

## New Zealand Lost Cases Project

### *R v Rice Owen Clarke*<sup>1</sup>

1 September 1849

Supreme Court, Wellington, Chapman J

**Keywords:** Bigamy; Marriage; Wesleyan Church

**Primary Sources:** *New Zealand Spectator and Cook's Strait Guardian*, 5 September 1849, p3; Notebook entitled 'Criminal trials No.5', 1845, MS-0411/006, Hocken Library, Dunedin, pp.220-228

**Additional Sources:** Judges Notes and Resident Magistrate Court Documents in 'Papers relating to cases and land sales', 1848-1849, MS-Papers-8670-046, Alexander Turnbull Library; 'Letters Vol. 3', 1849-1851, qMS-0420, Alexander Turnbull Library, Wellington, pp.736-7; 749-753; 'Correspondence from Henry Samuel Chapman to George Grey', 1848-70, GLNZ C10(6), Grey NZ Letters Vol.6, Manuscripts and Archives, Auckland City Libraries; *Wellington Independent*, 5 September 1849, p3; 8 September 1849, p4

**Counsel:** William Swainson<sup>2</sup> (Prosecution); Hugh Ross<sup>3</sup> for the Defendant.

**Significance:** *R v Rice Owen Clarke* was the first Supreme Court case for bigamy heard in the colony. The case involved a couple who had migrated to New Zealand together and the wife had later returned to England. While she was away, Clarke met a new woman who he proposed to marry. He approached the Methodist ministry at Wellington to discuss the status of his marriage. He claimed that as the marriage had never been consummated, it was never a valid marriage. The ministry agreed and in 1848, Reverend James Watkins married Clarke and his new wife Louisa Felgate. Clarke's first wife returned to Wellington and discovered his new marriage. She reported Clarke to the Police Magistrate and the prosecution ensued. Clarke was acquitted because the prosecution was unable to prove firstly that the first marriage had taken place, and secondly that his first wife was still living.

In correspondence with his father, Justice Chapman noted his frustration with the prosecution. Had they ensured that Clarke's first wife was in court, the prosecution would have been able to use witnesses to identify her and thus prove that she was still living.<sup>4</sup> The prosecution was also unable to prove the first marriage because the couple did not have an authenticated copy of their marriage certificate. In fact the only proof of their union was the testimony of a witness who sailed to New Zealand with the couple. This was a common problem with bigamy prosecution during this period. Many settlers had married in their home country before migrating; as many did not have official copies of their marriage certificate, this made verifying a legitimate marriage difficult. Marriages performed in New Zealand were far easier to verify due to legislation passed in 1847 and 1854, which reformed the process of marriage registration.<sup>5</sup>

Bigamy was first established as a felony in 1604.<sup>6</sup> This statute marked a significant change as bigamy no longer came under the jurisdiction of the Ecclesiastical Courts, but rather was an offence under the authority of the secular courts. In New Zealand, bigamy had a maximum sentence of seven years transportation. After transportation was abolished in New Zealand in 1854, the maximum sentence of four years penal servitude was established.

**Further Information:** Megan Simpson, “Solemn Ordinances are not to be trifled with”: Bigamy prosecution in colonial New Zealand (forthcoming 2010); Ginger S. Frost, *Living in Sin: Cohabiting as Husband and Wife in Nineteenth-Century England*, Manchester, 2008

### **Transcript of Decision<sup>7</sup>**

*New Zealand Spectator and Cook's Strait Guardian*, 5 September 1849, p2

R v Rice Owen Clarke

...In commenting on the case for bigamy, his Honor observed that some sort of-consultation had been held as to whether the previous marriage was void, but a mere proof of a voidable marriage would not therefore render a marriage void, or any subsequent marriage legal; and any person aiding and abetting by his advice the celebration of another marriage under such circumstances would lay himself open to an indictment, and would, if the extreme penalty of the law were enforced, be transported; and he mentioned this by way of caution, to prevent the repetition of similar conduct...

Rice Owen Clark was indicted for intermarrying with Louisa Felgate his first wife being still alive. The prisoner who was defended by Mr. Ross pleaded Not Guilty.

The first witness called was William Norgrove, painter, Wellington, who said he knew the prisoner at the bar, and had known him since 1841, he came out in the Gertrude with him; when they first went on board prisoner lived in the single men's berth, but at the end of about six weeks it was rumoured in the ship that he was a married man; the person said to be his wife was a young woman named Ann; she was living with the surgeon's wife as servant; has seen her since; they lived as man and wife near the Cemetery for about a year; she then left the colony; witness saw her again about two months since; she showed witness a paper; no conversation about their marriage took place in the presence of the prisoner.

Cross-examined by Mr. Ross - Could not say whether they lived together as man and wife on board the ship.

George Felgate, gardener - Is the father of Louisa Felgate; was at his daughter's marriage; could not recollect any particular conversation with prisoner in March; had been acquainted with him about a year; was present when the woman called who stated herself to be Clarks wife; she asked for him; he said, my name is Clark: she replied, yes, I know it is, and you are my husband; she persisted in saying she was his wife, and he said, she was no woman; thinks the prisoner admitted that he had been married, but on another occasion he said he had not consummated the marriage; the conversation took place on a Sunday in the afternoon; it was since the marriage

with his (witness's) daughter, probably two months after it; when the prisoner proposed to marry his daughter witness had some conversation with him; in consequence of what he had heard he asked him if he was not already married; he said he was not because the marriage was not consummated, and that she was not a woman; witness wished to have the opinion of a person more capable of judging than himself; thinks he mentioned this desire to the prisoner but cannot say whether the prisoner referred to Mr. Watkin, or whether he (witness) proposed it; he and the prisoner both attended the meeting; witness said what had passed would not alter his opinion ; that he did not think there had been any marriage; prisoner said he did not think it would ; had some conversation about the woman, who said she was his wife; understood that she had gone to England; his impression was that there had been some solemnity; the woman did not produce any paper when she called at his house.

James Watkin, Wesleyan Missionary - Knows the prisoner at the bar; has had conversation with him about his marriage; he stated that a form of marriage had been gone through; but he did mention the name; thinks he said it was in London a long time since; he did not say how many years: this conversation took place in the early part of this year. Witness produced the register of the marriage between R. O. Clarke and Louisa Felgate: he had married them.

John E. Smith, clerk to the Magistrates, proved the statements of the prisoner before the Magistrates: prisoner said, the person who calls herself Ann Ingoldsby I have never consummated marriage with: Mr. Watkin has stated precisely what I said to him, that no marriage could possibly be consummated with her by any one.

Mr. Ross objected that there was no proof to go to the Jury of a marriage with Ann Ingoldsby. Although there might be an admission of a previous marriage with some one, yet this marriage was not connected with Ann Ingoldsby.

His Honor overruled the objection but reserved the point for consideration if necessary. His Honor pointed out to the Jury that they must be satisfied of the marriage with Ann Ingoldsby, and also of that with Louisa Felgate, and that at the time of the marriage with Louisa Felgate Ann Ingoldsby was still alive. With regard to the fact of the second marriage there could be no doubt; but as to the first, it was for the Jury to say whether the admission was sufficient proof, and whether the first wife Ann was still alive. His Honor having commented on the various points in the evidence the Jury retired, and in a few minutes re-entered the Court and returned a verdict of "not-guilty".

### **Transcript of Chapman J's Notebook<sup>8</sup>**

The Queen v Rice Owen Clarke

1 September 1849

For bigamy - intermarrying with Louisa Felgate - his first wife Ann being alive.

Plea not guilty.

William Norgrove, Painter, Wellington - I know the prisoner at the bar. I have known him since June 1841. We came out on the Gertrude together. When he first came on board he lived in the single man's birth. In about 6 weeks he came out as a married man. A young woman named Ann was the person claimed as his wife - she was living with the surgeon's wife as his servant. I have seen her since. They were living as man and wife near the cemetery - they lived [?] about a year. They then left this colony. I saw her again about two months ago. She showed me a paper. No conversation ever took place in the presence of the prisoner about their marriage.

Cross examined - I cannot say whether they lived together as man and wife on board. I only know they were living in the same house.

George Felgate, Gardener, Hawkstone Street - I am the father of Louisa Felgate. I was at the ceremony of my daughter's marriage. I cannot recollect any particular conversation in March. I had been acquainted with him about a [sic] 12 month. I was present when the woman called who called herself Clarke's' wife. She asked for him. She said my name is Clarke. She said yes I know it is and you are my husband. She persisted in saying she was his wife and he said there was no woman. I think he did admit that he had been married but in another occasion he said he had not consummated it. (Judge notes admission 1st marriage.)

He said she was not a woman - he repeated this. They were also a good deal excited at the time. This was on a Sunday in the afternoon. It was since the marriage with my daughter - perhaps 2 months after their marriage. When prisoner proposed to marry my daughter I had some conversation with him. Conversation of what I had heard I asked him if he was not married already. He said he was not, because it was not because it was not consummated and that she was not a woman. Not being satisfied I wished to have the opinion of a person better capable of judging. I think I mention this to the prisoner - but whether he referred to Mr Watkins as I proposed it I cannot remember. I attended the meeting so did the prisoner. I said what had passed would not alter my opinion - that I did not think there had been any marriage - he said he said he did not think it would, he had some conversation about the woman who called herself his wife. My impression was that there had been some solemnity. When the woman called at my house - she did not produce any paper.

James Watkins, Wesleyan Missionary - I know the prisoner at the bar. I have had conversation with they prisoner about his marriage. He stated that a form of marriage had been gone through. he mentioned her[?] name. He said I think in London a long time ago. I think he did not say how many years. This conversation was in the early part of this year. I produce the Register of the marriage of Rice Owen Clarke and Louisa Felgate. I married them. (Judge notes the 2nd marriage.)

John Elijah Smith, Clerk to the Magistrate - The statement of Rice Owen Clarke proved "I have not consummated any marriage with Ann Ingoldsby - no marriage could possibly be consummated."

Mr Ross objected that there was no proof to go to the jury of a marriage with Ann Ingoldsby - there was something that might be an admission of a previous marriage with some one but nothing to connect this marriage with Ann Ingoldsby.

Objection overruled but the point reserved should it be necessary to consider it.

Points put to the jury. They must be satisfied:

1) Of the marriage with Ann Ingoldsby

2) Of new marriage with Lousia Felgate

That [?] second marriage Ann Ingoldsby was alive. As to the second marriage in fact - their can be no doubt. As to [the] first - it is for them to say whether the admission is enough proof. (Analysed evidence) They must also find that Ann - the first wife was alive.

Verdict: Not Guilty.

For further details contact Megan Simpson.

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<sup>1</sup> Justice Chapman and the newspaper reporters use both Clarke and Clark indiscriminately. Clarke is the spelling used in this piece as it is the spelling used in Chapman's judge's notebook.

<sup>2</sup> William Swainson arrived in New Zealand in 1841. Please refer to the *New Zealand Dictionary of Biography* <http://www.dnzb.govt.nz/>

<sup>3</sup> Hugh Ross arrived in New Zealand in 1843. Please refer to the *Australia Dictionary of Biography* <http://www.adb.online.anu.edu.au/biogs/A020350b.htm>

<sup>4</sup> 'Letters Vol 3', 1849-1851, qMS-0420, Alexander Turnbull Library, Wellington, pp.736-7

<sup>5</sup> An Ordinance for regulating Marriages in the Colony of New Zealand, 28 September 1847 (11 Vic. No.7); An Act to regulate Marriage in the Colony of New Zealand, 16 September 1854 (18 Vic. No.12)

<sup>6</sup> An Act to restrain all persons from marriage until their former wives and husbands be dead (1 Jac. I, c.11, 12)

<sup>7</sup> *New Zealand Spectator and Cook's Strait Guardian*, 5 September 1849, p3

<sup>8</sup> Notebook entitled 'Criminal trials No.5', 1845, MS-0411/006, Hocken Library, Dunedin, pp.220-228