

## New Zealand Lost Cases Project

### *Butler v Flavell*

7 March 1849

### Supreme Court, Auckland, Martin CJ

**Keywords:** Wife; Marriage; Desertion; Debt; Board; Couverture; Marriage Ordinance 1847

**Main Source:** *New Zealander*, 10 March 1849, p3

**Additional Source:** 'Auckland civil minute book', 1844-1856, BBAE 5635/1a, Archives New Zealand, Auckland, pp.177-178

**Counsel:** Thomas Edward Conry<sup>i</sup> for the Plaintiff; Frederick Whitaker<sup>ii</sup> for the Respondent

**Significance:** *Butler v Flavell* was the first New Zealand Supreme Court case to examine the issue of women's debt and the accountability of their husbands in honouring that debt. The action involved William Butler, a settler who provided Thomas Flavell's alleged wife Elizabeth, with passage money and board for over two years in Mongonui. It was a debt valued at £44 6s. 8d. The defendant's counsel claimed that while Elizabeth had lived with Flavell, he had never married her nor had he stopped her from returning to his residence. The plaintiff's counsel called Mr Skey, the minister who performed the marriage, to prove that Thomas Flavell had married Elizabeth Merrett in 1842. In the address to the jury, Chief Justice Martin outlined that if the marriage was legal and it was proven that Elizabeth had been living apart from her husband without "any reasonable justification or excuse", her husband would not be responsible for debts she had accumulated.<sup>iii</sup> The jury found for the plaintiff and granted £25 in damages.

From this verdict it seems probable that it was proven that Elizabeth had married Thomas Flavell, however, as the *New Zealander* did not publish detailed coverage of the case's evidence, it is impossible to tell the nature of the Flavell's relationship. As the jury imposed damages, it is highly likely that there was cruelty in the relationship or that Thomas Flavell failed to provide an adequate level of financial support during their separation. Abandoning one's financial responsibilities in a marriage was a violation of section four of the 'Ordinance for the Support of Destitute Families and Illegitimate Children'. This ordinance, passed in 1846, decreed that husbands who deserted their wives and families would be not only be accountable for their financial support but would also be subject to financial penalties if they failed to provide this support.<sup>iv</sup> Supplementary to this, the doctrine of *couverture* meant that in the eyes of the law a husband and wife were seen as one person; therefore any debt accumulated by the wife was also the husband's responsibility.<sup>v</sup>

**Further Information:** See M. Simpson, 'Women, Marriage and Debt: A case note on *Butler v Flavell* (1849)', forthcoming *VULWR*, 2010; Bettina Bradbury, 'From Civil Death to Separate Property: Changes in the Legal Rights of Married Women in Nineteenth-Century New Zealand', *New Zealand Journal of History*, Vol.29, No.1, 1995, pp.40-66; Janine Paver, 'Two Separate Purses: The Passage of the Married Women's Property Act, 1884, HIST 489 Essay, Victoria University of Wellington, 1991

## Transcript of Decision<sup>vi</sup>

This was an action to recover the sum of £44 6s. 8d for the amount of two items— one of £42 6s. 8d., due from the defendant to plaintiff for board and lodging of Elizabeth, the defendant's wife, from the 1st March, 1846, to the 11th May, 1848; and a second item of £2, advanced for passage money of defendant's wife from Auckland to Mongonui, by the schooner "Bride," in the Month of February, 1846.

The defendant pleaded that the said Elizabeth was not then nor never had been his wife; but that she had been living with him previously to the month of March, 1846, and that she left him on or about the 1st of that month without any sufficient cause and that she had never returned to him, although he had been always willing to receive her back. Defendant denied that the sum of £2 was a necessary advance, and said that the sum of £42 6s. 8d. for board and lodging was excessive.

Evidence in support of the pleadings was adduced.

Mr. Skey, for the plaintiff, was called on to prove his having performed the rites of matrimony between the defendant and Elizabeth Merrett, in the year 1842 at Mongonui. This witness was examined at some length by defendant's counsel as to his right to act in a clerical capacity.

His Honor summed up as follows:

There are two main questions in this case. First— was Elizabeth the wife of the defendant or not? And second, if so was there a sufficient cause for her living apart from her husband? It is absolutely necessary for the plaintiff to prove that she was the defendant's wife at the time when the credit was given to her; because at that time, she was not living with the defendant. (The Chief Justice then commented on the evidence of Mr. Skey, and on the Colonial Marriage Ordinance.) The ground of the whole claim then is this, that Elizabeth was the defendant's wife, for though it is true that where a man and woman live together as man and wife, without being in truth man and wife, the woman may bind the man by her contracts, for articles necessary for herself and the household; yet this holds only so long as they live together. When they have parted, all power in the woman to bind the man is gone. But it is not so with a wife. She, though living apart, may bind her husband by contracts for articles of necessity, though it is not necessarily true that she can do so under all circumstances. If, for instance, a woman leaves her husband without any reasonable justification or excuse, her husband is not answerable. Where any person gives credit to a woman, whom he knows to be a married woman, and to be living apart from her husband, the law imposed upon that person the obligation of making inquiry as to the circumstances under which she is so living. If it is by reason of cruelty, or ill treatment on the part of the husband, that the wife is driven from her home, or if it is by the free will and with the consent of the husband that the separation takes place, and after that the husband does not make and pay an adequate allowance for her; in either of such cases a stranger may supply her with articles necessary for her, and acquire a right to look to the husband for payment.

(The Chief Justice then read the material parts of the evidence.)

Verdict for plaintiff— Damages £25 and costs.

Mr. Conry (per Mr. Merriman) for plaintiff.

Mr. Whitaker for defendant.

**Registrar's Minute Book<sup>vii</sup>**

William Butler of Mongonui, Settler, Plaintiff v Thomas Flavell of the same place, Inn Keeper, Defendant

Action to recover Forty four pounds (£44) 6/8 being the amount of the two sums following (that is to say)

Forty two (£42) 6/8 due from Defendant to Plaintiff for Board Lodging and accommodation furnished by Plaintiff to Elizabeth the wife of the Defendant from the 1 March 1846 to the 1 May 1848. Plaintiff saith that the marriage of the Defendant and the said Elizabeth Flavell, his wife, took place on or about the month of June 1842 and is now a good and sustaining marriage, and

Two pounds (£2) advanced by Plaintiff for the passage money of the said Elizabeth Flavell by the Schooner Bride from Auckland to Mongonui in the month of February 1846 and which advance was necessary for the said Elizabeth Flavell at the time and under the circumstances in which it was made.

The Defendant for Plea saith.

That the said Elizabeth was not at the time in the declaration mentioned and never has been the wife of the Defendant and the Defendant further saith that the said Elizabeth properly called Elizabeth Merritt was living with the Defendant previously to the month of March 1846 and that she left on or about the 1 March 1846 without any sufficient cause and that she has never returned to the Defendant although the Defendant has always been willing to receive her back.

And the Defendant further saith that the sum of £2 alleged to have been advanced by Plaintiff the said Elizabeth Merritt was not necessary advance for the said Elizabeth as alleged.

And the Defendant saith the charge of Forty two pounds (£42) 6/8 is unreasonable and excessive.

And the Defendant does not admit that the sum of £2 was advanced by the Plaintiff as alleged.

There upon issue is joined.

Place of Trial: Auckland  
Time: 7 March 1849

Counsel: Thomas Conry (Plaintiff); Fredrick Whitaker (Defendant)

William Martin, Chief Justice

20 November 1848

On the fifteenth day of March one thousand eight hundred and forty nine the within named William Butler by his Attorney Thomas Edward Conry acknowledged himself to be satisfied by the within named Thomas Flavell of the debt [?] and charges therein mentioned therefore let the said Thomas Flavell be thereof acquitted.

Thomas Outhwaite, Registrar Supreme Court.

For further information, contact Megan Simpson.

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<sup>i</sup> Thomas Edward Conry, solicitor, died in Auckland in 1850, aged 39; *Daily Southern Cross*, 16 April 1850, p3

<sup>ii</sup> Frederick Whitaker, arrived in New Zealand in 1840. See his *Dictionary of New Zealand Biography* entry.

<http://www.dnzb.govt.nz/dnzb/>

<sup>iii</sup> *New Zealander*, 10 March 1849, p3

<sup>iv</sup> An Ordinance for the Support of Destitute Families and Illegitimate Children, 26 October 1846 (10 Vic. No.9) s4

<sup>v</sup> Sir William Blackstone, 'Of Husband and Wife', *Commentaries on the Laws of England (1765-1769)*, Ch 15

<sup>vi</sup> *New Zealander*, 10 March 1849, p3

<sup>vii</sup> 'Auckland civil minute book', 1844-1856, BBAE 5635/1a, Archives New Zealand, Auckland, pp.177-178