

“Not having the fear of God before her eyes...” : enforcement of the criminal law in the courts in the early Canterbury settlement 1853-1862.

Jeremy Finn
School of Law,
University of Canterbury.

Author’s Note

This paper was presented the Australia and New Zealand Law and History Society Conference, Perth, July 2004

A revised version dealing with the criminal litigation in the Supreme Court was later published, and with additional material by a co-author was published as Jeremy Finn and Charlotte Wilson) “ ‘Not having the fear of God before her eyes’: enforcement of the criminal law in the Supreme Court in Canterbury 1852-1872” (2005) 11 Canterbury LR 250-282:

The material dealing with criminal law cases in the Resident Magistrates Court appears, oijnn edited and revised form in are discussed in Jeremy Finn “Debt, drunkenness and desertion: The Resident Magistrate’s Court in Early Canterbury: 1851-1861” (2005) 21 NZULR 452.

Abstract:

This paper looks at the criminal cases heard in the Supreme Court and the Resident Magistrate’s Courts in Lyttleton and Christchurch in the first decade of the Canterbury settlement. It reports the results, so far, of research into the range of offences prosecuted, the choices made between civil and criminal actions, the manner in which the “general” criminal law was imposed and special features of the penal laws enforced by the courts. An account of findings as to the range of defendants in both courts, and the punishments imposed on them, is given. The paper also looks at some notable cases to consider insights they give into early Canterbury society and prevailing attitudes.

The early years of the Canterbury settlement in New Zealand provide an unusual opportunity to consider enforcement of the criminal law in a new community which inherited, rather than developed, its legal institutions. Canterbury was a new settlement in an area with virtually no pre-existing European population (and few indigenous people), yet deriving its institutions from the other, somewhat older, settlements of the colony.

Canterbury was a “Wakefield” colony, heavily influenced by Anglican church principles and members, which was intended to be a primarily agricultural settlement.

The rural base of the Canterbury settlement developed rapidly, with sheep-farming quickly becoming the dominant industry. with expansion being easier because the Canterbury pioneers could virtually ignore the interests of a small Maori population, the survivors of raids by other Maori from the north. Poor communications were a hindrance, and allowed the initial port settlement of Lyttelton to long retain dominance over the intended principal centre of Christchurch.

In 1850 a small European population of whalers and timber-fellers was transformed by several hundred Canterbury Association migrants. By the end of 1853, the (settler) population of Canterbury was around 3,000; this rose substantially in 1854-55, slowed over the period 1856-67 and then increased ever more rapidly. The 1861 census showed a (settler) population of 16,040; which increased a further 25% in the following year.¹ It is difficult to estimate accurately the Maori population over the period, but a contemporary source gave the (suspiciously precise) figure of 638 in 1858.² Experience of events in other parts of New Zealand suggests this figure was probably somewhat higher in the early years.

¹ Population data is taken from Hight, Sir James, Gardener W J et al, (eds), *A History of Canterbury* vol 2, p 64 and p323.

² *Lyttelton Times* June 29 1859.

2 The institutions

There were in this period in New Zealand court two principal courts - the Resident Magistrate's Court and the Supreme Court.

(a) The Resident Magistrate's Court

This court had jurisdiction over minor cases of theft and assault, drunkenness and breach of the peace, as well as over a wide range of "police" offences including such diverse matters as wandering stock, the illegal dumping of refuse and nightsoil and liquor licensing. The Resident Magistrate could exercise the jurisdictions conferred on any 2 Justices of the peace, but there were some matters (particularly relating to drunkenness) which could be dealt with by a Justice sitting alone. In Canterbury we find examples of one Justice sitting alone to try minor cases; two or more Justices sitting together to hear the full range of cases in which the Court had jurisdiction and others – by far the most common – where the Resident Magistrate sat either alone or with one or more Justices. In some weeks several of these permutations took place, so the court might sit three or four times, dealing on most occasions with one or two cases of drunkenness and the like.

The RMC could also commit people to the Supreme Court for further proceedings before a Grand Jury and thence to trial before a petty jury.

Initially the RM Court sat regularly in Lyttelton, with the only other court being held in the much smaller town of Akaroa. Unfortunately there is no useful data from the Akaroa courts. By April 1854 sittings were also held in Christchurch, and by 1857 the Court was advertising regular sessions - on a weekly basis in Christchurch, three times a month in Lyttelton and monthly sittings in the rural centre of Kaiapoi.³ These four towns are the only ones in which Courts regularly sat. There is an indication the Akaroa magistrate occasionally went on circuit to other parts of Banks Peninsula, but I have found no indication of any circuits being held on the plains side of the Canterbury settlement.

³ See for example *Lyttelton Times* of 4 July 1857

(b) The Supreme Court

The criminal jurisdiction of the Supreme Court was expressed thus in the Ordinance setting it up in 1841:

2. The Court shall have jurisdiction in all cases as fully as Her Majesty's Courts of Queen's Bench Common Pleas and Exchequer at Westminster have in England, and shall be a Court of oyer and terminer and gaol delivery and assize and nisi prius.

It could therefore deal with virtually all criminal cases. The court also had jurisdiction in Admiralty. To ensure there was no doubt about the authority of the Judges to try cases arising on the high seas, Judges were also commissioned as deputies of the Governor in his role as Vice-Admiral-Commissary and thus being able to exercise the English, rather than the colonial, Admiralty jurisdiction.⁴ This was a matter of some importance as a number of criminal cases were brought in that jurisdiction in relation to conduct on ships en route to Lyttelton.

The first sittings of the Supreme Court in the new settlement were held in November 1852. The early sittings of the Supreme Court in Canterbury were fleeting affairs, conducted at long intervals by a judge on circuit from Wellington. Not until March 1858 did Canterbury have a resident Supreme Court Judge, with the appointment of Henry Barnes Gresson, an Irish lawyer formerly in practice in Christchurch. There followed a significant increase in the frequency of criminal sessions, and by 1861 three or four sessions a year were held.

It is clear that during these long breaks between Supreme Court sessions some cases were dealt with in the Resident Magistrates Court which would otherwise have gone to the Supreme Court as for example a prosecution for escaping from custody in December 1853.⁵

⁴ See for example the proclamation in relation to Henry Barnes Gresson, New Zealand Government Gazette 8th December 1857.

⁵ *Lyttelton Times* 31 December 1853.

The proceedings in all these sessions strike the modern eye as notably lacking in procedural safeguards, as the proceedings saw an alternation of grand jury hearings and trials. The same panel of jurors served for the two days, with a shuffling of individuals between grand jury and petty (trial) jury panels to avoid anyone sitting on both in any one case, but no trial juror can have been entirely free from knowledge of the grand jury's views of the evidence.

It is notable that where the petty jury had to decide a case, verdicts were speedy. It was not uncommon for the verdict to be reached without the jury leaving their box, and the longest retirement recorded for the decade was in 1860 where it took the jury 35 minutes to acquit a ship's captain of alleged perjury in a civil action over the supply of provisions. Even a murder trial verdict in 1859 was reached "in about half an hour".

3. The Resident Magistrates Court in operation

The records of the Resident Magistrate's Court are incomplete – particularly for the early years of the settlement, although the gaps can to some extent be filled in by contemporary newspaper reports, although these are unsystematic and idiosyncratic, from late 1853.

3.1 some snapshots

We do have adequate records to establish the patterns of offending charged in the RMC at Christchurch in 1855 and 1856.⁶ In 1855 there were 59 charges brought. Of these 34 were for drunkenness. The next most common, at a mere 4 each, were liquor licensing offences resisting the police and assault. Of the four assault charges, two were of assault on the police; one was for assaulting the defendant's wife.

The 1856 records are a little different, in that of the 83 offences charged, drunkenness accounts for only 38. However the tally of other offences is

⁶ NZNA Chch CAAR CH290 Item 44 Register of Cases Christchurch RMC 1854-67

swollen by there being 9 charges – all apparently arising out of a single incident – of persons being charged with failure to assist police when called on, and six of wilful damage - again all on a single occasion. Five of the six charged with wilful damage had their charges dismissed. Were it not for the unusual set of charges for failure to assist, drunkenness would again have accounted for more than half the cases.

The records of the Resident Magistrates Court for Lyttelton for 1859⁷ show there were (by my count) 201 criminal charges brought to the court. Of these charges of drunkenness numbered 114. As a conviction seems to have been imposed in every case, the convictions for this offence must represent an even higher percentage of the actual convictions imposed. In descending order, the other major contributors to the total were theft (17); desertion of a ship or disobedience to ship's officers (16); allowing horses to roam at large (14); having unlicensed dogs (9); and obstructing streets or dumping refuse thereon (7). The range of less common offences included various licensing offences, a single charge of wilful damage and an equally rare case of resisting the police. It is notable that there is not a single assault charge for the year.

A less complete set of records – for the first two months of 1861 – show a somewhat similar picture, with 39 charges being brought, of which 16 were for drunkenness and eight for refusal of duty on a ship or desertion by a crewman. However nine individuals were charged with having unregistered dogs, a figure which may be unrepresentative of the normal run of cases. Of the remaining charges, only one of theft, one of wilful damage and one of resisting the police are in the really criminal bracket by modern standards.

3.2. Who brought the cases?

It is not always clear who was bringing prosecutions, but in almost all cases in the prosecutor is either the victim of the offence, or, particularly toward the end of the period under study, a member of the local police. One subset of

⁷ NZNA Chch CAHX CH132 Record of proceedings Lyttelton RMC 1858-60.

cases does reveal a different pattern – the constant trickle of prosecutions for breach of the provincial ordinances relating to the prevention or treatment of scab in sheep, where the prosecution was normally brought by an Inspector appointed under the ordinance. These cases are discussed below at part 3.6.

There are a number of cases where the principal aim of the prosecution appears to have been to bring to public notice a legal requirement which was not being met. In this category we can place at least some of the offences for allowing stock to run at large, prosecutions for having a dirty chimney (that is, one which caused a risk of fire); and other matters such as tethering horses in the main street. Others in the same class include the prosecution of a ship's captain for failing to deliver up loose letters to the Post Office.⁸ As the Resident Magistrate also effectively commanded the local police force, it is impossible not to conclude that the magistrate could not choose which laws should be enforced in this manner.

I found only one case which appears to have been brought by an “informer” – that is a person bringing the prosecution in the expectation of a reward payable on conviction. This case occurs in 1853,⁹ where a publican was charged with a number of licensing offences such as allowing dicing on licensed premises gaming and selling spirits on a Sunday. The newspaper report indicates counsel alleged the prosecutor was a “notorious” informer, and the prosecution collapsed amongst allegations of subornation of perjury of a witness.

In this regard it is important to note that in many cases a wronged person had a choice of whether to bring a civil action for damages, or to bring a prosecution. The court record shows a number of civil actions for assault where the principal aim seems to have been to get damages, while a criminal action would certainly have been possible. Thus in 1854 alone there are two civil cases for assault, and a private prosecution – the latter having the unusual feature that it was brought by a parent against his 6 year old son's

⁸ See *Lyttelton Times* 26 October 1859.

⁹ See *Lyttelton Times* 7 May 1853.

schoolteacher.¹⁰ It is an interesting commentary on contemporary community views, that the case was dismissed as the boy admitted he had made some noise before the teacher flogged him. Some of the private prosecutions are discussed at part 3.5 below.

It may also be that the differences in costs were relevant. To launch a civil action in the Resident Magistrates Court involved 12/- in costs exclusive of the cost of serving the summons; bringing a prosecution cost only 3/- and costs of service of summons (which was on a lower scale than for civil cases).¹¹ Even the smaller sum may have deterred some victims.

The other advantage of a prosecution was the possibility that a convicted defendant might be bound over to keep the peace¹² – and therefore provide the victim with somewhat more of an assurance against repetition.

This might well have been the basis for the prosecution in August 1854 of one Benjamin Gahagan who was prosecuted for assault on his wife, for “breaking” the house where she had sought refuge and assaulting the police when they intervened. Gahagan was fined £2 on each assault charge (with a prison term if the fine was not paid) and ordered to find two sureties for £50, and to enter a similar surety himself, against any future breach of peace toward his wife.¹³

That was not the only case where criminal proceedings were used to deal with a matrimonial problem. Another is provided by a prosecution for failure to maintain dependents. In 1859 a John Elliott was convicted of “desertion” or “neglect” (both terms are used) of his wife and children. Elliott’s wife indicated that she and their children had been left to board with a local family, and over the last 10 or 11 weeks Elliott had only provided £4-15 for their support. Elliott claimed he had paid as much as he could, but the Magistrate held the allegation of neglect had been “fully established”. Although Elliott was

¹⁰ See *Anon v Bilton*; Chch RMC, reported *Lyttelton Times* 8 April 1854. Contrast the two civil actions *Salt v McQuin* and *Graham v Gilbert* reported *Lyttelton Times* 23 June 1854.

¹¹ NZNA CH132/637 Record of Proceedings of Lyttelton Resident Magistrates Court 1858-1859

¹² Eg *Treleaven v Lewis* reported *Canterbury Standard* 3 August 1854.

¹³ See *Lyttelton Times* 9 September August 1854. It is possible that the defendant was the “Gahagan Senior” who appeared on later occasions charged with drunkenness.

apparently amenable to substantial punishment only a nominal fine of 1/- was imposed, on the condition Elliott paid at least £1 per week in future.¹⁴ The record does not allow us to establish whether this was a rare or a relatively common phenomenon.

There is some, but limited, evidence of Maori using the court's criminal processes. In 1859 a Maori, Simeon Pohata brought a private prosecution against one Bennington, alleging that the defendant and his father had attacked Pohata after Pohata had hit the defendant's younger brother for deliberately splashing him with seawater on a beach. The accused was convicted and fined 5/-.¹⁵ I have found only one other case of a Maori bringing a criminal prosecution in this period – where a Maori brought a prosecution for the unlawfully shooting of a dog.

3.3. Who were the defendants?

The incomplete nature of the data precludes any definite answer to this question. What follows is therefore a little impressionistic, but may serve as a basis for discussion. Further research is planned which may help interpret what we do know.

Firstly, the defendants are very largely European. I have found only two cases where Maori appeared as defendants to criminal charges - both of public drunkenness in February 1854.¹⁶ There is one case so far discovered of an Indian defendant – if that was the only one, it would be fewer, curiously, than in the Supreme Court.

Secondly, I am sure many of the defendants were not local residents. The Lyttelton data, in particular, includes a substantial number of persons who were transients – either travelling within New Zealand or, possibly more

¹⁴ see *Lyttelton Times* 9 July 1859.

¹⁵ *Pohata (native) v Bennington* Lyttelton RMC 12 September 1859, see *Lyttelton Times* 21 September 1859.

¹⁶ *Lyttelton Times* 18 February 1854. It is probable that this offending led to a successful prosecution, a few days later, of publican who was fined heavily for selling spirits to Maoris, see *Lyttelton Times* 25 February 1854.

frequently, seamen on ships calling into the port. The Court records do not give even minimal addresses, but we know there were cases involving indiscipline etc by seamen (see 3.5 below). It is, I think, a valid speculation that a fair proportion of the defendants in the drunkenness cases were seamen overindulging after time at sea. In the long term I hope to be able to identify more precisely the locals and the visitors, but that will be a long term project.

There were a number of female defendants- but the proportion is difficult to establish. In 1856 in Christchurch it was but two of 83 – one for drunkenness and one for “felony” – which may well have been larceny or a similar offence. In Lyttelton in 1859, of 201 charges, 8 were against women for drunkenness – with Christina Swanson being charged four times. Two different female defendants were also charged with having an unregistered dog, and with having a foul chimney. Five percent is perhaps an unusually high figure, but not out of line with the figures of the Supreme Court (see below).

3.4 Penalties

The RM Court did not then have the wide range of sentencing options open to modern courts., In effect, it had the choice between a monetary penalty by way of a fine – by far the most common form of penalty - or imprisonment.

Two other options were, on occasion, open. In cases of violence, the Court could bind an offender over to keep the peace, and to find sureties for future good behaviour. In effect, this relied on the economic self-interest of the defendant and his sureties to restrain him from future offending. There are a few cases of this being used, as with the domestic assault case discussed earlier.

Under the Resident Magistrate’s Court Ordinance 1846, the RM Court could in cases of larceny of goods under 20/- in value dismiss the charge even though the felony was proved. It is difficult to know whether this power was used, but the court records do on occasion show an acquittal of a larceny charge followed by the defendant being admonished.

Where the court did impose a term of imprisonment, it seems the longer terms were almost always in consequence of assaults – and the same is true of fines, as one of the highest fines I have seen in the Court’s ordinary criminal jurisdiction was for £5 for assaulting police.

I have seen no case where the maximum possible sentence of 6 months (for theft over £5 in value) was imposed. Theft cases tend to run around the 1 month imprisonment mark; assault cases may be similar or with perhaps only a fine. Imprisonment was also common in the cases of seamen charged with misconduct on their ships, as to which see 3.6 below.

Otherwise, the court records a regular litany of fines – 5/- here for an unregistered dog; 5/- or 10/- for drunkenness, varied by 20/- fines for second offences of drunkenness and, rarely, up to 40/- or even a few days imprisonment for a third offence. It appears it was only when fines got to this level that it was normal to threaten imprisonment in default of payment of the fine. Unfortunately we have no way of telling how many of those fined actually paid, and how many were imprisoned after not being able to pay. It is also clear that once the Supreme Court was sitting regularly, the RMC was very reluctant to impose substantial penalties, leaving the imposition of penalty to the Supreme Court judge whose powers were much greater.

3.5 Assault cases

One feature of the later 1850s is the number of private prosecutions for assault. The Lyttelton RMC heard two such cases on a single day in July 1859. The first, *Attiwell v Smart*¹⁷ was brought by Harriet Attiwell, a single female passenger on the ship “*Cameo*”, who prosecuted Alexander Smart, the second mate of the ship, for assault committed by tying her to the rigging of the ship and pumping water over her till she was drenched. The defence was essentially that this had been necessary discipline as Attiwell and others (as she admitted) had been making a great deal of noise despite orders to be

¹⁷ Lyttelton RMC 18 July 1859, see *Lyttelton Times* 20 July 1859.

quiet – so much so that the crew had been unable to sleep. Smart was convicted and fined £5, the court holding that he had no right to interfere in this way with a passenger, and that even a captain who ordered such treatment would be going too far. The newspaper report indicates that Smart was then summarily charged with contempt of court for the manner in which he answered the charge, and imprisoned for 48 hours in consequence.

The second case, *Owen v Cameron*,¹⁸ was again brought by a single female, Anne Owen, aged 17, who had been one of a number of schoolchildren from King Edward's refuge, Islington, who came out on ship "Mystery". Owen had, after domestic service in private homes, been employed by Peter Cameron, the landlord of the Robin Hood Hotel of Lyttelton and a former Chief Constable of the Canterbury police. Owen stated that Cameron immediately began to "approach her with improper addresses" and repeated them on various occasions; including three times where actually laid hands on her but she had escaped. Those incidents were each charged as assaults. Another girl from the same ship gave evidence that Owen had complained to her of Cameron's conduct, and when the witness visited the hotel, Cameron had taken "improper liberties" with her. Cameron's daughter Ellen and others from household, gave evidence that Owen was an idle girl "of dirty habits".

The Justices - in an interesting view of the burden of proof – held the case was difficult as such allegations were not susceptible of external proof, but if they were not to convict, they would have to decide Owen had trumped up the charge, and they considered her to be a witness of truth, and therefore convicted Cameron. Cameron had earlier been bound over not to breach the peace, but rather than ordering forfeiture of the surety (in the large sum of £100) by his sureties, they imposed one months imprisonment.

A rather different picture is shown in the other prosecution for assault involving a female in this winter season – and the only RMC assault case found where the defendant was a female. Martha Anderson was prosecuted

¹⁸ Lyttelton RMC 18 July 1859, see *Lyttelton Times* 20 July 1859

for an assault on her husband. Although Martha admitted striking a light blow, her husband could not give evidence as he was too drunk, and was taken into custody by the police. On the following day, the husband was convicted of drunkenness, and the assault charge against Martha was dismissed, with both parties being warned to be of good behaviour in the future.¹⁹

3.6 Of ships and seamen

From 1854 on there is a steady trickle – swelling on occasions to a spate – of prosecutions of sailors for disobedience to orders, mutiny, refusal of duty and the like offences. In May 1859, for example, the Lyttelton RMC dealt with one case of an apprentice seaman charged with desertion of the ship. The defendant, when questioned, indicated he deserted because he did not like the first mate. As he promised to ship out for England if released, no penalty was imposed.²⁰

No such good fortune had attended five other sailors (from an unnamed ship) who were convicted only days earlier of conspiring to refuse lawful commands. One was also convicted of assault on the ship's captain. He received a sentence of 12 weeks imprisonment with hard labour; the others 1 to 3 weeks imprisonment with hard labour. In the same week, the Court also heard three charges of desertion (all from different ships) and one of refusal to proceed to sea. Again, all were convicted, and received sentences of between one and 3 weeks imprisonment with hard labour. While it was unusual to see such a cluster of cases, there were certainly a steady run of these cases throughout the period.²¹

While the vast majority of cases involved prosecutions of ship's crew, there were occasional instances of ship's officers being prosecuted. In June 1861, the Court imposed a fine of £5 on a ship's captain for attacking a crewman who had declared himself too ill to work. The defence was, in effect that the seaman, one Mombarak, an Arab from Muscat, (described by the reporter as

¹⁹ *Lyttelton Times* 13 August 1859

²⁰ *Lyttelton Times* 1 June 1859.

²¹ See data in NZNA Chch CAHX CH132 Record of proceedings Lyttelton RMC May 1859.

"a remarkably black man") was a malingerer, and his conduct an element of a conspiracy by the crew to evade their duties.²² Half the fine was awarded to the complainant. (A fellow crewman was less fortunate, being imprisoned for four weeks for disobedience to an order.²³) As we have seen, in at least one case, discussed above 3.5 a passenger successfully brought a private prosecution against a ship's officer for his conduct on the voyage to New Zealand.

3.6. Scab cases

The largest monetary penalties imposed were, almost without exception,²⁴ those under the (provincial) Scab Ordinance, which required runholders to register sheep brands, have all stock branded for identification, and to get rid of any scabby sheep in their flocks. Fines for breaches of the ordinance could be levied on the basis of the number of animals involved. There is a twist here which I have not yet been able to investigate fully as to whether the legislation was amended or if judicial practice achieved a similar effect (I have not yet had time to access the provincial legislation and debates). When the first cases are reported – from September 1853 - the fines imposed were apparently genuine, as we see a case in December 1853 where a fine of just under £7 was imposed, but the defendant was given three months to pay.²⁵ Later that year we find what was to become a standard pattern, that a substantial fine would be imposed, but it would be remitted if the flock was later found to be clean.²⁶ This may have started as an indulgence to a particular defendant²⁷ but it is clear that in later years this became standard practice. The custom appears to have been to impose substantial fines – as for example 1/- per sheep – or £100 for a flock of 2,000.²⁸

²² *Lyttelton Times* 3 July 3 1861.

²³ *Lyttelton Times* 12 June 1861.

²⁴ One must say "almost" because in 1854 one Swinbourne was fined £100 for smuggling gunpowder, see *Lyttelton Times* 24 September 1853.

²⁵ See prosecution of Sinclair, reported in *Canterbury Standard* 11 January 1854.

²⁶ See for example the prosecution of Charles White, reported *Lyttelton Times* 22 June 1859 – fined £100, to be enforced unless flock shown clean by the end of November.

²⁷ The report of *Congreve v De Moulin* in *Lyttelton Times* 16 August 1854 may be read thus.

²⁸ See for example *Congreve v Moore* RMC Christchurch 7 October 1857, reported *Lyttelton Times* 10 October 1857. The defendant was fined an additional £50 for not having the sheep properly marked. Although the defendant was present in court, he presented no defence.

One measure of the apparent willingness of run-holders to evade the more onerous provisions of the Scab Ordinance is that Sir William Congreve,, who had as Inspector under the Ordinance prosecuted many other members of the elite for infractions of the law was himself successfully prosecuted in 1859, being fined £100 (and a mere 2/- for costs!) for not having his registered brand on his sheep. It is not clear if the usual remission of the penalty applied.²⁹ .

4. The Supreme Court in operation

4.1 some tabulated data

The following table represents the best analysis I have been able to make of the charges brought before the Supreme Court. The table is not guaranteed accurate, given the incomplete nature of the data and some degree of inconsistency between newspaper and court records..

OHP 2 Frequency of charges by type and year

Year	dishonesty	violent	sexual	unknown	other	total
1852	5	-	-	-	-	5
1854	6	-	2	-	-	8
1855	3	-	-	-	-	3
1856	1	-	-	10	-	11
1857	2	2	-	-	2	6
1858	5	1	1	-	2	9
1859	14	4	1	-	1	20
1860	29	-	--	-	2	31
1861	12	2	-	-	2	16
	77	9	4	10	9	109

Dishonesty includes: larceny / theft, obtaining by false pretences, receiving stolen goods, robbery, burglary, forgery, uttering, extortion.

Sexual offences include : assault with intent to carnally know girl under 12; assault with intent to rape; bestiality

Violence includes murder, shooting with intent to injure, different forms of assault

Unknown = offences only recorded as "felony" Other includes escaping lawful custody, perjury and brothel-keeping

This is Table 1 in text only file

These figures include all charges where the defendant was summoned to appear before the Supreme Court. As will be seen from the discussion and from OHP3, a significant number of these cases did not proceed to

²⁹ See *Lyttelton Times* 16 July 1859.

arraignment (the formal bringing up of the accused to plead to the charges at trial), some because the grand jury found “no bill” or that there was insufficient evidence to put the defendant on trial; others because the Crown chose not to proceed with the particular charge. A proportion of those arraigned pleaded guilty at that stage; others were convicted at trial and a number were acquitted. OHP 3 gives details of that process. It should be noted that the table includes two convictions for sexual offences where the jury convicted of an attempt rather than the full offence. In at least one such case it seems quite likely that such a verdict reflected only the unwillingness or inability of the six-year-old victim to testify with the necessary precision as to the accused’s conduct for the full offence to be proved.

Some conclusions can easily be drawn from this data. There is no absolute correlation between the number of charges and the growth in the population of the settlement, but the two are in reasonable harmony until 1860. The decline in numbers in 1861 is, I am inclined to think, possibly a function of the more volatile and transient elements being attracted to the new Otago diggings, but no clear proof is possible.

Secondly, the cases before the court are very heavily dominated by dishonesty offences. Indeed the figure of 77/109 probably understates the dominance, as I suspect the bulk of the “felony” cases in 1856 were of dishonesty offences.³⁰ Within that class of dishonesty offences certain shifts are notable, particularly that forgery and uttering of forged documents only appears in the last three years of the sample. Burglary is rarely charged; nor obtaining by false pretences. The mainstay is theft – commonly by servants or employees – including theft by a foreman of works and the embezzlement by the Secretary of the Provincial Lands Board.

While 9 offences of violence are listed, this may be a little unrepresentative. Two of the charges relate to simple assault in the course of a squabble

³⁰ The Christchurch RMC records for that year (see NZNA CAAR CH290/4 Register of RMC cases 14 March 1856) include a “Harry Black” committed for trial for theft. It is tempting to identify this individual with “Harry the Black” who was listed to come up for trial in the Supreme Court but whose case did not proceed. I have not (yet) succeeded in identifying others.

between neighbours, and a third – a charge of shooting with intent to injure – was apparently treated by the grand jury as effectively an accident. However the charges do include one of murder – of which the accused was acquitted – the only homicide case in the decade.

The four sexual cases include two of assault with intent to carnally know a girl under 12 and one of assault with intent to rape. These cases were always reported in the paper as “assault with intent etc”, and the evidence was suppressed. The fourth ‘sexual case’ was one of bestiality.

OHP #3 Outcomes by categories of offence:

	N	No bill	DNP*	acquit	Convict
Dishonesty	77	7	13	12	45
Violence	9	1	1	2	5
Sexual	4	-	1#	-	3**
Other	9	-	2	2	5
Unknown	10	-	3	-	7
	109	8	20	16	65

*DNP = did not proceed – prosecution called no evidence or otherwise discontinued proceedings. Thus includes directed acquittals where no evidence called.

accused absconded on bail

** convictions include ones for attempt rather than full offence

This is **Table 2 in text only file**

It will be seen from this that a very substantial proportion – nearly two-fifths of all charges did not result in conviction. The Grand Jury served as a screen, but 8 “no bills” of 109 does not seem high. I know of no data with which it can be compared, however. Of the 101 remaining cases, the Crown did not pursue the charges in twenty – in some cases clearly because the accused had already been convicted on other charges and there was no real point to the proceedings, in others because witnesses were not ready and in one case because the defendant’s solicitor has had convinced the Crown and the police of his client’s innocence before the sessions began.³¹

Many of the convictions came as a result of a guilty plea, but a 20% acquittal rate of those arraigned is still substantial. Again, comparative data would be welcome.

³¹ *Lyttelton Times* 2, 6 and 9 March 1861.

4.2 of prosecutors and defendants

The archival records almost invariably name the Crown as prosecutor – though there are two dishonesty cases in late 1861 which appear in the archive in the name of individuals. It is not clear whether these were genuinely private prosecutions, or whether the format reflects the complainant. The court records for two sessions in 1858 record most cases as “R (on the prosecution of X) v Y”, but it is far from clear that this represented actual charge of the prosecutions being in the hands of the person named, and the form of the records may simply reflect the recorder’s preference. Further research may shed some light on the issue.

We can be a little more definite about the defendants. They were overwhelmingly male and European. There is not case involving a person stated to be Maori, and as all other court records do note this – as do contemporary newspapers – the absence of positive data is very good evidence of the negative case.

Two cases were brought against Indian defendants (both workers brought out to Christchurch by a retired Indian Army officer); both were convicted, though one was acquitted on one of the two charges faced. The archival records indicate that one defendant in 1856 was named “Harry the Black” but no more is known of this individual.³²

Unfortunately the records are very inconsistent, and it is not possible to make any meaningful comment about ages - except that defendants as young as 16 were convicted – and employment, except to note that the range went from servants and labourers to the Secretary of the Provincial Lands Board and a ship’s captain.

Most seem to have been at least resident in Canterbury. However the 1856 “felons” may well have included sailors as in some cases the principal witnesses were ship’s officers not in New Zealand at the time of the sittings.³³

³² See fn 30

³³ See *Lyttelton Times* 5 July 1856

The tenor of some evidence recorded in some of the cases in 1859-61 suggests some of the persons accused of theft, forgery and the like were “transient” offenders who had relatively recently come to Canterbury from elsewhere, but the data is, as yet, not firm enough for any conclusions to be drawn. I hope to see if comparisons with jury and electoral lists allow a firmer classification into “local” and “transient” offenders.

4.3 punishment and penalties

The punishments imposed upon convicted defendants in the Supreme Court were generally more consistent and, as one would expect, significantly more severe than those in the RM Court. Disregarding the two convicted at the 1852 sessions – who were both sentenced to 7 years transportation (probably a necessity as no local jail then existed), all but one convicted defendant received a term of imprisonment. The one exception was a man convicted of assault in a neighbourly tiff, who escaped with a 40/- fine.

All male convicts received sentences requiring hard labour while imprisoned. The three female convicts were in two cases dealt with much less harshly than most males, with sentences for larceny of 1 month and receiving at three months, but Hannah Bone, who was convicted on a number of significant dishonesty offences received a total of 30 months.

The generality of cases were low level dishonesty offences, and here the norm appears to have been a sentence of 1 or 2 years – usually at the lower end. The highest imposed was 5 years – in Mackenzie’s case (see later part 4.4.) Only Parsons - three years for extortion (a case again, discussed later in part 4.5) received more than two years imprisonment on any one charge, though several prisoners received cumulative sentences which in total reached 4 years in one case and 30 months in another.

The sexual offences all appear to have been punished by two years imprisonment, although this may have been in one case because of a jury recommendation to mercy and in another because of evidence of prior good character (unusually, given unsworn by the Crown Prosecutor after the

intended witness was excluded!). The assault sentences varied extraordinarily - from the previously mentioned 40/-fine to a sentence of two years with hard labour – and one can only conclude that here the circumstances had more influence on the punishment than the more formulaic dishonesty sentences.

Again, I have not yet found a set of data which can be used for comparisons, but I invite suggestions.

4.4. Two case examples

Two different cases indicate different aspects of the Supreme Court's work. The 1855 sittings featured probably the best known criminal case in early Canterbury history, the conviction – and sentence to five years imprisonment - of James Mackenzie for theft of a thousand sheep.

“James MacKenzie was charged with stealing on the 1st of March last 1000 sheep belonging to the Messrs Rhodes. The prisoner attempted to evade the responsibility of his crime by pretending not to understand the English language and he occasionally gesticulated in Gaelic: but on the empanelling of a jury to decide whether he was really ignorant of the language several witnesses proved that they had conversed with him in English which at these times he seemed to understand perfectly. The jury decided the prisoner was ‘mute of malice’ when the Judge directed a plea of not guilty on the charge of robbery be recorded and the trial proceeded.

Mackenzie's fame is in part for the grand scale and brazenness of the theft, but more because he had taken the stolen sheep to a then unknown (to Europeans!) inland region of spectacular mountains, lakes and natural tussock pasture – which today is still known as “the Mackenzie Country”. The sheepstealer is, I believe, the only New Zealand felon to have his name commemorated in that of a unit of local government.³⁴

³⁴ For a vivid recreation, and contention that Mackenzie was in fact innocent, see James McNeish *The Mackenzie Affair* (Hodder & Stoughton, Auckland, 1972).

In 1859 there was the most thoroughly reported³⁵ of the criminal cases of that decade, the prosecution of Christina Gregg for the murder by arsenical poisoning of her husband James Gregg. The prosecution reasonably readily established that James had died from the ingestion of arsenic – with detailed evidence being given as to the then relatively novel Marsh’s apparatus used by medical witnesses. Opportunity to administer the poison was readily established, as James had been ill and had been nursed by his wife. Motive was suggested by the evidence of a former servant, who testified that he and the accused had been engaged in an adulterous relationship which handled to Christina’s pregnancy, which she had tried to conceal from her husband. However the prosecution could not establish that Christina had ever had any access to arsenic, and there was an instance of him suffering a similar attack in her absence. Defence counsel was therefore able to throw up the possibilities of some form of accidental ingestion by the husband, or deliberate poisoning by Christina’s lover. Despite a somewhat hostile summing up, the jury acquitted after a half-hour retirement and the accused left the court “supported by her brother and friends”.

4.5 Class bias in action in the courts

Class bias is obvious in many of the trials as with an 1854 case involving an alleged theft of a packet of gloves was defended essentially by claims that the circumstantial evidence did not establish the case, and by a defence summed up in the snobbish assertion of defence counsel that:

“it was monstrous to think that a person moving in society as the prisoner did would risk his reputation and character by the theft of a petty package, worth only a few shillings.”³⁶

The judge supported this line with a very sympathetic summing up in the accused’s favour, and he was speedily acquitted, but the judge “then addressed the prisoner and cautioned him against ever appearing again in court under similar circumstances”.³⁷

³⁵ The *Lyttelton Times* 7 and 10 December 1859 carried apparently almost verbatim testimony from almost every witness. The opening phrase of the title to this paper is derived from the indictment in this case.

³⁶ *Canterbury Standard* 30 November 1854.

³⁷ *Ibid*

There is, however, one case above all others which to me gives real insights into social attitudes among a significant and influential element of Canterbury society.³⁸ This involves the trial and conviction of John Parsons in 1859 for extorting money from one Arthur Acheron Dobbs by threatening to accuse him of having committed “an unnatural offence” – that is, homosexual conduct.³⁹ The trial apparently lasted most of two days, but Parsons was convicted. The newspaper did not report the trial in detail – as:

“the details of precocious villainy on the one side and folly on the other have already been published at length in the *Lyttelton Times*”⁴⁰

That reporting had been about 5 weeks earlier, where the newspaper reported at length⁴¹ earlier proceedings involving Parsons and Dobbs in the Resident Magistrate’s Court where – in perhaps the strangest proceedings so far found in my studies – Parsons had brought a private prosecution against Dobbs for obtaining money by false pretences – in effect, claiming that Parsons had come to Canterbury armed with substantial funds and an introduction from Dobbs’s sister; that Dobbs had promised to buy land for him with the money but had not done so – and had also not honoured various promissory notes. Much of the subsequent proceedings are rendered more understandable by the standing of Dobbs’s sister – who was the Duchess of Manchester.

Parsons was severely cross-examined to raise doubts as to his bona fides and veracity, and the report indicates he cut a poor figure in the witness box – being, for example, unable to remember the name of the ship on which he had travelled from England to Australia before coming to New Zealand, nor could he give the source of the money allegedly invested with Dobbs.

The second witness called was Parsons’s solicitor C W Wyatt, whose evidence must have caused a sensation in court. Wyatt testified he had been

³⁸ This account is based on NZNA Chch CAHX CH251 Supreme Court Criminal case files 1855- 1859; June 1859 sittings and *Lyttelton Times* 18 June 1859.

³⁹ The newspaper report indicates the perjury charge was withdrawn on the finding of guilt on the extortion charge, but the court records indicate guilty verdicts on each charge.

⁴⁰ *Lyttelton Times* 18 June 1859.

⁴¹ *Lyttelton Times* T 27 April 1859 reporting proceedings of 21 April 1859

acted as Parsons's solicitor, and in that capacity had been shown a receipt, signed by Dobbs, for £467 pounds to be used to purchase land as well as a further claim for moneys owed. Wyatt said he had become suspicious as to various matters, and had in private asked Dobbs whether any money had ever been received. Dobbs had then disclosed that he had employed Parsons as a servant and one occasion – having sold his spare bed(!), Dobbs came home one night “fagged and tired” and found Parsons in bed, and Dobbs then lay down in it with Parsons and slept. Four months later Parsons had demanded money by threatening to accuse Dobbs of “committing an infamous offence on him” – that is, in the context clearly meant to be a reference to homosexual conduct. Wyatt had asked whether there was any truth in the accusation – which Dobbs denied and on further asking whether there might be supporting evidence such as marks on clothes, received the (interestingly ambiguous) answer that Dobbs could safely say there would be no such marks. Dobbs had told Wyatt that he would rather have sacrificed his life or £10,000 than that his family should hear of such an accusation. The prosecution case then closed and the magistrates cleared the court and recessed, to return later to dismiss these charges and order Parsons to be indicted for perjury and extortion.

It is evident that either Wyatt as solicitor or both Wyatt and Parsons's barrister must have been complicit in the presentation in the Resident Magistrate's Court of the case in a manner designed to thoroughly discredit Parsons. Such conduct, while understandable, was clearly not in accord with professional and legal obligations to Parsons. That social or cultural norms prevailed over legal obligations is in itself interesting.

It is even more interesting that the newspaper treated the issue as one of a completely fabricated charge. One must imagine this was due to Dobbs's derivative social status; it is difficult to see what else could have outweighed the social stigma attaching to any suggestion of homosexuality.

My reading of the case is heavily coloured by the fact that in 1861 Dobbs was once again a principal witness in an extortion case – when one William Burton was alleged to have attempted to extort money from him by an identical allegation of bringing an accusation of homosexual conduct. On that occasion,

too, the *Lyttelton Times* appears to have treated Dobbs as a much-maligned innocent. This time the court said the evidence was “unfit for publication”, there seems to have been no inference of fault on the part of Dobbs. It seems all the obloquy fell on the accused, who was sentenced to three years imprisonment with hard labour, with Gresson stating “felt strongly inclined to order him to be publicly whipped.”⁴²

5. Conclusion

As this is very much a work in progress – or possibly even two or three works! – it is difficult to write a traditional conclusion.

It is clear that the Courts in the Canterbury settlement had a substantial load of criminal prosecutions – albeit mostly for drunkenness and low-level “police” offences. To judge from the record, serious crime was rare, and punished by substantial, though not by later standards excessive, penalties. However much work remains to be done before we can understand the factors affecting decisions to involve the criminal law rather than the civil – that is, to bring prosecutions rather than civil actions – and the pressures which may have affected those decisions. Nor are we yet in a position to understand why some cases were dealt with in the resident Magistrates Court rather than the Supreme Court, and vice versa.

While the current study indicates, perhaps surprisingly, the lack of involvement of Maori with the Court as defendants, finding Maori prosecutors was also an unlooked for result. Further, the low extent of female involvement as defendants is also perhaps a little surprising. Further work needs to be done to try to identify with more precision the cohort of persons prosecuted in these early years, so as to develop a better understanding of social factors such as residence, age and employment which may have affected their conduct or the likelihood of the criminal law being invoked. It is also intended to try to match that data with information about civil actions so correlations between indebtedness and offending may be considered. And, of course it may be that if good data can be developed, a comparative study of Canterbury and other colonial societies may be possible.

⁴² *Lyttelton Times* 4 December 1861.