

Taking the Stand

Women as Witnesses in New Zealand's Colonial Courts c.1840-1900

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Abstract

The study considers women as witnesses in New Zealand's colonial courts from c.1840 to 1900. An analysis of women as witnesses adds another dimension to what is known about the everyday but often compelling presence of women in New Zealand's colonial courts. In 1840 British law was formally implemented in Aotearoa/New Zealand. The law's institutional structures would soon follow. In 1841 the Supreme Court was established followed by the Resident Magistrate Courts in 1846. The courts were a part of formal British governance. While women were excluded from serving as judges, barristers, solicitors, court officials and jury members, they did appear before the courts as victims, defendants, spectators and witnesses. Being a witness was the only form of verbal participation women could undertake in the court processes during the nineteenth century.

Existing scholarly work has tended to concentrate on women appearing in the courts in the nineteenth century as victims or defendants. This study explores the complex agency of women using the law and as active participants in its deliberations. Four substantive chapters consider women as witnesses in cases involving petty offences, violent crime, civil cases and the Native Land Court and finally cases of divorce, bigamy and action of breach of promise of marriage.

Courts were significant public places in colonial New Zealand. They were places where disputes were settled, grievances could be aired, conduct was put on trial and order was maintained. A long established element of the legal tradition was that unprejudiced and fair justice could only be assured if the courts were open and public spaces. Thus, the witness stand was a place where women had a public voice.

Women's eligibility to appear as witnesses in the court changed over the period under study. In 1840 when British law formally arrived in New Zealand women were restricted in the cases and circumstances in which they could take the stand. Wives were unable to give evidence in cases involving their husbands. From 1843 to 1889 gradual changes to evidence law allowed women to take the stand in different ways and by 1900 women appeared as witnesses in case types ranging from civil actions to the most violent offences in the criminal law. Changes in married women's property law in 1860, and more significantly in 1884 and divorce law from 1867 generally extended the number and kind of cases in which women gave testimony in the courts. From the 1860s the Native Land Court became a familiar place for many Māori women forced to resort to the Court to establish title over land. Evidence suggests women's knowledge of whakapapa and the oral histories of iwi and hapū were vital on the witness stand to 'prove' their link with land.

The study shows the variety of ways in which the courts were places where women spoke on a public stage, and where their words were often recorded and reported on as part of the official proceedings of the justice system. As witnesses they were also in courtrooms where they watched and were watched in a public domain and their words were heard long before they had any say in political representation. Once women had the vote, from 1893, they were eager to reform the justice system: seeking the opportunity for women to serve on juries, to serve as police, to qualify as lawyers, and in reforming the most egregious injustices such as the differential grounds for wives and husbands to petition for divorce. The application of the law, and the making of the law, proved uneven but had closely interrelated phases in the history of women in colonial New Zealand.

List of Abbreviations

ANZ	Archives New Zealand
NSW	New South Wales
NZJH	New Zealand Journal of History
NZLR	New Zealand Law Reports
NZPD	New Zealand Parliamentary Debate
WCTU	Women's Christian Temperance Union

Introduction

“There can be no doubt that a woman is no good as a witness; in fact, she is as a rule, an absolute failure, either making damaging admissions unsolicited against the side in whose favour she is produced, or giving, in the same way, information positively useful to the opponents. A woman cannot seem to understand that, as a witness, she is only required to simply answer the questions put to her, without adding supplementary information and a few of her own comments, as she invariably does. . . inborn characteristics we must blame, I suppose, for she is as bad a witness to-day as ever, and I do not think she will ever learn that as much silence is peculiarly golden and useful to the side for which she appears whilst undergoing the not altogether pleasant ordeal in the witness box.”¹

These were the words spoken by a “well-known” Australian barrister which appeared in a number of Australian and New Zealand newspapers in 1897.² His words represent a common view of women on the witness stand at the end of the nineteenth century. Women witnesses took an active and vocal role in courts of law in the nineteenth century, while occupying no positions in the machinery of the legal system. Women could not be judges, barristers, solicitors, bailiffs, clerks, police or prison officers, only occasionally was a female searcher for the police called upon. Women were deemed unsuitable to serve on juries in New Zealand until 1942 with the one exceptional incident of a jury of matrons in 1883.³ It was not until

¹ ‘Exchange’, *Bay of Plenty Times*, 15 December 1897, p.3. <https://paperspast.natlib.govt.nz/newspapers/BOPT18971215.2.21.1>; ‘Women as Witnesses’, *The Dubbo Liberal and Macquarie Advocate*, 25 September 1897, p.4. <http://nla.gov.au/nla.news-article72501593>; ‘Women as Witnesses’, *The Armidale Express and New England General Advertiser*, 24 September 1897, p.7. <http://nla.gov.au/nla.news-article193369909>; ‘Women as Witnesses’, *The Sydney Mail and New South Wales Advertiser*, 13 November 1897, p.1028. <http://nla.gov.au/nla.news-article163798207>.

² *ibid.*

³ The first woman to become a lawyer in New Zealand was Ethel Benjamin, who was admitted to the bar in 1897. Throughout her eleven-year career she faced discrimination on the basis of her sex. She had great difficulty obtaining work, was never invited to the Otago District Law Society Bar dinners and had to work in a

1962 that women were allowed to serve on a jury on the same grounds as men, and it was not until 1976 that they could not opt out of jury service on the basis of being a woman.⁴ Until 1893 women could not exercise any say in the making or shaping of the law through the right to vote nor could they be involved in the writing of the law through sitting as representatives in parliament until 1919. It was not until Elizabeth McCombs was elected in 1933 that New Zealand saw its first woman Member of Parliament. The very language of the law in its statutes was dominated by the male pronoun. Whilst the legal concept of ‘the reasonable person’, used to denote a person who exemplifies the average skills, judgements and moral beliefs of a society, was not, in practice ‘the reasonable person’ but rather ‘the reasonable man’.⁵

The silence of women in the making and application of the law has come to be a prominent metaphor of their exclusion from legal and political institutions. In the political sphere Christine L. Krueger explains that to vote “is not so much to exercise power, control the distribution of resources, or restructure institutions as it is to ‘have a voice.’”⁶ The silencing of women in the political sphere has as a long history in New Zealand, as it does in other British colonies. What has received far less attention is the pockets of participation in which women could and did make noise as they were required to speak in the court as

separate section of their library. Pressure was also placed on her not to don legal dress. See Grant Morris, *Law Alive: The New Zealand Legal System in Context Third Edition* (Melbourne: Oxford University Press, 2015), pp.46-47; Janet November, *In the Footsteps of Ethel Benjamin: New Zealand's first woman lawyer* (Wellington: Victoria University Press, 2009); The first female judge in New Zealand was Augusta Wallace appointed in 1975; Bronwyn Dalley, ‘Criminal Conversations: Infanticide, Gender and Sexuality in Nineteenth-Century New Zealand’, in Caroline Daley and Deborah Montgomerie (eds.), *The Gendered Kiwi* (Auckland: Auckland University Press, 1999), p.8; Dorothy Page, *The National Council of Women: A Centennial History* (Auckland: Auckland University Press and Bridget Williams Books, 1996).

⁴ Page, p.115.

⁵ Wendy Parker, ‘The Reasonable Person: A Gendered Concept?’, *Victoria University of Wellington Law Review*, Vol. 23, no. 2, 1993, pp.105-112.

⁶ Christine L. Krueger, *Reading for the Law: British Literary History and Gender Advocacy* (Charlottesville: University of Virginia Press, 2010), p.158.

witnesses. This thesis will explore the extent and nature of women's appearance as witnesses in the colonial New Zealand courts.

Women gave evidence as bystanders, character witnesses, victims, and later in the nineteenth century, as defendants and as wives of defendants. In 1863 Mary Ann Kennedy gave evidence at the Wellington Supreme Court against two men who were charged and found guilty of stealing her watch.⁷ In the same year, Eliza Lister gave evidence against David Calnan, a soldier who was charged with sexually assaulting her daughter Ann.⁸ On being found guilty, Calnan was sentenced to 18 months imprisonment with hard labour.⁹ In 1861 Elizabeth Forsaith was sworn as a character witness at the Auckland Supreme Court. One of her employees, Edith Hewlett, was on trial for concealing the birth of her child.¹⁰ Elizabeth stated on the stand that "I cannot speak too highly of her character."¹¹ In 1895 Jane Meikle gave evidence in a perjury case brought by her husband against a man who had testified that he had seen Meikle's husband steal his sheep.¹² In 1865 a widow named Margaret Malcolmson was in court claiming her late husband's profits from his business partner George Blandford. She took the stand to give evidence of her husband and Blandford's business endeavours.¹³ The court found in her favour.¹⁴

The courts were established to be places where disputes could be solved and so order in the colony could be maintained. In January 1841 William Martin was appointed the

⁷ 'R v Welch and Lawler', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁸ 'R v Calnan', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁹ *ibid.*

¹⁰ 'R v Edith Hewlett', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹¹ *ibid.*

¹² 'A Perjury Case', *Poverty Bay Herald*, 13 June 1895, p.2.
<https://paperspast.natlib.govt.nz/newspapers/PBH18950613.2.24>.

¹³ 'Malcolmson v Blandford', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹⁴ *ibid.*

colony's first Chief Justice. Setting sail to New Zealand on board the *Tyne* on 7 April 1841 he was joined by Thomas Outhwaite and William Swainson who would become Registrar of the Supreme Court in Auckland and Attorney-General respectively.¹⁵ On their voyage, the three men began to map out how British law was to operate in New Zealand. Initially the New Zealand legal system was run under the jurisdiction of New South Wales until 16 November 1840. By then, British colonisers had set up legal institutions in dozens of colonies and British law had reached places as far flung as the Cape, Van Diemen's Land and Newfoundland.¹⁶ The three men had a wealth of examples of how to set up British legal institutions in colonial spaces. But young and idealistic Martin, Outhwaite and Swainson saw that New Zealand, free of convicts and slavery, had a chance to improve upon other colonies as a place of peace, prosperity, law, order and Christianity. The courts were central to their vision as an institutional structure in which society could be ordered and civility maintained.

Martin, Outhwaite and Swainson wished to simplify the British legal system, most notably through allowing a single layer of courts to have jurisdiction over both common law and equity.¹⁷ The three men were also keen to adapt British law to fit with the distinct New Zealand context in which Māori were not only recognised as British subjects under article three of the Treaty of Waitangi signed just a few months before, but had also considerable experience with British law through contact with New South Wales in trade and matters that might come under criminal law. In 1840 little more than 2000 Europeans were settled around

¹⁵ Jeremy Finn, 'Development of the Law in New Zealand', in Peter Spiller, Jeremy Finn and Richard Boast (eds.), *A New Zealand Legal History, 2nd Edition* (Wellington: Brookers, 2001), p.106.

¹⁶ Shaunnagh Dorsett, 'How Do Things Get Started? Legal Transplants and Domestication: An Example From Colonial New Zealand', *New Zealand Journal of Public and International Law*, Vol. 12, no. 1, 2014, p.107.

¹⁷At its most basic level common law operated on the basis that parliamentary statutes were the highest source of law, but that there also existed an unwritten body of law in which judges looked at precedents set in cases heard by the courts. Equity on the other hand was heard in the Court of Chancery and dealt with civil disputes, property, writs and the like with the aim of finding "equity" between two parties. England would join the two courts in 1870. See, Finn, 'The English Heritage', in Peter Spiller, Jeremy Finn and Richard Boast (eds.), *A New Zealand Legal History, 2nd Edition* (Wellington: Brookers, 2001), pp.13-26.

the colony, whilst the Māori population sat between 70,000 and 90,000.¹⁸ Martin believed that if “both communities, Māori and settler, could live together under the rule of law a strong and unified society would emerge.”¹⁹ Nine months after Martin’s arrival, his wife Mary Ann Martin arrived in the colony on board the *Bristolian*.²⁰ Like her husband, Mary was deeply evangelical, young, intelligent and idealistic.²¹ The Martins became proficient in Te Reo Māori and advocates for Māori interests and rights to the law as British subjects under the Treaty of Waitangi. Although Mary was known to keep her political opinions away from the public eye as she felt “obliged to turn my attention to the tea table and say that women did not meddle with politics”, her private letters reveal that she, like her husband, believed that Māori had respect for the law and wished to live under its order.²²

There was indeed desire from some Māori to use the courts. Māori had been “involved in commerce even prior to the British assertion of sovereignty, trading, for example with missionaries and whalers. Māori participated in the new economy created by the settlers post 1840 in many ways.”²³ They increasingly required a forum in which to resolve disputes with Pākehā and recover debts. The length of time it took for the courts to become accessible to some Māori, coupled with having “their own forums for obtaining justice” meant that engagement with the legal system fluctuated and differed markedly over time and place.²⁴ Nevertheless Māori desired to “participate in the institutions of the new

¹⁸ Judith Binney, Vincent O’Malley and Alan Ward, ‘The Coming of Pākehā’, in Atholl Anderson, Judith Binney and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), p.176.

¹⁹ Peter McKenzie, ‘New Zealand’s First Chief Justice: The Rule of Law and the Treaty’, *Victoria University of Wellington Law Review*, Vol. 43, no. 1, 2012, p.213.

²⁰ Mary Ann Martin had travelled from England to Sydney on board the *Tomatin* and then boarded the brig *Bristolian* to New Zealand. See, Frances Porter ‘Mary Ann Martin’, in Charlotte Macdonald, Merimeri Penfold and Bridget Williams (eds.), *The Book of New Zealand Women: Ko Kui Ma Te Kaupapa* (Wellington: Bridget Williams Books, 1991), pp.424-428.

²¹ *ibid.*

²² *ibid.*, p.426.

²³ Dorsett, ‘How Do Things Get Started?’, p.111.

²⁴ Lachy Paterson and Angela Wanhalla, *He Reo Wāhine: Māori Women’s Voices from the Nineteenth Century* (Auckland: Auckland University Press, 2017), p.230.

order.”²⁵ As Damen Ward notes, the courts were “a means and measure of civilization, and an expression of a particular type of colonial subjecthood.”²⁶ Being a British subject meant having the ability to use the law to your own advantage and seek remedy in the law’s courts. The rule of law through application and administration of British subjects was part of what it was to be a formal British colony and one of the benefits of being a British subject was being able to apply the law and act as an agent within the law.

The courts were one of the instruments and manifestations of imperial power which would connect New Zealand to the wider British Empire. How much the legal system was changed to fit New Zealand society and how much was simply transplanted from Britain has been a subject of debate. Legal transplants refer to the transportation of a legal system from one context to another. For Alan Watson, described as “the most influential legal historian” in the area of legal transplants, the “laws and institutions are simply transplanted, not developed locally on the basis of local innovation.”²⁷ Shaunnagh Dorsett has challenged this view arguing that transplants “do not just include the institutions itself, but the discourses, ideologies and intellectual strategies that underpinned choices of institutions and institutional design.”²⁸ British common law remained the core organising and founding principle of New Zealand jurisprudence. But Martin, Outhwaite and Swainson’s early changes to the legal system and the inclusion of Māori in the court system suggests that there was an attempt to shape British laws structure to the unique New Zealand social context.

²⁵ Alan Ward, *Show of Justice: Racial ‘amalgamation’ in nineteenth century New Zealand* (Auckland: Auckland University Press, 1974), p.36

²⁶ Damen Ward, ‘Imperial Policy, Colonial Government, and Indigenous Testimony in South Australia and New Zealand in the 1840s’, in Shaunnagh Dorsett and Ian Hunter (eds.), *Law and Politics in British Colonial Thought* (New York: Palgrave Macmillan, 2010), p.230.

²⁷ Dorsett, ‘How Do Things Get Started?’, p.106.

²⁸ *ibid*, p.107.

In December 1841 the Supreme Court was established.²⁹ It sat as a permanent court in Wellington and Auckland from 1841 which was extended to Dunedin in 1851 and Christchurch in 1852.³⁰ Over time circuit courts started to visit smaller towns such as Gisborne, Napier, New Plymouth, Nelson, Picton, Blenheim, Hokitika, Timaru, Queenstown and Invercargill. Supreme Court judges would go on circuit. The Supreme Court at first only sat twice a year and could become costly quickly to those seeking or required to appear before it, making its benefits inaccessible to many Māori and poorer settlers.³¹ The difficulty in accessing the Supreme Court became an argument to establish the Resident Magistrate Courts in 1846 (known as the Magistrate Courts from 1893).³² It took until the 1860s for the Resident Magistrate Courts to reach Māori in some areas.³³ The Resident Magistrates' Courts were set up for the prosecution of "crimes and offences not amounting to a felony" and the recovery of small debts.³⁴ The establishment of the Supreme Court and the Resident Magistrates' Courts aided the running of British law on a local level which included its administration through judges, lawyers and the courts; its enforcement through police, army and magistrates; and the participation of the British subjects in the courts. Women in colonial New Zealand were excluded from all other levels of the law's machinery except appearing as victims, defendants, spectators and witnesses.

The virtues of women being witnesses were being debated in the parliaments of Britain and its colonies in the later decades of the nineteenth century. Evidence laws had historically operated on a basis of competency exclusion of witness testimony. Competency

²⁹ An Ordinance for establishing a Supreme Court 1841.

³⁰ *ibid.*

³¹ Dorsett, 'How Do Things Get Started?', p.111.

³² *ibid.*; An Ordinance to provide for the establishment of Resident Magistrates Courts, and to make special provision for the Administration of Justice in certain cases 1846.

³³ Angela Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand', *NZJH*, Vol. 45, no. 1, 2011, p.73.

³⁴ Dorsett, 'How to Things Get Started?', pp.108-109.

exclusions referred to the exclusion of certain people and groups from giving evidence based on a lack of competency to act as a witness. These exclusions included convicts and anyone who was designated as having an interest in the outcome of the case, whether it be financial, or reputational and thus this included plaintiffs, defendants and their spouses. In the eighteenth century the leading text on evidence had been Jeffery Gilbert's *The Law of Evidence*, first published in 1754.³⁵ Gilbert categorised a hierarchy of evidence where oral testimony was placed at the bottom and little regard was paid to the quality of the evidence given.³⁶ Witnesses played a minor role in court proceedings and women rarely spoke in the courts.

In the nineteenth century British jurisprudence was being drastically transformed by the work of Jeremy Bentham. An outspoken advocate for law reforms, Bentham was a jurist and philosopher who produced an immense body of work on the British law with a substantial focus on evidence law.³⁷ Bentham's philosophies on evidence sat in contrast to Gilbert's work by emphasising the importance of witness testimony in court proceedings.³⁸ Bentham discredited the rationale behind competency exclusions, believing that they were a hindrance to establishing justice. Bentham argued that evidence "is the basis of justice: to

³⁵ Jeffery Gilbert, *The Law of Evidence* (London: A Strahan and W Woodfall, 1754).

³⁶ Ellis S. Magner, 'The Best Evidence - Oral Testimony or Documentary Proof?', *University of New South Wales Law Journal*, Vol. 18, no. 1, 1995, p.68; Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997), p.3.

³⁷ According to the Bentham Project, "*Introduction to the Rationale of Evidence* was first published, in a heavily edited version, as *An Introductory View of the Rationale of Evidence* in the 1843 Bowring edition of Bentham's works. The text has a composite history: the first twelve chapters were printed under James Mill's direction in 1812 but the rest remained in the manuscript form in which it had been composed during the years 1811-12 despite Bentham's efforts to get it published in 1818 and again in 1823-4. Covering much the same ground as the fuller text edited by John Stuart Mill in 1827 as *The Rationale of Judicial Evidence*." See, Bentham Project, 'An Introduction to the Rationale of Evidence,' *Bentham Project*; <https://www.ucl.ac.uk/bentham-project/publications/works-progress/introduction-rationale-evidence>; accessed 14 February 2020; Jeremy Bentham, *The Works of Jeremy Bentham: Published under the superintendence of his executor John Bowring, Vol VI* (Edinburgh: William Tait 1838-1853); Bentham, *Rationale of Judicial Evidence* (London: Hunt & Clarke, 1827).

³⁸ *ibid.*

exclude evidence is to exclude justice."³⁹ He advocated cross-examination to counteract the partiality of witnesses. Christopher Allen explains that in "Bentham's eyes, the exclusion of evidence was not just an error; it was a fundamental part of a corrupt system of judicial procedure."⁴⁰ Bentham's writings came to overtake Gilbert's influence and he was crucial in ushering in the modern era of thinking and practice when it came to evidence. In the post-Bentham era the importance of oral testimony in seeking justice and truth was seen as paramount for the law to fulfil its function as mediator and regulator over its subject.⁴¹ From 1843 to 1889 in New Zealand the laws of evidence were refined to privilege the oral testimony (*viva voce*) of a greater number of the law's subjects, including women.

Women witnesses came to speak more regularly in the highly public environment of the courtroom. A long established element of the legal tradition was that unprejudiced and fair justice could only be assured if the courts were open and public spaces. The iconic female figure of Lady Justice dating back to Roman times, received the addition of a blindfold in the fifteenth century to represent the impartiality of the law.⁴² This was to be secured through the observation of law by its subjects. It is an idealistic concept of how the legal system should function but it nevertheless secured the notion that the courts needed to be public spaces where women, although marginalised, could not be made completely absent. Bentham wrote that publicity "is the very soul of justice. . . It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst."⁴³ In New Zealand judges in the Supreme Court did not have the power to clear the court until the Criminal Code Amendment Act

³⁹ Bentham, *Rationale of Judicial Evidence*, p.1.

⁴⁰ Allen, p.9.

⁴¹ Stephan Landsman, 'From Gilbert to Bentham: The Reconceptualization of Evidence Theory', *Wayne Law Review*, Vol. 36, 1990, p.1886.

⁴² Gretchen McCord, 'Lady Justice's Blindfold', *Digital Information Law*, Vol. 20, no.4, 2017, p.2.

⁴³ Bentham, *The Works of Jeremy Bentham*, p.317.

1905.⁴⁴ However they could ask both women and children to leave. They could also hear cases *in camera*, but these occurrences were rare and considered a deviation from a fundamental principle of the law's operation. Cases needed to be judged particularly sensitive in order to justify their absence from the public eye but witnesses, including women witnesses, were still required to partake.

Like being a witness, being a spectator was a role that women could not be excluded from as they had the right to sit in the public seats alongside men. Linda Mulcahy has explored the depiction of women spectators in Victorian courtrooms suggesting that, "the law court may well have been a place in which the dominant male gaze was reversed and women had the right to look, to stare, scrutinise, and watch the law in action."⁴⁵ By looking at women in the courts in these positions of agency there emerges "the possibility of a feminist revisionist history of the Victorian legal system which draws attention to previously unrecognized patterns of participation in the public sphere".⁴⁶ Illustrations of female spectators' points to the sources available in which to study women in the courts. The illustrations also suggest that women's presence in the public space of the court were often the subject of unease, ridicule and humour as women were something to be stared at as they observed the court. Similar notions of women in the court can be seen in women who appeared as witnesses. As spectators women watched the courts. As witnesses women spoke to the court and the court in turn spoke back to them, making them active verbal participants in the law's processes. It highlights the complex and gendered social spaces of the courts where women's testimonies were given.

⁴⁴ Criminal Code Amendment Act 1905 s.3.

⁴⁵ Linda Mulcahy, 'Watching Women: What Illustrations of Courtroom Scenes Tell Us About Women and the Public Sphere in the Nineteenth Century', *Journal of Law and Society*, Vol. 42, no. 1, 2015, p.55.

⁴⁶ *ibid.*

As part of the public nature of the legal system, the courts were reported on in the colonial press. Newspapers in nineteenth-century New Zealand were numerous and wide reaching, as such they operated as key forms of communication. They relayed information widely and deeply amongst the colonial population, including to small towns and isolated districts, as well as connecting colonial inhabitants, both Māori and Pākehā, to global news and events as Māori language newspapers were a part of the colonial press scene. Reading the newspaper was as Tony Ballantyne has argued, an important source “of social identification” as newspapers shaped “the circuits of colonial life.”⁴⁷ Most court cases were reported in the colonial press to inform readers of the administration and enforcement of law in the colony as well as being of a form of entertainment for readers. When women appeared on the stand it only added to the courtroom drama of the nineteenth century and the press reported on them attentively.

The courtroom as a theatre is a well-established concept.⁴⁸ Everything from the courts procedures to its architecture lends itself to performance. The courts were public places which had ceremony, spectators and actors in clearly demarcated roles. Women witnesses were part of the cast of characters who made up the courtroom performance. Women were regular actors in courtroom theatre, but they were expected to perform according to social expectations. Miles Fairburn and Stephen Haslett in writing about violent crime in New Zealand from 1853 to 1940, have identified the courts as a place of social gesture, where

⁴⁷ Tony Ballantyne, ‘Thinking Local: Knowledge, Sociability and Community In Gore’s Intellectual Life, 1875 - 1914’, *NZJH*, Vol.44, no. 2, 2010, p.144.

⁴⁸ Ashley Nadeau, ‘Mary Barton’s Undoing: Affect, Architecture, and the Victorian Courthouse’, *Gaskell Journal*, Vol. 31, 2019, p.41; Katherine Fischer Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton: Princeton University Press, 1993); Katherine Stevens, ‘Criminal justice, race and gender in the colonial southwest Pacific, 1880-1920’, PhD Thesis, University of Cambridge, 2014; Yasco Horsman, *Theaters of Justice: Judging, Staging and Working Through in Arendt, Brecht and Delbo* (Stanford: Stanford University Press, 2011); Jon Hall, *Cicero’s Use of Judicial Theatre* (Ann Arbor: University of Michigan Press, 2014).

individuals were shamed and punished in order to reinforce normative codes of behaviour.⁴⁹ As a result, courtrooms not only operated as key spaces for the public airing of grievances and the enforcement of the written body of law, but also for the monitoring and enforcement of social principles. The witness stand, as an increasingly important verbal space within the courtroom, became a place where performative displays of conformity to highly gendered notions of correct conduct were evoked more starkly than in regular social settings. The court looked upon women witnesses with scrutiny and their credibility was often brought into question if they were not living up to notions of correct performance of femininity.

The respectability of a woman appearing as a witness in the court went a long way towards establishing her credibility. Female respectability, in colonial New Zealand was closely tied to a kind of useful, virtuous domesticity. When Mary Ann Martin arrived in New Zealand she attempted to train Māori women in the skills of domesticity such as housework.⁵⁰ Settler women were charged with the role of being moral guardians, keeping single men away from vice such as alcohol and prostitution and this was to be achieved primarily through marriage.

These contemporary ideologies applied to the majority of women in the colony. Most New Zealand women in the nineteenth century were married. Deborah Montgomerie explains that the great majority of New Zealand settlers “believed heterosexual marriage and female domesticity were part of the bedrock of a stable settler society.”⁵¹ Megan Simpson argues

⁴⁹ Miles Fairburn and Stephen Haslett, ‘Violent Crime in Old and New Societies: A Case Study Based on New Zealand 1853-1940’, *Journal of Social History*, Vol. 20, no. 1, 1986, p.94; Kirsten McKenzie, ‘Defining and Defending Honour in Law’, in Penny Russell and Nigel Worden (eds.), *Honourable Intentions? Violence and Virtue in Australia and Cape Colonies 1750-1850* (London: Routledge, 2016), p.23.

⁵⁰ Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), pp.37-38.

⁵¹ Deborah Montgomerie, ‘New women and not-so-new-men: discussions about marriage in New Zealand, 1890-1914’, *NZJH*, Vol. 51, no. 1, 2017, p.38.

that a woman's "sole responsibility was to marry and build a family; this was an emphasis constantly reinforced by the church, family, and popular opinion."⁵² As a result, marriage was considered the 'natural' occupation and life course for women in the colony.

Women's changing social, economic and legal position in the nineteenth century brought them into the courts as witnesses more regularly as the century wore on. When a woman married she became subject to the laws of coverture. Women's legal status was altered from being *feme sole*, a French legal term dating back to the twelfth century which referred to an unmarried, single or widowed women, to *femes couvertes*, bringing her under the legal protection and authority of her husband.⁵³ Married women ceased to exist as a legal person outside of the legal entity of their husbands and could not operate in the courts in a multitude of ways, including appearing as witnesses in cases involving their husbands. From 1843 law makers sought to do away with competency exclusions and wives appeared as witnesses in the courts regularly.⁵⁴ Laws that allowed increased access to divorce from 1867 allowed petitioners and respondents to take the stand against each other.⁵⁵ In 1884 the Married Women's Property Act was passed.⁵⁶ It allowed married women in New Zealand to own property separately from their husbands but it also redefined married women within the law as individuals and saw them entering the courtroom to take the stand in a greater range of capacities. Paradoxically women's increased presence on the stand led to increased levels of scrutiny around their testimonies. The expectations of female respectability and domesticity remained. The suffrage campaign in the later part of the nineteenth century did not seek to

⁵² Megan Simpson, 'The Action for Breach of Promise of Marriage in Early Colonial New Zealand: *Fitzgerald v Clifford* (1846)', *Victoria University of Wellington Law Review*, Vol. 41, no. 3, 2010, p.476.

⁵³ 'Femme Sole', *Oxford English Dictionary*; <https://www.oed.com/>; Brookes, *A History of New Zealand Women*, p.78.

⁵⁴ Evidence Act 1843 (England, Wales and Ireland); Evidence Act 1851 (England, Wales and Ireland); Evidence Amendment Act 1853 (England, Wales and Scotland); Evidence Act 1875; Criminal Evidence Act 1889.

⁵⁵ Divorce and Matrimonial Causes Act 1867.

⁵⁶ Married Women's Property Act 1884.

shatter the gendered organisation of society. The legal, social and economic changes to women's position in the nineteenth century sat along new ideas surrounding witness testimony where cross-examination and scrutiny of witnesses was encouraged as women appeared on the stand more frequently. Hierarchies of gender, knowledge, character and social position transcended the social spaces outside the courtroom determining levels of reliability and truth in female witnesses as their voices were increasingly heard in the courts.

Scholarship on New Zealand's legal history has been decades in existence and is now made up of an expansive and diverse body of work produced by both law and history academics. Legal academic Shaunnagh Dorsett has produced extensive research including work on the transplantation of the British legal system alongside notions of subjecthood, sovereignty and jurisprudence and a substantial contribution to the knowledge of Māori engagement in New Zealand's early legal system.⁵⁷ Her research on the unsworn testimony of Māori in the colonial courts has been invaluable to understanding the presence and agency of Māori witnesses on the stand for this thesis.⁵⁸ Adding to work done on Māori engagement in the colonial courts is Richard Boast's comprehensive research on the Native Land Court.⁵⁹

⁵⁷ Dorsett, 'How Do Things Get Started?', pp.103-122; Dorsett, 'Sovereignty as Governance in the Early New Zealand Crown Colony Period' in Shaunnagh Dorsett and Ian Hunter (eds.), *Law and Politics in British Colonial Thought* (New York: Palgrave Macmillan, 2010), pp.210-227; Dorsett, 'Sworn on the Dirt of Graves: Sovereignty, Jurisdiction and the Judicial Abrogation of 'Barbarous' Customs in New Zealand in the 1840s', *The Journal of Legal History*, Vol. 30, no. 2, 2009, pp.175-197; Dorsett, 'Reforming Equity: New Zealand 1843-56', *The Journal of Legal History*, Vol. 34, no. 3, 2013, pp.85-306; Dorsett, 'The First Procedural Code in the British Empire: New Zealand 1856', *New Zealand Universities Law Review*, Vol. 27, no. 3, 2017, pp.690-714; Dorsett, 'Procedural Innovation: The First Supreme Court Rules of New South Wales and New Zealand', *Australian Bar Review*, Vol. 35, no. 2, 2011, pp.128-151; Dorsett, 'Case Note: R v E Hipu', *Victoria University of Wellington Law Review*, Vol. 41, no. 1, 2010, pp.89-96; Dorsett, *Juridical Encounters* (Auckland: Auckland University Press, 2017).

⁵⁸ Dorsett, "'Destitute of the knowledge of God": Māori Testimony Before the New Zealand Courts in the Early Crown Colony Period', in Diane Kirkby (ed.), *Past Law, Present Histories* (Canberra: ANU Press, 2012), pp.39-57.

⁵⁹ Richard Boast, *The Native Land Court: A Historical Study, Cases and Commentary 1862-1887* (Wellington: Brookers, 2013); Boast, *The Native Land Court. Volume 2 1888-1909: A Historical Study, Cases and Commentary* (Wellington: Thomson Reuters, 2015); Boast, 'Māori Land and land tenure in New Zealand: 150 years of the Māori Land Court', *New Zealand Association of Comparative Law*, Vol. 22, 2016, pp.77-113; Boast, 'The Lost Jurisprudence of the Native Land Court: The Liberal Era 1891-1912', *New Zealand Journal of Public and International Law*, Vol. 12, no. 1, 2014, pp.81-101; Boast 'The Omaha Affair: The Law of Succession and the Native Land Court', *Victoria University of Wellington Law Review*, Vol. 46, no. 3, 2015,

Boast, alongside Peter Spiller and Jeremy Finn has also written a survey of New Zealand's legal history from its British origins to its formation in the present day, as well as work on many other topics of New Zealand's legal histories.⁶⁰ In 2010 Boast, a trained historian and lawyer, expressed his disappointment that legal histories had been abandoned to law schools. He claimed that the discipline of history had developed a legal blind spot and encouraged historians to engage more with New Zealand's legal past.⁶¹ An increasing number of historians, even before Boast's article, have turned to the law to understand the colonial past, a portion of which has focussed on bringing to light the presence and experiences of women in the legal system.

Lachy Paterson and Angela Wanhalla have recognised court records' value in their pursuit in bringing the voices of Māori women in the nineteenth century to the forefront of historical enquiry. Working to find the "faint traces of women's lives left in the written records" their *He Reo Wāhine: Māori Women's Voices From the Nineteenth Century*, explores how Māori women interacted with the state and its institutions, dedicating a chapter to Māori women in the colonial court system to discover how the intersection between race and gender met within the courts.⁶² They privilege the voices of the women themselves by

pp.841-874; Boast, 'The Native Land Court and the Writings of New Zealand History', *Law & History*, Vol. 4, no. 1, 2017, pp.145-171; Boast, 'Contextualising the Decisions of the Native Land Court: The Chatham Islands investigations of 1870', *Victoria University of Wellington Law Review*, Vol. 41, no. 3, 2010, pp.623-652; Boast, "In Re Ninety Mile Beach Revisited": The Native Land Court and the Foreshore in New Zealand Legal History', *Victoria University of Wellington Law Review*, Vol. 23, no. 4, 1993, pp.145-170; Boast, *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865-1921* (Wellington: Victoria University Press, 2008).

⁶⁰ Peter Spiller, Jeremy Finn and Richard Boast (eds.), *A New Zealand Legal History, 2nd Edition* (Wellington: Brookers, 2001); Boast, 'The Effects of Tenurial Change in Nineteenth-Century Latin America and New Zealand: A search for parallels and origins', *Journal of New Zealand Studies*, Vol. 11, 2011, pp.35-52; Boast, 'An Expensive Mistake: Law, Courts and Confiscation on the New Zealand Colonial Frontier', in Paul McHugh, Richard Boast and Mark Hickford (eds.), *Law and Confiscation: Essays on Raupatu in New Zealand History* (Wellington: Stout Research Centre for New Zealand Studies, Victoria University of Wellington, 2010), pp. 9-51; Boast, 'Land, Custom, and Ideology 1870-1940: The New Zealand Case in a Global Context', *Adelaide Law Review*, Vol. 37, no. 2, 2016, pp.325-368.

⁶¹ Boast, 'New Zealand Legal History and New Zealand Historians: A Non-meeting of Minds', *Journal of New Zealand Studies*, Vol. 9, 2010, pp.23-35.

⁶² Paterson and Wanhalla, *He Reo Wāhine*.

creating a rule for the inclusion in their collection that the texts had to include first person pronouns. Their work is drawn upon in this thesis's discussion of Māori women as witnesses in the Native Land Court and the specific legal, cultural, social and racial variations that determined how and why Māori women spoke in New Zealand's colonial courts.

Barbara Brookes' *A History of New Zealand Women*, provides a canvas of New Zealand women's history from pre-European arrival until the present day.⁶³ Although Brookes had a huge magnitude of content to cover, she takes time to highlight the distinct legal position that Māori women were placed in under British colonial law, especially in regards to the laws of coverture: that Māori women only became subject to if they married a European man.⁶⁴ Māori women were placed in a position whereby they were subject to part of a body of law which they had very little or no say to reside under. Brookes concurrently surveys settler women's position under the law in New Zealand, as well as their efforts to exercise more power over it in the later decades of the nineteenth century.

Settler women's presence within the courts has in recent years gained an increased amount of attention. Historian Charlotte Macdonald has used *New Zealand's Lost Cases Project* to explore dower claims, "a little known but illuminating aspect of the law in colonial New Zealand while also proving the value of the legal record as a point of access for social history."⁶⁵ Megan Simpson likewise used *New Zealand's Lost Cases Project* to look at an aspect of New Zealand women's involvement with the colonial courts through action of breach of promise of marriage cases.⁶⁶ Focussing on the 1846 case *Fitzgerald v Clifford*,

⁶³ Brookes, *A History of New Zealand Women*.

⁶⁴ *ibid*, p.78.

⁶⁵ Charlotte Macdonald, 'Land, Death and Dower in the Settler Empire: The lost cause of "the widow's third" in nineteenth-century New Zealand', *Victoria University of Wellington Law Review*, Vol. 41, no. 3, 2010, pp.493-518.

⁶⁶ Simpson, 'The Action for Breach of Promise of Marriage in Early Colonial New Zealand', pp.473-492.

Simpson notes the lack of voice women had until the passing of the Evidence Act 1875 stating that “Emily's [the plaintiff's] voice is noticeably absent throughout the testimony of the witnesses. They [other witnesses] deposed seeing her waiting for Clifford or quietly seeing the pair together, but the Court very rarely heard of Emily's actual feelings on the matter”.⁶⁷ Simpson uses the case as a lens in which to uncover expectations and notions surrounding courtship in colonial New Zealand.

In 2010 Simpson wrote a brief article on Margaret Reardon, the only woman to ever be sentenced to transportation in New Zealand. Reardon has also more recently been studied by Kristyn Harman in *Cleansing the Colony: Transporting Convicts From New Zealand To Van Diemen's Land*.⁶⁸ In her article Simpson points out that the most frequent role for women in the Supreme Court was appearing as witnesses but asserts that they were treated no differently than their male counterparts, unless they were of questionable nature.⁶⁹ Under the law though witnesses were not treated equally. Testimony was excluded on the basis of competency which focussed largely on a wife's ability to give evidence in cases involving her husband. As the majority of New Zealand women in the nineteenth century were married, evidence laws affected a large body of colonial women. Simpson astutely points out that women witnesses who displayed questionable behaviour were discredited by the courts. Simpson argues that this applied particularly to known drinkers. This thesis highlights that the scrutiny of witnesses through the process of cross-examination and appraisal of demeanour, appearance, and conduct applied to almost all women who took the stand to give evidence in the colonial courts, albeit in complex ways.

⁶⁷ *ibid.*

⁶⁸ Kristyn Harman, *Cleansing the Colony: Transporting Convicts From New Zealand To Van Diemen's Land* (Dunedin: Otago University Press, 2017); Simpson, ‘R v Margaret Reardon: Supreme Court Auckland, 1 September 1848’, *Victoria University of Wellington Law Review*, Vol. 41, no. 1, 2010, pp.99-106.

⁶⁹ Simpson, ‘R v Margaret Reardon’, p.99-100.

Bettina Bradbury has also referred to women giving evidence in her article on the Married Women's Property Act 1884 and highlights wives' inability to give evidence in cases involving their husbands.⁷⁰ Her piece also adds greatly to understandings of the workings of coverture law in nineteenth-century New Zealand as she brings to light the legal, social, economic and bodily autonomy of women.⁷¹ Bradbury addresses similar issues for women under the French legal system in Quebec, her *Wife to Widow: lives, laws, and politics in nineteenth-century Montreal* highlights the contrast between the French and British legal system in respect to women under the law.⁷² Constance Backhouse has commented that, "Unlike most other areas of women's legal history, which are still in early stages of gestation and appear predominantly in the form of isolated law or history journal articles, married women's property has generated an extensive bibliography".⁷³ This may be true for other common law jurisdictions however looking at the nineteenth-century New Zealand context, more work has arguably been produced in other areas such as women's crime.

A number of works were produced in the 1980s and early 1990s on women's criminality in colonial New Zealand. Macdonald's 'Crime and Punishment in New Zealand, 1840-1913: a Gendered History', gives an overview of the frequency and circumstances in which women found themselves before the courts charged with a crime.⁷⁴ Robyn Anderson and Jan Robinson also both wrote MA theses on women and crime in nineteenth-century

⁷⁰ Bettina Bradbury, 'From Civil Death to Separate Property', *NZJH*, Vol. 29, no. 1, 1995, pp.40-66.

⁷¹ *ibid.*

⁷² Bradbury, *Wife to Widow: lives, laws, and politics in nineteenth-century Montreal* (Vancouver: University of British Columbia Press, 2011).

⁷³ Constance Backhouse, 'Marriage, Women, and Property: A Legal History of Enforced Dependence', *American Bar Foundation Research Journal* 1987, Vol. 2, 1987, p.599.

⁷⁴ Macdonald, 'Crime and Punishment in New Zealand, 1840-1913: a Gendered History', *NZJH*, Vol. 23, no.1, 1989, pp.5-21.

New Zealand, Anderson focusing on Auckland and Robinson on Canterbury.⁷⁵ Each of these works highlight the gendered nature of crime in colonial New Zealand whilst discussing Victorian ideologies of womanhood, how female criminal behaviour deviated from these ideologies and how women were subsequently dealt with before the courts. All three scholars point out the strict binary which existed for women who broke social codes. Following on from the courts' enforcement of the law, Bronwyn Dalley's MA thesis explores the institutional control of delinquent women in Te Oranga reformatory from 1900 to 1913.⁷⁶ For her PhD thesis Dalley explored women's imprisonment in New Zealand from 1880 to 1920 and has published a number of articles on women's incarceration, whilst Margaret Tennant has looked at women's welfare homes in nineteenth-century New Zealand.⁷⁷

Although extremely useful, this research on women's crime stresses the law as something that happens *to* women. What has been less explored is the complex agency of women using the law and being active participants in its processes. Paterson and Wanhalla's *He Reo Wāhine* has added to the knowledge of Māori women's use of the courts.⁷⁸ Recently Bradbury too has sought to undercover the diverse ways women used the law. Her 2019 book *Caroline's Dilemma: A Colonial Inheritance Saga*, set primarily in Australia, where very similar legal regimes and legal culture prevailed, brings to light the tension between the law's entanglement and power over women's lives in the nineteenth century, as well as the ways in

⁷⁵ Robyn Anderson, "'The Hardened Frail Ones: Women and Crime in Auckland, 1845-1870', MA Thesis, University of Auckland, 1981; Jan Robinson, 'Of Diverse Persons, Men and Women and Whores: Women and Crime in Nineteenth Century Canterbury', MA Thesis, University of Canterbury, 1983.

⁷⁶ Dalley, 'From Demi-Mondes to Slaveys: A Study of the Te Oranga Reformatory for Delinquent Women, 1900-1918.' MA Thesis, Massey University, 1987.

⁷⁷ Dalley, 'Women's Imprisonment in New Zealand 1880-1920', PhD Thesis, University of Otago, 1991; Dalley, 'Following the Rules? Women's Responses to Incarceration, New Zealand 1880-1920', *Journal of Social History*, Vol. 27, no. 3, 1993, pp. 309-325; Dalley, 'Prisons without Men: The development of a separate women's prison in New Zealand', *NZJH*, Vol. 27, no. 1, 1993, pp.37-60; Margaret Tennant, 'Magdalens and Moral Imbeciles: Women's Homes in Nineteenth-Century New Zealand', *Women Studies International Forum*, Vol. 9, no. 5, 1986, pp.491-502.

⁷⁸ Paterson and Wanhalla, *He Reo Wāhine*.

which women used the law and became highly litigious to fight its power.⁷⁹ In the New Zealand context Bradbury has published an account of Mary Ann Rhodes.⁸⁰ The ‘natural’ Māori daughter of Wellington merchant William Barnard Rhodes, Bradbury follows Mary Ann Rhodes’ journey through the New Zealand courts to the Privy Council in London in order to be recognised as a beneficiary of her father’s will.⁸¹ As in *Caroline’s Dilemma* and *He Reo Wāhine* Bradbury’s article on Mary Ann Rhodes demonstrates that the law was not limited to something that happened to women, but that women were navigating the legal machinery and using the courts in ways in which they sought fair outcomes and to overturn injustices.

To increase understandings of the courts’ complex operation in women’s lives, it is important for this collection of work to grow by locating and analysing pockets of participation and agency of colonial women in the court system. Dalley has highlighted the single occurrence in 1883 of a jury of matrons, a group of women who were called upon to see if a woman was quick with child in the belief that, “it took a woman to know a woman”.⁸² Quickening “was popularly believed to designate the point at which a foetus became a human being and at which point life commenced: a pregnant women could be executed before quickening without fear of murdering the unborn child.”⁸³ In New Zealand a jury of matrons were called in the case of Phoebe Veitch. Just before her scheduled execution for the murder of her child in Whanganui in 1883, Phoebe’s counsel declared that she was pregnant. A jury of matrons was called to determine the presence of a foetus. In the end the jury of matrons

⁷⁹ Bradbury, *Caroline’s Dilemma: A Colonial Inheritance Saga* (Sydney: New South Publishing, 2019).

⁸⁰ Bradbury, ‘Troubling Inheritance: An illegitimate Māori daughter contests her father’s will in the New Zealand courts and the Judicial Review Committee of the Privy Council.’ *Australia & New Zealand Law History e-journal*, 2012, pp.126-164.

⁸¹ *ibid.*

⁸² Dalley, ‘Criminal Conversations’, p.81.

⁸³ *ibid.*

had to call upon a medical doctor who did determine after a considerable amount of time, that quickening had indeed occurred. Dalley asserts that these women acted as expert witnesses on the female body and in the area of female sexuality with a degree of voice and authority in the colonial courts.⁸⁴

It is lastly important to mention the work of Elisabeth McDonald, Rhona Powell, Māmari Stephens and Rosemary Hunter.⁸⁵ Their 2017 *Feminist Judgements of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* looks at a number of cases in New Zealand from 1916 to 2015 from a feminist legal viewpoint. It highlights the importance of feminist scholars to look at the lived realities for women when they came into contact with the legal system and the structures of power and dominant world views that shape their experiences.⁸⁶ It demonstrates the critical engagement of women with the courts whilst also highlighting the courts as gendered spaces that remain part of a gendered society, a subject which continues to receive scholarly attention.

An analysis of women as witnesses adds another dimension to what is known about the everyday but compelling engagements of women in New Zealand's colonial courts. This thesis examines the circumstances and frequency that women appeared on the witness stand, including in the Supreme Court, Resident Magistrate Court and from the 1860s, the Native Land Court. It also pays attention to the nature of the testimony women offered and the complex ways their testimonies were received by the courts. In doing so, this thesis sheds light on women in colonial society more broadly - their economic and social aspirations and struggles, as well as women's everyday lives and the sometimes fraught situations that they

⁸⁴ *ibid.*

⁸⁵ Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds.), *Feminist Judgements of Aotearoa New Zealand: Te Rino: A Two Stranded Rope* (Oxford: Hart Publishing, 2017).

⁸⁶ *ibid.*

found themselves before the courts giving testimony. Witness testimony helps to uncover how colonial women understood the law and the legal system, including being semi-entities in the eyes of the law, when this information is often absent from other written records.

Women appeared in the courts as witnesses in significant numbers. *New Zealand's Lost Cases Project* was an initiative conducted through Victoria University of Wellington from 2008 to 2010. The aim of the project was to identify where court records were in the archives from the Supreme Court's establishment in 1841 to the introduction of official law reporting in 1883, as well as providing details about some of the cases online.⁸⁷ However the dramatic increase in the number of cases in the 1860s caused the project to stop at 1870. Nevertheless, the database of cases available is advantageous to scholars wishing to look at the courts as the project team systematically identified Supreme Court and Court of Appeal cases through newspapers, judges notebooks and other court documents. According to the witnesses listed on *New Zealand's Lost Cases Project's* database, 689 appearances were made by women as witnesses in the Supreme Court between the years 1840 and 1870.⁸⁸ These numbers are not definitive as records were lost, destroyed, damaged or were otherwise unavailable for the project team to find. During the course of research for this thesis a number of women witnesses were found in Supreme Court records that were not listed on *New Zealand's Lost Cases Project*. The majority of women's appearances as witnesses in the courts were in the lower courts, as these courts heard by far the most cases. The records for the lower courts are patchy, thus making them harder to survey for accurate numbers of women witnesses. Supreme Court figures from *New Zealand's Lost Cases Project* are useful to gain general trends of women's appearances in the courts.

⁸⁷ *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases>.

⁸⁸ *ibid.*

Research for this thesis has focused on the years c.1840-1900, beginning with the year that British law formally arrived in New Zealand, became locally administered and jurisdiction of British governance encompassed colonial subjects, including Māori. The first woman witness appeared on the stand in 1844. It finishes at the year 1900, ten years after the passing of the Criminal Evidence Act 1889 and the last of the series of alterations to the colony's evidence laws that would affect women witnesses. It was a period which not only saw significant legal changes but significant social changes. The Pākehā population grew to outnumber the Māori population as Māori succumbed to disease, poverty, warfare and land loss. Concurrently New Zealand settlers continued to arrive and grow their families here. New Zealand became more connected as railway lines, mail services and telegraph cables were established. Education levels rose, including women's education, and New Zealand would have universities in four main cities by the turn of the century. The once rural spaces were transformed, as towns and cities were built up and the court stood as an integral structure of the urban environments.⁸⁹ 1900 is also the closing of the decade that saw women gain a say in the making of the law through gaining suffrage in 1893, the first country in the world to do so.

Initial intentions for the thesis were to include child witnesses in the analysis but in the interest of space and deeper analysis of the changing position of women during the decades covered, only adult women from the ages of 18 onwards have been focussed on. Although it should be noted that many children and teenage girls gave evidence in the courts

⁸⁹ Philippa Mein Smith, *A Concise History of New Zealand* (Cambridge: Cambridge University Press, 2011); Anderson, Binney and Harris, *Tangata Whenua: A History*; James Belich, *Making Peoples: A History of the New Zealanders, from Polynesian settlement to the end of the nineteenth century* (Auckland: Penguin, 1996).

during the nineteenth century and further research would be beneficial to examine their participation in the colonial courts. Research has largely centred on New Zealand's colonial Supreme Court, known today as the High Court. This was the court where the most serious offences of the colony were heard, and where richer and more detailed sources on witness testimony can be derived from. But women also appeared as witnesses and litigants in the lower courts, coroners' inquests and the Native Land Court and thus this thesis will touch upon these. Crown Books and judges notebooks offer an insight into who appeared as witnesses, how they were connected to the case and what they said, whilst newspaper reports are helpful to establish not only witness testimony but what judges said in court as their notebooks rarely contain their opinions on evidence. Newspapers are also the only consistent source of legal reporting in New Zealand prior to the adoption of official court reporting in 1883.

The discussion that follows is presented in four chapters. Chapter one addresses women as witnesses in cases of petty crime to expose and discuss the recurrent occurrences of women appearing as witnesses in the courts as well how the courts worked to control disorderly behaviour and how they received disorderly women when they appeared on the stand. Chapter two focusses on cases of violent crime, mostly from the Supreme Court, where performative displays of gender and the reading of witnesses' appearance and body become indicators of truth in female witnesses. Chapter three explores the cases of a non-criminal nature such as civil actions, disputes and actions in the Native Land Court. Reforms to evidence took place in civil law much earlier than in criminal law and thus these cases provide valuable insights into the ways that the witness stand was used as a verbal weapon against others as well as a place where conduct could be judged, and reputation could be saved. Chapter four explores women who took the stand in cases of bigamy, divorce and

action of breach of promise of marriage in cases largely relating to marriage and intimate relationships.

Chapter One

Taking the Stand in Cases of Petty Crime

The majority of cases in which women took the stand in court to give evidence involved petty crime. These included offences involving breaches of licensing laws, drunkenness and vagrancy, although overwhelmingly women appeared as witnesses in offences against property such as theft. Taking the 1850s Supreme Court records as an example, 64 per cent of the occurrences of women appearing on the stand to give evidence involved cases of petty crime.¹ It was crime of this less serious and non-violent nature in which women most often came before the courts as offenders as well as witnesses. Scholarly attention has predominantly focused on female offending in cases of petty crime.² Charlotte Macdonald looking at cases in the nineteenth century found that women offenders most frequently came before the courts for property, alcohol and prostitution related offences.³ Prostitution in itself was not a crime but, “soliciting, indecent exposure, living off the proceeds, keeping a disorderly house, and having insufficient lawful means of support all were.”⁴ Little has been said about how female offenders of petty crime spoke in court and even less has been said

¹ *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

² Robyn Anderson, “‘The Hardened Frail Ones:’ Women and Crime in Auckland, 1845-1870”, MA Thesis, University of Auckland, 1981; Jan Robinson, ‘Of Diverse Persons, Men and Women and Whores: Women and Crime in Nineteenth Century Canterbury’, MA Thesis, University of Canterbury, 1983; Charlotte Macdonald, ‘Crime and Punishment in New Zealand, 1840-1913: a Gendered History’, *NZJH*, Vol. 23, no.1, 1989, pp.5-21; Margaret Tennant, ‘Magdalens and Moral Imbeciles: Women’s Homes in Nineteenth-Century New Zealand’, *Women Studies International Forum*, Vol. 9, no. 5, 1986, pp.491-502; Kerry Wimshurst, ‘Age, Prostitution and Punishment in the Late Nineteenth Century’, *Australia and New Zealand Journal of Criminology*, Vol. 47, no. 1, 2014, pp.102-122.

³ Macdonald, ‘Crime and Punishment in New Zealand’, pp.5-21.

⁴ *ibid*, pp.13-15.

about the more frequent occurrence of women appearing in the court giving evidence as witnesses either as victims or as bystanders.

This chapter, for the most part, focuses on cases of petty crime involving offences against property. Offences against property encompass a large collection of cases that appeared in court records under theft, stealing, burglary, robbery, larceny, house breaking, theft from a dwelling, damage to property and receiving stolen goods. Most often, the intent of these offences was the taking away or appropriation of the property of another without their consent.⁵ Most commonly women appeared as victims of these offences in two scenarios: in situations where property had been stolen from their homes or property that had been stolen from hotels where they had been staying as guests or working.

In 1864, John Todd a soldier in the 57th Regiment at Whanganui was tried for breaking into the dwelling of William Thomas Owen and stealing a locket and ring that was placed on the dressing table of William's wife Mary.⁶ Two women gave evidence in the case. The first was Mary Owen who stated on the stand:

I am the wife of Mr Owen, the last witness. I recollect the evening of Sunday 5th June last. I went to church with Mr Owen. On returning from church I missed a locket and a ring; there was a brass clasp. I saw the ring and locket safe a day or two before; they were safe in the boxes on my dressing table. . . The locket and ring produced [to the court by policeman Sergeant Atkinson] are the same I have spoken about.⁷

⁵ Most of what can be known about witness testimony in cases of petty crime is derived from Supreme Court records. Supreme Court cases were more comprehensively recorded on in archives and newspapers. The value of the property stolen would have had to have been slightly higher to appear in the Supreme Court rather than in Resident Magistrate Court where the majority of petty crime cases were heard.

⁶ 'R v John Todd', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁷ *ibid.*

The second woman was Fanny Peake who the ring belonged to:

I am the wife of Mr Henry Peake, at Wanganui. I know the ring produced, it was given to me by Mr Loftus Gilmont Moyle. I left it in Mrs Owen's jewel ease [case]. It was in a box on her dressing table. I do not know [for] how long before this robbery.⁸

The two women had not known that the items had been stolen until a policeman presented the property to them. John Todd was found not guilty as he had merely received the goods from another soldier without knowing they were stolen.⁹

In 1897 Alexander Jakobsen was charged with having stolen a horse from the dwelling of John Wells.¹⁰ John Wells's wife Alice was the primary witness. Jakobsen was known to Wells and his family. Jakobsen had "pressed" Alice Wells to borrow a horse which he subsequently sold for £1.¹¹ Alice's reluctance to lend the horse to Jakobsen by making "all sorts of excuses" not to, suggests that Alice distrusted him.¹² Jakobsen was found guilty and sentenced to three years' imprisonment with hard labour.¹³ These cases illustrate the everyday nature of theft in colonial life, where neighbours stole from neighbours and people snuck into homes unnoticed until a policeman turned up at the door informing you that your property had been found in the possession of a suspected thief. Women may not have even witnessed a crime taking place but were required to appear as witnesses nonetheless to identify property and provide a possible timeframe for the theft. Alice Wells had witnessed and even facilitated what turned out to be the theft of her husband's horse.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ Auckland Crown Book, 1894-1898, BBAE A792 5637 Box 17, ANZ, Auckland.

¹¹ 'Supreme Court', *Auckland Star*, 1 June 1897, p.5.

<https://paperspast.natlib.govt.nz/newspapers/AS18970601.2.22>.

¹² *ibid.*

¹³ *ibid.*

When a theft took place at a dwelling, home or business, women were often there to witness the crime. Katherine Fredman helped her husband run a watch making business on Lambton Quay in Wellington and they made their home in the space above the shop.¹⁴ In 1862 she appeared in the Wellington Supreme Court as a witness in the case of Thomas Grady. A private in the 2nd battalion of the 14th Regiment, Thomas broke into the shop and stole a number of gold watches.¹⁵ Katherine Fredman stated on the witness stand:

I am the wife of Joseph Fredman, the last witness. I know the prisoner at the bar. I saw him on the 23rd September last. On the afternoon of that day, I was upstairs with my husband, who was ill, when I heard a noise of glass breaking. I went down stairs, and saw the soldier's arm in the shop window, taking the watches off the hooks. I said to him - "what are you doing?" he replied - "I am taking your gold away." I went outside and begged him to give me the watches. He had two gold watches and a silver one, they were in his right hand. I begged of him to give me the watches as they were not mine. He said he would "sooner smash them first." I went to Mr Maxton's, the next door neighbour, and called out for assistance; I walked up as far as Mr Taine's, when Mr Maxton joined me; I told him that the soldier had broken the window, and stolen the watches Mr Maxton then put his arm through the prisoner's and told me to go back to my shop; I did so, and told my husband what had occurred.¹⁶

Both Katherine Fredman and her husband had been upstairs when the theft took place. But due to her husband being ill it was Katherine who heard the shop window breaking, pursued Thomas Grady and thus it was also Katherine Fredman's testimony that was vital for the court to find Grady guilty and sentence him to twelve months imprisonment with hard labour, along with some "good wholesome advice" from Justice Alexander Johnston.¹⁷ But women were also economically and situationally tied to the home through the raising of children,

¹⁴ 'R v Thomas Grady', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

cooking, cleaning and contributing to the economic running of their families through domestic duties, consequently they appeared to have witnessed theft from dwellings, homes and even businesses regularly where they lived or helped their husbands. Taking the 1860s *New Zealand's Lost Cases Project* records as an example, women made up 20 per cent of witnesses listed in cases of theft from a dwelling.¹⁸ Men made up 66 per cent and policemen made up 14 per cent.¹⁹ In 1897 James Northy and Walter Anderson were a duo of petty thieves who, according to newspaper reports, “obtained a horse and hired a cart, and then deliberately started on a tour of plunder. Their mode was simple, rendering theft easy and detection difficult. They would drive up to isolated dwellings and make some pretence for calling. They thus found places which were unoccupied, and these they broke into and stole valuables, taking care not to disturb anything else.”²⁰ Contributing to their eventual detection, arrest and imprisonment were three women, Margaret Elizabeth Martin, Sarah Jane Caney and Mary Longnorth, who had all been at home when the duo approached their homes and found the men’s behaviour suspicious enough to report them to the police.²¹ All three women appeared on the stand to give evidence of what they saw.²²

When they were bystanders outside of homes women almost never appear to have witnessed crime in isolation, always being accompanied by a friend, relative or most often their husbands. In 1862 Margaret Stuart witnessed two men stealing money from James Osmond in Dunleavy's public house in Whanganui. Margaret Stuart explained to the court:

I live at Wanganui, and am the wife of the last witness. I know the prisoners at the bar, and I know Osmond. I saw them together on the 24th December

¹⁸ *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹⁹ *ibid.*

²⁰ ‘Supreme Court’, *Colonist*, 3 June 1897, p.3.
<https://paperspast.natlib.govt.nz/newspapers/TC18970603.2.13.4>.

²¹ Dunedin Crown Book, Criminal, 1896-1909, DAAC D256 Box 518, ANZ, Dunedin.

²² ‘Supreme Court’, *Colonist*, 3 June 1897, p.3.
<https://paperspast.natlib.govt.nz/newspapers/TC18970603.2.13.4>.

last, at Dunleavy's public house, Wanganui. I saw Daily take something out of Osmond's trousers pocket, it was either two or three pounds. I saw some notes in Daily's hand; he handed some to Darks, but I did not see whether they were the whole of them or not. Daily ran out of the back door, my husband ran after him. Darks remained in the house; he had a pound note in his hand, and said that Osmond had given it to him to take Ss [5/-]. out for a pair of boots.²³

Serious doubts were raised by the foreman of the jury about whether Margaret Stuart and her husband were sober at the time of witnessing the theft and recalled Margaret's husband William to the stand in order to determine his and Margaret's level of sobriety at the time. William Stuart assured the jury that he had been sober and "his wife was also sober."²⁴ But after only a period of ten minutes the jury returned a verdict not guilty.²⁵ It is hard to know if the jury thought that Margaret being in a public house would equate to her being intoxicated. Margaret was not known to the court and apart from her presence in the public house, they would have no reason to think her unrespectable. They did not ask Margaret Stuart herself if she had been drinking and there was no other evidence to suggest that she was intoxicated.

Prior to 1843 many of these women may have never taken the stand. People with an interest in the outcome of the case were excluded based on the perceived conflict of financial interest. Jeremy Bentham had encouraged cross-examination to remedy any conflict that the witness may have.²⁶ The level of intensity that cross-examination could reach became more evident when the offence and thus the punishment, became more serious. But in the often routine cases of petty theft women were subject to cross-examination and having their

²³ 'R v Patrick Daily and William Darks', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Jeremy Bentham, *The Works of Jeremy Bentham: Published under the superintendence of his executor John Bowring, Vol VI* (Edinburgh: William Tait 1838-1853); Bentham, *Rationale of Judicial Evidence* (London: Hunt & Clarke, 1827).

characters questioned. It was noted in the *Auckland Star* that Alexander Jakobsen had attempted to discredit Alice Wells' character to also discredit her testimony.²⁷ But breaking apart a witness' version of events was often the primary motive for cross-examination. In 1866 four men appeared in the Wellington Supreme Court on a charge of burglary.²⁸ The offence had been committed at the house of Thomas Cotter. Thomas's sister Mary had witnessed the event but did not hold up well under cross-examination, stating at first that she had "no doubt it was that prisoner" that she saw running away from her brother's home.²⁹ William Goldsmith, the man Mary Cotter had seen running away from the house that night, cross-examined Mary himself, a common occurrence if a prisoner appeared in court unrepresented. Eventually Mary relented to his pressure stating that she "could not positively swear that you were the person I saw that night."³⁰

Although William Goldsmith questioned Mary Cotter about the certainty of her claims, her character was never brought into question. The same cannot be said for two other women who appeared as witnesses in the case. Caroline Rudd was a suspected prostitute that Goldsmith had used as an alibi.³¹ The newspaper noted that Caroline Rudd "deposed that she was a single woman, and slept at Jones's, Upper Queen-street, on the 7th and 8th March. The prisoner Goldsmith did not stay with her that night. The witness was subjected to severe cross-examination by the prisoner. She admitted that she had gone by the name Rudd Goldsmith, that her real name was neither one nor the other. She had sworn by these names in other courts."³² Mary Ann Dixon was called to give evidence for the defence and swore that

²⁷ 'Supreme Court', *Auckland Star*, 1 June 1897, p.5.

<https://paperspast.natlib.govt.nz/newspapers/AS18970601.2.22>.

²⁸ Chief Justice Arney, Judge's Note Books, Criminal, 1 June 1866 – 12 September 1866, BBAE A304 25033 Box 536, ANZ, Auckland.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² 'Supreme Court', *New Zealand Heard*, 5 June 1866, p.4.

<https://paperspast.natlib.govt.nz/newspapers/NZH18660605.2.16>.

she had seen the stolen goods worn by another witness in the case. The newspaper noted that, “on cross-examination [she] admitted that she got her living by prostitution.”³³

There are two avenues to explore from the appearances of Caroline Rudd and Mary Ann Dixon on the witness stand in relation to how women interacted with the courts as witnesses. Firstly, although it was a common occurrence that women witnessed crime from their homes, women also held occupations and were placed in situations out of the home that brought them frequently into the position of witnesses in occurrences of petty crime. In 1899, Emily Blackstone, the postmistress in Alexandra, was called to give evidence at the Dunedin Supreme Court in the case of Septimus Ryan, a postal messenger who was on trial for stealing a letter containing £5.³⁴ Emily Blackstone’s testimony was used to establish if the envelope had been intact when she put the letter in Septimus’s postal bag.³⁵ Septimus was found guilty.³⁶ In 1866 Emily Bull, a female searcher for the police, gave evidence in a case of theft involving Emily Downes and Caroline Harrington. When sworn Bull stated:

I am a female searcher in the Police Office, Wellington. I accompanied Inspector Atcheson to the Hutt, in July last, for the purpose of making a search. I found a cash box in a clothes box in prisoner's bedroom. Prisoner told me it was her bedroom and her box. I found some coins in said box. The same coins are produced by the Inspector of Police. I examined a chest of drawers, and found eight £1 notes and one sovereign. Prisoner Downes was present. Prisoner said she burned an I.O.U. and a cheque that was in the cash box, and threw away a little box by the Government Buildings.³⁷

³³ *ibid.*

³⁴ Dunedin Crown Book, Criminal, 1896-1909, DAAC D256 Box 518, ANZ, Dunedin.

³⁵ ‘Supreme Court – Criminal Sessions’, *Evening Star*, 11 March 1899. p.3.

<https://paperspast.natlib.govt.nz/newspapers/ESD18990311.2.38.39>.

³⁶ *ibid.*

³⁷ ‘R v Emily Downes and Caroline Harrington’, *New Zealand’s Lost Cases Project*, <https://www.wgtn.ac.nz/law/nzlostcases/>.

Emily Downes was found guilty and Caroline Harrington not guilty.³⁸ In 1899 a second hand dealer named Ann Stanley gave evidence in a case of theft involving Annie Pilet who had sold a number of items to Stanley.³⁹ In 1895 George Wilkie was charged with theft in the lower courts while three second hand dealers, Charlotte Olsen, Margaret Hamilton and Louisa Gardner gave evidence that they had bought goods off Wilkie.⁴⁰ Shani D’Cruze and Louise A. Jackson have observed that pawnbrokers, as central figures within the second-hand goods market where stolen property often wound up, were regularly called upon to appear as witnesses.⁴¹ “‘Respectable’ dealers keen to preserve the trade reputations” sometimes acted as whistle blowers, returning stolen property directly to owners or appearing in the courts to give testimony, especially after receiving stolen goods was made a crime in 1692.⁴² In the George Wilkie case it was noted in the *Evening Star* that “in answer to the Bench, one of the second-hand dealers explained that she bought the coat cheaply because the police asked her to buy all the coats offered to her for sale, as a number had been reported missing.”⁴³ As D’Cruze and Jackson observed in England, second hand dealers in colonial New Zealand worked with police in order to either counteract petty theft, or to protect themselves against being charged with receiving stolen goods.⁴⁴ Either way their appearances on the witness stand highlights the diverse occupations women held in the colony.

³⁸ *ibid.*

³⁹ ‘Supreme Court – Criminal Sessions’, *Evening Star*, 28 November 1899, p.3.
<https://paperspast.natlib.govt.nz/newspapers/ESD18990311.2.38.39>.

⁴⁰ ‘The Courts Today’, *Evening Star*, 13 July 1895, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ESD18950713.2.10>.

⁴¹ Shani D’Cruze and Louise A. Jackson, *Women, Crime and Justice in England since 1660* (New York: Palgrave Macmillan, 2009), p.35.

⁴² *ibid.*

⁴³ ‘The Courts Today’, *Evening Star*, 13 July 1895, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ESD18950713.2.10>.

⁴⁴ D’Cruze and Jackson, p.35.

The appearance of women such as Caroline Rudd, Mary Ann Dixon and Margaret Stuart on the witness stand also suggests that women of different gradations of respectability were required to participate in the courtroom as witnesses and the different ways that their testimonies were used to establish truth and fact. Mary Ann Dixon's testimony was used by a defendant to suggest that someone else had stolen the items that William Goldsmith, William Perry, Alexander Buton and Bryant Corcoran were on trial for.⁴⁵ Caroline Rudd's testimony was vital for the Crown to fracture William Goldsmith's defence of an alibi.⁴⁶ Both women were prostitutes and their characters were questioned over cross-examination. As in the case involving Margaret Stuart, it appears that women who were positioned in morally ambiguous situations where they witnessed crime were subject to the court's doubts and that cross-examiners attempted to capitalise on this doubt to discredit women's testimony. Women who had witnessed crime from their homes were almost never subject to this form of vigorous cross-examination. But as in the case of Mary Stuart it is often difficult to determine if the discrediting of women's testimony directly affected the decision of the judge or jury. In the case involving Caroline Rudd and Mary Ann Dixon three out of the four men were found guilty of the burglary, with William Goldsmith receiving the harshest sentence amongst them of two years in prison with hard labour.⁴⁷

In 1892 William Henry Ellis was put on trial at the Dunedin Supreme Court for the theft of a silver watch from another guest at what the *Southland Times* dubbed Ellen Lewis' "house of ill fame" in Invercargill.⁴⁸ Like Mary Ann Dixon and Caroline Rudd, Ellen was

⁴⁵ 'Supreme Court', *New Zealand Herald*, 5 June 1866, p.4.
<https://paperspast.natlib.govt.nz/newspapers/NZH18660605.2.16>.

⁴⁶ *ibid.*

⁴⁷ 'R v Bryant Corcoran, William Perry, William Goldsmith and Alexander Buton', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁴⁸ 'Supreme Court', *Southland Times*, 10 February 1892, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ST18920210.2.18>.

most likely not wishing to draw attention to herself as a prostitute and her existence would be little, if not at all, known about by historians if she had not been drawn into the web of the criminal legal system as a witness in a case of petty theft. Caroline Rudd mentioned under cross-examination that she had given a number of different names when being sworn in to give evidence in the past, revealing that she had appeared as a witness before and attempted to avoid leaving a legal footprint by giving a false name.⁴⁹ Her regular appearances in the court may have raised questions about her trustworthiness. In the case of Ellen Lewis her testimony drew the attention of the court and the public to her occupation. Ellen's character was attacked intensely much like Caroline Rudd and Mary Ann Dixon's were. The defence counsel stated that "the evidence of a person connected as she was with the case should be very carefully weighed."⁵⁰ In response the Crown prosecutor pointed out that:

it was true that Lewis was a woman of bad character, but it should not be forgotten that unfortunates would not be unfortunate if it were not for men, but it was men like those who visited the house on the occasion in question who made them what they were. Why should they [the jury] be asked to reject her evidence in favour of that of the accused? . . . Was the accused admittedly not as depraved as the woman?⁵¹

The prosecutor's argument in this case was a highly charged and poignant defence in 1892 when the feminist movement was becoming active in Otago and Southland.⁵² Women were questioning the gendered double standards within the law, "which entitled men to a sexual licence while expecting chastity from women".⁵³ This gendered double standard was

⁴⁹ 'Supreme Court', *New Zealand Herald*, 5 June 1866, p.4.
<https://paperspast.natlib.govt.nz/newspapers/NZH18660605.2.16>.

⁵⁰ 'Supreme Court', *Southland Times*, 10 February 1892, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ST18920210.2.18>.

⁵¹ *ibid.*

⁵² Within two months of Ellen appearing on the stand, union organiser Harriet Morison, who had earlier been central to founding of the Tailoresses Union, helped set up the Women's Franchise League in Dunedin as a non-temperance alternative to the Women's Christian Temperance Union. Both groups were determined to see women gain a say in the making of the law through exercising the right to vote. See, Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), p.129.

⁵³ *ibid.*, p.148.

particularly evident in divorce laws prior to 1898 and will be discussed more in chapter four. The gendered double standard was also apparent in the Contagious Disease Act 1869 which allowed the policing and forced inspection of prostitutes for venereal disease.⁵⁴ In 1895 New Zealand society was called upon to “carry on your crusade against the brothels if you will, martyrize and crucify your weaker sisters, but in common justice shut your doors against and refuse to friendship and hospitality to their male partners in iniquity – the men who support and frequent houses of ill-fame.”⁵⁵ It is striking that these sentiments, voiced mainly by women, entered the courtroom in the defence of a woman witness by a Crown prosecutor. But Justice Joshua Williams was unmoved, arguing that when weighing evidence, character had to be considered and Ellen’s character as a prostitute made her testimony subject to doubt.⁵⁶ Juries were being asked to weigh up the character of the witnesses versus the character of the defendant in order to determine a verdict, creating a scenario where the witness was put on trial as much as the offender themselves. It demonstrates the highly gendered ways that principles of evidence and attitudes towards women within New Zealand society were applied to witnesses when they appeared before the courts. But it also suggests that in the 1890s these attitudes were being questioned inside the courtroom concurrently to their being questioned outside of it. In the case of Ellis, the jury found him not guilty.

What is evident is that ‘questionable women’ were in positions in which they witnessed petty crime, perhaps even more so than respectable women. Prostitution was a form of commerce that required the women who worked in the occupation to be out of the home. Prostitutes were present in public places such as hotels and pubs where theft and petty crime often took place. On 13 December 1894 the Resident Magistrates Court in

⁵⁴ *ibid*, p.146; Contagious Disease Act 1869.

⁵⁵ Macdonald, *The Vote, the Pill and the Demon Drink* (Wellington: Bridget Williams Books, 1993), p.54.

⁵⁶ ‘Supreme Court’, *Southland Times*, 10 February 1892, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ST18920210.2.18>.

Christchurch heard a case in which Carl Schultheis was charged on two counts of breaching the Licensing Act 1881 by selling alcohol in prohibited hours.⁵⁷ Schultheis was the license holder at the White Swan on Tuam Street. Both alleged instances of the illegal sale of alcohol had taken place at his hotel on Sunday 25 November 1894.⁵⁸ Christina Lawson, Ada Gilbert and Sarah Smith had been found drunk outside the establishment shortly after 9.00am with a male friend named Albert Lucas, possibly still out from the night before.⁵⁹ That Sunday evening a woman named Emily Russell was found by a policeman holding a bottle of beer which she claimed she had received from the White Swan.⁶⁰ All four women gave evidence for the prosecution. Christina Lawson, Ada Gilbert and Sarah Smith's testimony was of little use to the court as they remembered almost none of their movements and actions that morning, admitting to the court whilst on the stand that their intoxication had impaired their memory.⁶¹

Emily Russell's testimony differed from the other three women. She appeared to remember the day vividly and maintained that the drink had been a gift from the barman as a remedy for a headache she was suffering at the time.⁶² Richard Beetham, the Magistrate presiding over the case, did not trust her testimony and announced to the court that he was choosing not to believe her.⁶³ There are many aspects of Emily Russell's story which may have influenced Beetham's decision to doubt her. Like Margaret Stuart, her presence in the White Swan could have been a factor. The consumption of alcohol, especially on a Sunday, spoke of immorality and went against the idealised conduct of women in the colony, who just

⁵⁷ 'Breach of Licensing Act', *The Lyttelton Times*, 13 December 1894, p.3.

<https://paperspast.natlib.govt.nz/newspapers/LT18941213.2.9>.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

over a year earlier had won the right to vote after campaigning on a platform of temperance. But questioning character was more than a form of social judgement inside the courtroom, it also had legal grounds. The Evidence Act 1843 had allowed people with an interest in the case to appear as witnesses.⁶⁴ But the increased presence of such people on the stand meant that a clause was entered into the Act which stated that such “persons (who are appointed to decide on truth and judgement in a case) should exercise their judgement on the credit of a witness and on the truth of their testimony.”⁶⁵ This had certainly been occurring prior to the Act’s establishment. But as people more closely connected to the case were allowed to give evidence, the clause was written as a measure to instruct the courts to look upon testimony with scrutiny pertaining to the circumstances that a witness found themselves on the stand. The relationship of a witness to the parties, their reputation being maintained and in the case of civil disputes, any financial advantage the witness may gain depending on which way the court ruled, were all viewed as reasons that witness testimony should be appraised. Beetham may have believed that Emily was trying to save her own skin as she stated that the beer was gifted to her.⁶⁶ Such a defence would have spared her being charged with drunkenness.

The 1843 Act allowed people with a criminal conviction to give evidence.⁶⁷ It was another reason that the clause surrounding judgement of a witness was entered into the Act as parliament debated and eventually agreed that convicts’ testimony was necessary to obtain justice and how much their character influenced their integrity on the stand should be left to the judge and jury in the courtroom to decide.⁶⁸ Emily Russell was no stranger to the justice

⁶⁴ Evidence Act 1843 (England, Wales and Ireland), s.1.

⁶⁵ New Zealand adopted the Evidence Act 1843 (England, Wales and Ireland) under the English Acts Act 1845; Evidence Act 1843 (England, Wales and Ireland), s.1.

⁶⁶ ‘Breach of Licensing Act’, *The Lyttelton Times*, 13 December 1894, p.3.
<https://paperspast.natlib.govt.nz/newspapers/LT18941213.2.9>.

⁶⁷ Evidence Act 1843 (England, Wales and Ireland), s.1.

⁶⁸ *United Kingdom Parliamentary Debates*, 1842, Vol. 61.

system. She appeared in the Christchurch courts on a regular basis as an offender around the years of the Schultheis case on charges involving drunkenness, misuse of alcohol and larceny.⁶⁹ It could have been Beetham's belief that Emily Russell's experience in the courts not only diminished her character but also gave her the knowledge with which to manipulate the courtroom, possibly explaining her providing an explanation for the sale of the beer when the other three women witnesses stayed silent.

The Magistrate found Schultheis guilty on both counts of breaching the Licensing Act. Schultheis appealed the second count involving Emily Russell's testimony and the case went to the Supreme Court in 1895.⁷⁰ Whether or not the Magistrate should have believed Emily Russell's evidence became the central basis of the appeal as the law report noted that the "[s]tipendiary Magistrate disbelieved the evidence as to the beer being a gift, and held that it was a sale, or a transaction in the nature of a sale, and convicted accordingly."⁷¹ But the Supreme Court had to determine if he was right in doing so. The systematic scrutiny of testimony had been occurring in the courts since their establishment in New Zealand. It is interesting that this was the first time it had been challenged under legal grounds in a New Zealand court. In the Supreme Court Emily was required to again give testimony and stuck to her story that the beer had been a gift. But the Supreme Court ruled that "the credibility of witnesses is for the Magistrate. He may be justified in disbelieving them by their demeanour, or by the improbability of the story, or for any other reason. It is for him to say."⁷² Possibly the defence counsel could have argued further but it was negated by the ruling that even if

⁶⁹ 'Magisterial', *Star*, 18 February 1888, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18880218.2.25>; 'Magisterial', *Star*, 14 May 1888, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18880514.2.26>; 'Police Court', *Star*, 24 September 1889, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18890924.2.27.1>; 'Magisterial', *The Lyttelton Times*, 27 February 1889, p.3. <https://paperspast.natlib.govt.nz/newspapers/LT1890227.2.9>; 'Magisterial', *The Lyttelton Times*, 8 July 1892, p.3. <https://paperspast.natlib.govt.nz/newspapers/LT18920708.2.8>.

⁷⁰ *Schultheis v Wilson* — (1895) 13 NZLR 295.

⁷¹ *ibid.*

⁷² *ibid.*

Emily's testimony was believed, the beer being a gift was still in breach of the Licensing Act.⁷³

What is striking though is that Emily Russell had given evidence for the Crown, not the defence, even though her evidence provided a defence for Schultheis. It is possible that the prosecution knew that Emily's explanation for being given the beer would not likely be taken seriously by the court and thus they used her evidence only to establish that she had received a beer from The White Swan establishment. The case illustrates that witnesses were being judged by the courts in order to determine truth and reliability and that character was often central to this judgement. It also suggests however that 'questionable' women's testimony was being used in diverse ways in prosecution and defence tactics to establish facts in the case, even when their testimonies were unlikely to be taken seriously. What is apparent in all these cases is that it was an established norm to question witnesses' credibility by determining and highlighting their character outside the courtroom.

Women's testimony in cases of petty crime provides an insight into the ways which women were placed within colonial society to witness crime. But such testimony is illuminating for historians in other ways, for instance, on how women understood property and their legal position within marriage. Drawn within their testimonies on the witness stand are notions of ownership and possession. In 1865 Henry Warnicky, a 35 year old soldier, was found guilty and sentenced to six months imprisonment with hard labour by the Supreme Court for stealing a watch and gold chain from the United Service Hotel in Auckland.⁷⁴ The newspaper cites the property as Andrew Robinson's who had also identified the items as his

⁷³ *ibid.*

⁷⁴ Auckland Crown Book, 1865-1870, BBAE A792 5637 Box 1, ANZ, Auckland; 'Criminal Sessions', *Daily Southern Cross*, 2 December 1865, p.5. <https://paperspast.natlib.govt.nz/newspapers/DSC18651202.2.20.1>.

at the police station after their recovery.⁷⁵ But witness testimony from the case reveals that the watch and gold chain were the property of Andrew's wife Agnes Louisa Robinson.⁷⁶ In Agnes Robinson's testimony she states, "I am the wife of Andrew Robinson, residing at Cambridge, on the Waikato. On the evening of the 14th September I was in the United Service Hotel, kept by Mr. Quick. The watch produced is my property. I had it in my bedroom in the hotel."⁷⁷ Andrew did not give evidence.

Hotels and boarding houses were common sites of petty theft from women. Often crowded or in central locations, thieves looking for an easy target could observe items worn by women such as jewellery knowing that they might be left vulnerable in hotel rooms. In 1891 George Widdicomb was found guilty by the Dunedin Supreme Court of stealing a number of personal items from hotel keeper Sarah Sinclair and her servant Catherine Duggan who both appeared on the stand and gave evidence.⁷⁸ In 1896 Rose Anna Nelson, a boarding house keeper, gave evidence against one of her boarders who had stolen her property. He pleaded guilty to the theft.⁷⁹

Sarah Sinclair, Catherine Duggan and Rose Anna Nelson were all single women who owned their property. Agnes Robinson's testimony suggests a number of possibilities in relation to how women viewed property within marriage. Until 1884 married women's inability to own property meant that larceny cases had to be brought by a woman's husband, even if she was the only person to witness the crime. The law also viewed the theft of their

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ 'Criminal Sessions', *Daily Southern Cross*, 2 December 1865, p.5.
<https://paperspast.natlib.govt.nz/newspapers/DSC18651202.2.20.1>.

⁷⁸ 'Supreme Court', *Otago Daily Times*, 1 September 1891, p.4.
<https://paperspast.natlib.govt.nz/newspapers/ODT18910901.2.43>.

⁷⁹ Auckland Crown Book, 1888-1893, BBAE A792 5637 Box 17, ANZ, Auckland.

property as the theft of their husbands' property. But women, like Agnes Robinson who appeared on the stand two decades before the Married Women's Property Act, very rarely referred to property as their husbands, especially personal items, made for women, such as clothing and jewellery. Women may have been ignorant to the hampering legal restrictions that were placed on them with the laws of property ownership living more in the abstract than within the daily lives of married women. It is also possible that women's attitudes towards property within marriage were swayed by the ways the law operated. Property of the wife known as *chattels person in possession* which included items such as money, jewellery and household goods, were dissolved into that of the husband's property upon marriage.⁸⁰ However, apparel or ornaments "usually worn by her" known as *paraphernalia*, a term borrowed from the civil law, could not be bequeathed in the husband's will and go to the executors, but they could be sold by the husband during his lifetime or the time of his marriage.⁸¹ In effect the law recognised women's personal attachment to certain belongings but it is difficult to ascertain how acutely women were aware of these often complex laws that controlled their property. It is also entirely possible that Agnes Robinson was asserting a degree of agency over her personal belongings. The use of the first person pronouns as she asserts that the items were "my property", suggests that she did not see the items as something that her husband owned but instead as things she possessed.⁸²

When the Married Women's Property Act was introduced in 1884, it allowed for women to not only own property within marriage but allowed them to act independently in the court from their husbands, as if they were *feme sole*.⁸³ Thus, in theory, Agnes Robinson

⁸⁰ William Blackstone, *Commentaries on the Laws of England* (London: Clarendon Press, 1765), p.239.

⁸¹ *ibid.*

⁸² 'Criminal Sessions', *Daily Southern Cross*, 2 December 1865, p.5.

<https://paperspast.natlib.govt.nz/newspapers/DSC18651202.2.20>.

⁸³ Married Women's Property Act 1884.

would have identified the items as hers at the police station, the newspaper would have printed that the items were her property and Agnes would have brought the case to the courts by herself. But the application of these new laws in the courts were malleable and often the subject of great confusion. When Ann Stanley, the second hand dealer, gave evidence against Annie Pilet in 1899, Pilet was on trial for stealing a watch from the house of her estranged husband.⁸⁴ Prior to 1884, it was possible for a wife to steal from her husband, personal belongings that she may have viewed as her own. Bettina Bradbury has explored this bizarre scenario when Mrs Watson left her husband in Christchurch in November of 1881, taking with her some of her possessions, Bradbury comments that, “we don’t know whether the household plate she took had initially been hers or her husband’s. Legally it made no difference. Marriage made it her husband’s property, so he had a right to sue for loss of it.”⁸⁵ But Annie Pilet was being charged with stealing items she believed belonged to her, after the Married Women’s Property Act 1884 had allowed her the right to hold these belongings as her own legal property.

The Married Women’s Property Act 1884 made provisions for the situation that spouses may commit offences against one another’s property if they were living apart.⁸⁶ Peter Pilet was convinced that as Annie Pilet and he had been living separately for over a year, he was entitled to charge her for the theft.⁸⁷ But Annie Pilet was firm on the witness stand that the watch “was [my] own” and all her husband had done was pay for it to be repaired.⁸⁸ Annie was another woman living a ‘questionable’ life. She had pleaded guilty in the Supreme

⁸⁴ Dunedin Crown Book, Criminal, 1896-1909, DAAC D256 Box 518, ANZ, Dunedin; ‘Supreme Court – Criminal Sessions’, *Evening Star*, 28 November 1899. p.3.

<https://paperspast.natlib.govt.nz/newspapers/ESD18990311.2.38.39>.

⁸⁵ Bettina Bradbury, ‘From Civil Death to Separate Property’, *NZJH*, Vol. 29, no. 1, 1995, p.42.

⁸⁶ Married Women’s Property Act 1884, s.15.

⁸⁷ ‘Supreme Court – Criminal Sessions’, *Evening Star*, 28 November 1899. p.3.

<https://paperspast.natlib.govt.nz/newspapers/ESD18990311.2.38.39>.

⁸⁸ *ibid.*

Court a year earlier for theft, and had, according to Ann Stanley, regularly pawned items to her.⁸⁹ In the case brought by her husband she admitted that she had needed the watch to pay a fine at the Police Court and she “never dreamed there could be any harm in breaking the window and taking the things.”⁹⁰ Living separately from her husband also would have caused eyebrows to be raised in the court, a place that reinforced the importance of marriage in colonial New Zealand. But Annie had told her young son to inform Peter that she had been to collect the watch and the offence was committed in broad daylight, suggesting that she simply did not see a problem with breaking the window.⁹¹ Her methods of obtaining the watch aside, as well as her lifestyle and previous criminal activity, the issue for the Supreme Court was if the watch was technically hers. Annie Pilet on the witness stand certainly articulated that she believed the watch belonged to her. Like Agnes Robinson’s watch and gold chain they were personal items that she wore, and thus they belong to her personally at least, if not legally. In the end the jury found her not guilty.⁹²

The Married Women’s Property Act 1884 had allowed both Annie Pilet and Peter Pilet to give evidence against each other. Defendants and their spouses were, until the passing of the Criminal Evidence Act 1889, deemed incompetent to give evidence in criminal cases in which either of them were involved. Laws relating to spouses giving evidence were being slowly altered in the nineteenth century as part of wider changes to evidence laws. As the New Zealand parliament observed the changes to the laws of Britain, they would

⁸⁹ *ibid*; Dunedin Crown Book, Criminal, 1896-1909, DAAC D256 Box 518, ANZ, Dunedin.

⁹⁰ ‘Supreme Court – Criminal Sessions’, *Evening Star*, 28 November 1899. p.3.
<https://paperspast.natlib.govt.nz/newspapers/ESD18990311.2.38.39>.

⁹¹ *ibid*.

⁹² ‘Criminal Trials’, *New Zealand Mail*, 29 November 1899, p.28.
<https://paperspast.natlib.govt.nz/newspapers/NZMAIL18991130.2.57>.

subsequently debate the necessity, consequences and prudence of adopting the same legislation under the English Acts Act or amending laws to suit the colony's context.⁹³

The Evidence Act 1843 marked the beginning of substantial changes to evidence laws and was adopted in New Zealand under the English Acts Act 1845.⁹⁴ It widened the margins of the perceived capacity of people to give evidence including convicts and people with an interest in the case, but stopped short of allowing the defendant and plaintiff or their spouses to take the stand.⁹⁵ There were numerous reasons why the laws of evidence kept strict boundaries in place when it came to spouses speaking in court and these debates focussed overwhelmingly on the wife. It was firstly seen as a violation of the public policy that allowed confidence in private life to let a wife take the stand in cases which her husband was involved as privacy was “one of the cornerstones of Victorian domestic ideology.”⁹⁶ The occasional failure of justice had been viewed for some time as a reasonable price to pay to maintain this privilege.⁹⁷ In 1851 when the evidence laws were again modified, Lord Chancellor in the House of Lords deemed it a direct violation of the confidence necessary to maintain married life.⁹⁸ He questioned how unrestrained and familiar intercourse between husband and wife could remain if she was allowed to testify.⁹⁹ Many also saw the law as a mercy to wives who would either be coerced by their husbands to commit perjury or forced to incriminate their husbands on the stand. But the rhetoric reduced women to being submissive

⁹³ The English Acts Act was an ordinance which allowed the New Zealand government to directly bring into operation within the colony Acts of British parliament.

⁹⁴ Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press, 1997), p.1; Evidence Act 1843 (England, Wales and Ireland); English Acts Act 1845.

⁹⁵ Evidence Act 1843 (England, Wales and Ireland).

⁹⁶ Brian W. McCuskey, ‘The Kitchen Police: Servant Surveillance and Middle-Class Transgression’, *Victorian Literature and Culture*, Vol. 28, no 2, pp.359-375.

⁹⁷ Allen, p.98.

⁹⁸ Lord Chancellor, *United Kingdom Parliamentary Debates*, 1851, Vol. 118; Evidence Act 1851.

⁹⁹ Lord Chancellor, *United Kingdom Parliamentary Debates*, 1851, Vol. 118.

subjects of their husbands and the law, where they were expected to either crumble under the pressure of their husbands or under the pressure of cross-examination.

Negating these debates was the fact that under the laws of coverture, women had no independent legal status from that of their husbands. In the eyes of the law the husband and wife were one entity and thus giving testimony for or against one's husband was seen to be as good as giving evidence for or against oneself. If she did, it would be, as eighteenth century jurist William Blackstone summed up in his famous work *Commentaries on the Laws of England*, "to suppose her separate existence" which she legally did not have.¹⁰⁰ Elisabeth MacDonald explains further that the "longstanding rule that prevented a woman from testifying against her husband in a criminal trial (even if she wished to). . . stemmed from the rule against self-incrimination. As a wife was not considered a separate legal entity, testifying against her husband was seen as contrary to this privilege."¹⁰¹ Even after 1889 when New Zealand implemented the Criminal Evidence Act, spouses could only give evidence for the defence and only if the defendant agreed to it.¹⁰² The full removal on restriction of spouses giving evidence in criminal cases did not take place in New Zealand until 2007.¹⁰³

Given the conservative view of the British parliament surrounding wives' ability to give evidence in criminal cases in the early decades of the colonial period, the Criminal Evidence Act 1889 was a major leap forward in New Zealand's evidence laws. It was implemented ten years before Britain allowed the same measures and it points to a slow separation of New Zealand law from the British parliamentary influence, even if British legal

¹⁰⁰ Blackstone, p.105.

¹⁰¹ Elisabeth McDonald, 'Contemporary Feminist Thought in Aotearoa/New Zealand, Feminist Legal Theory in Aotearoa New Zealand: the impact of international critical work on local criminal law reform.' *Women Studies Journal*, Vol. 28, no. 2, 2014, p.74.

¹⁰² Criminal Evidence Act 1889, s.2(a).

¹⁰³ McDonald, p.74.

tradition remained firmly embedded. Women receiving the right to vote just five years later solidifies this point further and makes the 1890s a unique decade in which to look at women in the courts in New Zealand. It was largely reported that lawyers and judges all desired the 1889 Act. Member of Parliament George Hutchison from Taranaki, described it as doing away with “the last of a series of disabilities which have gradually given way before the enlightenment of the age.”¹⁰⁴ The Married Women’s Property Act had also been introduced in 1884, allowing women to operate within the courts independently from their husbands and dissolving the argument in the later nineteenth century that a wife could not testify because she did not legally exist. But the Criminal Evidence Act 1889 only allowed spouses to give evidence for the defence. The Married Women’s Property Act 1884 had made an allowance for this however. Under section 16 of the Act it stated that in “any such criminal proceeding against a husband or a wife as is authorized by this Act, the husband and wife respectively shall be competent and admissible witnesses against each other.”¹⁰⁵ It was referring specifically to offences against a spouse’s property thus it allowed Annie Pilet and Peter Pilet to take the stand against each other.

One year earlier when Annie had been charged with theft at the Dunedin Supreme Court, she had chosen not to take the stand and give evidence under the Criminal Evidence Act 1889. Annie was not alone, many female offenders of petty crime appear not to have taken the opportunity to give evidence. Emily Russell did not take the stand in any other case she appeared in besides the Schultheis case where she was appearing as a witness for the prosecution and was not on trial herself.¹⁰⁶ It is unclear why she did not testify in cases

¹⁰⁴ George Hutchison, *NZPD*, 1889, Vol. 64, p.66.

¹⁰⁵ Married Women’s Property Act 1884, s.16.

¹⁰⁶ ‘Magisterial’, *Star*, 18 February 1888, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18880218.2.25>; ‘Magisterial’, *Star*, 14 May 1888, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18880514.2.26>; ‘Police Court’, *Star*, 24 September 1889, p.3. <https://paperspast.natlib.govt.nz/newspapers/TS18890924.2.27.1>; ‘Magisterial’, *The Lyttelton Times*, 27 February 1889, p.3.

relating to her own offences post 1889. It is possible that she may have been advised not to. Given her low social status and regular offending, the courts may have taken exception to her boldness to try and defend herself and treated her more harshly. This is certainly true in some of the more violent cases which will be discussed in chapter two. But it is highly probable that Emily did not have the financial means in which to hire defence counsel as it is noted a number of times that she had no fixed abode.¹⁰⁷ It is also possible that Emily chose not to give evidence. As a frequent offender her inattention to the law meant she may well have seen giving evidence as a waste of time and simply wished to get the formality of the court proceedings over and done with. Many women appearing in the courts for cases of petty crime seem to have taken this approach and simply pleaded guilty to a charge or declined to give evidence when asked if they wanted to. In 1897 Ellen Whitter pleaded guilty for a charge of stealing from a dwelling.¹⁰⁸ In 1898 Catherine Stephens pleaded guilty when she appeared in the Supreme Court for housebreaking and theft.¹⁰⁹ In 1900 Mary O’Neil was charged with theft from a dwelling but the Crown Book notes that “the prisoner declined to be sworn.”¹¹⁰ The same note appears next to Sarah Jones’ name when she appeared in the court for theft a few weeks after Mary O’Neil.¹¹¹

Whatever their reasons, it is evident that many female offenders did not take the stand in cases where they were charged with petty crime. But as Annie Pilet shows, this did not apply to all women and what can be learnt from these women’s testimonies is highly valuable. In 1899 Mary and Charles Banwell were charged together on multiple counts of

<https://paperspast.natlib.govt.nz/newspapers/LT18990227.2.9>; ‘Magisterial’, *The Lyttelton Times*, 8 July 1892, p.3. <https://paperspast.natlib.govt.nz/newspapers/LT18920708.2.8>.

¹⁰⁷ *ibid.*

¹⁰⁸ Dunedin Crown Book, Criminal, 1896-1909, DAAC D256 Box 518, ANZ, Dunedin.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

theft in the Dunedin Supreme Court.¹¹² Mary gave testimony to the court in almost all the cases in which she and her husband appeared, each time taking sole responsibility for her crimes and insisting that Charles did not know about the stolen goods that Mary had brought into their home.¹¹³ The Crown prosecutor argued that since the goods were found in Charles's home they were Charles's possessions and not his wife's. This argument was rejected by Justice Williams and the jury on the basis that Mary now had the right to own her own property.¹¹⁴ But the prosecutor maintained that Charles was still responsible for Mary's criminal actions.¹¹⁵ Justice Williams likewise found culpability difficult to ascertain despite Mary's confession on the witness stand. Although Mary could hold her own property he declared that there "is nothing in these circumstances by which one can infer that the husband was not head of the house, and had control of the house and persons and things within it."¹¹⁶ He maintained that the domestic distribution of power and responsibility over crime had not shifted despite the changes in the law and it shows the complex ways in which attitudes held by the court and its occupants came to clash with changes in equity law relating to women's property.

Married women's agency was a debated topic within the courts. Prior to 1893 British common law did not consider a married woman responsible for her own crimes, especially if she committed the offence in the presence of her husband.¹¹⁷ Laws of coverture placing married women under the protection and authority of their husbands meant that husbands

¹¹² *ibid.*

¹¹³ *ibid.*; Judge Williams, Judge's Note Book, Criminal, 29 May 1899-1 September 1899, DAAC D437 21220 Box 949, ANZ, Dunedin; 'A Wholesale Steal', *Evening Star*, 11 April 1899, p.2.

<https://paperspast.natlib.govt.nz/newspapers/ESD18990411.2.28>; 'Supreme Court – Criminal Sessions', *Evening Star*, 1 June 1899, p.2. <https://paperspast.natlib.govt.nz/newspapers/ESD18990601.2.34>.

¹¹⁴ 'Supreme Court – Criminal Sessions', *Evening Star*, 1 June 1899, p.2.

<https://paperspast.natlib.govt.nz/newspapers/ESD18990601.2.34>.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Brookes, p.78; Criminal Code Act 1893.

were responsible for their wives conduct and “she was presumed to act under his coercion.”¹¹⁸ After the passing of the Criminal Code Act 1893 the law stated “No presumption shall be made that a married women committing an offence does so under compulsion only because she commits it in the presence of her husband.”¹¹⁹ Women were now responsible for their own crimes and questions in relation to women’s agency intensified. They were by this time also separate legal entities to their husbands with the passing of the Married Women’s Property Act 1884.¹²⁰ If the Criminal Code Act 1893 and the Married Women’s Property Act 1884 were strictly observed, Charles Banwell’s guilt would not have been brought into question. But the power of a husband over his wife was still to a degree assumed, displaying the malleable nature of the law courts surrounding the belief of women’s testimony, agency and the relationship that could exist between a husband and wife. Perhaps due to these new complicated, and in some ways unanswerable issues that were present as the legal position of women changed, Justice Williams instructed the jury to give Charles Banwell the benefit of the doubt and they found him not guilty.¹²¹ Charles Banwell remained in custody however as a guilty verdict of receiving stolen goods from the Magistrate Court was not addressed in the Supreme Court.¹²² Women had clearly been recognised and sanctioned by law to have a relative degree of agency, but the Banwell case shows that inside the courtroom though there was a reluctance to accept married women’s culpability over petty crime.

There is more that can be drawn from Mary and Charles Banwell’s case as the court largely agreed that she was suffering from kleptomania. Kleptomania was defined as the urge

¹¹⁸ Blackstone, p.446.

¹¹⁹ Criminal Code Act 1893, s.24 (2).

¹²⁰ Married Women’s Property Act 1884.

¹²¹ *ibid*; ‘A Wholesale Steal’, *Evening Star*, 11 April 1899, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ESD18990411.2.28>.

¹²² ‘Supreme Court – Criminal Sessions’, *Evening Star*, 1 June 1899, p.2.
<https://paperspast.natlib.govt.nz/newspapers/ESD18990601.2.34>.

to steal and the inability to control that urge. It was an increasingly utilised defence in Britain in the later nineteenth century and was used to explain cases of female middle-class stealing.¹²³ The rise of the kleptomania defence sat at an intersection in time where the growth of consumer culture amongst women was attributed to their greater financial independence and was coupled alongside the beginning of the appearance of medical doctors in the courts as expert witnesses in cases involving crime.¹²⁴ Doctor's participation in the courts was part of the "long path of medicalizing criminology" as the public and the courts needed a way to understand why women of financial means would shoplift.¹²⁵ But the medical testimony to explain women's behaviour concurrently, as Tammy Whitlock and Gareth Shaw point out, "robbed women of the agency of their own rational if not legal actions in dealing with existence in an increasingly material culture."¹²⁶ Mary Banwell's case highlights the unease of the courts with women's new legal and economic position and the possible consequences of that position. Mary Banwell was allowed to take the stand and give evidence to admit culpability over her own crimes, but the courts found that if they could not allocate responsibility to Charles Banwell, they would to a medical explanation and with it diminishing any agency Mary Banwell had over her behaviour. The disregard of Mary Banwell's testimony suggests that in theory women were allowed to hold property, vote, be responsible for their actions, and take the stand to admit culpability over their crimes but that the application of these reforms was difficult for the courts to accept and execute.

Scholarly work has focussed predominantly on the role of the female offender in cases of petty crime. But women appeared on the witness stand as bystanders and victims of

¹²³ Tammy C. Whitlock and Gareth Shaw, *Crime, Gender and Consumer Culture in Nineteenth-Century England* (London: Routledge, 2005), p.3.

¹²⁴ *ibid*, pp.135-190.

¹²⁵ *ibid*, p.190.

¹²⁶ *ibid*, p.153.

petty crime more frequently than they appeared as defendants. Partly this is due to the inability of women to give evidence in their own defence until 1889, unless it was in the exceptional instance of offence against their husband's property in which they could then take the stand from 1884. But it is apparent that a large number of women chose not to give evidence even when the law allowed them to do so. Women's testimony in these cases, whether it be as a bystander, victim or defendant, firstly shows how women were placed in colonial society in which they witnessed or became victims of crime. Women frequently appeared in cases in which theft had taken place from a dwelling or hotel. But it also shows that women held a number of occupations in which they were in a position to witness crime, including being shop keepers, hotel keepers, second hand dealers and post mistresses. But often, and even perhaps more so, women with less reputable occupations such as prostitutes appeared on the stand in cases involving crime. When these women took the stand to give evidence the gendered nature of the courts' approach to women's testimony became starkly apparent. Character was questioned as a tactic by cross-examiners, but also by judges and juries. This scrutiny had legal grounds and was written into statutes and case law by the end of the nineteenth century. These laws were in their written form, gender neutral. But the application of the laws in the courts reveal the highly gendered nature in which they were applied. Secondary to this, women's testimonies reveal the ways in which the courts were struggling to apply the changing laws that not only altered women's legal position but their positioning within a household, within marriage and in committing crime. Women's testimonies disclose how they viewed themselves, their property and their crimes within these legal complexes. Criminal evidence was a specific strand of the law in New Zealand which affected not just petty crime but violent crime also which will now be discussed in chapter two.

Chapter Two

Women as Witnesses in Cases of Violent Crime

Women came before the courts as witnesses as well as victims in cases of violent crime.

Violent crime has been viewed as a male dominated affair. The majority of violent crimes were committed by men.¹ Offenders in such cases, as Charlotte Macdonald points out, were more likely to offend against other men, they were then arrested by male police, came before a male magistrate or judge and were heard by a male jury.² Women's chief involvement in violent crime was appearing as witnesses in the courts and they did so in a diverse range of circumstances. This chapter considers a wide range of violent offences to illustrate the complex ways that narratives of gender, race and evidence operated over time in the courtrooms of colonial New Zealand.

Violent crime, for the purposes of this chapter, is an offence committed against another person's physical body including murder, attempted murder, manslaughter, assault, rape, sexual assault and illegal abortion. Cases of high treason will also be discussed which included aspects of violence against others. Women's experience on the witness stand in these cases differed markedly from cases of petty crime and crime of a less serious nature. The stakes were higher, with lengthy prison sentences, penal servitude and execution being

¹ Charlotte Macdonald, 'Crime and Punishment in New Zealand, 1840-1913: a Gendered History', *NZJH*, Vol. 23, no.1, 1989, p.17.

² *ibid.*

possible outcomes and thus women's credibility as witnesses was also brought more acutely under scrutiny.

In 1866, Henry Elliott was found guilty in the Auckland Supreme Court on a charge of stabbing his wife Mary, who was seven months pregnant at the time.³ Mary Elliott testified:

I am the wife of the prisoner. I was living with Mrs. Hamilton at Otahuhu, on 31st March last year when Mrs. Donovan came and told me that my husband wished to see me in front of her cottage alone. I sent word that he could see me at Mrs. Hamilton's. He had been drinking for a fortnight before that time. I had to leave him through his drinking. . . I saw prisoner raise his hand with great force. I felt no blow. I got up and ran out into the road. I then felt a sharp pain across my chest. I put my hand to my breast, and my hand was covered with blood when I removed it. I felt a pain on the left side of my belly. I did not at that time feel a pain from a wound anywhere also. I turned around and said to Mrs. Hamilton, "He has murdered me." The prisoner then ran away in the direction of the camp. I afterwards returned to the house. Dr. Elmsley examined my person. I was confined to bed for twelve days. I was seven months in the family-way at that time.⁴

Not all women were as willing to give evidence against their husbands as Mary was. In 1862 William Meads was sentenced to six weeks in the Nelson gaol for assaulting his wife.⁵ The attack had been viewed by his mother-in-law Ann Armand, who also became subject to his violence.⁶ When Ann Armand was sworn in to give evidence she was firm in her statements that William Meads knocked her daughter down "three times and jumped upon her inside with his nailed boots with all his force; blood came from her nose; he threatened to serve me

³ 'R v Henry Elliott', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁴ Auckland Crown Book, 1865-1870, BBAE A792 5637 Box 1, ANZ, Auckland; Chief Justice Arney, Judge's Note Books, Criminal, 1 June 1866 – 12 September 1866, BBAE A304 25033 Box 536, ANZ, Auckland; 'Supreme Court', *Daily Southern Cross*, 7 June 1886, p.4.
<https://paperspast.natlib.govt.nz/newspapers/DSC18660607.2.22>.

⁵ 'R v William Meads', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁶ 'Supreme Court', *Colonist*, 19 August 1862, p.2.
<https://paperspast.natlib.govt.nz/newspapers/TC18620819.2.4>.

the same. I then went after a constable. . . You had your boots on; you did knock me down; I did throw a brick at your head after you struck me.”⁷ When her daughter, Caroline Meads took the stand though, the newspaper noted that “the wife of the prisoner was palliative of his conduct, and her replies to some questions from the prisoner were contradictory of the statements of previous witnesses, and called a warning from his Honor.”⁸

In 1867 Elizabeth Jones was put on trial at the Dunedin Supreme Court for stabbing her husband David. When she took the stand to give evidence she pleaded with the court to show mercy, maintaining that the attack was retaliation against the violence that she had suffered from her husband. She stated that her story was “the truth, the whole truth, and nothing but the truth, s'help me God. And I hope the jury be merciful to me; for he's been always abusing and beating me.”⁹ Elizabeth Jones was found guilty but received just six months in prison.¹⁰

In 1863 a man named Te Warena appeared before the Supreme Court in Nelson for assaulting his wife, Hariata Tarangiawa, who gave testimony of the incident to the court:

I am married. Prisoner is my husband. We live at Collingwood, and were there on the first of January. I was in my husband's house that morning, and Eliza [their daughter] was with me. I was getting the kettle to boil. Eliza began to dance and I began to sing. My husband came into the ware. When near the fire, he requested me to dance also. I would not. He kicked me with his foot on my thigh. He had neither boot nor shoe on. He seized me by my hair, and I seized him by his hair. I did not see him take up a stick, nor did I feel him strike me. The first notice I had of having been struck was the flowing of blood from my head. I was crouched on the ground, for, when we were

⁷ *ibid.*

⁸ *ibid.*

⁹ ‘Supreme Court Criminal Session’, *Otago Witness*, 6 September 1867, p.3.

<https://paperspast.natlib.govt.nz/newspapers/OW18670906.2.8>.

¹⁰ *ibid.*

struggling, we had both fallen to the ground.¹¹

Married women's legal ability to give evidence against their husbands in cases involving domestic violence offers a striking example of the different ways the law operated in cases of violent crime. Even with the passing of the Criminal Evidence Act 1889 wives were only able to give evidence for the defence.¹² The exception to the law which allowed wives to take the stand against their husbands in the instance of domestic violence stemmed from the Lord Audley Case in 1631. Merveyn Touchet, the second Earl of Castlehaven and the twelfth Lord Audley, was tried and later executed for the sodomy of a number of his male servants and the rape of his wife, Lady Anne Stanley.¹³ The court allowed Lady Stanley to give evidence on the basis that she was an aggravated party and the ruling became part of the common law tradition, although it would not appear in legislation in Britain until the passing of the Criminal Evidence Act 1898.¹⁴

The practice of allowing spouses to give evidence in cases of domestic violence was inherited by New Zealand with the adoption of British law and created an exceptional circumstance for wives to appear for the prosecution in cases involving their husbands. But many women would have also had good reasons to avoid the courts if their husbands were being violent towards them. Aside from the problems of funding the legal proceedings and

¹¹ 'R v Te Warena', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹² Criminal Evidence Act 1889.

¹³ Marital rape was not recognised by law in Britain until *R v R* in 1991. In 1961 New Zealand extended rape to include forced sexual intercourse with a wife whilst undergoing a divorce. This was amended in 1985 to include forced sexual intercourse with a spouse at any time. Lord Audley was convicted of the rape of his wife because he forced his male servants to lay with her against her will. See, Cynthia B. Herrup, *A House in Gross Disorder: Sex, Law and the 2nd Earl of CastleHaven* (Oxford: Oxford University Press, 2001); Colin Manchester, 'Wives as Crown Witnesses', *The Cambridge University Law Journal*, Vol. 37, no. 2, 1978, p.249; Ruth Harrison, 'Marital Exception in Rape (Great Britain)', *Journal of Criminal Law*, Vol. 56, no. 2, 1992, pp.228-289; Crimes Act 1961, s.128(3)(a)(b); Crimes Amendment Act (No. 3) 1985 s.2(4).

¹⁴ Evidence Act 1898 (England, Wales and Scotland), s.4 (1); In New Zealand the Criminal Evidence Act 1889 s.2 (2) included the words "The wife or husband of the person charged shall not be called as a witness without the consent of that person, except in any case in the wife or husband might have been compelled to give evidence before the passing of this Act" thus allowing the tradition to continue.

facing the possibility of living without an income whilst the offender served a prison sentence, they were required to lay the complaint themselves and give evidence, placing them at risk of retaliation with more violence.¹⁵ Prior to 1867 when divorce became available, women had very few options to seek redress or escape a violent home life and thus a significant number of women did end up on the witness stand to give evidence against their husbands, although a conviction was never guaranteed.¹⁶ Women faced difficulty in providing corroborating evidence of violence that most often took place behind closed doors. In 1864 a case was brought against Stephen Watson at the insistence of his wife who claimed that he had tried to poison her, but the case was dismissed because of lack of evidence.¹⁷ But women's testimonies offer a vantage point from which to explore how women understood and responded to violence within marriage, as well as the ways that women attempted to deal with a violent or problematic home life prior to seeking redress through the courts.

Historically the law's attitude towards violence within marriage was ambivalent at best. The laws of coverture which brought women under the authority of their husbands seemed to lend themselves to an accepted degree of violence which had been used as a legal means of correcting a wife's behaviour. William Blackstone remarked in the late eighteenth century that:

The husband also, by the old law, might give his wife moderate correction. In the polite reign of Charles II, this power of correction began to be doubted; and a wife may now have security of the peace against her husband . . . the courts of law will still permit a husband to restrain a wife of her liberty, in

¹⁵ Dean Wilson, 'Community Violence in Auckland, 1850-1875.' MA Thesis, University of Auckland, 1993, pp.41-42.

¹⁶ *ibid*, p.43.

¹⁷ Judge Chapman, Judge's Note Book Criminal Cases, 1864-1865, DAAC 21218 D437 Box 876, ANZ, Dunedin; 'R v Stephen Watson', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

case of any gross misbehaviour.¹⁸

It is possible that some women in colonial New Zealand accepted this form of power within marriage. Caroline Meads' acceptance of her husband's conduct stemmed from more than just a fear of further violence.¹⁹ Linda Gordon has found when looking at domestic violence in Boston from 1880 to 1960, that shared assumptions surrounding understandings of domestic power relations that situated men as dominant over women resulted in a degree of tolerance or even acceptance of violence within marriage.²⁰ But this analysis is complicated by a number of factors. Firstly, the courts in New Zealand appear to have taken domestic violence seriously when it did come before the courts. Secondly, some women in their testimonies tell narratives of fighting back, suggesting rejection of husbands' violence, not acceptance. Caroline Meads' mother was one such woman, as she confessed to throwing a brick at William Meads when she saw him assaulting her daughter.²¹ Elizabeth Jones was another.²² Gordon argues when looking at domestic violence in Boston that women were almost never the primary aggressor, instead their violence was reactionary or a response to violence towards them or a loved one.²³ Her work suggests that many women were unwilling to accept violence in their homes and chose different methods to remedy the situation in order to protect themselves and their families, including taking the matter to courts, leaving or fighting back in immediate self-defence or as a response to continuing provocation and trauma.

¹⁸ William Blackstone, *Commentaries on the Laws of England* (London: Clarendon, 1765), p.106.

¹⁹ 'Supreme Court', *Colonist*, 19 August 1862, p.2.

<https://paperspast.natlib.govt.nz/newspapers/TC18620819.2.4>.

²⁰ Linda Gordon, *Heroes of Their Own Lives* (New York: Viking, 1988), pp.260-261.

²¹ 'Supreme Court', *Colonist*, 19 August 1862, p.2.

<https://paperspast.natlib.govt.nz/newspapers/TC18620819.2.4>.

²² 'Supreme Court Criminal Session', *Otago Witness*, 6 September 1867, p.3.

<https://paperspast.natlib.govt.nz/newspapers/OW18670906.2.8>.

²³ Gordon, p.274.

Hariata Tarangiawa's testimony caused the Crown to drop the case against her husband.²⁴ Justice Johnston stated in her case that a "man is not entitled to beat his wife. If he beat her, except in his own defence, he is liable to be proceeded against. It is said that you beat and ill-used your wife badly, and that not merely in defending yourself."²⁵ His words suggest that the courts were not willing to accept domestic violence in the colony. But women who admitted on the stand to retaliating with violence were awkward victims for the court to accept. Victimhood in these cases was associated with passivity, defencelessness, vulnerability and submissiveness of a wife towards her husband. Although the courts were willing to accept male violence as a matter of self-defence against women, the same cannot be said for wives who acted in self-defence against their husbands. Acts of violence committed by women within marriage are still little understood in historical research as men rarely brought cases to court where they had experienced violence from their wives.²⁶ Nevertheless it is apparent, as Elizabeth Foyster argues, that "male violence could be represented as legitimate in a way that was impossible for female violence."²⁷ These were often complex and malleable cases. But they can illustrate that victims' testimonies were discredited if appropriate victimhood was not displayed whilst on the stand. They also show that certain types of male violence were still being considered as 'natural' against a wife whilst any violence from a woman was considered 'unnatural'.²⁸

In 1848 George Chaplin appeared in the Wellington Supreme Court for assaulting his wife who suffered a broken jaw, amongst other injuries.²⁹ The jury found that he had

²⁴ 'R v Te Warena', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

²⁵ *ibid.*

²⁶ Elizabeth Foyster, *Martial Violence: An English History, 1660-1857* (Cambridge: Cambridge University Press, 2005), p.103.

²⁷ *ibid.*, p.105.

²⁸ *ibid.*

²⁹ 'R v George Chaplin', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

committed the violence after “extreme provocation” of finding his wife drunk in the house with a woman known to be a prostitute and another man.³⁰ His wife Catherine gave evidence but remembered little of the assault describing herself as being “insensible”.³¹ She could not explain, under cross-examination, who the woman or man were or how the alcohol had found its way into the house.³² The court showed “merciful consideration” towards Chaplin, sentencing him to only one month in the gaol despite inflicting what was described as a “very serious personal injury” to his wife.³³

Hariata Tarangiawa’s case demonstrates that some Māori women appeared in the courts in cases of violent crime. Māori women came into contact with the criminal courts in important and significant ways, including as witnesses. In late 1842, a Māori woman named Rangihaua Kuika and her eighteen-month-old son were found brutally murdered in Cloudy Bay just outside of Blenheim.³⁴ Rangihaua Kuika was the wife of whaling boss James Wynen. Samuel Ironside, the Wesleyan missionary at Cloudy Bay wrote that “I should judge some European has *lusted* after her, and finding her unwilling to consent had *forced* her, and found it necessary to *murder* her in order to conceal the crime.”³⁵ Another Māori woman named Kataraina told the local Māori community that her husband, Richard Cook an employee of whaler John Guard, had committed the murders.³⁶ The Māori community wished to commit utu immediately but were convinced by Samuel Ironside to let the matter be dealt with by the British courts.³⁷ In 1843 when the case reached the Supreme Court, “Ironside’s

³⁰ ‘Supreme Court’, *New Zealander*, 6 September 1848, p.2.
<https://paperspast.natlib.govt.nz/newspapers/NZ18480906.2.6>.

³¹ *ibid.*

³² *ibid.*

³³ ‘R v George Chaplin’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

³⁴ Shaunnagh Dorsett, *Juridical Encounters* (Auckland: Auckland University Press, 2017), p.112.

³⁵ Richard Boast, ‘In the Waitangi Tribunal: In the Matter of The Te Ihu Inquiry (Wai 785)’, *Kensington Swan*, 11 June 2003, pp.3-4.

³⁶ Dorsett, *Juridical Encounters*, p.112; Boast, pp.3-4.

³⁷ Dorsett, *Juridical Encounters*, p.112.

own credibility and the Treaty of Waitangi itself were all ‘on trial with Cook’”.³⁸ Kataraina went to take the stand against her husband but was stopped by her husband’s barrister as wives could not give evidence against their husband unless it was a case of domestic violence. The Crown prosecutor had assumed that Cook and Kataraina were not lawfully married.³⁹ Samuel Ironside was called to testify that he had performed the marriage between the couple and Chief Justice Martin was forced to rule that Kataraina and Cook were legally married under British law, and thus she could not give evidence.⁴⁰ As the case rested on her testimony Cook was acquitted, leaving local Māori outraged.⁴¹ Richard Boast argues that the tension born out of the failure of the British legal system to protect Māori in the Cook case was directly linked to the Wairau Affair that occurred later in 1843, the first significant armed conflict between Māori and British settlers after the signing of the Treaty of Waitangi.⁴² If Kataraina had been allowed to give evidence she may have been the first woman in the Supreme Court to do so in New Zealand. According to *New Zealand’s Lost Cases Project* the first woman witness did not appear on the stand until at least a year after the Cook case in 1844.⁴³

New Zealand was unique amongst British colonies in allowing indigenous unsworn testimony in the courts. Traditionally an oath was required to be taken before a witness’s testimony was given. Witnesses held up their hand and repeated the phrase, “I swear by Almighty God, as I shall answer to God at the great day of judgement, that I will speak the truth, the whole truth and nothing but the truth.”⁴⁴ Or some version of this. Damen Ward

³⁸ Boast, p.4.

³⁹ *ibid*, p.5.

⁴⁰ Dorsett, p.113.

⁴¹ *ibid*.

⁴² Boast, p.6.

⁴³ *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁴⁴ The Oaths Act 1890 s.2.

explains that law officers in England in the 1830s and 1840s considered the rules relating to unsworn evidence as “fundamental elements of British jurisprudence that colonial legislatures could not amend.”⁴⁵ Witnesses could be tried for perjury if they did not tell the truth.

Margaret Reardon, the only woman to be sentenced to transportation in New Zealand, was sentenced accordingly because she committed perjury in a murder trial.⁴⁶ According to *New Zealand’s Lost Cases Project* four other women were also charged with perjury in New Zealand prior to 1870.⁴⁷ Common law required witnesses to have a degree of religious knowledge in order take an oath. This stemmed from the belief that a witness had to be able to “perceive future moral or religious consequences to giving false testimony.”⁴⁸ Since *Omichund v Barker* in 1744 where an Indian merchant who believed in a god was allowed to take the oath, India had allowed ‘infidels’ to swear and give evidence as “the substance of the oath predates Christianity”.⁴⁹ In 1858 at the Christchurch Supreme Court an Indian man was allowed to swear upon the Koran.⁵⁰ Whilst still under the jurisdiction of New South Wales, the New Zealand Land Claims Act was passed making provision for Māori unsworn testimony in order to investigate who had acquired land from Māori prior to signing of the Treaty of Waitangi.⁵¹ This was unlike New South Wales, where an ordinance for the unsworn testimony of Aboriginal people had been rejected in 1840. Later, Governor Robert Fitzroy, who had replaced the late Governor William Hobson in 1843, wished to assimilate and

⁴⁵ Damen Ward, ‘Imperial Policy, Colonial Government, and Indigenous Testimony in South Australia and New Zealand in the 1840s’, in Shaunnagh Dorsett and Ian Hunter (eds.), *Law and Politics in British Colonial Thought* (New York: Palgrave Macmillan, 2010), p.229.

⁴⁶ Kristyn Harman, *Cleansing the Colony: Transporting Convicts From New Zealand To Van Diemen’s Land* (Dunedin: Otago University Press, 2017), pp.164-165; Simpson, ‘R v Margaret Reardon: Supreme Court Auckland, 1 September 1848’, *Victoria University of Wellington Law Review*, Vol. 41, no. 1, 2010, pp.99-106.

⁴⁷ *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁴⁸ Damen Ward, ‘Imperial Policy, Colonial Government, and Indigenous Testimony in South Australia and New Zealand in the 1840s’, p.229.

⁴⁹ Dorsett, “‘Destitute of the knowledge of God’”: Māori Testimony Before the New Zealand Courts in the Early Crown Colony Period’, in Diane Kirkby (ed.), *Past Law, Present Histories* (Acton: ANU Press, 2012), p.41.

⁵⁰ ‘R v Goodren’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁵¹ It was not until Australia passed the Evidence Further Amendment Act in 1876 that unsworn evidence was allowed in their courts, see Evidence Further Amendment Act (Australia) 1876; New Zealand Land Claims Act 1840 (NSW).

familiarise Māori with the British legal system by allowing them to give unsworn evidence.⁵² There was a desire amongst some Māori to use the courts to advance their interests and address grievances they had with Pākehā.⁵³ Thus in the Evidence Act 1843 the measure of allowing Māori to give unsworn testimony was solidified further.⁵⁴

In criminal cases Māori women appeared in the same capacities as settler women: as victims, defendants and witnesses. No woman's experience as a witness was the same, with women's social and legal position varying greatly, as did their perceived aptness as witnesses and their own experience of encounters with the court system. But court records go a long way, as Lachy Paterson and Angela Wanhalla argue, to expose "the degree to which [Māori women] understood the law, and how the legal system treated their testimony."⁵⁵ Māori encountered their own set of challenges when appearing as witnesses in the courts. Language barriers could impede participation and having a skilled interpreter was vital for Māori to operate within the courts and to obtain justice.⁵⁶ It is possible that the issue went beyond simply being able to narrate their version of events. Katherine Stevens argues when looking at native participation in the colonial courts of Fiji, New Caledonia and New Hebrides, proficiency "in speaking the language of the courtroom, including responding to the appropriate social, cultural and legal cues and expectations, was an important part of a successful performance as a trustworthy victim, defendant or witness."⁵⁷ It is possible that Hariata Tarangiawa did not understand the language of the court in this way when appearing as a witness. But these issues were complex, Paterson and Wanhalla have found, when

⁵² "Destitute of the knowledge of God", pp.39-57.

⁵³ Dorsett, 'How Do Things Get Started? Legal Transplants and Domestication: An example from Colonial New Zealand', *New Zealand Journal of Public and International Law*, Vol. 12, no. 1, 2014, p.111.

⁵⁴ *ibid*; Evidence Act 1843; Ward, 241.

⁵⁵ Lachy Paterson and Angela Wanhalla, *He Reo Wāhine: Māori Women's Voices from the Nineteenth Century* (Auckland: Auckland University Press, 2017), p.229.

⁵⁶ *ibid*, p.232.

⁵⁷ Katherine Stevens, 'Criminal justice, race and gender in the colonial southwest Pacific, 1880-1920', PhD Thesis, University of Cambridge, 2014, p.164.

looking at a sexual violence case involving Māori defendants in 1865, that racial “amalgamationist philosophy worked against the interests of the female victim in sentencing”, Justice Johnston passed a light sentence on the men citing the perceived ignorance of British law.⁵⁸ At other times the race of the defendant, witness or victim, was put on trial as much as the crime itself.⁵⁹

In 1869 six Māori women caused a sensation in the press as they took the stand as Crown witnesses. The 1860s had seen an intense decade of fighting between Māori and the Crown.⁶⁰ Out of the turmoil and after escaping imprisonment on the Chatham Islands, Te Kooti Arikirangi Te Turuki emerged as a Māori guerrilla leader and prophet who in 1868 would lead the “ultimate confrontation between Māori and the Crown.”⁶¹ Matene te Karo, Rewi Tamanui Totitoti and Hetariki te Oikau were among the men who appeared before the Supreme Court in Wellington charged with rebellion and being followers of Te Kooti.⁶² The proceedings were an ordinary criminal case, they were also political trials following the passing of the Disturbed Districts Act in August 1869 which allowed judges to sentence

⁵⁸ Paterson and Wanhalla, *He Reo Wāhine*, p.236.

⁵⁹ Martin Wiener highlights the complex ways that class and geographical understandings of race operated in courtrooms around the British Empire. Whilst analysing criminal cases in Queensland from 1869 to 1889 he comments that understanding the events on trial and the defendant’s behaviour were determined by understandings of “a mental framework of racial, and geographical difference.” See Wiener, *An Empire on Trial: Race, Murder and Justice Under British Rule 1870-1935* (Cambridge: Cambridge University Press, 2009); Barrington Walker, *Race on Trial: Black defendants in Ontario’s criminal courts 1858-1958* (Toronto: Toronto University Press, 2010); Heather Holst, ‘Equal Before the Law? The Chinese in the Nineteenth-Century Castlemaine Police Courts’, *Journal of Australian Colonial History*, Vol. 6, 2004, pp.113-136; Pamela Scully, ‘Rape, Race and Colonial Culture: The Sexual Politics of Identity in Nineteenth-Century Cape Colony’, *The American Historical Review*, Vol. 100, no. 2, pp.335-359; Chandra Mallampalli, *Race, Religion and Law in Colonial India: Trials of an Interracial Family* (Cambridge: Cambridge University Press, 2011).

⁶⁰ Judith Binney, Vincent O’Malley and Alan Ward, ‘War and Survival’, in Atholl Anderson, Judith Binney and Aroha Harris, *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), pp.228-252; Vincent O’Malley, *The New Zealand Wars: Ngā Pakanga o Aotearoa* (Wellington: Bridget Williams Books, 2019).

⁶¹ Binney, O’Malley and Ward, ‘War and Survival’, p.274.

⁶² The men were tried in batches. The law also did not recognize the term rebellion and thus they were officially charged with high treason. See, ‘R v Matene te Karo, Rewi Tamanui Totitoti and Hetariki te Oikau’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

Māori to death for high treason, sending a strong message of what could occur if you were disloyal to the Crown.⁶³

The six women witnesses were intimately connected to the case. Two of the women, Riria Kiamare and Wikitoria Topa, were wives of men who had also been followers of Te Kooti, escaping with Te Kooti from the Chatham Islands. Their husbands had subsequently been executed by Te Kooti.⁶⁴ Three of the women, Ema Koitipa, Maraea Morete (Maria Morris) and Miriama Whakahira were widows whose husbands had been killed by Te Kooti and his men during the fighting at Patutuahi, north of Gisborne.⁶⁵ The sixth woman was Maata Te Owai, Te Kooti's second wife.⁶⁶ Five of the six women had strong motives to give evidence for the Crown as retribution for their husbands' deaths. Whilst Maata Te Owai declared on the stand that Te Kooti had "deceived her."⁶⁷ Judith Binney has noted the "vindictiveness" with which Maata gave her evidence.⁶⁸ Binney, as well as Paterson and Wanhalla, have noted that the testimonies in the high treason cases "were hardly disinterested statements. Being implicated in a rebellion could result in being excluded from land shares through the Native Land Court."⁶⁹ But these young women were also giving evidence for the Crown in cases that could, and did, end up seeing Māori executed. They were putting themselves at great risk of being ostracised by their kin, iwi, hapū or communities. Nevertheless, Paterson and Wanhalla argue that the women witnesses "were happy to testify

⁶³ Disturbed Districts Act 1869.

⁶⁴ 'R v Matene to Karo, Rewi Tamanui Totitoti and Hetariki te Oikau', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁶⁵ *ibid.*

⁶⁶ They had married on the Chatham Islands in 1867. See, Binney, *Redemption Songs: A life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press and Bridget Williams Books, 1995), p.17; Binney, *Stories Without End: Essays 1975-2010* (Wellington: Bridget Williams Books, 2010), p.25.

⁶⁷ 'R v Matene te Karo, Rewi Tamanui Totitoti and Hetariki te Oikau', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁶⁸ Binney, *Redemption Songs*, p.92.

⁶⁹ Paterson and Wanhalla, *He Reo Wāhine*, p.108.

– in order to identify those accused of killing loved ones.”⁷⁰ Paterson and Wanhalla have used women’s testimonies in the high treason cases as a source in which to enlighten understandings of Māori women’s experiences of the fighting between Māori and the Crown. Testimonies are “perhaps the most significant source of accessing women’s views on war, as well as their experiences of it.”⁷¹ Paterson and Wanhalla suggest that the women’s testimonies, “do not impart a clear sense of temporal progression – what appears to be a short period of time could in fact be weeks – their accounts do provide a sense of what they experienced.”⁷² These experiences included such things as the strict discipline the women were subject to alongside the men who were fighting.⁷³ What has been less analysed is how the courts treated their evidence in these highly political and charged cases.

The women’s testimonies focussed largely on the agency of the men fighting under Te Kooti with Maata Te Owai explaining the authority that Te Kooti held over his followers.⁷⁴ The circumstances surrounding the case and the possibility of the defendants’ executions meant it attracted a large amount of attention in the colony. Māmari Stephens has argued that the courtroom is not dissimilar to the performative and ritualistic space of the marae as both are places of storytelling. On the marae, as in the courtroom, participation is gendered. However some Māori women would have spoken at rūnanga and operated in the role of witnesses within Māori methods of control and justice.⁷⁵ In the settler space of the Supreme Court the six women added to the high levels of theatrical court drama which the

⁷⁰ *ibid.*

⁷¹ *ibid.*, p.73.

⁷² *ibid.*, p.104.

⁷³ *ibid.*, p.105.

⁷⁴ ‘R v Matene to Karo, Rewi Tamanui Totitoti and Hetariki te Oikau’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁷⁵ Māmari Stephens, “‘Tame Kaka Still?’ Māori Member and the Use of Māori Language in the New Zealand House of Representatives’, *Law Text Culture*, Vol. 14, no. 1, 2010, pp.220-246.

press reported on keenly with a large number of Māori present as spectators in the courtroom.⁷⁶

The settler newspapers praised the women for their testimonies and the clarity in which they delivered them. The *Evening Post*, commenting on Riria Kiamare, noted that “the witness Rira was severely cross-examined. . . but without shaking her evidence in the slightest degree, in fact rather confirming it. . . She gave her evidence very clearly, and related her adventures naively.”⁷⁷ The clarity with which the women gave their evidence was a welcome surprise for the Crown and the Crown’s supporters. The *Wellington Independent* commented:

The clearness and evident truthfulness with which they told their tale carried conviction to the minds of all who heard it. It is interesting to notice how much more self-possessed and clear in giving evidence the Maori witness is, as a rule, compared with the European. This is probably owing to the Maori habit of observing the minutiae of every day’s occurrences, and chattering them over before the camp fires at night.⁷⁸

The women appearing for the Crown would have won them favour in the colonial press as participation in the legal system was seen as a way in which to show loyalty to the Crown as well as evidence of civility and expected colonial subjecthood.⁷⁹

The women’s appearance was also a focus of attention and commentary. The attention towards female witnesses’ appearance and the inspection of their physical being for signs of

⁷⁶ ‘R v Matene to Karo, Rewi Tamanui Totitoti and Hetariki te Oikau’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁷⁷ Binney, *Redemption Songs*, p.128.

⁷⁸ ‘General Summary’, *Wellington Independent*, 2 October 1869, p.4. <https://paperspast.natlib.govt.nz/newspapers/WI18691002.2.16>.

⁷⁹ Ward, p.230; Wanhalla, ‘Interracial Sexual Violence in 1860s New Zealand’, *NZJH*, Vo. 45, no. 1, 2011, p.73.

truth was common conduct. Methods of appraising content were “carried over into the visual examination” of appearance as evidence and came to be read in “tandem” with the content of a woman’s testimony.⁸⁰ Riria was described as “rather a pleasant looking woman, of about 30 years of age, very quiet and self-possessed, but with a somewhat care-worn look.”⁸¹ Whilst Wikitoria was reported as being “a little, oldish woman, with nothing remarkable about her appearance.”⁸² Maata’s testimony and appearance received the most attention as she was described as having “a better means of getting information” being married to Te Kooti.⁸³ She would become a star witness for the Crown in multiple cases as well as in the Native Land Court, where she was given the task of naming supporters of Te Kooti in order for the Crown to deny them ownership of land.⁸⁴ The press reported her as being “considerably the youngest of the witnesses, and is far from bad looking. Her features are small and regular, and she has more of an Asiatic than a Maori appearance. A red and white scarf twisted in her hair sets off her rather peculiar style of face to advantage.”⁸⁵ The focus on the women’s appearance may have stemmed from the distrust of women’s testimony that saw the jury, judge and spectators, and as an extension, readers of the newspaper reports, to seek other methods of analysing them in order to find signs of truthfulness or deception.

Scrutiny was a regular experience of women on the stand in criminal cases, but most acutely in cases involving sexual violence. In the early nineteenth century the British courts came to define rape as a violent crime.⁸⁶ The history of sexual violence in the British courts

⁸⁰ Katherine Fischer Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton: Princeton University Press, 1993), pp.39-40.

⁸¹ ‘This Day’, *Evening Post*, 21 September 1869, p.2. <https://paperspast.natlib.govt.nz/newspapers/EP18690921.2.9>.

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ Binney, *Redemption Songs*, p.128.

⁸⁵ ‘This Day’, *Evening Post*, 21 September 1869, p.2. <https://paperspast.natlib.govt.nz/newspapers/EP18690921.2.9>.

⁸⁶ Elizabeth Kolsky, “‘The Body of Evidencing the Crime’”: Rape on Trial in Colonial India, 1860-1947’, *Gender & History*, Vol. 22, no.1, 2010, p.111.

largely involves the silence of women's voices.⁸⁷ Cases coming before the courts were rare and prosecution even rarer. Until 1841 a mandatory death sentence was carried out if a defendant was found guilty of rape.⁸⁸ In theory then, British jurisprudence viewed rape as one of the gravest crimes a person could commit. Whilst in practice the harshness of the sentence led the courts to being overly cautious about prosecuting.⁸⁹ Martin Wiener has found that most victims of sexual violence in Britain were from the lower classes and did not have the financial means to take the matter through the courts.⁹⁰ The shame of making a complaint coupled with the dirty tactics involved in defence, such as the bribing of witnesses, meant that the number of sexual violence cases in the British courts remained low.⁹¹ Nevertheless, Wiener argues that when they did come before the courts in the second half of the nineteenth century, the complaints were taken seriously, leading to an increased rate of convictions.⁹²

In New Zealand most women who appeared on the stand in cases involving sexual violence were white settlers. Little attention was paid to the sexual violation of Māori women unless they were the wives of respectable settlers.⁹³ Sexual violence against Pākehā women on the other hand seems to have been viewed with major concern as it “violated the developing principles of a middle-class mind-set that emphasized the moral purity of women and the importance of protecting that purity through social and legal means.”⁹⁴ Settler women's purity, far from being protected though, was put on trial, with the burden of proof being

⁸⁷ Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England 1770-1845* (London: Pandora, 1987).

⁸⁸ Substitution of Punishments for Death Act 1841, s.3.

⁸⁹ Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge: Cambridge University Press, 2004), pp.76-122.

⁹⁰ *ibid*, p.79.

⁹¹ *ibid*, pp.76-122.

⁹² *ibid*.

⁹³ Reflecting also the experience of Aboriginal women in Australia see, Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand', p.77.

⁹⁴ Erin Ford Cozens, 'Our Particular Abhorrence of These Particular Crimes: Sexual Violence and Colonial Legal Discourse in Aotearoa/New Zealand, 1840-1855', *Journal of the History of Sexuality*, Vol. 24, no. 3, 2015, pp.379-380.

placed on the female plaintiff. Her purity, respectability and character was often brought into question whilst she was on the witness stand in an attempt by the defence to break apart her credibility.⁹⁵

In 1865 Mary McPherson, a domestic servant from the Wairarapa, took the stand to give evidence in the Wellington Supreme Court of the sexual assault she suffered at the hands of Peter Nivon.⁹⁶ After her initial statement the defence counsel, Patrick Buckley, harshly cross-examined Mary in an attempt to establish that the encounter was consensual rather than an assault. Mary firmly denied this suggestion.⁹⁷ The report of her testimony whilst under cross-examination follows:

[Mary:] The prisoner courted me, but I don't care for men. . .The prisoner had pulled me about and kissed me before. I have been to the prisoner's tent. He helped me to look for the cows, and he began pulling me about. I struggled, and he pulled all the bands out of my petticoats. When the prisoner came to me on the 17th November, I chaffed him, but I didn't poke him in the ribs with a broom handle. I never put my arms round his neck on the 17th November. When I was sitting on his knee he did nothing to me. But he asked me why I had not gone to meet him some time before? to which I replied that I was poorly. (Mr Buckley here pointed out various discrepancies between the witness' statement and the depositions.) Examination continued: When the prisoner had hold of me on the sofa, I asked him to let me go. He didn't tear my clothes. I could not kick him, as he was above me. I could not get away from him and run away. The door was shut, but I did not shut it, and I never asked him to come into the yard with me. (Mr. Buckley here pointed out another discrepancy in the evidence.)⁹⁸

Peter Nivon was found guilty of common assault but not rape, and was sentenced to twelve months imprisonment without hard labour.⁹⁹

⁹⁵ *ibid*, p.398; Paterson and Wanhalla, p.236; Macdonald, 'Crime and Punishment in New Zealand', p.17.

⁹⁶ 'R v Peter Nivon', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁹⁷ *ibid*.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

Defence counsel were becoming talented actors as they cross-examined witnesses “skilfully and aggressively” in an attempt to attack the prosecutrix’s credibility and sway the jury towards acquittal.¹⁰⁰ Prisoners who defended themselves also applied these methods towards women witnesses, although they were less successful in executing them. In 1865, John McGrath and William Poe were put on trial for the sexual assault of Mary Shepperson.¹⁰¹ McGrath cross-examined Shepperson in an effort to display that she was a consenting party in what the *New Zealand Herald* labelled “a very lame defence.”¹⁰² Both men were found guilty and sentenced to six months in prison with hard labour.¹⁰³ In the first sexual violence case brought in the colony in 1846, Henry Hodges attempted to imply whilst cross-examining Ann Cording that she was a consenting party and had also been drinking at the time of the assault rendering her memory unreliable.¹⁰⁴ She firmly stated that “you threatened me, and that was sufficient to prevent me calling for assistance; I had only one glass of brandy and water. . .If I take brandy it brings on spasms; I was perfectly in my senses at the time.”¹⁰⁵ Hodges was found guilty and sentenced to transportation for life.¹⁰⁶

In 1869 Margery McDonnell gave evidence which outlined the sexual assault she suffered by Patrick O’Rourke, who had snuck into her bedroom when her husband was downstairs.¹⁰⁷ Her lack of resistance to the assault was questioned by the defence counsel. Under cross-examination she stated, “I had a momentary impression that the man was my husband, but I was not properly conscious at first. Till I became aware that it was not my

¹⁰⁰ Wiener, *Men of Blood*, p.84.

¹⁰¹ Auckland Crown Book, 1865-1870, BBAE A792 5637 Box 1, ANZ, Auckland.

¹⁰² ‘Supreme Court – Criminal Sitings’, *New Zealand Herald*, 8 September 1865, p.5.
<https://paperspast.natlib.govt.nz/newspapers/NZH18650908.2.18>.

¹⁰³ Auckland Crown Book, 1865-1870, BBAE A792 5637 Box 1, ANZ, Auckland.

¹⁰⁴ ‘R v Henry Hodges’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹⁰⁵ *ibid*; Harman, p.127.

¹⁰⁶ *ibid*.

¹⁰⁷ ‘R v Patrick O’Rourke’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

husband, I offered no resistance; I was unable to call out; the pressure on my throat was too great.”¹⁰⁸ The defence argued that sufficient proof of the crime could not be established given “the question whether there had at any time been, on the part of the woman, ‘conscious acquiescence.’”¹⁰⁹ After only a “moment’s consideration” the jury returned a verdict of guilty.¹¹⁰ Justice Johnston remarked that there was “something very shocking in this, having a man about a house, a respectable married woman in her bed and her husband below stairs, and such a crime committed in such a bold manner.”¹¹¹

Marriage was indeed central to women’s credibility on the stand in sexual violence cases. In 1862 at the Dunedin Supreme Court when Mary Ann Smith took the stand in a case of rape against Michael Malony and Patrick Kinnary, her recent marriage was questioned by the defence counsel.¹¹² It was suggested that the nuptials had taken place in order for her to appear more creditable as Mary and her husband had taken the opportunity to get married when Mary was called to Dunedin to give evidence in the rape case.¹¹³ The defence also questioned her presence on the Otago goldfields, where in the 1860s single immigrant women were regarded as being susceptible to prostitution and causing the spread of venereal disease and other immoral behaviour.¹¹⁴ One newspaper noted that “females on the diggings were generally suspected of being loose; but Mrs Smith was not more talked about than others.”¹¹⁵

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² ‘R v Michael Malony and Patrick Kinnary’, *New Zealand’s Lost Cases Project*;

<https://www.wgtn.ac.nz/law/nzlostcases/>.

¹¹³ ‘Supreme Court Criminal Business’, *Otago Witness*, 24 October 1862, p.2.

[https://paperspast.natlib.govt.nz/newspapers/OW18621024.2.4](https://paperspast.natlib.govt.nz/newspapers/OW18621024.2.4;);

¹¹⁴ Catherine Coleborne, ‘Insanity, Gender and Empire: Women living a “Loose Kind of Life” on the Colonial Institutional Margins’, *Health and History*, Vol. 14, no. 1, 2012, p.82; Macdonald, ‘The “Social Evil”’ in Barbara Brookes, Charlotte Macdonald and Margaret Tennant (eds.), *Women in History: Essays on European Women in New Zealand* (Wellington: Allen & Unwin, 1986), pp.13-34.

¹¹⁵ ‘Supreme Court Criminal Business’, *Otago Witness*, 24 October 1862, p.2.

<https://paperspast.natlib.govt.nz/newspapers/OW18621024.2.4>.

Although defence counsel were quick to jump upon the opportunity to stain a woman's character, it did not always follow that the judge, jury and public were as quick to believe them. In the case of Mary Ann Smith, her attackers were found guilty.¹¹⁶ Wiener argues that in England married female victims with good reputation were most likely to succeed in the courts in cases of sexual violence, but their experience on the witness stand was often no different to single female witnesses.¹¹⁷ Mary Ann Smith may not have been of good reputation like Margery McDonnell was, but both women were married and had success finding justice in the courts. Both women however were subject to rigorous cross-examination by defence counsel, suggesting that Wiener's findings can be extended to women's experiences in the courts as witnesses in New Zealand.

An additional factor in Mary Ann Smith's case was the presence of medical evidence. A doctor testified that she had experienced with extreme violence.¹¹⁸ Attitudes towards evidence in rape cases had been significantly altered by the writings of seventeenth-century jurist Sir Matthew Hale.¹¹⁹ The "Hale warning" which it came to be known, was spoken in courtrooms as late as into the 1980s and included the line that rape "is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho' never so innocent."¹²⁰ Hale emphasised a requirement for physical proof on the woman's body that a violation had taken place, as well as the interrogation into her past sexual history, creating a culture where women who appeared on the witness stand were put on trial as much as the defendant themselves.¹²¹ The rise of medical evidence in nineteenth-century rape cases to

¹¹⁶ 'R v Michael Malony and Patrick Kinnary', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹¹⁷ Wiener, *Men of Blood*, p.85.

¹¹⁸ 'Supreme Court Criminal Business', *Otago Witness*, 24 October 1862, p.2. <https://paperspast.natlib.govt.nz/newspapers/OW18621024.2.4>.

¹¹⁹ Kolsky, p.110.

¹²⁰ *ibid*, p.111; Hale's writings were published posthumously. See, Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (London: Sollom Emlyn, 1736), p.634.

¹²¹ Kolsky, p.111; Hale, p.628.

prove lack of consent and evidence of violence became “the cornerstone of any rape case, and without it there was little apparent chance of success.”¹²² Whilst there were instances of women’s testimony being believed unaccompanied by medical testimony, they were rare and often required performative displays of distress and emotion.¹²³

The focus on physical evidence redirected the courts’ attention away from the narrative of the witness. Instead her body and not her words were examined by a male doctor and the courts to establish truth.¹²⁴ Tony Severinsen has found that “no other testimony appeared to be given more credence than that provided by a doctor in a case of sexual assault, particularly when the charge was rape.”¹²⁵ The authority given to the white, male medical voice, coupled with the use of Hale’s attention to physical evidence and heavy handed defence tactics, implied that a culture in the New Zealand courts existed where “hierarches of knowledge and reliability” surrounding incidences of sexual violence was accepted and where the voice of the female witness sat at the bottom.¹²⁶ Wiener argues that after 1841 Hale’s philosophy of evidence was largely abandoned in Britain.¹²⁷ But Elizabeth Kolsky has found that the same cannot be said in colonial India.¹²⁸ Nor does it hold true for colonial New Zealand, where the interrogation of the woman witness, the reading of her body and medical testimony to provide physical proof of violation of the victim remained a crucial part of sexual violence cases.

¹²² Tony Glen Severinsen, “Easy to charge, hard to disprove” Responses to sexual assault on women in New Zealand, 1860-1910’, MA Thesis, Victoria University of Wellington, 1995, p.92.

¹²³ In the 1862 the sexual assault case of Isabella Hoyes was heard at the Auckland Supreme Court, where Chief Justice George Arney was so taken by Hoyes display of suffering he ruled that there could be no doubt as to her truthfulness. See ‘R v John Hoolahan’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹²⁴ After the Offences Against the Person Act 1861, the emission of semen was no longer required in order to prove rape but resistance to the attack still was.

¹²⁵ Severinsen, p.92.

¹²⁶ Stevens, p.176.

¹²⁷ Wiener, *Men of Blood*, p.76-112.

¹²⁸ Kolsky, p.111.

Women did not solely appear in the courts as witnesses in cases where men were the perpetrators. They also appeared in cases where violence had been committed by women. From 1889 offenders under the Criminal Evidence Act were allowed to take the stand in their own defence.¹²⁹ As what was discovered in cases of petty crime, in violent criminal cases most female defendants maintained a silent role in legal proceedings. New Zealand's most famous murderess Williamina 'Minnie' Dean was one these women. The only woman ever executed in New Zealand, Dean was a 'baby farmer' from Winton, Southland who was tried, convicted and hung in 1895 for the murder of Dorothy Edith Carter, one of the children in her care.¹³⁰ 'Baby farming' was a practice in which women took children into their care for money, either permanently or for a short period. The practice was seen by some as a way for women to abandon unwanted offspring and become "displaced from their traditional roles" of wife and mother.¹³¹ An article in the *Southland Times* called the children in Dean's care, "the offspring of moral guilt".¹³² Exaggerated portrayals of "morally debased" 'baby farmers' were not uncommon in the press as the court cases served not only as entertainment but also as a public warning about what was considered to be 'unnatural' behaviour.¹³³ Dean was no exception to this as the press described her as "cold-blooded", "wicked" and as a "monster".¹³⁴

Although often heavy handed, barristers had to tactfully interrogate female witnesses without being seen to bully them. But given the demonisation of Dean in the press it was

¹²⁹ Criminal Evidence Act 1889.

¹³⁰ Lynley Hood, *Minnie Dean: Her Life & Crimes*, (Auckland: Penguin Books, 1994).

¹³¹ Annie Cossins, *Female Criminality: Infanticide, Moral Panics and the Female Body* (Hampshire: Palgrave Macmillan, 2015), p.3.

¹³² Hood, p.185.

¹³³ Cossins, p.3.

¹³⁴ Hood, pp.185-192.

doubtful that this balance would be found, or even matter. According to evidence put forward by Lynley Hood, Dean was eager to testify but she relented once she realised the depth in which the Crown would question her.¹³⁵ Defendants and their counsel also had to be strategic about their method of defence and women's absence on the stand following the Criminal Evidence Act 1889 may have been an effort to bolster the likeability of the female defendant as she performed one of the most ideal traits of womanhood in the nineteenth century, silence. It is also possible that lawyers felt they could better articulate the side of the defence and be heard in the male dominated courtroom. Despite Dean being found guilty her defence lawyer Alfred Hanlon, did make an impact as court spectators burst into applause at the conclusion of his address.¹³⁶

Notwithstanding Dean's silence in the courtroom, a significant number of women in her case did take the stand. Of the 47 witnesses who gave evidence, 16 were women.¹³⁷ By the time Dean's case reached the Supreme Court in Invercargill on 18 June 1895, most of these women would have narrated the story of their involvement in the Dean case at least three times, if not more. A day after Dorothy died from an overdose of laudanum, another baby named Eva Hornsby, also died in Dean's care. A Supreme Court case into Eva's death was due to directly follow Dorothy's but Dean's death sentence made it impossible. The witnesses in Dorothy's case at the Supreme Court had thus given evidence at the coroner's inquest into Dorothy's and subsequently Eva's death and that of a skeleton found buried in Dean's backyard not far from the bodies of Dorothy and Eva.¹³⁸ As of 1893 the law did not allow the juries of coroners' inquests to commit a case directly to trial and consequently cases

¹³⁵ Hanlon also had doubts about the truthfulness of what Dean had told him, possibility out of her distrust for authority. See Hood, pp.173-174.

¹³⁶ Hood, p.180.

¹³⁷ Crown Book, 1894-1916, DAFG D504 18923 Box 157, ANZ, Dunedin.

¹³⁸ Hood, pp.129-162.

in which foul play was suspected were then heard in the Magistrate Court.¹³⁹ It meant that by the time the women took the stand in the Supreme Court some of them would have testified to their version of events upwards of four times already. Evidence for the death of Eva was also, much to Hanlon's objection, permitted in the Supreme Court trial into the murder of Dorothy, increasing the number of witnesses that took the stand.¹⁴⁰

The women witnesses in the Dean case can be broken into three groups. The first was made up of hotel inn keepers, servants and the like, who were put on the stand to establish Dean's movements along the Southland railway lines that she had travelled to pick up Dorothy and Eva. They were questioned surrounding the presence of the two babies and of Dean's hatbox which Dean was accused of concealing the girls bodies in.¹⁴¹ In a rather dramatic display of scientific rationale, two sandbags were brought into the court correlating to the weight of each of the girls bodies and put inside a hatbox. Any witness who testified to having picked up the hatbox, which included a number of the women witnesses, were invited by the Crown to pick up the box and compare its weight to that of the box on the day they encountered Dean.¹⁴² It offered an unusual opportunity for women to be included in the scientific evidence which their testimony often sat in opposition to and Hood notes that "they all agreed helpfully" that it was about that weight when they carried it."¹⁴³

The second group was made up of people who personally knew Dean. Esther Wallis, a girl of fifteen years, who had been adopted by Dean in 1890, was recalled and cross-

¹³⁹ Criminal Code 1893.

¹⁴⁰ Hood, p.167.

¹⁴¹ Judge Williams, Judge's Note Book, Circuit Court Invercargill, Civil and Criminal, June 1895- June 1895, DAAC D437 212200 Box 1076, ANZ, Dunedin; 'Winton Child Murders: Trial of Mrs Dean', *Otago Daily Times*, 20 June 1895, p.3. <https://paperspast.natlib.govt.nz/newspapers/ODT18950620.2.30>.

¹⁴² *ibid*; Hood, p.167.

¹⁴³ Hood, p.167.

examined several times to not only recount her memory of Dean arriving home after picking up the girls, but also to testify to the comings and goings of other children from Dean's house at Winton in the years since she had lived there.¹⁴⁴ Margaret 'Maggie' Cameron, a dressmaker from Winton was also cross-examined carefully by Hanlon. Her testimony was sought by the Crown to identify Dean's handwriting. The chemist book in Bluff where she had purchased the laudanum had been signed 'M. Gray' but Maggie maintained on the stand that the handwriting was Dean's and held firm to her claim under Hanlon's cross-examination:

You have no doubt that these letters are in Mrs Dean's handwriting? He asked.

I have no doubt about it.

It is comparatively easy to form an opinion from several pages of manuscript, but the case is different when there are only five letters. Do you mean to tell the court that those five letters were penned by Mrs Dean.

Yes.

Beyond all doubt?

Yes.

You swear to that? What about the capital M?

She always made an M that way.

And what about the G?

She always made a G like that.

But that is not her name.

It is somebody else's name, but her handwriting.

You will swear positively that no other person wrote those words?

Yes.¹⁴⁵

The chemist himself could not confirm Dean as the woman who had bought the bottle of laudanum from him.¹⁴⁶

¹⁴⁴ Judge Williams, Judge's Note Book, Circuit Court Invercargill, Civil and Criminal, June 1895- June 1895, DAAC D437 212200 Box 1076, ANZ Dunedin; 'Winton Child Murders: Trial of Mrs Dean', *Otago Daily Times*, 20 June 1895, p.3. <https://paperspast.natlib.govt.nz/newspapers/ODT18950620.2.30>.

¹⁴⁵ Hood, pp.145-146.

¹⁴⁶ *ibid*, p.146.

The only witnesses whose characters came into question on the stand was that of the third group, which was made of women involved in the practice of ‘baby farming’.¹⁴⁷ The testimony of these morally suspect women was a necessary evil for the Crown’s case but they provided an easy target for the defence to break apart their credibility on the stand. Hood notes that Jane Hornsby, the grandmother of Eva, who was also the person who had handed her over to Dean, did not “stand up well to Hanlon’s vigorous cross-examination.”¹⁴⁸ But the press was not so quick to discredit the women witnesses. Jane Hornsby’s testimony received little mention in the press, the *Southern Cross* was one of the only papers which did pause for thought following her testimony and was more sympathetic than what could be expected, they asked:

What did such things show? They showed that where an unfortunate girl has an illegitimate child it is, under existing social principles, in a manner outlawed. The mother has to do something to hide her shame, because the world looks aghast over her slip—perhaps the only one of her life—and so the poor little child of love has to be sent away—looked after or adopted by someone so that those to whom it belongs may hold up their heads in society, which otherwise would pass them by. That such things could happen proved the rottenness of society.¹⁴⁹

How can the sympathy towards the women witnesses in the press be explained? To answer this question it is necessary to turn to another criminal case, tried in the same year as Dean’s. Annie Brown was put on trial for performing illegal operations on women alongside her husband Henry Brown.¹⁵⁰ Her arrest came following the death of one of their patients in Palmerston North. Although the case does not fit

¹⁴⁷ Judge Williams, Judge’s Note Book, Circuit Court Invercargill, Civil and Criminal, June 1895- June 1895, DAAC D437 212200 Box 1076, ANZ, Dunedin; ‘Winton Child Murders: Trial of Mrs Dean’, *Otago Daily Times*, 20 June 1895, p.3. <https://paperspast.natlib.govt.nz/newspapers/ODT18950620.2.30>.

¹⁴⁸ Hood, p.171.

¹⁴⁹ ‘Charge of Murder’, *Southern Cross*, 22 June 1895, p.8. <https://paperspast.natlib.govt.nz/newspapers/SOCR18950622.2.30>.

¹⁵⁰ Illegal operations in nineteenth-century court cases referred to abortions; *R v Brown* (1896) 15 NZLR 18.

comfortably under the definition of a violent crime, it was a serious crime and the parallels that exist between the two cases in relation to how the courts and the press dealt with the women witnesses helps to analyse treatment towards women witnesses.

Similarly to the Dean case, Brown did not take the stand. But a number of women who had engaged her and her husband's services did. These women were heavily cross-examined by Brown's defence counsel, with suggestions that they had been paid to appear as witnesses.¹⁵¹ But the *Marlborough Express* described them as having "performed a public duty and that their actions would go far to redeeming their characters."¹⁵² The witnesses in the Brown case had come forward voluntarily and were at risk of incriminating themselves on the stand. The defence counsel asked Ann Elliott if she realised that she could go to jail for admitting her guilt on the stand, she replied that she had not realised but did not care, "it was better to tell the truth."¹⁵³ Other women had a better idea of the legal implications of giving evidence. Two years previously Caroline McGovern was charged with performing illegal operations. On the stand a number of women refused to give evidence unless given a pardon.¹⁵⁴ Ann Elliott instead asserted her moral standards by a desire to tell the truth. Looking at the Brown and Dean cases it is possible to deduce that the court and the press held different levels of culpability for women who were engaged in the illegal practices of parting with unwanted pregnancies or children. It appears that witnesses were given an informal public pardon, and at times even a legal pardon, to appear on the stand without social or legal judgement.

¹⁵¹ 'Supreme Court', *Evening Post*, 5 December 1895, p.3.

<https://paperspast.natlib.govt.nz/newspapers/EP18951205.2.40>.

¹⁵² 'A Stiff Sentence', *Marlborough Express*, 21 December 1895, p.2.

<https://paperspast.natlib.govt.nz/newspapers/MEX18951221.2.21>.

¹⁵³ *ibid.*

¹⁵⁴ 'A Charge of Malpractice', *Feilding Star*, 31 August 1893, p.2.

<https://paperspast.natlib.govt.nz/newspapers/FS18930831.2.14>; 'Supreme Court', *South Canterbury Times*, 6 September 1893, p.3. <https://paperspast.natlib.govt.nz/newspapers/SCANT18930906.2.34>.

Criminal cases, especially those involving women perpetrators, drew the curiosity and attention of the public. Sensational literature had become popular in the 1860s with the centrality of female characters in criminal cases becoming a well-established literary trope and as an extension the courts became a place of fascination where private affairs “turned into public spectacles in the theatre of the courtroom. A novel form of real-life drama drew the salaciously inclined . . . the criminal courts also threw the spotlight on to ‘the secret theatre of the home.’”¹⁵⁵ From the 1880s, London based journalist W.T. Stead gave rise to the new journalism. It had found its roots earlier in the century with the increased interest in court reporting of criminal cases from the 1830s, however Stead “exploded sensational and shock journalism far beyond what had been the norm”.¹⁵⁶ Both the sensational literature and the new journalism of the nineteenth century raised awareness and curiosity of crime, with “violent or subversive deeds of criminals [being] carried across the domestic threshold to violate the sanctuary of the home.”¹⁵⁷ In cases of abortion in New Zealand, Brookes notes that even in the 1930s it was the “the subject of whispers at work or over the back fence, came dramatically to public attention whenever an abortionist went on trial.”¹⁵⁸ Violent criminal trials involving women witnesses lent themselves to the performative nature of courtroom drama. Women’s appearance, clothing and demeanour were all put under a microscopic lens in which male members of the court and spectators seemed to take delight in viewing. In 1891 a reporter commented on the “respectable looking” women who turned out at the

¹⁵⁵ Lyn Pykett, *The Nineteenth-Century Sensation Novel* (Liverpool: Liverpool University Press, 2011), pp.1-3.

¹⁵⁶ Nelson O’Ceallaigh Ritschel, *Bernard Shaw, W.T. Stead, and the New Journalism* (Cham: Palgrave Macmillan, 2017), p.10.

¹⁵⁷ Pykett, p.3.

¹⁵⁸ Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), p.198.

Christchurch Supreme Court to view the murder trial of Anna and Sarah-Jane Flanagan, labelling them “horror-hungerers”.¹⁵⁹ He commented:

Let us hope that the time is not far distant when they will never be seen there; when they will vindicate their claim to the title of the gentle sex, and every woman will set an example which will prevent men from regarding so painful a scene as a murder trial as an entertainment. . . a sensitive mind could not be shocked by the general manifestation of morbid curiosity.¹⁶⁰

The public, both male and female, clearly had an interest in the sensational aspects of violent crime and women being involved as defendants, victims or witness only heightened the drama of courtroom theatre.

When women appeared as witnesses in cases of violent crime it increased the curiosity of criminal trials. Violent crime in colonial New Zealand was highly gendered and so too were the discourses, experiences and perceptions of women who appeared on the witness stand to give evidence. Judith Butler’s renowned work on gender performance helps explain the ways in which identity is formed through repeated actions in social rituals, creating naturalised gendered behaviour.¹⁶¹ As Sarah Burgess explains, these “behaviours and actions are not performed consciously by a subject but rather work to create a subject.”¹⁶² It is apparent that women involved in cases of violent crime were expected by the public and the courts to perform conceptions of victimhood, femininity or evilness depending on the circumstances that they appeared in a case. But many witnesses fit awkwardly within these notions with even their verbal participation in the courts going against expected conduct.

¹⁵⁹ ‘Child Murder Case at Christchurch’, *Taranaki Herald*, 3 March 1891, p.3.

<http://paperspast.natlib.govt.nz/newspapers/TH18910303.2.25>.

¹⁶⁰ *ibid.*

¹⁶¹ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).

¹⁶² Sarah Burgess, ‘Ladies of the Empire: Governor’s Wives in New Zealand 1887-1926’, MA Thesis, Victoria University of Wellington, 2015, p.92.

Women's testimonies reveal that women who were involved in domestic violence may have left their marriages or even have shown violence towards their husbands. Sexual violence victims were expected to portray overly performative displays of victimhood and resistance to the assault. But the rise of medical testimony in the nineteenth century coupled alongside the intense concentration of the courts on physical proof of sexual assault laid out by Hale, meant that women witnesses could do little to have their voices heard if their story was not corroborated by a doctor. It created new hierarchies of testimony within the courts which did little to solve the inherent distrust of women's testimony. The Dean and Brown cases illustrates that at times the witness stand became a place of redemption for women, whereby participation in legal proceedings as witnesses was seen as evidence of conformity to the moral and legal code of colonial society. These paradoxical experiences of women on the witness stand reveal the complex ways that women's testimonies were received and operated in cases of violent crime.

Chapter Three

Women and Wives Giving Evidence in Civil Cases and the Native Land Court

Evidence laws within the civil law were amended much earlier than in criminal law. From 1843, the British parliament started to do away with the competency exclusions that had restricted a wife's ability to give evidence in civil cases. These changes also took effect in the New Zealand judicial system. From 1854 the newly formed New Zealand parliament implemented changes on a local level. This chapter will focus on cases of civil disputes, civil actions and cases in the Native Land Court. In these cases women, both married and single, gave evidence in new ways as changes to evidence laws took place in conjunction with the broader transformation of married women's social, economic and legal position.

In 1864 the Dunedin Supreme Court heard a civil dispute concerning the lease of the Union Hotel on Dunedin's Stafford Street.¹ The plaintiff was a man named Joseph Harding who was holding the defendant, George Crowhurst, to a contract signed by the parties. In the contract Crowhurst had agreed to sell the remainder of his lease of the Union Hotel (amounting to seven years) for a sum of £1100.² George Crowhurst maintained that he had not agreed to the terms of the contract and had instead intended to sell only two

¹ 'Harding v Crowhurst', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

² 'Supreme Court – Civil Session', *Otago Witness*, 4 June 1864, p.3.
<https://paperspast.natlib.govt.nz/newspapers/OW18640604.2.6>.

years of the lease.³ George Crowhurst was in debt at the time, a situation he claimed that Joseph Harding and his agent John Harris took advantage of.⁴ George Crowhurst's wife, Sarah Crowhurst, had been present at the hotel when the negotiations between her husband, Joseph Harding and John Harris took place and was called upon to give evidence. She testified as follows:

When Harris said, "Well, Mrs Crowhurst we have got this little matter settled." I asked, "Well how much is it to be." Harris replied, "£1100 for two years" and I said, "Well, I thought you would not get the £1200." Harris said the money was to be paid the next day. My husband and I went back the next day at eleven o'clock, and Harding told us he could not settle with us till two o'clock. We returned at two and stopped till half-past three, when we saw him as we were leaving the house. He asked us to call next morning, which we did. Crowhurst said to him, "well are you prepared to settle this morning," and Harding replied, "I cannot be bothered like this," but he afterwards asked Crowhurst for the lease, saying "you can have the money in an hour and a-half." Crowhurst said he would not give the lease until he got the money. Harding asked him to come back by himself to settle the business. Crowhurst did go by himself afterwards. Some time [sic] after all the row had taken place I met Harris. My mother was also present. I asked him, "Whatever was in that paper you got George to sign?" He [Harris] replied, "If there was anything in it except the L[£]1100 for the two years may my Maker suffer my limbs to drop one from other."⁵

The testimony of Sarah's last meeting with John Harris was corroborated by her mother, Anna Garlick, who also took the stand:

I am the mother of the last witness. I remember, along with my daughter, meeting Harris on the street one day, and we conversed about the articles in this agreement. My daughter said, "What was that you got George to sign at the Union?" He replied he did not know of anything except the agreement for £1100 for two years. If he knew that it was for anything else he wished

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

that his limbs might drop from his body.⁶

Sarah Crowhurst's testimony became vital in Justice Henry Chapman finding in favour of her husband George. Sarah, although having no legal status or property of her own, was evidently involved in the business affairs of her husband. The Union Hotel was a business that they ran as husband and wife and thus she accompanied George to the Union Hotel for the negotiations. It is evident in her conversations with John Harris that she was aware of the expectations that her husband had for the negotiations and even had her own opinions on them, as she was not surprised to find that John Harris could not make Joseph Harding pay the extra £100 that her husband had desired.⁷ But Sarah Crowhurst's testimony also suggests that she was made to sit on the periphery of his business affairs. Although present at the Union Hotel she was not allowed to be present for the negotiations. Sarah had to find out from John Harris the outcome of the disputes. Joseph Harding also requested her not to be present when the transaction took place.⁸

There are several possibilities as to why Sarah was put in this marginal position. Joseph Harding and John Harris may not have been comfortable with discussing matters of business in front of Sarah when conversations about the lease were becoming increasingly heated. It is also possible that the two recognised Sarah's awareness of the business and saw her presence as an obstacle to obtaining their desired outcomes. She may have even been a sharper negotiator than her husband. But as a married woman Sarah Crowhurst's legal status meant that she could not play a larger role in the transactions, unable to sign her name to any documents. The law denied her any formal part in the business transaction

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

and thus also the court proceedings as she appeared as a witness and not as co-defendant. Nevertheless her testimony illustrates how settler women were positioned and participated in the business affairs of their husbands. It appears she was an integral part of the Union Hotel enterprise and that she ran it alongside her husband. The evidence she gave in court was also a fundamental part of the legal proceedings.

The situation was very different if a married woman brought a civil suit to court, or a suit was brought against her. A month prior to Sarah Crowhurst's evidence in the Dunedin Supreme Court Justice Chapman heard the evidence of two women in a civil suit. Helen Potter, a domestic servant, brought a case against her employer Sarah Cargill, seeking £500 damages for slander and assault.⁹ Helen Potter claimed that Sarah Cargill had, on 25 October 1863, thrown a stool at Helen hitting her in the back. Cargill then allegedly yelled at Helen Potter, calling her among other things, a "common whore" in an incident provoked by Helen Potter's interaction with one of Sarah Cargill's children.¹⁰ Helen did not have the legal power in order to bring the suit herself, nor could she bring the legal proceedings against Sarah without bringing them against her husband also. It was one of the curious and often odd situations that Constance Backhouse asserts resulted from the inhibiting and often impractical laws of coverture that led to law requiring Helen's husband, James Potter, to be listed as a co-plaintiff and Sarah's husband, John Cargill, a prominent local politician and runholder, to be listed as a co-defendant in the case.¹¹ But John Cargill, although listed as a co-defendant, did not give evidence in the case on the basis that he did not witness nor have any knowledge of the alleged incident other than

⁹ Judge Chapman, Judge's Note Book, DAAC 21218 D437 Box 875, ANZ, Dunedin; 'Helen Potter and James Potter v Sarah Cargill and John Cargill', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹⁰ Judge Chapman, Judge's Note Book, DAAC 21218 D437 Box 875, ANZ, Dunedin.

¹¹ Constance Backhouse, 'Married Women's Property Law in Nineteenth Century Canada', *Law and History Review*, Vol. 6, no. 2, 1988, p.213.

what his wife had later told him of it.¹² Sarah Cargill, on the other hand, despite being a non-person in the eyes of the law as a married woman, took the stand to tell her version of events.¹³

James Potter, Helen's husband, did give evidence in the case. Justice Chapman recorded in the margins of his notebook that James Potter and Helen Potter's testimony relating to the incident was contradictory. Helen Potter portrayed Sarah Cargill's language as more abominable than what James Potter heard it to be.¹⁴ Helen Potter also testified that Sarah Cargill had called her a thief, something that her husband could not corroborate, although both agreed that Sarah Cargill had thrown a stool at Helen Potter.¹⁵ Nonetheless, the truth of Helen's story was questioned by Justice Chapman. He noted:

There was some difficulty in the matter that the language of the nature described should ever have passed between persons who, in their separate walks of life were respectable. There was a strong moral improbability that Mrs Cargill ever used the words imputed to her, for such language was not common in her circle in life. Neither was it at all probable that a respectable woman of a servant should have used the words imputed to her. It led, in his mind, almost to the inference that there was a quarrel between the two women as to the conduct of their respective children — the most tender point upon which a woman could be touched — a row took place, and high words had passed on both sides, and these words now alleged to have been used were only an exaggeration of what had really passed upon the occasion. Mr and Mrs Potter differ in their evidence, not as to the assault, but as to the words used.¹⁶

¹² Judge Chapman, Judge's Note Book, DAAC 21218 D437 Box 875, ANZ, Dunedin; 'Helen Potter and James Potter v Sarah Cargill and John Cargill', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

¹³ *ibid.*

¹⁴ Judge Chapman, Judge's Note Book, DAAC 21218 D437 Box 875, ANZ, Dunedin.

¹⁵ *ibid.*

¹⁶ 'Supreme Court – Civil Sessions', *Otago Daily Times*, 6 May 1864, p.5. <https://paperspast.natlib.govt.nz/newspapers/OW18640507.2.23>.

Chapman's summary illustrates that notions of womanhood in nineteenth-century New Zealand varied based on a woman's class. Sarah Cargill, who had the financial means to hire a domestic servant, was a middle-class woman and a respected member of Dunedin society as the wife of a politician and a member of a leading family. It was doubtful to Chapman that she could have heard or used the language that Helen Potter claimed. The disparity between the women's social situations is alluded to through the phrase "in their separate walks of life."¹⁷ Although it is noted that both women were respectable, the faith in Helen's testimony was diminished by middle-class standards of respectability, inherited from Britain, where expectations of the purity of women belonging to the middle classes were hard to shake.¹⁸ Chapman did not question how Helen Potter may have heard the language, if not from Sarah. The Potter case illustrates that the courts were a place where class and respectability were on display when witnesses took the stand. It appears that class created a surrogate hierarchy of evidence when a gendered one could not exist. Justice Chapman awarded Helen Potter £40 on the charge of Sarah Cargill throwing a stool at her, but would not award the £500 in damages for slander.¹⁹

Women who appeared on the stand in cases of civil disputes communicate a number of important points to historians. Foremost, that women made up part of New Zealand's economy and thus they too were represented amongst the people who appeared on the stand to give evidence in civil disputes and actions. Further to women's economic work inside the home many women contributed to the economic life of the colony as wage

¹⁷ *ibid.*

¹⁸ Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and women of the English Middle Class 1780-1850* (London: Hutchinson, 1987).

¹⁹ 'Helen Potter and James Potter v Sarah Cargill and John Cargill', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

earners.²⁰ Ample paid work was available for women who were willing to take on positions as domestic servants.²¹ Whilst Barbara Brookes notes that a woman named Susan Waters “set up a store soon after her arrival with her family in 1842. . . Dressmakers were in high demand; indeed, sewing was second, in terms of women’s employment, only to domestic service.”²² Catherine Bishop has emphasised the range of businesses that women were involved in, from shopkeepers, butchers, publicans, brothel keepers, prostitutes, and boarding house keepers.²³ The leading occupations for wage earning women in colonial New Zealand were domestic service, the clothing industry and education, such as being teachers and governesses. Many more women also helped their husbands run farms and even continued to do so after their husbands’ deaths.²⁴ These economic activities flowed on into the courts where women were brought onto the stand to give evidence in cases which were heard under the civil law such as disputes. The Potter case illustrates that women of all class and social backgrounds could become litigious and use the courts as a way to seek redress. Helen Potter may have even thought that her chances of winning damages would be improved. Helen Potter believed that the Cargills could afford to pay the £500 and as members of a prominent and well thought of family. Sarah and John Cargill may have also have wanted to get the legal proceedings out of the way quickly by agreeing to pay the sum. But instead Sarah Cargill used the witness stand as a place in which she could defend

²⁰ Raewyn Dalziel, ‘The Colonial Helpmeet: Women’s Role and the Vote in Nineteenth-Century New Zealand’, *NZJH*, Vol. 11, no. 2, 1977, pp.112-123.

²¹ Charlotte Macdonald, *A Woman of Good Character* (Wellington: Allen & Unwin, 1990), p.107.

²² Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), pp.65-66.

²³ Catherine Bishop, *Women Mean Business: Colonial business women in New Zealand* (Dunedin: Otago University Press, 2019).

²⁴ James Belich, *Making Peoples: A history of the New Zealanders, from Polynesian settlement to the end of the nineteenth century* (Auckland: Penguin, 1996), pp.387-397; Macdonald, *A Woman of Good Character*; L.C. Duncan, “‘A New Song of the Shirt?’ A History of Women in the Clothing Industry in Auckland 1890-1939, MA Thesis, University of Auckland, 1989; Mary Anne Barker, *Station Life in New Zealand* (London: Macmillan, 1870); Sarah Ell, *The Lives of Pioneer Women in New Zealand from Their Letters, Diaries and Reminiscences* (Auckland: Bush Press, 1993).

her actions and rebut the accusations against her by publicly denying to the court all of what Helen Potter said.

Women's presence on the witness stand also highlight the ways the civil law and coverture operated in practice inside the courtroom. How and why women could appear in civil cases was altered greatly by laws relating to women's property and, this chapter will argue, evidence laws. As was discussed in chapter one, upon marriage, women's legal status altered and she and her property were brought under the protection, control and legal identity of her husband. She went from being *feme sole* to *feme covert*.²⁵ Having no individual legal personhood a married woman was not only unable to own property but could not sign contracts without her husband or sue or be sued independently unless in the rare instance where a special agreement or settlement had taken place prior to marriage.²⁶ As William Blackstone aptly summed up "the husband and wife are one person in law; the legal existence of the women is incorporated and consolidated into that of the husband; under whose protection and *covert* she performs everything . . . she can bring no action for redress without her husband's concurrence. . . neither can she be sued, without making the husband a defendant".²⁷ For some women these disabilities upon marriage may have existed in the abstract, not affecting their daily life and thus also not engendering any feelings of dissatisfaction or impairment. It was, as Bettina Bradbury points out, only when things went wrong, that many women confronted their legal incapacities.²⁸ Bishop argues that some women "with supportive husbands who were happy for their wives to be ostensibly acting as their agents the issue of coverture did not arise – unless challenged in

²⁵ 'Femme Sole', *Oxford English Dictionary*; <https://www.oed.com/>; Brookes, p.78.

²⁶ Bettina Bradbury, 'From Civil Death to Separate Property', *NZJH*, Vol. 29, no. 1, 1995, p.44

²⁷ William Blackstone, *Commentaries on the Laws of England* (London: Clarendon Press, 1765), p.105.

²⁸ Bradbury, p.44.

a legal dispute.”²⁹ When legal disputes did occur and women came into contact with the justice system, coverture laws restricted any agency which they had to act independently illustrating the highly gendered nature of the courts.

In contrast to criminal cases, laws relating to evidence under the civil law were modified much earlier. As was highlighted in chapter one, the idea of spouses giving evidence in cases of a non-criminal nature was debated by the British parliament as early as 1843 with the passing of the Evidence Act that year.³⁰ The clause which would have allowed parties and their spouses to give evidence was ultimately declined. The issue was brought up again in 1851 when the Evidence Act was introduced in England, Wales and Ireland and its contents were applied directly to its colonies, including New Zealand.³¹ The Act allowed the plaintiff and defendant to give evidence in civil suits and actions, a stark departure from the criminal law which would not allow defendants to take the stand until 1889 in New Zealand, and not until 1898 in England, Wales and Scotland.³² But the British parliament in 1851 stopped short of allowing wives to take the stand in civil cases in which their husband was a plaintiff or defendant, even if the husband could now take the stand himself.³³ Although the legislation would read that spouses could not give evidence, the debates in the British parliament always centred on the wife giving evidence in cases in which her husband was the party and not the other way round. The inability of a wife to give evidence was fuelled by the belief that a husband had a right to privacy within marriage. It was a deeply embedded concept in British jurisprudence. In a way, wives’ exclusion from giving evidence in civil disputes in which their husband was a party was in

²⁹ Bishop, 58.

³⁰ The Evidence Act 1843 was adopted by New Zealand under the English Acts Act 1845.

³¹ Evidence Act 1851 (England, Wales and Ireland).

³² Criminal Evidence Act 1889; Criminal Evidence Act 1898 (England, Wales and Scotland).

³³ Evidence Act 1851 (England, Wales and Ireland), s.2 & s.3.

conflict with the laws of coverture as it recognised that a husband and wife were separate people. In another way however it can also be seen that it maintained the subordinate position of a wife to her husband, as he but not her, was allowed to speak in court. The language of the law in relation to witnesses lends itself to the latter argument, whereby the party was *competent* to give evidence but a wife was not.

Just two years later in 1853, evidence laws were brought up again in the British parliament. This time it was specifically to address the issue of wives giving evidence. The measure was successfully passed, although still reluctantly by some.³⁴ The intention of the Act was “to make perfect the legislation of 1851, permitting the wife to be a witness with the exception of confidential information and communication.”³⁵ The Act was adopted by New Zealand in 1854 under the English Acts Act.³⁶ Wives could thenceforth take the stand and give evidence in the New Zealand courts in civil cases, thirty-five years before they would be allowed to do the same in criminal ones, and forty-five years before they could do the same in criminal cases in England, Wales and Scotland.³⁷ It confirms the importance of examining women as witnesses according to case types. Evidence laws created unique contexts within the civil and criminal law which allowed women to take the stand, altering the frequency and experience of women as witnesses in the courts.

The 1853 changes to evidence law were implemented out of the pragmatic acceptance that wives’ testimony was often necessary to secure resolutions to civil disputes. When the Evidence 1851 was being passed through the British parliament it was

³⁴Evidence Amendment Act 1853 (England, Wales and Ireland), s.1; *House of Lords, United Kingdom Parliamentary Debates*, 1853, Vol. 127.

³⁵ Lord Brougham, *House of Lords, United Kingdom Parliamentary Debates*, 1853, Vol. 127.

³⁶ English Acts Act 1854.

³⁷ Criminal Evidence Act 1889; Criminal Evidence Act 1898 (England, Wales and Scotland).

noted that there were many cases in which a wife acted as an agent and aid to her husband.³⁸ If he was allowed to give evidence in cases relating to his business, she must be allowed to do the same. Otherwise a shopkeeper's wife could sell goods in her husband's shop, but the law would then prevent her from giving evidence in relation to a transaction if a suit was brought by or against her husband relating to it.³⁹ Under the laws of coverture, the suit could not be brought by or against her directly. Such a situation would most likely lead to the case's dismissal in the courts. Whilst reforming the laws of coverture would have been a more overarching measure to take in relation to these issues, as it would have allowed women to act as *feme sole* within the courts, the British parliament was unwilling to address coverture laws at the time. Nevertheless the parliamentary debates suggest that members of parliament were aware of the unjust situations that the laws of coverture produced and it was through the laws of evidence that some of these particularly awkward situations were rectified.

If George Crowhurst's case had come before the courts prior to 1854 in New Zealand, Sarah Crowhurst would not have been allowed to take the stand and the outcome of the case may have been very different. But in 1864 the laws of coverture still made it impossible for Sarah Crowhurst to be more formally involved in her husband's business endeavours. When Helen Potter and Sarah Cargill met in court in their civil dispute, also in 1864, the laws of coverture stipulated that their husbands had to be listed as a co-defendant and co-plaintiff. It was only on the witness stand that the women could act and speak independently from their husbands and hold the court's attention as an individual person. The law created a paradox in the courtroom whereby although Helen Potter and Sarah

³⁸ Mr Henley, *House of Commons, United Kingdom Parliamentary Debates*, 1851, Vol. 118; Lord Cranworth, *House of Lords, United Kingdom Parliamentary Debates*, 1851, Vol. 118.

³⁹ *ibid.*

Cargill were legally subordinate to their husbands, their testimony surpassed their husbands' in importance and relativity, with John Cargill not even taking the stand.

Māori women's legal position differed greatly from Pākehā settlers, notably in the application of coverture laws. Prior to European arrival it has been suggested that rank and not gender was a determining factor as to who owned property. The notion of 'ownership' of property was not tied to marriage and thus under recognised customary laws following the signing of the Treaty of Waitangi, married Māori women were allowed and continued to own land if their husbands were also Māori.⁴⁰ The Native Lands Act 1869 confirmed that married Māori women could operate in the courts as if they were *feme sole*, 15 years before married Pākehā women could do the same under the Married Women's Property Act 1884.⁴¹

It meant that married Māori women were able to make claims and give evidence in the Native Land Court. Established in 1862 and 1865 under the Native Land Acts, the Native Land Court was designed to create individualised Māori land titles in order to make the land easier for settlers to buy.⁴² Brookes explains that the "type of collective ownership that Māori held was outside the purview of English law. . . traditionally thought of as a communal resource to be nurtured, land became recast in European terms as property, subject to individual ownership."⁴³ The court became a place where oral histories and

⁴⁰ Barbara Brookes and Margaret Tennant, 'Maori and Pakeha Women: Many Histories, Divergent Pasts?', in Barbara Brookes, Charlotte Macdonald and Margaret Tennant (eds.), *Women in History 2: Essays on women in New Zealand* (Wellington: Bridget Williams Books, 1992), p.40.

⁴¹ Native Lands Act 1869; Married Women's Property Act 1884.

⁴² Angela Wanhalla and Lachy Paterson explain that the 1862 Act created the first court, which only met on a few occasions, whilst the 1865 Act shaped the court in what became its permanent structure, see, Lachy Paterson and Angela Wanhalla, *He Reo Wāhine: Māori Women's Voices from the Nineteenth Century* (Auckland: Auckland University Press, 2017), p.38; Richard P Boast, 'The Native Land Court and the Writing of New Zealand History', *Law and History*, Vol. 4, no. 1, 2017, p.145; Native Lands Act 1862; Native Lands Act 1865.

⁴³ Brookes, *A History of New Zealand Women*, pp.54-58.

whakapapa were reconstructed into evidence for a European legal framework and heard by a Pākehā judge in order to establish who had a claim to land.⁴⁴ The scrutiny that the oral histories came under, as well as the interrogation that took place into conflicting narratives, was, according to Richard Boast, not viewed in any different way by judges to evidence that was presented in a regular court trial.⁴⁵ At first European legal norms were often lost on Māori who were unfamiliar with the courts' workings. Strategies started to develop between Māori outside of the court about what evidence each person would give in order to unify stories between iwi and hapū. The use of such strategies is what Ann Parsonson cites as a reason that Māori women rarely appeared to give evidence as "senior women were seldom called on. . . . Forthright and formidable, senior women might have had difficulty supporting some of the strategies of their male relatives."⁴⁶ Whilst it is true that men far outnumbered women as witnesses in the Native Land Court, it is also true that histories have tended to privilege male witnesses as their voices are far more reachable in the archives. In recent years however, women's participation giving evidence in the Native Land Court has started to be researched and acknowledged. Brookes cites Riperata Kahutia, who was "steadfast in her pursuit of land claims in the Poverty Bay area. . . . Riperata's arguments were spirited and compelling. In an 1875 claim, 'She spoke for over an hour without wavering from the subject and with a fervid eloquence that was listened to attentively even by her opponents.'"⁴⁷

⁴⁴ Ann Parsonson, 'Stories for land: Oral narratives in the Māori Land Court', in Bain Attwood and Fiona Magowan (eds.), *Telling Stories: Indigenous history and memory in Australia and New Zealand* (Wellington: Bridget William Books 2001), p.22.

⁴⁵ Boast, 'The Native Land Court and the Writing of New Zealand History', p.159.

⁴⁶ Parsonson, p.24.

⁴⁷ Brookes, *A History of New Zealand Women*, p.92.

Richard Boast has found in his research that most Māori women appeared as witnesses in the Native Land Court in the last decade of the nineteenth century.⁴⁸ This is reflected in a satirical newspaper article published in 1898, in which a female witness in the Native Land Court was asked why she, and not her mother was giving evidence as the case was a question of ancestry. The woman replied that, “my mother is too old, didn’t understand the court system and how to tell lies.”⁴⁹ The satire suggests that the colony was aware of the strategies used by Māori to keep their land and that the colonial newspapers were highly suspicious of Māori women’s testimony. Paterson and Wanhalla have also found a number of women who took the stand. Atareta Te Aho gave evidence in the Native Land Court in Greytown in 1892.⁵⁰ Paterson and Wanhalla argue that historians “can see from her evidence that Māori women did not always have a good understanding of the Native Land Court and what was happening with their lands, often trusting relatives to ensure they received their fair share.”⁵¹ Understandings of the court system aside, knowledge of whakapapa and the oral histories of iwi and hapū were vital on the witness stand. Niniwa-i-te-rangi, also known as Niniwa Heremaia, a woman of mana from Ngāti Kahungunu in Wairarapa and Hawkes Bay, was an expert on such matters as well as being an outspoken and forceful woman. In 1891 she challenged the Native Land Court for a rehearing in what became a bitter battle amongst her and her family. Paterson and Wanhalla assert that her knowledge of whakapapa and tradition undoubtedly helped her secure land through the courts as she was recognised to hold claim to over 2000 acres by the end of the proceedings.⁵² Interestingly, Inano Walter has found that women were

⁴⁸ Boast, *The Native Land Court: A Historical Study, Cases and Commentary 1862-1887* (Wellington: Brookers, 2013), p.157.

⁴⁹ *Ashburton Guardian*, 20 April 1892, p.2.
<https://paperspast.natlib.govt.nz/newspapers/AG18920420.2.13.3>.

⁵⁰ Paterson and Wanhalla, p.39.

⁵¹ *ibid.*

⁵² *ibid.*, p.41.

treated no differently giving evidence in the Native Land Court based on their marital status.⁵³ This is not in line with what can be observed in cases involving settler women, where marriage status was central in the explicit hierarchy of evidence within the courts. However Paterson and Wanhalla have noted Māori women's experiences appearing in the Native Land Court differed greatly over time and place.⁵⁴

The legal status of Māori women changed if they married a European man, when common law would then override customary law. A Māori woman who married a European man would find herself under the same legal restrictions as Pākehā women.⁵⁵ One reporter noted in 1850 that “when the native woman married, the land became the property of her husband, and that the Maori title being thus extinguished and the husband having no Crown Grant, it was liable to be taken as demesne land of the Crown.”⁵⁶ Brookes cites the case of Kenehuru Meurant who brought 30 acres of land into her marriage to settler Edward Meurant, 20 acres of which was subsequently confiscated by the Crown.⁵⁷ When the case went to court Kenehuru Meurant's lawyer pointed out that, “If she merely live in concubinage with a European, all the power in New Zealand cannot touch one acre of that land.”⁵⁸ Indeed Walter has found that many Māori women were avoiding marrying their Pākehā partners as marriage became an attractive avenue for European settlers to gain access to Māori land.⁵⁹

⁵³ Inano Walter, ‘He Wāhine, He Whenua I Ngaro Ai? Māori Women, Māori Marriage Customs and the Native Land Court, 1865-1909’, MA Thesis, University of Otago, 2017, p.55.

⁵⁴ Paterson and Wanhalla, p.38.

⁵⁵ Bradbury, pp.44-45.

⁵⁶ Quoted in Brookes, *A History of New Zealand Women*, p.77.

⁵⁷ *ibid*, p.78.

⁵⁸ *ibid*.

⁵⁹ In 1881 the Native Accession Act made Māori customs subject to British law Māori women's property rights were undermined. However the mistake was recognised later that same year and The Native Act Amendment Act 1881 reinstated their right to own property separately from their husbands, See, Angela Ballara, ‘Wāhine Rangatira: Māori Women of Rank and Their Role in the Women's Kotahitanga Movement of the 1890s’, *NZJH*, Vol. 27, no. 2, October 1993, p.135; Native Lands Act 1869, s.22; Māori women's concern over land and their legal status was also reflected in their involvement in the suffrage campaign,

The issue of Māori women becoming subject to the laws of coverture when marrying European men was negated in 1884 by the passing of the Married Women's Property Act.⁶⁰ The Act not only allowed women to own and control their property, it awarded them the legal status of an individual person and thus they could appear in civil suits without their husband being listed as a co-defendant or co-plaintiff. The Act came following more limited reforms in previous decades. In 1860 the Married Women's Property Protection Act had been introduced and was the first step towards remedying the hampering legal constraints on married women.⁶¹ As in other colonies such as Canada, the mobile settler lifestyle led to a high rate of desertion in colonial New Zealand.⁶² Under the laws if a wife was deserted in New Zealand, any money she made was still technically that of her husband and could be claimed by him or his creditors. The 1860 Act thus allowed for any property acquired during the period since desertion to be protected from him under law, and although it was implemented two years after other common law jurisdictions such as New South Wales, the New Zealand Act allowed women a larger degree of independence.⁶³ In 1870 the law was extended to protect wives' property in situations where desertion had not taken place but the wife was subjected to cruelty by her husband, if he had been living in open adultery, a habitual drunk or was failing to provide for his wife and family through illness and other unavoidable causes.⁶⁴ In 1873 the Life Assurances Companies Act allowed married women to make policies or contracts for life insurance, endowments or annuities and "for the purposes of any such contract she shall be

where their focus was less on issues surrounding alcohol and more on the legal and social disadvantages they suffered through legislation and colonial authority, see Ballara, p.129; Walter, p.57.

⁶⁰ Married Women's Property Act 1884.

⁶¹ Married Women's Property Protection Act 1860.

⁶² Backhouse, p.211.

⁶³ Married Women's Property Protection Act 1860; Bishop, pp.63-64.

⁶⁴ Married Women's Property Protection Act 1870, s.2.

deemed to be a *feme sole*.⁶⁵ The Married Women's Property Act 1884 gave all married women, regardless of situation, the right to hold their own property and act as if they were *feme sole* within New Zealand courts.⁶⁶

The change in married women's legal status greatly altered the circumstances in which they appeared on the stand to give evidence. In May 1885 the Resident Magistrate's Court in Wellington heard a case in which Daniel Egan applied for maintenance from his wife Bridget Egan.⁶⁷ Daniel Egan was no longer able to work and was thus appealing to his wife to support him from the interest she earned from property which she now legally owned under the Married Women's Property Act 1884.⁶⁸ Bridget Egan took the stand to give evidence outlining her income which was enough for Magistrate Herbert Wardell to rule that she did not have sufficient means to support her husband.⁶⁹ The case brought into

⁶⁵ Life Assurances Companies Act 1873, s.47.

⁶⁶ New Zealand differed from Britain in regards to when it introduced these reforms. England had introduced its Married Women's Property Act in 1870 and extended it in 1882. The 1870 English Act had awarded women the right to keep their own wages and an inherited sum of money up to the value of £200. It meant that the majority of New Zealand women from 1870 to the passing of the Married Women's Property Act 1884 had less economic freedom and legal autonomy than women in England. As well as women in parts of Canada and the United States, where married women's property reforms had taken place in some states even before the signing of the Treaty of Waitangi. New Zealand had evidently missed an opportunity in 1870, when the Upper House "eviscerated" the bill that would have given women the right to own their own property. Even after the 1884 Act women could only own her own property, not the same property as her husband, leaving traces of the deeply held beliefs that women were economically reliant on men and shaping attitudes and expectations towards women's education, work and wages. New South Wales had also passed a Married Women's Property Act in 1879, five years before New Zealand, whilst the state of Victoria passed its in the same year as New Zealand. Brookes remarks that "New Zealand appeared not to have kept up with the changes wrought in England by an 1870 Act which would gave protection to married women's separate property. The 'inalienable privileges' to which English women were entitled would be lost in coming to New Zealand, unless a woman went through the 'humiliating' and 'degrading' process of gaining redress by applying to a resident magistrate to expose her husband's shortcomings." Although the Married Women's Property Act 1884 was victory in the fight for women's equality, New Zealand was following other common law jurisdictions when it came to women's property rights. It is somewhat of a remarkable feat then that New Zealand became the first country in the world in which women won the right to vote just nine years after the Married Women's Property Act, a disparity not lost on historians such as Bettina Bradbury. See, Married Women's Property Act 1870 (England and Wales); The Married Women's Property Act 1882 (England and Wales); Scotland introduced similar legislation in 1877; New Zealand largely copied the 1882 when they introduced their Married Women's Property Act in 1884. Bradbury, p.53; Brookes, pp.106-108.

⁶⁷ 'Magisterial', *New Zealand Mail*, 29 May 1885, p.13.

⁶⁸ <https://paperspast.natlib.govt.nz/newspapers/NZMAIL18850529.2.56>.

⁶⁹ *ibid.*

⁶⁹ *ibid.*

question the liability of women now that they were able to earn and keep their own money, destabilising the fundamental economic organisation of New Zealand society where the white male was viewed as the breadwinner. The case shows the ways in which the courts and the witness stand became an arena where couples navigated the new economic and legal terrain for women.

It was not only within marriage that women's new legal and economic freedom caused confusion as the 1884 reform had wide reaching effects. Licensing laws were another important arena where this can be explored. A liquor license was generally considered to be property and thus it was assumed that the Married Women's Property Act 1884 allowed women to now hold a license.⁷⁰ However in 1888 the Supreme Court found in *Callender v Allan* that the Married Women's Property Act 1884 did not override the licensing laws of 1881 which stated that married women could not hold a license.⁷¹ Later in 1888, the licensing committee incorrectly issued a license to a married woman named Margaret Roche as it "did not appear on the face of her application that she was a married woman, and there being no opposition the certificate was granted without any evidence being taken. The fees were paid and the license was issued."⁷² When the matter came before the Supreme Court Margaret Roche asserted:

She was the lessee from the Corporation of the site of the hotel, the current, lease being for a period of twenty-one years from the 6th February, 1885, and that she was the owner of the buildings and improvements thereon; that the license for the hotel was on the 19th April, 1885, transferred to her from Michael Pagan; that the license was renewed to her on the 1st June, 1885, and from time to time thereafter; that she had not been summoned by the Licensing Committee to attend and had received no notice of opposition to her application for a renewal, and therefore did not attend; and that on the

⁷⁰ Susan Upton, *Wanted, a Beautiful Barmaid: Women Behind the Bar in New Zealand, 1830-1976* (Wellington: Victoria University Press, 2013), p.27.

⁷¹ *Callender v Allan* (1888) 6 NZLR 436.

⁷² *In re Roche* (1888) 7 NZLR 206.

28th June, 1888, before receiving notice of these proceedings, she had agreed to assign her interest in the hotel to John Roche [her husband] for the purpose of a temporary license, which was granted.⁷³

It was a peculiarity that remained after the passing of the 1884 Act that a married woman, as Margaret Roche rightly asserted in her evidence, could own the premises in which alcohol was served yet remained unable to hold the license in which to serve it. The confusing and often ambiguous wording of the laws in relation to women holding licenses meant that licensing committees often found loop holes in which to issue a married woman a license, or that the legality was even simply ignored.⁷⁴ This was done more frequently in the early 1880s as a reaction to temperance supporters protesting against female publicans.⁷⁵ But the Roche case closed these loopholes by firmly cementing in law that married women by no means were allowed to hold a license.⁷⁶ The licensing regulations of 1889 clarified and solidified these regulations further in response to what was, “the easy justification for refusing a wife a licence” that the coverture laws gave.⁷⁷ Bishop asserts that the dismantling of the laws of coverture prompted changes in licensing laws.⁷⁸ However it would be more accurate to say that the Supreme Court ruled in *Callender v Allan* in 1888 that the 1881 licensing laws still stood regardless of the Married Women’s Property Act and that alongside the Roche case, the rulings would have serious consequences for female publicans.⁷⁹ What the Roche case illustrates however is that similarly to the Egan case, the witness stand was a place wherein confusions in respect to women’s new legal status were played out.

⁷³ *ibid.*

⁷⁴ Upton, p.27, 84.

⁷⁵ *ibid.*

⁷⁶ *ibid.*, p.84.

⁷⁷ Licensing Act 1881; Licensing Amendment Act 1889; Bishop, p.172.

⁷⁸ Bishop, p.172.

⁷⁹ Upton, p.86.

This chapter has thus far focussed on married women in civil actions and disputes, as the laws of coverture, and later the reforms to these laws, shaped the ways in which women appeared in the courts to give testimony. But single women too appeared as witnesses in civil cases, often involving cases of libel and slander. Libel referred to the written defamation of a person, whilst slander, as was seen in the case involving Helen Potter and Sarah Cargill, referred to spoken defamation.⁸⁰ The cases could be tried as under the criminal or civil law according to what the plaintiff was seeking. Civil cases involved seeking compensation from the defendant, whilst criminal libel looked for the defendant to serve a prison sentence. Regardless of the method in which the cases were tried, the witness stand became a place of verbal weaponry against another, as well as a place in which defendants attempted to clear their name of any wrong doing.

In 1868 the Auckland Supreme Court heard a slander case involving William Isaac. Isaac was seeking £5000 damages from Thomas Kempthorne for spreading a rumour that he had committed adultery with one of his servants, Margaret Drew and getting her in “the family way”.⁸¹ The rumour resulted in the loss of an annual allowance from William Isaac’s father-in-law worth £1000 annually.⁸² Both parties gave evidence in the case as legislation had allowed them to do so in cases of libel and slander since 1843, eight years prior to legislation allowing parties to give evidence in other civil cases.⁸³ A number of women also gave evidence, including Margaret Drew who, although married at the time,

⁸⁰ Libel Act 1843 (England, Wales and Ireland).

⁸¹ ‘Isaac v Kempthorne’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>; ‘Supreme Court – Civil Sitting’, *Otago Witness*, 26 December 1868, p.7. <https://paperspast.natlib.govt.nz/newspapers/OW18681226.2.26>.

⁸² *ibid.*

⁸³ Libel Act 1843 (England, Wales and Ireland).

was separated from her husband as a result of his drinking.⁸⁴ She strongly denied that any adultery or seduction had taken place stating on the stand that “I never at any time had any improper liberties taken with me by Mr Isaac. Mr Isaac was always a gentlemen in his own home. He always acted as such. I am not now pregnant by anybody, nor have I ever been.”⁸⁵ Elizabeth Sutherland, another servant in the employment of Isaac, also gave testimony, stating “I am in Mr Isaac’s service. I have been there two years. I was living with the family before [the] last witness entered Mr Isaac’s service. I have filled the capacity of the housemaid. I never observed anything improper between Mr Isaac and the last witness. She always slept with me.”⁸⁶ Both the women appear to have been assertive and firm in their testimonies to the nature of the relationship between Isaac and Drew. A number of women also came forward to testify that they had not seen Drew pregnant. Janet Turnbull, a friend of Drew’s, stated, “she did not appear pregnant. She could scarcely have had a child without my knowing.”⁸⁷ Whilst Ann McIntyre testified that: “She could not have been confined during these two months without my knowledge.”⁸⁸ These women witnesses were all brought forward in a capacity in which they held some authority, the nature of the female body and child bearing. The court found in favour of Isaac and he was awarded £100, a fraction of what he had been seeking, but his name along with Drew’s, was cleared.⁸⁹

Restoring reputation was often the main motivation for nineteenth-century libel and slander cases. Rosemary Tobin has remarked that from the time of the industrial revolution

⁸⁴ ‘Isaac v Kempthorne’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>; ‘Supreme Court – Civil Sitting’, *Otago Witness*, 26 December 1868, p.7. <https://paperspast.natlib.govt.nz/newspapers/OW18681226.2.26>.

⁸⁵ ‘Supreme Court – Civil Sitting’, *Otago Witness*, 26 December 1868, p.7. <https://paperspast.natlib.govt.nz/newspapers/OW18681226.2.26>.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ ‘Isaac v Kempthorne’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

the language of reputation changed from being spoken about in terms of honour and dignity to a form of property and social currency in which to secure employment, trade and to operate in a world now organising itself around the market economy in larger urban centres instead of in smaller communities.⁹⁰ Kirsten McKenzie has found in the colonies of New South Wales and the Cape in the 1830s that “personal status was protected and attacked in diverse ways, the law carried the most weight as a weapon against scandal.”⁹¹ In the colonial period of New Zealand, the law, and within it the witness stand, was used as an agent in which to fight for and restore reputation. But the witness stand was also where reputation was attacked and considered by not only the courtroom, but the public who watched the case and read about it in the newspapers. Civil cases were reported on regularly but often with less vigour than criminal cases that drew large amounts of interest for their often scandalous nature. However certain civil cases, such as slander and libel offences did draw public attention, as did divorce, bigamy and action of breach of promise of marriage cases which will be discussed in the next chapter. These cases became sources of access to real-life drama which was often hidden from public view.⁹² It again highlights the performative nature of giving evidence as witnesses dramatized their good characters for the courtroom.

Charlotte Macdonald has found that for women seeking employment as domestic servants, reputation hardly mattered.⁹³ Unlike Tobin’s argument for Britain, where female domestic servants relied heavily on reputation to obtain work, the shortage of domestic servants in New Zealand meant that employers could not be choosy when it came to who

⁹⁰ Rosemary Tobin, ‘Public Discussion as a Defence to Defamation’, *New Zealand Universities Law Review*, Vol. 21, no. 3, 2005, p.387.

⁹¹ Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne: Melbourne University Publishing, 2004), p.70.

⁹² Lyn Pykett, *The Nineteenth-Century Sensation Novel* (Liverpool: Liverpool University Press, 2011), p.2.

⁹³ Macdonald, *A Woman of Good Character*, p.107.

they hired.⁹⁴ Macdonald notes that, aboard the *John Temperley* bound for New Zealand in 1866 “ten of the women were described as prostitutes, and two were discovered to be pregnant during the voyage. ‘Unfavourable reports’ about them ‘got abroad’ before the ship arrived, yet ‘the demand for female domestic servants was so great that employers risked their character and they were all engaged within twenty four hours’.”⁹⁵ But as the Isaac case shows, domestic servants were often brought in to be witnesses in other people’s legal battles for restoring reputation. However as will be discussed in the next chapter in cases of divorce, domestic servants’ access to private knowledge could be a double edged sword for employers. Brian McCuskey has titled them “Kitchen Police” and explains the “mounting anxiety about the eyes and ears of servants in the home” where transgressions of employers would be gossiped about between servants and even outed by them in the courts.⁹⁶ The privacy of domestic life was cited as one of the reasons that wives were unable to give testimony, but it remained “under siege as long as the family remain[ed] under surveillance” of their servants.⁹⁷ But Margaret Drew’s testimony illustrates how servants’ private lives could become entangled as part of the cases involving their employers and the witness stand became an important place for them to assert their good characters and testify to the nature of others.

It may have been unnecessary for female domestic servants to maintain a good reputation to secure work, but other women did use the courts in similar ways to William Isaac. In 1891 a woman named only as Mrs Good, brought a case of criminal libel against Hugh Shortland, her daughter’s ex-fiancé. Shortland had written a number of letters

⁹⁴ Tobin, p.387.

⁹⁵ Macdonald, *A Woman of Good Character*, p.107.

⁹⁶ Brian W. McCuskey, ‘The Kitchen Police: Servant Surveillance and Middle-Class Transgression’, *Victorian Literature and Culture*, Vol. 28, no. 2, p.359.

⁹⁷ *ibid.*

claiming to have seduced Mrs Good's daughter during the time of their engagement.⁹⁸ Mrs Good had stopped the engagement after Shortland's questionable intentions and character came to light.⁹⁹ On the stand she explained that Shortland had declared that "if he did not have her [daughter] he would take good care that nobody else would."¹⁰⁰ Miss Good, the woman in question, whose name remained unknown in the press as she was only referred to as "the young woman", gave evidence strongly denying that any sexual encounter between the two had taken place.¹⁰¹ She also took the opportunity on the stand whilst being cross-examined by Shortland, to call him "extremely rude."¹⁰² Kirsten McKenzie points out that female "honour was invariably bound up with questions of sexuality" as the polarization of women's reputations between madonna and whore dominated the nineteenth-century rhetoric surrounding women.¹⁰³ It is likely that Mrs Good sought legal action to restore her daughter's name and thus too her future marriage prospects and economic security, as the prosecutor "referred to the necessity for keeping pure and unsullied the reputation of woman."¹⁰⁴ It was, however, as in sexual violence cases discussed in the previous chapter, not the woman's evidence that secured a conviction but the evidence of two doctors who testified that they had examined Miss Good and could confirm that she had not been seduced.¹⁰⁵ The outcome highlighted again the authority given to the white, male medical voice over women's testimony when reputation and character of the women became the focal point of a case.

⁹⁸ *In re Shortland* (1893) 12 NZLR 137.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ 'Alleged Libel', *Auckland Star*, 12 September 1891, p.5.

<https://paperspast.natlib.govt.nz/newspapers/AS18910912.2.26>.

¹⁰² *ibid.*

¹⁰³ Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne: Melbourne University Publishing, 2004), p.70.

¹⁰⁴ *ibid.*

¹⁰⁵ *In re Shortland* (1893) 12 NZLR 137; 'Alleged Libel', *Auckland Star*, 12 September 1891, p.5.

<https://paperspast.natlib.govt.nz/newspapers/AS18910912.2.26>.

Libel cases were not always brought against an individual. Paterson has researched the Te Waka Māori Libel Case in 1877 where capitalist landholder Henry Russell successfully sued the newspaper editor and printer of *Te Waka Maori o Niu Tirani*, the government run Māori language newspaper, for libel.¹⁰⁶ The newspaper had published two letters criticising Russell, written by Ārihi Te Nahu, a chief from Ngāti Kahungunu.¹⁰⁷ The case is interesting for a number of reasons, including that the offending material was in Te Reo and Russell chose to sue the newspaper's government employees for libel and not Ārihi Te Nahu who wrote the letters.¹⁰⁸ Ārihi Te Nahu did participate in the court proceedings nonetheless as a witness for the defence, where Māori understandings of evidence in the British legal system were problematic. Oral community understandings of events considered adequate by the Māori witnesses were not considered adequate by the court.¹⁰⁹ Her testimony and the subsequent cross-examination took four days. Paterson explains that the “defence lawyer, through gentle questioning, naturally tried to elicit as much information against Russell as possible, to suggest that there was at least some evidence to show illegal or unethical behaviour with regard to his land dealings. Despite her long and detailed answers, Ārihi provided little oral testimony or written documentation to substantiate her claims. When cross-examined by Wilson, her responses were short and terse, with refusals to answer questions or claims not to remember details”¹¹⁰ The case helps show the ways in which Māori women, including Māori women in positions of authority such as Ārihi Te Nahu, appeared on the stand in cases of a non-criminal nature, besides in the Native Land Court. It highlights their willingness at times to engage and participate in the British legal system as they appeared on the stand but also

¹⁰⁶ Paterson, ‘The Te Waka Māori Libel Case of 1877’, *Law and History*, Vol. 4, no. 1, 2017, pp. 88-112.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*, p.89.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*, p.101.

the different set of challenges they faced as they navigated the culture and practices of the British law and the settler space of the colonial courtroom.¹¹¹

Changes to evidence in the civil law occurred in New Zealand much earlier than in criminal law, allowing women to give evidence as wives in civil cases. These changes were done on the basis that justice was paramount. On one hand the British parliament was being pragmatic by enabling wives to take the stand even if they were not legal entities. By recognising wives as individuals, separate from their husbands, wives could take the stand whilst still holding the legal status of *feme covert*. On the other hand, coverture laws were still in operation in cases that wives appeared to give evidence. Husbands still had to accompany their wives to court even if their participation was so marginal, their voices were not heard. When this occurred, and women gave evidence against women, new hierarchies of evidence emerged in the court as gender became less meaningful, other aspects of personhood entered the evidence hierarchy such as class and social status. After the laws of coverture had been reformed, the witness stand became a place in which the new social, legal and economic position of women was questioned and debated as society and the courts were confronted with new and often confusing legal situations that the Married Women's Property Act 1884 produced. From the 1860s Māori women began to give evidence in the Native Land Court. The testimony of single women and Māori women in civil cases also shows the varied social, legal and economic ways New Zealand women appeared on the witness stand and the individualised contexts that these factors produced.

¹¹¹ *ibid*, p.97.

Chapter Four

Taking the Stand in Cases of Divorce, Bigamy and Action of Breach of Promise of Marriage

Matters of love and relationships in New Zealand's colonial courts flow through many of the cases in which women appeared on the stand to give evidence. Sometimes the subject of love was an undercurrent, for instance in the cases involving libel and slander discussed in the previous chapter.¹ But many cases existed, both in the criminal and civil law, where lovers had the opportunity to become litigious and relationships came to be policed and mediated by the courts. It is these cases, such as bigamy, divorce and action of breach of promise of marriage, that often drew women to the witness stand and that this chapter now considers.

In March 1884 Justice Williams of the Dunedin Supreme Court sat down to hear a civil action brought by a woman named Ellen Forder.² He was the same judge who eleven years later would preside over the trial of Minnie Dean. In contrast, Ellen Forder's case involved the civil law. Forder's case was against William Brown, a man whom she had been cohabiting with for the past nineteen years.³ Ellen Forder had been married and deserted prior to cohabiting with Brown. Following her desertion she took out a protection order under the

¹ Criminal cases too display this undercurrent. In the high treason trials in 1869 where Maata Te Owai, the Crown's star witness, appeared to be heavily motivated by revenge against her husband Te Kooti. See, Judith Binney, *Redemption Songs: A life of Te Kooti Arikirangi Te Turuki* (Auckland: Auckland University Press and Bridget Williams Books, 1995), p.128.

² *Forder v Brown* (1884) 2 NZLR (SC) 303.

³ *ibid.*

Married Women's Property Protection Act 1860, so that her £100 in savings would not be claimed by her husband.⁴ She then used the money to go into business with William Brown. They bought a number of cows to set up a dairy business, run under his name.⁵ After living happily together in this situation for a number of years Forder and Brown quarrelled. Brown sold the cows and kept the proceeds. Forder, in response, took out a civil action against him in court in order to claim her share of the profits from the sale.⁶ Justice Williams however found in favour of William Brown, citing that the conduct of the two meant that in effect they had been living together as husband and wife. Thus Brown technically owned the property which he and Forder held together.⁷ The case was labelled "peculiar" by the colonial press as it exposed a number of important points about women's changing legal and economic position.⁸ Firstly, that the changing legal landscape of the nineteenth century was altering how women could engage in the justice system. If Ellen had been deserted prior to 1860 she would have had no means of protecting her property unless she had made a legal agreement prior to marriage.⁹ If she had been deserted after the passing of the Married Women's Property Act 1884 such actions would have not been necessary.¹⁰ But more importantly the case showed that couples who cohabited were subject to the laws of coverture in some instances. If Ellen Forder had brought her case to court six months later, once the Married Women's Property Act had passed, the outcome of the case may have been different.¹¹

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ 'A Peculiar Point', *Hawera & Normanby Star*, 26 March 1884, p.2.

<https://paperspast.natlib.govt.nz/newspapers/HNS18840326.2.10.4>; 'Strange Partnership Dispute', *Marlborough Express*, 26 March 1884, p.2. <https://paperspast.natlib.govt.nz/newspapers/MEX18840326.2.18>.

⁹ Married Women's Property Protection Act 1860.

¹⁰ Married Women's Property Act 1884.

¹¹ The Married Women's Property Act was passed on 18 October 1884.

Ellen Forder and William Brown's case suggests that the courts could be flexible about what they deemed to be marriage. Ginger Frost has explored cohabitation in the British context at length, finding that the courts were at times accepting of couples who cohabited.¹² But this differed widely based on couples' class background. Judges and juries also often held different views on who was responsible for "living in sin", with judges generally seeing the woman as a victim of male seduction.¹³ In New Zealand an 1875 short satirical story suggests that men did face scrutiny and disapproval if it was believed they were cohabitating. Published under the headline "How to Discredit a Witness" the satire detailed the cross-examination of a male witness who lived with a woman he was not married to, the punchline was that the woman turned out to be the witness's mother.¹⁴ The same satire appeared in colonial newspapers a number of times in subsequent decades under headlines such as "His Reputation Saved" and "The Saving Question".¹⁵ Although the court was an institution that ostensibly responsible for upholding the legality of marriage, the Forder and Brown case illustrates that the New Zealand courts could be fluid in their definition of marriage if it appeared that a couple was, or had been, living as a stable married couple. This is similar to what Frost argues for Britain in the same period.

In nineteenth-century New Zealand people who wished to enter into new marriage-like relationships often did so outside of the law.¹⁶ As mentioned in the previous chapter, some Māori women chose not to marry their European partners in order to protect their

¹² Ginger S. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England* (Manchester: Manchester University Press, 2008), p.1.

¹³ Frost, *Living in Sin*, p.41.

¹⁴ 'How to Discredit a Witness', *Colonist*, 24 August 1875, p.4.

<https://paperspast.natlib.govt.nz/newspapers/TC18750824.2.17>.

¹⁵ 'His Reputation Saved', *Tuapeka Times*, 29 October 1892, p.2.

<https://paperspast.natlib.govt.nz/newspapers/TT18921029.2.33>; 'The Saving Question', *Otago Witness*, 24

October 1895, p.49. <https://paperspast.natlib.govt.nz/newspapers/OW18951024.2.153.2>.

¹⁶ Frances Porter and Charlotte Macdonald (eds.), *'My hand will write what my heart dictates': The unsettled lives of women in nineteenth-century New Zealand as revealed to sisters family and friends* (Auckland: Auckland University Press with Bridget Williams Books, 1996), p.259.

land.¹⁷ Desertion was common in the migrant society of colonial New Zealand.¹⁸ And divorce was almost unattainable until 1867. Thus cohabiting was often the only available means to enter into a new relationship. But as the satire suggests, living outside the law did not mean that you could avoid its structure completely. Although courts may have been sympathetic towards women who cohabitated, it often caused legal confusion for participants involved in civil cases. In 1849, William Butler attempted to recover the sum of two nights' accommodation from Thomas Flawell after Flawell's wife Elizabeth failed to pay her bill.¹⁹ Under the laws of coverture Butler had taken the correct course of action. But on the stand Thomas revealed that he and Elizabeth were not married but had instead been cohabitating.²⁰ The case needed to be brought against Elizabeth directly. Thomas's revelation that she had left him before the court case began and her whereabouts was unknown forced Butler to drop the case.²¹ In *Forder v Brown* on the other hand, Justice Williams applied the laws of coverture as the couple lived together as if they were man and wife and had been doing so for many years, they were recognised by others as being married and their conduct, as Justice Williams interpreted it, made an unspoken agreement between them that Forder's money became Brown's when they entered into business together.²² Ellen Forder viewed that for all intents and purposes, she and William Brown lived as a married couple except by law but she then used the lack of legality to their relationship to challenge Brown in the courts. The courts however, paid more attention to their intentions as a couple than to the legitimacy as a couple under law.

¹⁷ Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), p.78; Inano Walter, 'He Wāhine, He Whenua I Ngāro Ai? Māori Women, Māori Marriage Customs and the Native Land Court, 1865-1909', MA Thesis, University of Otago, 2017, p.57.

¹⁸ Raewyn Dalziel, 'The Privileged Crime: Policing and prosecuting bigamy in nineteenth-century New Zealand', *NZJH*, Vol. 51, no. 2, 2017, p.2.

¹⁹ 'Butler v Flavell', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

²⁰ *ibid.*

²¹ *ibid.*

²² *Forder v Brown* (1884) 2 NZLR (SC) 303.

When cohabitating couples came before the courts the application of laws relating to a husband and wife were further blurred when it came to giving evidence. Nowhere was this more evident than in cases involving bigamy. Bigamy under New Zealand law was a criminal offence.²³ Cases came to the courts infrequently. Raewyn Dalziel has identified 71 persons who were charged with bigamy between 1849 and 1900.²⁴ Most of what is known about bigamy in New Zealand during the nineteenth century is through these cases. Prosecutors had a hard time finding documentation that proved people were married and as in the case of Forder and Brown, there was an acceptance amongst the courts, and in wider society, of couples who appeared to be married, even if they were not legally so. Adding to the cases failures was evidence laws. The law prevented parties and their spouses from giving evidence in criminal cases until 1889. The courts in cases of bigamy had to establish quickly who the defendant was legally married to, in order to determine who could and could not give evidence, even if the parties testimony was a necessary component to establish this fact. As a result of these barriers, cases often reached a deadlock. In other cases debates took place inside the courtroom about whether enough proof had been shown that a witness was not married to the defendant. In 1864 this scenario occurred in the Christchurch Supreme Court when Mary Anne Martin, the second wife of Charles Hackett, was put on the stand in his

²³ Raewyn Dalziel explains that in “1828 the British Parliament included bigamy in the Offences against the Person Act, defining it as the act of marrying a person during the life of a former husband or wife. Convicted bigamists could be transported for seven years or imprisoned for up to two years with or without hard labour. A defence to a bigamy charge could be mounted if a first spouse had been continuously absent for seven years and the defendant had no reason to think he or she were still alive. In 1861 the punishment was amended to penal servitude for a period of three to seven years or imprisonment for up to two years with or without hard labour.¹⁴ New Zealand legislated for colonial marriages from 1847, requiring one of the parties intending marriage to take an oath or make an affirmation ‘that he or she believeth that there is not any impediment of kindred or alliance or other lawful hindrance to the said marriage’.¹⁵ However, the British law on bigamy remained operative until the New Zealand Parliament passed a local Offences against the Person Act in 1867. This Act was closely modelled on the British legislation and made bigamy a felony liable to the same punishments.” See, Dalziel, p.3.

²⁴ *ibid*, p.1.

bigamy trial.²⁵ The newspaper transcript of the case shows how messy issues of evidence law could become:

The next witness called was Mary Anne Martin, the person to whom the prisoner had been married after the solemnization of the marriage with Susannah Grimstone. Like the first wife, she was respectably dressed, and appeared to have experienced a similar number of summers. On being sworn, she deposed - I know the prisoner. I was married to him in the month of January, 1862. We were married by the Rev. Mr Fraser, the Presbyterian Minister in Christchurch.

Mr. Moorhouse [the counsel for the defence] – Is this evidence. She is his wife.

His Honor [Justice Gresson] – Mr Duncan has shown proof that she is not his wife, having proved that a marriage took place between the prisoner and the other woman.

Mr. Moorhouse – There is no proof that this man and Susannah Grimstone were married.

His Honor – There is proof of it by the certificate.

Mr. Moorhouse – That proof had not been accepted by the Jury.

His Honor (emphatically) – It is no matter whether it has or not; it has been accepted by the Judge (a laugh). . . the Crown have given proof of a marriage with Susannah Grimstone, and that, in her lifetime, he married another and unless it is shown there was a divorce, this witness is not his wife.²⁶

The debate between Justice Gresson and Mr Moorhouse went on for some time before Mary Anne Martin was allowed to continue her testimony, it being established by the court that she was not his legal wife.²⁷

Even if it was clear who the defendant was legally married to, the laws that prevented a wife from taking the stand in criminal cases involving her husband made it impossible at times for her to prove her identity. The mobility of people around the British Empire in the nineteenth century meant that bigamy cases often consisted of a person being married to two

²⁵ ‘Supreme Court’, *Lyttelton Times*, 8 March 1864, p.5.
<https://paperspast.natlib.govt.nz/newspapers/LT18640308.2.25>.

²⁶ *ibid.*

²⁷ *ibid.*

people in separate places. In 1872 a case of bigamy was brought against William Antill by Margaret Tobin.²⁸ The two had been convicts in Tasmania and had gained permission to marry in 1853.²⁹ Tobin and Antill lived with each other for a number of years and moved to Woodend, north of Christchurch, once they had gained their freedom.³⁰ In 1869 William Antill visited his hometown of Leicester, England and married a woman named Mary Ann Orton in 1870.³¹ On his return to Canterbury and after the discovery of his second marriage, Margaret brought a case of bigamy against him.³²

It was clear from documents presented to the court that William and Margaret had been married. The issue before the court became instead: if Margaret, now living in New Zealand, was the Margaret Tobin who had married William in Tasmania.³³ No witnesses from Tasmania could be brought forward to vouch for her identity, the cost of the fare was too great. Margaret was not allowed under the law to testify, an act which could have proved her identity and secured a conviction. The *Star* newspaper covering the case noted that “a serious failure of justice has occurred, there can be no doubt. Is that failure the fault of the law as it now stands – or is it the fault of those whose duty it is to administer the law?. . . The woman herself, as the prisoner’s wife, could not give evidence in proof of her marriage, and the learned judge who presided was very recently compelled to direct the jury to return a verdict of acquittal, although there was no moral doubt of the prisoner’s guilt.”³⁴ These situations would continue to occur until the passing of the Criminal Evidence Act 1889.³⁵ Although

²⁸ Dalziel names Margaret Tobin as Margaret Kavanagh however newspaper reports on the case and *New Zealand’s Lost Cases Project* list her as Margaret Tobin. See, ‘R v William Antill’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>; Dalziel, pp.1, 23.

²⁹ Dalziel, p.23.

³⁰ *ibid.*

³¹ ‘R v William Antill’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

³² *ibid.*

³³ *ibid.*

³⁴ *ibid.*

³⁵ Criminal Evidence Act 1889.

wives would still be unable to take the stand to give evidence against their husbands, they could at least take the stand to prove their identity.

The laws of evidence were different however if bigamy was being used as grounds for divorce. In 1867 divorce became available in the colony.³⁶ Prior to 1867 the legal break up of a marriage in New Zealand was almost impossible to obtain. Couples either had to be granted a divorce by an Act of Parliament or return to England and petition for a divorce there. England and Wales had made divorce available in 1857, but travelling back 'home' for such an endeavour was an economic impossibility for many New Zealand settlers.³⁷ British colonies however would sequentially follow England's lead in altering their divorce laws. South Australia adopted the legislation along similar lines to England and Wales in 1858, followed by Tasmania in 1860, Victoria in 1861, Western Australia in 1863 and Queensland in 1864.³⁸ New South Wales followed behind New Zealand in 1873.³⁹ In New Zealand the 1867 legislation allowed men to divorce their wives for adultery. However if women wished to divorce their husbands they could only do so if adultery was aggravated by bigamy, rape, sodomy or bestiality, or if they could prove extreme cruelty and desertion for five years.⁴⁰ The discrepancy in the law between the sexes was written in the belief that men had a sexual instinct that women did not and thus they were awarded a sexual licence that transcended social practices and made its way into legislation, highlighting the gendered nature of the law where any sexual agency in women was unacceptable.⁴¹

³⁶ Divorce and Matrimonial Causes Act 1867.

³⁷ Before the English Act in 1857, people tried to obtain a divorce in the courts in Scotland, who had more liberal divorce laws, however the English Courts did not recognise the divorce if it was granted. See, Hayley Brown, 'Loosening the Marriage Bond: Divorce in New Zealand c.1890s-1950s', PhD Thesis, Victoria University of Wellington, 2011, p.22.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ The Divorce and Matrimonial Causes Act 1867, s.17&18.

⁴¹ Brookes, p.148; Porter and Macdonald, p.259.

There was considerable debate surrounding the introduction of the legislation. It was felt that it made marriage merely a civil contract and not a divine union under God.⁴² It was a debate that had been taking place since Hardwicke's Marriage Act 1753, a piece of legislation that emphasised the legal agreement of marriage over the religious sacrament.⁴³ The 1867 New Zealand legislation also prompted fears that the moral fabric of the colony's society would be jeopardised if divorce were allowed. Charles O'Neill, the Member of the House of Representatives for Goldfields Otago, complained that the morals of England had not improved under their divorce laws and he feared the destabilisation of New Zealand society if the Bill was passed.⁴⁴ Despite these fears it did pass, albeit on very different grounds for men and women. This was to become a key aspect of the law that feminists sought to change later in the century.⁴⁵ They succeeded in 1898, when the grounds for divorce were widened and updated so that women could petition for a dissolution of marriage on the same grounds as men.⁴⁶ As with the initial legislation for divorce, colonies in the British Empire differed widely on when the "sexual double standard" was removed. New South Wales changed its legislation in 1881, followed by New Zealand in 1898.⁴⁷ The other Australian colonies would follow in the first decades of the twentieth century but England and Wales would not change their legislation until 1923.⁴⁸ Hayley Brown comments that "although England led the way in establishing the first divorce statute, New Zealand and Australia liberalised and extended the grounds for divorce earlier."⁴⁹ It illustrates once more

⁴² Henry Bunny, *NZPD*, 1867, vol.1.2 p.1094.

⁴³ Frost, p.9; Marriage Act 1753 (England and Wales).

⁴⁴ Charles O'Neill, *NZPD*, 1867, vol.1.2 p.1094; Brookes, p.158.

⁴⁵ Brookes, p.157.

⁴⁶ Divorce Act 1898.

⁴⁷ Brown, p.29.

⁴⁸ *ibid.*

⁴⁹ *ibid.*, p.22.

that alongside evidence and suffrage laws, the 1890s ushered in a gradual but significant departure from British law in New Zealand.

The Divorce and Matrimonial Causes Act 1867 did allow petitioners and respondents to give evidence in divorce cases.⁵⁰ This meant that from the outset the courts learned of the various ways that marriage could fail from the perspective and words of women as they appeared as both petitioners and respondents. Permitting the parties to take the stand also immensely simplified cases in which bigamy was being used as grounds for the petition. In 1869 the Supreme Court in Wellington heard Emily Anne Croucher's petition for a divorce from Elijah Hay Croucher for bigamy and adultery.⁵¹ The facts of the case were curious. Emily and Elijah had married approximately ten years prior to the case being brought but had been separated for some time. Elijah had then married Eliza Cauty, who was the widow of Emily's brother James.⁵² Both Emily and Eliza were able, and did, give evidence in court. Emily's testimony reveals how, prior to the laws of divorce, women viewed their rights as persons within marriage and how they dealt with an unsatisfactory marital situation:

I left my husband because I had heard that he was committing adultery, and also because I disliked him very much, and I considered myself perfectly justified in leaving him. . . The reason why I disliked him so much was because he was nearly always drunk. He lived with me about a fortnight after our marriage, and then he was away for a month. We lived together about six weeks in all. I had known him about a year. I never saw him drunk before our marriage, and I never heard of his being so. I was then only eighteen years of age.⁵³

⁵⁰ Divorce and Matrimonial Causes Act 1867, s.46.

⁵¹ 'Croucher v Croucher', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁵² *ibid.*

⁵³ *ibid.*

When Eliza took the stand it was revealed that she knew when marrying Elijah that Emily was still alive, and she had even learnt of her whereabouts.⁵⁴ But it was Emily and not Elijah or Eliza who came under criticism from the court. They thought she should have done more to prevent the second marriage of her husband, although she claimed to have no knowledge of it until eighteen months after it had taken place.⁵⁵ The case re-cemented the notion that despite the existence of the divorce laws, the colony's legal and social stand on marriage still followed the lines that the "relationship between husband and wife followed more literally the marriage vows of a wife to love and obey".⁵⁶ Emily's independence and stubbornness whilst giving her testimony shows that not all women were willing to accept this notion.

The judges did however take pity on Emily for marrying a man she could not love and the court stretched the rules of the law in order to grant her a divorce. The flexibility surrounding the new divorce laws were regularly apparent when the cases came before the Supreme Court. Divorce cases in the nineteenth century were relatively rare. The Wellington Divorce Register lists 268 cases of divorce from 1868 to 1897, the year before the laws changed and the grounds for the divorce were widened.⁵⁷ On average then, nine cases were heard in Wellington each year, but that did not mean that a divorce was always granted. Judges could always deny a petitioner a divorce if it was felt a petitioner's reasons, and the evidence to support those reasons, did not fit within the framework and standards that were laid out in legislation. In 1887 there were 26 petitions for dissolution of marriage, of which 16 were given decrees.⁵⁸ But there is evidence to suggest, as in cases of bigamy, that the

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ Porter and Macdonald, p.253.

⁵⁷ Divorce Register, 1868-1897, AAOM W3265 6042 Box 1, ANZ, Wellington.

⁵⁸ 'Report on the Statistics of New Zealand 1889', *Statistics New Zealand*; https://www3.stats.govt.nz/historic_publications/1889-official-handbook/1889-official-handbook.html?_ga=2.207116883.1135995198.1575336572-1280114491.1575336572#d450e22947.

courts and society at large showed flexibility and understanding when it came to the expectations of marriage. Judges were not unknown to stretch the law to allow parties to divorce. In the Croucher case the grounds for divorce did not meet the threshold for which a decree would be regularly issued. The court granted the divorce anyway. Chief Justice George Arney stated in his ruling:

[T]he Court had decided upon making the decree absolute, but that under ordinary circumstances the relief of the Court would not have been granted, because the grounds on which the petition had been presented were not sufficiently strong in warranting the Court in granting a dissolution of the marriage, but that the Court considered this as not only an exceptional, but also as a specially painful case, in which a young and inexperienced girl had been induced against her inclination to marry a man, whom, directly after, she discovers to be a drunkard and a disreputable fellow, and the Court could not wonder that she was disgusted with her short experience of matrimony.⁵⁹

The Court was sympathetic to Emily as they viewed her as a naive youth who had married a drunken older man. But the law still technically upheld Emily and Elijah's marriage. Nevertheless, Chief Justice Arney granted a divorce. It was presumably recognised that Elijah and Eliza would continue to live outside of the law if the divorce was not granted, in what Frost declares was often "official disapproval but pragmatic acceptance" of couples such as the Crouchers.⁶⁰ Dalziel too has found that as long as bigamy "reflected a desire for, and resulted in, a stable marriage, society and the law could be tolerant."⁶¹ It illustrates again that the Court did uphold marriage, but the definition of marriage was often widened to include couples who lived not inside the letter of the law, but within the social expectation of a marriage.

⁵⁹ "Croucher v Croucher", *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁶⁰ Frost, p.1.

⁶¹ Dalziel, 3.

In the first case tried in the colony under the new legislation, Janet Aickman petitioned for a divorce from William Aickman on the grounds of cruelty. Janet Aickman appeared in court to give evidence against William.⁶² The two had been married in Scotland in 1857 and later settled in Whanganui. Sometime after their marriage William became physically and verbally abusive towards Janet.⁶³ On 16 September 1869, when Janet took up the opportunity under the new legislation to petition for a divorce, she also took up the opportunity to give evidence on the witness stand. It was here that she detailed the abuse which she had suffered at the hands of her husband. The court sat at 10 o'clock that morning to hear the first woman under the new legislation give an account of her marriage. Janet Aickman stated:

I am the wife of William Aickman, and am at present living at Wanganui. I was married to my husband on 30th October, 1857, in Scotland. We cohabited together in Scotland for some time after the marriage, and then came out to New Zealand, and lived at Wanganui. A very short time after the marriage, my husband began a course of continued intemperance, abusive language, and brutal and violent conduct towards me, all of which he has more or less pursued ever since, both in Scotland and Wanganui. He was frequently in the habit of staying out night after night, and not returning home till the morning, and then very much inebriated. He was at times very violent indeed, scarcely anything in fact could exceed his violence on occasions when he was intoxicated.⁶⁴

She later went into detail of the abuse she suffered. The *Wellington Independent* newspaper commented that during “the whole of her examination the petitioner appeared to be suffering under very great distress of mind, and cried frequently, her emotion at times being so great that it was with apparent difficulty that she could answer the questions put to her by the Court and Mr [Patrick] Buckley.”⁶⁵ Until 1881 three judges were required to preside over divorce

⁶² ‘Aickman v Aickman’, *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

cases and only a few cases were heard by a jury. In effect this meant that all divorce cases had to be held at the Wellington Supreme Court.⁶⁶ After 1881 the law changed and only one judge was required to hear petitions for divorce. Cases from then on were heard at Supreme Courts around the country.⁶⁷ In 1869 Janet Aickman's emotion on the stand prompted one of the judges presiding over her case to decide that there "could not be any doubt of the testimony of the petitioner" and the divorce was granted.⁶⁸ Janet Aickman's story and emotion on the stand clearly impacted the court. It also demonstrates that women's demeanour on the stand in divorce cases needed to be framed in a way that proved their accusations. Janet Aickman's behaviour on the stand was in keeping with the grounds of her petition, as the victim of a cruel husband. Further to this however, Janet's testimony offers insight into the sometimes dark reality of marriage for New Zealand women. As was discussed in chapter two, women could testify against a partner in cases of physical abuse when it was tried as a criminal offence. However, from 1867 they had a chance to remedy the situation more permanently via divorce where the often long term pattern of abuse within marriage came to light through women's testimony. Nevertheless, divorce was still an expensive and elaborate legal process and many women would have continued to simply live separately from their husbands or deal with the violence in different ways.

Not all women who appeared in divorce cases were judged to be as innocent as Janet Aickman. In 1896 the Hokitika Supreme Court heard the divorce case of George and Mary Jane Moore. The *Inangahua Times* reported that a "number of persons from Charleston district reached Reefton yesterday by conveyance from Westport and left by trains this morning to Hokitika. They are to attend the Supreme Court sittings there as witnesses in the

⁶⁶ Brown, p.22.

⁶⁷ *ibid*, p.126.

⁶⁸ 'Aickman v Aickman', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

divorce case of Moore v Moore.”⁶⁹ One of these witnesses was Mary Jane Moore herself. She was accused of having an affair with Robert Powell.⁷⁰ Mary Jane Moore gave her evidence in a crowded courtroom. She did not deny the affair but maintained that her husband had forgiven her for her transgression.⁷¹ She testified:

I was at Powell’s on April 20th 1895, when a certain confession was made. My husband, Mr Moore, then took me home and we slept together. I promised I would not misbehave again. From that day to 24th May things went on just as before. A fortnight afterwards my husband suggested I should leave quietly and we could come together again when things quieted down. I then decided to go to Auckland where I had friends. He was very friendly all the time and there was no hint of any proceedings. . . The first notice I had of the divorce was when I was served with a citation on 15 August. I can give no cause for the change in Mr Moore from his forgiveness on April 20 to his decision that I must go away on May 25.⁷²

The request of George Moore that Mary Jane “go away” until things “quietened down” suggests that the affair had caused a scandal in the close knit community of Charleston on the West Coast of the South Island, where Robert Powell was also a married man.⁷³ George Moore’s testimony contradicted Mary Jane’s in many ways. He claimed never to have forgiven her and requested that she leave the marriage and the town.⁷⁴

⁶⁹ ‘Local and General’, *Inangahua Times*, 7 March 1896, p.2.
<https://paperspast.natlib.govt.nz/newspapers/IT18960307.2.8>.

⁷⁰ Hokitika Divorce File, Moore, George v Moore, Mary Jane and Powell, Robert, CAIF CH826 12269 Box 113, ANZ, Christchurch; Robert Powell was listed as a co-defendant. In cases where a woman was seeking a divorce from a man, she was required to supply the name of the woman he had committed adultery with, but she was not listed as a co-defendant. A man was listed as a co-defendant when a husband was seeking a divorce from his wife. The situation meant women often only found out they had been mentioned in a divorce case when it was reported in the colony’s newspapers. It would not be until 1943 that women had to be informed that they were named in a divorce case. The listing of the co-defendant in the newspapers made it clear to the public if a woman was being accused of extramarital relations, heightening the drama and interest surrounding a case. See, Brown, pp.41-42.

⁷¹ ‘Supreme Court of Westland’, *West Coast Times*, 8 September 1896, p.2.
<https://paperspast.natlib.govt.nz/newspapers/WCT18960908.2.11>.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ ‘Supreme Court of Westland’, *West Coast Times*, 12 March 1896, p.2.
<https://paperspast.natlib.govt.nz/newspapers/WCT18960312.2.14>.

The issue of forgiveness in divorce cases had been first addressed in New Zealand in 1890. Samuel May attempted to stop his wife from divorcing him for cruelty and adultery on the grounds that she had forgiven him.⁷⁵ Justice Williams pondered the issue but eventually ruled that although a previous affair had been condoned, it was presumably on the condition that the behaviour was not repeated and since it had been, he could grant the divorce.⁷⁶ Interestingly in the May divorce case, Nellie May's testimony was uncorroborated, something that would have ordinarily been unacceptable. But Justice Williams found that she had been honest about incidents which had occurred in the past, as her husband had admitted to them, and thus there was no reason why she would be untruthful about the incidences that were on trial now. In a strange way her husband became her endorser.⁷⁷ It was also noted that the "illness" that he had given to her as a result of his affair, presumably referring to a venereal disease of some kind, could be proven by a medical doctor if necessary.⁷⁸ This case again exhibits the power that medical evidence had in the court when even the acknowledgment of its possible application held equal weight to the testimony of the woman's.

The often scandalous nature of divorce trials caused them to become well attended occasions with petitioners, respondents, judges, lawyers, witnesses, and spectators gathering in a city or town to hear the proceedings. But they also became a place where the woman's conduct, like Emily Croucher's, was acutely and sometimes harshly evaluated. Marriage was a means through which women's respectability was secured, as well as a means in which sexual instinct was controlled. When marriage broke down, the divorce courts offered a public opportunity for women's conduct to be policed and measured against this social code

⁷⁵ *May v May* (1890) 8 NZLR 763.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *ibid.*

as she was judged not only by the courts but also by the courtroom attendants when she took the stand to give evidence. Supreme Court trials were a significant affair for the local community, especially in the towns where the circuit courts were held. Judges were required to tour the country at different times of the year to hold trials in locations that did not have a permanent Supreme Court. The arrival of the court in towns often prompted “all the fanfare accorded to a travelling circus.”⁷⁹ Bronwyn Dalley has stated that nineteenth-century divorce trials were “vibrant social spaces for the re-enactment of access to the secrets of sex” and were consequently widely attended.⁸⁰ Women witnesses became reluctant entertainment to those in attendance in the courtroom, while the columns of the colony’s newspapers were places where “the most intimate details of their failed relationships saw the light of day.”⁸¹ Readers, as much as those who were placed in the public gallery, were spectators in courtroom dramas. But the testimony of women in the courts can be viewed as more than entertainment as the stand became a place in which the policing of colonial femininity and sexual relationships took place.

There were times when the details in a divorce case were of such a sensitive nature that the judge would hear the case in private. In 1893, the Supreme Court in Auckland heard the testimony of Adeline Maria Hall Harris whose expectations for marriage had, like Janet Aickman, Emily Croucher and many other women, failed.⁸² Her married name was Tutin and she was petitioning for a divorce from Samuel Tutin on the grounds that he had not

⁷⁹ Tony Glen Severinsen, “‘Easy to charge, hard to disprove’ Responses to sexual assault on women in New Zealand, 1860-1910’, MA Thesis, Victoria University of Wellington, 1995, p.85.

⁸⁰ Bronwyn Dalley, ‘Criminal Conversations: Infanticide, Gender and Sexuality in Nineteenth-Century New Zealand’, in Caroline Daley and Deborah Montgomerie’s (eds.), *The Gendered Kiwi* (Auckland: Auckland University Press, 1999), p.65.

⁸¹ Kirsten McKenzie, *Scandal in the Colonies: Sydney and Cape Town, 1820-1850* (Melbourne: Melbourne University Publishing, 2004), p.91.

⁸² Judge Conolly, Judges Notebooks, Divorce and Matrimonial, 1889-1900, BBAE A304 24986 Box 77, ANZ, Auckland.

consummated their marriage.⁸³ The intimate and often unspoken issues of married life that Adeline's testimony would detail promoted Justice Edward Conolly to hear the case *in camera* (privately) and none of her testimony was printed in the press. Justice Conolly may have also wished to protect Samuel Tutin from the fascination of the public. Samuel's failure to consummate his marriage may have stemmed from impotence. Consequently he would be a target for the press as showing inadequate 'manliness.' The only record that exists of the case is the detailed notes Justice Conolly took of Adeline's story. She testified that:

I was married to the respondent 28 May 1891. . . after our marriage we went to Carlton House, a boarding house in City Road Auckland. We stayed there two nights. Occupied the same room and bed on both nights in our ordinary sleeping dress. He wished me goodnight and kissed me before he went to bed. . . I was willing to receive his conjugal embrace. He made no attempt to consummate the marriage. He slept all night as far as I know. The second night his conduct was the same. He did not attempt to embrace me. He kissed me night and morning. . . I was very disappointed at his treatment of me. . . he continued to kiss me morning and night for 6 to 9 months. I was very affectionate towards him all the first part of our married life. We occupied the same [bed] for quite a year. He showed no fondness to me.⁸⁴

Samuel never consummated the marriage, even after Adeline spoke to him about it several times. She hoped that time away being a witness in the Supreme Court in Auckland would spark some feelings of yearning in him but when she returned he did not come to meet her.⁸⁵ It is possible that this previous experience of being a witness in the Supreme Court gave her the confidence to speak so candidly and confidently in her divorce case on matters that were not often discussed publicly, let alone to a male judge.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ An Adeline Tutin is listed as being a witness in a manslaughter case involving a child in the Auckland Supreme Court in 1891. This aligns with the timeline given in her testimony. See 'Charge of Cruelty and Neglect', *Auckland Star*, 2 December 1891, p.5. <https://paperspast.natlib.govt.nz/newspapers/AS18911202.2.37.1>; *ibid.*

Her testimony highlights the expectations of sexual union within marriage that women held. Brookes has commented that the centrality of sex came under scrutiny in the early twentieth century as a husband's sexual access to his wife was debated in divorce cases where women had refused to have sexual relations with their husbands.⁸⁶ She notes that no matter what the circumstances around the cases were, it appears "that sex within marriage was a male prerogative."⁸⁷ What makes the Tutin case interesting is that it suggests that women in the nineteenth century too had sexual expectations for marriage and did not view it solely as a male prerogative. It also shows that they were even willing at times to take legal action through the courts if their expectations were not fulfilled. Justice Conolly granted Adeline a divorce.⁸⁸

Female petitioners and respondents were not the only women to take the stand in divorce cases. In 1894 Justice Conolly heard another divorce case in the Auckland Supreme Court where three women gave evidence. Orlando Kempthorne was seeking a divorce from his wife Jessie for adultery. As per the legal custom, her alleged lover, James Rogers, was listed as a co-respondent.⁸⁹ Two women were brought forward to give evidence that would prove the affair.⁹⁰ Mary Longhurst and her husband kept a boarding house in Custom Street West, Auckland, and May Hoggard was a domestic servant at the boarding house. Both women gave evidence on the stand that Jessie Kempthorne and James Rogers had stayed at the boarding house and occupied the same room.⁹¹ The women had assumed that the pair were married, and May Hoggard could further confirm that the two had shared a bed, an

⁸⁶ Brookes, pp.158-160.

⁸⁷ *ibid*, p.160.

⁸⁸ Judge Conolly, Judges Notebooks, Divorce and Matrimonial, 1889-1900, BBAE A304 24986 Box 77, ANZ, Auckland.

⁸⁹ *ibid*.

⁹⁰ *ibid*.

⁹¹ *ibid*.

observation she made when delivering their breakfast in the morning.⁹² The third woman to give evidence was Jessie Kempthorne herself. She testified that she did not wish to divorce her husband and that the two women were mistaken about her relationship with James Rogers. Far from having an affair, she claimed that she had been nursing him whilst he was sick. Justice Conolly was more inclined to believe evidence which could be corroborated, and the divorce was granted.⁹³

The testimony of female domestic servants, as in cases of libel and slander, feature in cases where the relationship between two people was the focal point of the courts' inquiry. It shows their proximity to a type of private knowledge that other members of society did not have access to. Thus, despite their class and social status, their privileged insight into what occurred behind closed doors became the cornerstone of these cases. One such case type was action of breach of promise of marriage. Action of breach of promise of marriage was a legal remedy most often taken up by a woman seeking damages from a man who had promised to marry her and failed to fulfil that promise. The action has been studied by Frost and New Zealand historian Megan Simpson.⁹⁴ Both historians view the cases as a window into the expectations of courtships, as well a way to explore how Victorian women used the courts in Britain and its colonies to resolve private matters of love and finances.⁹⁵ As with women taking out slander or libel cases, the courts were used as a space where more than damages were being sought, as women took up the action as a method in which to clear their name in a romance gone bad. Women's primary economic security was through marriage, and if there

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Frost, *Promises Broken: Courtship, Class and Gender in Victorian England* (Charlottesville: University of Virginia Press, 1995); Megan Simpson, 'The Action for Brach of Promise of Marriage in Early Colonial New Zealand: Fitzgerald v Clifford (1846)', *Victoria University of Wellington Law Review*, Vol. 41, no. 3, 2010, pp.773-492.

⁹⁵ Frost, *Promises Broken*, p.12; Simpson, p.474.

was any question that her reputation had been tarnished as a result of the failed engagement, the court, as a public place, was a space in which the value of her reputation could be maintained or restored. A successful breach of promise case could restore her prospects for future marriage and economic security.⁹⁶

Suing for breach of promise of marriage was a suit which sat at the intersection of legal, social and cultural norms in New Zealand as the court decided what conduct within courtship was considered appropriate and fair.⁹⁷ The female plaintiff walked a fine line between needing to portray all the notions of correct femininity in order to win favour, a role which would have made her passive, silent and helpless, whilst concurrently asserting enough agency in which to initiate the action and make her case in order to secure damages. As Simpson points out, “in terms of conduct, taking action could challenge her respectability, as women were expected to remain passive and in the private sphere of the home, her participation in the trial brought her into the public sphere and the male dominant courtroom.”⁹⁸ In her article Simpson focuses on the case of *Fitzgerald v Clifford*, the first action brought in New Zealand in 1846.⁹⁹ 10 cases in total were actioned before 1875 in New Zealand, seven of which appear on *New Zealand’s Lost Cases Project*. Six were heard in Dunedin and all but one involved a woman bringing the suit against a man.¹⁰⁰ The relative rarity of the cases in New Zealand reflects the private nature of courtship in the nineteenth century. It also may reflect that the marriage market in New Zealand worked in women’s favour as generally there were fewer women than men. Thus, using the courts to restore

⁹⁶ Simpson, p.476.

⁹⁷ Frost, *Promises Broken*, p.12.

⁹⁸ Simpson, p.490.

⁹⁹ *ibid*, pp.473-492.

¹⁰⁰ Simpson, p.474; They were *Emily Fitzgerald v Charles Clifford* 1856, *Sarah Ann Ford v Alexander Telpher* 1864, *Isabella Carr v William Stevenson* 1868, *Elizabeth Feeny v John Richardson* 1872, *Ellen Brown v David Peter* 1872, *Julius Wenkheim v Hermann Arndt and Marie Arndt* 1873 and *Margaret Forrester v John Darling* 1874. See *New Zealand’s Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

future marriage prospects was less necessary. Many women also did not wish to have their private lives made public whilst others would simply not have had the economic means in which to bring the proceedings, highlighting a component of class in civil cases involving women which were often not apparent in criminal cases. Despite the relatively rare occurrence, Simpson states that the actions “were a key part of maintaining order and respectability in the colony.”¹⁰¹ They offered opportunity for women in the colony to assert agency over their lives through legal processes.

As the action was most often brought by a woman, the burden of proof that marriage had indeed been promised and not fulfilled rested on her shoulders. Until 1875 however, she was not allowed to speak in court. The Evidence Act 1851, which allowed parties to give testimony in civil cases explicitly denied parties in action of breach of promise of marriage the right to do the same.¹⁰² In England, there were concerns surrounding the temptation to commit perjury by women who were more motivated to win the case than tell the unvarnished truth.¹⁰³ The fact that New Zealand directly adopted the legislation that prevented parties from giving evidence suggests that many in the colonial government were happy to accept this. Whilst others balked at the idea that the two people who were most qualified in which to attest to the nature of the relationship and the promises made were unable to speak in court.¹⁰⁴ A bill to amend these laws was introduced in New Zealand in 1871 after England allowed parties in actions of breach of promise of marriage to give evidence in their Evidence Further Amendment Act 1869.¹⁰⁵ In New Zealand, the bill was debated and rejected in 1871 and again in 1873, finally passing two years later to become the

¹⁰¹ Simpson, p.474.

¹⁰² Evidence Act 1851 (England, Wales and Ireland), s.4.

¹⁰³ Frost, p.20.

¹⁰⁴ *ibid.*

¹⁰⁵ Evidence Further Amendment Act 1869 (England, Wales and Ireland), s.68.

Evidence Act 1875.¹⁰⁶ It is a curious contradiction in the law at this time that parties were allowed to give evidence in divorce cases from 1867 but not in action of breach of promise of marriage cases until 1875.

Thus the woman plaintiff, although able to assert enough legal agency and autonomy in which to bring a suit to court independently, had to stay silent in court. There were clear disadvantages to this scenario, including that her thoughts and feelings on the matter and how the breakdown of her relationship had affected her was never heard. It furthermore meant that the judge, the jury, other witnesses and the public were all able to bestow their opinion on the conduct of the parties within their courtship and breakup, but the parties themselves could not give their own perspective on the matter and what their expectations from the courtship actually were. Instead letters made up a vital source of evidence in which to determine what the nature of the relationship was and what promises had been made, and in many cases this was enough to secure damages. In the case of *Elizabeth Feeney v John Richardson* in Dunedin in 1872, letters between the two detailing their engagement and John's reasons for delaying the marriage, were enough in order for Elizabeth to secure damages. The letters were later printed in a number of the colony's newspapers.¹⁰⁷ But if letters did not exist it could be hard for the female plaintiff to secure damages if she was not allowed to give testimony.

There were also a number of advantages that female plaintiffs held by not taking the stand. Firstly, if letters were unavailable, the majority of the evidence was made up of eyewitness accounts which testified to the nature of the relationship, and here women had a

¹⁰⁶ Evidence Act 1875.

¹⁰⁷ 'Elizabeth Feeney v John Richardson', *New Zealand's Lost Cases Project*; <https://www.wgtn.ac.nz/law/nzlostcases/>.

distinct advantage. Women prior to marriage most commonly lived at home, and thus the majority of the courtship took place within that home. Women could bring forward family members who saw the couples conduct together but also domestic servants, who held an intimate and privileged position to view what happened behind closed doors, testimony that the male defendant could not take the stand to rebut.¹⁰⁸ The majority of cases in New Zealand prior to 1875 were tried on the basis of evidence through letters. However, in *Fitzgerald v Clifford* for example, Simpson notes:

The first and most illuminating testimony came from Fitzgeralds' servant, Mary Reid. She lived with Thomas and Emily for ten months over 1844-45 and possibly had the closest view into the pair's private relationship. She testified that she believed Clifford and Emily were lovers, noting that their visits took place over three or four hours, behind closed doors. She was forbidden to enter without knocking. She stated that 'from Mr Clifford's behaviour – I should think that they were on terms of intimacy.' She also claimed to have seen them talking closely at church, noting 'I know they were lovers because there is something between sweethearts that you cannot help knowing.'¹⁰⁹

The courts offered a unique platform in which working class women could voice their opinions and perceptions on matters of courtship in the colony when they are often absent from other written records. After the passing of the Evidence Act 1875 testimony from domestic servants was still used to corroborate evidence but the voice of the female plaintiff was heard more frequently. In 1897 Caroline Parry, a domestic servant, brought and gave evidence in an action of breach of promise of marriage against George Crothers, an architect, seeking £200, which she was awarded.¹¹⁰ It was unusual for a domestic servant to take out such an action. Evidence against George however was overwhelming as alongside Parry's

¹⁰⁸ Frost, p.29.

¹⁰⁹ Simpson, p.484.

¹¹⁰ Judge Conolly, Judges Notebooks, Civil, 24 September 1895 - 17 June 1897 Box 94, BBAE A304 24986 94, ANZ, Auckland.

testimony a number of letters were produced which included proof that a wedding day had been set. Crothers also did not appear in court to defend himself.¹¹¹ Her case suggests that not only did female plaintiffs take the opportunity to give evidence but that some working-class women in the colony could and did take up the opportunity to seek remedy to settle personal matters in the courts. This was especially apparent later in the century and may be due to an increased awareness of New Zealand women, through highly publicised changes to their legal status, on their capacity to use the law to seek redress in personal matters.

Although the evidence laws were liberalised in 1875 for actions of breach of promise of marriage, other evidence laws remained throughout the nineteenth century. In 1898 considerable debate took place over the laws of evidence which were listed in the Destitute Persons Act 1894.¹¹² The debates centred around a case which started in the Magistrates Court in Invercargill but eventually made its way to the Supreme Court and subsequently the Court of Appeal, in which Caroline Church was seeking maintenance from the father of her illegitimate child, George Harvey.¹¹³ Under the Act paternity had to be proved, and as with actions of breach of promise of marriage, the burden of proof was placed on the female plaintiff.¹¹⁴ The legislation was particularly strict surrounding the requirements of evidence in New Zealand in regards to paternity, even more so than in England where legislation stated that the “Justices shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and, if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said Justices, they may adjudge the man to be the

¹¹¹ *ibid.*

¹¹² Destitute Persons Act 1894.

¹¹³ *Harvey v Church* (1898) 17 NZLR 19.

¹¹⁴ Destitute Persons Act 1894, s.9.

putative father."¹¹⁵ Whilst the New Zealand Act stated: "No person shall be adjudged to be the father of an illegitimate child upon the evidence of the mother. . . unless corroborated in some material particular by other testimony to the satisfaction of the Magistrate."¹¹⁶ Both Acts, it was noted essentially stating that: "no man shall be taken to be the father of an illegitimate child on the oath of the mother alone."¹¹⁷ But the New Zealand version appeared much stronger, less open to interpretation and also denied that evidence of all kinds were allowed, instead stating that only testimony was sufficient evidence.¹¹⁸ This meant that evidence such as Harvey giving money to Church and the characteristics of the child, such as his skin colour, were not accepted in court.¹¹⁹ Church could only bring forward one witness to give testimony which was deemed insufficient proof that Harvey was indeed the father and Church lost her case.¹²⁰ Church would have been in a difficult position under the evidence laws. Unwed mothers were also often seen as being unworthy of charitable aid as they "were authors of their own fate" and thus taking their case to court would have been a drastic but necessary step. This was so when Caroline Church took the case to court and Harvey denied being the child's father.¹²¹

The changing legal landscape of the nineteenth century appeared to create a context in which lovers could become more litigious and use the courts to seek redress for relationships that had gone wrong. The motivations for such actions were numerous and depended largely on the situation surrounding a case. Economic gain or security appears to have been one driving force behind women entering into the courts and taking the stand. Restoring

¹¹⁵ *Harvey v Church* (1898) 17 NZLR 19.

¹¹⁶ *ibid*; Destitute Persons Act 1894, s.9(3).

¹¹⁷ *Harvey v Church* (1898) 17 NZLR 19.

¹¹⁸ Destitute Persons Act 1894, s.9.

¹¹⁹ *Harvey v Church* (1898) 17 NZLR 19.

¹²⁰ *ibid*.

¹²¹ Brookes, p.80.

reputation through giving evidence, as in slander and libel cases was also a key factor. It meant that the witness stand again became a place in which women and their conduct were judged, not only by those appointed to decide on truth in a case, but by the throngs of people who attended the cases and read about them in the newspapers. Often this was more explicit than what can be observed in criminal cases as people aired their dirty laundry on the witness stand and the cases became sources of entertainment of a lighter kind. What is apparent, though, is how varied the laws were in allowing or prohibiting women's evidence in these cases. In divorce cases evidence was allowed from 1867 on the same grounds that it was rejected in action of breach of promise of marriage cases in 1871 and 1873. Parties in a bigamy case could not give evidence until 1889 but if they were divorcing on the grounds of bigamy from 1867, then they could take the stand. These intricacies suggest that the colony was grappling with women's changing legal, social and economic position and as one law had a flow on effect to another, these debates were being constantly ignited when it came to who could speak in court and why.

Conclusion

In this examination of women as witnesses in the courts of colonial New Zealand we have seen the many occasions and diverse circumstances in which women appeared on the stand to give evidence. Both in criminal and in civil cases women became entangled in legal disputes and fraught situations involving crime that saw them enter courtrooms and give evidence as victims, defendants and bystanders of events. Through these testimonies it has been possible to explore women's place in society more broadly as well as how women understood the law as a mechanism in which they could seek legal remedy. Women took the stand to legally separate themselves from a relationship gone bad, restore their reputation, seek redress for the theft of property, or to ensure that justice was done if a crime had been committed against them. Frequently women simply took the stand because they had been at a certain place, at a certain time and became thus involved in legal cases to establish probable timelines of events or to confirm or undermine alibis. From the 1860s Māori women took the stand to give evidence in the Native Land Court. An analysis of women as witnesses adds another dimension to what is known about the everyday but often compelling engagements of women in New Zealand's colonial courts.

Women appeared as witnesses in the courts more so than in any other role. This thesis has demonstrated how, by the end of the nineteenth century, married women were entering the courtrooms and taking the stand in new ways. At various points between 1843 until 1889 law makers sought to do away with the competency exclusion which concentrated largely on wives' ability (and, at the beginning, considerable inability) to give evidence against their

husbands. Simultaneously, law makers were redefining married women's status under the law.

Women witnesses were speaking in the public and powerful space of the court: the domain where the law was administered and applied to colonial subjects. The introduction and enforcement of British law was an essential element of settler colonialism. The rule of law was a marker of British imperial power and a certain type of order that would strive to be enforced throughout the institutional workings and structure of the courts. Women were actors in the administration of the law long before they had the right to choose their lawmakers, that is, to gain the core right of citizenship, the ability to vote. Women appeared as witnesses before women could appear as judges, barristers, solicitors or clerks. Once they had the vote, in 1893, they worked hard to expand the part women could play in the application of the law as well as in its making in parliament. One of the priority issues was campaigning to make women eligible for jury service. Women were deemed unfit to serve on a jury in New Zealand until 1942. Until 1962 they could not serve on a jury on the same basis as men and until 1976 women could still opt out of jury service on the basis of their sex. These exclusions became key issues that the National Council of Women addressed from the outset. The right for women to serve on a jury would “prove one of the longest struggles by New Zealand women for equal rights of citizens.”¹ Drawing attention to women witnesses highlights that women were participating in a verbal capacity in the courts for decades before they had other ways of exercising voice in these spheres of legal power.

¹ Dorothy Page, *The National Council of Women: A Centennial History* (Wellington: Auckland University Press and Bridget Williams Books, 1996), p.25.

Part of the British legal system was that justice had to be open. When women took the stand to give evidence in the courts they did so in highly public places. Apart from a few rare instances, the public attended court cases and women witnesses became the object of public gaze. Court proceedings were fulsomely reported in numerous and widely read newspapers in the colony. Newspapers and their readers became part of the public space of the courtroom and thus it was not only those present that the women witnesses were talking to but the readers of the newspapers, who learnt about the women's words, appearances and demeanour on the stand through the press. Newspapers provide an important source for the historical exploration of this subject. They do not exist alone, but have been valuable alongside judges' notebooks, Crown Books and information provided by *New Zealand's Lost Cases Project*.

Growing numbers of appearances by women on the witness stand over the period c.1840 to 1900 was, in large part, due to changes in evidence laws. From 1843 the British parliament sought to do away with the competency exclusions that had prevented wives giving evidence in cases involving their husbands.² Law makers sought first to amend evidence within the civil law. During the Crown colonial period changes to the law in New Zealand had been implemented by the British parliament directly to New Zealand, or New Zealand adopted the altered laws under the English Acts Act.³ Afterwards the New Zealand parliament started to make alterations to the law on a local level. Intricacies started to develop regarding when people could and could not give evidence. Petitioners and respondents could give evidence in cases of divorce for example, eight years before parties in action of breach of promise of marriage cases could.⁴ In 1889 the Criminal Evidence Act allowed parties and their spouses to give evidence in criminal cases if the defendant agreed to it.⁵ It was the last

² Evidence Act 1843 (England, Wales and Ireland); Evidence Act 1851 (England, Wales and Ireland).

³ English Acts Act 1845; English Acts Act 1854.

⁴ Divorce and Matrimonial Causes Act 1867; Evidence Act 1875.

⁵ Criminal Evidence Act 1889.

major adaptation in the law in respect to wives giving evidence for a significant time. The full removal of the restrictions of spouses' testimony did not take place in New Zealand until 2007. 1843 to 1889 thus saw an exceptional period of change.

The 1889 Act was also a departure from British evidence laws. Following the Crown colonial period New Zealand had largely followed behind Britain in making amendments to evidence laws. At times New Zealand had even appeared more conservative and cautious towards defining who could take the stand. In 1869, England, Wales and Ireland allowed parties in action of breach of promise of marriage cases to give evidence, a move the New Zealand parliament declined in 1871 and 1873, finally allowing it in 1875.⁶ But allowing defendants and their spouses to give evidence in criminal cases in 1889 came ten years before the British parliament allowed the same to occur in England, Wales and Scotland.

Changes in evidence law were being debated and implemented simultaneously with wider changes in married women's social, economic and legal position. Coverture laws which consolidated wives' legal status into that of their husbands, were being slowly dismantled in the nineteenth century.⁷ In some ways evidence laws were also adding to this gradual dismantling as wives were recognised to be individual persons who needed to take the stand separately from their husbands. Changes to coverture laws were also creating new circumstances which drew women to the witness stand. In 1860 the Married Women's Property Protection Act was passed, allowing for any married woman's property acquired during a period of desertion to be protected under law.⁸ In 1870 the law was extended to protect wives' property in situations where desertion had not taken place but the wife was

⁶ Evidence Act 1875.

⁷ Bettina Bradbury, 'From Civil Death to Separate Property', *NZJH*, Vol. 29, no. 1, January 1995, p.40.

⁸ Married Women's Property Protection Act 1860.

subjected to cruelty by her husband, if he had been living in open adultery, a habitual drunk or was failing to provide for his wife and family through illness and other unavoidable causes.⁹ In 1873 the Life Assurances Companies Act allowed married women to make policies or contracts for life insurance, endowments or annuities.¹⁰ In 1884 The Married Women's Property Act gave all married women, regardless of situation, the right to hold their own property and act as if they were *feme sole* within New Zealand courts.¹¹ Women could now sue or be sued, hold a separate purse to their husbands and sign contracts. The witness stand appeared to become a place where confusion surrounding these new laws were expressed and sorted out for the benefit of the court, the parties, but also the colonial public which read about court cases in the press or participated in the courtroom as spectators.

Women's testimonies were placed within hierarchies of evidence in the courts. The rise of the expert witness such as medical professionals, began to hold the upmost authority on the witness stand and women's testimony sat in stark opposition to the perceived factuality of expert testimony. The content of women's testimony, especially in the criminal law, began to be systematically distrusted. This distrust of women's testimony became firmly embedded in the New Zealand legal system. The expanding circumstances that brought women to the witness stand paradoxically saw women's testimony become open to greater scrutiny and their testimonies came to sit at the bottom of the hierarchies of evidence. These hierarchies were highly gendered, but aspects of a woman's identity such as class, social status, race and marital status were also factors in how women's testimony was received.

⁹ Married Women's Property Protection Act 1870, s.2.

¹⁰ Life Assurances Companies Act 1873, s.47.

¹¹ Married Women's Property Act 1884.

Together with existing legal histories of women in New Zealand, this thesis has recognised the centrality of marriage to women's social, legal and economic position. Marriage not only determined how and why women found themselves on the witness stand, but also often how credible they were perceived to be. Marriage permeated women's lives as it dictated occupation, economic security, legal and social standing. The majority of New Zealand women in the colonial period were married and thus the changes to evidence law and to laws of coverture drastically altered the ways that most women operated under the law and in the law's courts. Women witnesses, and their testimonies, expose the ways that marriage was shaped as an ideal by the law and wider society, and how lived realities often departed significantly from those ideals. Women's testimonies also highlight the different forms a 'marriage' could take. Women's testimonies reveal the ways that marriage could be challenged and how women were using the courts to do so, as well as the far from ideal marriages many women endured.

The tension between the written law, which sanctioned the expansion of women's testimony and the rise of the systematic distrust of their testimonies is complex and hard to pin down to a single explanation. It is possible that colonial aspirations and anxieties surrounding the creation of a new society, partly through the image of the respectable white woman, led to an intensified scrutiny of women's femininity, conduct, behaviour and morals, particularly when they encountered the legal system and came to speak in the highly public place of the courtroom. The practice of interrogating a female witness's character to further discredit her testimony was used in almost all cases in which women appeared and was only heightened in cases of sexual violence, when a woman witness was single or when she was of 'questionable moral character'. It is possible that this accepted practice of intensified questioning towards certain women on the stand created a situation whereby in theory,

women had more legal autonomy to speak in court, but in practice the diversity of women appearing on the stand who did not fit the image of the respectable white settler woman, coupled alongside anxieties surrounding women's changing legal, social and economic position, generated a culture of intensified scrutiny of all women as witnesses in New Zealand's colonial courtrooms. This culture included extensive and harsh cross-examination and a focus on women's appearance, demeanour and conduct outside of the courtroom being brought into question.

When women took the stand, they were expected to perform correct displays of femininity and asserting too much agency could backfire. It is for this reason that many female criminal offenders appeared not to take the stand after 1889 when the law allowed them to do so, in an attempt to bolster credibility as they stayed silent in the courtroom. But it was also apparent that defence lawyers felt themselves better qualified in which to talk to the court and frame their client in an appropriate light. This illustrates how the voice of women was subordinate to the white male professional figure. Female defendants not taking the stand is partly the reason that women most often appeared on the witness stand as bystanders and victims of petty and violent crime.

Domestic servants do not fit neatly into the hierarchy of evidence that placed women's testimony in opposition to the professional male voice. Their appearance in the court also illustrates how courtrooms could be places that inverted social hierarchy. Domestic servants were recognised to have privileged access to private knowledge and were used by the courts and their employers to seek truth in cases of libel, slander, divorce and action of breach of promise of marriage. Far from their testimonies being discredited, their access to the sights and conversations of the home and private life, resulted in them acting as a kind of

‘expert’ witness through their unique proximity to the actors or activities under scrutiny. Thus, their testimonies held a considerable amount of weight in these cases.

The legal record shows us something about the wide range of economic activities in which women were engaged in colonial New Zealand. Women held a number of occupations that brought them into the court as witnesses. In cases of petty crime women pawnbrokers worked with police to counteract theft and appeared on the stand to give evidence against customers in an effort to maintain a good reputation for the trade. They endeavoured to avoid appearing in the courts themselves in cases of receiving stolen goods. It was less their gender and more the dubious reputation of their profession that saw them questioned on the witness stand. These women’s presence on the witness stand, as well as the testimonies of women witnesses in general highlight the reach of the law in colonial women’s lives. Their testimonies shed light into women’s experiences in the world, through their own words. The occupations they held, where they spent time outside of the home which saw them witness crime, how they viewed their marriages, employees, employers, husbands and members of their family and society. Their testimonies help us gain a sense of how women perceived right from wrong and how the law worked within and structure their lives.

When women appeared on the stand for the most part women were subject to the culture of distrust in the courts, such distrust was amplified in cases where the stakes were particularly high, such as sexual violence and murder cases. This culture remained in New Zealand well into the twentieth century and has remnants still in the present day. In November 2019 as this thesis was being completed the Sexual Violence Legislation Bill had its first reading in the New Zealand parliament. In February 2020 it is awaiting a report from the Justice Committee. The aim of the bill is to amend “the Evidence Act 2006, Victims’

Rights Act 2002, and Criminal Procedure Act 2011 to reduce the re-traumatisation victims of sexual violence may experience when they attend court and give evidence.”¹² As the bill was being read, the murder trial of 22-year-old British backpacker Grace Millane was being heard in the Auckland High Court (what would have been the Supreme Court in the nineteenth century). Grace’s past sexual history and conduct with her murderer in the immediate days preceding her death was used by the defence in an effort to prove that Grace’s death was a consensual sexual encounter gone wrong. This defence was characterised by Scott Beard, lead detective on the case, as a method of “repetitively revictimis[ing] the victim and the victim's family”¹³ The Sexual Violence Legislation Bill includes an incentive to disallow the past sexual history of a victim to be used as part of the defence, marking the possible end in New Zealand to the remaining traces of Sir Matthew Hale’s philosophies of evidence in sexual violence cases. This thesis goes some way towards explaining the history of the legal and cultural treatment of female witnesses when they took the stand in colonial New Zealand’s courts.

¹² ‘Sexual Violence Legislation Bill’, *New Zealand Parliament*; https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_93010/sexual-violence-legislation-bill; accessed 27 January 2020.

¹³ Danielle Clent, ‘Top detective in Grace Millane case says rough sex should not be a defence’, *Stuff*; <https://www.stuff.co.nz/national/crime/119706042/top-detective-in-grace-millane-case-says-rough-sex-should-not-be-a-defence>; accessed 21 February 2020.

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