Butterworth's Fortnightly Notes.

"Law is the doctrine, and custom the practice of Society." —*Balsac.*

TUESDAY, MAY 24, 1927.

THE STATUS OF SOLICITORS.

The points raised by the learned contributor "Rusticus" in the contributed article in this issue are of interest to every member of the profession. The suggestion that a similar and rival institution to the Public Trust Office should be founded, appears to be unnecessary. Solicitors, confronted with the cases where it is desirable to recommend a Perpetual Trustee already have an alternative to the Public Trust Office. The Guardian Trust and Executors Company, for instance, is an institution which can be recommended with confidence. It is ably organised, it is backed by the South British Insurance Company, which Company has agents in every town and village in the Dominion. The testator who asks for more than the Guardian Trust affords, is seeking for too much.

The alleged dominance of the Barrister influence on the New Zealand Law Society can easily be altered if the members of the profession so desire. In this connection it may be pardonable to point out that the "Fortnightly Notes" is the only practical medium whereby a practitioner may address his views to the profession and in this important respect the "Fortnightly Notes" is an asset to the profession as a whole. Should country practitioners desire to make their influence felt in respect to the election of the Council of the New Zealand Law Society their views can be freely expressed (within necessary limits, of course) in the columns of this Journal, so that the pro and con of proposals may be known to the whole profession.

The public generally has a particular interest in knowing the names of practitioners who conduct cases in the Courts, otherwise what is to guide a layman in the selection of his adviser. This should be a sufficiently cogent reason to persuade editors to continue the long-established practice of citing the names of counsel in their Court Reportings. Evidently there is at least one editor in Taranaki who cannot see the news value of this item. The Hawera Law Society is to be congratulated upon its taking the matter in hand as is indicated by our correspondent.

MR. J. SNELL.

The personal affairs of a member of the profession are of no concern to any brother practitioner, and as such do not call for comment in a Journal devoted to purely professional interests. When, however, a member of the legal fraternity, through a domestic vicissitude, is misrepresented to the public to such a degree as has been the unhappy experience of Mr. J. Snell, then a correction of that misrepresentation appears seemly and appropriate. Mr. Snell, LL.B., sometime secretary of the Public Trust Office, and now Comptroller of the Mortgage Division of that Institution, won a scholarship at the age of thirteen years and since then has practically fended for himself. He entered the Civil Service and now has a record of which he can be rightly proud. His life has not, however, been one devoted to self-seeking, he being an adherent and ardent supporter of the Church of England, and has placed the members of that Community under no small obligation for the considerable work he has carried out. He, with other members of his family, established a home for his aged parents and in so doing has obligated himself to no small degree. His father elected not to live at the home provided, and to which Mr. Snell continues to contribute, and made a demand upon Mr. Snell for £1 per week. Mr. Snell intimated his willingness to contribute to his parent's support, but felt that certain arrangements should be made in his father's interest. The answer to this intimation was the commencement of proceedings under the Destitute Persons Act. Mr. Snell acted with laudable restraint, urging only that his father did not spend money wisely. It would appear to be a little difficult to see how a person who has a home provided for him, and further, has an income of 17/6 weekly can be deemed to be destitute. Another proposition which presents itself is: Can a son who has arranged, and in so doing obligated himself, for a home for his parents be called upon to contribute toward a second establishment upon one of the parents electing to leave the family home, and further should both parents elect to require separate establishments and refuse to be accommodated in any other way, would the said son be required to contribute to three establishments? Counsel for Mr. Snell, however did not present such cogent considerations to the Court, but was able after conference, to announce a settlement which redounds to the credit of Mr. Snell, and evidences a magnanimity under trying circumstances which is seldom met with.

MISTAKEN IDENTITY.

That evidence of identity requires to be considered with the greatest of caution is axiomatic. The truth of this statement was exemplified to a remarkable degree recently in the Auckland Magistrate's Court. The facts were as follows: A medical practitioner sued Mrs. H. for a fee of 10/6 for attendance on her daughter. Mrs. H. denied the attendance on her daughter. The daughter also testified denying. The doctor gave evidence, and stated that he identified both mother and daughter. He had examined the daughter for twenty minutes. She had an affection of the spine. He had taken a note of the name and address of the defendant. The number of the house entered in his book by the doctor was not correct but the street noted down was the street in which the defendant lived. The defendant in evidence admitted that she lived in the street the doctor had entered in his book, that her daughter suffered from the spinal complaint diagnosed by the doctor; also under cross-examination that she has been sued by several other medicos to recover fees for medical attendance. The magistrate, Mr. Hunt, intimated that he was inclined to give judgment for the medico, but decided not to enter up judgment for a few days (following the precedent of Grantham J. in Adolph Beck's case). During the interval, it was ascertained that another Mrs. H. living in the same street, with a daughter of about the same age and of the same type as defendant's daughter, suffering from the same spinal trouble consulted the plaintiff and was responsible for the fee defendant was sued for. The result of course was judgment for the defendant. The point of interest however is that for twenty minutes a trained observer, with a special interest examined a young girl, and took the notes necessary to the occasion, and yet with every confidence and honesty identified another person as the girl examined.

After this illustration the value of an identification parade can hardly merit consideration.

SUPREME COURT.

Alpers J. February 2; May 5, 1927.
Nelson.

TASMAN FRUIT PACKING ASSOCIATION LTD. v. H.M. THE KING.

Company Law—Winging-up—Crown Debt—Whether Entitled to Priority—Whether Prerogative Applicable to Trading Debts—Companies Act 1908, Section 246.

Originating summons to determine whether the Crown was entitled to priority of payment in a winding-up. The plaintiff was an association registered under the Industrial and Provident Societies Act 1908. It had borrowed money from the Crown under the Fruit Preserving Industries Act 1913; the moneys were secured by way of mortgage. By the State Advances Amendment Act 1922, sections 3 and 4, the debt was transferred to the State Advances Account. By the State Advances Act 1913 the debt was a Crown debt. The plaintiff association went into voluntary liquidation on 13th December, 1923. There were two creditors only, both of them unsecured, viz.: the Crown to whom £464 was owing, balance of the loan above mentioned after realization of the security, and the Nelson Co-operative Fruit Co., Ltd., to which was owing the sum of £460, balance of purchase money for land and plant.

Glasgow for plaintiffs.
Fell for the Crown.
Rout for the Nelson Co-operative Fruit Co., Ltd.

ALPERS J. said that the pre-eminence of the Sovereign's prerogative right to payment of a debt was a rule of great antiquity. Its origin probably went back to the days of tribal chieftaincy of the early Kings; it was found firmly established in feudal times. The rule had often been propounded in the Courts; it was enunciated by Lord Coke in **Quick's case** (1611) 9 Co. Rep. 129 (a). See also **Rex v. Wells,** 16 East. 278, and **New South Wales Taxation Commissioners v. Palmer** (1907), A.C. 179, 182. Under the Bankruptcy Acts both in England and in New Zealand, the Crown's prerogative right to priority of payment had been extinguished in clear and unequivocal terms. As regards the winding-up of companies in England, the House of Lords had decided that, by the combined effect of Sections 186 and 209 of the Companies (Consolidated) Act 1908 (Eng.) the bankruptcy rule that Crown debts had no claim to priority of payment other than such priority as was given by the Statute obtained in the case of the voluntary winding-up of an insolvent company—**Food Controller v. Cork** (1923) A.C. 647. But though the New Zealand and the English Companies Acts, as regards provisions for winding-up were similar in important respects, there was an essential difference between them on the point now under consideration which made that decision inapplicable in New Zealand. Counsel for the Crown had contended that the law in New Zealand on this point stood to-day where the law in England stood in 1878—the year in which the Court of Appeal in the case of **In re Henley and Co.,** 9 Ch. D. 469, decided that the Crown by virtue of its prerogative was entitled to priority of payment of a debt in the winding-up of a company. It became necessary therefore to examine the legislation on the subject. The part of Section 10 of the Judicature Act 1875 (Eng.) relating to the winding-up of companies was reproduced in the New Zealand Companies Act 1908, Section 246. That section did not include any express reference to priority; rather did it seem to exclude it by the enumeration of other particulars as to which the rules in bankruptcy should prevail. If the section admitted of being construed so as to include priority of payment the question would be simplified, if not concluded. But the difficulty in the way of giving that construction to the section was that the priorities set out in Section 120 of the Bankruptcy Act 1908, were different from those set out in Section 249 of the Companies Act 1908. If therefore the assimilating provisions of Section 246 of the Companies Act, 1908 were given the wider construction and held to include priorities of debts, there would be two conflicting schemes of priority in the same statute.

There was a remarkable conflict of judicial opinion revealed in a line of cases upon Section 10 of the Judicature Act 1875 (Eng.). In considering these authorities there were two important distinctions, frequently referred to, that should be borne in mind. The first was the distinction between what were sometimes spoken of as the two prerogatives and sometimes as, what appeared to be the better opinion, the two methods of enforcing the one prerogative, viz.: (1) The right of the Crown to seize, by writ of extent if need be, all the assets of the debtor and out of these to satisfy its debt, and (2) The right of the Crown to come into a proceeding in bankruptcy or into a winding-up prove its debt, and insist upon payment of it in priority to all other creditors: see **N.S.W. Taxation Commissioners v. Palmer** (*cit. sup.*) at p. 184, and **Food Controller v. Cork** (*cit. sup.*) at p. 669. The other distinction was that in bankruptcy the assets of the debtor passed at once to the Assignee or trustee and became vested in him, and that in a winding-up the assets did not pass to the liquidator but remained in the company.

Coming now to the first of the cases to be considered: In 1878, Jessel M.R., decided in **In re Albion Steel and Wire Co.,** 7 Ch. D. 547, 549, that the meaning of Section 10 of the English Act was simply that the rules in bankruptcy should apply so far as related to proof. But in 1881 Malins V.C., in **In re Association of Land Financiers,** 16 Ch. D. 373, refused to follow the Master of the Rolls and adopted the wider construction of Section 10, holding that the priority given to wages by the Bankruptcy Act 1869, Section 32, extended to the winding-up of a Company. **Henley's Case,** 9 Ch. D. 469, though decided in 1878, three years after the passing of the Judicature Act, contributed nothing to the elucidation of the conflict; for in that case Section 10 was as completely ignored as though it had never been enacted.

The Bankruptcy Act 1869 (Eng.), was replaced by the Bankruptcy Act 1883. By the combined effect of Sections 40 and 150 of the latter Act added to the fact that in bankruptcy there was a *cessio bonorum* the Crown's prerogative claim to priority of payment in bankruptcy was definitely extinguished.

In the same month that the Bankruptcy Act 1883 (Eng.) was passed, the Companies Act 1883 (Eng.) became law.

It was obvious that when this latter statute was passed with the sole object of conferring priority of payment upon clerks and workmen in a winding-up, there could have been no idea in the mind of the Legislature that these priorities had already been conferred eight years before by the assimilating clause of the Judicature Act. That conclusion was further confirmed by the fact that while the Companies Act 1883 (Eng.), and the Bankruptcy Act 1883 (Eng.), became law within five days of each other the priorities conferred in the two statutes were different. See per Younger L.J. in **In re Webb** (1922), 2 Ch. 369, 394, affirmed *sub. nom.* **Food Controller v. Cork** (*cit. sup.*). It was true that in **In re Oriental Bank Corporation,** 28 Ch. D. 643, decided in the very next year, Chitty J. considered the question to be still open; but the Companies Act 1883, was not referred to in argument.

It is also true that in three cases decided between 1895 and 1901—**In re Leng** (1895), 1 Ch. 652, **In re Reywood** (1897), 2 Ch. 593, and **In re Whitaker** (1901), 1 Ch. 9—it had been held that the words in Section 10 of the Judicature Act 1875, "the same "rules shall prevail as to debts provable," were wide enough to bring in that part of the bankruptcy law which directed what debts are to be paid in priority to others. But those three cases all turn on the first part of Section 10—that which referred to the administration by the Court of the assets of any person who might die insolvent—and the learned Judges who decided them were therefore not embarrassed in construing that part of the section by the difficulty that the wider construction they placed upon it would import conflicting systems of priorities into the same statute. The part of Section 10 which referred to the winding-up of insolvent companies had in fact been repealed by the Preferential Payments in the Bankruptcy Act 1888 (Eng.), and these three cases were accordingly not conclusive upon the construction of Section 10 as assimilating the provisions in Bankruptcy and winding-up.

His Honour was therefore of opinion that the Legislature in New Zealand had not in any statute, either by express words or by necessary implication, taken away the Crown's prerogative right to priority in a winding-up. This opinion was based mainly upon the anomalous results that would follow, if Section 246 of the Companies Act 1908 (the Judicature Act section) were so construed as to import into that Act, in conflict with the priorities set out in Section 249 the entirely different scheme of priorities of Section 120 of the Bankruptcy Act 1908.

His Honour thought the question concluded in favour of the Crown upon another ground by the authority of the decisions in **In re Henley and Co.** (*cit. sup.*), and **In re Oriental Bank Corporation** (*cit. sup.*). In the latter case it was held that whatever might be the effect of Section 10 of the Judicature Act 1875 (Eng.) in importing into winding-up proceedings the priorities set out in Section 40 of the Bankruptcy Act 1883 (Eng.), the first of the two prerogatives had not been superseded and, there being no *cessio bonorum* in a winding-up, the Crown could still by Writ of extent or other summary process seize enough of the assets to satisfy its debt without coming in to prove. This

conclusion also appeared to receive some support from Section 6 (3) of the Acts Interpretation Act 1908.

The decision in **Food Controller v. Cork** (1923), A.C. 647, had no application in New Zealand. That decision rested upon the combined effects of Sections 186 and 209 of the Companies (Consolidation) Act 1908 (Eng.), and in particular upon subsection (a) of Section 209 which assigned priority to assessed taxes—a clause without counterpart in any New Zealand statute. But though His Honour felt thus compelled to hold that the Crown's claim to priority had not been taken away by statute in New Zealand it had been strongly urged at the bar that the question should be considered, apart from statute, upon wider ground: whether the ancient prerogative was really applicable to modern circumstances, whether it covered in its scope liabilities to Government Departments which were mere trading debts and were only "Crown debts" in a strained and artificial sense. In every case in which the prerogative had been successfully invoked in the Courts in England the debt sought to be recovered had been a "Crown debt," *stricto sensu*—income tax, land tax, sums for the use of His Majesty's naval or military forces, balances due to the Royal Mint, and such like. The only reported case which His Honour had been able to find in which an attempt had been made to recover a trading debt by invoking the prerogative, was the **Food Controller v. Cork** (*cit. sup.*); which case however had been decided on another ground.

It is many years ago that the Crown's prerogative was abrogated in bankruptcy; no doubt it would have been extinguished in winding-up proceedings also, but for delay in carrying out a project, long contemplated as one learns, for bringing the company legislation in New Zealand into harmony with the Imperial Statutes—a consummation by all lawyers most devoutly to be wished.

His Honour dealt at length with the judgments of their Lordships in so far as they dealt with the applicability of the prerogative to trading debts, and pointed out that their Lordships had refused to decide the case on this ground and had reserved the question for consideration in some other case. His Honour felt that the responsibility of deciding the question was not incumbent upon a single Judge of first instance; it would be left to the Court of Appeal, if and when occasion offered, either in the present case or some other.

His Honour desired to add that the case had been ably argued and to express his indebtedness to the counsel engaged for their assistance.

Solicitors for plaintiffs: **Glasgow, Rout and Moynagh,** Nelson.
Solicitors for the Crown: **Fell and Harley,** Nelson.
Solicitors for the Nelson Co-operative Fruit Company, Limited: **Rout and Milner,** Nelson.

MacGregor J. May 2, 6, 1927.
Wellington.

MAHONEY v. JOHNSTON.

Practice—Jury—Action for Breach of Promise of Marriage—Amount of Damages Only Question in Dispute—Whether Action Could More Conveniently be Tried Before a Jury—Rule 257 (a).

Summons by plaintiff for an order that action be tried before a Judge and a Jury of twelve. The action was one for breach of promise of marriage; the plaintiff claimed the sum of £3,000 as damages. The defendant admitted the promise of marriage and breach thereof; accordingly the only question left to be determined at the trial was as to the amount of damages.

Dunn for plaintiff.
Johnston for defendant.

MacGREGOR J. said that the summons was issued under Rule 257 (a) of the Code. This rule was a new one but several cases had already been decided upon it. In **Bond v. Gear** (1926) G.L.R. 333, Stringer J. had on the plaintiff's application, ordered the trial of an action for breach of promise of marriage to take place before a Judge and a Jury. The learned Judge in that case said:—

> "It seems to me that with its composite intelligence a jury, "viewing the relevant considerations from a variety of angles, "and assisted by the presiding Judge, is more likely to arrive "at a just and proper conclusion on the matters at issue, "than would any individual Judge acting alone."

His Honour respectfully agreed with these remarks, and thought therefore that he should follow the decision in **Bond v. Gear.** The present action in some respects presented an even stronger case for a jury. The only matter at issue was the one question of damages for which a large sum was claimed. In **Ford v. Blurton,** 38 T.L.R. 801, Bankes L.J. said that juries "were essentially good tribunals to decide cases in which the "amount of damage was at large and had to be assessed. The "damages in an action for breach of promise of marriage were "not measurable by any fixed standard, and were almost "entirely in the discretion of the jury."—16 Halsbury's Laws of England, 277. In the result therefore His Honour was of opinion that the damages in the present case would be "more conveniently" assessed by a Jury than by a Judge sitting alone.

At the argument it had been suggested on behalf of the defendant that in assessing the damages the Jury might through prejudice be misled into arriving at a wrong result. The proper answer to such a suggestion was to be found in the remarks of Atkin L.J. in **Ford v. Blurton** (*cit. sup.*) at p. 805, where that learned Judge said:—

> "I cannot help supposing that the application was made "and resisted because of a feeling that a Jury might be pre-"judiced in such an action. I cannot think that such a "topic is admissible for consideration or should be included "within the term 'convenience.'"

Solicitor for plaintiff: **Alexander Dunn,** Wellington.
Solicitors for defendant: **Johnston, Beere and Co.,** Wellington.

MacGregor J. May 2, 6, 1927.
Wellington.

PAYNE v. BEATTIE.

Practice—Summons for Removal of Action into Supreme Court—Sum Claimed less than £100—Cognate Action Set Down for Trial in Supreme Court—Magistrates Court Act 1908, Sections 151, 152.

Summons by the defendants for the removal of an action from the Magistrate's Court into the Supreme Court. The action was brought by the plaintiff to recover the sum of £50 as damages for intimidation. At the date of the application there were already pending two other actions which arose out of the same circumstances and involved substantially the same questions as those at issue in the action sought to be removed. One of these actions was already part heard in the Magistrate's Court, and the other had been set down for trial at the next sittings of the Supreme Court. All three actions were triable at Wellington.

Myers K.C. and Hay for defendants in support of summons.
O'Leary for plaintiff to shew cause.

MacGREGOR J. said that as the amount claimed was £50, he had under Section 151 (3) of the Magistrates Court Act 1908, a discretion as to the removal of the action into the Supreme Court. The main grounds suggested for the removal of the action were two: (1) that difficult questions of law would emerge for determination at the trial, and (2) that there were already pending two other actions which arose out of the same circumstances and involved virtually the substantial questions at issue in the action sought to be removed. His Honour thought that the real object underlying the application was not so much to remove the action into the Supreme Court for trial, as to ensure in the interests of justice that the case should not finally be decided until the Supreme Court had determined the cognate questions arising in the action already brought in that Court. His Honour was not at present convinced that he should make forthwith an order for removal of the action. To make such an order in a summary way might involve the plaintiff in considerable hardship both as to delay and as to costs. To refuse the order for removal, on the other hand, might be unfair to the defendants in the whole circumstances of the case. His Honour proposed to adopt a middle course, which would save expense, without causing any avoidable loss of time to the parties.

His Honour would not now finally dispose of the present application. The action would accordingly remain for the time being in the Magistrate's Court, which His Honour assumed would from time to time adjourn the hearing thereof in terms of Section 152 (1) of the Act. The action already part heard would doubtless proceed before, and in the discretion of, the learned Magistrate. The action pending in the Supreme Court should be heard within the three weeks time. Should any undue delay take place or other untoward circumstance arise it would be open for either party to apply further under the present Summons as they might respectively be advised.

Summons reserved for further consideration, with liberty to either party to apply.

Solicitors for defendants: **Mazengarb, Hay and Macalister,** Wellington.
Solicitors for plaintiff: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

FULL COURT.

Sim J.
Stringer J.
Herdman J.

April 8; May 16, 1927.
Auckland.

IN RE METAL STORES LIMITED.

Company—Memorandum of Association—Whether Power to Deal in Land—Whether Profit Acquired by Dealing in Land Available for Dividend.

The Metal Stores Ltd. was a private company incorporated under the Companies Act 1908. The objects of the Company were set out in 20 separate clauses in the Memorandum of Association. The first of these objects was to acquire the business of the Gruar Hardware Company. The second was to carry on the business of machinery and hardware merchants and furnishing and general warehousemen in all its branches and of builders and contractors. The third clause enumerated a large number of other businesses, but dealing with land is not one of these. It enumerated also a large number of different kinds of goods to which the Company's dealings might extend, but the subject of land was not mentioned. Clause 4 enumerated some more businesses as objects of the Company. Clause 10 dealt with the acquisition of land. The object there stated was to purchase, take on lease or otherwise acquire any real or personal property which the Company may think necessary or convenient for its business. The object stated in clause 16 is to carry on any other business which might seem to the Company capable of being conveniently carried on in connection with the before-mentioned businesses or any of them or calculated directly or indirectly to enhance the value or render profitable any of the Company's property or rights. After the incorporation of the Company, James Joll and Arthur Joll agreed to sell to the Company a certain property situate in Victoria Street, Hamilton, for the sum of £2,000. At this time there were only three shareholders in the Company—the two Jolls and one Birch. The property was never transferred to the Company but was (in so as affected the present proceedings) treated by all parties as belonging to the Company. The property was subsequently resold at a profit (Joll Bros. signing the transfer) and pursuant to a resolution the amount of this profit was allocated proportionately to the credit of the three shareholders in the books of the Company. On this allocation James Joll was entitled to £1,170 which sum was placed to the credit of his Call Account. The Company subsequently went into voluntary liquidation. James Joll proved in the liquidation for £998 10s. 0d., the books of the Company showing him as a creditor for that amount. The Liquidator claimed that Joll was indebted to the Company in a larger amount for calls on shares, and that Joll's proof therefore could not be allowed. The case was originally argued before Stringer J., who delivered a judgment on written argument submitted by counsel. This judgment was delivered in inadvertence before Mr. Ziman had submitted his argument in reply. It was afterwards agreed by the parties to treat the matter as if judgment had not been given, and to have the case re-argued before the Full Court.

Tompkins for James Joll.
Ziman for Liquidator.

SIM J., delivering the judgment of the Court, said that the question to be determined was whether or not Joll was indebted to the Company as alleged by the Liquidator. The answer to that question depended on the view taken of the dealings in connection with the above property. The parties having elected to treat the property as belonging to the Company, they are bound by that election. The net proceeds of sale belonged, therefore, to the Company, and could not be disposed of as the resolution purported to dispose of them. It had been contended, however, by Mr. Tompkins that a dividend might have been declared by the Company out of the profits realised on the sale of the property, that such dividend might have been applied in payment of the calls due by the shareholders, and that the matter ought to be dealt with as if such a dividend had been declared. The reply made by the Liquidator to this argument was that the Company was not entitled to declare such a dividend, as the profit in question was not a profit arising from the business of the Company. Article 107 of Table A, which applied to the Company, provided that "no dividend shall be payable except "out of the net profits arising from the business of the Company." It had been contended by Mr. Tompkins that it was part of the business of the Company to deal in land, and that the profit realised on the sale of the property could be treated, therefore, as arising from the business of the Company. In support of this contention he had relied on the decision in the case of the **Wellington Steam Ferries Co. v. Commissioner of Taxes,** 29 N.Z. L.R. 1025, in which it was held that the Company's Memorandum of Association gave it power to deal in land and carry on the business of a land company. The conclusion arrived at by Mr. Justice Cooper in that case was based mainly on Clause (*i*) of the Memorandum of Association which declared that one of the objects of the Company was "to buy, sell, improve, manage, "lease, and turn to account, dispose of, and deal in any land "in the Colony of New Zealand." The Memorandum of Association of the Metal Stores did not contain any similar declaration and in the opinion of the Court the clauses on which Mr. Tompkins relied did not make dealing in land part of the business of the Company. In the opinion of their Honours Clause 10 of the Memorandum made the acquisition of real property ancillary to the business of the Company, as defined in the clauses mentioned above, and did not make dealing in land part of the business of the Company. If Mr. Tompkins' argument were accepted, it would follow that if only one business were specified in the Memorandum, Clause 16 would enable the Company to engage in whatever other business it pleased. The scope of such a clause must be limited in some way, but it was not necessary for the Court to attempt to specify that limit. For the purposes of the present case it was sufficient to say that the property in question appeared to have been acquired in connection with the business which was being carried on by the Company. In the opinion of the Court it was not part of the business of the Company to deal in land, and the profit on the sale of the property in question could not be treated as arising from the business of the Company. It should be treated as an accretion to capital, and was not available for payment of a dividend. It was true that there were cases in which it had been held that such an accretion might be treated in some circumstances as available for the purposes of a dividend. **Lubbock v. British Bank of South America** (1892) 2 Ch. 196, was such a case. This decision had been approved of in the subsequent cases of **Verner v. General and Commercial Investment Trust** (1894) 2 Ch. 239, 265, and **Foster v. New Trinidad Asphalt Co. Ltd.** (1901) 1 Ch. 208. Their Honours thought that the present case could not be brought within the decision in **Lubbock v. British Bank of South America** (*cit. sup.*), but, even if it could, the terms of Clause 107 of Table A would forbid the payment of a dividend out of such an accretion, for it would not be a profit arising out of the business of the Company: **Wall v. London and Provincial Trust** (1920), 2 Ch. 582. Their Honours thought therefore, that James Joll was not entitled to credit for any part of the £1,170 credited to his Call Account, and his claim in the liquidation should be disallowed.

Solicitors for James Joll: **Tompkins and Wake,** Hamilton.

Solicitors for Liquidator: **Hayes, Ziman, Buttle, and Dowling,** Auckland.

BENCH AND BAR.

Messrs. E. Blampied and R. A. Hayman, of Auckland, have joined in partnership in the practice of their profession as Solicitors.

Mr. Robert Stout who was associate to the Rt. Hon. Sir Robert Stout during the latter part of his term as Chief Justice of New Zealand, has been admitted to the staff of the firm of Hunter and Ronaldson, of Christchurch.

Mr. H. C. M. Norris, Barrister and Solicitor, of Hamilton, has been appointed Chancellor of the newly-constituted diocese of the Waikato.

Mr. D. K. Logan, LL.B., formerly partner in the firm of Gawith, Logan, Williams and Biss, has commenced practice on his own account, the remaining partners Messrs. Gawith, Williams and Biss, continuing in partnership together.

THE CONVEYANCER.

LIGHTERING AGREEMENT.

MEMORANDUM OF AGREEMENT made this day of 1927 BETWEEN A.B. (hereinafter called " the carriers ") of the one part and C.D. (hereinafter called " the owners ") of the other part WHEREBY it is agreed as follows :—

1. The carriers shall as and when required by the owners take delivery in the carriers' slings at of all goods to be lightered from the wharf of the owners to ships lying in the roadstead at and shall deliver the same by its lighters and barges at the rate of charge specified in the Schedule hereto.

2. If in the opinion of the carriers the working of the bar of the River shall be unsafe or if in the like opinion the delivering of goods from lighters and barges to such ships as aforesaid shall be unsafe then this agreement shall be suspended until safe conditions are in the like opinion restored and no claim shall arise against the carriers for delay.

3. The carriers shall not be liable for the act of God, the King's enemies fire and all and every other danger and accident of the sea river and navigation latent defect in hull machinery or appurtenances strandings collisions and all other accidents of navigation and all losses and damages caused thereby even when occasioned by negligence default or error of judgment of the master mariners or others servants of the carriers but unless stranded sunk or burnt nothing hereincontained shall exempt the carriers from liability to pay for damage to cargo occasioned by bad storage by improper or unsufficient dunnage or absence of customary ventilation or by improper opening of valves sluices and ports or by causes other than those above excepted.

4. The liability of the carriers shall commence on delivery to their sling at the wharf at and shall terminate on delivery to the ships' slings aforesaid.

5. The carriers shall not be liable for incorrect delivery of goods except such have been distinctly marked by the owners.

6. During the continuance of a strike or lockout the obligation of both parties under this agreement shall be suspended.

7. If the rate of wages paid by the carriers or the rate of insurance shall be increased or decreased the rates specified in the Schedule hereto shall be increased or decreased proportionately. In the event of dispute the proportion shall be fixed by the President of the Chamber of Commerce at .

8. This agreement shall not apply to explosive inflammable or other dangerous goods under any circumstances nor to furniture or other fragile goods unless securely packed in crates or cases.

9. No claim for loss or damage will be allowed unless the same is made within twelve hours after the delivery of the goods in the ships' slings.

10. The carriers will not be responsible for any loss of market nor for any indirect or special damages in respect of goods carried or that ought to be carried.

11. All frozen or chilled goods shall be placed in properly insulated chambers and such chambers shall be kept at a temperature not below and not above .

12. This agreement may be terminated by either party by three calendar months' written notice to the other.

AS WITNESS the execution hereof.

THE EXECUTIVE COUNCIL.

Regulations as hereinafter mentioned appeared in Gazette No. 27, published on 5th May, 1927 :—

Regulations relating to noxious weeds made by Order-in-Council on the 3rd July, 1916, and gazetted on the 6th July, 1916, amended by the addition to the list of noxious weeds set out in the First Schedule, of the plant known as " Elephant's Foot " (Elephantopus scaber)—Cook Island Act 1915.

Presbyterian Social Service Association of Southland (Incorporated) declared to be a charitable institution within the meaning of sub-section one of section 82 of the Destitute Persons Act 1910.

Regulations as to Fees and Allowances for Members of the Local Government Loans Board—Local Government Loans Board Act 1926.

Amended Regulations for the Intermediate Examination—Education Act 1914.

Bird known as Carunculated Shag (phalacrocorax carunculatus) absolutely protected—Animals Protection and Game Act 1921-22.

Certain areas in the Otago and the Hawke's Bay Land Districts declared to be sanctuaries for native and imported game—Animals Protection and Game Act 1921-22.

Order-in-Council dated 5th November, 1926, regarding recognition of Load-line Certificates issued by Belgian Authorities to Belgian ships—Merchant Shipping Act 1894 (Imperial).

" The Greek Tonnage Order 1927 " dated 7th February, 1927, relating to Tonnage Measurement of Greek Ships—Merchant Shipping Act 1894 (Imperial).

Order-in-Council dated 7th February, 1927, exempting Portuguese Vessels from the provisions of the Act, relating to Life-saving Appliances—Merchant Shipping Acts 1894 and 1906 (Imperial).

Amateur Radio Regulations 1925. Notification by Minister of Telegraphs regarding penalty for failure to renew Licenses—Post and Telegraph Act 1908.

In Gazette No. 28, published on 10th May, 1927 :—

Additional Regulation relating to Maori Land Boards: 82. Application for the consent of the Governor-General in Council to a proposed alienation by way of sale or exchange under section 17 of the Native Land Amendment and Native Land Claims Adjustment Act 1923, shall be lodged, in duplicate, with the South Island District Maori Land Board, together with a statement of all the material terms and conditions of the proposed alienation, and the material circumstances and grounds of the application. The Board shall take the same into consideration, and shall forward its recommendation thereon to the Under-Secretary, together with a duplicate of the application.—Native Land Amendment Act 1913. Native Land Amendment and Native Land Claims Adjustment Act 1923.

Certain provisions of the Mining Act 1926 to apply to prospecting and mining for and the storage of Petroleum and other Mineral Oils and of Natural Gas within certain areas in the Taranaki Land District.

Rule No. 89 of the Rules made under the Bankruptcy Act 1908, on the 21st March, 1893, and published in the Gazette of the 23rd March, 1893, revoked, and the following rule made in lieu thereof : " A bankruptcy notice shall be served, and the service thereof shall be proved, in the like manner as is by the said Act and by the Bankruptcy Rules, 1893, prescribed for the service and proof of service respectively of a creditor's petition."

Alterations to Scale of Charges in force upon the New Zealand Government Railways—Government Railways Act 1926.

Extradition convention between Great Britain and Estonia, dated 18-11-25, made applicable to the Commonwealth of Australia (including Papua and Norfolk Island) the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland, and India, as and from the 23rd February, 1927.

Extradition Acts 1870 to 1906 (Imperial).

Returns of Income derived during year ended 31st March, 1927, required to be furnished to Commissioner of Taxes, Wellington, on or before 1st June, 1927—Land and Income Tax Act 1923.

THE LATEST DECLARATION OF INDEPENDENCE.

(By H. F. Von Haast).

(Continued from last issue)

(2.) But assuming that the Monarchy continues in the United Kingdom, as we all devoutly hope that it will, the maintenance of one constitutional monarch for a series of autonomous communities is an impossibility. According to the theory of our Constitution, which is continued in each of the self-governing Dominions, the Crown in Parliament is the law-making power of each Dominion and the Crown in Council is the executive power of each Dominion. The King therefore is bound in each case to act upon the advice that he receives from the Ministers of each Dominion, and in each case it is the duty of each set of Ministers to advise him in every emergency that arises. Let us take the present case of China as an example. The British Cabinet advises the King to take such steps as may lead to war with China, the Australian Cabinet, let us say, advises him merely to take steps for the protection of British subjects pending the evacuation of all British from China, the Canadian Cabinet advises the minimum of protection and the convocation of a conference of the chief powers interested in the East to consider the attitude of the Western world to China. Prompt action is necessary, and the King both on account of his legal position and also because of Great Britain's superior status and greater stake in China, must perforce follow the advice of the British Cabinet. What does this mean ? It means : (1) that the Crown is not in practice a bond of Empire, although it is useful as a fiction for a common allegiance ; (2) that in external affairs and peace and war the British Parliament and Executive are in fact supreme and can subject the Empire to war.

But it may easily happen that in minor and domestic matters, such for instance as in conflicting interests in the Pacific, the Executive action or the legislation of New Zealand and Australia might clash. Whose advice would the King take in that instance ? Clearly that of his British Ministers who would be the arbiters between the two Dominions. If his British Ministers were to stand aside and give him no advice, the King himself, it is obvious could not take the advice of both the New Zealand and the Australian Cabinets.

Hitherto we have had the British Cabinet as the channel through which all communications went to the King, with the power to decide in the last resort in the interests of the Empire as a whole, and to over-ride the advice of a Dominion Cabinet which would prejudice such interests.

But what is to be the position according to the formula and report ? Confusion worse confounded. Under the formula we have no clearing-house for receiving the legislation and the advice to the Crown from the different Dominions and reconciling them. We have a King in personal touch with the British Cabinet but not with the Cabinets of the several Dominions. His channel of communication with the Dominions by means of the British Cabinet is cut off, or, if it still exists, it is a mere conduit pipe, and it is the duty of the British Cabinet merely to say : " This is the advice of (say) the New Zealand Government. We cannot interfere in the matter." The Committee considers that " the recog- " nised official channel of communication should be in " future between Government and Government direct." The Governor of each Dominion is no longer the representative of the British Government, but merely the representative of the Crown. In this event therefore the appointment would be made by the King on the advice of the Cabinet of the Dominion. It is difficult to see from whom the Governor is to take his instructions and to whom he is to report as representative of the Crown. The King himself cannot give such instructions, for the King has to follow the advice of the British Cabinet, and the Governor is not the representative of the British Cabinet which has no control over him, and can therefore neither appoint him or recall him. It appears therefore that to be consistent with the formula and the report, the Dominion Government will make the appointment off its own bat and also dismiss the Governor, if he fails to give effect to its advice. Theoretically of course, the King will do so on the advice of the Dominion Cabinet. The Governor, if the legislation or action of the different members of the Empire is to be kept in harmony, should therefore be either a Constitutional lawyer of very high attainments or should have an adviser of high capacity to scrutinize each statute or each executive action likely to conflict with the legislation or action of some other self-governing community or prejudicially to affect the interests of the Empire as a whole so that he may withhold his consent, as representative of the Crown, the one link of Empire, pending a settlement by the Imperial Conference of possible differences. The King must be presumed to be in touch with a Dominion Government not through the British Cabinet, but merely through his representative, the Governor of the Dominion. The whole thing becomes a series of impossibilities if the formula means what it says, and must sooner or later lead to the abolition of the Governor altogether or else the substitution of men of such high standing as Constitutional lawyers and statesmen that their tendency would be to have too great a say in the endeavour to reconcile the legislation of the different autonomous communities, which again would lead to their abolition. Whenever a Governor becomes anything more than a mere figure-head and asserts his own individuality, trouble ensues.

The question of foreign relations, including the power and method of making treaties and the accrediting representatives to foreign governments, is so full of complications and dangers of friction not only between the component parts of the Empire and foreign states, but also between the individual members of the Empire themselves that this independence in foreign relations without any supreme body with the right and the power to take action that will prevent foreign policies clashing appears a step that is perhaps likely to bring about a complete dissolution of the Empire sooner than any other proposal of the Committee. The several Dominions will, to use Keith's words, get more and more " into the habit of disregarding Imperial unity " and mutual co-operation will become more and more difficult. This question of foreign relations needs a paper to itself.

Next, according to the formula, each Dominion must have power to give extra territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace order and good government of the Dominion. But, if each Dominion is autonomous. then it can give extra territorial operation to its legislation without interference from any other Dominion or from the Mother Country. It can alter its boundaries and annex territory. If it cannot do this, then it cannot be autonomous and some other body must have the power to prevent it from doing so. In any event the giving to each Dominion's legislation extra-territorial operation may easily lead to clashes for the settlement of which there is no provision. In any Empire or Nation composed of several States there must be a

Sovereign Government and a High Court that gives the final decision as to what legislation is within the powers of the States and what within the powers of the Federal or Sovereign Government. But in the British Empire, according to the formula, there is no Sovereign body, only a series of autonomous states, each of which has full legislative and executive power without restriction by any other and although at present we have the Judicial Committee of the Privy Council as the alternative Court of Appeal for the Empire, according to the report and according to the autonomy of the several Dominions, any Dominion can abolish altogether the right of appeal to that body, so that we should have no ultimate Court of Appeal for the whole Empire to decide which legislation of the several parts is to prevail in case of conflict.

In fact from the formula it would appear as if all the restrictions upon the Dominions imposed by their Constitutions or by the common law of England were *ipso facto* abolished, although the Committee places on record the fact that, "apart from provisions embodied "in constitutions or in specific statutes expressly pro- "viding for reservation, it is recognised that it is the "right of the Government of each Dominion to advise "the Crown in all matters relating to its own affairs. "Consequently it would not be in accordance with "constitutional practice for advice to be tendered to "His Majesty by His Majesty's Government in Great "Britain in any matter appertaining to the affairs of "a Dominion against the views of the Government "of that Dominion." It would appear therefore that the Committee considers that the autonomy of a Dominion is still restricted by the provisions of its Constitution or of Imperial Statutes providing for reservation. If so, then what becomes of the proud boast in the formula that no self-governing community of the Empire is in any way subordinate to another in any aspect of its domestic and external affairs? If each Dominion is really to be autonomous and therefore the power of reservation, which has practically fallen into disuse, save for emergencies of conflict between Dominion and Imperial interests, must be abolished, why not be logical and by Statute abolish these restrictions in the Constitution and in Imperial Statutes?

It is of course perfectly clear that the recommendations of decisions of the Imperial Conference cannot bind the law courts, which until the law is altered by the Imperial Parliament must decide according to the existing common law, Statutes and Constitutions. Until the sovereignty of the Imperial Parliament is definitely destroyed by legislation, the law courts must decide on the basis of its existence. That is the root of our whole Constitution.

The Committee says that nothing would be gained by attempting to lay down a Constitution for the British Empire. But the fact is that the British Empire has a Constitution, that is definite and at the same time flexible, that works well, that provides for all the difficulties and emergencies that may arise and that is in accordance with the facts of the case, which the formula certainly is not. Is it a fact to assert that Newfoundland or New Zealand is equal in status to Great Britain? Under our present constitution each Dominion has practical autonomy in its domestic affairs within its own boundaries, but the Imperial Parliament is technically supreme over the whole Empire and the appeal to the King in Council provides in the Judicial Committee of the Privy Council a representative Court that can finally dispose of all questions of the validity of legislative or executive action throughout the Empire. We have in the British Cabinet responsible to the British Parliament a body charged with the final advice to the King in all Imperial matters, that will only override the advice of a Dominion Cabinet where it conflicts with Imperial interests, that can represent the Empire as a whole in its relations with other nations, in taking prompt action anywhere in the world to defend the interests of the citizens of the Empire and that can, where necessary for the protection of the Empire, declare war; a Cabinet that has at its command a British navy and a British army strong enough to enable it to give effect to its policy.

Now the Committee, if its formula is really to mean what it says and is not merely camouflage to keep Canada and South Africa nominally within the Empire, proposes to abolish that Constitution without substituting any constitution for it, to dissolve the Empire and to replace it by a group of autonomous nations.

But the fact is that, in spite of all this talk about autonomy, when it comes down to bedrock, everyone knows that the formula does *not* state facts, that in practice the British Parliament and British Cabinet must for the present in the nature of things be sovereign and supreme. There must be some body to act for the Empire in case of emergency. Every Dominion is dependent not only for its foreign policy, when it develops one, but for its very existence upon the British Navy. New Zealand for instance, administers the former German colony of Samoa under a mandate from the League of Nations. If Germany, Austria and Italy resolved to restore to Germany her former colonies, how could New Zealand hold it without the aid of the British Navy. Without that Navy no part of the Empire could have any foreign policy. Just so long as the United Kingdom maintains the Navy practically single-handed, so long must the decision of the British Cabinet in the last resort in matters of external policy or internal action that may lead to foreign complications prevail over the decision of any Dominion. It goes without saying that the British Cabinet would pay the greatest respect to the views of other parts of the Empire, but in the long run it would make up its own mind and carry out its own decision. The policy therefore of any Dominion that might lead to conflict with other nations would depend in the long run on whether it could get the British Navy to back it. Nor would the rest of the Empire, no matter what the formula says about autonomy, tolerate the pivot of the Empire, Capetown, passing into hostile hands, any more than England would in the event of another Great War, permit Ireland to be used either directly or indirectly as a base for hostilities against her.

The intelligent foreigner who endeavours to understand the formula must smile to himself when he sees the Dominions declaring their autonomy and leaning on the British Navy, while the larger of those Dominions contribute practically nothing towards it. When the history of the British Empire comes to be written, the future Gibbon will pen some of his most incisive sarcasms on the attitude of those Dominions who proclaimed their autonomy so loudly while declining to contribute to the Navy upon which their existence and the existence of the Empire depended, will marvel at that Atlas of the Empire, the British taxpayer, who endeavoured to bear the whole burden of the naval defence of the Empire upon his own shoulders, and will point out how by a simple system of Federation and a proportionate contribution by the Dominions to the Imperial Navy, the Empire could have been maintained intact against all rivals, but how the Dominions in grasping at the shadow of autonomy lost the substance of self-protection and effective union.

LONDON LETTER.

Temple, London,
16th March, 1927.

My Dear N.Z.,—

It is little enough I have to tell you this fortnight and much of that little is sad. Deighton Pollock, whom your brethren of the New Zealand Bar cannot have failed to meet when they were over here last year and whom they cannot have failed highly to appreciate, died suddenly a few days ago, in the very midst of his business and happy prosperity. It has been cynically remarked "*De mortuis nil nisi bunkum,*" and no man's memory is like to suffer more from the principle upon which that cynicism insists. If it should be repeated to you, as I have seen it recorded elsewhere, that Deighton Pollock was a charming man and a great lawyer, suspicion might be left in the minds of some observers that he was not even a charming man. And yet he was indeed; very courteous, very graceful, essentially a gentleman and entirely a man. His loss must be a significantly great one to his friends; thus: I often lunch at the Temple with one Mumford from his Chambers, and Mumford, notwithstanding quite enough work to keep him serious, has always been a peculiarly merry luncheon companion; since the sad event, I have hardly seen him smile and he finds great difficulty, I know, in recovering from the shock. Deighton Pollock was not a great lawyer, though he was reasonably and probably sound; but he was a very reliable as well as a very happy adviser, companion and man, and of the valuable type least readily to be let go. Of Crossman, appointed to be his successor, not a great deal is yet known; among successful men the success of a Chancery Junior is probably the least public and least known in the world. I was before Astbury J. this morning and I suggested to my learned opponent that Wilfrid Hunt was supposed (over on our side) to be a more likely candidate; but my opponent told me that either was worthy, as coming from the first rank of equity Juniors of the day.

I may perhaps discuss, next, what few cases I have to discuss, beginning with **Importers Company v. Westminster Bank.** Curiously enough I was studying the pro's and con's of this over in the Inner Temple Library, just now, when MacKinnon J., who decided it, came along. There seems to be some controversy, in Banking circles, as to whether it was rightly decided; but the higher pundits, I understand, incline to think it was. The material section in our Bills of Exchange Act 1882, is the 82nd, and it is to the effect, as you recall, that, given good faith and no negligence, a Bank, receiving payment **from a customer** of a cheque crossed generally or specially as to which that customer has no title, incurs no liability to the true owner of the cheque by reason of having received such payment. The short point of the decision is that the words "from a customer" include "from another Bank, for collection." Here the plaintiff's crossed cheque was manipulated by a forger and the asset obtained through a German Bank; the German Bank sent it to the defendant Bank, to clear with the plaintiff's Bank. Hence the claim and the point. A further cheque case, of less note, is **S.A. des Grandes Etablissements du Tourquet Paris-Place v. Baumgart**: here the defendant drew cheques upon an English Bank in favour of a French casino, the plaintiffs, who cashed them for moneys advanced, as it was found as a fact, for purposes of gaming. Shearman J. (who now by the way wears a beard, if you will forgive me interpolating an item of personal news which I have long been meaning to tell you) rejected a claim on the cheques but held the plaintiffs entitled to succeed on the count for money lent.

My Lords Justices Bankes, Scrutton and Atkin dismissed the appeal in **Leyton U.D.C. v. Williamson,** the case which I think I have already mentioned to you, and if I have not I do not suppose that it much matters, as an authority as to the appropriate and inappropriate ways of dealing with recognizances in the instance of a corporation appealing from a decision of a court of summary jurisdiction by Case Stated. The question (while we are on crime and bodies corporate) of indicating a limited company in respect of offences to the person was dealt with by Finlay J. at Glamorgan Assizes, in an unreported but widely noted case, as you will have seen. In the matter of negligence, I have once before incurred the contempt of the logical among you and the thanks (I hope) of the practical by mentioning as an authority in law what is in truth only a precedent in fact having no general binding effect upon anyone. I will do it again: thus **Anderson and Another v. Southern Railway Co.,** while, my logical masters, *it lays down no law, very much assist my* practical friends who desire to defend against suits for damages railway companies whose carriage doors have been locked with the result that their passengers have not been able to obtain entry at the platform and, seeking entry elsewhere, have suffered accidents. Not altogether seriously I call your attention next to the case of **Harper v. Associated Newspapers Ltd.,** an insurance case in which is discussed the question whether a man, pushing his bicycle up a hill, is at the time of so doing a cyclist or a pedestrian! And lastly I may mention, with less flippancy but with not much more emphasis, the Ferry case: **Layzell v. Thompson and Others.** The effect upon a claim to be owners of a ferry, of the fact that the tide ebbed and left the channel at times traversable on foot, was, affirming Romer J. held to be none by a Court of Appeal comprising the Master of the Rolls, Sargant L.J. and Lawrence L.J.

"And that," as the drearily modulated voice of the Broadcaster regularly remarks, "concludes the new bulletin of to-night."

The new Silks are said to be imminent upon publication; Croome-Johnson, Pritt and Melville, presumably are to be amongst them. All of the above three are familiar names; the first practitioner has a very big practice and the second a very high reputation, at any rate in forensic warfare. I have heard Stamp's name mentioned, from the other side, but I hardly believe it: eminent man though he is in the law, too much of his weight is on, or rather in, paper to justify (I should have said) a gamble on the spoken address. There is another rumour, which may be of interest to you, and that is of the intention of a leading, indeed the leading, advocate of the day to move an agitation for the institution of a Circuit of the Judicial Committee. It is a large and a fine conception, that a Judicial Committee should be so reformed and reconstituted, that it goes regularly the Circuits of the Empire, much as His Majesty's Judges go the circuit of the country Assizes. There might, however, be certain practical difficulties and even disadvantages to be surmounted; but at least the innovation would carry the undoubted blessing that it would rejuvenate, of necessity, the Imperial Court of Final Appeal.

Yours ever,
INNER TEMPLAR.

CORRESPONDENCE.

To the Editor.

Sir,—

Professional Conduct.

In your last issue, the article under the above-mentioned heading calls to mind a rather embarrassing situation with which I was called upon to grapple some little time ago and which although not wholly appropriate to the subject matter of your article will no doubt be of interest to the members of the profession and impress upon them the necessity for establishing for the protection of the public and themselves some tangible security against unprofessional conduct and the embezzlement of clients' moneys.

A week or so ago I was instructed to act for the Vendor and the intermediate purchaser on the transfer of a section to a purchaser for whom another firm were acting and I had to obtain from a well-known financial institution a partial release of a First Mortgage in order to clear the title and complete the transaction. A little delay occurred in obtaining the partial release and the Vendor (to whom I explained the reason for the delay) himself subsequently interviewed one of the officers of the Department on the day finally fixed for the settlement and left instructions on no account to hand over the partial release of the Mortgage to me without further instructions from him.

Later in the day when the Vendor came to see me I requested an explanation and was informed by him that as he was not a business man he did not know whether my explanation of the reason for the delay was correct or not and his confidence in the profession having been shaken by the publication of so many charges against Solicitors for misappropriating trust funds he felt that he could not afford to take any risks as the £100 which was to come to him on completion formed the greater part of his worldly possessions.

Apart from placing me in an embarrassing position (temporarily of course) with the financial institution in question, this experience tends to confirm a previously existing opinion that the lack of security and re-imbursement against the misappropriation by Solicitors of trust funds does not inspire that confidence which should exist between Solicitor and Client and that accordingly not only is the public but also the profession suffering thereby.

I had hoped to have seen long ere this the expression of the opinions of other more experienced practitioners. Unfortunately I am unable to formulate any definite scheme. The most practicable scheme would appear to be the adoption of a fidelity bond on somewhat similar lines to that taken out by Licensed Land Agents except that it would be effected by and in the name of The New Zealand Law Society which could deal direct with some Insurance Corporation.

Each Solicitor taking out an annual practising certificate would in addition to the fee therefor pay say £10 towards the assurance fund and in the case of any practitioner or firm employing a staff, the contribution to the fund would be increased either on the basis of the number of the staff employed or (and it would appear to be fairer) on the annual amount of salaries paid to the staff. I am not able to say how many Solicitors take out practising fees during the year but if the number for the whole of New Zealand were two thousand it would in view of the amount usually misappropriated per year be an adequate security to clients. The proceeds of such contributions would amount to £20,000 which should obtain a cover for an exceedingly substantial amount. In the course of time the Society could perhaps establish its own assurance fund. It would be interesting to hear what other readers' views are.

Yours, etc.,
C. R. BARRETT.

Lower Hutt,
14th May, 1927.

To the Editor.

Sir,—

Standard Form of Mortgage.

In reply to your correspondent "Scrutator," let me reply to his remarks seriatim.

(1) I see no more objection or confusion in Mortgagor and Mortgagee than in Assignor and Assignee, Lessor and Lessee, Donor and Donee and a great many other appellations of a similar nature.

(2) Covenants for title in Mortgages and securities for money are the same as in Conveyances upon sales except that they are absolute instead of qualified. That is to say, that, while in Conveyances upon sales the covenants are restricted to the acts and omissions of the vendor and the ancestors and testators through whom he claims, the covenants in Mortgages and securities for money are unrestricted and amount to a warranty against and for the acts and omissions of the whole world.

(3) I fail to see anything very distressing in this covenant, even in dwelling houses such a covenant is desirable as in the event of a forced sale a neglected place stands much less chance of being sold at auction than a place kept in a reasonable state of repair. In some cases, of course, such a covenant is useless. It can then be struck out. A Solicitor in using any form must use his brains.

(4) Whilst the form may not have been expressly limited to freehold, impliedly it must be so. There are other covenants that are not in the general form that are required in a Leasehold Mortgage and this must be obvious to your correspondent and provision in the cases of Leasehold Mortgages must be made accordingly.

(5) Personally I have always found it wise to nominate the Insurance Company and not provide for one to be approved. There are certain institutions which will not accept insurance from certain Fire Companies and it is always preferable to be on the safe side.

(6) There can be no real objection to this course. Personally I have had considerable experience in making up Mortgage accounts and as far as I can see there is no real objection whatever.

(7) Your correspondent must know that it is not necessary to make demand for moneys payable under the Mortgage. If the Mortgagor makes default then he must take the consequences. The latter part of your correspondent's remarks with reference to this clause is typical of the whole tone of his letter.

(8) In all properly drawn Mortgages it is for the Mortgagee to stipulate, not the Mortgagor.

(9) I cannot see that this is out of place. I would suggest your correspondent read the clause again, together with the preceding clauses.

(10) There is no particular reason except that it follows a declaration and further covenants should be introduced by appropriate words.

(11) The principal reason is to enable a Mortgagee to nominate a particular Company if he wishes. The implied covenants under the Act must of course apply

except as varied. An expressed variation will be found in the power of sale clause.

(12) I fail to see quite what is meant by this objection. The clauses are numbered as far as need be and I am at a loss to see how the form could be improved by numbering every sentence.

(13) I would suggest that your correspondent have a more careful examination of the power of sale clause given with that in the Schedule to the Act. It will reveal ample modifications.

(14) It would be interesting to know your correspondent's reasons for this not being common in New Zealand. I have seen a very great number of forms with it in.

(15) If your correspondent will follow the form more carefully he will find that this is provided for.

(16) With reference to this, the statutory form of Mortgage leaves out a great many things which it is customary to insert in more fully drawn Mortgages. There can be no possible objection to the words inserted in this case and no objection has ever been made by any District Land Registrars.

(17) This is entirely a matter of taste. For my own part I have always found it more convenient to have it at the end.

In conclusion I would like to point out that your correspondent appears to have overlooked the fact that in drawing a Mortgage he is acting for the Mortgagee. It is the Mortgagee he is protecting, not the Mortgagor. Moreover, the use of the statutory form is adopted by comparatively few practitioners. My own view of the matter is that it is better that the Mortgagor should know what he is covenanting to do than that he should be entirely ignorant of his obligations under the Mortgage. Does your correspondent in using the statutory form produce to his Mortgagor the Schedule in the Act and show him the various obligations which he is entering into by signing the statutory form? I personally make a rigid practice of requesting Mortgagors to read through Mortgages before executing them and it seems to me that it is desirable that they should know their obligations in signing the document.

Yours, etc.,

"ATTORNEY."

Wellington,
11th May, 1927.

THE STATUS OF SOLICITORS.

At the annual general meeting of the Taranaki District Law Society considerable discussion took place in regard to the formation of some counterpoise to the activities of the Public Trust Office. A suggestion made by Mr. A. Coleman, of Stratford, seems worthy of consideration. It is fairly obvious that something will have to be done unless the profession, on its solicitor side is content to have itself become a department of State. Mr. Coleman pointed out that the Legal and Clerical Guarantee Association of England was originally formed by the Solicitors of England to supply a corporation-sole trustee and to give the necessary financial guarantee that the administration of deceased persons' estates would be duly carried out. If such a Society were formed, Solicitors would be able to influence the destination of wills and to keep in touch with the legal work and administration of estates in which their clients are concerned.

It is time that the members of the profession picked up the gage which for so long the Public Trustee has been flinging down so contemptuously. There is scarcely a Public Trust advertisement which does not contain some veiled allusion to the uselessness or wickedness of the legal profession generally. To all of which the profession meekly bows its head and makes no reply. Any stick is good enough for the castigation of the legal profession and it is safe to say that never was its credit so low. If this state of things only drives the members closer together for mutual support and cleansing, it will not entirely have failed of good.

The opinion was warmly expressed at the Annual Meeting of the Taranaki Law Society that the barrister side enjoys too great a preponderance in the Councils of the New Zealand Law Society. It was pointed out that in England there is the Bar Council to look after matters affecting barristers and the Law Society to represent the solicitors. But, as we have fusion of the branches here it was felt that matters affecting the solicitor side were being prejudiced by the fact that the Council of the New Zealand Law Society was made up largely of barristers.

The Taranaki Law Society has determined to try conclusions with one of the local papers. This journal some time ago adopted the practice of omitting in its reports of law suits, all reference to counsel engaged. The Society having come to the conclusion that such a practice was less than the members were entitled to, instructed the Council of the Society to interview the owner-editor of the offending newspaper, and to put it quite plainly that unless the practice were speedily altered retaliatory measures would be considered.

"RUSTICUS."

THE LORD CHANCELLOR'S SEAT.

In the literal sense there is no "bar" in the House of Commons; it is but a brass rod let in the floor. Yet many people imagine it as a sort of waist-high barrier. And the "woolsack" in the House of Lords—most people would declare it to be but a figure of speech, and that there was "no such thing." Yet there is. It is a square sack filled with pure wool, and on it the Lord Chancellor, as "Speaker" of the Upper House, sits quite comfortably.

The woolsack was first placed in position in the reign of Edward III. In his reign the great national industries were the weaving of woollens and the export of yarn. Thus, as a symbol of what wool meant to Britain a sack of wool was placed in the House of Lords as a seat for the most important officer of the State. The custom has been maintained ever since, with the slight variation of making the sack square and covering it with a red cloth.

THE RULE OF THE ROAD.

With the multiplication of motor vehicles on the roads, the law as to liability for accidents at the junction of a main road and a secondary or bye road becomes of increasing importance.

A case recently came before the first division of the Court of Session at Edinburgh in which this question was fully and carefully considered.

The action arose out of the collision of a motor van and private motor car, at the junction of a main road and a side road in Haddingtonshire. The van owner claimed damages, and the owner of the motor car counterclaimed. At the hearing in the Sheriff's Court damages were awarded the motor car owner. On appeal the Court of Session (the Lord President, Lord Clyde, Lord Sands and Lord Blackburn) non-suited the motor car owner, awarded the owner of the motor van costs of the appeal, and expressed the opinion that the accident was equally contributed to by both parties.

Delivering judgment, Lord Clyde said that at the time of the impact the car was going at a very high speed, but in approaching this cross-road the driver of the van had completely omitted his duty of look-out to its own left in order to see whether any traffic was approaching on the main road. He did not do it, and that was negligence, and gross negligence. It was because he had not taken that precaution that he proceeded to cross the cross-roads as if everything was all safe and clear in his way, and that was undoubtedly negligent. But the case really turned on, whether the car was in any better position; and it seemed to him it was in a very much worse position. When the driver was somewhere from 100 to 200 yards away from the cross-road, he had it full in his eye, and saw the body of the van approaching the cross-road. The case had been apparently, to some extent, affected by the idea which he should have been glad to think was now finally exploded, that in some way or other a person who travels on a main road is absolved from the duty of care and consideration for other traffic which approaches that main road from a side road, of the existence of which the traveller on the main road knows.

The idea seems to be that, either by virtue of some rule of the law universal, or in consequence of some arbitrary and judge-made rule of the road, the person who travels on the main road is somehow absolved from the ordinary considerations of care, or relatively absolved from the duty of care and consideration of everybody else. He had no sympathy with that view. He did not believe that it ever was, or is, any part of the law of Scotland whatever.

Lord Sands, in the course of his judgment, said, that in his view, where cars are approaching a cross-road in such circumstances that, if they persevere without regard to one another, a collision may take place, the understanding is that the driver upon the side road gives way to the driver upon the main road. It does not follow that this absolves the main-road driver from responsibility if he maintains his course and speed. The driver on the side road may fail to observe the car upon the main road, or may misjudge pace and distance, or he may fail to recognise his road as being a side road. Accordingly, the duty of the driver upon the main road is not to rely absolutely upon the side road vehicle giving way. He must watch the vehicle approaching on the side road, and be prepared to take the necesssary steps to avoid collision if this vehicle does not give way to him.

There does not appear to be any reported decision of the English Courts dealing directly with the question of the rule of the road at cross-roads, or laying down the principle that side road traffic, in the ordinary course, must give way to main road traffic. In the earlier Scottish case of **Macandrew v. Tillard** (1909) S.C. 78, however, the Lord President, Lord Dunedin, said, "where there is any possibility at all of collision "it is the business of the person in the side road to give "way to the person on the main road." Substituting "probability" for "possibility," this dictum may be regarded as fairly representing the view our Courts would act on in similar cases.—"Justice of the Peace."

UNITED STATES LOANS.

In answer to a question in the House of Commons on November 9, the Chancellor of the Exchequer gave the following particulars as to the War and post-War debts due by other European Governments, to the United States Government as stated in American publications, and the total payments to be made over a period of 62 years in the case of debts which have been the subject of funding agreements.

	Principal of Debt as funded.	Aggregate amount of paymnts to be received over the 62 years period.
	£	£
Great Britain	920,000,000	2,221,193,000
France	805,000,000	1,369,534,820
Italy	408,400,000	481,535,500
Belgium	83,556,000	145,566,100
Poland	35,712,000	87,137,510
Czecho-Slovakia	23,000,000	62,562,287
Serb-Croat-Slovene State ..	12,570,000	19,035,527
Roumania	8,918,000	24,501,252
Estonia	2,766,000	6,666,228
Finland	1,800,000	4,339,011
Lithuania	1,206,000	2,906,388
Latvia	1,155,000	2,791,727
Hungary	387,800	938,648
Total ..	2,304,470,800	4,428,707,998

The rate of interest charged is 3 per cent. for 10 years, and 3½ per cent. for the following 52 years, except in the cases of Belgium, France, Italy, and the Serb-Croat-Slovene State, in which cases the rates charged are the following:—

Belgium—No interest on pre-Armistice debt.

Interest on post-Armistice debt at reduced rates for 10 years; thereafter 3½ per cent.

France—5 years, nil; 10 years, 1 per cent.; 10 years, 2 per cent.; 8 years, 2½ per cent.; 7 years, 3 per cent.; 22 years, 3½ per cent.

The annual payments in the case of the most important debts are as follows:—

	United Kingdom. £	France. £	Belgium. £	Italy. £
1922–5 ..	96,386,000	—	—	—
1926 ..	32,180,000	6,000,000	768,000	1,000,000
1927 ..	32,030,000	6,000,000	820,000	1,000,000
1928 ..	32,250,000	6,500,000	940,000	1,000,000
1929 ..	32,118,000	6,500,000	1,090,000	1,000,000
1930 ..	32,156,000	7,000,000	1,240,000	1,000,000
1931 ..	31,988,000	8,000,000	1,460,000	2,924,250
1932 ..	32,220,000	10,000,000	1,590,000	2,941,225
1933 ..	36,780,000	12,000,000	1,690,000	2,958,175
1934 ..	36,556,000	15,000,000	1,810,000	3,015,100
1935 ..	36,332,000	16,000,000	1,910,000	3,091,950
1936 ..	36,108,000	18,000,000	2,534,500	3,188,700
1937 ..	36,884,000	20,000,000	2,543,300	3,325,325
1938 ..	36,625,000	21,000,000	2,551,400	3,401,775
1939 ..	36,366,000	22,000,000	2,538,800	3,518,125
1940 ..	37,107,000	23,000,000	2,546,200	3,634,325
1941–50*	364,102,000	249,000,000	25,381,900	47,341,300
1951–60*	361,422,000	250,000,000	25,405,500	69,938,300
1961–70*	362,730,000	250,000,000	25,416,300	94,791,750
1971–80*	370,983,000	250,000,000	25,496,500	123,662,000
1981–84	147,847,000	100,000,000	10,263,600	60,858,400
1985–87	—	73,534,820	7,570,100	47,944,800
Total	2,221,193,000	1,369,534,820	145,566,100	481,535,500

* Ten years.

JUSTICES ACTING WITHOUT JURISDICTION.

The recent case of **Palmer v. Crome and Others** ("The Times," 4th February, 1927), in which Mr. Justice Talbot delivered a considered judgment and which was brought by the plaintiff against two justices of the peace, for damages for wrongfully issuing a warrant for, and causing a distress to be levied upon the plaintiff's goods for six months' poor rate and expenses, although resulting in judgment being entered for the defendants, nevertheless exhibits and marks the great care and responsibility that develops upon justices in the exercise of their important jurisdiction.

The case turned upon the limitation imposed by statute to the amount of rates to be levied where the occupier happens to be a weekly tenant, **Hammond v. Farrow** (1904) 2 K.B. 332; 68 J.P. 352; **Mansel v. Itchen Overseers** (1906) 1 K.B. 221; 70 J.P. 148.

The justices had issued a distress warrant for a larger amount than was permissible having regard to section 2 of the Poor Rate Assessment and Collection Act 1869, which enacts: "No such occupier (including weekly "tenants) shall be compelled to pay to the overseers "at one time or within four weeks a greater amount "of the rate than would be due for one quarter of the "year."

The plaintiff had appealed to the quarter sessions against the distress warrant and the appeal had been allowed without costs.

The defendants denied that they issued the warrant wrongfully and/or without jurisdiction, and relied upon sections 1 and 2 of the Justices' Protection Act 1848. They contended that if the issue of the warrant was wrongful, such issue was an act done by them in pursuance of the execution or intended execution of their public duty as justices of the peace, and that they were protected by section 1 of the Public Authorities Protection Act 1893.

Mr. Justice Talbot held that the justices' contention that the distress warrant was rightly issued was *res judicata* by the decision of the quarter sessions, and the only question was whether the justices had acted within their jurisdiction in which event they were protected (unless express malice were shown). Section 1 of the Act of 1848 enacts:—"That in an action against a justice for any act done in the execution of his duty with respect to any matter within his jurisdiction malice must be proved."

The plaintiff contended that the justices had acted without jurisdiction, and that he had, under section 2 of the same Act, a right of action without proving malice, as he would have had before the passing of the Act.

Mr. Justice Talbot held that the error of the justices having been upon a decision as to facts in dispute before them, there was *prima facie* evidence to found their jurisdiction.

Justices are not liable in an action of trespass where on evidence before them they come to an erroneous decision as to their jurisdiction on a question of fact: **Calder v. Halkett** (1839), 3 Moo. P.C. 28, at page 77. It was otherwise if, upon the facts so found, they decided wrongly in point of law, **Houlden v. Smith** (1850), 14 Q.B. 841.

But they cannot be held liable for an error on a point of law in a case within their jurisdiction: **Somerville v. Mirehouse** (1860), 25 J.P. 21.

It need hardly be pointed out that if the justices had acted maliciously and without reasonable and probable cause they would have been liable, but a very strong case must be made out: **Abrath v. N.E.R. Co.** (1886), 11 A.C. 247.

And justices are not liable where they have been guilty of a mere irregularity as distinguished from a clear excess of jurisdiction: **Bott v. Ackroyd** (1859), 28 L.J.M. C. 207.

Where, however, upon the face of the proceedings it is evident that they have no jurisdiction or they have clearly exceeded it (e.g., where they have convicted in the absence of a person who has not been duly served with the summons), **Ex parte Smith** (1875), 39 J.P. 613, and they nevertheless adjudicate against the defendant the justices are liable for the wrong done, and in this event it need not be proved that the act was done maliciously and without reasonable and probable cause, **Agnew v. Jobson** (1877), 42 J.P. 424; **Ratt v. Parkinson** (1851), 15 J.P. 356.

But it is important to note that in any event, by the joint effect of section 2 of the Justices' Protection Act, and section 1 of the Public Authorities Protection Act, the conviction or order complained of must have been quashed, and the other conditions therein mentioned as to notice of, and time-limit for, commencement of action, before the action for damages can be brought.

With regard to the damages recoverable the curious provisions of section 13 of the 1848 Act should be carefully noticed—where in the special events there mentioned the amount recoverable may be cut down to the magnificent sum of two pence, and the plaintiff may not get any costs.—"Justice of the Peace."

LEGAL LITERATURE.

The Australian branch of the House of Butterworth has just published "The Trustee Acts of New South Wales" annotated by Messrs. Nicholas and Harrington of the Bar of New South Wales. But the publication contains not only the Trustee Act of 1925, but also the preceding Acts and the full text of the Acts governing the Permanent and Perpetual Trustee Companies of New South Wales and Rules of Court and appendices on the management of estates by trustees.

The New South Wales Act of 1925 is a consolidated Act and includes not only the previous New South Wales Acts but in addition relative English enactments as far back as to George V, Chap. 5.

So far as the New Zealand practitioner is concerned, he will obtain most help from the cases decided by the Equity Court and from the appendices above-mentioned.

The Editors in a foreword say that they believe that the work will be of help to those interested in the management of trust estates by reason that the principal act dealt with was constructed only after painstaking surveys of trustee law in other jurisdictions and after conferences between the Commissioner for Law Reform who drafted the act and the reports of those institutions which were engaged in the administration of the law affecting Trusts and Trustees.

After a perusal of the work, I can well believe that the Editors are entitled to entertain their belief.

L. A. T.