Litigation in the early years of the Canterbury settlement 1852-1861.

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1. Introduction

This paper looks at the frequency and nature of litigation in the early years of the Canterbury settlement on the east coast of the South island of New Zealand. Because this was a new settlement in an area with virtually no pre-existing European population (and few indigenous people), but was a part of a more developed colony with an existing institutional base of courts and of inherited and local law, it provides an unusual opportunity to obtain a picture of litigation in a new community which inherited, rather than developed, its legal institutions.

This paper focuses on civil litigation in the Supreme Court of New Zealand, the superior court of record, and is based primarily on archival records available in Christchurch, particularly the Supreme Court Minute Book, supplemented by other archival material and by contemporary newspaper reports. The termination date of the study, around the end of September 1861, is dictated by changes in the recording of matters before the Supreme Court, under which very many fewer details are entered into the Minute Book.

I must begin with a caveat that this paper does not attempt at all to deal with all cases before the courts in Canterbury – there is clearly a substantial body of disputes which were heard in the lower courts which fall outside the purview of this study; I have not looked at these, partly because it would extend this paper substantially; partly because of pressure of time, and partly because the documentary record is patchy enough to raise some doubts as to the possibility of ever establishing a sufficiently accurate picture.

2. The context

2.1 History and Geography

Canterbury was unusual in that it was a planned settlement principally conceived and executed by private, rather than governmental, enterprise. The story is all the standard books, but may be sketched sufficiently here by saying that Canterbury was planned by its designers, the Canterbury Association, as a Wakefield-plan settlement, and at the same time an

Anglican colony. The planners therefore intended a version of an idealised rural England, with the Association acquiring cheaply a very large area of land, which it would sell off gradually, but at a "sufficient" price (in practice a substantial price), to capitalists who would thus providing the initial funds for the settlement's development, while hardworking labourers would be kept to wage work by the relatively higher price of land, at least for some time – and then they could transmute themselves into a rural yeomanry who could further aspire to progress by exploiting the work of further labourers brought out with the assistance of the moneys paid for the dear land. While the system worked as well, or as badly, in Canterbury as it did anywhere else, Wakefieldian theory was frustrated by the dreams of, and opportunities provided by, the pastoral age.

Canterbury had, from its initial days, a substantial class of reasonably well-to-do landowners and professionals who came out directly from England to live in the colony, and who often found themselves as landlords of farmers or small businesses, and often also provided loan finance, or other investment capital, for farms or businesses. In addition, and unusually for New Zealand, Canterbury had a significant number of "absentee" landlords – mostly the English based members of the Canterbury Association who had acquired land in the settlement in return for providing initial capital; some of these absentee landlords found litigation in the Supreme Court necessary to protect their interests.[1]

The physical conditions of the Canterbury provided reasonably good conditions for the planned new settlement. Most of the Canterbury area was flat or only gently rolling country; much of it in open tussock grassland, interspersed with large patches of native "bush" or forest. Soils ranged form stony gravels to deep loans suitable for intensive agriculture; the drier tussock lands held out early promise for sheep farming. There was however a major problem with communications, in that only two good harbours served the settlement; Lyttleton (at one time Port Cooper) and Akaroa; both being these being separated from the broad plains by steep hillsides, then largely forest covered. Travellers had initially only two options for travel from Lyttelton, for much of the period of this study the largest centre of the settlement for many years, to Christchurch, the intended principal settlement of Canterbury, and soon to become its dominant centre. There was a narrow winding track over a steep hill ("the Bridle Path", still a resort of the more determined Sunday walkers), or to go by water around the coast and over a quite significant tidal bar at the mouth of the Avon river, which flowed through Christchurch. After a few years this was supplemented by a road over the hills, but until a rail tunnel was driven through between the centres in the late 1860s, transport was always difficult. Nor were communications much better over much of the Canterbury Plains, and the adjoining foothills, over which sheep farmers quickly spread, as the plains and foothills were streaked with rivers which,

[1] See for example *Scott as attorney for Rt Hon William Drago Montague, Duke of Manchester v Fantham* 25 May 1860 National Archioves of New Zealand, Christchurch branch (hereafter NZNA) CAHX CH53/22B Minute Book Supreme Court 1860-61 and *Wortley v Williams* 5 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61

although normally shallow, could rise in flood quickly and become impassable for days.

There appears to have been a fairly consistent pattern of smaller farmers taking up land close to Christchurch – partly from a desire to supply the small town market where possible, partly because the richer and better-watered soils were principally closer to Christchurch.

One other feature of the Canterbury area was undoubtedly attractive to the Canterbury Association and to colonists alike – Canterbury had only a very small indigenous population at the time of European settlement as the local iwi, Ngai Tahu, had been largely destroyed or driven out by raids from the north. As a result, the Canterbury pioneers could virtually ignore the Maori population and its interests, save in regard to three or four small communities.

2.2. Development of the settlement

The arrival of the "First Four Ships" in late 1850 brought several hundred Canterbury Association migrants, overtaking, though not overwhelming, the small European population then existing, mostly in small coastal communities as whalers or felling timber. 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 – initially as a result of further migration organised by the Canterbury Association, but also as a result of the success of the sheep farmers, which drew moneyed settlers from other areas of the colony and even from Australia. A census in 1861 showed a (settler) population of 16,040; in the following year the population increased a further 25%[2]. An alternative measure of the development of the settlement is that while there were but three lawyers resident and practising in Lyttelton and Christchurch in 1851, there appear to have been eleven by 1857, and a further 13 joined the local profession between 1859 and 1861.[3]

2.3 Legal and institutional context

The New Zealand court structure over this period comprised two main institutions, the Resident Magistrate's Court and the Supreme Court. The former, presided over by a paid, but not legally qualified, magistrate (or rarely, two unpaid Justices of the Peace) had a summary civil jurisdiction in civil cases to a value of £20; it also had a minor criminal jurisdiction, as well as a special role in dealing with cases involving Maori.

The Supreme Court was a relatively unusual superior court for the time, in that its civil jurisdiction combined encompassed both equity and the common law; it also dealt with issues as to wills and estates, and also had a supervisory power over lunatics. It was also the principal court for serious criminal matters. One critical circumstance is that the first sittings of the

[2] Population data is taken from W J Gardener (ed) *A History of Canterbury* (Christchurch, Whitcombe & Tombs 1971) vol 2, p 64 and p323. In the years after this study finishes, development of the settlement was significantly affected by the flood of population firstly to the Otago goldfields (to the south of Canterbury) and, a few years later, by gold rushes on the West Coast, across the main mountain ranges from Canterbury, but commercially and administratively intertwined.

[3] Calculated from data in National Archives of NZ, Christchurch CAHX Ch244/1 Index of Barristers and Solicitors (Christchurch) prior to 1876.

Supreme Court in Canterbury were fleeting affairs, conducted at long intervals by a judge on circuit from Wellington. Not until 1858 did Canterbury have a resident Supreme Court Judge, with the appointment of Henry Barnes Gresson, an Irish lawyer formerly in practice in Christchurch. In 1859 the Supreme Court began to sit in Christchurch, rather than Lyttelton.

There were other minor courts such as a Court of Requests and a simple Justice of the Peace court, but neither loomed large in Canterbury's life. Nor, it seems, was there any significant effect within our time period, of the creation in 1858 of the District Court as an intermediate civil and criminal court – indeed no District Court Judge was appointed at this time to the Canterbury area. The court was, however, later to take a significant case load from the Supreme Court in some areas of the country.[4]

3. Litigation – frequency and quantum

3.1. Cases set down for hearing

In considering the nature and frequency of Supreme Court litigation in Canterbury, we can have regard to three different measures.

One is to take the simplest, and smallest, sample – the cases which actually were set down for a defended hearing in the Supreme Court before judge and jury (a feature of the cases heard in Canterbury is that all bar one case (an estate matter[5]) heard in full court were jury matters. If this criterion is taken, there are few cases indeed. In 1852, at the first sittings of the Supreme Court, three cases were heard – one a successful action by a lawyer to recover fees for professional services; one, by the same plaintiff, for libel – he was non-suited; and the last an action in negligence for the value of a horse which died while in the custody of the defendant. It was two years before the Supreme Court sat again, and even then the November 1854 sittings were brief, as in all three cases brought (one in contract, two apparently to do with title to land) the parties had agreed that the defendant would consent to a verdict for the plaintiff, subject to the judge's later decision on a specific point of law.

Although the Supreme Court sat again in 1855, there were no defended civil cases, and in 1856 there was but one (an action for specific performance of a contract for sale of land). The last occasion on which the Supreme Court was required to travel on circuit to make one of its "Angel's visits" (as a local paper described them)[6] was in April 1857, when seven cases were set down for hearing. Of these three were settled and one was stood over. In two the defendant consented to judgment being entered for the sum claimed, and only in the last was any issue left for the court – and then only to formally order an agreed verdict for a sum of £1,000, subject to a decision by arbitrators to whom a matter was being referred. It is impossible to tell what the nature of the six cases thus terminated were, but it is probable that at least three, each

[4] Details of these courts can be found in Spiller, Finn and Boast *A New Zealand Legal History* (Brookers, Wellington, 1996) ch 5.

[5] *In re estate of Peter Haylock*,heard 30 December 1854, see NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860 and *Lyttelton Times* 2 December 1854.

[6] *Lyttelton Times* editorial, 25 April 1857

brought by a firm of merchants, involved actions for debt.[7] Thus in the first five years of the period covered by this paper, the occasional visits of the Supreme Court occasioned but fourteen cases being set down for trial, and fewer than half of these actually proceeded to a verdict.

The picture, at first sight, changed somewhat when the Canterbury settlement acquired a resident Judge in 1858. Although in the first sittings of 1858 there were no civil cases, in a second sitting in October and November the court heard two defended cases, one of defamation[8] and one for damages for assault (a third case, also of defamation, was withdrawn when the first failed; another case was settled and the fifth case set down for trial, relating to land title) had to be postponed as counsel was no longer available. The assault case, *Baker v Schroder* [9] was by far the longest running case of the entire period – running over seven days of hearings, and then ending with an equivocal verdict, whereby the plaintiff, an Anglican clergyman horsewhipped in a Wellington street outside his church, recovered £50 "in vindication of the law", the jury not being able to agree on the defendant's allegation in mitigation of damages that the horsewhipping was because the plaintiff had indecently assaulted the defendant's daughter. Yet neither *Baker v Schroder* nor the defamation cases can properly be called "Canterbury" litigation; they having both been transferred from Wellington because it was believed no impartial jury could be obtained there.

In 1859 the dearth of local defended cases continued – although the Supreme Court had moved to quarterly sessions, rather than bi-annual ones. Only one civil case went to trial all year – a case in contract for the price of cattle supplied to a butcher.[10] In 1860 the tally went up to five defended cases – two in contract, one in negligence, one for breach of an equitable obligation and one unknown. In 1861 the tally went up to nine – the highest number in the period covered by this paper; of these five were in contract, one concerned title to land, one was an action in trover relating to livestock, one an action for seduction and one in trespass[11] (this latter being the only case in the period where a jury verdict was later set aside and the case reheard, with a different outcome) and one, in form a civil action, for a penalty under the customs legislation.[12]

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[7] In one of these, the defendant was a farmer named Alexander McBratney, who appears regularly as defendant in debt actions for at least the next five years.

[8] The defamation case, *Bowler v McKenzie & Muir* 18 November 1858 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860, reported *Lyttelton Times* 20 November 1858 presented the strange spectacle of counsel for the defendant newspaper publishers, one William Fox (later Premier of New Zealand) informing the jury that he personally was the author of the allegedly defamatory material, . In the same issue of the newspaper there appears a letter to the Editor from Fox, setting out material the judge had refused to permit to use in his closing address.

[9] NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860, reported *Lyttelton* Times 24 and 27 November and 1 December 1858.

[10] *Field v Austin* NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860; reported *Lyttelton* Times 14 December 1859. For other similar cases against butchers see section 5.3 below.

[11] *Stephens v Woodford*,7-8 March 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *Lyttelton Times*,13 March 1861.

[12] *McKellar v Craig* 1 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *The Press* July 6 1861 and *Lyttelton Times* 10 July 1861, discussed further section 4.4 below

In total then, the Supreme Court actually heard in civil sessions fewer than thirty local cases in nine years, a figure which must be judged small even allowing for the scanty population of the Canterbury region.

3.2. Writs issued

A totally different impression of the quantum of litigation is gained if account is taken of the number of writs issued by the Canterbury registry of the Supreme Court.[13] The records are somewhat incomplete and at times a little unreliable, but they indicate that in 1852, the first year of the Canterbury Registry, a mere eleven writs were issued; the numbers then dwindled to five in 1853, none in 1854, rose again to thirteen in 1855, dropped again to seven in 1857 and a to mere six in 1858. While these small numbers initially may indicate the lack of a resident Judge, and a consequent belief that lodging a case might be futile, this cannot be the explanation for the low figures in 1858, and the explanation must lie elsewhere.

The subsequent years were very different – in 1859 something in the order of 207 writs were issued; somewhere in the order of 290 the following year, and about 240 in the first nine months of 1861. It may be noted that that these figures do not include any matters relating to probate, administration or the control of lunatics and their property.

3.3. Minute Book count

Lastly, there is the measure, which I would contend is probably the most accurate indicator of the actual frequency, and nature, of civil litigation in Canterbury, and that is the number of matters which came before the Supreme Court either in its civil list sittings, or were dealt with in Chambers by the Supreme Court Judge. This method of counting allows us to take into account the estate and lunatic cases, as well as assessing interlocutory matters and the mainstay of Canterbury lawyers, applications for an order for judgment for moneys due. A count of the cases on this basis produces the following estimates;

Defended matters set down for hearing 34
Interlocutory and procedural applications 120
Estates 82
Orders for judgment 255.

Those figures need further to be clarified; the first orders for judgment are in January 1859, but no more are made until July 1859; after that date, as discussed in section 5, these orders dominate the work of the Supreme Court.

In attempting to assess the volume of litigation, it must also be noted that there were occasional instances of interlocutory or interpleader matters which were heard in the Supreme Court in Canterbury, even though it is clear the matter related primarily to matters external to the settlement.[14] The numbers

[13] NZNA CAHX Ch53/53A Register of Supreme Court Writs.

[14] See for example *Osborne and Cushing v Macandrew* 26 February 1861 NZNA CAHX CH53/22B Minute Book 1860-61 (interpleader matter as to ownership of goods seized on a writ of execution in a matter between Melbourne and Dunedin merchants. A second case, *McNulty v Macandrew*, dealt with on the same day, raised essentially the same issues. Another Otago-centred case is *Young v Berney* 1 November 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.

of such cases are small in absolute terms, and it seems at least possible that there are “Canterbury” cases in other registries against which they should be offset.

4. Defended cases

4.1 Clash of norms

One of the most interesting features of the defended cases is that in at least two, the matter appears to have gone to court as a result of a clash between what we may call formal law, and the practices and customs of the settlers. The two cases which to my mind exemplify this are *Anderson v Harrison*[15] and *Dalgety, Buckley & Co v Cameron*[16].

In *Anderson v Harrison* the plaintiff had been contracted to saw a very substantial amount of lumber from trees on the defendant's land. However when the contracted cut was almost complete, the sawn timber was largely consumed by fire. The plaintiff sought payment for the timber so lost; the defendant insisted that property in the timber had not passed, so the plaintiff had not delivered the contracted amount, and was not entitled to payment. Although I suspect most English lawyers would have considered that the sawyer had retained title to the timber, the plaintiff asserted that the custom was that once the sawn timber was stacked, it became the property of the contracting party. Other sawyers gave evidence of a similar custom, and the jury awarded the sawyer the £409 claimed.

That case can usefully be compared with the rather simpler issue in *Dalgety, Buckley & Co v Cameron* where the plaintiff merchants sued Cameron, a ship captain, for damage to a cargo, carried by the defendant, which was damaged by seawater following the grounding of the defendant's ship on the river bar at the mouth of the River Avon. Under the common law, and indeed under statute, a carrier was generally liable for damage to goods while in the carrier's care; here however the jury appears very quickly to have accepted the evidence of the defendant and three local merchants that it was a customary term of contracts for shipping goods between Christchurch and Lyttelton that the goods were at the shipper's risk, and the carrier was only liable if negligence was established.

4.2. Of damages

A small number of cases seem to have been fairly straightforward disputes in the nature of contracts, where it is perhaps only the need to establish the particular damages claimed that had led to the case coming before the court at all. In this bracket we may include a number of cases in 1861. Perhaps the most interesting is *Hargreaves v Fantham* [17] where Joseph Fantham, a miller and apparently the most frequently sued man in Canterbury, was found liable in damages to the tune of £224 for delivering only a fifth of a promised 50 tons of flour. It seems likely the case went to a hearing only to force the plaintiff to establish the losses claimed, which it appears had been incurred in acquiring a substitute cargo from Wellington, at a higher price, and in shipping it down.

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[15] 5 March 1860 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860, reported *Lyttelton Times* 7 and 10 March 1860.

[16] 1 June 1860 NZNA CAHX CH53/22B Minute Book 1860-61, reported by *Lyttelton Times* 10 June 1860.

[17] 27 June 1861 NZNA CAHX CH53/22B Minute Book 1860-61, reported by *Lyttelton Times* 3 July 1861 and *The Press* 5 July The costs of the action were taxed at a very substantial 39-7-8; not surprisingly given Fantham's frequent appearances as a judgment debtor, execution was levied a month later against the person.

In many other cases it is difficult to see how the jury came to their view of the damages to be awarded. In the otherwise straightforward case of *Marshall v Giggs*[18] the plaintiff complained that a dray and four draught bullock purchased for £110 was not delivered; instead the plaintiff received an inferior dray and but two bullocks. As a result the plaintiff was put to expenses, detailed at around £40, in hiring carters to move materials. Damages of £150 were awarded, suggesting that the jury had given not merely the extra costs but also the entire capital sum.

Such apparent generosity is also to be suspected in *Evans v Millton*[19] where the plaintiff recovered very substantial damages for an alleged breach of trust by the defendant, who on non-payment of moneys owed to him by the plaintiff had not sued on the dishonoured promissory notes but instead sold 50 acres of land which, the jury found, had been conveyed to him only as security for the debt. The plaintiff was awarded £1250 for this breach, despite the fact the defendant had received but £1,000 for the land, and despite evidence that even that price would not be achieved if the land was sold for cash at the time of the trial. It is tempting to speculate here as to why the award was so substantial; it may be hypothesised that the special jury, which as ever included a number of merchants, was well aware of the fragile edifice of credit on which the settlement depended, and was concerned to see that legal forms and requirements for action against debtors were carefully followed.

Not all plaintiffs were so successful. In another case[20] a disappointed purchaser of land alleged the boundaries of the "run" being bought had been deliberately misrepresented by the vendor, with the consequence the value of improvements by way of a house and stockyards were lost; the purchaser sought £2,000 in general damages; and £1,000 in special damages. Although he received only £800 from the jury, this must be set against the purchase price of £500.

There were also a small number of cases where it is clear the real gravamen of the case was not any figure in damages, although damages may have been claimed, but the vindication of a claimed title to property,[21] or of the plaintiff's character (as in the defamation actions mentioned earlier, or the case of *Baker v Schroder*). In one or two cases it is difficult not to see the real motivation as personal ill-feeling. Included in this latter class are *Simms v Holland* [22] where the plaintiff was suing a former business partner for allowing

[18] 30 September 1861, NZNA CAHX CH53/22B Minute Book 1860-61 ; reported *Lyttelton Times* 2 October 1861 and *The Press*, 5 October 5 1861.
[19] 6-8 September 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *Lyttelton Times* 12 September 1860.
[20] *Collier v Caton* 2 October 1861, NZNA CAHX CH53/22B Minute Book 1860-61; reported *The Press*, October 5 1861 and *Lyttelton Times* 9 October 1861.
[21] In this category come such cases as *Wyatt v Slack & le Fleming* 1 October 1861, NZNA CAHX CH53/22B Minute Book 1860-61; reported *The Press*, October 5 1861 and *Lyttelton Times* 9 October 1861 where the plaintiff sought, and received, effectively nominal damages for trespass onto lands the plaintiff occupied under a pastoral licence; the defendants claimed the land was included within their licensed lands.
[22] 5 September 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 reported *Lyttelton Times* 8 September 1860.

the escape of a horse which the defendant was allegedly to have sold on the plaintiff's behalf, and a case in trespass to a flour mill.[23]

4.3. Cases seeking equitable remedies

One of the notable features of the cases before the courts is the comparative dearth of applications for equitable remedies. These are discussed further in section 8, below, but it is notable that there is but one application for an order for specific performance of a contract, and only a handful of actions for injunctions. It is not clear why this occurs, but in the early years it may be presumed the absence of a resident Judge meant such equitable relief would rarely be sought; in the later years it may simply have been that in general at least one major reason must have been the rapidity with which cases could be brought. The shortest delay appears to have been the period of just over a month from an alleged breach of contract to a jury verdict for the plaintiff[24]; in March 1861 a case for damages for "illegal and forcible entry" onto the plaintiff's premises was heard less than two months after the cause of action arose.[25]

4.4. Other defended cases

One of the most tantalising cases, notable for the remarkable brevity of the reporting in both the contemporary newspapers, is the one action for seduction in the period, *Houlihan v Harston*[26] where the plaintiff sought damages of £500, alleging the defendant, a prominent Lyttelton solicitor,[27] had seduced his daughter.[28] In most Supreme Court cases, even civil cases, the newspapers printed at least a précis of the evidence of the witnesses; in this case there is no such reportage, and merely an indication that after two days of evidence, the jury were unable, despite a lengthy retirement, to agree on a verdict; the case was later settled out of court. It is tempting to ascribe this reticence more to Harston's influential connections than to any Victorian reserve.

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[23] *Stephens v Woodford*, see section 5.3 below.

[24] *Marshall v Giggs* 30 September 1861, NZNA CAHX CH53/22B Minute Book 1860-61 ; reported *Lyttelton Times* 2 October 1861 and *The Press*, 5 October 5 1861.

[25] *Stephens v Woodford* 7 and 8 March 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61, reported *Lyttelton Times* 13 March 1861. In that case a re-trial was granted; that was completed only four months after the first trial: *Stephens v Woodford* 8 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 reported *Lyttelton Times* 10 July 1861 and *The Press*, July 13 1861.

[26] 1 July 1861, NZNA CAHX CH53/22B Minute Book 1860-61; reported *The Press* 6 July 1861 and *Lyttelton Times* 10 July 1861.

[27] Edward Frederick Buttemer Harston had qualified as a solicitor by serving articles to an attorney in England, which articles were later transferred to a New Zealand solicitor. He was admitted in new Zealand in 1859, and quickly acquired a very substantial practice in Lyttelton, often appearing for merchant firms seeking judgment orders against debtors. He later sought to be struck of the roll as a solicitor so he could seek admission to the English bar, but some years later was re-admitted as a solicitor in New Zealand.. See documents filed in NZNA CAHX CH 244/1 Index of Barristers and Solicitors (Christchurch) "prior to 1876".

[28] The relevant Supreme Court Rules, the Regulae Generales of 1856 contained a specific rule, Rule 89, relating to the pleading of seduction actions, whereby the plaintiff (who had to be the father of the girl allegedly seduced or another male in loco parentis) needed only to aver that the victim was under 21 years of age; there was no need to plead or prove she was employed by the plaintiff or that plaintiff had suffered any loss.

A more unusual action, and one which would not now be classed as a civil litigation although it was heard in the civil sittings of the Supreme Court is *McKellar v Craig*,[29] where McKellar was suing to recover a penalty under the Customs legislation for an alleged fraudulent evasion of duty in relation to a shipment of tea; the action failed in the face of the defendant's strong denials of any fraud and assertions that the admitted error as to the weight of tea was one of which he was unaware at the time the relevant customs declaration was made. It may also be pertinent to note that the jury in this case, as with almost all Canterbury special juries, contained a significant number of merchants in a substantial way of business. We may speculate that they, as importers themselves, would have been reluctant to see actions for customs penalties become common. A final feature of this case is that once the verdict was given Craig, the successful defendant, discontinued an action against McKellar which had been set down for the same day. The grounds for that action are not discoverable, but it is interesting, and not a little curious, that the defendant's Craig's costs in the discontinued action were taxed at almost double those he recovered as the successful party in the case that went to a hearing.[30]

5. Judgment orders

5.1. Nature and origins

In 1859 the Supreme Court was presented for the first time with an application for an order for judgment. This form of application would appear to have been based on Rule 307 of the Regulae Generales of 1856, which allowed plaintiff to move for judgment if no plea or demurrer had been filed in reply to a plaintiff's writ within the permitted time. This procedure roughly corresponds with the modern summary judgment, except that the plaintiff did not have to show there was no arguable defence to the action. (The rule was also productive of a steady trickle of procedural applications to permit a plea or demurrer to be filed out of time). The first instance of judgment orders comes in January 1859, where a sheepfarmer recovered, on a order for judgment two different sums of around £120 from a Christchurch butcher.[31] There appears to be no reason why it should have taken more than two years from the enactment of the Regulae Generales for such orders to be sought.

The cases in which judgments were sought under Rule 307 must be coupled with the less frequent but still quite common cases where the defendant's response to a writ for a sum of for money was to file, under Rule 422, a cognovit or confession of action. This process was only possible where the defendant had received legal advice; the principal benefit of such a step appears to have been in minimising court costs.

The judgment order procedure was, almost exclusively, used to recover moneys due, whether by way of a contractual sum, or repayment of moneys

[29] 1 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *The Press* July 6 1861 and *Lyttelton Times* 10 July 1861.
[30] See *McKellar v Craig* 4 July 1861. The taxed costs awarded to McKellar on the abandoned claim were £36-7-8 as against the £21-7-4 to be paid to Craig for his successful defence in the other matter. McKellar recovered his money by execution against goods some six months later..
[31] *White v Slee* 21 January 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860.

lent. The qualification as to "almost exclusively" must be made to take note of one case where the judgment order was for possession of land.[32]

In general it is not possible from existing records to determine which actions related to payment of contractual sums and which were, in effect, for repayment of loans and the like. In only one is an indication given clearly, where the case is described as being brought on a bill of exchange.[33] The largest sum on a judgment order appears to have been *Miles & Co v Le Cren*[34] where the defendant confessed, through his attorney, liability for £6,000; such an action was, almost certainly, an action in debt rather than contract. By contrast, the smallest claim shown on the record was for a mere 7/1 owing in interest to the Union Bank; the costs in the matter were taxed at over £12.[35] Other smaller claims included actions in November 1860 by Wellington traders for sums of £7-7-0 and £11[36] and although such claims as these may be exceptional, it is clear that a very substantial percentage of the total summary judgment cases involved claims below £40 in value. Not a few of these smaller claims were brought by working class people, probably in many cases as actions for unpaid wages.[37]

5.2. The plaintiffs

Who brought all these actions for judgment orders?

The majority of the approximately 250 judgment orders made in 1859-1861 were sought by individual plaintiffs who appear only once or twice in the lists of cases; these ranged, as we may see, from labourers and farmers to traders. However there is a very notable subset of cases in which the individuals who sought judgment orders were merchants of one kind or another. This phenomenon starts comparatively early on – the first large batch of judgment orders on 8 July 1859 included three cases brought by a single merchant, Louis Edward Nathan of Christchurch. Four identifiable merchants or merchant firms between them account for almost 20% of the judgment orders; other merchants who brought fewer actions certainly take the total past the 25% mark.[38]

It is notable that a significant strand of cases are to be found where workmen are suing their apparent social betters. We may take as a elegant example of this apparent social contrast the entitulature of one summary judgment case in 1860,where the parties are described as "William Lingberton and John Donovan of Worsley's Bush, bushmen v Henry Tuft Worsley, of Worsley's Bush, gentleman".[39] The bushmen succeeded in recovering a judgment for

[32] *Wortley v Williams* 5 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[33] *Lucas, acting branch manager of Union Bank of Australia at Christchurch v Goodacre* 16 March 1860 Mbk 1.
[34] 18 May 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[35] *Palmer, as manager Christchurch branch, Union Bank of Australia v Turner* 1 February 1861 NZNA CAHX CH53/22B Minute Book 1860-61.
[36] *Hamersley v Hore* 30 November 1860 NZNA CAHX CH53/22B Minute Book 1860-61 and *Cook v J W Moorhouse.* 30 November 1860 NZNA CAHX CH53/22B Minute Book 1860-61, respectively.
[37] See for example *McCormick v O'Neill* 30 November 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[38] The highest tallies come from Dalgety Buckley & Co and E A Hargreaves, with 14 apiece, JT Peacock & Co with 11 and Nathan with 10.
[39] *Lingberton and Donovan v Worsley* 10 February 1860 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.

£64, which was probably a sum due for either clearing forest or sawing timber, or perhaps both. No order for execution was ever made, so it may be the claim was settled or compromised.

Only a small number of cases were brought by female plaintiffs. A Christchurch linen draper, Jane Skillicorn, recovered a judgment against a local solicitor in 1860 for a sum in excess of £100, which suggests the amount due was not merely for goods supplied.[40] Other cases by female plaintiffs were *Healey v Barnard*[41] (an action for the round figure of £80, which suggests it was for a loan rather than a contract sum) and *Dillon v Lawrence*,[42]. Dillon was described as a lodging house keeper, and the judgment sum, £27-16-7, may well have been for accommodation.

It would also appear that plaintiffs were generally of full age – I found only one case where a the real plaintiff was a minor.[43]

In this context we may note that there appears to be not a single case where a Maori was involved, as either plaintiff or defendant, in Supreme Court proceedings. There is one case where an Asian labourer, from the details given as to his address one of a number brought to Christchurch by a retired Indian Army officer, sought a judgment order against a miller; the cause of action is not discoverable.[44]

5.3. The defendants

There are also a number of instances where it is clear that a defendant had been living very much on undeserved credit, and once one creditor sought judgment, others moved as quickly as they might to seek to secure their interests.

A classic example of this process is the unfortunate William Henderson, a hotelkeeper of Akaroa, who in July 1859 was sued successfully by a number of traders including one merchant who succeeded in getting two judgment orders (for a total of over £300 in principal and interest)[45] a cooper,[46] a draper[47] and, most strikingly, another merchant who sought the very large sum of £500.[48] In this last case execution, ordered against the person, was delayed for more than five years. At least one more action was filed, though

[40] *Skillicorn v Hodgson* 10 August 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61. Skillicorn was in a large enough way of business to advertise prominently in the newspapers, see for example *Lyttelton Times* 6 June 1860.
[41] 10 February 1860 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[42] 21 September 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[43] *Quinty v Healey* 23 August 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61, where the Court was asked for an order to allow one Alfred Dunn to sue Catherine Healey on Anne Quinty's behalf. The cause of action is not, as yet, discoverable.
[44] *Shoree Singh v Ashby* 30 August 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60. The sum sought was £53-15-0 and interest and costs.
[45] *Alport v Henderson* 16 July 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860.
[46] *Raymond v Henderson* 16 July 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[47] *Moss v Henderson* 17 August 1859 £30 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[48] *Dransfield v Henderson* 17 August 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.

apparently judgment was never sought.[49] A year later Henderson, then described as a "yeoman" was sued by another Christchurch merchant, this time for the less spectacular, but still substantial sum of £133.[50]

A slightly less direct example would appear to be that of Charles Edward Fooks, "gentleman" of Christchurch who in March 1861 was sued by a firm a firm of solicitors;[51] in July of that year by a brewer (who obtained two separate judgment orders on a single day)[52] as well as by two different merchants[53] and, in September 1861, by another lawyer who sought to recover professional fees.[54] In this case it seems highly probable that the litigation against Fooks had been triggered by the convictions for embezzlement in December 1860 of what must have been a close relative, Charles Berjew Fooks, former Secretary of the Waste Lands Board.[55]

The occasionally precarious finances of many leading Canterbury figures is best illustrated by William Sefton Moorhouse, formerly elected Superintendent of the Canterbury Province, who was successfully sued several times in 1860, and was clearly unable to satisfy the judgments in cash, as execution was levied against his goods.

There were also a steady trickle of cases, usually involving relatively small amounts, brought by merchants against tradesmen, such as *Gould and Miles v Rees*.[56] Rees, at various times described as a painter, glazier and paperhanger, was defendant in half a dozen cases over 1859-61. A second example is *Gould and Miles v von Gartner*[57] here the defendant Gustav von Gartner, was a German, naturalised in the Naturalization Act 1854 who traded, apparently not very successfully, as a timber merchant

Butchers were not infrequently defendants in cases brought by sheepfarmers or stockowners, which certainly suggests the butchers may have been less than punctilious in paying for livestock received. One such case resulted in a defended hearing; others were simply dealt with under the summary judgment process.[58]

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[49] *Barnard v Henderson* 16 July 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60. The plaintiff here was an auctioneer.
[50] *Nathan v Henderson* 3 July 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[51] *Wyatt and Harston v Fooks* 13 March 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[52] *Taylor v Fooks* 29 June 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 (two orders totalling over £110).
[53] *J Dann and F A Bishop, t/a Dann and Bishop v Fooks* (principal sum £71, plus interest of £45, which indicates a debt of very considerable antiquity) ;
Hargreaves v Fooks 29 June 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 (£226)
[54] *Dampier v Fooks* 13 September 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 (suing for fees as taxed).
[55] *R v Fooks* 7 December 1860 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *Lyttelton Times* 8 December 1860. Dampier, who was counsel at the first of CB Fooks's trials, was the lawyer seeking to recover professional fees in September 1861.
[56] 9 September 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[57] 9 September 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[58] See for example *Millton v Slee* 30 August 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60; *Cookson v H Brown and E Campbell, t/a Brown and Campbell* 10 February 1860 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60; *Carew v Joyce* 24 February 1860 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.

One of the recurrent features of the entire period is the frequency of actions against flour millers – and in particular against one miller, Joseph Fantham, who was sued by thirteen different plaintiffs in his individual capacity in the years 1859-1861; in addition a partnership between himself and W T Stephens was sued by three other plaintiffs.[59] Most of these actions arose out of his trade as a miller, but one was brought by Richard Woodford, from whom he had at one time bought an interest in a mill. To complete the picture, it must be noted that W T Stephens, at different times a business partner of both Fantham and Woodford succeeded, albeit at a re-trial, in gaining £50 as damages in an action against Woodford for trespass on the mill when seeking satisfaction for the debt owed by Fantham.[60] Woodford himself had also on occasion been the subject of judgment orders.

6 Litigants

Millers were far from the only colonists who found themselves at different ends of the legal process. William Robert Cator, described in 1859 as being a commission agent of Christchurch, successfully sued a Charles Andrew Freeland "gentleman" of Christchurch for £95 in July 1859,[61] but was himself sued by various creditors in 1860, when he is described as a farmer.

Another figure, who appears frequently as a plaintiff, and less so as a defendant, is the lawyer, Charles Edward Dampier who has already been mentioned as the plaintiff in two cases in the first sittings of the Supreme Court in Christchurch in 1852[62] and as the applicant for mandatory orders in 1861. This were far from his only appearances as in both 1859 and 1860 he had had successful actions for judgment orders brought against him in and in 1861 we see him seeking to recover professional fees by way of an order that he be awarded the sum determined by the registrar of the Supreme Court after taxation of his bill of costs.[63] On the same day as that application was made, Dampier also was successful in obtaining a judgment order against a Lyttelton farmer; given that the farmer in question had recently had a number of judgment orders made against him, it may be that this case too was for professional fees.[64]

7 Of fees and costs

It is not possible to work out what proportion of the costs awarded by the courts in the simple chambers actions were intended to reflect out of pocket costs and what portion was in effect the lawyer's fee. In the vast majority of these cases taxed costs awarded were in the £12 - £14 range. It seems likely

[59] Although no other individual can rival Fantham in the number of individual cases brought against him, Alexander Webb, a Christchurch wharfinger, came close with nine, and the total sums claimed from Webb may even have surpassed Fantham's total.
[60] *Stephens v Woodford* 7-8 March 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *Lyttelton Times*,13 March 1861; the retrial was 8 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61; reported *Lyttelton Times* 10 July 1860 and *The Press*, July 13 1861.
[61] *Cator v Freeland* 22 July 1859 NZNA CAHX CH53/21 Minute Book Supreme Court 1852-60.
[62] Section 3.1 above.
[63] *Dampier v Fooks* 13 September 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61. For the vicissitudes of Fooks see section 5.3.
[64] *Dampier v Heron* 13 September 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.

from the tables of current fees that official fees to be paid would not have exceeded £3 or £4 or at the outside £5 (even with extra folios of documents at 6d per 72 words!); execution costs and the costs of taxation itself might have added perhaps £2 or £3 more, at most. This would appear to leave a substantial margin for the lawyers. It may be that these calculations are too favourable to the lawyers, but if costs other than fees were, say, 75% of the normal taxed costs rather than 50-60%, the fee component would still have been £3 or £4. To have even a few of these cases each month would provide, one would think, a reasonable income.
These calculations may be compared with another datum which gives some indication of the fees contemporary lawyers considered a reasonable return for their labours (or, perhaps more accurately, had persuaded the New Zealand Parliament was a reasonable return). This is provided by the District Courts Act 1858, which provided a regime whereby a solicitors for both parties were, in effect guaranteed at least 3 guineas for each case, in addition to out of pocket costs.[65]

7.1 Rules as to costs

It would seem highly likely that one aspect of the popularity with plaintiffs, and lawyers acting for plaintiffs, of the summary judgment process was that the successful plaintiff was entitled to recover costs – which were very often a substantial element of the total for which judgment was entered; these costs must, I think, have included a substantial element of professional fees. Under the Regulae Generales of 1856,[66] Rule 172,a plaintiff in an action for money (or to recover land or chattels) was to receive costs if he or she was successful won on substantial issue and got 40/- or more[67]. If however the plaintiff was not successful on all issues, costs were apportioned between the issues on which the respective parties succeeded. Rule 173 makes it clear that costs of Counsel were also to be apportioned in this way, which implies that counsel's costs were normally awarded to a successful plaintiff. Insofar as this was the case, the plaintiff had the satisfaction of knowing that if the judgment could be satisfied, the defendant was, in effect, paying not only the debt due but for the plaintiff's legal expenses in getting judgment.

7.2. Contingency fees?

Two side-issues which I have not, at least not yet, been able to resolve are whether lawyers in Canterbury in effect operated a contingency fee system, of bringing these cases on the basis that the plaintiff would not be asked to pay

[65] Under s55 a plaintiff's solicitor was entitled to recover out of pocket costs in all cases, and where the plaintiff was successful, a fee based on 5% of the sum for which judgment was given, subject however to always getting the 3 guinea minimum, win or lose. Solicitors for the defence were well provided for: s56 again guaranteed out of pocket costs, and if the defendant succeeded, the solicitor could receive 5% of the sum for which the summons was issued. If the plaintiff succeeded, the defendant's solicitor again got 5% of the sum for which judgment was given, again subject to the three guinea minimum, win or lose.

[66] These were made under the Supreme Court Procedure Act 1856, and replaced a much briefer code of procedure put into effect in 1846.

[67] It is notable that in cases where only nominal damages were sought (as in *Wyatt v Slack & le Fleming* 1 October 1861, NZNA CAHX CH53/22B Minute Book 1860-61; reported *The Press*, October 5 1861 and *Lyttelton Times* 9 October 1861) or where the plaintiff and defendant agreed judgment would be entered for the plaintiff, plaintiffs were careful to stipulate for, and were successful in receiving, the 40/- minimum.

any professional fee, and what happened in cases where no successful execution of the judgment debt was possible.
On the former of these questions, I note that on occasions the principal sum claimed was less than the costs awarded –the cases noted above in section 5.1. certainly suggest cases were pursued where a plaintiff who was funding the case could hardly find the action worthwhile.

There may well have been some enthusiasm among would-be plaintiffs for lawyers to fund the bringing of proceedings – in July 1861 a correspondent to a Christchurch newspaper deplored a rumoured rise in Court fees, arguing that colonial circumstances made it mandatory to leave property or funds in the hands of trustees or agents; if these persons defaulted in some way, the same defalcations that gave grounds for the owner of the property to sue could also leave the owner in financial difficulties which prevented payment fo the requisite fees.[68]

8. Procedural matters and injunctions
In among the applications for judgment, there were an increasing number of interlocutory matters, principally applications for an extension of time to plead to writs, or to amend the pleadings in a case filed (such applications might come from either party). Curiously, despite the frequency with which writs were issued but no proceedings are ever minuted, there seem to be but two cases where defendants sought to strike out actions against them for want of prosecution, and both such cases come on the same day, at the end of our sample.[69]

In only two cases did plaintiffs seek injunctive relief to prevent defendants dissipating assets prior to adjudication of the dispute.[70] In other cases, again only a handful over the years studied, the plaintiff sought a different form of security by seeking to have the defendant arrested prior to determination of the case.[71]

The only other example of injunctive relief being sought appears to be one effectively relating to land title, where a runholder sought an injunction to prevent the Commissioners for Waste lands from "interfering" with his run; they have arranged for the impounding of 6,000 sheep on a part of the run claimed by other graziers.[72] There was also one case where an unsuccessful

[68] "A Cosmopolite" *The Press*, July 6 1861.
[69] *Gladstone v Millton* 30 August 1861 and *Alport v Simchell* 30 August 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.
[70] See for example *Hombrook v Parkinson* 15 March 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860, where the defendant was enjoined from selling horses until a bill of exchange had been honoured, and *Collier v Caton* 12 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 where the plaintiff, who later succeeded in getting damages for misrepresentation as to the boundaries of a pastoral run purchased from the vendor, successfully sought an injunction to prevent the defendant from "negotiating a bill of exchange for £250-0-0 dated about 25 April 1861, drawn by defendant and accepted by plaintiff payable at Union Bank of Australia, Lyttelton branch, on 21 September" until further order of the court.
[71] See for example *Templer v Phillips* 22 March 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860; *Giggs v Wilkins* 4 April 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860.
[72] *McLean v Brittan* 5 March 1859 CAHX CH 53/21 Minute Book Supreme Court 1852-1860. Although the case was heard in chambers, the *Lyttelton Times* reported the fact of the hearing on 9 March 1859

defendant sought to prohibit the sheriff from distraining on his goods to satisfy a judgment order, although there the injunction granted was discharged the following day at the request of his counsel.[73]

Nor were other mandatory orders commonly sought. There were only two applications for mandatory orders in the nature of prerogative writs, both brought by the same plaintiff, Charles Dampier, a lawyer and frequent litigant, who in June 1861 successfully sought to set aside an arbitration award[74] and some months later sought, unsuccessfully, a writ of prohibition against a Resident Magistrate to prevent a case against Dampier proceeding, although the nature of the latter case is not known.[75]

9. Satisfying judgment – execution against goods and against the person

9.1 Methods of enforcement

Obtaining judgment against a debtor for a sum of money was, of course, only part of the problem for any creditor. Then came the task of recovering the money, or its value. There were only two effective measures - "execution against goods" (that is, to seize assets of the defendant and sell them to satisfy the judgment and costs) or execution against the person (effectively imprisonment for debt). It is clear from contemporary newspapers that an order for execution "against the goods" of a defendant did not in fact mean the Sheriff was limited to seizure of chattels – advertisements for sheriff's sales (which listed the names of the parties to the relevant action) include the sale not merely of household goods, stock in trade and livestock but also book debts and even a leasehold interest in land.

While the Regulae Generales allowed execution 14 clear days after judgment, it is normal to see a rather longer time elapse. It is interesting that the first case in which the minimum time was allowed to elapse was one where the Sheriff of Christchurch, the person in charge of levying execution, was,in his private capacity, the judgment creditor![76] Again, there seems to have been some degree of change in practice, here, as in 1859, it was common for the summary judgment to provide that execution be stayed for 21 days.[77]

9.2. Interpleaders and absent defendants

In a small number of cases[78] (one in three disputes arose as to the entitlements to goods seized, and the court was required to determine, on an interpleader summons, who was entitled to the goods in question. Most such

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(the only discovered incident of such a report), and the next issue, on 12 March 1859 gave a very full report of the chambers argument which the newspaper said had been supplied to it,perhaps by one of the lawyers involved.

[73] *ex parte Henry Jackson* 12 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.

[74] *ex parte Dampier* 29 June 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61.

[75] *Ex parte Dampier* 13 September 1861 mbk 2.

[76] *Maude v J W Moorhouse and T G D Holland, t/a Moorhouse & Holland* 14 September 1860 NZNA CAHX CH53/22B Minute Book 1860-61.

[77] See for example *Nathan v Warner* I July 1859 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860. In that case execution was not in fact levied for 9 months.

[78] One in 1859, three in each of 1860 and 1861.

cases appear to have been settled between the parties; where this did not happen the Court held a summary hearing to determine the issues.[79]

There was also a special procedure under the Absent Defendants Act 1858 whereby a plaintiff who sued a defendant who had left the jurisdiction could seek satisfaction against funds of the defendant held by any person in the colony. The procedure was complex, apparently as a way of safeguarding the rights of the absent defendant – and there is but one example of an application under the Act in the Canterbury Minute book, an action by a William Henry Valpy, an Otago run-holder against Sir William Congreve, baronet, for £750, of which Valpy sought to recover just over £200 which was in the hands of a Christchurch merchant. He was ultimately successful, but the process required four separate court appearances, and the furnishing of a bond for £500 as security in case the judgment in his favour was vacated on appeal.[80]

9.3 Execution in practice

Many judgment creditors appear never to have enforced the judgment – or so one must assume from the fact that the record of a judgment in the creditor's favour is not accompanied by any order for execution, nor are costs in the matter taxed. The proportions of such un-executed judgments varies significantly from about 25% of all judgments in the first half of 1860 to almost half of the judgments in 1861.

Two quite different phenomena may explain a failure to enforce a judgment. Firstly there may well have been a number of cases where the judgment creditor was able to use the fact of judgment, and the prospect of the recovery of significant further sums by way of costs, as a lever to extract payment, or at least partial payment from the debtor. The second possibility is that the judgment creditor simply found that the costs of execution would be wasted, because there was no real prospect of recovering even the judgment sum. This may well have been the case in a number of instances where other creditors had already succeeded in getting orders for execution against goods or against the person of the creditor.

It is significant, perhaps, that in a small number of cases execution occurred only after a substantial lapse of time – perhaps after negotiations for payment broke down, or more likely after the debtor had managed somehow to accumulate enough wealth to make execution worthwhile. The most extreme case of this was one where execution was levied more than six years after the initial judgment.[81]

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[79] See for example the hearing on 21 December 1860 of the dispute between Mills and Brittan as to ownership of goods seized on fi fa in *Brittan v von Gartner* ; the decision in favour of Mills was delivered 4 January 1861 NZNA CAHX CH53/22B Minute Book 1860-61.

[80] See *Valpy v Congreve*, variously 10 December 1860; 28 February 1861, 15 March 1861 and 19 June 1861; ; NZNA CAHX CH53/22B Minute Book 1860-61.

[81] *Hargreaves v McBratney* 21 December 1860 ; NZNA CAHX CH53/22B Minute Book 1860-61. Such a procedure required a special order form the Court under R 196 of the Regulae Generales, which Hagreaves apparently received on 15 March 1867.

One interesting change in early 1861 is that execution against the person which had hitherto only been sought where execution against goods had failed to satisfy the judgment comes instead to be the first form of execution ordered. There appears to be no legal basis for this change, and it may simply have been a change of practice – perhaps dictated by the known state of affluence of the judgment debtor.[82] Most peculiarly, there is one case in 1861 where execution against goods was ordered only after execution against the person had been tried without satisfaction of the debt.[83]
Another curious feature is to find a case where one solicitor sought a judgment order against another member of the profession, with the order being enforced by execution against the person.[84]

10. Conclusion

While this study cannot claim to have covered the entire field of litigation in the early years of the Canterbury settlement, it does establish certain features of the period and the community which may used as the basis for comparisons with litigation in other communities and at other times.
One of the primary matters for any comparative study is the need to determine the definitions to be used in determining the quantum of litigation. It is contended that unless account is taken of the very considerable amount of chambers work, and the use of such procedures as the judgment orders which have loomed large in this study, no complete picture can be established.
Secondly, it is clear from the Canterbury experience that litigation in the Supreme Court was open to a very wide sector of colonial society, even though clearly mercantile interests made most use of it. The role of lawyers in promoting, facilitating and,perhaps, funding access for the working class plaintiffs is deserving of very much more study.
Thirdly, in considering the incidence of litigation and the characteristics of litigants in colonial society, it is essential not merely to consider the classes of regular plaintiffs, but also the people who became frequent defendants, either as a result of one major event or as chronic debtors sued on many occasions over a period of year. Nor should any study neglect the people who appear both as plaintiffs and as defendants; the classes are not mutually exclusive.

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[82] The first such case is *Parkerson v Inwood* 1 February 1861; NZNA CAHX CH53/22B Minute Book 1860-61. Inwood, a Christchurch fellmonger, had had four orders made against him in the previous year. Inwood was later imprisoned at the instance of another judgment creditor a month later - *Miles t/a Gould and Miles v Inwood*, 15 March 1861 NZNA CAHX CH53/22B Minute Book 1860-61. However in the second case where execution against the person was the first order made, *Peacock and Buchanan t/a J T Peacock & Co v Dean* 15 February 1861 NZNA CAHX CH53/22B Minute Book 1860-61 there is no prior record of suits in the Supreme Court; this does not, of course, preclude the possibility that the defendant was known to be impecunious. Execution was not levied for six weeks in that case, which does suggest that perhaps other avenues for satisfaction of the debt had been tried first.

[83] *McFarlane v McBratney* 22 July 1861 ; NZNA CAHX CH53/22B Minute Book 1860-61. McBratney was a regular defendant in such cases – being sued twice in 1860 and four times in 1861 – but this was the only occasion on which execution against the person was ordered.

[84] *Bamford v Patten* 19 March 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61. It is probable the dispute here was for a debt, of some £74-17-0, as the defendant had previously been articled to the plaintiff. See documents in NZNA CAHX CH 244/1 Index of Barristers and Solicitors (Christchurch) "prior to 1876". For Patten's later career see Finn *"The Early Years of an Unregulated Profession : Lawyers in the South Island 1850-1869"* (1995) 6 Canterbury LR 56, 65. There is another case of what appears to have been a simple debt action between solicitors: *Wormald v Hodgson* 5 July 1861 NZNA CAHX CH53/22B Minute Book Supreme Court 1860-61 (order for judgment for £60).

Lastly, it is suggested that a proper understanding of the impact of litigation requires us to ascertain what we can about the processes of enforcement of judgments, and the social or economic factors affecting this.
I hope this paper will both stimulate discussion of these matters and encourage similar studies of other jurisdictions and periods.