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"There is, in fact, no such thing as judge-made law, for the Judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not been authoritatively laid down that such law is practicable."

—LORD ESHER, M.R., in *Willis and Co. v. Baddeley*, [1892] 2 Q.B. 324, 326.

Vol. XII. Tuesday, February 18, 1936. No. 3

Roadworthiness and Seaworthiness: A Misleading Analogue.

IN his recent work, *The Law of Motor Insurance*, the learned author, Mr. C. N. Shawcross, gives a caution as to the effect of a judgment given by Mr. Justice Goddard in the King's Bench Division in December, 1934, in which it was held that there is an implied condition in a policy of motor insurance that the motor-vehicle shall be roadworthy: a judgment in which, as a learned counsel has written, "a new word was added to the judicial dictionary and judicial sanction given to the conception of 'roadworthiness' as applying to motor insurance, on analogy with 'seaworthiness' in marine insurance": *Barrett v. London General Insurance Co., Ltd.*, [1935] 1 K.B. 238.

The learned author's caution as to the application of that judgment to cases where the facts or policy are not exactly similar has recently been justified by the opinion of the Judicial Committee in affirming the judgment of the majority of our Court of Appeal in *Trickett v. Queensland Insurance Co., Ltd.*, [1932] N.Z.L.R. 1727, and thus re-affirming the judgment of the learned Chief Justice in the Court below. In that case, when it was before the Judicial Committee, the appellant first sought to exclude the exemption of the insurers from liability while, as the policy stated, the insured car was "being driven in a damaged or unsafe condition." It had been found on the facts in the Courts below that at the time of the accident, which took place about midnight and as a result of which the insured was killed, the lights of the car were not shining. The appellant sought to convince their Lordships that the terms of the exempting proviso were ambiguous and that, to avoid liability under the policy, the respondents must go further and prove that the driver of the car knew at the material time that the lights were extinguished. The Board declined to hold that the proviso was couched in ambiguous terms, but considered its terms were "unambiguous and plain—indeed intractable." And to the same effect as the learned Chief Justice had held in the Court of first instance, their Lordships refused to read into the policy words which were not there, or to supplement it by adding to the terms of the proviso "to the knowledge of the driver," as they were invited by the appellant to do. Moreover, as the defect was not a latent one, but was potentially dangerous, the car was actually and *de presenti* unsafe to drive, and was driven after that state of affairs had developed. As to the case of a latent defect, their Lordships offered no opinion.

It is, however, the third, and independent, point on which the appellant relied with which we are immediately interested: that the law affecting the proviso to the policy, exempting the respondent from liability in respect of any loss, damage, or liability occurring or any personal accident to the assured occurring—

> "While any motor-vehicle in connection with which indemnity is granted under this policy is . . .
>
> (*e*) being driven in a damaged or unsafe condition.

could be assimilated to the marine law of seaworthiness, and that the proviso, like the implied warranty of seaworthiness in a contract of marine insurance, only applied to the condition of the car at the beginning of its journey. In support of this assumed analogy, *Barrett v. London General Insurance Co., Ltd.* (*supra*) was cited. In that case the defendant, by a policy of motor-car insurance, agreed to indemnify one Stone against liability to a third party for the death of or bodily injury to any person not being the driver of the motor-car specified in the policy, or a person in the insured's service, or a member of his family or his household, caused by the motor-car while in use by the insured. Stone, while driving the car specified in the policy, negligently knocked down and killed one Barrett who was not within the class of persons excluded as above. As the defendant company repudiated liability, Stone assigned to the widow of Barrett the moneys which were alleged to be due to him (Stone) under the policy. The defendant company, in denying liability, relied on the following clause in the policy:

> "This policy does not cover or insure against liability in respect of any accident while driving the car in an unsafe or unroadworthy condition,"

and alleged that at the time of the accident and at all material times prior thereto the car was being driven in an unsafe and unroadworthy condition in that the brakes were defective and dangerous.

Mr. Justice Goddard found on the facts that the accident was caused by the foot-brake failing at the critical moment of the accident, and that there was evidence that at the moment of the impact the car was unsafe and unroadworthy. His Lordship then said:

> "The question is whether the exclusion absolves the defendants from liability when all they have proved is that at the moment of the collision the vehicle was in such a condition. Both counsel said they knew of no authority on this point, and no cases were cited. I have been unable to find any case relating to the insurance of motor-cars or other vehicles in which this or a similar exclusion has been considered, but I think that considerable assistance can be obtained from well-settled principles in marine-insurance law relating to seaworthiness."

His Lordship then went on to say that the word "unroadworthy" seemed to imply the same state in relation to a road vehicle as "unseaworthy" does to a vessel.

Furthermore His Lordship pointed out that it is elementary in marine-insurance that the owner of the vessel insured impliedly warrants that it is seaworthy; and it is settled law that, while there is an implied warranty that a ship is seaworthy at the time of sailing, there is no warranty that it shall continue seaworthy throughout the voyage: per Parke, B. (as he then was)

in *Dixon v. Sadler*, (1839) 5 M. & W. 405, 414; 151 E.R. 172, 175; and this was reaffirmed by him, when, as Lord Wensleydale, he delivered the opinion of the Judicial Committee in *Biccard v. Shepherd*, (1861) 14 Moo. P.C.C. 471, 493; 15 E.R. 383, 392.

Mr. Justice Goddard was of opinion that this doctrine should apply to the clause in the insurance policy before him, and that the clause should be read as meaning that the car must be roadworthy when it sets out on its journey. He continued:

> "Everyone knows that in a motor-car something may give or go wrong in the course of the journey, which may, temporarily at any rate, put the car out of control, and that from a variety of causes, and if in such circumstances this exclusion is to relieve the underwriters, it seems to me that the indemnity given by the policy would be exceedingly precarious."

The learned Judge expressed the opinion that, as the onus of proving unseaworthiness is on the underwriters (*Davidson v. Burnand*, (1868) L.R. 4 C.P. 117), therefore the onus of proving unroadworthiness is likewise on the insurers, and that it was not enough for them to prove the vessel was unseaworthy at the moment of the disaster, as that would mean that the warranty continued throughout the journey. As a ship and a motor-car are two different things, His Lordship said he did not think that what would raise a presumption in the case of the one would necessarily raise it in the case of the other. He added:

> "If, however, it were found that on leaving, or within quite a short distance of the garage, the brakes refused to act, or some other mechanical defect showed itself, it would, I think, be a fair inference to draw that the car was not roadworthy when it set out."

He concluded that, as the defendants had failed to satisfy him that the car was unsafe or unroadworthy when it set out on the journey in the course of which the accident occurred, the plaintiff was entitled to succeed.

In *Trickett's* case, their Lordships of the Privy Council were not convinced of the applicability or the soundness of the reasoning in the judgment in *Barrett's* case; though they did not question the conclusion reached by the learned Judge on the facts therein. Their Lordships' opinion, which was delivered by Lord Alness, proceeds:

> "They are not able to assimilate, as did the learned Judge, the position of a ship at sea with that of a motor-car on land and in rigidly applying the same code of law to both cases. For reasons which are too obvious to be stressed in detail their Lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land is unsound."

Trickett's case was heard and determined in New Zealand, both in the Supreme Court and on appeal, before the judgment in *Barrett's* case was given, but on all the other points raised before their Lordships' Board the judgment of the learned Chief Justice and the joint judgment of the majority in the Court of Appeal (MacGregor and Kennedy, JJ.) were upheld. Goddard, J., was apparently right in his conclusion as based on his judgment on the facts but unsound in his application of the law of marine insurance to those facts or the terms of the policy of motor-car insurance before him—but even he said, it will be remembered, that "a ship and a motor-car were two very different things," and that what would raise a presumption of unseaworthiness in the one would not necessarily raise a presumption of unroadworthiness in the other. But he also said this:

> "If a vehicle be unsafe, it is unroadworthy, and *vice versa*, and 'unroadworthy' seems to me to imply the same state in relation to a road vehicle as 'unseaworthy' does to a vessel."

In the authority cited by him, *Dixon v. Sadler* (*supra*), the insurance was a time policy for a defined voyage, extending over a defined period of six months, and the vessel was rendered unseaworthy in the course of that voyage by the wilful act of the master and crew who threw overboard a part of the ballast; and it was held that there was an implied warranty that the vessel should be seaworthy at the time of her sailing upon the voyage, but not continuously during its course. As the judgment of the Court of Exchequer, per Parke, B., put it: In the case of an insurance for a *certain voyage*,

> "it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it."

It is clear that the conditions of a ship at sea and a motor-car, from the very nature of the two means of transport and the elements in which they respectively journey, are wholly dissimilar; so, too, it follows that a policy of marine insurance from its very nature differs in most material respects from a policy of motor-car insurance, but it is in this matter of an implied warranty as to seaworthiness that the difference is chiefly apparent: the former policy attaches for a defined and certain voyage, while the latter covers an undefined number of journeys during the period of the policy.

Further, the standard of seaworthiness varies with the nature of the voyage insured; the vessel may be seaworthy for one voyage but not for another, for a voyage at one season of the year and not for a voyage at another season; she may be seaworthy when laden with one kind of cargo, and not so when laden with another kind. This is shown by Lord Cairns, L.C., in *Steel v. State Line Steamship Co.*, (1877) 3 App. Cas. 72, 77, when he said:

> "The ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter."

One of the main difficulties to which their Lordships pointed, without specifying them, is probably the fact that a policy of motor-car insurance is a time policy, usually for a year. In marine insurance policies which are time policies, there is no implied warranty of seaworthiness at any stage of the adventure, though the assured cannot take advantage of his own wrong where his own default has resulted in the vessel's loss: *Trinder, Anderson and Co. v. Thames and Mersey Marine Insurance Co.*, [1898] 2 Q.B. 114; *Thomas v. Tyne and Wear Steamship Freight Insurance Association*, [1917] 1 K.B. 938, and see the Marine Insurance Act, 1908, s. 40 (5). In *Eldridge on Marine Policies*, 2nd Ed., 140, we are told that the general application of the principle of an implied warranty of seaworthiness to time policies would be attended with great difficulties,

> "for a time policy often attaches when a ship is at sea, or in a position where the owners would be quite unable to refit her in order to comply with the warranty when the policy attached; moreover, the purpose for which she is to be employed under a time policy cannot be set out with the same definite exactness as to voyage, cargo, and other incidents as it can in a voyage policy. Therefore, although no doubt there are instances in which the principle might be applied to time policies, yet the general adoption of the principle in regard to time policies would be attended with such difficulties in practice, and would involve the owner in so much uncertainty, that it is now settled that there is no implied warranty of seaworthiness in a time policy."

These considerations become all the stronger when applied to the insurance of motor-cars under a time policy, and show the inapplicability of an implied warranty of the same nature in regard to motor-car policies.

The only practical application to a motor-car of the warranty of seaworthiness that is implied in a policy of marine insurance would be to make it continuous during the period of the policy, or, to make it apply seriatim to each possible and indefinable journey to be undertaken. but either such application would destroy the analogy as, even in marine insurance, the warranty of seaworthiness does not attach except at the beginning of a definite voyage or at the beginning of each stage in that particular voyage.

Finally, as is pointed out in *Porter's Laws of Insurance*, 8th Ed., 143, "Implied warranties are almost, if not quite, confined to marine insurance." And, we may observe, the warranty of seaworthiness in a policy of marine-insurance is now implied by statute, *viz.*, "that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured": Marine Insurance Act, 1908, s. 40 (1). This is an adaptation of the codification of the law relating to marine insurance effected by the Marine Insurance Act, 1906 (Imp.), and like that Act continues to apply the rules of the common law to contracts of marine insurance, save in so far as they are inconsistent with the provisions of the statute. It reproduces s. 39 (1) of the Imperial Act: *9 Halsbury's Complete Statutes of England*, 864; and see the further subsections of s. 40 (or s. 39) in both statutes as to other warranties of seaworthiness to be implied in policies of marine insurance. There is no parallel to that section in any statute dealing with the insurance of motor-cars.

Summary of Recent Judgments.

JUDICIAL COMMITTEE
1935.
Dec. 2, 19.
Lord Blanesburgh.
Lord Atkin.
Lord Thankerton.
Lord Maugham
Lord Roche.

PUBLIC TRUSTEE v. LYON.

Insurance — Life — Protection from Creditors — "Company" — "Policy" — Applicability to Policies effected in Country other than New Zealand — Life Insurance Act, 1908, ss. 41, 65, 66 — Life Insurance Amendment Act, 1925, s. 4.

The definition of "company" as applied by s. 41 of the Life Insurance Act, 1908, to the provisions of Part II thereof, is inconsistent with its limitation to such companies as carry on business in New Zealand, no such limitation being expressed in s. 41; and, further, there is nothing in the provisions of s. 65—which protects life-insurance policies from the creditors of the assured—to limit the applicability of the definitions in s. 41; and s. 66 (as amended by s. 4 of the Life Insurance Amendment Act, 1925)—which extends the protection given by s. 65 to all policies that are dependent on accident, sickness, death, or other contingencies of life (with certain specified exemptions)—does not provide a context inconsistent with that view.

The policy-moneys were not Scots assets falling to be administered according to the law of Scotland.

Semble. If the provisions of s. 65 merely barred the right of recovery of the policy-moneys in New Zealand, such bar would operate to prevent their recovery in the New Zealand administration, in the course of which the present question arose. If, on the other hand, s. 65 destroyed the right or title of the New Zealand creditors as against the policy-moneys which formed part of the estate of a person domiciled in New Zealand, then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt against the policy-moneys.

So Held by the Judicial Committee of His Majesty's Privy Council, dismissing an appeal from the judgment of the majority of the Court of Appeal (*Myers*, C.J., and *MacGregor*, *Blair*, and *Kennedy*, JJ., *Herdman*, J., dissenting), reported [1934] N.Z.L.R. 296.

Counsel: **Ross,** for the appellant; **W. N. Stable, K.C.,** and **J. Buckley,** for the respondent.

Solicitors for the appellant: **Wray, Smith, and Halford** (London), agents for **The Solicitor,** Public Trust Office (Wellington). **Solicitors for the respondent**: **T. E. Crocker and Son** (London), agents for **Rout and Milner** (Nelson).

NOTE:—For the Life Insurance Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Insurance*, p. 78; Life Insurance Amendment Act, 1925, *ibid.*, p. 127.

SUPREME COURT
Wanganui.
1935.
Nov. 21; Dec. 4.
Reed, J.

IN RE PERRETT (DECEASED), PERRETT AND OTHERS v. PUBLIC TRUSTEE AND OTHERS.

Will—Interest Passing—Bequest of Residue to those of the Sons and Daughters "who shall survive me"—In the event of "any child" of Testatrix Predeceasing her Leaving Issue, the Children of Deceased Child to Take "all benefits under this my will which his her or their parent my child would have taken if he or she had survived me"—Whether Children of Son who had died before Will took any Share in Residuary Estate.

Testatrix, a widow, had ten children, one of whom, E., died in her lifetime and ten years before the execution of her will, leaving three children (the present plaintiffs). For seven years prior to her death, testatrix assisted in the plaintiff's support, and since her death they were entitled to receive under their father's will one-tenth of the income of his estate.

By cl. 9 of the will of the testatrix, the residue of her estate was bequeathed to her trustees to call in and divide the proceeds "equally between those of my sons and daughters with the exception of [a named son, C., for whom special provision was made] who shall survive me."

Clause 10 of the will provided as follows:

"In the event of any child of mine predeceasing me leaving issue him or her surviving I direct that such issue shall take and equally between them if more than one all benefits under this my will which his her or their parent my child would have taken if he or she had survived me."

In answer to the question whether the plaintiffs took any share in the residuary estate of the testatrix,

Moss, and **O'Dea,** for the plaintiffs; **B. C. Haggitt,** for the Public Trustee; **Brodie,** for the remaining defendants.

Held, 1. That cl. 10 was intended to be simply a substitutionary clause providing for the devolution of the interest in the estate of a son or daughter (with the exception of the named C.) who should die subsequent to the making of the will and before the death of the testatrix.

2. That the words "who shall survive me" in cl. 9 of the will definitely negatived the inclusion of any child already dead, and the plaintiffs, therefore, took no share in the residuary estate.

Christopherson v. Naylor, (1816) 1 Mer. 320, 35 E.R. 369, followed.

In re Webster's Estate, Widgen v. Mello, (1883) 23 Ch.D. 737, and **In re Fitton (deceased), Morrison v. Public Trustee,** [1932] N.Z.L.R. 1508, referred to.

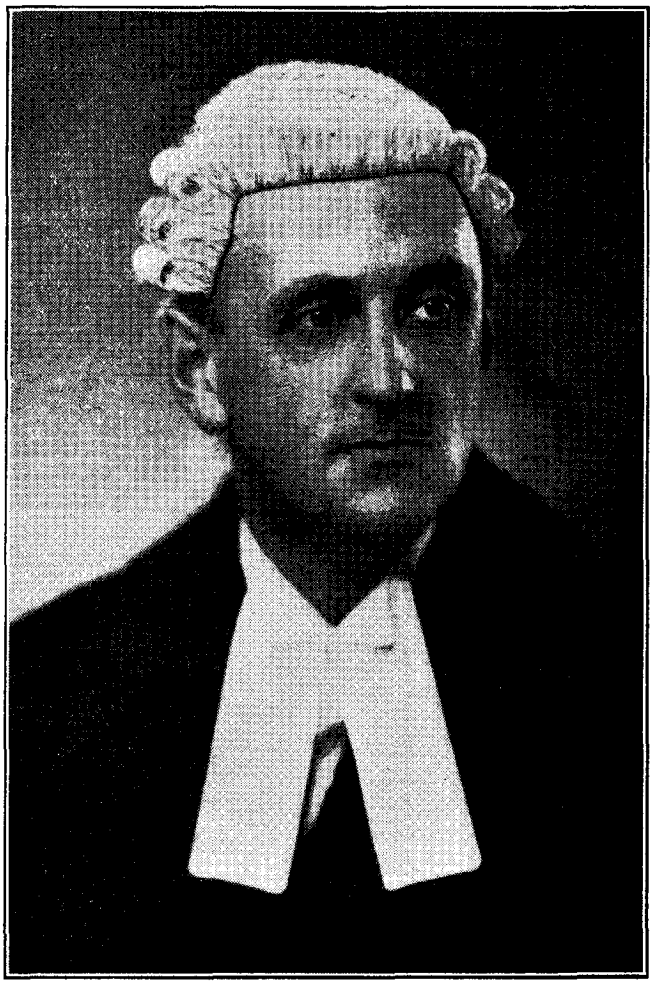
Solicitors: **O'Dea and O'Dea,** Hawera, for the plaintiffs; **Treadwell, Gordon, Treadwell, and Haggitt,** Wanganui, for the Public Trustee; **A. D. Brodie,** Wanganui, for the remaining defendants.

Case Annotation: *Christopherson v. Naylor*, E. & E. Digest, Vol. 44, p. 793, para. 6502; *In re Webster's Estate, Widgen v. Mello, ibid.*, p. 795, para. 6517.

A New King's Counsel.

Mr. P. B. COOKE, M.C., LL.B.

The distinction of being the youngest barrister to take silk in this Dominion has fallen to Mr. Philip Brunskill Cooke, M.C., LL.B., lately of the Wellington firm of Messrs. Chapman, Tripp, Cooke, and Watson. On January 30, he received his patent of appointment—probably the first anywhere in the new reign—from the Rt. Honourable the Chief Justice (Sir Michael Myers) in the presence of a large and representative gathering of his professional brethren, including the Rt. Hon. Sir Francis Bell, G.C.M.G., K.C., Mr. C. H. Weston, K.C., and Mr. H. F. O'Leary, K.C. The Hon. Mr. Justice Reed was with the Chief Justice on the Bench; and the Hon. Sir Frederick Chapman and the Hon. Mr. Justice Ostler were present.



S.P. Andrew Studios.

Mr. P. B. Cooke, M.C., LL.B.

Mr. Cooke, who was born in Palmerston North forty-two years ago, comes of a legal family. His father, the late Mr. F. H. Cooke who died two years ago, was in practice for many years in Palmerston North, where he held the offices of Crown Prosecutor and Borough (and later City) Solicitor. The new silk received his early education at Huntley School, Marton, and at Wanganui Collegiate School, where, in 1909, he won a Senior National Scholarship. As a full-time student at Victoria University College he obtained his Bachelor of Laws degree at the end of a three years' course. Being too young to seek admission to practice, he spent the year 1913 as Associate to the then Chief Justice, the Rt. Hon. Sir Robert Stout.

In December, 1913, Mr. Cooke entered the office of Messrs. Chapman, Skerrett, Tripp, and Blair. He soon attracted the notice of Mr. C. P. Skerrett, K.C., as he then was, and at that time in the full flush of his brilliant career at the Bar. Then the War intervened, and Mr. Cooke was away on active service until 1919, when, on his return to New Zealand, he rejoined his former principals and soon afterwards was admitted as a partner by them.

In February, 1926, there began a series of events which led to Mr. Cooke's becoming a senior member of the firm which he had served from his admission to the profession. Sir Robert Stout having resigned, Mr. C. P. Skerrett succeeded him as Chief Justice. Two years later, to the day, Mr. A. W. Blair was elevated to the Supreme Court Bench. From that time Mr. Cooke shared with Mr. G. G. G. Watson the responsibilities of the common-law side of a great practice. In opinion-work alone, he was kept very busy indeed. He left the only firm with which he had been in any way connected during his professional career to take silk at the end of last month.

Mr. Cooke had a distinguished military career in the years that interrupted his professional work. He had held a Second-Lieutenant's commission from early in 1912, and in March, 1914, he had been transferred to the Wellington Divisional Signal Company, being promoted to the rank of Lieutenant in the following March. In the same year he went overseas with a commission in the New Zealand Engineers. He served at first at the N.Z. Rifle Brigade's Headquarters at Heliopolis and also at Moascar on the Suez Canal. In April, 1916, he embarked for service in France, where he served until the end of the War with an interval of four months in England in 1917 as officer in charge of the Reserve Depot of the Divisional Signal Company. He was then appointed Officer-in-Charge of Artillery Signals, N.Z. Division, with the temporary rank of Captain.

In the Birthday Honours list, 1918, Mr. Cooke was awarded the Military Cross "for Distinguished Services in connection with Military Operations in France and Flanders," and was promoted Captain in the following month. Before the end of the War, he had risen to the command of the New Zealand Divisional Signal Company, and to the rank of temporary Major. On his return to the Dominion in 1919, he was transferred to the Reserve of Officers, and later he was posted to the Retired List.

Mr. Cooke was married in 1924 to the only daughter of the late Mr. and Mrs. H. M. Gore, of Wellington. They have two children.

Owing to the rule of the Wellington District Law Society limiting accession to its Council to one member of a firm, Mr. Cooke was unable to offer his services to that body. In recent years, however, he has been

a member of the Council of the New Zealand Law Society as representative of the Marlborough District Society. He represents the parent body on the Rules Committee created under the Judicature Amendment Act, 1930. He also holds the office of Revising Barrister under the Building Societies Act, 1908, for the Wellington District.

Notwithstanding a busy professional life, Mr. Cooke has found time to take a prominent part in various sports activities. For many years he has been a member of the Wellington Golf Club, which he represented in inter-club matches including those for the Tuson Cup. He served continuously on its committee from 1920 to 1925. He is president of the Thorndon Tennis Club and one of its most enthusiastic playing members. He is the President of the Wellington Badminton Association, and takes a keen interest in that form of recreation.

The new silk's versatility is shown in his having been a member of the Council of the New Zealand Academy of Fine Arts.

Although the present is an occasion on which compliments are the rule, those who best know Mr. Cooke realize that he would be affronted with any suggestion or attempt to flatter. There are many diverse qualities in which a leading counsel may excel. He may be gifted with eloquence; he may be a powerful pleader before a jury; he may be a great case lawyer or a sound judge of fact. But this is not the time to consider the appropriate category to which Mr. Cooke may be relegated; these are *post obit.* impertinences from which there is every reason to hope that he may be spared for many years to come. But every member of the profession who has practised as his contemporary recognizes certain facts.

That Mr. Cooke profited from his early association with the late Sir Charles Skerrett, there is no doubt. Those who remember the style and method of that outstanding figure at the Bar, agree that the new King's Counsel has fashioned his forensic equipment on the model presented to him in daily contact at the outset of his professional career; and with success. Like his old master, he is no mere specialist. His abilities and experience are well-suited to commercial cases, to equity suits, and to general common-law work. Recent examples *coram publico* are found in *Moore v. Commercial Bank of Australia, Ltd.* during 1934; and in the breaking of new ground in an undeveloped branch of the law in *Dominion Air Lines, Ltd. v. Strand*, [1933] N.Z.L.R. 1, in both of which actions he was associated with Mr. G. G. G. Watson, with Mr. H. J. V. James as their able junior. Again in the hard-fought appeal, *Nelson v. Braisby (No. 2)*, [1934] N.Z.L.R. 559, a perusal of Mr. Cooke's finely-presented and comprehensive argument for the appellant gives some idea of his quality as an advocate. He was briefed for the Crown in the recent *Amalgamated Society of Railway Servants v. The Attorney-General*, [1934] N.Z.L.R. 536, while earlier he appeared for the Commissioner of Taxes in *A.B. v. Commissioner of Taxes*, [1930] N.Z.L.R. 473, in which the assessment was upheld; and he also represented the Crown before the Royal Commission, consisting of three Judges, in relation to the Woolston Tanneries.

On the criminal law side, Mr. Cooke's appearances have been infrequent. In this connection, he tells a good story against himself. While still young at the Bar, he was briefed to defend a prisoner. He applied for, and obtained, bail for his man. But the erstwhile prisoner absconded, his bail was estreated, and he has never been heard of since. He had had the opportunity of viewing his youthful counsel!

In Court, mere dialectic in advocacy does not appeal to Mr. Cooke. He relies on the application of sound and well-established principles to the matter at hand, and on meticulous preparation of his brief—in other words, on industry and precision and thoroughness. Moreover, this preparation is inspired by a gift of sound common sense allied to an uncanny capacity for clear thinking. The result is presented to the Court with a fine economy of phrase, but with forceful deliberation of manner. His courtesy and high sense of the dignity of the Court—and of counsel—never bring him into the sporadic prominence with which the daily Press delights to record "sensations in Court," but his professional brethren know and respect his solidity and worth, both in opinion-work and at the Bar; and they honour him accordingly.

One now recalls a New Zealand barrister, who spent considerable time last year in the Courts in England, and who therein carefully observed leading counsel as well as those before the Privy Council and in the House of Lords, who said in a letter to the writer in November of last year: "I have seen most of the leading men at the Bar here. Plenty of them are of the New Zealand average, but Phil. Cookes are quite rare." Since that was written some of the men he mentioned have received high preferment in the profession. Mr. Cooke, K.C., is still a young man, and the best of his years are before him. What the future holds, no one can tell. But it is not an idle prophecy to say that there is no high office in the legal world around us to which he is not qualified to attain.

Lawyers and Literary Allusion.—Lord Macmillan when addressing to the law students of Birmingham "Some Observations on the Art of Advocacy," in 1933, remarked: "I believe that no advocate can be a great pleader who has not a sense of literary form, and whose mind is not stored with the treasures of our great literary inheritance, upon which he may draw at will." And one of the passages dearest to the heart of Viscount Finlay—that (possibly) inspired his "*Reading* before the Honourable Society of the Middle Temple" in the same year—is "a perfect sketch of a Scots lawyer." Pleydell, showing Colonel Mannering "the best editions of the best authors," remarked: "These are the tools of trade. A lawyer without history or literature is a mechanic—a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect." Thus, Mr. Norman Birkett, K.C., in opening before Mr. Justice Bennet the case of *Macleay and Another v. Soames* (*Times*, November 27), which involved a disputed will and an estate of a million pounds, referred to "one of the principal matters concerned," in these words. He was speaking of the property, Sheffield Park, Uckfield, Sussex: "His Lordship might have heard of the estate under the name of Sheffield Place, where Gibbon, after writing *The Decline and Fall of the Roman Empire*, stayed with the Earl of Sheffield during his later years."

Correspondence.

[*It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.*]

Criticisms of the Statute-book.

The Editor,
THE NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

I recently received from Sir William Graham-Harrison (formerly Parliamentary Counsel to the Treasury, London), the report of an address delivered by him to the Society of Public Teachers of Law in July, 1935. The full title of the address is "An Examination of the Main Criticisms of the Statute-book and of the Possibility of Improvement." There is much good matter in the address, entertainingly presented; and it well repays perusal. As we all know, the condition of the Statute-book is a perennial subject of criticism by informed and uninformed critics. Sir William Graham-Harrison in his address presents the draftsman's side of the picture. He, to my own knowledge, is a most charmingly courteous and modest man, as I learned when I was fortunate enough to be associated with him in London in the discussion of certain problems arising in connection with what is now the Statute of Westminster, 1931, and his observations in defence of the draftsman make no attempt to castigate his critics; only, with respect to some of them, he would have them better informed.

The following extracts from Sir William's address stand well enough alone, divorced from their context, and you may think it worth while, following your article on "Legislative Lapses" to publish what he has to say:—

> "We now come to what is, in my opinion, the most serious, as being the most difficult to eradicate, of the causes of the imperfections in the statutes—*i.e.*, the mistakes of the draftsmen. I admit, without hesitation or sense of shame, that draftsmen (like the rest of the world) make mistakes in their work, but I do so subject to this reservation:
>
> "(1) The number of mistakes is small in proportion to the bulk of the work done, but this is not realized because the Courts (and consequently to some extent the general public) only see the cases where there are mistakes: it is as if a doctor should say that all the world is ailing because ninety per cent. of the people he sees every day are sick people.
>
> "(2) Acts to a large extent do what they are intended by their authors—*i.e.*, the Government—to do. I asked the other day the following question—*viz.*, whether, except for a comparatively small number of exceptions, the enactments amending the Income-tax Acts from the end of the War onwards had achieved what they were intended to do, not only generally (of this we are all painfully aware) but in detail. The reply from three great experts in Income-tax Law administration was "Emphatically 'Yes'."

(I think that in New Zealand we are equally entitled to claim that we have accomplished the purposes of the Government.)

Referring to certain observations made by a Select Committee appointed in 1875 (to make recommendations for the revision of the Statute-book), the lecturer, in the course of his address, says:—

> "In view of these observations by the Committee, the critics might not unreasonably argue that the present defective condition of the Statute-book must be attributed to the failure of the "present system" to fulfil the Committee's expectations—*i.e.*, that the blame must be placed on the Government draftsman. I shall venture—at the risk of being told that anything on this subject coming from one who has held the office of Government draftsman must be valueless—to question whether the above suggestion represents the whole truth, and to submit for consideration the following propositions as representing the realities of the situation:—
>
> "(1) On the whole, there has been some improvement in drafting since 1875; I would suggest a comparison of the Local Government Act, 1933, with some of the statutes which it repealed;
>
> "(2) The defects of the Statute-book are exaggerated by the critics, and the causes of some of them are almost beyond remedy;
>
> "(3) The difficulties of Parliamentary drafting, both by reason of its inherent character and of the conditions in which the work has to be done, are under-estimated; some account of these difficulties will be given later on;
>
> "(4) No system will produce a set of infallible draftsmen, who will never make a mistake and will be able to foresee every case to which their Bills will have to apply."

I think that the closing remarks of Sir William's address are as true of New Zealand as of England, and can bear repetition here:

> "There is a great deal of misconception as to the duties of the Government draftsman. Lord Sankey at one end of the scale in experience and Mr. John Willis at the other concur in thinking that his work consists in putting legislative proposals—whether put before him in the shape of a draft Bill or otherwise—into legal form. If it were so, his life would certainly be an easier one, but in fact his duties are far more extensive.
>
> "His first duty is to produce a Bill which will do what the Government of the day, as represented by the Minister concerned, want done. In order to do this he must find out—not always an easy task—what in fact the Minister and/or his department want. He knows that, without interfering with the administrators in questions of policy (though they will have very little scruple about interfering with his drafting), he must do what he can to prevent the Minister getting into difficulties. If the Minister or his department are obdurate in resisting him on a legal point, he must do what is necessary to get, if he can, the support of the Law Officers.
>
> "When the drafting of the Bill is approaching completion he will have to take his part in the preparation of notes and memoranda on it.
>
> "But all this time he has got to bear in mind his second duty—to see that the Bill is not only right in substance but also satisfactory in form—that it is as intelligible, as well drafted, and as short (though he must not forget Sir George Jessel's protest against a wrong sort of conciseness) as he can make it. If he is to do this, he must bear in mind the Horatian

exhortations *nocturna versate manu, versate diurna*, and *limae labor*. He must examine and criticise, and produce fresh drafts, all at very high speed; he should know his Bill backward and forward, and be able at a moment's notice to say where any particular provision is to be found in it and why it is there. And he must be able to do this not in respect of one Bill only, but of two or three concurrently.

"He has many masters, all crying out simultaneously like the daughter of the horse-leech, "More, more!" If he makes a social engagement for an evening in the session, he will probably find that some stage of one of his Bills is in the House that evening; if he proposes to take a week-end away, he will be told on Friday evening that a Minister wants a new draft of something early on Monday.

"And at the end of all, he will be told that he is idle, careless, makes nothing but mistakes, and is hopelessly incompetent.

"And it is on this question of the criticism of the Office of the Government draftsman that I would say one last word. That Office is in process of recovering from the difficulties and disorganization of the post-War period, but if the hopes which may reasonably be entertained for its future are to be fulfilled, it must be treated with a rather more understanding sympathy and exposed to a rather less uninformed criticism than has hitherto been the case. The critics might take to heart the remarks of Bishop Butler in the preface to *The Sermons*—

> "'It must be acknowledged that some of the following discourses are very abstruse and difficult, or, if you please, obscure; but I must take leave to add that those alone are judges whether or no and how far this is a fault who are judges whether or no or how far it might have been avoided! General criticisms concerning obscurity may be nothing more at the bottom than complaints that everything is not to be understood with the same ease that some things are.'

"and Dr. Johnson's observation—

> "'A woman's preaching is like a dog walking on his hind legs. It is not well done; but you are surprised to find it done at all'."

Yours faithfully,
J. CHRISTIE,
February 7, 1936. Law Draftsman.

The Water Cure.—In this JOURNAL some years ago, a learned contributor said: "It hath ever been the use of Judges to ask questions of those who argue law matters before them. Sometimes a Judge does well to ask his questions and sometimes he would do better to keep silence. For, when a Judge asks a question because he seeks an answer he may do well. But if he inquire with any other purpose, he will seldom miss doing ill." In a recent issue of the *Law Journal* (London) a cure is recalled for patients who may show symptoms of Judicial loquacity. In olden times in the House of Lords, Lord Morris of Killanin was of the opinion that his noble colleague, Lord Watson, talked too much, and asked too many unnecessary questions. At the conclusion of a long appeal, Lord Morris addressed his noble and learned colleague: "My advice to you is to follow the advice a parish priest gave to a talkative woman: 'Take a cup of holy water in your mouth, sit still, and be careful not to swallow it.'" Water (in an unhallowed state) is always available in the Courts.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Deed of Hypothecation of Municipal or other Bearer Debentures by way of Collateral Security.

THIS DEED made the day of 19 BETWEEN A.B. of etc. (hereinafter together with his executors administrators and assigns called "the mortgagor") of the one part AND C.D. of etc. (hereinafter together with his executors administrators and assigns called "the mortgagee") of the other part WHEREAS the mortgagor has applied to the mortgagee for the loan of £ which the mortgagee has agreed to grant upon having security therefor by way of the memorandum of mortgage of land hereinafter mentioned together with security collateral thereto over the debentures more particularly described in the schedule hereto upon and subject to the terms hereinafter set forth

NOW THIS DEED WITNESSETH as follows:—

1. IN CONSIDERATION of the sum of £ this day paid lent and advanced by the mortgagee to the mortgagor (the receipt whereof is hereby acknowledged) the mortgagor DOTH HEREBY COVENANT with the mortgagee:—

(1) The mortgagor will pay to the mortgagee the sum of £ (hereinafter called "the principal sum") on the day of 19 .

(2) The mortgagor will pay to the mortgagee interest upon the principal sum or so much thereof as shall for the time being remain outstanding and unpaid hereunder at the rate of £ per centum per annum computed from the day of 19 and payable by quarterly payments on the days of and in each and every year.

2. FOR THE CONSIDERATION aforesaid the mortgagor DOTH HEREBY ASSIGN TRANSFER SET OVER HYPOTHECATE CHARGE AND PLEDGE the said debentures and all money due and to become due thereunder and all rights remedies and powers incidental thereto unto and with the mortgagee TO HOLD the same unto the mortgagee by way of mortgage and security for payment of the principal sum and interest thereon and other moneys due or to become due by the mortgagor to the mortgagee in accordance herewith.

3. FOR THE CONSIDERATION aforesaid the mortgagor DOTH HEREBY COVENANT with the mortgagee as follows:—

(1) There is due owing and secured to the mortgagor upon the execution of these presents on the security of the said debentures the sum of £ for principal moneys and interest thereon in terms of the said debentures from the day of 19 .

4. AND IT IS HEREBY AGREED AND DECLARED by and between the parties hereto as follows:—

(1) These presents are collateral to and co-existent with a certain memorandum of mortgage bearing even date herewith and given by the mortgagor in favour of the mortgagee and comprising ALL THAT etc. the same moneys being secured thereunder as hereunder and the said two instruments shall be read and construed together so that a default under either of them shall

be deemed also to be a default under the other of them but so nevertheless that the mortgagee may exercise his powers and pursue his remedies under either of the said two instruments separately or under both thereof concurrently.

(2) The mortgagee shall not so long as no default be made by the mortgagor under these presents or under the said collateral mortgage sell transfer or encumber the said debentures or any of them.

(3) All moneys principal interest or otherwise received by the mortgagee as the holder or bearer of the said debentures at any time during the continuance of this security shall be applied in or towards payment of first costs (if any) to which the mortgagee shall be entitled secondly interest on the principal sum and thirdly the principal sum in accordance with the covenants in that behalf hereinbefore contained notwithstanding that the due date for payment of the principal sum shall not have then arrived.

(4) The mortgagee as the bearer or holder of the said debentures shall during the continuance of this security be at liberty to institute any proceedings or concur or combine with any bearers or holders of other debentures of the same or any similar series issued by the same body corporate in any proceedings taken for the purpose of enforcing the rights of the mortgagee as such bearer or holder and the mortgagor will ratify whatsoever may lawfully be done by the mortgagee in the premises and any costs incurred by the mortgagee in any such proceedings shall be paid by the mortgagor and the mortgagor will indemnify the mortgagee accordingly.

(5) If default shall be made by the mortgagor under these presents or the said collateral mortgage it shall be lawful for the mortgagee as the bearer or holder of the said debentures forthwith to sell or transfer the said debentures or any of them after the expiration of the period of fourteen days from the posting of a prepaid registered letter addressed to the mortgagor at his last known place of abode or business in New Zealand giving notice of such intention to sell or transfer (and in respect of such notice the receipt of the post-office shall be conclusive evidence of the posting and delivery thereof) at the market price or prices for the time being or at the best price obtainable for the said debentures or any of them and the receipt of the mortgagee shall be a sufficient discharge for any moneys arising under this power of sale or transfer and no purchaser or purchasers of the said debentures or any of them who may have notice of this security shall be concerned to enquire whether the power of sale or transfer has arisen or whether any moneys remain outstanding under the security of these presents or the said collateral mortgage and the proceeds of such sale and transfer or sales and transfers shall be applied in payment of first all costs brokerage charges and expenses properly incurred by the mortgagee in and about the sale and transfer and secondly the principal sum and interest and other moneys which may be due or accruing due to the mortgagee in terms of these presents and the said collateral mortgage.

(6) The mortgagee shall not be answerable for any involuntary loss arising from the exercise of the above power of sale and transfer or from the mortgagee's neglecting or failing to institute proceedings to protect the rights of the mortgagee as bearer or holder of the said debentures.

(7) In and about the exercise of the above power of sale and transfer any and every sale effected in good faith by the mortgagee through the agency of a member of any recognized Stock Exchange in New Zealand shall be deemed for all purposes between the mortgagor and mortgagee to have been a sale effected at the best price obtainable.

IN WITNESS etc.

SCHEDULE.

ALL THOSE etc.

SIGNED etc.

New Zealand Law Society.

Council Meeting.

(*Concluded from p. 26*).

Law Practitioners Amendment Act, 1935: General Report from President.—The President outlined to the meeting what had occurred during the final stages of the Bill in Parliament, and explained that Section 45 of the Amendment, which allowed five years' legal service in a State Department to count as a qualification for admission as barrister, had been inserted by the Upper House in direct opposition to the Society's wishes.

Executive Committee.—The President drew the attention of the Council to the recommendations of the Committee set up last year to enquire into a proposed reconstitution of the Society, the report of that Committee being as follows:—

"*Council.*—(*a*) The Council is at present too large for the convenient transaction of business, and the actual carrying out of the Society's business should be in the hands of a small executive body which should meet frequently.

(*b*) The Council shall be composed of 20 representatives to be elected by each District Law Society from its own members in the following numbers: Auckland, 4; Wellington, 3; Canterbury and Otago, 2 each; the nine other Societies, 1 each.

(*c*) A member of the Council to be elected until his successor is appointed.

(*d*) The office of Treasurer to be abolished.

(*e*) A member to be entitled to appoint a proxy from his own Society only.

(*f*) The Council to hold an annual meeting and such others as are deemed necessary.

Executive.—(*g*) The Society's work to be performed by an executive body consisting of not more than nine members, of whom the President and Vice-President are *ex officio* two. Five members shall be a quorum.

(*h*) The executive to be elected for two years at a general meeting of the Council.

(*i*) At least one member of the Executive shall be a representative of a District Law Society other than one of the four main centres.

Finance.—(*j*) The present contribution of 10s. to the Society and 11s. to the Council of Law Reporting shall be altered to 16s. to the Society and 5s. for Law Reporting.

(*k*) The Society shall be empowered to pay all or any part of the expenses of members attending meetings of the Council or Executive."

One delegate stated that he was strongly opposed to the proposal of creating an executive committee. There was a large attendance of the Council at the present meeting, and the work was being satisfactorily and expeditiously disposed of. It was a great advantage to have the views of all the Societies, particularly of the smaller ones which had problems of their own. The reasons which previously urged the Committee to

recommend the formation of an executive committee no longer had any weight. The Society could now afford to assist in payment of expenses of delegates from the smaller Societies. He then moved: "That so much of the above Report as refers to the appointment of an Executive Committee be rescinded," the motion being seconded.

Several delegates spoke in support of the motion, while another thought that it might be better merely to leave the matter in abeyance, as the same position might arise again. The motion was then put to the meeting and carried unanimously.

It was also decided that the office of Treasurer should remain in the meantime.

Rules and Regulations for Proceedings of Disciplinary Committee and Appeals therefrom.

The proposed Rules and Regulations as drafted and then approved by the Wellington Committee, were discussed. It was pointed out that, as the Committee would have to work under the Rules when gazetted, its members should settle the Rules for themselves. The Committee was accordingly empowered to settle the Rules, and to take steps to have passed the necessary Order-in-Council.

Clerks and Others as Members of District Law Societies.—The following letter from the Canterbury District Law Society was considered:—

"The Law Practitioners Bill, Cl. 34 (3) says:—

'Any person who not being in practice as a barrister or solicitor as aforesaid is for the time being enrolled as a barrister or solicitor of the Court may in accordance with the rules of any District Law Society be retained or admitted as a member of that Society.'

You may remember that my Society used to elect solicitor clerks as members of the Society, and that your Society ruled that they could not by law be members of any Society.

Would you kindly inform me whether the above subsection is intended to allow solicitor clerks in future to become members of a District Law Society if the rules of a Society so permit."

A delegate pointed out that now that the Society has the right of disciplining members, clerks are paying fees without the right of representation, while another delegate was of the opinion that everyone paying a practising fee should have the right to become a member.

It was decided that each District Law Society should be allowed to make its own rules as to admission of qualified clerks in accordance with s. 34 (3) of the Law Practitioners Amendment Act, 1935.

Amendment to Rule 413G, Code of Civil Procedure.—The following letter was received by the Secretary from the Rules Committee:—

"With reference to your letter to me of the 6th July, 1933, I have to say that this matter was considered by the Rules Committee at its meeting on 16th instant when it was resolved that the proposal be not supported, as being unnecessary. Members understood that the course proposed is in fact generally followed under existing practice, and one of Their Honours who is a member of the Committee instanced papers at present before him sent forward from the Supreme Court at Hamilton."

Actions by and Against Government Departments.—The President mentioned that Mr. Ziman had written to him asking that this matter should be resuscitated, and it was accordingly decided that Messrs. A. H. Johnstone, K. C., J. B. Johnston, G. P. Finlay, and R. L. Ziman should wait on the Attorney-General and press the adoption of the proposed Bill.

Fees in Bankruptcy—Abolition of £6 Fee on Filing Creditor's Petition.—The Wellington Society forwarded the following letter from a practitioner:—

"It has always seemed to me that the fee of £6 payable on the filing of a *creditor's* petition in bankruptcy is inequitable. With a view—if the Council thinks fit—to representations being made in the proper quarter to have the fee amended, I should like to bring the following considerations to the notice of the Council:—

(1) The purpose of the high fee of £6 is, no doubt, to ensure that where there is nothing in the estate, there is some recompense to the Department for the work which necessarily devolves upon the Official Assignee or his Deputy.

(2) In cases where a petition is dismissed for any reason, the fee having been paid on the filing of the petition is not refunded to the petitioning creditor and the Department obtains a fee greatly in excess of that payable on any other application to the Court and in no way commensurate with the work involved.

(3) In cases where the debtor wishes to effect a compromise with the petitioning creditor or creditors it adds considerably to the sum which he has to find.

(4) If the £6 were payable on the sealing of the order of adjudication, the purpose for which presumably the fee is imposed would be achieved without penalising as it does at present the petitioning creditor or the debtor in cases where the petition is dismissed or withdrawn.

The above remarks have no application, of course, to the filing of a debtor's petition in bankruptcy."

It was stated that the original idea of a fee was to prevent petty bankruptcies, but it had not been meant to apply to a creditor's petition. It was then decided to make representations to the proper authorities to have the fees on both debtors' and creditors' bankruptcies substantially reduced.

Council Meetings.—On the motion of Mr. Howie, it was decided that at least four Council meetings should be held each year.

Five Years' Qualification as Barrister—Law Practitioners Amendment Act, 1935, s. 45.—The President drew attention to s. 45 of the 1935 Amendment, and explained that this Section had been included by the Upper House in direct opposition to the wishes of the Society. Three notices had now been received from officers in Departments of State of their intention to apply under the section for admission as barristers. The Wellington Society had decided not to oppose the applications, and the President wished to know the views of the New Zealand Council on the matter.

That each Society should arrange for some responsible person to inspect the Court file in every case, and if necessary to appear and oppose the application, was one delegate's opinion. After several members had pointed out that often there was very little delay between the filing and the hearing of an application, and it might be impossible for a District Society to have the chance of considering the facts, it was decided that Messrs. O'Leary and Watson should interview the Chief Justice and try to arrange some course of action which would ensure the serving on District Societies of copies of the relative affidavits in connection with each application.

The opinion was expressed that action should be taken to repeal s. 45 as soon as possible.

Vote of Thanks to Proxies.—Mr. H. B. Lusk, at the conclusion of the business, expressed the appreciation of the Council of the excellent work which had been done in the past by those Wellington practitioners who had acted as proxies for the District Societies, a vote of thanks to these gentlemen being duly carried.

Australian Notes.

By Wilfred Blacket, K.C.

Non haec in foedera veni.—It is much to be regretted that Australian Parliaments have so poor a sense of honesty in dealing with statutory contracts and contractors. Recently I referred to one matter of hardship endured by the puisne Judges of New South Wales, but dealt only with the matter of salary and its diminution by income tax; but that is only a part of their grievance, for their appointment was as provided by the Constitution Act *quamdiu se bene gesserit*; then the contract was varied and retirement at seventy was made compulsory. The Act also provided for pension at the rate of two-thirds of the statutory salary on retirement, but unfortunately Mr. Justice Foster became ill and had to retire after seven years' service, but still was able to draw his pension for fifteen years thereafter, and then the contract was again varied to the detriment of the Judges by an amendment providing that the rate of pension should be according to the length of service. The gross injustice of imposing these conditions upon Judges whose contracts were defined by the original Act needs no comment, but even in the case of recent appointments the Legislative Acts and omissions show a shocking disregard for the dignity of the Bench. A similar breach of contract on a much more extensive scale is now to be perpetrated at the cost of the Public Service, for the statutory retiring age is to be reduced from sixty-five to sixty in order that there may be an opportunity of finding employment for a number of boys who have not been able to find work for themselves. The deserved comforts that men had worked to win must now be diminished in order that a necessitous Government may prove its determination to find work for the unemployed.

Marine Gate-crashers.—Off the Victorian coast a sea-leopard tried to clamber into a small fishing-boat. Fortunately there was a rifle handy and an expert at the butt end of it, so the leopard died suddenly, but another arrival of the same kind is cruising in those waters making it necessary for fishermen to take a more effective weapon than a whisky-bottle in the boat with them. Sea-lions and sea-leopards have also several times landed on the eastern coast and as they have not always been treated with the true Australian hospitality so gratefully acknowledged by world-famous doctors, public notification has been made of the fact that the prohibition of cruelty to animals extends to these visitors from underseas, and that they are specially protected by our laws. Their names and addresses have not been stated, as in the case of Pelorus Jack, but still it is legislatively recognised that they have their finer feelings and are entitled to the free and safe use of our beaches when they choose to come ashore on their lawful occasions. Frankly, I do not know the sections which enforce this recognition of their rights, but in this respect I may not be more culpable than Mr. Justice A. H. Simpson, Chief Judge in Equity, New South Wales, from 1896 to 1917. He was very small of stature but very great in knowledge of the law. One day while walking abroad at Katoomba he was greatly annoyed and alarmed at seeing a cow in the road ahead. He wandered into the bush to escape from danger and later getting on to the road again and meeting a constable reproved him for not impounding the cow, whereupon the constable said, "Ah well, me little man, if you knew as much about the law as I do you would know that you can't impound them outside of a municipality." And the constable was right. It was His Honour's misfortune that he was somewhat short-sighted, and on one other day when walking out—I did not say "stepping out"—at that same mountain resort and seeing what he thought to be a hearse approaching, stood at the roadside with black silk hat lowered and head reverently bowed while a Municipal cart loaded with the dustbins of the citizens passed by, but that is another story.

The "Demnition Bow-Wows."—At Hobart, Mrs. Annie Laurie Crawford, a wealthy widow who had lived alone, except as hereinafter stated, in a small cottage, was found dead. In her room there were also eighteen dogs, and she had died from natural causes two days before the discovery of her death. Achieving the ambition of an old-time romancer, the dogs had to "lay them down and die" for their mistress, for the Coroner ordered that they should be destroyed.

Plenty of Mercy.—A death a day is the tribute paid by New South Wales to the motorists, so when the appeal of Frederick Gagliardi was called on before Judge Markell, sitting in Quarter Sessions appeals for the first time since his recent appointment, the police and public were glad to know that a strong and just Judge had attained to the Bench, for His Honour said, "If a man wants to drink he must not drive a car. Things have come to such a pass that people are being killed every day by careless drivers. If a motorist will not realise his duty to the public, he must be stopped from driving."

The charge against Gagliardi was that he had driven a motor-car on a main road upon which there is much traffic at a speed dangerous to the public, and he admitted having driven at a speed of forty-five to fifty miles an hour across intersections, but the police admitted that he was a competent driver and that no person had been actually endangered, and appellant stated that he "took a pride in his driving." Explaining two convictions for driving while under the influence of intoxicating liquor, he said that on one occasion when he felt the effects of liquor he pulled up and asked a police sergeant to get him a driver. The officer took him to the police-station instead, and charged him. On the other occasion he drew into the gutter at 2 a.m., as he felt himself affected by liquor. A police car came upon the scene, and he was taken to the lock-up. It is somewhat remarkable that a man who had twice been admittedly drunk and incapable of driving his car should have any further opportunity of doing motor-mischief, and Mr. Scobie, S.M., desiring, no doubt, to protect the public, fined Gagliardi £20, suspended his licence until its expiry, and ordered that he should be disqualified from holding a licence for three years thereafter. Judge Markell was more merciful. Very much more. He bound Gagliardi over to be of good behaviour, to commit no breach of traffic regulations, and to come up for sentence if called upon within three years. Nothing was mentioned as to his duty to say his prayers and put out the milk-jug, but it is hoped that he will do these things in devout and orderly manner.

It is interesting to observe that this evil of drunken drivers has ancient examples to its discredit, for on August 11, 1855, John Connor was fined £2 for "having been drunk while in charge of a bullock-team in the town of Melbourne."

Legal Literature.

Trial of Alma Victoria Rattenbury and George Percy Stoner. Edited by F. Tennyson Jesse. Notable British Trials Series. (Butterworth and Co. (Publishers), Ltd.). Pp. 298 Illustrated.

With surprising celerity, Miss. F. Tennyson Jesse has edited and the publishers have produced this record of a trial in which the events concluded in the last week of last June.

This "trial" provides a remarkably graphic "human-interest" story, and its details would be rejected with scorn by the novelist accustomed to producing "thrillers," as being too improbable for belief. The editor, in her Introduction, unfolds the story with great skill, and, at the same time, provides an acute psychological analysis of the principal characters. Her comments, which are severe on the woman in the case, appear to be at variance with what the average man would conclude. This is especially striking in regard to the generally-assumed influence over the youth who was condemned to death on the part of the experienced and much older woman whose husband he murdered. That she dazzled this young former farm-hand to the point of distraction, with gifts of crepe-de-chine pyjamas at £3 3s. 0d. a time and similar presents, seems to have been the basis of the jury's recommendation to mercy when he was found guilty.

The action of the events leading to the trial moves with great speed from the engagement of the youth Stoner as chauffeur-handyman by Mrs. Rattenbury in the last week of September, 1934, until he and his thrice-married mistress stood charged with murder in the dock of the Central Criminal Court on May 27, 1935.

Even with the acquittal of Mrs. Rattenbury, after the able defence put up for her by Mr. T. J. O'Connor, K.C., her leading counsel, and the sentencing to death of the eighteen-year-old Stoner on May 31, the sequence of tragic events does not end. Three days later, Mrs. Rattenbury committed suicide, an occurrence that is fully dealt with in the book; and, after Stoner's appeal to the Court of Criminal Appeal had failed, notice was taken of the jury's recommendation and he was reprieved before the end of the same month. His whole association with Mrs. Rattenbury had lasted only nine months.

This is one of the most astonishing "trials" of the series with which we have become familiar; and it is up to the accustomed high level of production and completeness of its predecessors. It may be that its up-to-date setting adds to the interest of an amazing story; but, be that as it may, the imagination of the novelist would boggle at recording events and relationships such as are here set forth.

Winning the Toss.—Some years ago a Judge was appointed to preside in one of the English Courts, much to the annoyance of the profession, who considered the Lord Chancellor might have made a better use of his patronage. His conduct for some time after his appointment justified the apprehensions previously entertained. Once after he had delivered judgment in a particular case, a King's Counsel observed in a tone loud enough to reach the Bench: "Good heavens! every judgment in this Court is a mere toss-up." "But *heads* seldom win," observed a learned junior sitting behind him.

Practice Precedents.

Running-down Action: Statement of Claim, Statement of Defence, and Judgment.

Rule 253 of the Code of Civil Procedure provides for the mode of trial of a civil action in the Supreme Court: *Stout and Sim's Supreme Court Practice*, 7th Ed., 195; see also the notes thereto. Quite commonly in what are known as "running-down" cases the cause of action is one of negligence, which, being a "tort," makes it distinct from a cause of action that is exclusively a breach of contract, or arising out of a breach of contract. So that, the action being in tort, the trial may be by jury: see Rules 254-258 of the Code, *loc cit.* The claim in this precedent contemplates a trial by a jury.

It is to be noted that one of the plaintiffs is an infant, so that an order for the appointment of a guardian *ad litem* will already have been made on separate petition. By Rule 74 of the Code of Civil Procedure, *op. cit.*, p. 87, the guardian is liable for costs; and this raises the question as to whether the guardian is entitled to an order for costs. This question has recently been raised in several cases before the Supreme Court, and it is usual to make an order that costs be reserved on the petition for appointment of a guardian.

Pursuant to s. 13 of the Public Trust Office Amendment Act, 1913, moneys or damages awarded on behalf of an infant are to be paid to the Public Trustee unless the appropriate Court otherwise orders: see, however, as to the Court's discretion, *Walters v. Ryan*, [1933] N.Z.L.R. 821. In the precedent hereunder, the damages are first paid into Court. The plaintiffs' costs consequent thereon are taxable as between party and party and as between solicitor and client, and it is the duty of the taxing officer to certify the respective amounts thereof and the difference (if any). No costs other than those so certified are payable to the plaintiffs' solicitor. The Public Trustee must receive notice of such taxation, *and is entitled to appear and be heard thereon.*

For general information, attention is directed to s. 15 of the Hospitals and Charitable Institutions Amendment Act, 1932, whereby the costs of relief granted by the Hospital Board to injured persons are to be a charge on the damages recovered: see, generally hereon, *Powell v. Hayston and the Wellington Hospital Board*, [1934] N.Z.L.R. 971.

The question as to whether issues are necessary is one that arises, and will be dealt with in the next issue of the JOURNAL.

STATEMENT OF CLAIM.

IN THE SUPREME COURT OF NEW ZEALAND. No.

.....District.

.....Registry.

BETWEEN A.B. of an infant suing by his guardian *ad litem* C.D. of clerk and the said C.D. Plaintiffs

AND

E.F. of etc. Defendant.

day the day of 19 .

THE PLAINTIFFS by their solicitor say:—

1. On the evening of the day of 19 the plaintiff firstly named was riding his bicycle along Street in the City of .

2. At the same time a motor-car owned by and registered in the name of the defendant was being driven out of Street across the intersection of Street.

3. The driver of the said motor-car so negligently and unskilfully managed the motor-car of the defendant that it collided with the plaintiff firstly named.

4. The negligence of the driver of the motor-car consisted in :—

(*a*) Failing to keep a proper look-out.

(*b*) Driving across the said intersection at a speed that was excessive having regard to the circumstances then existing.

(*c*) Failing to observe the cyclist.

(*d*) Failing to slow down stop or steer clear of the said cyclist.

5. As a result of the said accident the plaintiff firstly named sustained a fracture of the skull with a severe degree of concussion and cerebral irritation affecting his eyes and nose and other wounds and bruises.

6. As a further result of the said accident the plaintiff firstly named had to receive hospital and medical care and attention and has been prevented from earning any wages and has endured much pain and suffering. He is also advised that he will not be able to work for a long time to come and may be permanently partially disabled and will lose much of the enjoyment of life in future. His clothing and bicycle were also damaged.

7. As a further result of the said accident the plaintiff secondly named has been put to considerable expense for hospital and medical treatment and will be put to considerable further expense in an endeavour to cure the plaintiff firstly named of his said injuries.

WHEREFORE the plaintiffs claim by way of special and general damages as follows :—

SPECIAL DAMAGES

Hospital Account .. .. £ .
Doctors' Accounts .. .. £ .
etc.

This statement of claim is filed and delivered by solicitor for the plaintiffs whose address for service is at the office of Messieurs , Street .

STATEMENT OF DEFENCE.

(*Same heading.*)

day the day of 19 .

THE DEFENDANT by his solicitor says :—

1. The defendant admits the allegations contained in paragraphs (1) and (2) of the statement of claim.

2. The defendant admits that a collision occurred at the intersection of Street and Street on the day of 19 between a bicycle ridden by the plaintiff firstly named and a motor-car owned by and registered in the name of the defendant but save as is expressly admitted the defendant denies each and all the several allegations contained in paragraph (3) of the statement of claim.

3. The defendant denies each and all the several allegations contained in paragraphs (4), (5), (6), and (7) of the statement of claim.

AND FOR A FURTHER DEFENCE the defendant by his solicitor says :—

4. The defendant repeats the allegations and denials contained in paragraphs (1) to (3) inclusive hereof.

5. The aforesaid collision was caused by the negligence of the plaintiff first named in (*a*) failing to give way to a vehicle approaching from his right-hand side (*b*) failing to keep a proper look-out (*c*) riding across the said intersection at a speed that was excessive having regard to the circumstances then existing (*d*) failing to give any warning of his approach and (*e*) failing to slow down stop or steer clear of the said motor-car.

This statement of defence is filed by of solicitor for the defendant whose address for service is at the offices of Messieurs solicitors Street .

JUDGMENT.

(*Same heading.*)

day the day of 19.

THIS ACTION coming on for trial on the day of 19 before the Honourable Mr. Justice and a common jury of twelve persons AFTER HEARING Mr. of counsel for the plaintiffs and Mr. of counsel for the defendant and the evidence adduced by or on behalf of the plaintiffs and the defendant and the jury having found for the plaintiffs in the sum of pounds shillings and pence (£) IT IS ADJUDGED that the plaintiff A.B. do recover against the defendant the sum of [*words and figures*] and the sum of [*words and figures*] for costs and that the plaintiff C.D. do recover against the defendant the sum of [*words and figures*] which said sums shall be paid into Court.

AND IT IS ORDERED

1. That pursuant to the provisions of s. 13 of the Public Trust Office Amendment Act 1913 the sum of [*words and figures*] for damages and the sum of [*words and figures*] for costs shall be paid out of Court to .

2. That the special damages recovered by the infant amounting to [*words and figures*] shall be paid by to the infant whose receipt shall be a sufficient discharge therefor.

3. That the taxed costs to which the solicitors for the plaintiffs are entitled shall be paid to them by the said out of the damages and the party and party costs received by the said .

4. That the sum of [*words and figures*] the special damages to which the plaintiff C.D. is entitled shall be paid out of Court to the plaintiff's solicitors upon production to the Registrar of the usual authority in writing signed by the said plaintiff.

AND liberty is reserved to either party and to to apply for further directions herein.

By the Court.

Registrar.

(List of party and party costs, disbursements and witnesses' expenses to be attached to judgment.)

Rules and Regulations

Post and Telegraph Act, 1928. Radio Amendment (Radio-dealers) Regulations, 1935.— *Gazette*, No. 13, February 6, 1936.

Government Railways Act, 1926. Alterations in General Scale of Charges upon the New Zealand Government Railways— *Gazette*, No. 13, February 6, 1936.

Board of Trade Act, 1919. Board of Trade (Bread-price) Regulations, 1936.—*Gazette*, No. 14, February 13, 1936.

Extradition Acts, 1870 to 1932 (Imp.). Extradition Treaty with Switzerland.—*Gazette*, No. 14, February 13, 1936.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits (Regulation of Prices) Regulations, 1936.—*Gazette*, No. 14, February 13, 1936.

Public Works Act, 1928. Electrical Supply Regulations, 1935, amended.—*Gazette*, No. 14, February 13, 1936.

New Books and Publications.

The Improvement of Roads and Bridges, Including the Restriction of Ribbon Development Act, 1935. By Harold B. Williams, LL.D. (Butterworth & Co. (Pub.) Ltd.). Price 28/-.

Housing Acts, 1899-1935. By A. Henderson and L. Maddock. (Eyre & Spottiswood). Price 42/-.

Death Duty Accounts, 1935. By Charles H. Picken. (Waterlow). Price 5/-.

The Law of Gaming, Betting, and Lotteries. By A. Fellows. (Solicitors' Law Stationery Office). Price 21/-.

Sir Samuel Romilly (1757-1818). By C. G. Oakes, 1935. (Allen & Unwin). Price 24/6d.

Questions and Answers. Civil Procedure for Examiners. By R. W. Farrin. Second Edition, 1935. (Sweet & Maxwell Ltd.). Price 5/-.

Highway and Road Traffic Law. By R. P. Mahaffy. (Arnold). Price 21/-.