

**THE EARLY YEARS OF AN UNREGULATED PROFESSION:
LAWYERS IN THE SOUTHERN DISTRICTS OF NEW ZEALAND 1850-1869**

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1. Introduction.

Studies of the legal profession in New Zealand have been few and very much dominated by the accounts of the organised profession as related in institutional histories of the national or local law societies¹. Although there in recent years accounts of some of the larger North Island firms have been published which venture into the earliest years of the profession in New Zealand, the history of lawyers in the South Island prior to the creation of the various Law Societies has been largely uncharted outside the slim coverage given in the institutional histories of the New Zealand law Society and the Otago District Law Society by Cooke and Cullen respectively. This paper attempts to outline some of the salient features of the early years of the legal profession in the areas which at one time made up the "Southern District" for the purposes of judicial circuits - that is the areas now known as Canterbury, Otago, Southland and the West Coast of the South Island. of New Zealand² over the period of significant settlement from about 1850 when the towns of Christchurch and Dunedin were established to the formation of the New Zealand Law Society in 1869. Two aspects in particular are considered. The first is an attempt to investigate the origins of the practitioners of the day by considering the requirements for admission to the profession and the antecedents of such members of the profession as can be readily identified. the latter part of this paper considers how professional discipline was preserved and standards enforced in the absence of any formal professional structure. In considering each of these issues, it is important to bear in mind that in this period as now, the legal profession in New Zealand was "fused" so that lawyers could be both barristers and solicitors and admission in one capacity generally gave a right to admission and practise in the other. This fusion had begun as a purely temporary measure in 1841, and there were various attempts made to divide the profession - in

¹ The most-cited work is R B. Cooke (ed) *Portrait of a Profession : The Centennial Book of the NZ Law Society.* (NZLS, Wellington, 1969). The best of the regional histories is M. Cullen *Lawfully Occupied: The Centennial History of the Otago District law Society* (ODLS, Dunedin, 1979).

² The Nelson area was part of the "Southern" judicial district in the 1840s and 1850s; after the founding of Dunedin and Christchurch the old Southern circuit became the Central or Wellington circuit. When Marlborough separated from Nelson province it too remained a part of the Wellington circuit.

attempts made to divide the profession - in 1861 it was even provided that the judges of the Supreme Court could make a rule requiring lawyers to select only one branch of the profession in which to practise and to give up any rights to practice in the other³ - but these all foundered or were reversed on the simple grounds of necessity of dual practice in the smaller centres and the perception that a fused profession kept costs down.

³ Law Practitioners Act 1861, ss59 and 60. It appears that no such rule was ever made.

2. The origins of the legal practitioners in the Southern District.

Qualifications for entry to the New Zealand profession in the 1850s and 1860s were not onerous. Lawyers could qualify by the serving of articles (later coupled with an examination in New Zealand law) or on the basis of qualifications from abroad⁴. Initially the mere fact of overseas admission entitled a lawyer to entry to the New Zealand profession; after 1861 lawyers were required to pass an examination as to the differences between English and New Zealand law.⁵ That examination requirement came about after the House of Representatives proposed, in the Law Practitioners Amendment Bill 1862, that practitioners from any British colony be entitled automatically to admission in New Zealand. This provision was opposed in the Upper House by the Chief Justice, Sir George Arney, on the basis that while the processes required for admission in Britain or in the Australian colonies ensured an adequate standard among applicants, the same could not be guaranteed in other colonies.⁶ Arney succeeded in persuading the Legislative Council to oppose the House of Representatives provision, and the ensuing compromise was that, while practitioners from other colonies could be admitted all practitioners were required to pass an examination in the differences between English and New Zealand law.

However the ensuing requirement of passing an examination was not particularly onerous - in 1863 C W Richmond told a relative that:

"I am said to be the most strict examiner in New Zealand. But I have passed several very shallow persons , and it is not intended to make the examinations such as to place entrance into the profession beyond the reach of men of average capacity."⁷

No matter which qualification for admission was relied on, a would-be practitioner was required to be formally admitted by the court, and the (albeit incomplete) records of the admission of these lawyers provides by far the most useful and complete indication of the composition of the profession in its early years.⁸

⁴ See Supreme Court Ordinance 1841 s13 and Supreme Court Ordinance 1844, s16; see also Law Practitioners Act 1861 and Law Practitioners Act Amendment Act 1862.

⁵ Law Practitioners Act Amendment Act 1862, s4.

⁶ 1862 NZPD 564.

⁷ Richmond to A S Atkinson, 15 November 1863, in G H. Scholefield (ed) *The Richmond-Atkinson Papers* (Government Printer, Wellington, 1960), vol 2, p.74.

⁸ Relevant papers are held in both the Christchurch and Dunedin repositories of the national Archives of New Zealand, to the staff of which Institutions I offer my thanks. The Christchurch records are considerably more complete than those in Dunedin, in particular in the inclusion of material relating to disciplinary proceedings and applications for taxation of costs and the like (see below); the absence of the former is remediable by recourse to documents in Christchurch or by outside sources; the absence of the latter leaves a lacuna that the author was unable to fill.

The lawyers represented show a very wide range of qualifications for admission to the profession in New Zealand. The documents show that on the Christchurch roll of legal practitioners 1850-1869, there were 64 identifiable lawyers on the roll of barristers and/or solicitors (though only one practised a barrister alone, and only six, at any time, were solicitors alone). Of these, the antecedents of 61 can be traced.

By far the largest single group were those who had been admitted to practice in England as attorneys, solicitors or proctors (24) then came the 11 English barristers. The third largest cohort was those who had qualified on the basis of serving a term of articles solely in New Zealand (10) most had served five years, a few were entitled on the basis of a special examination to serve only three years). However there were also three practitioners who had served parts of their articles in New Zealand and part in England - if these were to be considered as locals, those qualifying locally become the second largest group. lesser numbers came from Australia (three from Victoria, two from New South Wales and two from Tasmania); and in addition there were four Irish barristers, - two Scots solicitor and an Irish solicitor

The raw figure of seven Australian practitioners somewhat understates the Australian contribution to the Canterbury profession, since in addition to the seven lawyers who qualified on the basis of admission or articles served solely in Australia, there were two English solicitors (S J South and E F Ward) who had been in practice in Victoria; one of the Irish barristers had also been in practice there (G E Barton) and the sole Irish solicitor had come via Queensland.

It is also noteworthy that the profile of admissions changes remarkably over the period. While there were three lawyers who were admitted on the basis of articles served in New Zealand in the first decade (ie. between 1850 and 1860), there came a hiatus for several years, - there were only one new practitioner who qualified locally between 1861 and 1868 (T I Joynt); the remaining six who qualified on the basis of articles did so in the last three years of our period (1867-1869).

There are also some changes in the profile of those admitted on the basis of overseas qualifications. In the first decade, the British practitioners who were admitted had a sizeable range in the number of years since first admission to practice in their home jurisdictions. There were several who had only recently qualified prior to emigration; many others had ten or more years experience. There is no apparent significant differentiation between different branches of the law.

In the early 1860s, this pattern changes somewhat - while those seeking admissions on the basis of being an English solicitor or attorney remain generally reasonably experienced (of the 9 English solicitors admitted in the years 1862 - 1865, only three had less than ten years experience since admission in England, and of those one had nine and one five years - only one had less than five years experience). The English barristers were similarly experienced - of six, seeking admission in those same years on the basis of admission to the Bar in England only one had been called for less than five years. Yet the Australians were very much less experienced - three of five Australians had less than two years experience.

It is difficult to interpret these figures, but it does suggest that the Canterbury area attracted a significant number of older migrants - that it was not seen as a place for young lawyers to carve out a career as much as a place where experienced practitioners could move into an established professional milieu.

The Canterbury data is slightly more complete than for the other main centre of population and legal practice, the Otago region centred on Dunedin. However it is clear that the transformation of Dunedin and the Otago region consequent on the discovery of large amounts of gold in 1861 was reflected in the radical change in the character of the legal profession servicing both old inhabitants and the influx of newcomers.

Of the 66 or 67⁹ lawyers who were admitted to practice in Otago or who practiced their profession in the region¹⁰, between 1850 and 1869, the vast majority came to the area in or after 1862. The small number of early practitioners, who were English or Scots in their training¹¹ were to be joined before 1861 was out by several practitioners from other parts of New Zealand.¹² However the major influx was to be in 1862 when 12 new lawyers began practice in the Otago region and two more in Southland. There were a further 8 new lawyers the following year and thence a steady pattern of increasing numbers - 6 more in 1864, 5 in 1865, slowing to only four in each of 1866, 1868 and 1869; the low point was the three new practitioners in 1867.

This large growth in numbers was largely the result of migration of lawyers from other centres - only 10 lawyers were admitted on the basis of articles served in Otago over the period 1862-69. The rest of the increase was due to incomers, some few from other parts of New Zealand or direct from Britain but principally from Australia. As might be expected, there were many lawyers who came from the colony of Victoria, where the goldfields were somewhat in decline, but perhaps surprisingly Tasmania contributed a very substantial share of the Australian contingent to travel to Otago. It is noticeable that the Tasmanians who came to Otago tended to be significantly younger and significantly less experienced in their professions than were those who came to Otago from Britain or from Victoria. This may perhaps indicate a perception on their part that there were better chances of creating a successful professional career in a fresh colony. The peripatetic careers of some of these lawyers can be illustrated by reference to two.

⁹ The uncertainty as to the numbers is caused by the incomplete records leaving unresolved the status of certain individuals; there is for instance a John Stamper stated by Cullen and Smith *"Lawfully Occupied"* p.24 where to have been in practice in Dunedin in 1864-5, but there are no supporting documents among the surviving court record. There is also the curious case of William Perkins who was admitted in August 1867. The roll of practitioners gives the name as William Staham Perkins; but the admission documents are clearly in the name of William Watchorn Perkins. It seems probable that there was nevertheless only the one lawyer.

¹⁰ The two are not identical classes; there were several persons who sought admission to the profession but never practiced, including such well-known characters as John McGlashan and John Bathgate. Equally there were a number of lawyers who were admitted elsewhere in New Zealand and then moved to practice in Otago (see below).

¹¹ John Hyde Harris, David Garrick (both former English solicitors) and James Howorth, an English barrister were joined prior to the discovery of gold by Malcolm Graham who was admitted in 1859 on the basis of articles served in Dunedin and later by George Cook, another English attorney. John Gillies and Richard Jeffreys practised in Dunedin after admission on the basis of their admission to practice in Scotland; John McGlashan, Robert Chapman and John Bathgate were admitted on the basis of Scots qualifications but did not practice. However Thomas Gillies and William Stuart who were first admitted in Dunedin used time served in Scots law offices as part of their admission qualifications.

¹² In 1861, E P Kenyon and W Rawlins came from Christchurch; E A Julius and C W Richmond from the North Island. All save the last (an English barrister) had been attorneys in England.

The first is William Wilfred Wilson, who was admitted in England as an Attorney in 1846, emigrated to South Australia where he was admitted as a barrister and solicitor in 1851 and then practiced in Victoria as an Attorney from 1856 till his arrival in Dunedin in 1862.¹³ The other exemplar of the mobility of some professional men is George Samuel Wegg Horne who was admitted in 1866 without filing the normal evidence of prior practice, since H S Chapman, the resident Supreme Court judge of the day, had noted in a memorandum that Horne need not produce certificates of admission elsewhere:

" as I am cognisant of the fact that he practised for many years in Melbourne as a Solicitor and attorney and before that in Tasmania where I believe he was also admitted to practice as a Barrister" ¹⁴

There were also some smaller centres of the legal profession in the South Island. In 1867, there were 10 lawyers who obtained practising certificates in the Invercargill registry - of those, three had first qualified in New Zealand, two in Scotland, two in Tasmania and one in England. Several of these lawyers are represented in the earlier sample for Otago - it seems probable that they were active on the goldfields, which spanned the two judicial districts. That assumption is the more valid because we also have a list of practitioners on the West Coast for the period 1866-1869, where there were thirteen practitioners. Of these, three were English (though two of those had practised in Victoria); four were Australians, and one was Irish. The remainder are not traceable. Most importantly, however, of the 13 practitioners, nine appear on the Otago roll; three had also been on the Invercargill roll. These lawyers, therefore, it may be confidently assumed, were so specifically interested in goldfields practice as to migrate with the miners.

¹³ File LP 271 NZNA(D).

¹⁴ Memorandum by Chapman dated 30 July 1866; file LP 126 NZNA(D).

3. Discipline

In the period before the Law Societies were created, control of the legal profession was in the hands of the judges of the Supreme Court. Initially this was under the provisions of the Supreme Court Ordinance 1844 which allowed for removal of a lawyer from the roll "for reasonable cause". The adequacy of this as a disciplinary provision may be doubted.

In 1860, the Supreme Court Judges were requested by Parliament to give their opinion on the regulation of at least a part of the legal profession - the solicitors. This they did. The resulting *Report of the Supreme Court Judges on the Qualifications and Admission of Solicitors* was returned to Parliament in 1860 and the report was printed in the Appendices to the Journal of the House of Representatives.¹⁵ These recommendations largely determined the nature of the Law Practitioners Act 1861, a measure stated by one of its proponents, Arney CJ, to be modelled on the 1860 recommendations¹⁶.

The judges' recommendations fall into two groups. Firstly there were provisions aimed at ensuring that law clerks did in fact gain a real benefit by way of education as to matters legal during the period of serving articles. To ensure this the judges wanted to see not only the adoption of provisions found in England in the Attorneys and Solicitors Act 1843(Imp), under which the court could terminate articles if the master was insolvent or bankrupt or was imprisoned for 21 days or more for debt, but also a more general power in the Supreme Court to discharge a clerk from articles in cases of "misconduct by his master or such decrease in business as would deprive the Clerk of the benefit of articles". The specific provision adopted from the English law appeared as part of the Law Practitioners Act 1861; the more general proposal of the judges reached the statute book only in a section which limited lawyers to no more than two articulated clerks.

Secondly the judges wanted to see certain minimum standards imposed, by the adoption from the same English Act of rules¹⁷ governing practice as a solicitor, including a prohibition on solicitors acting as such while in prison. These specific provisions were to be supplemented by a general disciplinary provision under which the Supreme Court, or any judge thereof, "shall have full power to remove from the rolls, suspend from practice, or attach any solicitor"¹⁸.

However it seems that Arney, at the least, had second thoughts about the desirability of the vesting the power of control in a single Supreme Court judges. Only about a year later, during the debate on the Court of Appeal Bill, Arney made a special point of the Bill vesting the power to strike practitioners off the rolls in the Court of Appeal, not in the Supreme Court

"It was by this bill intended that such an important power which affected not only the honour and character of those subject to its exercise but might deprive a man of the chance of subsistence for himself and his

¹⁵ 1860 AJHR A-1

¹⁶ 1861 NZPD 12.

¹⁷ 6&7 Vic c 73, ss 28-32

¹⁸ 1860 AJHR A-1, p.8

family in the profession to which he had been educated should be intrusted only to a full bench of justices."¹⁹

There was still power in the Supreme Court judges to suspend practitioners pending reference to the Court of Appeal where urgent action was needed and a Court of Appeal bench (then any two or more of the Supreme Court judges!) could not conveniently be assembled.

This remained the formal position until after the end of the period covered by this paper.

The vesting of the power of control in the Court carried with it one vital, but not obvious, prerequisite for its use. The Court could only act when matters were brought before it - it had no practical power, or conventional usage, whereby the judges instigated action against delinquent members of the profession. In the absence of an organised Law Society, action could only come from individual practitioners.

The received tradition among historians of the legal profession is that practitioners were reluctant to take on the function of prosecutor and to bring before the court a claim that another practitioner had been guilty of some form of malpractice. In speaking in favour of the Law Society Bill 1869, which authorised the creation of a New Zealand Law Society, D.F. Main, a lawyer MP, pointed out that such a society could act as prosecutor when needed, whereas .

"hitherto it had become the duty of some individual member of the profession to prosecute the party and he, in consequence, incurred all the odium of a common prosecutor".²⁰

As one commentator has pointed out, the motives of a lawyer who was to impeach a fellow lawyer were open to misconstruction²¹.

This all suggests that lawyers were reluctant to be involved in disciplinary cases and were involved in them only with great reluctance. While there is some evidence for this, its universality may well be doubted on the facts of the cases where striking off the roll was a real possibility.

However there is another, less obvious, challenge to the validity of the received view. That is the manner in which the court used its disciplinary powers in cases where it was requested to intervene by applications for orders which went to the taxation of costs or the delivery up of documents - cases in which there was no serious question of the lawyer against whom complaint was made being suspended from practice.

¹⁹ 1862 NZPD 419.

²⁰ 1869 6 NZPD 468.

²¹ Lynella Smith, "The Otago Legal Profession 1848-69" (BA Hons thesis, University of Otago 1978), p.84.

4. Taxation of costs and other orders.

Among the cases where the court was requested to intervene there are a number which would now arrive in court only after the Law Society had sought to determine a complaint - in particular allegations that the charges levied by a lawyer were excessive and should be taxed by the Registrar of the Supreme Court.

In other cases the court was asked to intervene in ways which were more in the nature of insistence that delinquent lawyers perform their duties to clients. The difficulty clients faced was that a lawyer was entitled to a lien on legal documents belonging to a client to secure payment of monies owed from legal services; where the lawyer failed to perform his duties, he could frustrate attempts by the client to change lawyers by failing to submit a bill for services and insisting that, until a bill was made out and paid, the client's documents would be retained as security. Nowadays the Law Society could intervene to ensure that the lawyer did not frustrate a change of adviser; in the 1850s and 1860s the only solution was to seek a court order that the lawyer submit his bill of costs.

One Christchurch practitioner, John Dean Bamford²², was the subject of two such applications in 1861. The first sought not just a bill of costs but also that he deliver up mortgage documents which had not been registered as required by the client. The second was by a client who alleged that Bamford had been receiving moneys due to the client and refusing to either release the monies or submit a bill for his services. Since the amount allegedly withheld was of the order of £1700, the client's anger can be readily understood. Both applications were successful and Bamford was ordered to deliver up the relevant documents, a bill of costs and a statement of account.²³

There may also have been occasions where lawyers themselves sought to use the court's powers as a way of avoiding acrimonious disputes, as there are two cases (one to be mentioned further later} on the Christchurch files where the action for taxing of a bill of costs was initiated by the solicitor.²⁴

The supervisory power of the court appears to have been invoked in regard to a significant number of practitioners - in addition to the two lawyers already mentioned (Bamford and Oakes), there appear to have been applications for taxation of costs or other orders against six others. Of the eight involved, three were the subjects of multiple applications. Of these the most impugned, by some distance, was Thomas Ingham Joynt (fifty years later to be Christchurch's first KC). Joynt had three applications for costs to be taxed over the period 1865-67 - one being in an insolvency case where he rendered a bill for £189²⁵, an enormous sum by contemporary values.

²² See Bamford documents in file CH 244/1, NZNA (Christchurch).

²³ See Minutes for 13 December 1861 and 20 December 1861, - Supreme Court Minute Book, CH 53/23, NZNA(Christchurch).

²⁴ O W Oakes referred one matter - see Bill of Costs to Alfred Palmer, in O W Oakes documents, file CH 244/2, NZNA (Christchurch), and Minute 10 January 1865 in Supreme Court Minute Book, CH 53/25, NZNA(Christchurch). T I Joynt another - see Minute 16 July 1867 in Supreme Court Minute Book 1867, CH 53/26, NZNA(Christchurch).

²⁵ Bill of Costs to George Black, in Joynt documents, file CH 244/1, NZNA (Christchurch)

This case, unusually, was one of the cases where the lawyer himself referred the matter for taxation. Unfortunately the result of the application cannot now be traced.

Another of the applications for taxation of Joynt's bills of costs is notable not so much for the amount but for the style in which items were presented on the account - in a rather franker style than today's lawyers would be likely to use:

"attending you in a long conference advising you to call a meeting of
your creditors when you declined to do so as you were afraid of some of
your creditors - 13s 8d"²⁶

Of the other applications against other lawyers, perhaps the most unusual was an application for a costs order by a W F. Moore against A C Cottrell, where Moore alleged that Cottrell had agreed to represent Moore in insolvency proceedings for a lump sum of £25; Cottrell had not only charged more but had actually sued for his fees and had had Moore committed to debtor's prison for failure to pay the bill. Although an order was made for taxation of the costs²⁷; unfortunately, the result of the taxation cannot be ascertained..

²⁶ Bill of Costs to Hugh Bennetts, in Joynt documents, file CH 244/1, NZNA (Christchurch)

²⁷ Minute 23 July 1869 in Supreme Court Minute Book, CH 53/26 NZNA(Christchurch).

5. Striking off proceedings

These cases, however important to the individuals concerned, do not reflect the ultimate form of discipline available to the court - the power to suspend or strike off a practitioner. I have been able to discover five cases in the South Island where the courts were invited to use the disciplinary powers granted by statute to remove a practitioner from the Roll for misconduct. One is the notorious, and very special case, of Henry Smythies, the others (to be discussed in more detail below) are those involving Edward Cardale, John Patten, Francis Slater and Francis Wilcocks.

For the sake of completeness, it may be mentioned that these do not involve all the cases where disciplinary powers were relevant. Firstly there were three lawyers who sought their own removal from one of the rolls of practitioners - both W J L. Travers (in 1866) and C W. Wyatt (in 1863) intended to forego the right of practice as attorneys to concentrate on practice at the Bar. The third, Edward Harston, was a somewhat different case. Harston had been admitted in 1859 in Christchurch on the basis of articles in England and Christchurch but in 1864 sought to be struck off the New Zealand roll of solicitors, so that he could seek admission in England as a barrister. It seems he was successful in obtaining the call, and on his return to the colony in 1868, he sought readmission to dual practice). Secondly there are cases where lawyers decamped ahead of their creditors and no disciplinary proceedings were brought, though they might well have been justified, as with E A. Julius and Benjamin Balmer in Oamaru.²⁸

Of the cases where there was a live issue for the court as to striking off for disciplinary reasons, the most notorious, and the best known, is that of Henry Smythies. Smythies had as a young solicitor in England been convicted of forgery - having forged a document necessary for him to claim his (otherwise proper) fees for litigation from a deceased estate. He had in consequence of the conviction been struck off in England. He arrived in New Zealand and sought admission to the bar, making disclosure to Arney CJ and producing testimonials to the effect that Smythies was not morally blameworthy. Arney consulted the other judges and they determined Smythies could be admitted; he was. Smythies's antecedents became known to other practitioners in New Zealand, and indeed a memorial to the judges signed by virtually the entire profession in Dunedin objected to his having been permitted to enter practice.²⁹

When it became obvious that more subtle measures would not work, Smythies's opponents promoted legislation *ad hominem*, the Law Practitioners Act Amendment Act 1866, which forbade the enrolment to practice of anyone with convictions, anywhere in the Empire, for perjury or forgery, and went on to make it illegal for any such convict to practice law in New Zealand. Having procured the passage of such legislation, the Dunedin lawyers then requested the Government to take steps under the Act to prevent Smythies practising; the government sought assistance from the judges

²⁸ Smith, *op cit*, p. 64.

²⁹ Smith, *op cit*, p. 74.

"in order that a uniform practice may be established in New Zealand whereby the acts and conduct of offending solicitors may be brought before the Court."³⁰

The judges declined to take the initiative on the matter, saying that an action could be brought under the Act by either a private lawyer or by the Attorney-General³¹. The Government was not prepared to act, so a prosecution was brought privately. The first attempt failed on the basis that the Act had been defectively drafted and no indictment could lie³²; a second attempt was more successful (the technical problem having been avoided by the Interpretation Act 1868). Smythies was first convicted in the Resident Magistrates Court and then, on the basis of that conviction, suspended from practice³³ by C D R Ward, acting as a temporary Judge of the Supreme Court. It is, perhaps significant that Ward was the judge who was prepared to find grounds for suspension, since he was not involved in the discussions which had led to Smythies's admission, and had already demonstrated in a case in Wellington an intransigent attitude toward colonial practitioners who sought to gloss over facts to their discredit occurring while in practice in England.³⁴ Smythies later, unsuccessfully, sought readmission to the profession; this time the Court of Appeal upheld the decision of the Supreme Court against him.³⁵

The Smythies case, therefore, represents an unusual aspect of the discipline of the profession; the judiciary were largely sympathetic to his case; the profession strongly against him. Certainly it did allow the lawyers of Dunedin to appear to be active in ensuring the quality of lawyers; a role they were not reluctant to adopt.

The next case to come before the courts appears to be that of John Patten, again a Dunedin practitioner. Here the case was much more straightforward. Patten had been articled to his father, a Melbourne solicitor in the 1850s, being forced by the latter's death to complete his articles with another Victorian practitioner. He moved to New Zealand, where he was admitted in 1861 and practised for a time in Lyttelton near Christchurch before moving to Dunedin³⁶.

³⁰ E W. Stafford to A J Johnston 28 February 1867, in G.H. Scholefield (ed) *The Richmond-Atkinson Papers* (Government Printer, Wellington, 1960), vol 2, p.232.

³¹ Johnston to Stafford 18 March 1867, in G.H. Scholefield (ed) *The Richmond-Atkinson Papers* (Government Printer, Wellington, 1960), vol 2, p.235.

³² (1867) Mac 941.

³³ (1869) Mac 702.

³⁴ See *Bunny v Judges of the Supreme Court of New Zealand* (1862) NZPCC 302, where Bunny was suspended from practice (on a motion brought by Ward) until such time as he had dispelled allegations of improper conduct in relation to bankruptcy litigation in England - something he never achieved.

³⁵ (1870) NZCA 376.

³⁶ While in practice in Canterbury, Patten was successfully sued by Bamford for some reason unknown. Bamford recovered £74-17-0 plus costs and interest. It is a comment on the scale of legal fees at the

Patten was suspended by Richmond J in the Dunedin Supreme Court, and then later, in February 1863, struck off by the Court of Appeal to whom the case had been referred. The evidence adduced was that Patten had been acting for a well known Dunedin identity, Saul Solomon, into whose premises had entered bailiffs who took up occupation pending payment of moneys owed. Patten, on being appealed to by Solomon, acknowledged that in the instant case the liability was Patten's own. Patten then borrowed from Solomon a sufficient sum, £13, to discharge the debt, and departed, with the bailiffs. Much to Solomon's dismay, the bailiffs returned saying the debt had not been discharged and Solomon on enquiry discovered that Patten had had discussions with the creditor's lawyers and left without paying. Solomon then saw Patten in a boat heading for a steamer in Port Chalmers, which steamer Solomon knew was about to leave for Australia. Solomon then found a police officer and had Patten arrested.

Patten was in fact never prosecuted for any offence, but the courts had little trouble with his case, regarding Patten as having made false statements akin to perjury³⁷. An action for an order that Patten be struck off was brought by the firm of lawyers who had acted for Patten's creditors. This fact goes some distance to explaining why Patten was at first only suspended by Richmond J in the Supreme Court, pending reference to the Court of Appeal, since Richmond had, at the time of Patten's impugned conduct, been a partner in the firm seeking Patten's expulsion from the profession and indeed Richmond had been one of the lawyers with whom Patten had had discussions on the relevant day. Richmond's erstwhile legal partner, Thomas Bannatyne Gillies, appeared at the Court of Appeal hearing to support suspension and seek a striking off.³⁸

It is important to note that in Patten's case, unlike Smythies, the onus of legal proceedings being taken against a malefactor fell on the shoulders of parties already in contention with the lawyer whose conduct was impugned before the court - it was not something done by a disinterested member of the profession. Despite a received tradition to the contrary, reliance on interested parties appears to have become the norm in discipline cases, since in each of the three remaining cases where striking off was in question, the matter came before the court on the motion of a party already involved in some civil litigation with the practitioner against whom allegations were made. Indeed, in two of the three cases it seems almost as if the striking off issues arise as an incident of the other litigation.

The three remaining cases of which there are records all arose in the Canterbury area. The first was the sad case of Francis James Wilcocks³⁹. Wilcocks was an English attorney who had practiced there, without much apparent success, until coming to Canterbury in 1864 when he was admitted to the New Zealand profession. Success apparently eluded him in his new country as well, since he had in 1865 been in custody for debt and had sought protection under the bankruptcy laws.⁴⁰ In 1866 he became the defendant in striking off proceedings brought by one

time that while the interest awarded was £\$-5-0, the costs were £13-9-10. See Minute for 19 March 1861, in Supreme Court Minute Book, CH 53/22, NZNA(Christchurch).

³⁷ See Registrar's notes with Patten documents, file CH 244/2, NZNA (Christchurch).

³⁸ (To complete the intimate nature of the proceedings, and emphasise how small colonial communities were, we may note that the sheriff who had authorised the bailiffs to take occupation of Solomon's premises was John Gillies, father of T.B. Gillies!)

³⁹ The following account is based on the papers relating to Wilcocks, in file CH 244/2, NZNA (Christchurch).

⁴⁰ Minute 6 October 1865, Supreme Court minutebook 1865, CH 53/26, NZNA (Christchurch).

of Christchurch's more ebullient practitioners, William Henry Wynn Williams. Wilcocks had been briefed to act as agent for Wynn Williams in a debt case heard at Akaroa, in which case Wilcocks was successful. The defendant paid to Wilcocks, by cheque, the sum of £34 for the debt due and costs. Wilcocks cashed the cheque at the hotel at which he was staying, but failed to account to Wynn Williams or the client for any of the money. Wilcocks's later story was that he had lost some or most of the money when "riding over the rough country from Akaroa to Pigeon Bay", and had spent the rest. There was some dispute as to whether Wilcocks had represented to Wynn Williams that the defendant's cheque had been dishonoured - Wynn Williams apparently believed this was not a simple case of loss. Wilcocks later claimed he had not replaced the lost money because he had no resources with which to do so - "only his poverty prevented it".

On Wilcocks's repeated failure to pay, Wynn Williams commenced proceedings for striking off, despite pleas for merciful silence from Wilcocks because of the "ruinous results to myself and large family". But Wynn Williams was resolute that the matter could not be left as a simple matter of moneys owing - action had to be taken "in justice to the profession and myself", although

"I will instruct Mr Garrick to leave the matter in the hands of the court
and if his Honour sees fit to be merciful towards you in consideration of
your paying the money I shall be glad of it"

Why was Wynn Williams so adamant that the court's jurisdiction be invoked? The answer seems to have been a simple form of self-interest, the need for protection of his own reputation - the matter had to go to court

"... as the plaintiff and the Akaroa people think I have kept the man's
money".

Although it appears that Wilcocks was, at least temporarily suspended⁴¹ and the case referred to the Court of Appeal, there is nothing on the Roll of Solicitors maintained in Christchurch to indicate the result of the case. Other decisions of the Court of Appeal or Supreme Court are endorsed on the roll, so one may assume that Wilcocks's suspension was terminated by the Court of Appeal.

The last two cases where the courts had to consider whether to permit a lawyer to continue practice both came before the court in 1868, {indeed the Supreme Court hearings were on the same day - 8th May 1868}. The first to do so was that of Edward Cardale, a practitioner in Timaru.⁴² Cardale was, again, an English solicitor who had come to New Zealand after several years practice in England. He purchased a leasehold interest in some land in Timaru and raised funds to build an office thereupon; it was these loan transactions which led him to appear before the court. In essence the complaints against him were that he had granted security over the land twice to secure two different loans; one from a local commercial lender, the other from a prominent Canterbury investor and capitalist, Robert Heaton Rhodes. It is a reasonable assumption that Heaton Rhodes took exception to what was at best disingenuous, and at worst

⁴¹ *Christchurch Press*, 10 March 1868

⁴² The following account is based on the papers relating to Cardale, in file CH 244/1, NZNA (Christchurch).

fraudulent, conduct by Cardale - the motions for Cardale to be struck off are all prepared by lawyers described as acting for Heaton Rhodes. Cardale was suspended by the Supreme Court in May 1868, pending a reference to the Court of Appeal, and later that year the Court of Appeal suspended him for three years.⁴³

Cardale's case, where the disciplinary element of the proceedings clearly has little to do with any form of self-policing by the profession, may be thought not dissimilar in that regard to the cases of Patten and, less markedly, Wilcocks. The last case, is that of Francis Slater, is also difficult to fit within the received tradition of selfless practitioners leaping to the defence of ethical standards.

Francis Slater was again a former English solicitor, though much more experienced than the other practitioners discussed above since he had first been admitted in England in 1834, some thirty years before he sought admission in Christchurch. In 1868, Slater was acting for a local investor, Alington, who had temporarily returned to England having left money invested in various ways including some lent on mortgage to one Baldwin. Baldwin proved to be an unsatisfactory debtor, though at one point he did make a substantial payment to Slater by a bill of acceptance which had to be heavily discounted for cash. Slater did not account to Alington's agents and attorneys for any moneys due from Baldwin, claiming that the moneys paid were due on a separate account for work done by Slater. The attorneys sought to force Slater to pay; the striking off proceedings appear to have been a drastic form of commercial pressure. What complicated matters was that Slater was effectively bankrupt - his bankruptcy with an excess of liabilities over assets of £11,000 was announced only a few weeks later.

Most unusually the striking off application was reported in the local newspaper⁴⁴, whose readers may have been somewhat mystified by the cryptic nature of the report which requires to be supplemented by the official documents. It is clear that neither the agents of the creditor nor the judge were suggesting there had been deliberate fraud by Slater - at most the trial judge thought Slater could have been "more straightforward" in his explanations. Given the absence of fraud, Gresson J declined to even suspend Slater, let alone refer the case to the Court of Appeal. Slater was therefore entitled to, and did, return to the practice of law (something which was not then prevented by such minor matters as bankruptcy!).

6. Conclusion

The attempts made in this paper to quantify data as to aspects of the early history of the legal profession in the southern provinces of New Zealand before the formation of the Law Societies indicate a need to reconsider the traditional view that the early New Zealand legal profession had difficulty in ensuring that professional discipline was adequately maintained. It is clear that the profession did manage to function reasonably adequately prior to the formation of any professional body to regulate professional discipline and to advance the views of the profession. Lawyers did bring matters to the attention of the courts - indeed it might be thought they were

⁴³ Cardale's creditors also sought to pursue him further, something which led to several applications for orders of adjudication on several occasions in April and May 1868; see Supreme Court Minute Book, CH 53/26 NZNA (C).

⁴⁴ *Christchurch Press*, 9 May 1868.

more ready to seek the court's exercise of its powers than the court was to grant it. Most importantly, this paper shows that it was more likely that the court would be asked to exercise its powers of discipline over members of the profession where there was an existing legal dispute affecting the lawyer of whose conduct complaint was made than that a discipline case would arise as a matter where legal practitioners intervened altruistically for the good of the profession.

In this regard, as in consideration of the composition and antecedents of the early profession, it is unfortunate that there exist no adequate data for other areas of New Zealand or for comparable colonial societies. Further research into the origins of the legal profession might well reveal much about the effects that external conditions had on recruitment into the profession and the sources of practitioners, the comparative attractions of the colonies for practitioners of different backgrounds and at different stages of their careers. It is to be hoped that ultimately further work will allow a reasonably accurate picture of the early New Zealand profession to emerge; and that the results will be able to be contrasted with data from other colonies.