those who desired to practice as solicitors only would undoubtedly be appreciated by students returning to civil life after the war.

The Chairman was asked to urge this viewpoint when further discussions arose.

(To be concluded.)

SOME EXPERIENCES OF AN OLD LEGAL ACCOUNTANT.

Mr. C. P. Skerrett.

By A. F. Wiren.

(Concluded from p. 60.)

Mr. Skerrett loved his profession and worked hard at it. He left no stone unturned to get up both his facts and his law. He did not trouble much about his own private affairs. He was indeed wrapped up in the law. He was quick at mastering all details, and knew instinctively how to use them. He never sacrificed his client for his pleasure, and always gave preference to his work before shelving his client's demands. He was very quick at noticing weak points in his opponent's case, and also in dealing with a hostile witness. He won many a case by upsetting these latter gentry in cross-examination.

One had to be very brief in discussing office matters, and, as he detested dictating for his diary, I often had to make out a large account from very small material. When documents were drafted or letters written, I had no difficulty in putting the story together, but I am afraid many a conference and attendance on a client was missed because his diary showed nothing about it.

About the 'eighties and 'nineties, Mr. Skerrett was fond of riding and always kept two or three mounts, besides one horse useful in harness. He was a member of the Wellington United Hunt Club, the Master of which was Harry Crawford, of Miramar, on whose property Club runs were first held. Later they took place from Tawa Flat to Porirua. The Club also used to hold a race meeting on an off day of the Wellington Winter Meeting.

Mr. Skerrett figured as a winner in the Club's most interesting event, the Club's Steeplechase, owners up, but gentlemen riders could be substituted.

The meeting held in July, 1893, at the Hutt Course (now used for trotting races) was the one in which Mr. Skerrett rode a winner. J. E. Henrys was the handicapper, and Joseph Ames ran the totalizator. The Wellington Racing Club secretary, Mr. H. M. Lyon, conducted the proceedings. Much rain had fallen earlier, the day being showery and the course heavy. The distance was three and a half miles and the stake fifty sovereigns, second horse ten pounds from the stakes.

The Idler was top weight with 11 st. 12 lbs. Mr. Skerrett's horse, Halicore, had with several others, 11 st.; and all maiden starters, which included Halicore, were allowed 5 lbs. Every horse, owing in a great measure to the state of the ground, either baulked or fell. At the finish, all riders were covered with mud. Matchless was leading up to the last hurdle, but again fell, and Halicore, safely negotiating this hurdle, ran into first place and "won by a distance." Amalgaman was second, and Fly Wheel third. The time was 10 min. 40 secs., the dividend being £50 10s. There were six tickets on the winner, but I believe Mr. Skerrett only held one ticket. Other members of the Hunt Club were D. G. A. Cooper (then the Registrar of the Supreme Court), Andrew Wylie, Frank Dyer, and Jack Mills.

In his younger days the late Chief Justice was fond of dancing, no doubt as a means of relaxation from the cares of his work; and he had the following adventure one evening in Wellington. This came about when he received an invitation from a mortgagor litigant, whose case was pending. He had come into the case on an adjournment ordered by Mr. Justice Richmond, who considered that, as the interests of a mortgagor and the mortgagee clashed, they should be separately represented. The mortgagor was employed in a large timber company whose annual dance was about to take place, and Mr. Skerrett's client thought it would be a good move to have his counsel as a guest. He, therefore, gave him a couple of tickets, and extracted a promise that they would be used. To see that there was no mistake, he rang up on the morning of the dance and was assured that the affair was not forgotten. That day Mr. Skerrett was engaged in Court and only got back to his office at five o'clock. He could not find the dance tickets, which he had left on his desk, and concluded he must have left them in his house. They were not found there, and he decided to go without them. At this period—the early 'nineties—the top floor of George Thomas and Co.'s old building opposite the A.M.P. Society was the fashionable dance-room of Wellington. Accordingly he proceeded there, thinking to find his client. Sure enough a dance was in full swing, and, giving a friendly nod to the doorkeeper, he walked in. Having changed his shoes, he entered the dance-room, but he saw nothing of his client. He had no difficulty in finding partners, and, after a couple of dances, one of the officials came up to Mr. Skerrett in a friendly way, and said that Mrs. T., who was with other ladies on the platform, would like to meet him.

"Certainly" was the reply. "Who is Mrs. T.?" "She is one of our Vice-Presidents," was the answer, and he was thereupon introduced. After chatting a short while, Mrs. T. remarked: "We are so pleased to have you with us, but must apologize for the absence of our President, Mr. J. Rigg, who cannot leave the Legislative Council just now but will be here later." Mr. Rigg was the President of the Tailoresses Union and "C.P." had got into the wrong show. After a couple more dances, he decided to leave, and did so.

Next morning the irate client rang up and charged Mr. Skerrett, not only with having broken his promise, but with giving the tickets to some one else, whose identity they had not discovered. Mr. Skerrett had to explain that he had lost the tickets, and guessed what had really happened. It appeared that his younger brother—the one who was killed in the Matabele War—had seen the tickets on his brother's table and admitted that he had given them to a young fellow whose best girl was being escorted to the dance by a rival; and this individual wanted to see how matters were progressing. However, the client was later consoled by getting out of his lawsuit a bit better than at one time he expected.

Throughout these stray notes, I have referred to the late Chief Justice as "Mr. Skerrett," for such he was at the time of which I write. By sheer ability and energy, he became Chief Justice and was knighted. His early death deprived the Bench of a career that promised to be as brilliant judicially as it had been forensically.

I have refrained from saying anything about the Wellington barristers who now adorn the Supreme Court Bench, but I trust that I may say, with respect, that they, too, have reached their high office by their ability and hard work.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Magistrates' Court.—"*Magistrate*"—"*Magistrates' Court*"—*Where used in Statute—Difference in meaning.*

QUESTION: Is "Magistrate" in a statute identical with "Magistrates' Court" in a statute?

ANSWER: No. There is an important difference: See *Stafford* v. *Stanford*, (1908) 11 G.L.R. 220.

2. Debtors' Emergency Regulations.—*Mortgages Extension Emergency Regulations—Whether Provisions may be waived.*

QUESTION: Is there a right of waiver under the Debtors Emergency Regulations, 1940, or the Mortgages Extension Emergency Regulations, 1940?

ANSWER: No. *Soho Square Syndicate, Ltd.* v. *E. Pollard and Co., Ltd.*, [1940] 2 All E.R. 601; but consent may be given as provided for by Regs. 10 and 15 respectively of the said regulations.

3. Practice.—*Motion—Actual Relief sought—Necessity for stating same precisely.*

QUESTION: Should an application state precisely the actual relief sought?

ANSWER: Yes, see *W.* v. *M.*, (1941) 2 M.C.D. 61; moreover the forms of application prescribed by Magistrates' Courts Amendment Rules, 1940 (Forms No. 199 and 200), contain a footnote "State precisely the nature of the order sought." In *Stephens's Supreme Court Forms*, at p. xli, it is said that a "motion should state clearly and in detail the order which is sought . . . "

4. Infants and Children.—*Marriage of Infant—Consent of Father—Whether irrevocable.*

QUESTION: If a father gives his consent to the marriage of a minor, can he retract such consent before the actual solemnization of the marriage?

ANSWER: Yes; see *Younge* v. *Furse*, (1857) 8 DeG. M. & G. 756, 44 E.R. 581; *Hodgkinson* v. *Wilkie*, (1795) 1 Hag. Con. 262, 161 E.R. 546. The reason is that the parental authority continues up to the time of the marriage.

5. Judgment Summons.—*Attachment of Debt—Issue Six Years after Judgment—Whether Leave necessary.*

QUESTION: Is leave necessary under s. 119 of the Magistrates' Courts Act, 1928, to issue a judgment summons after six years?

ANSWER: No: see *Bundy* v. *Motor Cab Owner Drivers' Association*, (1930) 46 T.L.R. 422, 423. Moreover, such leave is not necessary in the case of attachment of debt proceedings: *Fellows* v. *Thornton*, (1884) 14 Q.B.D. 335.

6. Criminal Law.—*Principal discharged—Whether Conviction of Person as Aider and Abettor good.*

QUESTION: If a principal is discharged can a person be convicted as an aider and abettor?

ANSWER: Yes: see *Morris* v. *Tolman*, [1923] 1 K.B. 166, 171, where Avory, J., said: " . . . for in all offences below felony any person aiding and abetting or counselling and procuring the commission of the offence may be convicted either as principal or as aider and abettor."

7. Justices of the Peace.—*Committal for Trial—Justices equally divided—Procedure.*

QUESTION: Where on the preliminary investigation under the Justices of the Peace Act, 1927, whether or not an accused person shall be committed for trial for an indictable offence the Justices are equally divided; what course should they pursue?

ANSWER: They should adjourn the inquiry for rehearing before themselves or before a differently-constituted tribunal.

8. Chattels Transfer.—*Affidavit on Registration of Instrument—Before whom sworn.*

QUESTION: In connection with registering an instrument, can the affidavit required in support thereof be sworn before the solicitor acting for the grantee in preparation of the instrument?

ANSWER: Under s. 7 of the Chattels Transfer Act, 1924, an affidavit required by that Act may be sworn before any solicitor of the Supreme Court, or a Registrar, or any Justice of the Peace. It is not clear whether such an affidavit might be sworn before the solicitor acting for the grantee in preparation of the instrument, but it would seem this may be done: *Sainsbury's Chattels Transfer Act*, 29, and *Ball's Law of Chattels Transfer*, 33.

In England, it has been held that a grantee's solicitor is incompetent to take the affidavit, but there is provision to this effect under certain rules: *Baker* v. *Ambrose*, [1896] 2 Q.B. 372. If it is considered that the affidavit might later apply to the detriment of the grantee, it would be safer and more advisable to have such affidavits taken before an outside solicitor, or a Justice of the Peace; *per contra*, R. 189 of the Code of Civil Procedure applies to an affidavit in a *lis pendens*.

9. Court of Appeal.—*Appeal to Privy Council—Motion for Conditional Leave—Nature of Motion—Final Leave—Affidavit necessary.*

QUESTION: In applying to the Court of Appeal for conditional leave to appeal to the Privy Council, is a formal notice of motion necessary, and is any supporting affidavit required?

ANSWER: Applications for leave to appeal may be made by motion in Court at the time when judgment is given, or by notice of motion within twenty-one days after the date of the judgment appealed from: Privy Council Appeals Rules, R. 4.

In the first instance there is no necessity to file a motion, the application being made in Court at the time when judgment is given. If not applied for then, a notice of motion is filed within the prescribed time; there is no necessity for any supporting affidavit.

In applying for final leave, a supporting affidavit is necessary to show that the provisions of the conditional order have been complied with.

ACTS PASSED AND IN OPERATION.

No. 7. Prolongation of Parliament Act, 1942 (July 13).
No. 8. War Expenses Amendment Act, 1942 (July 13).

LOCAL ACTS.

No. 1. Auckland City Market Empowering Act, 1942 (July 13).
No. 2. Invercargill City Special Rate Empowering Act, 1942 (July 13).
No. 3. New Plymouth Recreation and Racecourse Reserve Amendment Act, 1942.
No. 4. Auckland City Housing Act, 1942 (July 13).

RULES AND REGULATIONS.

Shipping Safety Emergency Regulations, 1940. Shipping Safety (Small Craft) Order, 1942. Amendment No. 1. No. 1942/195.

Transport Legislation Emergency Regulations, 1940. Transport (Farmers' Tractor) Emergency Order, 1942. No. 1942/196.

Labour Legislation Emergency Regulations, 1940. Defence Works Labour Legislation Suspension Order, 1942. Amendment No. 3. No. 1942/197.

War Injuries to Civilians Emergency Regulations, 1942. No. 1942/198. (Emergency Regulations Act, 1939).

Land and Income Tax Amendment Act, 1935. Income-tax (United Kingdom Traders) Exemption Order, 1942. No. 1942/199.

National Expenditure Adjustment Emergency Regulations, 1942. No. 1942/200. (Emergency Regulations Act, 1939.)

Occupational Re-establishment Emergency Regulations, 1940. Amendment No. 2. No. 1942/201. (Emergency Regulations Act, 1939.)

Suspension of Apprenticeship Emergency Regulations, 1939. Amendment No. 4. No. 1942/202. (Emergency Regulations Act, 1939.)

Customs (Visiting Forces) Emergency Regulations, 1942. No. 1942/203. (Emergency Regulations Act, 1939.)

Customs (Visiting Forces) Emergency Regulations, 1942. Customs (Visiting Forces) Proclamation, 1942. No. 1942/204.

Control of Prices Emergency Regulations, 1939. Price Order No. 95 (Nails). No. 1942/205.

Workers' Compensation Act, 1922. Workers' Compensation (Tasmanian Reciprocity) Order, 1942. No. 1942/206.

Maize Marketing Emergency Regulations, 1942. No. 1942/207. (Emergency Regulations Act, 1939.)

Hospitals Administration Emergency Regulations, 1942. No. 1942/208. (Emergency Regulations Act, 1939.)

Customs Acts Amendment Act, 1942. Sales Tax Order, 1942. No. 1942/209.

Companies Emergency Regulations, 1942. No. 1942/210. (Emergency Regulations Act, 1939.)

Fisheries Act, 1908. Sea-fisheries Regulations, 1939. Amendment No. 13. No. 1942/211.

Control of Prices Emergency Regulations, 1939. Price Order No. 96 (Matches). No. 1942/212.

Factory Emergency Regulations, 1939. Waste Paper Control Notice, 1942. No. 1942/213.

Explosives Licenses Emergency Regulations, 1942. Emergency Regulations Act, 1939. No. 1942/214.

Rating Emergency Regulations, 1942. Emergency Regulations Act, 1939. No. 1942/215.

Labour Legislation Emergency Regulations, 1940. Amendment No. 3. Emergency Regulations Act, 1939. No. 1942/216.

Labour Legislation Emergency Regulations, 1940. Earthquake Damage Labour Legislation Suspension Order, 1942. No. 1942/217.

National Service Emergency Regulations, 1940. Registration for Employment Order No. 3. No. 1942/218.

National Service Minister Emergency Regulations, 1942. Emergency Regulations Act, 1939. No. 1942/219.

Supply Control Emergency Regulations, 1939. Scrap Rubber Control Notice, 1942. No. 1942/220.

Primary Industries Emergency Regulations, 1939. Milking Machinery Control Order, 1942. No. 1942/221.