

# Civil litigation in the Resident Magistrates' Courts of the Canterbury settlement 1853-1862

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## Author's Note

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## 1. INTRODUCTION

The title of this paper, and its time frame differ slightly from those in the abstract. It looks at the volume and nature of civil litigation in the Resident Magistrate's Courts during some of the early years of the Canterbury settlement. Canterbury is of interest not only because it is my home area, but because it gives a chance to look at law and litigation in a new settlement which nevertheless inherited existing colonial institutions and laws.

This research started as a complement to work I have done on litigation in the Supreme Court in Canterbury in this period 1852-1861. I hope to carry that research on for later years, but it became clear one could not make much sense of Supreme Court litigation without considering the more numerous, if generally smaller-value cases filed in the Resident Magistrate's Court.

This paper is very much a work in progress – there is still some primary data to analyse; when that is done it should be possible to do a more refined statistical analysis of the amounts in dispute, and ( I hope) to identify regular litigants with more precision, and to seek to link them to other sources of biographical information. There is also an need to extend the period of the survey, and to check more fully for personal records of litigants, and indeed of magistrates. However, the data I have so far acquired – with great help from my research assistant Charlotte Wilson – does allow us to come to some understanding of litigation and litigants in the period.

There are two principal sources for this paper – the archival records held in the National Archives (Canterbury Branch) – principally a register of cases in the Lyttelton and Christchurch Resident Magistrates' Courts and a partial record of proceedings in those courts. Unfortunately records of the "regional" courts are far less satisfactory. The contemporary newspapers often reported at least some of the proceedings in the Lyttelton and Christchurch courts – though not those of the other centres – but the reporting is very uneven. The principal paper, the *Lyttelton Times*, rarely bothered to mention any details of "simple debt cases" on the basis these were not of interest. In the last years or so of the period the new paper, the *Christchurch Press*, gives much fuller, but far from complete, coverage.

## 2. THE COURT – JURISDICTION AND FEATURES

### 2.1 jurisdiction at creation

The Resident Magistrates' Courts, set up under the Resident Magistrates Courts Ordinance 1846, were the first attempt to create a court of general jurisdiction to handle in a summary jurisdiction both civil and criminal matters. Various attempts had been made to set up courts where Justices of the peace could exercise criminal jurisdiction – and such courts may well have in practice handled civil cases as well; there was also an attempt to replicate the English ( and Australian) “Courts of Requests” to handle very small civil claims of debt and contract. For the most part, however, civil litigation was confined to the Supreme Court, which posed obvious problems both of cost and – given there were but two Supreme Court Justices in the Colony at this time - of delay.

The Resident Magistrates' Court was also intended to have a special function in handling disputes between Maori and settler – and where possible disputes between Maori – as experience had shown that it was unwise or impracticable to expect satisfactory handling of such cases by Justices of the Peace. The solution attempted was the appointment of salaried resident magistrates – rarely with any legal training or experience - who often also acted as heads of what limited police forces as existed and/or were more generally agents of the central government. It was thought such men were more likely to be amenable to instruction from the centre, and somewhat more likely to win the confidence of Maori.<sup>1</sup>

We may therefore consider the jurisdiction of the Resident Magistrates Court, when first set up, as comprising:

- (a) a criminal jurisdiction which encompassed both summary trial of minor offences and the preliminary investigation of more serious offences;
- (b) A jurisdiction over cases involving Maori. In these cases (whether Maori v Maori or Maori v Pakeha) the Court was not bound by the strict law, but was to decide the matter in equity and good conscience. If both parties were Maori, the Resident Magistrate sat with two Maori assessors, but execution of the decision (ie enforcement by arrest, distress etc) would not be ordered unless the Resident Magistrate concurred in the decision. If only one of the parties was Maori and the other a settler, the Resident Magistrate could sit alone, or with one or more Justices of the Peace. The limit of jurisdiction here varied spectacularly – a Resident Magistrate alone could hear a claim to a value of £20, but if sitting with a JP the limit rose to £100. I shall mention the exercise of this jurisdiction, at 4.4. below.
- (c) There was a general civil jurisdiction for cases not involving Maori – whereby the Resident Magistrate or any two or more Justices of the Peace could hear “any claim or demand whatsoever of a civil nature” up to of £20.

### 2.2 ejectment

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<sup>1</sup> For a detailed study of the policy and operation of these courts in the North Island see Alan Ward *A Show of Justice*, (1984)

This jurisdiction was not significantly changed for ten years, except that the (short-lived) New Munster<sup>2</sup> Legislative Council conferred on the Court, under the Summary Ejectment Ordinance 1849, a jurisdiction whereby the Resident Magistrate and any two Justices of the Peace could hear an action for summary ejectment. Such an action could be brought by an owner of land, or that owner's agent, whereby the owner or agent showed a title to the land in question, and the court was then to summon the person in actual occupation of the land. If that occupier could not show title to the land, or a licence to occupy it, the occupier was liable for a fine of up to £10 together with damages for wrongful occupation if the complainant had already given the occupier notice to quit the land, such damages for wrongful occupation as court might award. The defendant could escape by showing to satisfaction of the Resident Magistrate and Justices "or any two of them" a prima facie right or title in himself. The procedure is one which legal historians may see as a conceptual borrowing from Henry II's writ of ejectment, and perhaps for the same reason – that the processes of the only court which had the power to determine title to land (in 1840s New Zealand the Supreme Court, in Henry's time the local courts) were so slow and unreliable that alternatives had to be found. It may be doubted however that the ordinance was prompted by great concern for the public welfare. The Ordinance specifically provided that the possession of a land order issued by the New Zealand Company, with an entry into company's books, deemed to be a sufficient title to allow action to be brought. In effect, the ordinance was an attempt to give the Company and its agents a weapon with which it could harry squatters or others who occupied land to which the Company asserted title.

So far I have found but one example of this procedure being used in Canterbury, the case of where *Wakefield v Bourne*<sup>3</sup> where Felix Wakefield sought to eject the defendant Bourne from land admittedly owned by the plaintiff, but was defeated because Bourne produced a lease of the land signed by another member of the Wakefield clan, which the court considered was a "sufficient justification" for his occupation.

### **2.3 restriction of types of claim**

A significant change was made in 1856, when the Resident Magistrates' Court Ordinance Amendment Act 1856 narrowed the jurisdiction in cases not involving Maori, with the general "any claim or demand whatsoever" being limited by the exclusion of any action which challenged the validity of any devise bequest or limitation under any will or settlement, as well as the exclusion of actions for malicious prosecution, for libel or slander, for criminal conversation or seduction or breach of promise of marriage. Nor could the Court entertain any action regarding title to land. It is very hard to determine the effect of these limitations, but it clearly had some impact in the area of defamation.

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<sup>2</sup> An administrative division of the new colony between 1846 and 1852, New Munster was the southern portion of the North Island and the whole of the South Island. It had its own legislative body, and was administered by a Lieutenant Governor, however both were subject to control by the central administration. The capacity to create similar institutions for the northern counterpart, New Ulster, was not implemented.

<sup>3</sup> Lyttelton RMC 23 August 1854, see *Lyttelton Times* 30 August 1854.

The register of actions in the Lyttelton Resident Magistrates' Court shows seven defamation actions filed in 1856, although details of only one have so far come to hand. In *Heaphy v Day*<sup>4</sup> William Heaphy brought an action for slander for words "said on the jetty at Lyttelton on 24 May last, the day of the regatta". Heaphy's lawyer, Charles Dampier, stated that the case had been brought in the Lyttelton Resident Magistrate court rather than in the Supreme Court so that the case would be heard in the place where Heaphy was best known and where persons with knowledge of his character were available. There was no attempt to defend the case – Day had already apologised outside the court, and made a fulsome personal apology at the hearing. Following that, and an intimation by counsel that the plaintiff wanted only judgment for a nominal sum to cover his expenses, the Court awarded 40/- and costs and, according to one local paper, the parties "left the Court apparently on good terms".

It must be noted that these actions were excluded only where both parties were settlers; in cases involving Maori the wider jurisdiction was retained, and, as will be seen, Maori on occasion brought actions which were not open to settlers.

The Act also made two other less significant changes. Under s3 plaintiffs were prohibited from splitting a claim so that the elements could each be brought within the jurisdiction of the Resident Magistrates' Court. The issue seems rarely to have arisen in practice.<sup>5</sup> There was, it should be noted, no objection to a plaintiff abandoning the excess over the jurisdictional limit, and this was not infrequent in practice.

Secondly, the Act provided a clear schedule of fees for process servers, and for bailiffs and for witness expenses. It is an indication of the difficulties and costs of transport in the colony that travel, beyond a radius of a mile from the courthouse, by bailiffs or witnesses was charged at 1/- a mile. Witnesses were also entitled to a base fee of 10/- which could be almost as much as the costs of a summons (3/-), a hearing (6/-) and the entry of judgment (3/-) combined. It is perhaps not surprising that few cases involved many witnesses.

## **2.5 Extension of jurisdiction to £100**

More far-reaching, if short-lived changes were made by another statute that year. The Resident Magistrates' Court Extension of Jurisdiction Act 1856 provided for the maximum civil claim in non-Maori cases to rise from £20 to £100.

It is very evident that many litigants sought to take advantage of the extended jurisdiction, although much of the court's time was still spent on the smaller claims. A graphic illustration of this can be seen by comparing cases heard in the Christchurch and Lyttelton Resident Magistrates Courts in 1858. The

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<sup>4</sup> Lyttelton RMC 23 August 1854, see *Lyttelton Times* 30 August 1854; *Canterbury Standard* 7 September 1854. .

<sup>5</sup> Research so far shows it only arose in one case. In *Samuels v Rule* Christchurch Resident Magistrate's Court June 17 June 245 1862, see *Christchurch Press* June 28 1862, Rule, a local veterinary surgeon, consented to judgment in an action for £15-10-0 but successfully defended another action for £7-5-0 by claiming the action was the result of a division of the cause of action.

sittings of 17 August and 23 August heard 11 civil cases for debts, all for amounts more than £20 – with the highest being a claim for just over £90, and the average just under £50. In the following two weeks, the courts heard 9 cases, with a maximum claim of £5-15-8, and an average of just over £3.

## 2.6 Jury trial

The rise in the maximum claim which could be entertained was accompanied by provision for Resident Magistrates to sit with a jury of four if required in any case involving a claim for more than £5, but as the process involved summoning 12 potential jurors – at a cost of 2/6 each, a juror's fee of 10/- for each juror empanelled, the use of a jury involved a minimum of £3-10-0 in jury costs – an outlay unlikely to be regarded as desirable by most litigants, particularly as the Resident Magistrate could still determine the case in any claim for up to £20 where the jury failed to agree. (if the claim was for more than £20 the case had to be re-heard).

Jury trials in the Resident Magistrates' Court seem to have been rare; so far only one case has been found. In *J H Bryant v Charles Reed*<sup>6</sup> the plaintiff sought the large sum of £92-9-0 for damages and expenses following breach of an arbitrator's award relating to the termination of the plaintiff's employment as manager of the defendant's sheep station. Under the award, the defendant was to have provided transport for the plaintiff, his heavily pregnant wife and their household goods to Christchurch, but the drivers of the bullock team refused to take them, claiming there was too great a volume of baggage. The plaintiff and his wife were forced to stay on the station while alternative transport was arranged (at a cost to the plaintiff of over £54) – and during which period Mrs Bryant gave birth. The claim was for the £54 odd for the transport and an amount of £38 for the forced stay; the jury awarded a total of £82. Reading the controverted evidence about the situation, one cannot help feeling Bryant was relying somewhat on juror's sympathy for his wife rather than the strict validity of his claim – which may explain the use of a jury. [As an aside – one must wonder about any arrangement which provided for a woman almost due to give birth to undertake a journey of more than 50 miles by bullock cart. We don't have Mrs Bryant's testimony, nor know anything of the child]

## 2.7 Removal and reinstatement of extended jurisdiction

It is clear that many litigants used the extended jurisdiction until it was repealed by the District Courts Act 1858 with effect from 1 January 1859.

The extended jurisdiction was largely reinstated by the Resident Magistrates' Jurisdiction Extension Act 1862, where Magistrates were given jurisdiction up to £50, and the Governor could authorise particular magistrates to hear cases to £100 (I have not yet found out whether this was granted to any Canterbury magistrate). The new Act attempted to direct cases to the Magistrate's Court by a provision, not found in the 1856 legislation, which required the Supreme Court, where a plaintiff was awarded only a sum which fell within the Resident Magistrates' Court jurisdiction, to order only the costs which could have been

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<sup>6</sup> Christchurch RMC 27 and 28 August 1857, reported *Lyttelton Times* 5 September 1857.

ordered in the Resident Magistrates' Court. Its impact, if any, falls outside the current study.

The Resident Magistrates' Courts Act 1858 made further, minor changes, by allowing the court to re-hear cases where it thought fit. It also added what may well have been a useful power to hear cases brought by persons under 21 for wages or money due for work or piece work.

## 2.8 other powers

We may round off this legislative chronicle by noting that the Resident Magistrates Court was given two occasionally important powers by other statutes. The court was given jurisdiction over the confinement of, or release of, persons alleged to be insane (see Lunatics' Ordinance Amendment Act 1858) – a power exercised on three occasions in 1859 and on others in the 1860s. Perhaps more importantly, the Married Women's Property Protection Act 1860 –allowed a deserted wife could apply to a Resident Magistrate, or a bench of Justices of the Peace for an order to protect money or property acquired 'by her own lawful industry'. Such an application could be disputed by husband or creditors of husband. The deserted wife had status as femme sole for the purpose of making contracts, the bringing of legal actions and so on. It is difficult to tell whether this statute had significant practical effect. There are more actions brought by women plaintiffs after 1860, but it is not possible in the majority of cases to tell whether the plaintiff was suing as a femme sole, or under the statutory power. The cases by women litigants are discussed at 4.5 below.

## 2.9 enforcement

Decisions of the Resident Magistrates' Court in its civil jurisdiction could be enforced by distress ( seizure and sale of goods) and/or by imprisonment of a person who failed pay money as ordered.<sup>7</sup> Imprisonment for debt for non-payment of such orders was effectively at rate of one month for every £5 or part thereof, to maximum of 4 months imprisonment. Although at least some debtors imprisoned in relation to a Supreme Court proceeding could seek an order from that Court for release after 2 months if full disclosure was made of all assets,<sup>8</sup> there does not seem in the 1840s to have been any equivalent process for debtors imprisoned under Resident Magistrates' Court orders. (The position of persons imprisoned for debt by the Resident Magistrates' Court was effectively brought into line with that for those imprisoned by order of the Supreme Court by the Resident Magistrates' Courts Act 1858).

## 2.10 Personnel

One of the obvious avenues for further work is to learn more of the persons who filled this judicial role. In the interest of brevity in what is already an unwieldy paper I do not intend to discuss here the work done so far in this area

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<sup>7</sup> The Resident Magistrates Court Ordinance 1846 made applicable to Resident Magistrate Courts which operated more than 10 miles from any Court of Requests the provisions of the Summary Proceedings Ordinance 1842. No Court of Requests was ever set up in Canterbury, so the Summary Proceedings Ordinance applied.

<sup>8</sup> Debtors could seek early release if the debts had not been fraudulently or recklessly incurred, or were debts owed to the Crown, or were for damages awarded in actions for seduction or criminal conversation: Imprisonment for Debt Ordinance 1844. An order for release of the debtor from imprisonment meant the debtor could not later be re-arrested for that debt, but any property was still liable to be seized and sold.

### 3. LITIGATION- QUANTUM AND NATURE

#### 3.1 crude data

One measure is the total numbers of cases heard. (cases involving Europeans only )

year	Total	%increase		Population	%increase
1853	67				
1854	89	34		3,895	
1855	140	57		5,347	37
1856	461	229		6,160	15
1857	639	39		6,712	9
1858	628	-2		8,967	33
1859	1337	112		12,874	43
1860	1480	11		15,370	19
1861	1450	-2		16,040	4
1862	1164	-20		20,342	27
	7455				

Source Court hearings data compiled by Charlotte Wilson from *New Zealand Official Yearbook of Statistics 1856, 1857, 1858, 1859, 1860, 1861, 1862*. Population data from W J Gardiner (ed) *A History of Canterbury* (1971), vol 2, p323).

A caveat must be made in considering these statistics. There are a number of cases where it is not entirely clear whether the case was truly “civil” as opposed to ‘criminal’ in nature. The distinctions were rather less clear in the 1850s that they may appear now, particularly where matters such as assault were concerned. Was the action properly classed as a private prosecution (criminal), or as an action for damages?<sup>9</sup>

Nor were these confusions restricted to assaults. In a case where a plaintiff sought damages for adultery and the register does allow us to be certain the case was civil in nature, we find the newspaper referring to the defendant admitting ‘the offence’, and the damages awarded as “a fine”, with the court ordering imprisonment if the payment ordered was not made. The case was one between Maori litigants, and it is possible this contributed to a looseness of language.<sup>10</sup>

There are several notable things about this data.

<sup>9</sup> In one case in 1854 for assault, the court is reported as giving judgment for the plaintiff for 2/6d damages (*Graham v Gilbert* 23 June 1854 reported *Lyttelton Times* 24 June 1854) but in the same year in *Salt v McQuin* (Christchurch RMC 27 and 28 August 1857, reported *Lyttelton Times* 5 September 1857)- an action alleging assault by an employer on a 15 year old ex-employee – it is far less clear whether the action was criminal or civil – although the newspaper describes the youth as the “plaintiff”, which rather suggests the latter. The newspaper, which describes the youth as “an impudent servant”, reports the decision thus: “The Court was of the opinion Salt had deserved what he got and dismissed the case”. Note too that the evasion of debts due was sometimes apparently seen as at least close to criminal behaviour. Consider the tone of a report that “We understand William Hurley who ran away indebted to several people was captured by the police at Akaroa and is now lodged in Lyttelton Gaol.” *Lyttelton Times* 10 June 1854.

<sup>10</sup> *Te Paro v Ko Kupere and Henare Te Wha Chch* RMC 9 November 1859, reported *Lyttelton Times* 12 November 1859 The case is discussed further **where**.



### **3.2. Data analysis – population link**

the increase in the number of cases is vastly greater than the population increase overall, but it is not parallel with it. There is a very great jump between 1855 and 1856 – when the population is more or less static. I must confess as yet I simply don't know why this happened.

we may note that the second significant spurt in Resident Magistrates' Court cases – between 1858 and 1859 – is more closely paralleled by a growth in population numbers. Over the next two years, indeed, the population growth is greater than the increase in court cases. Lastly, the 1862 figures show the peculiar result that litigation was down, despite the growth in population.

I suspect (but only suspect) that there is some kind of complex linking to economic cycles within the Canterbury settlement, but this requires much further work and study. One tentative hypothesis for the rise in litigation following behind rises in population is that the newcomers entered a credit economy, and it took time for those who were not creditworthy to show up – in effect, litigation about debt will of its very nature lag some distance behind the incurring of credit.

It will be noted, too, that the legislation discussed earlier gives no obvious reasons for these patterns in litigation. The increase in jurisdiction in 1856 may perhaps explain some of the growth in 1856-58, but it can hardly explain the radical growth the following year, when the Resident Magistrates' Court jurisdiction had been limited.

It is perhaps significant that in the later years where the rate of increase of Resident Magistrates Court litigation is first slowing, and then reversing, there is a spectacular growth in litigation in the Supreme Court with the introduction of the judgment summons procedure (of which I have written elsewhere), so that in 1859 the number of writs in the Supreme Court went from 6 to 207, and on to 290 in 1860 and, for the first nine months of 1861, to 240.

### **3.3. Geographical analysis**

We should also look at the geographical spread of the litigation, by comparing the number of cases in the different centres that heard cases:

There were Resident Magistrates' Courts in five Canterbury centres in the period. The initial two were in Lyttelton, the main port of Canterbury, and in Akaroa, a smaller port on the southern side of Banks Peninsula and the centre of a reasonably prosperous agricultural and timber area with a high percentage of French settlers.

In 1855 two further courts are opened, in Christchurch, which rapidly became the dominant Canterbury township, and in Kaiapoi, a riverside port some 30 kilometres or so miles to the north of Christchurch. Lastly there is a court in Timaru, a smaller port, some 160 km south of Christchurch.

We must note here that it is artificial to distinguish between the Lyttelton and the Christchurch magistrates courts. The two centres, although separated by the Port Hills, were only a short distance apart, and it was standard practice

for litigants in either centre to bring actions in the other. Further, and whenever a list of cases in the one court was not completely heard, the residue would be stood over to the other. It is therefore much more informative to look at the ration of cases heard in the country centres – the “non-metropolitan” percentage, as I have chosen to call it. It should however be borne in mind that many “rural” cases still found their way into the Lyttelton and Christchurch courts for one reason or another..

Year	Lyttelton	Chch	Akaroa	Kaiapoi	Timaru	% non-metro
1853	57	-	10	-	-	17.5
1854	73	-	16	-	-	18
1855	58	51	23	8		16.4
1856	155	278	15	13		5
1857	301	280	11	47		9.1
1858	328	200	44	56		15.9
1859	262	740	118	177	40	25
1860	313	786	79	240	62	25.7
1861	345	608	138	214	145	34.3
1862	239	642	41	139	103	24.3
	2131	3585	495	894	350	23.3

Source *New Zealand Official Yearbook of Statistics* 1856, 1857, 1858, 1859, 1860, 1861, 1862.

With the exception of 1856, the “non-metropolitan” cases are a significant proportion of the total, but they are far from regular in their nature. It will be noted that the Akaroa figures vary significantly, but the most spectacular growth is that of Kaiapoi. While it is true that the North Canterbury area for which Kaiapoi was the service centre and port was growing fast in the late 1850s, a threefold increase in litigation in one year (1858 to 1859) is more than can be explained by population growth alone. Unfortunately it is impossible to do more than speculate, as there are no archival records for the Kaiapoi Resident Magistrates’ Court, and none of the local newspapers reported any of the courts proceedings. Nor have I found any assistance, as yet, in any local histories.

### 3.4 nature of litigation

Obviously, we must also look at the types of cases brought.

Once again we are at the mercy of incomplete data, but there is no question that the overwhelming majority of litigation in all courts was for debt.

Consider the following data from the Lyttelton and Christchurch registers

Year	cases	debt	%debt
1855 (L)	58	40	69
1856 (C)	329	262	80
1857( C part year)	147	140	95
1858 (L, part year)	191	186	97
1859 (L)	353	298	84
1860(L)	481	415	86
1861(L)	425	392	92
1862 (L)	264	254	96

*Source Records of Proceedings of Resident Magistrates Court at Lyttelton, NZNA Christchurch CH132/ 637 – 639. Figures do not match those from Government statistics, probably because of confusion between Lyttelton and Christchurch hearings of cases filed in the other centre).*

It is often difficult, if not impossible, to determine the nature of the debt which gave rise to the action. In some cases the register or a newspaper record makes it clear whether the debt was essentially a result of a merchant or professional providing credit to a customer – phrases such as “balance of account” or “on account goods supplied” sometimes appear. More commonly, however, there is a simple annotation “debt”. However there were a few instances where the court register goes into sufficient detail that we can establish which debts are essentially trading debts, and which relate to long-term loans of capital sums.

We may look at the complaints filed for two days hearings in 1860.

On 6 February 1860, there were seven cases set down for hearing by the court.<sup>11</sup> Of these, two were actions for unpaid wages, one for money owed for board and lodging, one for goods supplied and the remaining three were for unpaid interest on capital – the amounts were £100, £200 and £400, in each case at an interest rate of 15%.

In November that year, nine civil cases were set down for 7 November.<sup>12</sup> The nature of one is uncertain, but only two related to capital debts; the others were for unpaid balances for goods or professional services (4) and dishonoured acceptances of bills of exchange(2).

### **3.4 Termination other than by judgment**

Further vital features of this litigation are the frequency of termination without a formal hearing, and the frequency of plaintiff success when cases did go to a hearing. We may take as a fairly representative example the figures for civil litigation in Christchurch and Lyttelton in 1860. In that year, there were 481 civil complaints.

Of these, many never got to the stage of resolution by the court at all. In 68 the summons was not served (which may mean either the defendant could

<sup>11</sup> Entries for 6 February 1860 in Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.

<sup>12</sup> Entries for 7 November 1860 in Register of Proceedings of Lyttelton RMC, NZNA file CH132/638

not be found, or some arrangement was entered into with the plaintiff) while in 38 the parties did not appear when the case was called. There were also 41 cases where the hearing was adjourned but never resumed. Thus in over a third of the cases no resolution appears on the record.

In about a further quarter of the cases there was a clear result, though not by a hearing - 88 were settled out of court, while in 22 the debt was paid into court before the hearing and in 15 there was judgment by consent. In each of these cases there could be a saving of court costs.

Of the cases that got to a hearing – only a little over a third - there was judgment for the defendant in only 4 cases; for the plaintiff in 164. In five cases the plaintiff was non-suited (ie failed to prove a necessary matter but elected to have the case discontinued with liberty to seek to bring it again at a future time when the deficiency could be remedied).

It must be remembered, however, that “judgment for the plaintiff” will include cases where the plaintiff received an award, but of less than was originally claimed. It is clear there was a steady trickle of cases where the defendant did succeed to at least some limited extent. My impression is this was more common in cases where the plaintiff sought damages in contract or in tort than where the action lay in debt, but there were certainly some cases where the defendant either alleged he was not indebted in the sum claimed, or that there was some set-off which had to be taken into account. Further work is needed to determine how common this was.

A useful check on the Lyttelton / Christchurch data can be found in the one year for which we have decent figures for the Akaroa Resident Magistrates’ Court.<sup>13</sup> In 1861, there were 138 civil cases between settlers. Of these there was judgment for the plaintiff in 84; 47 were settled out court, in six the plaintiff was non-suited and in only one was there judgment for the defendant.

### **3.5 Quanta of litigation**

While, as noted above, the largest claims in the Resident Magistrates’ Court came under the extended jurisdiction and neared the £100 maximum, the smallest claim I have seen, is the action in *Morrison v McLeod*<sup>14</sup> where the plaintiff sued for 6/- for goods sold. The defendant had acknowledged in writing the debt, saying he would pay it if the plaintiff visited him, but if the plaintiff wanted to issue a summons “go ahead” – an invitation duly accepted. When the action was called on, the defendant had changed his stance somewhat by writing to the court, enclosing 6/- and a “medical certificate of illness” and requesting the case be delayed for three months so he could bring evidence he was not indebted. The case was adjourned, though only for four weeks, but was in fact never called on again. The reporter for the *Lyttelton Times* philosophised “However this case may go, the original debt will, we fear, be swallowed up in costs and both in the trouble of settlement.[sic]”.

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<sup>13</sup> Draft return 1861, included in Akaroa RMC Inwards letters 1859-186 NZNA Christchurch CH448/1 9

<sup>14</sup> Lyt RMC 15 August 1859, reported *Lyttelton Times* 27 August 1859.

### 3.6 RMs in action

While most of the judgments of the Magistrates appear to have been no more than entering judgment for debt, or recording a settlement of out court or the like, there are occasions in which a degree of initiative or judicial creativity is to be observed.

It is notable that in the vast majority of case sit appear that judgment was for a fixed sum, usually it seems due some weeks after judgment. However there are a few cases where the Court was careful to order payment in instalments. A convenient if extreme example is a sitting of the Christchurch Resident Magistrates' Court on 27 August 1857, where two defendants who each owed debts of around £30 were allowed to pay them in installments over three months, while a third, who owed £38-8-0 on a promissory note was allowed to pay it off at £2 per month.<sup>15</sup>

However by far the best example of judicial creativity I have found so far is *Haley v Dougherty*<sup>16</sup> where the plaintiff sought damages for the defendant's breach of an agreement to allow the plaintiff and his wife to live rent-free with the defendant and his wife in return for assistance with building the defendant's house. The arrangement had broken down because of quarrels between the defedant's wife and the plaintiff's wife – who, the court was informed, was the defendant's daughter. The court awarded the plaintiff £11-5-0 (rather than the £30 claimed), but:

“at the suggestion of the court, the parties agreed the plaintiff should take 5 acres of the plaintiff's wheat, as it stood, in payment”.

### 3.7 Lawyers and the RMCs

One of the notable features of the Resident Magistrates' Court is the degree to which it operated as a people's court” – with litigants in person dominating the scene. It is a little difficult to be precise, but evidence from the Registers for the Lyttelton magistrates Court 1859-1861 suggests that around one case in six was not “presented” – that is filed by, or if the case went to court, conducted by, the actual plaintiff. Not all the cases that were presented by someone other than the real plaintiff were by lawyers – there are several cases of women bringing cases on behalf of minors of the same name (presumably children); there are others where it may be that the presenter held a power of attorney from the real plaintiff. The “one case in six” figure is of course a significant under-estimate for the case that went to court, since it is in disputed cases that it was more likely that counsel would be involved. It is notable that in the employment litigation before the court, and a number of cases involving cattle trespass or other agrarian concerns, lawyers were very much more likely to be present than where the plaint was in debt.

It is also evident from the records that lawyers were initially very commonly involved, at least for the plaintiff, in even the more mundane cases in the early part of the period under study, but that there is an apparent change around August 1858. It is suggested that the reason for the change is quite simple. In the period up to an including August 1858, the costs awarded

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<sup>15</sup> Respectively *Sedcole v Butcher*, *Baxter v Hamlet* and *Fitzgerald v Coppell*, all reported *Lyttelton Times* 5 September 1857.

<sup>16</sup> Lyttelton RMC 22 February 1859 reported *Lyttelton Times* March 2 1859.

frequently touch the £4 to 5 level, with items for “fee £3-3-0” appearing. From September 1858, the fees levied are rarely more than 15/- to 19/- and one no longer sees any item for “fee”. This indicates that in the early years, successful plaintiffs, or their lawyers, were probably recovering a 3 guinea professional fee as part of the costs. From September 1858, such fees were clearly not being allowed by the magistrates. (We may note that the District Courts Act 1858 did allow for lawyers to recover 3 guinea fees as part of the costs; it may be that magistrates took this as an indication they should not be recoverable in the resident magistrates’ courts).

Even so, one lawyer stands out as dominating litigation in the Canterbury RMCs in the 1850s and 1860s – Richard Wormald, of Lyttelton. He appeared as counsel in over 100 cases in Lyttelton Magistrates’ Court in the period 1859-1861 - something like 10% of all cases heard. No other lawyer appears even to have got into double figures. However Wormald’s appearances were not only as advocate. He frequently appeared as plaintiff, but it seems likely this was often to sue for interest on moneys he had lent as agent or attorney for his clients.<sup>17</sup> He regularly advertised in the newspapers that he had money to lend, and that he could arrange suitable investments for those with funds. It appears to have been activity of this kind which led to his appearance as a defendant in two actions in 1854, where on Taylor alleged Wormald had received two different amounts of money as attorney for a partnership between Taylor and one Crawford, but Wormald had not paid them over. In both cases Wormald claimed, unsuccessfully, a set-off for legal work done - Taylor showing that one legal bill had been sent for taxation in the Supreme Court because its amount was disputed, and that in the other Wormald had not actually been instructed to act.<sup>18</sup>

## 4. LITIGANTS AND LITIGATION OTHER THAN IN DEBT

### 4.1. employment related litigation

There is a consistent thread of cases involving employment matters. Almost all of them were brought by employees suing for wages, but there appears to have been one brought by an employer for damages for breach of contract in that the employee left before the term of his employment expired.<sup>19</sup>

It is very noticeable that defendants were much more likely in these employment cases than in any other kind of case to appear to defend the action, and to seek either to minimise any damages which might be awarded, or, in a significant number of cases, to advance a counter-claim of some sort. Indeed, hardly a case seems not to have been contested in some way.

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<sup>17</sup> See for example *Wormald v Homersham* Lyttelton RMC 17 November 1857 and *Wormald v Moorhouse* of the same date, both reported *Lyttelton Times* 21 November 1857. Moorhouse, a former RM himself and a leading local politician was not infrequently in embarrassed financial circumstances.

<sup>18</sup> *Taylor v Wormald* 13 and 20 March 1854, reported *Lyttelton Times* 25 March 1854. Wormald was challenged in unrelated Supreme Court litigation in 1859 over similar allegations of improperly setting-off bills for legal work against moneys received. File CH 244/1, Law Practitioners Act NZNA (Christchurch).

<sup>19</sup> *Burke v Evans* 26 February 1859 reported *Lyttelton Times* March 5 1859

The earliest I have found is in 1854, in the case of *Thomas Lucas v George Whiting*<sup>20</sup>, where a sailor claimed non-payment of his share of the proceeds for working a boat ( he being on “thirds” rather than wages). This was one of the few cases where the plaintiff received the full amount claimed; one of the few others came some months later with the rare sight of a “professional” suing for salary - the Anglican Dean of Christchurch appeared as a plaintiff in December 1854, seeking payment of arrears of salary – which were paid on the spot.<sup>21</sup>

In another case of a few months later, *Bowen v McQueen*<sup>22</sup>- we find the more characteristic pattern whereby the employer advances the argument that the amount of wages (here claimed by a male plaintiff for his wife’s services) should; be reduced because the employee had not completed the agreed term of services. In that case the court awarded £1-5-0 instead of the amount claimed of £9, and the costs of the action were divided. Shortly after that, a slightly more sophisticated argument was put in *Charles Smith v Moore*<sup>23</sup> that the plaintiff could not recover in full the £9 claimed: “...as the plaintiff left the service of Mr Moore without due notice, thereby breaking a verbal contract between himself and Mr Moore, judgment was given for £4.”

Some three years later, the court was invited to hold that an employee’s failure to serve out the term of employment disentitled him to recover any wages at all. In *Head v Brown*<sup>24</sup> - a case where unusually both parties were legally represented, the plaintiff sought £32-9-11 for wages due for work done by himself as a farm servant and his wife as a domestic servant. There was no relevant written contract of employment, but there was evidence of a verbal agreement for plaintiff to work for a year, which counsel for the defendant claimed entitled the defendant to a non-suit without the matter being gone into further. The court reserved that point and heard a deal of evidence as to the alleged unsatisfactory nature of the plaintiff’s work and his more than average capacity for beer (the defendants complained that they were brewing 40 gallons of beer a fortnight and it was all being drunk, yet the plaintiff complained of a shortage of beer...!). At the conclusion of the hearing, John Hall RM, in this case sitting with JPs, announced the bench was divided on the non-suit point, and they intended to state a case for the Supreme Court. Counsel for each party urged a decision of some kind be made, rather than stating a case, but after adjourning the case overnight, the Court announced a case would be stated. As none was ever heard in the Supreme Court, we may assume the matter was settled out of court.

As these cases may indicate, the Resident Magistrates’ Court does not appear to have been a court where an employee plaintiff could feel confident of success. It is impossible in reading the cases not to get a strong feeling that the class and economic interests of the Magistrates led them to favour employers. Consider four cases from 1859, all involving John Hall RM.

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<sup>20</sup> 6 March 1854 reported *Lyttelton Times* 11 March 1854.

<sup>21</sup> *Matthias v Sewell* Lyttelton RMC 21 December 1854, reported in *Canterbury Standard* 28 December 1854.

<sup>22</sup> Lyt RMC 2 June 1854 reported *Lyttelton Times* 10 June 1854.

<sup>23</sup> Lyttelton RMC 21 June 1854, reported *Lyttelton Times* of 24 June 1854.

<sup>24</sup> Christchurch RMC 23 and 24 November 1857 reported *Lyttelton Times* of 28 November 1857.

Firstly, there is a case<sup>25</sup> where an farmer being sued for £6-6-0 for wages as a farm servant was held entitled to off-set the costs of a set of check reins ( valued at £1-7-0) allegedly lost by the plaintiff's negligence against the unpaid wages. The court then held that as the farmer had tendered the lesser sum before the hearing, costs fell solely on the plaintiff!

Then come two of the more unusual cases, even by the standards of the period. In June 1859, two Indian workers were each sued by their employer for absenting themselves from work. In the first case, the employer's action was a counter suit to one bought by the employee. In *Gunga Ram v McKenzie*<sup>26</sup> Ram sued not for unpaid wages, but for alleged breach of contract in that he alleged the employer had failed to provide him with the promised warm clothing suitable for an Indian in a Canterbury winter. The defence was simply that the contract had been complied with; the defendant stating that on the day the claim had been filed in court, the plaintiff had been wearing:

“two blue shirts, one warm waistcoat, 1 blue Guernsey, one blue-striped checked shirt and a comforter round his neck, 2 pairs of moleskin trousers, one on top of the other, besides boots and socks”.

The court held the plaintiff had no reasonable grounds for complaint and had “no doubt” been misled to complain by the ill-advice of someone. Ram's case was thus dismissed, with costs against the plaintiff. The court then heard an action by McKenzie against Ram for 7/6 being damages Ram absenting himself from work at he time of the alleged breach. The Court held this amount was “no more than fair” compensation. .. Thus ram was out of pocket not merely costs in his own action, but the damages and the costs in the counter-suit.

Yet worse was to befall his fellow employee. In the other action for damages brought by the employer, *McKenzie v Bhoranee Singh*, McKenzie produced a written agreement made in India with what he claimed was the defendant's mark on it; as well as a document purporting to be a certificate made in New Zealand in 1854, and witnessed by a Justice of the Peace, acknowledging the agreement as being in effect.. When the Court questioned Singh about the document, and could not get a clear answer whether or not the mark on the document was his, the bench decided he was guilty of contempt of court and ordered his imprisonment for seven days.

We may conclude this sad narrative with *Dobbs v Beard*<sup>27</sup> where the female plaintiff had worked for the defendant for 9 months and sought leave to go to Christchurch briefly. Leave was denied, and she was told that if she went, she could stay away, and would not be paid any wages. Despite this she went, and the promised results ensued.

“The Court considered the plaintiff had no grounds whatever for bringing the present action; that whatever agreement for service she had with the defendant she had broken it by leaving the defendant's service in a most

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<sup>25</sup> *Price v Bishop* Chch RMC 16 February 1859 reported *Lyttelton Times* 19 February 1859.

<sup>26</sup> Chch RMC 8 June 1859 reported *Lyttelton Times* 11 June 1859

<sup>27</sup> Lyt RMC 15 August 1859, reported *Lyttelton Times* 27 August 1859.



unwarrantable manner and she might think herself fortunate that the defendant had not brought an action against her for her behaviour.” The upshot was that the plaintiff not merely did not receive her wages, but was left to pay 19/- costs for the case. This may perhaps have been in accord with the law, but hardly with justice.<sup>28</sup>

#### 4.2. Of ships and travellers

In both criminal and civil cases the Canterbury Resident Magistrates' Courts were regularly called on to determine cases which a legal purist would have considered to fall outside their jurisdiction as involving matters either arising from an agreement made in England or as occurring on the high seas - usually in the context of litigation about some event occurring on the passage from England to the colony. In only one case does a defendant seem to have specifically pleaded the jurisdictional point, and that without success. In *Looke v Kesteven*<sup>29</sup> a ship's captain sued a passenger for breach of an agreement made in England that the defendant's servant would serve as a crew member during the trip in return for a greatly reduced passage fee. It was alleged that the servant had refused to obey orders and or to do work assigned. The defendant set up a screen of defences, claiming that the servant had done all he could in his state of health, that the agreement between the parties was not made on stamped paper and, most importantly, that it was made in England. The newspaper reported the court's response, which owes more to pragmatism than legal principle, thus:

“The Resident Magistrate said he could not listen this plea for a moment; that if people were thus allowed to evade payment of agreements made in England there would be no security in such agreements”.

There were other contexts in which the Canterbury RMCs were required to adjudicate on matters which had happened on the voyage from England. There were for example on 3 October 1859 alone two cases where passengers successfully disputed the charges levied upon them for freight on the voyage.<sup>30</sup> Only a few weeks later the Court had to decide an action by a ship's surgeon for wages due for his services on the voyage. The plaintiff was successful, as the defendant appeared unable to substantiate claims the surgeon had not performed his duties adequately.<sup>31</sup>

There were also inevitably a number of cases involving seamen – usually as criminal charges of mutiny, disobedience to orders and desertion, but sometimes involving allegations of assault (both by crew members on officers and vice versa). These are themselves deserving of a substantial study, but fall outside the confines of this paper.

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<sup>28</sup> Charlotte Dobbs was some months later seeking a court order for relief under the Destitute Persons Relief Ordinance; the case was settled out of court. *Regina by Charlotte Dobbs v James Chambers* 24 June 1862., reported Christchurch Press 5 July 1862 One other female employee fared marginally better, though not well, in 1860. Shirley Gow sued for £5 due as her wages as housekeeper, but recovered only 20/-, with the costs divided between the parties. *Shirley Gow v J Abrahamson* 13 February 1860. Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.

<sup>29</sup> Reported *Lyttelton Times* 17 July 1854.

<sup>30</sup> *Rossiter v Cookson Bowler & Co* and *Webb v Raven*, Lyttelton RMC 3 October 1859, reported *Lyttelton Times* 5 October 1859

<sup>31</sup> *Prins v Byron* Lyt RMC of 24 and 28 October 1859, reported *Lyttelton Times* 29 October and 2 November 1859.

### 4.3 Of farmers and rural cases

Once curiosity of the material so far scanned is that there is relatively little which relates to the principal economic activities of the settlement – pastoral farming and agriculture. While one of the first identifiable civil case in the Resident Magistrates’ Court is *Caulfield v Archer*<sup>32</sup> where the plaintiff successful alleged his stock had been unlawfully impounded by the defendant, the number of “rural” cases is quite low. There are a number of cattle trespass cases, several cases of damages being sought for sheep killed by dogs and the like, but these seem fewer in number than the trickle of employment cases. One possibility is simply that the absence of data from the rural courts has real effect here, the other that there may have been rather greater willingness to settle disputes without recourse to the law, or at least before the case came near the court. Further study is needed, and so I don’t intend to discuss the matter in more detail here.

### 4.4 cases involving Maori

There is considerably more research to be done into Maori use of the Resident magistrates’ Courts in early Canterbury – in particular to try to find out more about cases in the Kaiapoi, Akaroa and Timaru areas.

We do know that a few cases were brought by Maori against Maori. In 1854 there was an action, *Kairakau v Tommy*<sup>33</sup> as to rights to the progeny of a cow belonging to the plaintiff where the defendant ( a chief from Timaru) had not accounted for the plaintiff’s share. The Maori assessors sitting with the parties questioned the parties, and ordered the defendant to deliver the calf and pay costs (which were in fact paid by other Maori in court). The report in the *Lyttelton Times* is couched in a curious tone, as if the reporter could not decide to deride the proceedings or to compliment the parties for their demeanour.

There are at least two cases where a Maori plaintiff sued for damages for adultery. In *Te Paro v Ko Kupere and Henare Te Wha*<sup>34</sup> the plaintiff sought damages of £50 against each of two defendants, and received an award of £30 in each case, the adultery have been admitted by the defendants and by the plaintiff’s wife. A little over a year later another plaintiff sought damages of £100 for adultery, and was awarded “some boards, a boat, a horse and £10”, which may well have equated to the value claimed.<sup>35</sup>

There was also a small number of actions by Maori against Europeans (though largely in the last year of our sample)<sup>36</sup>. In two actions heard by the Magistrate and two Maori assessors on 18 September 1862, Maori plaintiffs sued settlers – one being an unsuccessful claim for the value of a cow

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<sup>32</sup> Christchurch RMC 27 October 1853, see *Lyttelton Times* of 5 November 1853

<sup>33</sup> Lyttelton RMC 21 February 1854, see *Lyttelton Times* of 4 March 1854.

<sup>34</sup> Chch RMC 9 November 1859, reported *Lyttelton Times* 12 November 1859 –

<sup>35</sup> See *Piani v Haimona Simon* 2 January 1861, in Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.

<sup>36</sup> There is one case where a Maori brought a private prosecution for assault, successfully, against a European *Pohata (native) v Bennington* Lyttelton RMC 12 September 1859, reported *Lyttelton Times* 21 September 1859.

destroyed by the settler<sup>37</sup> and another a largely unsuccessful claim for rent for land (the plaintiff did not get the rent sought, but did get damages for timber removed by the defendant).<sup>38</sup> Some weeks earlier it seems a female Maori plaintiff had been more successful in getting damages for the value of cows destroyed, but the record does not clearly indicate whether the action was brought against a settler or a Maori.<sup>39</sup>

Among the few cases so far found where a settler was suing a Maori defendant are three in January 1861, where one Augustus Ford sued three Maori, each for sums of 20/- or less described only as “balance of account”.<sup>40</sup> In each case the matter did not proceed to a full hearing, as two cases were settled out of court and in the third the sum in question, a mere 8/-, was paid into court. In each case the costs incurred appear to have been restricted to 1/-. I have not yet tracked down Ford’s business, but I note he was suing a number of settlers at this time, so may have been a trader who wished either to improve his liquidity, or prepare for a change of location or trade.

#### 4.5 women as litigants

One notable feature of the material I have so far seen is the number of women plaintiffs (there are few women defendants, though some are to be found). As we have seen, at least one Maori woman had a case brought for her; and there are femmes sole who sued for wages due for their employment; others sued for moneys due for board and lodging or for debt. It should also be remembered that many women brought actions in form as criminal prosecutions for assault or for neglect which might now be classed as civil actions for domestic violence orders or maintenance orders and the like. However female involvement in litigation in the 1860s does not stop there. There are two identifiable cases of women appearing in court to bring actions on behalf of (apparently) their children. Both were actions in debt, for the same not insignificant sum of £2-5-0, though how the debt came about one cannot tell. In the first the plaintiff received judgment; in the other the defendant did not appear.<sup>41</sup>

The most striking single point found in all this research - and I must here say it was my research assistant Charlotte Wilson who spotted the first relevant entry - is a trio of entries in the court register - one in early 1860; two in 1861.

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<sup>37</sup> See *Maika v Simon* 18 September 1862, in Register of Proceedings of Lyttelton RMC, NZNA file CH132/639.

<sup>38</sup> See *Piana v Williams* 18 September 1862, in Register of Proceedings of Lyttelton RMC, NZNA file CH132/639.

<sup>39</sup> See *Rai Whatau Ruti (Lucy a native) by Wihiana* 4 July 1862, in Register of Proceedings of Lyttelton RMC, NZNA file CH132/639.

<sup>40</sup> See entries for 23 January 1861 for *Ford v Para Tau*, *Ford v Ropetana* and *Ford v Watson (native)* in Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.

<sup>41</sup> *T Turner (by Mary Ann Turner) v J Burrell the younger* 25 March 1862; 16/09/62 *William Taylor (by Annie Taylor) v Emily Hedgman* 16 September 1862. Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.

The first reads

13 February 1860 Elizabeth Cameron of Norwich Quay v Joseph Ashby – 9-10-0 for goods supplied “Plaintiff not able to sue being a married woman. Non-suited”.

Note that the judgment of the court is a non-suit – which allowed a plaintiff to reopair the legal weakness in the case, if s/he could.

The second and third read:

30 January 1861 - Cameron Bros by Mrs Cameron v Joseph Forster – 14-15-2 “Summons not served, may be extended”.

and

6 February 1861 - Cameron Bros by Mrs Cameron v William Packard – 7-10-0 on a promissory note due 29 October 1960. Judgment for plaintiff 7-10-0 and costs 19/-

These entries are remarkable. It is clear that Mrs Cameron ( probably but not certainly the Elizabeth Cameron of Norwich Quay) appeared in the Court to present the case for the well-known firm of merchants – Cameron & Co – and at least on the second occasion, her gender was no bar to judgment being entered for the firm. There is, alas, no record I have yet found which explains the circumstances further, but I shall be trying to find out more.<sup>42</sup>

## 5. CONCLUSION

These tantalising fragments of Mrs Cameron’s story make a good place to finish this “work in progress” paper. In my view, there is a great need to look closely at civil litigation – in some ways the poor relation of study in the field – not merely for the understanding it may give us of the colonial economy and society, but because of the wonderful tapestry of individual stories it throws up. I look forward to working in the area over the next few years. I would welcome your suggestion for sources to look at, critiques to consider and parallel research to draw upon.

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<sup>42</sup> See Register of Proceedings of Lyttelton RMC, NZNA file CH132/638.