PROTECTING CLIENTS' MONEY – THE ROAD TO THE SOLVENCY AND EXPERIENCE REQUIREMENTS OF THE LAW PRACTITIONERS ACT 1955

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Abstract

This article explores two largely unexplored aspects of the history of the New Zealand legal profession: the generally ignored but very substantial cohort of lawyers who caused financial losses to their clients and other creditors by bankruptcy or theft – or both – and the slow developments of rules designed to limit that loss-causing behaviour. It is argued that the legal profession was remarkably slow to take any effective action, with the vital step of requiring solicitors to operate trust accounts being forced upon them by Parliament in 1892. As the article demonstrates, the trust account regime was not adequately enforced for several decades, with the public continuing to suffer loss through defalcations and bankruptcies of solicitors. The article concludes with discussion of the suspect Law Society claims that inexperience was the key element in lawyers failing to protect their clients and creditors, a claim which was apparently used to justify imposing a "three years' experience" restriction on the right to commence practice on one's own account, as well as a long-overdue bar on bankrupt solicitors remaining in practice.

I. Introduction

The Law Practitioners Act 1955 contained two novel provisions – a requirement that a practitioner not be a bankrupt or insolvent and a requirement of three years' experience in legal employment prior to practice on the lawyer's own account. Neither of these innovations have been the subject of any significant discussion in the literature about the New Zealand legal profession. Although apparently unrelated, it appears that the changes were both aimed at a single problem – that some lawyers, in one way or another, took or dissipated the funds entrusted to them by their clients. Other means of dealing with the problem, with increasing degrees of rigour,

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had been tried, but none had proved entirely successful. The history of loss-causing behaviour and of attempts to limit or prevent it can be divided into three stages. The first, from 1840–1892, saw no significant restrictions on lawyers' conduct except the basic provisions of the various Law Practitioners Acts and minimal supervision by the Supreme Court. The second, which begins with the requirement that solicitors operate trust accounts imposed in 1892, runs to the initiation in 1913 of compulsory audits of solicitors' accounts, although arguably the terminal date should be adjusted because the 1913 change took time to bed in. The final period involves the attempt to tighten those existing approaches until major changes in 1943 and 1955 opted for a different and more exclusionary treatment of bankrupts and the less experienced. These changes are discussed in more detail in section IX below.

II. The Scale of the Problem

There is a received tradition that the legal profession in New Zealand has had only the occasional "bad apple" criminal solicitor. This may stem from the "establishment" nature of most books about the profession, books that generally emphasise the careers of successful lawyers and largely ignore the unsuccessful or disreputable. Only one chapter in the Law Society's centenary history, covering the years 1869–1968, mentions any cases of lawyers' clients suffering significant losses. ES Bowie, writing on Canterbury, mentions two lawyers found to have died insolvent and gives a substantial account of the Harper & Co scandal of the 1890s.[1] Bankruptcies of lawyers hardly get a mention. There is a curious reflection of this in contemporary newspapers. Throughout the period covered in this article, newspapers frequently reported comments by public figures – politicians and others – about lawyers, and published many letters to the editor critical of the profession, often describing lawyers as "sharks" who were prepared to abandon all rules of good conduct – and indeed obedience to the law – in the interests of making money. Yet there was little or no comment about loss-causing lawyers betraying their clients or those from whom they obtained credit.

I contend in this article that loss-causing solicitors were quite common – certainly far more common than previously believed – especially in the 1880s and the 15 years or so after World War 1, and that the losses suffered by their clients were much more substantial than has previously been suspected. By searching the newspaper sources available through the Papers Past collection provided by

1 See ES Bowie QC "Canterbury" in R B Cooke (ed) *Portrait of a Profession* (AH and AW Reed for NZLS, Wellington, 1969) at 249 and 259–261, respectively.

the National Library,[2] and using archival materials, it has been possible to identify 113 individuals who caused major or minor loss to clients by criminal offending or inability to meet their commitments to their creditors, or both.

The first of these is to be found in the 1850s, 13 in the 1860s and seven in the 1870s. In the latter part of that decade and throughout the 1880s and early 1890s, New Zealand was gripped by a major financial depression. This was reflected in the "casualties" or loss-making solicitors – six in 1880 alone, with 15 more over the rest of the decade and seven more by 1896. There were no more cases until 1903, but a relatively low total of seven cases in the 1900s was followed by a major spike in the following decade with 19 identifiable defaulters, six in 1914 alone. Many of those were on a large scale. As with earlier episodes of default and loss to clients, there was little newspaper comment on these events. The *Wellington Times* was a rare exception, arguing in 1913 that maintaining the Public Trust Office was necessary because defaulting solicitors were not uncommon.[3]

The first years of the 1920s saw a major resurgence in the economy, but hard times returned in the later years and persisted throughout the 1930s. This is reflected in the numbers of loss-causing solicitors – 18 in the 1920s, of whom five were in 1928, and 25 in the 1930s. There is insufficient data for the remainder of the period but it seems numbers were significantly lower,[4]

Those numbers need to be seen in the context of a legal profession which grew rapidly in numbers in the 1860s in the aftermath of the gold rushes. I have identified 656 lawyers entering the profession in New Zealand to the end of 1880, of whom a number practised only as barristers and others who were only briefly in the country. It is unlikely that as many as 400 solicitors were in practice in the 1880s, so the proportion of loss-causing individuals may have been at least five per cent. Numbers increased readily until the late 1890s, when the growth accelerated: there were 524 practising solicitors in 1896 and 710 in 1905.[5] Numbers increased dramatically after that, 1,398 in 1922 became 1,685 in 1926 and reached a pre-World War II peak of 1,779 in 1929.[6] Numbers declined significantly over the 1930s, but no precise data is available. Thus, the proportion of loss-causing solicitors is far lower in the post-World War I period than it was earlier.

2 All newspaper sources quoted were accessed through that collection. The author is grateful to the National Library for creating such a rich archive of material without which research of this type would be impossible.

3 The original is not available but the relevant leader is republished in the *Taranaki Daily News* (New Plymouth, 23 May 1913) at 4.

4 This reflects the current cut-off date for the newspapers in the Papers Past collection.

5 Jeremy Finn "The Legal Environment of Salmond's Time" (2007) 38 VUWLR 689 at 704.

6 The data for the 1920s is taken from Minutes of Meetings of the New Zealand Law Society Executive Committee, held by that Society.

III. Causing Loss

To understand the impact of incompetent or dishonest conduct by lawyers, we must first understand the ways in which that conduct could cause loss to clients. This article takes a broad definition of "clients" as including both persons to whom the solicitors provided legal services and those who provided funds to lawyers either to lend out at interest (usually, but not always, on the security of a mortgage over land) or as loans to the solicitor personally, with or without that person being a client for legal services. Lawyers providing legal services often received money to be paid, on instructions from the client, to a third party or from a third party to be transmitted to the lawyer's client. In the absence of any developed financial markets, solicitors in New Zealand, as in Australia or England, acted as conduits for investment. Dishonest or negligent solicitors often stole or otherwise misapplied money which was to be lent out or failed to get proper documentation of mortgages. In a significant number of cases, lawyers would not, or could not, pay over funds to the person(s) to whom they were due, either because they had criminally taken the money or used it for their own purposes, or because it had been intermingled with the lawyer's own funds and was lost when the solicitor became insolvent.[7] There is no single term which encompasses these conceptually distinct but, in practice, overlapping forms of generating losses to clients, nor is there a convenient term for the person causing them. This article uses the less than euphonious or elegant terms "loss-causing" and "loss-causing solicitor".

Theft or other criminal offending caused clear and measurable loss to the victim. In theory, a lawyer who stole money from a client could be sued by the client for the amount taken. Actions for this purpose were rare because the costs of prosecution fell on the victim of the offending – or, later, on Law Societies – and there would be scant prospect of recovering the stolen money.[8] There was no available fund from which victims of dishonest lawyers could be compensated until the establishment of the Solicitors Fidelity Guarantee Fund in 1929. This fund, amassed by levies on all solicitors, made good most losses suffered by the conduct of lawyers in the course of their practice as solicitors (though not necessarily losses where the lawyer was acting as a manager of client investments). The setting up of the Fund drew some public attention. One newspaper story in 1930 commented that the setting up of the Solicitor's Fidelity Guarantee Fund showed the "high standard of honour" of

7 Solicitors who became insolvent also caused losses to those who had provided goods or services on credit. This reflected the general risk of customer insolvency faced by all such traders, and falls outside the scope of this paper.

8 ES Bowie QC "Canterbury" in R B Cooke (ed) *Portrait of a Profession* (AH and AW Reed for NZLS, Wellington, 1969) at 261, identifies this as a major constraint on prosecutions of Leonard Harper for his part in the activities of his firm.

New Zealand lawyers.[9] Certainly the Fund figured largely from the 1930s in lawyer contributions to any public debate. It is interesting to note the New Zealand Law Society spent £500 ($50,000 in 2021 values)[10] on a publicity campaign to explain its creation, effect and claims system.[11] It must be noted that compensating clients for their losses from that Fund simply transferred the loss caused by the offending from the clients to the solicitors who had to contribute to the Fund.

Nor did the creation of the Fund aid with bringing defaulters to justice. The transition to State responsibility for doing so has not been documented, but appears to be between the First World War and Second World War. In 1929, when John Black Batchelor, an absconding and larcenous solicitor was arrested in Australia, newspapers noted that the costs of bringing him back to Christchurch would fall on the creditors but several creditors had offered to fund the process.[12]

Bankruptcy and its more genteel cousin, a composition with creditors, caused losses in a different way. If a lawyer became insolvent all his assets, except those minimal personal belongings protected by the bankruptcy laws, could be taken to satisfy the claims of creditors.[13] Property which a lawyer held purely as a trustee was, in theory, not the property of the lawyer and therefore could not be claimed against. Often there was insufficient evidence of a trust, and in any case the trust property may well have been improperly converted to the use of the lawyer. A composition with creditors occurred where the debtor and his creditors entered an agreement that the debtor (or the debtor's relatives or friends) would pay a specified fraction of the debts owed, and the creditors agreed to accept that sum in full settlement of their claims either without the invocation of the bankruptcy laws or as a way of terminating, if the court approved, bankruptcy proceedings. In this article "bankruptcy" should, unless the context requires otherwise, be taken to include compositions with creditors.

Creditors could benefit from a composition because it was a quicker process and because it created certainty as to what would be recovered. The amount foregone could be, and usually was, a very large fraction of the debt owing, and thus a loss to the creditor. In 1903, Joseph Blades, an Auckland solicitor, is reported to have reached agreement with his creditors to pay them five shillings in the pound (that is, 25 per cent of what was owed), with the payment to be made both to those creditors

9 *Thames Star* (8 January 1930) at 4.

10 Comparisons of monetary value in this article are derived from the Reserve Bank's online inflation calculator: <https://rbnx.govt.nz>. All comparisons are rounded for convenience and because the original sum may not be precisely known.

11 New Zealand Law Society *Annual Report* (1930) at 6.

12 *The Sun* (Auckland, 19 June 1929) at 10.

13 The creation of early New Zealand bankruptcy legislation is ably discussed by Stuart Anderson "Going for the Broke: Making Bankruptcy Law in New Zealand c 1860–1867" (2015) 26 NZULR 507–534.

who had already "proved in bankruptcy" – that is had their claims acknowledged by the court – and those who had not yet done so. Part of the agreement was that his bankruptcy would be annulled; the Court sanctioned this agreement and Blades was discharged from bankruptcy.[14] A rather less willing bargain may have been struck in the case of John King in 1859, as described below.

Estimating the levels of loss caused by a bankruptcy is difficult where there was no detailed accounting record. Initial reports usually included as assets of the bankrupt any book debts owing to him for legal services, without factoring the proportion unlikely to be recovered. Reports by the Official Assignee or by trustees of a bankrupt's estate sometimes revealed how little the book debts were worth. One example of many is when Charles Forwood decamped to Australia in 1880, his accounts showed debts owing of over £1,000 (around $180,000 in 2021 values), but a likely recovery of only £280.[15] In 1887, £170 of book debts owed to Alfred Augustus Catomore of Dunedin were valued at £15.[16] Nearly 30 years later, another bankrupt had book debts of more than £23,000 ($3.75 million in 2021 values) but the Official Assignee considered only half were recoverable.[17] It is possible that some of the more optimistic lawyer-bankrupts had failed to allow for this factor when assessing their solvency and continued trading themselves into further debt. The position was more complex where lawyers had contingent obligations that might or might not become due. For example, Gervase Disney Hamerton of New Plymouth, who was bankrupted in January 1880, had direct liabilities of £4,216 (a little over $750,000 in 2021 values) outweighing assets of £3,610 (about $640,000 in 2021 values) both being dwarfed by the contingent liabilities of £14,002 (around $2.5 million in 2021 values).[18] The latter probably reflected guarantees of the indebtedness of others.

Throughout the period, the costs of litigation in bankruptcy proceedings fell on the unfortunate creditors. Many obviously declined to finance proceedings which were unlikely to generate a significant return. Sometimes, if the amounts owing were small and the chance of recovery low, creditors simply did not attend the mandatory creditors' meeting which left the decision in the hands of the few present.[19] In other cases, it appears creditors did not pursue potentially successful actions because of the costs of litigation. Joseph Alexander James McGregor, one of several lawyers to be bankrupted twice while in practice, first filed in bankruptcy

14 *The Auckland Star* (Auckland, 7 September 1903) at 2.
15 New Zealand National Archives (NZNA) Wellington AAOM W3843 Box 98 record 1217.
16 *The Otago Daily Times* (Dunedin, 1 November 1887) at 4.
17 The lawyer was Charles Hill, of Christchurch, another absconder: *The Evening Post* (Wellington, 4 November 1914) at 2.
18 *The Evening Post* (Wellington, 20 January 1880) at 2.
19 For example, no creditors at all appeared at the meeting held in respect of John Rankine Cowan in Queenstown in 1882, see the documents in NZNA Dunedin, file AEPG D568 22919 Box 115, item a.

in 1868, with liabilities exceeding assets by over £11,000 (about $1.3 million in 2021 values). The Official Assignee considered a number of the transactions by McGregor and his close associates at the time of the bankruptcy were fraudulent and could be set aside by the court but, as none of the creditors were prepared to litigate, the Assignee was powerless to intervene.[20]

IV. Bankruptcy and its Consequences for Lawyers

Throughout the period covered by this article, creditors could seek to have debtors imprisoned to force payment of judgment debts; such imprisonment could be avoided by filing in bankruptcy. Solicitors seem to have done so on a number of occasions, probably because statute effectively prohibited solicitors who were prisoners in any prison from carrying on their legal practice during the period of confinement.[21] Once released from prison, the solicitor could resume normal practice.

Bankruptcy, however, did not affect practice rights. Nor, at least in the 19th century, did it carry any particular stigma. It was, to some extent at least, simply the consequence of a volatile colonial economy that some investments and businesses prospered, and others did not. Lawyers, particularly those who made capital investments of one kind or another, were no exception. Most bankrupt lawyers carried on with their practices; some were later appointed to government positions – Samuel South became a District Judge and Henry Perham a Coroner and deputy District Judge – or to other positions of public regard. Charles James Foster, appointed in 1873 as the first Law lecturer in Canterbury, had been bankrupted in 1869.[22] This was a more lenient regime than some others – the Civil Service Act 1866 provided that officials were deemed to forfeit their government position if they became bankrupt or entered into a composition with creditors.[23]

The Supreme Court could – and in the 19th century very occasionally did – exercise its inherent power over lawyers in cases where the circumstances of the bankruptcy reflected on the fitness of the practitioner to practice law. The standard of probity demanded was not high, as evidenced by the Court of Appeal's decision

20 NZNA Dunedin DAAC D256 18116 Box 525 record 44. For further discussion of this case see Jeremy Finn "The Early Central Otago Goldfields Lawyers" in L Carpenter and L Fraser (eds) *Rushing for Gold* (Otago University Press, Dunedin, 2016) at 246–247.

21 Law Practitioners Act 1855, s 33. The provision was re-enacted virtually unchanged in the Law Practitioners Acts of 1882 and 1931.

22 J H Farrar, "Dr CJ Foster – Canterbury's First Law Teacher" (1980) 1 Canta LR 5 at 9.

23 Civil Service Act 1866, ss 20, 24 and 21.

in *In re Staite.*[24] In deciding an application for readmission after striking off for misappropriating funds, the Court held that where a solicitor had misappropriated his client's moneys, striking off proceedings would be terminated if the client was repaid (whether by the solicitor or another) and the costs of the proceedings were also paid. If such payment was not made the solicitor would be struck off, and re-admission to the profession would only occur if there was no reason affecting the character of the solicitor. One might think the misappropriation would, of itself, affect the solicitor's character! Staite was refused readmission not because of the earlier theft but because he had accrued multiple convictions for public drunkenness since he was struck off.

As bankruptcy increasingly became associated with, and consequent on, criminal proceedings against the lawyer in question, and as the colonial economy became more settled, the position probably changed and there was some loss of social standing. By the 1930s, it seems many lawyers saw bankruptcy as a matter of last resort. They may have been reluctant to expose their finances to the public gaze, and possibly lose clients by confessing that they were insolvent. In 1931 a provincial solicitor, Athol Fieling Howarth, was convicted and imprisoned for theft of something over £900 (around $100,000 in 2021 values) from his trust funds. The losses came not from the practice itself but from property dealings. At his sentencing hearing his counsel commented that Howarth should have declared bankruptcy, and Smith J found it necessary to say that: "It was much better for a solicitor to go bankrupt than to misappropriate trust moneys".[25] No further comment on contemporary mores is needed!

V. Establishing Losses Caused by Bankrupt Lawyers

Bankruptcy records contain two documents estimating the degree of indebtedness of the bankrupt and the assets available to creditors. The first was provided by the bankrupt at the time of filing for bankruptcy; the latter by whoever settled the final accounts (initially trustees in bankruptcy, later the Official Assignee). It is clear, but not perhaps surprising, that many lawyers who filed in bankruptcy significantly misstated the extent of their liabilities and any deficit. In some cases, this may have been genuine error; in others it may have been an attempt to conceal embezzlement and theft. An uncomplicated example is Charles Edward Bunny, a solicitor who commenced practice in 1877 in a small North Island town, and

24 *In re Staite* (1883) 1 NZLR 362 (CA).
25 *The Auckland Star* (Auckland, 6 March 1931) at 3.

was bankrupted in April 1884. Bunny filed a statement of debts and assets which showed a relatively small overall shortfall of only £321 (about $52,000 in 2021 values) given the assets were stated to be £935 (over $150,000 in 2021 values) and the debts £1,256 (about $203,000 in 2021 values). The Official Assignee found that the assets had been stated at more than three times their actual value and the debts were almost half as great again as had been stated. The overall deficiency was therefore over £1,700 ($275,000 in 2021 values). Allegations of fraud and embezzlement were raised but Bunny was discharged by the judge on a point of law.[26]

On some occasions the difference between reality and the figures filed may have been the result of unduly optimistic assumptions by the bankrupt. A classic example is William Sinclair who practised for more than 30 years after admission in 1878, including 14 years as Crown Solicitor in Blenheim. Sinclair became involved in land speculation and development around 1909 and apparently got into financial difficulties shortly after that. He filed in bankruptcy in April 1914, claiming to have assets which drastically outweighed his liabilities on the basis he had options over large areas of land in the North Island which he could exercise at £2 per acre and believed the land would quickly resell for £10 an acre. On that basis he had assets of well over £4,400 compared to debts of £1,700. A newspaper headlined this court report as "Optimistic Bankrupt", and the Official Assignee considered that the land was unlikely to produce anything like the figures claimed.[27]

VI. Discharge from Bankruptcy

It appears that for much of the 19th century – but apparently not persisting into the 20th – creditors would occasionally forgo some or all of their claims and accept losses where the bankrupt was essentially a victim of circumstances, particularly where they had been affected by meeting obligations on guarantees or had simply been the victim of changing economic circumstances. The bankrupt who was perceived as having done his honest best to meet his obligations might receive significant concessions which left the bankrupt and his family with significantly more chattels and other property than the law would have done. For example, Alfred Augustus Catomore essentially had all his debts forgiven because the root cause of his inability to pay was the collapse in the value of properties he had purchased in Palmerston, an Otago provincial town, which at the time had inflated prices arising from an anticipated gold boom.[28]

26 *New Zealand Mail* (Wellington, 31 October 1884) at 13.
27 *The Sun* (Auckland, 30 April 1914) at 5.
28 The details of the case are in NZNA Dunedin file DAAC D256 18122 Box 610 record 1 "Dunedin Bankruptcy 1887–1927".

One of the most unusual discharges from bankruptcy was in the case of an Oamaru lawyer, Joseph O'Meagher, who was bankrupted in December 1883 but informed the Official Assignee in January 1884 that he had negotiated a composition with his creditors under which he would pay one penny in the pound on his debts (0.4 per cent) and retain all his estate and effects. The court gave effect to this arrangement, which is remarkable since one of the creditors was a firm of Dunedin lawyers owed £130 and O'Meagher was retaining assets returned at £520 (mostly book debts which were probably not worth anything like the recorded value) while the creditors accepted a loss of over £1,200. O'Meagher indicated that the creditors had all accepted that his bankruptcy was not his fault and that he had behaved honourably. There is therefore the possibility that his difficulties were caused by meeting a guarantee or some similar obligation which was seen as socially more important than meeting his normal liabilities. Alas, we know no more about the case.

VII. Insolvency and the Dead or Vanished

Throughout the period covered by this article, a debtor committed an act of bankruptcy by leaving New Zealand without notifying his or her creditors. This allowed steps to be taken in the bankruptcy even if the lawyer could not be found – temporarily or permanently. Proceedings could also be taken where an individual died and her or his estate was insolvent. Absconding from New Zealand was not uncommon – indeed in the 1860s alone there were at least four offenders who tried to do so, with two succeeding. The two who got away were Michael Creagh in 1864 and Thomas Shayle George in 1867. Creagh had been appointed to a government administrative position in Dunedin but shortly after arriving there he decamped for Australia with a very substantial amount of money. This was never apparently recovered.[29] Thomas Shayle George disappeared from Auckland in February 1867, leaving completely out of pocket a substantial number of clients who had provided him with money to lend out.[30] George died the following year in the United States.[31]

The other two lawyers had very different experiences. John Patten was arrested in 1863 as he tried to board a ship in Dunedin and was convicted of misappropriating a small sum from a client.[32] In early March 1867, the Supreme Court granted an application that the estate of Edward James Cox be sequestered for the benefit of

29 *The New Zealand Herald* (Auckland, 18 January 1864) at 3.
30 *Lyttelton Times* (Lyttelton, 23 March 1867) at 2.
31 *The New Zealand Herald* (Auckland, 27 June 1868) at 3.
32 Jeremy Finn "The Early Years of an Unregulated Profession: Lawyers in the Southern Districts of New Zealand 1850–1869" (1995) 6 Canterbury LJ 56 at 65.

his creditors.[33] Approximately a week later, Cox disappeared from Auckland leaving, by one report, "a confession of systematic fraud" and liabilities of about £20,000 (about £2.3 million on 2021 values) to clients who had entrusted him with money for investment.[34] He was soon arrested in Wellington, brought to Auckland and committed for trial on charges of theft of money from a client. The prosecution failed, as the judge considered the evidence did not establish theft, as opposed to some other offence.

There was little newspaper comment about the impact of the defalcations by George and Cox. One local newspaper considered the losses suffered by creditors could be traced back to the actions of unsophisticated savers entrusting small sums to solicitors who promised higher interest than did banks, without regularly recovering the principal amount to ensure it was secure.[35] A rival publication argued the problem of defaulting solicitors was due to entry to the legal profession being unduly easy so that "money-lending" solicitors could set up in practice.[36]

Other delinquent solicitors of the period employed the tactic of disappearing from the colony. Benjamin Balmer of Oamaru was made bankrupt in 1885 on the basis he had committed an act of bankruptcy by departing from his place of residence with intent to defeat his creditors. Affidavits filed in the proceedings indicated that Balmer had not been seen in the town for two weeks, had been pursued for various debts and had allegedly told a local stable keeper that he was leaving Oamaru for Honolulu and "if he could only reach that place, he would be all right or words to that effect".[37] His wife and children were left behind in poverty. Balmer's debts exceeded his assets by £2,800 (around $560,000 in 2021 dollars) and the creditors received about 30 per cent of what they were owed. In January 1888, Samuel Jackson "the younger", a solicitor on the Thames goldfield, was declared bankrupt on the basis of acts of bankruptcy including leaving the country without notifying his creditors. He was reported the following year to be practising law in California.[38] Successful evasion of creditors and authorities became much rarer in the 20th century, although Charles Hill of Christchurch managed it in 1914.

I have identified eight lawyers who were found to be clearly insolvent at the time of their death and should be treated as loss-causing solicitors, although their indebtedness may not have been known even to their family before then. In one of these cases, Allan Holmes, who died in Dunedin in 1909, almost the entire debt

33 *The Daily Southern Cross* (Auckland, 11 March 1867) at 5.
34 *The Colonist* (Nelson, 22 March 1867) at 3.
35 *The Daily Southern Cross* (Auckland, 5 March 1867) at 4.
36 *The New Zealand Herald* (Auckland, 9 April 1867) at 3.
37 *The Evening Star* (Dunedin, 11 August 1885) at 2.
38 *The Auckland Star* (Auckland, 17 January 1888) at 5; and *The Auckland Star* (Auckland, 5 June 1889) at 3.

owed was to a person with the same surname and we may surmise that the solicitor had been supported financially by that family member for some time.[39] Others seem to have largely kept themselves afloat by indiscriminate borrowing and/or theft of clients' funds. William Halse died in 1882 in New Plymouth after almost 40 years of legal practice. It emerged that he had stolen many thousands of pounds from his clients -according to one account to feed a gambling addiction. His debts totalled over £22,000 and creditors received just under 6/- in the pound (30 per cent of what was owed) so the deficiency must have been over £16,000 (or $2.8 million in 2021 values). The largest single insolvency on death was probably that of William Coleman, an Auckland lawyer and businessman who died in 1915. His debts exceeded his assets by an estimated £40,000 (somewhat over $6 million in 2021 values). One of these seven, John Beatty Gresson (the son of Mr Justice Henry Barnes Gresson) committed suicide when discovery of substantial thefts from his clients became inevitable. There was a deficiency of over £20,000 ($3 million in 2021 values) in his estate. It is possible that Frederic James Hammond of Auckland also committed suicide in 1921.[40]

VIII. Combining Law and Other Activities as a Cause of Bankruptcy

A significant number of bankrupt lawyers had combined their legal practice with some other activities, farming and property speculation being very common. Perhaps the most unusual was John James Patterson, a solicitor in Dannevirke who also operated a sawmilling business. Patterson filed for bankruptcy in December 1908 but the public examination of his financial situation which was required by law did not take place until September 1909, being delayed by his trial, conviction and sentence for a breach of the Bankruptcy Act.[41] A newspaper story at the time of his filing suggested that creditors would suffer "heavy" losses but unfortunately no more details are available.

Edric Adolphus Julius, of Oamaru, was bankrupted in 1871 largely because of the failure of a large-scale sheep farming operation which he undertook in partnership

39 NZNA Dunedin, file DAAC D239 9075 Box 305 record 500.

40 Hammond died of an overdose of "chloral lydiate" which he had apparently been using as a sleeping draught. The Coroner recorded a finding of death by misadventure on the basis that the deceased had a record of being careless with medicines: *The Auckland Star* (Auckland, 5 September 1921) at 5. The inquest was informed that Hammond had been worried about business matters, but does not appear to have been told that Hammond had been convicted earlier that year of failing to file tax returns covering 1918 to 1920, and that both he and his junior partner were on the verge of bankruptcy as a result of very large thefts from clients.

41 *Hawera & Normanby Star* (Southern Taranaki, 17 December 1908) at 5; and *The Evening Post* (Wellington, 13 September 1909) at 7.

with his brother.[42] That side of his affairs was basically given a fairly clean slate by the Official Assignee, who considered there had been no misconduct and creditors would eventually recover pretty close to their full entitlement. It appears that his law practice was at that time in significantly greater difficulties as the liabilities related to the law practice were over £5,000 (more than $760,000 in 2021 values) greater than the assets. His statement of affairs indicates clearly that several hundred pounds had been lost in an abortive attempt to develop what was believed to be a new goldfield. The Official Assignee did not comment on this aspect of his affairs. Despite the bankruptcy, Julius continued practice in Oamaru for many years.

At the other end of our period, a number of the bankruptcies in the early 1930s also had little to do with the legal practices of the lawyers concerned. The largest defaulter was a Gisborne lawyer, George Henry Lysnar, who went bankrupt in May 1930 with a deficit of more than £24,000 (over $2.5 million in 2021 values). This came principally from losses on his massive sheep farming operations as a result of a drop in wool prices and a forced sale of land at which the land was disposed of at a significant undervalue. Lysnar stated, apparently credibly, that in 1921 his assets had been more than £46,000 (about $4.2 million in 2021 values) greater than his liabilities.[43]

IX. Tackling Loss-Causing Behaviour and Changes to the Requirements for Practice

The history of attempts to limit or prevent loss-causing behaviour can be divided into three stages. In the first, from 1840–1892, there were no significant restrictions on lawyers' conduct except the basic provisions of the various Law Practitioners Acts and minimal supervision by the Supreme Court. The second, which begins with the requirement imposed in 1892 that solicitors operate trust accounts runs to the initiation in 1913 of compulsory audits of solicitors' accounts, although arguably the terminal date should be adjusted because the 1913 change took time to bed in. The final period involves the attempt to tighten those existing approaches until major changes in 1943 and 1955 opted for a different and more exclusionary treatment of bankrupts and the less experienced.

42 See the documents in NZNA Dunedin, file DAAC 11816 D256 536/596.
43 The Auckland Star (Auckland, 20 May 1930) at 19.

A. The laissez-faire period to 1892

As indicated, for the first five decades of the colony's history the legislature imposed no special rules requiring solicitors to handle their clients' money in any particular way, nor limited bankrupts from practicing law. Possibly nothing was seen as necessary in the early years – the first known significant cases of a lawyer's conduct which led to major losses by a client or the public was in 1859 when John King of Wellington was challenged over his executorship of an estate where he had not accounted for £1,800 of the capital (around $225,000 in 2021 values) nor paid any interest on the estate fund for seven years. King pleaded an inability to pay. When threatened with contempt proceedings for failure to comply, King negotiated an agreement, to which the judge reluctantly agreed, for the legatees to accept £1,900 in full settlement and King's friends would find the funds.[44] Given the high interest rates of the time and the compounding debt, the legatees must have suffered a substantial loss.

In the early 1860s there were a couple of instances of proven dishonesty by lawyers,[45] but these concerned only small sums which the clients did not recover. As we have seen, Michael Creagh and Edward Cox both defaulted in the mid-1860s. The first bankruptcy of a practising lawyer, Samuel Munckley South in Dunedin, occurred in 1864.[46] The lack of comment may have been because he had incurred most of the relevant debts in Australia before he migrated to New Zealand.

The following year saw the first lawyer to declare bankruptcy on the basis of locally-incurred debts. Edward Cardale, an Englishman, practised in Timaru in 1867–1868. Clearly his practice did not prosper, and within six months of starting his own firm he filed in bankruptcy, stating a deficit of around £370 (about $42,000 in 2021 values) on which basis the creditors would lose 10 per cent of what they were owed.[47] He attributed his bankruptcy to "unexpected pressure from creditors and inability to get his estate in in time to meet his liabilities".[48] Striking off proceedings were brought in the Court of Appeal, but Cardale was only suspended from practice for three years.[49] Shortly afterward, Francis Slater went bankrupt with the largest

44 *The Wellington Independent* (Wellington, 23 October 1858) at 3.
45 See Finn, above n 32, at 65–66.
46 NZNA Dunedin DAAC D256 20364 Box 620 record 199.
47 *Lyttelton Times* (Lyttelton, 18 January 1868) at 2. It seems likely the actual deficit was greater than first stated because later reports indicate that the Official Assignee had great difficulty in collecting moneys allegedly owed by Cardale's clients: *The Timaru Herald* (Timaru, 30 June 1869) at 2. The first, abortive, bankruptcy hearing is reported in *The Timaru Herald* (Timaru, 13 May 1868) at 2; and a second meeting in *Lyttelton Times* (Lyttelton, 22 July 1868) at 2. A partnership between Arthur Perry, a prominent local lawyer and Cardale was dissolved in August 1867: *Lyttelton Times* (Lyttelton, 24 August 1867) at 3.
48 *Lyttelton Times* (Lyttelton, 27 March 1868) at 2.
49 *The Evening Post* (Wellington, 9 November 1868) at 2.

deficiency of the 1860s – over £11,000 (about $1.4 million in 2021 values). As no dishonesty was alleged, Slater was not even suspended from practice.[50]

In the 1870s there was one embezzlement and a further six bankruptcies, including William Wilfrid Wilson who had already been bankrupted in Australia before coming to New Zealand[51] and two New Zealand lawyers, John Richard Pattinson Stamper[52] and Henry Hamersley Travers,[53] who were both to be bankrupted on two occasions while in practice. Both the latter had quite small deficiencies, as did most of the other living loss-makers of the decade. The largest deficiency was that of David Main of Dunedin, who was found revealed after his death to have debts of about £10,000 (around $1.8 million in 2021 values) more than his assets.[54] Things were to change.

B. The introduction of trust accounts and of audit requirements

The first substantial step toward limiting defalcation by lawyers occurred in 1892. The Law Practitioners Amendment Act 1892 required all solicitors to maintain a trust account into which clients' money must be paid and kept separate from the lawyer's own finances. This change, then unique in the British Empire, was the last legislative achievement of Sir George Grey, and did not originate with the legal profession in any way. One newspaper welcomed this as a way of minimising losses caused initially by lawyers' inadequate management of funds – labelled as a system of "muddle" – rather than initial dishonesty.[55]

The new requirement was far from a complete solution. While there were fewer bankrupt lawyers in the 1890s than in the previous decade, this may have been more to do with a general economic recovery than anything else. Further, shortly after the new law was passed, there was the largest single defalcation by solicitors until modern times in nominal value, and by far the highest on an inflation-adjusted basis. The implosion of Harper & Co in Christchurch in 1893 caused losses to clients of more than £182,000 ($36 million in 2021 values).[56] Harper, the son of an Anglican Bishop of Christchurch, is perhaps the first of the "establishment" figures to be publicly regarded as embezzling clients' funds – though far from the last. It is not

50 Finn, above n 32, at 67–68.

51 Wilson was bankrupted in Melbourne in 1862: *The Argus* (Melbourne, 12 December 1862) at 6; and in Auckland in 1870: *The Daily Southern Cross* (Auckland, 11 June 1870) at 3.

52 Stamper was bankrupted in 1875: NZNA Dunedin DAAC D256 18116 Box 541 record 890; and again in 1892: DAAC D256 18122 Box 610 Record 1 Dunedin bankruptcy register, entry 592.

53 See *The Evening Post* (Wellington, 21 September 1877) at 2; and *The Evening Post* (Wellington, 17 September 1888) at 3.

54 Probate records, NZNA Dunedin DAAC D239 9073 Box 37 record 791.

55 *The Timaru Herald* (Timaru, 30 August 1892) at 2.

56 ES Bowie QC "Canterbury" in R B Cooke (ed) *Portrait of a Profession* (AH and AW Reed for NZLS, Wellington, 1969), at 260 states the loss as £182,500 not including losses of family members, so the total may have been higher.

clear whether there was a direct link between the trust account requirement and the collapse of Harper and Co. Leonard Harper, the leading figure, had promised consistently high rates of interest to investors, and it appears that, as with modern Ponzi schemes, capital coming from later investors was being used to pay interest to earlier investors – with the usual fatal result.

There were then a series of defalcations and bankruptcies in the run-up to the First World War, some on a grand scale. There appears to be a higher proportion of solicitors who had stolen money from their clients going bankrupt after investigations had begun or indeed after convictions had been entered. In this period, no solicitors remained in practice after bankruptcy. Most of the large-scale cases had clearly been going on for some years. Christchurch solicitor Frank Bruges embezzled, with the help of his managing clerk James Goodman, at least £10,000 (around $1.75 million at 2021 values) from his clients. In March 1906, Bruges was bankrupted on a creditors' petition. Bruges's liabilities exceeded his assets by more than £10,000 and something close to that sum in trust moneys was irrecoverable. Both were tried and convicted of dishonesty offences. Bruges successfully appealed against his conviction and at the re-trial was acquitted when Denniston J directed the jury to acquit on the basis of insufficiency of evidence.[57] (Bruges apparently argued Goodman had been criminally dishonest; while Bruges himself had been at most careless). Despite the acquittal, the Canterbury District Law Society successfully sought to have Bruges struck off the roll on the ground of professional misconduct, including failure to operate a trust account and paying trust funds into his own bank account despite cheques on that account being dishonoured for lack of funds. The Court of Appeal readily did so.[58] One judge suggested that the deliberate and prolonged breach of the trust account requirement would of itself have justified striking off.[59] This clearly opened the way for Law Societies to focus on breaches of the requirement to have a trust account as a primary basis for disciplinary action, without an absolute need to show dishonesty. It was not until the 1920s they really took the opportunity offered.

There was an important further regulatory step in 1913. The great weakness of the 1892 trust account legislation was that it lacked any enforcement regime. Indeed, at the time of Grey's Bill, some commentators said a heavier penalty was needed and suggested a possible threat of imprisonment would be necessary. That suggestion was not then adopted, but s 14 of the Law Practitioners Amendment Act 1913

57 The Crown Prosecutor, Walter Stringer KC, recovered very substantial damages from *NZ Truth* for its suggestion that Stringer had been involved in a conspiracy to keep Bruges out of jail: *Norton v Stringer* (1909) 29 NZLR 249.

58 *In re Bruges* (1907) 26 NZLR 541.

59 At 544.

empowered the Governor-General in Council to make regulations for the annual audit of solicitor's accounts. Those regulations could include fines of up to £100 for the breach of any of the regulations and also provides that a deliberate failure to comply with the regulations was a ground under which the Supreme Court could exercise, if it chose, to exercise its summary jurisdiction over officers of the court by suspension or striking off. In practice, the latter was not used but the threat of it was clearly a significant incentive to comply. A remaining weakness of the scheme was that the solicitor to be audited had unrestricted choice as to who that auditor would be.

Again, it is hard to measure the immediate effect of the audit requirement. It seems probable it had some influence in some cases. As noted earlier, Charles Hill, a Christchurch lawyer and speculator in land, absconded (successfully) in 1914 owing large amounts. He may have done so because any audit would have found that he did not maintain a trust account as required and his accounts had not been balanced for nine years.[60] However the economic dislocations which were among the secondary effects of the First World War may well have been more significant.

Some defalcations revealed very large sums of money had been lost. Three stand out. Walter Shaw, a Timaru solicitor and land developer was found in 1912 to have lost around £51,000 pounds of his clients' moneys (around $9 million at 2021 values). Shaw was charged with multiple counts of theft.[61] Creditors recovered only two per cent of their money. [62] The following year a smaller, but still very significant amount had vanished in the clutches of Oliver Gillespie, a Manawatu lawyer, who admitted to stealing at least £10,000 ($1.5 million or so in 2021 dollars) from the trust fund of his firm (the illness of his senior partner having left him in control of affairs); he was bankrupted with a total deficit of around £16,000 (around $2.4 million in 2021 values).[63] As in many other cases, victims of his offending were left to litigate to determine who would carry what proportions of the losses incurred.[64] The third was the insolvency of William Coleman described earlier.

It is clear that during this period, some solicitors ignored, for one reason or another, the trust account requirement. More than 20 years after it was mandated,

60 *NZ Truth* (Wellington, 7 November 1914) at 2. Hill may well have been responsible for the suicide of the Official Assignee in Christchurch, who was found by the Coroner to have poisoned himself while of unsound mind, having been depressed and worried about an absconding solicitor, who, in the context must have been Hill: *The Manawatu Standard* (Palmerston North, 7 November 1914) at 5.

61 *The Press* (Christchurch, 28 August 1913) at 9.

62 "In Bankruptcy" (1925) 62 *New Zealand Gazette* 2507 at 2531.

63 *The Manawatu Standard* (Palmerston North, 17 December 1915) at 5.

64 *The Ashburton Guardian* (Ashburton, 2 May 1914) at 4.

a solicitor stated in an affidavit filed in (successful) striking off proceedings for embezzlement and conduct incompatible with being a solicitor, that:[65]

> I have no banking account. I keep all money of my clients in a cash-box. My transactions are mostly for cash. A banking account would be of no use to me. On receipt of the £29 3s. 4d. belonging to Mrs Bridgland, I at once placed it in my cash-box. From the time of my so placing it there, there has always been in my cash-box a larger amount than would be necessary to cover the said sum and all other moneys of my clients in my hands.

One Auckland lawyer tried to evade the trust account rules by labelling the sole bank account he maintained as "the trust account" in which were mingled monies due to clients and those to which he was entitled. The Court of Appeal, not surprisingly, considered this a breach of the statute and the solicitor was struck off.[66] Perhaps the most egregious offender against the rule requiring trust accounts to be audited is Henry Edward Elliott who was struck off for breach of the audit rule in 1913 but readmitted to the profession in 1919. He was then convicted and fined for failure to have his trust account audited in 1920, 1922, 1925 and 1926. In the latter year he sought an adjournment of striking off proceedings so he could obtain an auditor's certificate.[67]

Some quite prominent lawyers were found to have breached the trust account rules, including at least two former Crown Prosecutors and one Crown Solicitor – J W White of Timaru. In the latter case the Law Society's auditor found the firm's books and finances to be very unsatisfactory. There was a substantial deficiency in the trust account, as funds from it had been used for business purposes because the bank would not allow the firm's business account to be overdrawn.[68] White resigned his official position shortly afterwards.

A rather different weakness of the scheme was revealed after the Auckland firm, Hammond and Cracknell, collapsed with large amounts owing to creditors. The senior partner, Hammond, who appears to have been the major culprit, died as writs were being prepared to sue him. Cracknell first claimed the deficiency was about £20,000 (approximately $1.8 million in 2021 values); it appears to have been at least twice that. He was struck off in 1921 and convicted on a guilty plea of stealing £8,200

65 *In re Baillie (A Solicitor)* (1915) 34 NZLR 705 at 712.
66 *In re F* [1932] NZLR 315.
67 *The New Zealand Herald* (Auckland, 11 February 1922) at 11; *The Auckland Star* (Auckland, 2 July 1925) at 9; and *The New Zealand Herald* (Auckland, 10 May 1926) at 10.
68 See documents in file J1 1053 1924/961, NZNA, Christchurch.

(about $730,000 in 2021 values) and sentenced to three years imprisonment.[69] These estates were not finalised until 1926, with creditors of the firm receiving just over 2/6 in the pound (about 13 per cent of what was owed). A local accountant was prosecuted for providing false declarations that the firm's books had been audited, allegedly because he feared losing the firm as a client if he did not do so. The shortfall in the trust account, according to that report, was around £45,000 (around $4 million in 2021 values).

C. Changes and reform 1935–1955

The Law Practitioners Act 1931 authorised the tightening of some aspects of the audit process, including giving the Government power to define certain classes of accountants who could conduct trust account audits.[70] These changes clearly did not prevent solicitors from getting into default, but it is notable that the average level of loss caused by delinquent solicitors was lower in the 1930s than in the preceding decades.

As noted earlier, the Court of Appeal was for many years reluctant to take a particularly strong stands against financial misconduct by solicitors. This clearly changed greatly during the 1920s and 1930s. By 1935, the Court of Appeal was no longer requiring that an element of dishonesty in the solicitor's conduct be shown before striking off would be ordered. Persistent failures to keep the trust account records accurately or to reply accurately to the Law Society's auditor, as well as general disregard of the trust account and audit rules could suffice.[71]

That change, though welcome, was rendered almost irrelevant by Parliament. Power to discipline, by fining, suspending or striking off offending lawyers was transferred to the Disciplinary Committee of the New Zealand Law Society by the Law Practitioners Amendment Act 1935. One consequence of this was that the newspapers could report far less frequently, and in less detail, on defalcations by solicitors. Under the former regime it could reasonably be expected that an application for an order that the practitioner show cause why he or she should not be struck off would be reported in some detail and the decision of the Court of Appeal would be reported, though not necessarily with details of the judgment. This was

69 *The Press* (Christchurch, 12 October 1921) at 12; and *The Auckland Star* (Auckland, 22 December 1921) at 7.

70 Law Practitioners Act 1931, s 47.

71 *In Re S a solicitor* [1935] NZLR 908. The lawyer, Arthur Everard Seaton of Taumarunui, admitted gross negligence in running his practice but denied dishonesty, a claim which appears borne out by the Law Society auditor finding his records were accurate: *The Press* (Christchurch, 16 October 1935) at 9.

not so under the new regime,[72] something which may well have affected the degree to which there was public discussion or concern about levels of misbehaviour by lawyers.

Other suggestions for change were made. A very significant development was the promotion of a viewpoint that inexperience, rather than dishonesty or negligence, was the root cause of loss-making behaviour by solicitors. Senior lawyers argued that the basic problem with defaulting lawyers was not inherent criminality but a lack of experience and practical skills. They pointed to the existing legal provisions which allowed solicitors to enter the profession by study and examination without having to go through a period of articles working in a law office, and which then let those inexperienced lawyers set up their own practices without further gaining practical experience. The next step in the argument was that such young and inexperienced lawyers would not be equipped to keep proper financial records and would, acting honestly but incompetently, find themselves in some financial difficulties. From there it was argued that young lawyers in such financial difficulties would be likely to give way to the temptation to resort to peculation from, or speculation with, clients' funds.

The first public articulation of this argument I have discovered is in a letter from the New Zealand Law Society President, Alexander Gray, published in the New Zealand Law Journal in 1928, outlining proposals for the new Solicitors Fidelity Guarantee Fund.[73] One solution to this perceived "problem" was the remit agreed at the New Zealand Law Conference in 1929, to recommend as part of the legislation for the fidelity fund that no one should be able to practice on his or her own account as a solicitor until the age of 25.[74] A suitable clause duly appeared in the Law Practitioners Amendment Bill 1929 but was struck out by the Statutes Revision Committee of Parliament.[75]

To some extent, Gray's argument was probably linked to the perceived oversupply of university-educated lawyers and the belief among many of the profession that practical training was essential to the practice of law. Although the "inexperience leading to criminality" argument has been picked up by uncritical later writers, its validity is certainly open to challenge. While there were some young lawyers who offended – Batchelor is one, Robert Bain, a 26-year-old Gisborne solicitor who pleaded guilty to one charge of not having his trust account audited and 20 charges

72 The author was, some years ago, granted access to the records of the Disciplinary Committee to the end of 1945 on the basis that identifying details of practitioners would not be published. Any references to practitioners by name after 1935 are based solely on newspaper reports or material in the National Archives.

73 A Gray "Solicitors Trust Funds" (1928) 4 NZLJ 77.

74 (1929) 5 NZLJ 99 and 141.

75 (1931) 6 NZLJ 242.

of theft,[76] is another – others do not fit the mould. The inexperienced Frederick James McKenna, of Patea, was convicted in 1927 on a guilty plea, of forgery of documents to cover up failures to keep proper accounts, but no clients' money was lost.[77]

One of the last reported lawyer bankrupts of the 1930s shows a pattern of behaviour which was far from the paradigms of youthful inexperience and temptation. Charles Stephen Longuet, of Invercargill, filed in bankruptcy in July 1939. At this time Longuet, a solicitor of long practice aged in his late 60s, indicated that he had been the recipient of large sums designed for investment and he had treated this as money he could invest as he saw fit. He therefore treated the loans as income completely under his control.[78] In 1939, he finally had his accounts properly determined and found that he was in deficit and reported himself to the Southland District Law Society. It is evident that his conduct had involved breaches of the audit regulations and, latterly, the Solicitors Deposit Regulations of 1937. Yet he had, somehow, been permitted to carry on his practice despite these breaches. Later that year a meeting of creditors was told that despite having debts of around £20,000 (about $2.1 million in 2021 values); his assets were such that creditors would probably receive around half their money back.[79]

The position was transformed by two statutory changes. The first, in 1943, created a special regime for lawyers who were undischarged bankrupts or had not held a practising certificate in the previous two years. Section 20 of the Statutes Amendment Act 1943 required a barrister or a solicitor who was an undischarged bankrupt to give at least two months' notice of an intention to apply for her or his annual practising certificate and gave the Disciplinary Committee of the Law Society the power to refuse a certificate if the applicant was not of good character and a fit and proper person to practice law. The provision drew no comment at all in the newspapers of the day, and that section of the Bill was not commented on by any Parliamentarian. Indeed, the Attorney-General, HRG Mason, stated that none of the amendments made by the Bill "were of remarkable interest".[80] Its origins remain obscure. There is no indication in the New Zealand Law Journal nor in the material in the Law Society archives that the impetus for the amendment came from within the legal profession. It may well be that it was a measure of Mason's own devising.

76 *The Press* (Christchurch, 19 August 1930) at 3. The proposer, WJ Hunter of Christchurch, argued (probably inaccurately) that a recent notable Christchurch embezzler, John Black Batchelor, had been a clerk in the Public Trust Office before he qualified as a solicitor at the age of 21 and started his own practice shortly thereafter; the Public Trustee later denied he had been employed there.

77 *The Press* (Christchurch, 31 March 1927) at 11.

78 *The Auckland Star* (Auckland, 10 July 1939) at 8; and *The Evening Post* (Wellington, 12 July 1939) at 13.

79 *The Auckland Star* (Auckland, 25 October 1939) at 9.

80 (1943) 263 NZPD 992.

The proponents of change may have been influenced by memories of the large influx of new lawyers after the First World War and wished to exercise some greater control over entry, but wished to do so in an unobtrusive way. It is perhaps significant that the requirement of notice for a person who had not held a certificate for two years was not to apply to persons who had spent that period in the armed services.

There appears to have been no public debate about regulation of solicitors between the 1943 Amendment and the revision of the Law Practitioners legislation in the 1955 Act. It is possible that relevant material exists in the Law Society archives, but if so, it is not in any way reflected in material in the Law Journal over the relevant period. It seems logical to think that the ban on practice while bankrupt simply reflected changed social and commercial mores, and any experience under the 1943 changes. It is notable that this aspect of the 1955 Bill was not commented on at all during the Bill's passage.

X. Conclusion

It is surprising that there was no legislative debate in 1955 about the requirement that solicitors have at least three years' experience before setting up on their own account, nor subsequent exploration of the reasons for, and impact of, the change. This was clearly a reformulation of the earlier minimum age provision cast in rather less obviously discriminatory form. In hindsight we can see that that requirement has led to a significant reshaping of the legal profession and a proliferation of employed solicitors.

It may well be that the proponents of the change saw this as merely a variant of the very common practice under the 1931 Act that an established lawyer would engage a promising young man (or much more rarely a promising and determined woman) who worked as a law clerk while studying and qualifying. On qualification the clerk would rapidly become a junior partner or depart with the new qualification and experience to start practice on her or his own account. (Law students who had not worked as law clerks were far less likely to join established firms as a partner). It may well have been expected that lawyers with those three years of experience would then generally be taken into partnership – or set up on their own account – rather than remaining as employee solicitors short of partner level. Parliamentary debates on the Solicitors' Fidelity Guarantee Fund proposal in 1929 tell us that the vast majority of practising solicitors were practising on their own account, that is, as the sole principal of a firm or as a partner in a larger entity. The process whereby the pre-1955 pattern developed into the much more hierarchical structure of present-day law firms does not appear to have been explored.

Conditions on entry to the legal profession – and the requirements for remaining committed to practice – are fundamental aspects of the operation of the legal system. This article is an attempt to both draw attention to the strange evolution of critical elements of rules which remain current and to invite broader approaches to histories of the legal profession in this country. Too many histories are from the top down. Little attention has been paid to looking at the less successful lawyers. There has also been a significant lack of socio-legal studies which attempt to place legal phenomena in their social and historical context. More, and wider-based, research needs to be done if we are to understand how lawyers operated and their influences on New Zealand society and history. That might give us insights for the future. Ka mua, ka muri.[81]

81 This whakataukī means "walking backwards into the future" – the idea we should look to the past to inform the future.