The schoolgirl and the horse-whipped parson: an account of an early New Zealand cause celebre.

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Abstract:
This paper examines the curious litigation surrounding the Reverend Arthur Baker; litigation which included the criminal prosecution of Baker for allegedly indecently assaulting Mary Schroder, a schoolgirl; the appellate review of, and quashing of, the resulting conviction , and then the re-litigation of the whole matter in a civil action brought by Baker against George Schroder, Mary's father on the basis of George Schroder's public assault on Baker – horsewhipping him in the street outside Baker's church.
Although the truth or otherwise of Mary Schroder's allegations may never be determined, the nature of the case, its conduct in different court proceedings, and the manner in which it was reported in the newspapers, provide interesting insights into contemporary attitudes to such offending, and to public challenge to, and criticism of, legal proceedings. Not the least interesting element is that this is a rare case of a trial of an alleged offender from a position of social privilege. Even more rare is the fact that the issues were in effect re-litigated; and rarest of all is the degree to which the proceedings, and its detail, were the subject of public and media discussion.

Part 1. Opening; overview and protagonists

The public element in this case began on 13 August 1858, when the Reverend Arthur Baker was standing in the street outside St Paul's Anglican Church in central Wellington following the morning service. He was there accosted by George Schroder, a Nelson merchant, who accosted him with the words "You have insulted my daughter", and on Baker offering to speak to him in private, Schroder said "It comes to this – either you are a liar or my daughter – I believe you are". Schroder then struck Baker "thirty or forty" blows with "a thick riding whip" – horsewhipping being the traditional expression of anger and contempt - and then said "Now take your remedy".[1] It is not clear how serious the assault in fact was – although Baker was to claim (characteristically, in words attributed to an unidentified third party) that it was

[1] *Lyttelton Times* November 24 1858, evidence of Arthur Baker.

"a brutal and cowardly assault"[2], it does not seem he was seriously hurt. Baker may have been surprised at the occurrence, but presumably not so at the existence of animus on Schroder's part – then and later Schroder's avowed justification for his actions was that Baker had, months earlier, indecently assaulted Schroder's twelve year old daughter Mary, a pupil at a Wellington school, when Mary and her sisters were briefly staying at Baker's residence.
Baker's reaction to the assault was to consult friends with legal expertise and, on Monday 14 August, to file a writ in the Supreme Court, seeking damages for assault . Long before any such case could come on for hearing, and about two weeks after the assault, Schroder's own lawyer, William Locke Travers, laid an information in the Resident Magistrate's Court, charging Baker with indecent assault. That information was heard, in circumstances which will be discussed later, by the Resident Magistrate, Henry St Hill, and a panel of 15 other Justices of the Peace, and by a majority Baker was convicted, and fined £5.

As will be discussed in the later stages of this account, Baker was successful in having the conviction set aside in the Supreme Court, where it was held the conviction was tainted by pre-determination and bias on the part of one Justice of the Peace. Less success attended the civil suit for assault, which was eventually tried not in Wellington but in another settlement, Christchurch. Although Baker was awarded £50 damages "in vindication of the law" from the jury, this was but a tenth of the damages sought, and the jury professed itself unable to agree on the truth of the accusation of indecent assault, a matter relied on by Schroder to minimise damages.

We should at this point retreat in time somewhat to introduce the protagonists of this initial part of the cause.

Of the Schroders, relatively little is known. George Schroder was an early settler in Nelson, (on the northern coast of the South island, a day or so's sail from Wellington) where he was in business as a wholesale merchant,[3] dealing, it seems principally in agricultural produce.[4] He had clearly prospered sufficiently in that business, and by participation in the large-scale sheepfarming that gave an early economic impetus to the South Island in the late 1840s and 1850s,[5] to be able to educate his family, for Mary Schroder was the youngest of three sisters at the same private lady's school in Wellington in 1858.

Mary herself is an even more shadowy figure. She was at the time of the alleged assault twelve years old; described by her schoolmistress thus "Mary is a very nice girl; when first she came to me she was a little wild"[6].

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[2] *NZ Spectator* September 8, 1858, letter by Baker.
[3] Ruth M Allan, *Nelson: A History of Early Settlement* (Wellington, A H and A W Reed, 1965) p144 lists GW Schroder as on of 8 such merchants in Nelson in 1842.
[4] The only document by Schroder I have been able to trace is a letter written in 1847 about such commodities, George Schroder to T King 1847 in King papers NZNL Ms 5641-26.
[5] Lowther Broad "*The Jubilee History of Nelson from 1842 to 1892* (Nelson Jubilee Committee, Nelson, 1892), p104 lists GW Schroder as one of the holders of a licensed run in the Awatere Valley in 1850.
[6] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge,.

At the time of the (alleged) assault Mary was recovering from an attack of influenza which had been severe enough that she had been splitting blood but, in the opinion of her doctor who saw her the same day, this would not have been likely to mean that "she would be attacked with lightheadedness or nervousness".[7] Clearly, too, she seems to have been possessed of a degree of strength of character, as she maintained her position and testimony despite very lengthy cross-examination on two different occasions.

By contrast, we know very considerably more about the central figure of this affair. Arthur Baker was English, apparently born in Newbury, Berkshire around the year 1817. He appears to have been destined to the Church from his teenage years – he went up to Oxford in 1835, at the age of 18, and graduated with a BA in 1840. (As was the custom of the time, his MA was conferred some years later without further study). He was initially a deacon and then a priest in London, serving as a curate in four different parishes in London between 1841 and 1853. In that latter year he emigrated to New Zealand, in the company of his sister and her husband, one Henry Bunny, who will feature briefly later in the story. It appears this must have been as it were a private venture on Baker's part, as he did not have any official church position in the first year of residence in New Zealand, but when in 1855 he moved to Wellington a number of positions came his way, both as an assisting master at a church school (from 1857) and, from 1855, as vicar of St Paul's Church, in one of the principal Anglican parishes of the Wellington region.[8]

Baker's character is hard to assess. His supporters, most of whom are writers within the Anglican Church,[9] allow that he was a controversialist and stirred up varied, and vigorous, reactions. . More of his character may be revealed later, but at the least it can be said that earlier in that same year he had demonstrated publicly a singular willingness to make unsubstantiated verbal

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[7] *NZ Spectator* 8 September 1858, evidence of Dr Johnston.

[8] This data is largely drawn from an undated "fact sheet" published by the Parish of St Paul's, held in the Wellington Public Library.

[9] There are few mentions of Baker's case in the histories of the Anglican church in New Zealand. Most - including the centenary history of the Diocese - make no mention of the matter at all; the few that do either obscure the facts of the incident, or put an interesting interpretation on the facts. Thus George McMorran *Some Schools and Schoolmasters of Early Wellington* (1900) at p106, describes Baker as a versatile man who "loved above all things a fight with pen or tongue", but whose influence was crippled "through the formulating of a serious charge against his personal character"; and while many rejoiced at his departure from the colony "there were those who believed him to be – and still consider him – a martyr". That may be true, but is less than informative. A more recent historian, Peter Butt suggests in *The Cross and the Stars: An Historical record of the Anglican Diocese of Wellington* (1993), at p 31 that Baker's most serious problem was his conviction by a majority of "assaulting a young girl who was a guest in the vicarage" (no mention of "indecent" assault!); Butt goes on to say that Baker was 'exonerated" by Selwyn (which might be thought to overstate the case. Butt then suggests Baker succeeded in an appeal against conviction (which is not technically correct), though pointing out this was not necessarily a decision on the merits. Butt further asserts that a "…further complication in the case was the suggestion that one of the bench of magistrates had suborned one of the witnesses." As is discussed later, there was an issue as to a witness, but any suggestion of "subornation" is goes far beyond the established facts. Butt conclude by citing an earlier ecclesiastic author, M R Pirani *A Short History of the Cathedral of St Paul's the Apostle* (1958) p9 that Baker was innocent and that he had been attacked because of his vocal support for the Government policy (which particular policy is not explained) "which was not shared by most of the population of Wellington." The final picture built up is, it may be thought, cumulatively inaccurate.

attacks on opponents in terms which, even by the robust standards of the day, were intemperate. This reading is based on letters written by Baker to one of the local newspapers, the *Wellington Independent*, in January 1858.

After the paper had printed a letter suggesting, inter alia, that the number of Anglicans in the settlement had been overstated in a census in 1857 and that Archdeacon Hadfield's behaviour had lost the Anglican church support both in adherents and in financial contributions, Baker had replied attempting (with remarkably unconvincing effect) to justify the claimed number of Anglicans, and in an intemperate post-script, had described the allegations concerning Hadfield as "gratuitous fabrication". This in turn was the subject of critical comment in a newspaper editorial, to which Baker responded, lamely claiming when he used the phrase 'gratuitous fabrication" he meant only "assertion without proof"!![10]

As will be seen, many of Baker's later effusions show similar indiscreet language and a liking for very special pleading. He was, however, apparently able in person to attract others – Mary Schroder's teacher, Elizabeth Burbridge considered him kind to the children, and described her then confidence in him and her disbelief at Mary's accusations.[11] At that time Miss Burbridge was, she told the Resident Magistrate's Court, under the impression from his manner that "Mr. Baker was paying me attention"[12] – and it would appear any matrimonial proposal might well have been accepted. A further light on Baker's character is that at the trial in the Resident Magistrate's court counsel for Baker introduced into evidence a number of letters written by Burbridge to Baker after Mary Schroder's accusation; Burbridge saying these letters were all written under her misapprehension as to Baker's intentions.[13]

Part 2 : the setting and local politics

Although the colonial settlement in Wellington dated back to 1839, it was still a small community. More importantly for our purposes, it was by far the most factionalised politically, with the litigation in *Baker v Schroder* falling within a period of unusually bitter partisan political strife. On the one side was an elected head of the Provincial Government – headed by Isaac Featherston, whose faction drew support from the working-class and smaller business and from some of the liberal middle-class. On the other was a somewhat strange coalition, dominated by large land-holders, the urban conservatives and supporters of the New Zealand Company. In elections in 1857 Featherston had won the Superintendency, but the opposition controlled the Provincial Council. Featherston had refused to accept an administration proposed by the majority in the Provincial Council, and to make his resigned and stood for re-

[10] *Wellington Independent*; Letter by Baker 6 January 1858; Editorial, 13 January 1858; letter by Baker 20 January 1858.
[11] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge.
[12] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge.
[13] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge, A later correspondent to the *Wellington Independent* alleged that Baker had not merely had these letters produced in court, but had published before the trial an exculpatory pamphlet which included extracts from her letters to him (but not vice versa): *Wellington Independent*, Letter from "Scrutator" 2 October 1858. I have found no other mention of such a pamphlet, let alone a copy, but it may be significant that Baker, who challenged many other allegations about him, did not challenge this one.

election.[14] That election took place in June 1858; with Featherston defeating the opposition candidate, one Henry St Hill, the Resident Magistrate in Wellington.

The newspapers of the time were, perhaps unsurprisingly, on opposite sides of the divide – the *Wellington Independent* a strident champion of Featherston; the *New Zealand Spectator* an equally vehement voice in opposition.[15] As will be seen, in dealing with the various events in Baker's affairs the newspapers took similarly partisan approaches; the *Spectator* being supportive of Baker while the *Independent* was very much in the other camp.

It seems clear that Baker was firmly in the St Hill political camp, perhaps because of connections through his brother-in-law or, more probably, because the Featherston party insisted that education be secular and resisted any attempts to use provincial funds for Church-based schools.[16] The polarization of social life seems to have been significant, and certainly Baker was frequently (if to any objective bystander quite unconvincingly) to attempt to portray the whole matter as tainted by political machinations.

Part 3 Two "events".

It is not now possible to determine (though it is clear possible to surmise) what happened between Arthur Baker and Mary Schroder on 1 June 1858. The Schroder sisters were all staying temporarily, at Baker's invitation, at his residence.

According to Mary Schroder, after "dinner" at about 2pm, her sisters left to go to Miss Burbridge's; the convalescent Mary remained.

> "I was lying on the sofa, Mr. Baker was writing in the same room, there were three tables in the room; he was writing at the table by the window. I had some notes in my pocket from Miss Burbidge. I had been reading them, and after reading them I put them in my pocket and lay down. I put my shawl over my feet. I fell asleep about a quarter of an hour after this. When I woke Mr. Baker came over to me. He took the shawl off my feet and pulled my dress out from under me, and put his hand in my pocket. He then put his hand under my dress, he touched my flesh * * * * he kept his hand there about a minute. I did not say anything. He did what I have stated without my leave. I thought it wrong that he should do it. He knelt down and asked me whether I would not make friends. I said no, that I wanted Mrs. Langley. There was a noise like somebody coming in at the door. Mr. Baker got up and went away. I again asked for Mrs. Langley and Mr. Baker rang the bell. Mrs. Langley asked me what was the matter, I did not tell her; I told her I wanted Miss Burbidge, she said she would send for her. Mr. Baker said he

[14] Alan Mulgan *The City of the Strait: Wellington and its province - A Centennial History* (Wellington, A H and A W Reed, 1939), pp172-173.
[15] For comment on the newspapers of the time, see Alan Mulgan *The City of the Strait: Wellington and its province - A Centennial History* (Wellington, A H and A W Reed, 1939), pp200-201.
[16] For the division as to education see Alan Mulgan *The City of the Strait: Wellington and its province - A Centennial History* (Wellington, A H and A W Reed, 1939) p189.

> would go; he then told Mrs. Langley she was to go. Mrs. Langley did not know which to believe. Mr. Baker told Mrs. Langley when she came into the room, that I woke up crying. Mr. Baker went for Miss Burbidge and brought her back with him. Miss Burbidge asked me what was the matter, I took my sister Kate and Miss Burbidge into the bed room and told Kate what Mr. Baker had done to me, and Kate told Miss Burbidge in the bed room before I left. Miss Burbidge could not hear me when I told my sister."[17]

Baker at first appears simply to have agreed with suggestions that Mary had dreamed the incident. Elizabeth Burbridge described his conduct when he arrived to call her to see Mary, and subsequently, thus.

> "Mr. Baker's manner was calm and collected. The girls were ready to go with me and we all went together. When I got to Mr. Baker's I saw Mary in the sitting room… She was quiet and pale, and looked as if she had been crying. She looked unhappy…"[18]

Burbridge later described her reaction to Mary's accusation (as relayed by her sister), and Baker's response when she conveyed it:

> " At the time I thought there was something I could not understand. I could not suppose such a thing possible. I came out of the bedroom a few minutes after I had recovered myself. Mr. Baker was in the sitting room. I said to him I did not know what to understand, I thought the child must have been dreaming. He said he thought so, and went on writing. I was undecided whether to stay or go away. Mr. Baker asked me to stay to tea and I remained. It was fair that evening but not very light. Mary refused to remain at Mr. Baker's unless I stayed with her."[19]

She later added that after they had had tea, Baker left to go to the Archdeaconry Board.

Clearly Baker displayed little reaction at the time to what he was invariably characterized as a most serious allegation. Such a reaction seems unusual, but whether one should ascribe his sang-froid to a clear conscience or to brazen effrontery is perhaps more a matter of opinion.

In the following month, Burbridge continued to keep up good relations with Baker, on some occasions visiting him with the Misses Schroder. In the meantime, not at all surprisingly, gossip carried the substance of Mary's allegations throughout much of Wellington - Elizabeth Burbridge indicating that Mrs Featherston, having heard the rumour, had visited her to ask about

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[17] *NZ Spectator* 8 September 1858, evidence of Mary Schroder,. This is a somewhat fuller account than that in the *Wellington Independent*; the critical details of the alleged assault are omitted from the latter's report. The asterisks are in the original, and apparently represent material the newspaper considered unfit for publication.

[18] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge.

[19] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge.

the matter.[20] Baker was later to claim that the rumours had been augmented by invented allegations of previous similar conduct – which he denied had any foundation in fact.[21]

In the meantime, Burbridge had written to George Schroder to come to Wellington, ostensibly on account of the illness of Kate Schroder, and George Schroder visited Wellington around the 15th of July. At that time Burbridge informed him of Mary's accusation.

It is not entirely clear what happened in the weeks between Schroder's arrival in the settlement, around 15 July, and the assault on Baker on the 13th August. It would appear that Schroder approached Baker, directly or indirectly, at some point – and, according to Baker,

> " For these many weeks past, from the hour I first heard of the allegation, I have earnestly challenged full investigation. This justice was repeatedly refused me."[22]

One may surmise, therefore, that Schroder found any of Baker's proposals for "full investigation" unsatisfactory or, more likely, saw them as an attempt to evade responsibility for conduct which George Schroder believed, as he said, had taken place. The choice of the street outside Baker's church after a Sunday service as a venue for the horsewhipping becomes explicable as being one of the few, if not the only, time Schroder could be assured of locating Baker, and of there being an audience which would ensure the matter would become public.

Part 4 The first legal proceedings

Following Schroder's attack on him, Baker sought legal advice. Curiously enough for a man whose brother-in-law was a lawyer, Baker seems to have sought legal advice not from a practitioner but from the leader of his political party, the Resident Magistrate Henry St Hill.[23] It appears Baker was advised to bring a civil action for assault against Schroder – rather, it seems, than the speedier resolution of seeking to have Schroder prosecuted for assault. The choice was simple – as Baker was to say, a civil action afforded him "an opportunity of clearing my reputation, with evidence given by myself on oath, in the highest Court of Justice" – in contrast to the later criminal prosecution brought by Schroder in which Baker claimed "the only witness who could *possibly* give evidence directly contradictory of the main charge, is prohibited from speaking".[24] He therefore initiated such a suit, claiming the very substantial sum of £500. (One may speculate that St Hill was not at that stage entirely keen to have the matter ventilated in a criminal action in which he would have to sit).

Whatever Baker's motive, Schroder seems to have reacted both quite swiftly and with considerable deftness. Schroder's lawyer William Locke Travers,

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[20] *NZ Spectator* 8 September 1858, evidence of Elizabeth Burbridge.
[21] *NZ Spectator*, 16 September 1858, letter by Baker,
[22] *Wellington Independent*, and *NZ Spectator*, 8 September 1858, (identical) letters by Baker.
[23] *NZ Spectator*, 15 September 1858, letter by Travers
[24] *Wellington Independent*, and *NZ Spectator*, 8 September 1858 (identical) letters by Baker.

commenced a criminal prosecution of Baker for indecent assault. The necessary information was laid on Monday 30 August; with Baker being summonsed to appear on Friday 3rd September. It appears that St Hill, who was sitting alone on the Friday morning, had expected Baker's lawyer to bring some objection to the prosecution which would delay the hearing; when no objection was forthcoming St Hill declined to decide the matter himself, instead delaying the matter for some hours until a bench of Justices of the Peace could be assembled.[25] It is an interesting indication of the importance attached by JPs to their judicial duties, or perhaps of their interest in this particular case, that on three hours notice 15 Justices of the Peace had joined St Hill to hear the case. It appears there was some discussion at that point as to whether the case should be entertained but the decision was to hear the case.

The hearing of the case occupied not merely the whole of the afternoon of Friday 3 September 1858, but the whole of the Monday – the evidence only being concluded after midnight, at which time the bench retired for an hour before returning with a majority verdict of guilty. The larger part of the time appears to have been involved in lengthy examination and cross-examination of the two principal prosecution witnesses, Mary Schroder and Elizabeth Burbridge. It is difficult to establish just how much was involved, but the newspaper reports of the proceeding devote slightly more space to the cross-examination of Mary Schroder than to her evidence in chief; while the report of Mary Burbridge's cross-examination was more than half as long again as that of her evidence in chief. It is difficult from the stilted report to be clear as to the thrust of Baker's case, but it appears to have been directed at the (some what inconsistent) propositions that Mary Schroder was ill and may have dreamt the whole episode or that she was an ill-brought up child prone to lying and therefore to be disbelieved. On this latter limb, there appears to have been extensive cross-examination as to the nature and circumstances of her complaint to her sister, later to Miss Burbridge and as to disclosure to her parents. The proportionately longer cross-examination of Elizabeth Burbridge appears to have been directed firstly at trying to find an inconsistency in the account of Mary Schroder's disclosure, and then, at greater length, at showing that Burbridge herself appeared not to believe the charge by showing that she had continued to associate with Baker in friendly terms (it is in this regard that she was cross-examined as to the contents of letters written by her to Baker after the incident).[26]

The only other prosecution witness was Mary Schroder's doctor, who gave evidence she was unlikely to have been lightheaded or (in effect) hallucinating.

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[25] Baker's lawyer, John King, was later to create some ill-feeling by comments in a letter to the press which implied that only JPs known to be hostile to Baker had been summoned to sit; an allegation which drew a formal resolution from the JPs concerned requiring King to withdraw an unfounded allegation. King did so, lamely claiming that he had misconstrued a statement by Travers that a bench of JPs would be summoned as meaning an anti-Baker bench would be summoned. See *Wellington Independent* 11 September 1858, letter by John King, *NZ Spectator*, and *Wellington Independent*, 2 October 1858, letter by St Hill conveying resolution of JPs and letter in response by King. It would appear characteristic of the Baker side in this affair that grave charges were made, on the flimsiest of evidence, only to be retracted when challenged.

[26] See p4, above.

The defence called Baker's housekeeper, who gave extensive evidence as to the circumstances of the visit, as to the fact she had not heard Mary Schroder cry out (as Mary had testified she had done); that she had not observed any disarrangement of a shawl around Mary's body and legs, and then gave evidence as to Baker's calm demeanour. The other defence witnesses were called to give evidence of Elizabeth Burbridge having expressed the view Mary Schroder was a liar.[27]

As indicated above, the JPs voted, by it appears a vote of 10-6, to convict. Baker was convicted, and fined £5, and ordered to pay costs. The relatively nominal penalty was, it was to be alleged by Baker, deliberately chosen to limit his right of appeal, as the Summary Proceedings Ordinance 1842 only allowed an appeal where a penalty greater than £5 had been imposed.

Part 5: The resort to publicity

So far the case, while unusual in that it involved an allegation of sexual impropriety by a member of the socially privileged classes, is not otherwise very remarkable. What sets it apart from any other proceedings of the period is that Baker and his supporters chose to carry their defence of Baker's cause into the public arena - and to do so by impugning not only the prosecution and the verdict but also the course of proceedings and indeed the Court and its members.

The first salvo in the publicity campaign was dispatched by Baker himself. He wrote letters to the editors of both Wellington papers during the trial, and these letters were (at his request) published in the same issue as the reports of the trial. This first letter advanced a range of arguments against the proceedings and the verdict – starting with an argument that reporting of the trial would be, in the event he was later exonerated, "highly prejudicial to public morals, to myself, and to other parties concerned". . He then, with a remarkable inconsistency which seems at the time not to have drawn comment though it may well have been perceived, first argued that it was unfair he should be called to answer to a charge made "…not days, or weeks, but more than a quarter of a year ago" and where Burbridge had not believed the allegation.

> "One knows how a fancy long dwelt upon grows into the mind, and become incorporated with it, as a truth. One knows also, how exceedingly difficult it is to disprove apparent circumstances after a lengthened lapse of time, of which at the moment the explanation is self evident. I maintain it to be a case of very gross injustice, that the fact of this charge was withheld from the party principally concerned until memories had grown weak and ideas had hardened into seeming realities."

It is difficult to see any factual basis for this remarkable allegation – given the substance of the allegation was conveyed to him on the very day it happened,

[27] This form of collateral attack (which was repeated in the Supreme Court civil action) on the credibility of Mary Schroder, and Elizabeth Burbridge would not now be admissible.

it might be thought neither the claim of embellishment nor the claim that the "fact of the charge" was concealed from him have the slightest foundation. Nor can the latter claim easily stand with Baker's averment in the following paragraph that ever since the allegation had been made, he had been ready to have it investigated, and this had been refused him.

He then transferred his attack to the fairness of proceedings in which he could not give evidence alleging the choice of a criminal charge a had been made to prevent his ventilating the matter in the Supreme Court. In terms which bear a remarkable contrast to his later arguments, he wrote:

> "I sincerely believe that, in any Court of Justice in England, the charge, under the circumstances, would not have been entertained. Legal technicalities would have yielded to the plain equity of the case, (and a Police Court especially is a Court of Equity as well as law), the plaintiff would have been ousted as incompetent, and the matter at issue been left for adjudication before a jury in the higher Court, to which the appeal had been made."

He then passed to the purported unfairness of a matter being decided by a majority of the JPs, instead of requiring the unanimous verdict of a jury .

> What is the deep principle of Trial of Jury, which has made it for so many centuries, the bulwark of British liberty and justice. Surely it is this – that a minority, even of one dissentient juror, implies a *possible doubt* of guilt, which doubt is justly given in favor [sic] of the accused.

- and , of course he noted that he had not had the benefit of the doubts entertained by some JPs.

Next in line for attack was the nature of the hearing itself and, more directly, the behaviour of those magistrates who had voted to convict. Here for the first time came the signature tune of Baker's whole publicity campaign – that the verdict was the result of bias – that "a considerable majority" of the JPs were biased against Baker "on politics, personal, or religious grounds" – though at this stage he did not allege deliberate unfairness but the "natural bias of prejudice and predilection".

To round out his attack, he then complained the proceedings had been improperly conducted – that JPs had not attended the whole of the hearing, had cried "hear, hear" when evidence against Baker was adduced and that leading questions had been put to Mary Schroder "prompting the very words on which the fact of the alleged crime principally depended".[28] This latter allegation is the only one for which there is some external, if not independent support, as Baker's lawyer was later to write to the newspaper complaining that

> The words which the witness Mary Schroder stated in answer to my question, were of that peculiar kind that no child of her age could

[28] All the quotations in this section, unless otherwise attributed, are drawn from *Wellington Independent*, and *NZ Spectator*, 8 September 1858, (identical) letters by Baker.

> have given unless previously tutored, and on my commenting strongly upon the subject Mr Carkeek, one of the Magistrates, stated openly that the words were not the words of Mary Schroder in answer to my question, but were the words in which he had asked her the question pointedly, to which she had answered "yes". Whereupon I stated to the bench that I had not heard the question put by Mr Carkeek, and had I done so I should have objected to its being put – and the Chairman H St Hill, Esq, also stated that he did not hear the question, and thought it an improper one. Without this question and answer no legal offence could have been proved against Mr Baker.[29]

To round out his case, Baker then argued that his housekeeper's evidence demonstrated the untruth of Mary Schroder's account – although to a logician evidence that the housekeeper did not hear a cry is no proof one was not made; nor evidence a shawl was in place proof it had always been so.

As indicated above, Baker's letters appeared in the same editions of the local papers as the report of the trial. Both newspapers were published bi-weekly (Wednesdays and Saturdays) , so there was time for responses and developments to be received and printed in the next editions. The opportunities were taken up. In the papers of 11 September there appeared a letter of complaint by Baker's lawyer John King taking issue with the manner in which the bench had been summoned and the use of leading questions by a JP to which reference has already been made but going on to repeat the allegations of bias, though here squarely alleging the bias to have been political – that Justices:

> "whose political feelings against Mr Baker are well known could find it convenient to neglect their public duties to sit on the Bench, for the purpose of hearing a charge against their political opponent, and whose votes on the occasion, were as is well known against him. I am sure all impartial persons will at once say that it would have been more honorable, and shown a delicate feeling had they kept away.[30]

The bias argument made here was effectively countered in the successor edition of the NZ Spectator, by a letter from Travers, Schroder's lawyer. in reply to Baker's first letter. Travers was quick to point out, in much more measured terms, that the allegation of bias could be made by either side.

> I have been informed, but I really cannot say whether it be true or not, that Mr. St. Hill did join the other magistrates in adjudicating upon the case, and that he had expressed an opinion unfavourable to my client; but I should not, even in the teeth of Mr. St. Hill's openly avowed partiality to Mr. Baker. think of accusing that gentleman of being swayed by that partiality in the judgment he arrived at. *L'opinion est libre*, and Mr. St. Hill's opinion was unshaken by evidence before him, I can't help that, and should

[29] *Wellington Independent*, 11 September 1858, letter by King.
[30] *NZ Spectator*, and *Wellington Independent*, 11 September 1858 letter by King.

> certainly not dream of imputing to him corrupt motives in the formation of his judgment on the case; but I might just as well do so in his case as Mr. King in the case of the other magistrates, and with somewhat more cogent grounds than he has advanced in support of his attack upon those who, as gentlemen and men of honour, and upon their oaths as magistrates, decided that Mr. Baker was guilty.[31]

Travers's letter was published alongside a letter from "A Dissenter", an anonymous correspondent who asserted himself (or perhaps herself) to be neither acquainted with Baker nor even of the Anglican community. This correspondent attacked the verdict on the basis of firstly some difference in the evidence as reported in the two different newspaper reports(!) and, perhaps a little more cogently, on the basis that there had been evidence Mary Schroder had been characterized as untruthful (conveniently ignoring Burbridge's denial of any such remarks).[32] If indeed it be that "A Dissenter" was independent of the Baker camp, such a critique suggests a victim of sexual offending was unlikely to gain much credence had her prior character not been virtually irreproachable.

It might be thought strange enough that both the defendant, two counsel and a member of the public had written letters concerning the matter; what might be thought even more strange is that neither newspaper seems to have considered such correspondence out of place.

The editions of 15 September 1858 carried reports of a further development – the drawing up and signature of a "Memorial" to the Bishop of New Zealand (then George Selwyn) supporting Baker and urging his case. The Memorial was stated by the *NZ Spectator* to have been signed in the course of a single afternoon by 112 people "including members of various Religious Denominations and of different political opinions" and that many of the signatories had "spontaneously" asked to sign it. The gravamen of the memorial was that firstly the memorialists were not satisfied the charge had been proved; secondly given the degree of doubt the case should not have been tried in the Resident magistrate's Court. As noted earlier, the memorialists also raised the issue of the inability of a defendant to give evidence.

It may be surmised that despite the claim of non-sectarian support, the Memorial to the Bishop was organized by friends or supporters of Baker. The leading mname was that of Edward Toomath, to whose position as a teacher in an Anglican school Baker had succeeded in 1855.[33] The tone and content of the terms of the memorial clearly follow some of the arguments raised by Baker at the time of the trial, although it is notable no argument as to the alleged bias of the Bench is made..

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[31] *NZ Spectator*, 15 September 1858, letter by Travers.
[32] *NZ Spectator*, 15 September 1858, letter by "A Dissenter".
[33] For a brief discussion of Toomath's contribution to education in Wellington, see Alan Mulgan *The City of the Strait: Wellington and its province - A Centennial History* (Wellington, A H and A W Reed, 1939), p188.

Following these pro-Baker effusions, or perhaps following up on them, came a second letter to the *NZ Spectator* by Arthur Baker himself – ostensibly responding to the support from "A Dissenter". The letter is a remarkable document, indicating a very significant shifting of ground by Baker. No more is he arguing that his prosecutor, and the majority of the bench who convicted him, were misguided. He characterized the prosecutors as following the way of "persecution"; of intending to condemn him without a hearing (an odd statement for someone convicted at a trial), and alleged the facts themselves had shown him not guilty. This version must strike the modern reader as a remarkably selective reading of the facts; it may well be it had a similar effect when first published.

Baker then went on to raise two fresh matters. Firstly he alleged he had been convicted by "a bare majority" of the Justices (rather than the 10 – 6 vote apparently widely reputed), and further claimed that of the 9 voting to convict, one had (according to Baker) earlier pronounced him innocent. Baker thus argued this Justice should have voted for acquittal, which he claimed would have made the numbers equal and he would have been acquitted on St Hill's casting vote. If ever a proposal had been made for secrecy of JPs votes, no better argument could have been adduced than that letter.

Baker was on what proved to be a more successful track when he alleged that the pro-conviction forces had committed the "outrage of tampering with my own household in the hope of turning evidence against me".[34] This "tampering", it was to emerge, had taken the form of a JP speaking to Baker's housekeeper prior to the trial, the exact nature of the conversation being controverted – and its consequences will be discussed later.

It will be noted that so far the publicity surrounding the trial and the verdict had been largely pro-Baker, and that of the two newspapers the *NZ Spectator* had apparently been at least somewhat in Baker's camp, while the *Wellington Independent* had been neutral in its stance. The first, tentative, criticism of Baker's epistles came with a letter to the *Independent* with a letter from "ABC" which suggested that Baker should name those he alleged were misusing their position on the Bench to persecute him; that Baker was wrong as to the margin of the vote to convict, and that if some Justices were lead to vote to convict by the evidence, there was no reason to think the majority were doing other than judging the facts as they saw them.[35]

Part 6: The first foray into the Supreme Court – rule nisi

Baker had sensibly not been content to leave his campaign to the forces of public opinion. Instead he had challenged its legality, in proceedings by way of certiorari. The grounds alleged are interesting, not least for the reliance on technicalities of the kind Baker had thought – at the time of his trial - should not stand in the way of justice. Thus the grounds of challenge included arguments that Mary Schroder, not her father should have laid the

[34] This and the quotations in the preceding two paragraphs are from *NZ Spectator*, 18 September 1858, letter by Baker.
[35] *Wellington Independent*, 22 and 26 September 1858, letter by ABC to Editor

information; that the conviction was bad because the adjournment of the Court to determine its reasons had taken it into the Tuesday morning but the document setting forth the conviction did not reflect this, and perhaps less minutely, that one of the JPs , C D R Ward, should not have sat because he was a Solicitor of the Supreme Court, by virtue of admission to the fused profession in New Zealand) and in England solicitors could not sit as Justices.[36] He also reiterated his claim the proceedings were improper as being brought to prejudice his civil case against Schroder. The most substantial ground, however, and the one which was to succeed, was a challenge to the verdict for bias and pre-determination by another JP, C J Pharazyn.[37] It was clear Pharazyn had discussed the allegations against Baker with his housekeeper, Langley prior to the trial. The divergent recollections of the conversation, as shown in affidavits (later printed in full in the newspapers) suggest to say the least that Pharazyn had opined that Baker's involvement in local politics had been both unwise and inappropriate for a clergyman; Langley went on to allege (and Pharazyn to deny) that he had indicated she would face awkward questions about her own relationship with a local man if she gave evidence supporting Baker, and that Baker's political opponents would ensure his conviction.

On 29 September Mr Justice Gresson granted the rule nisi for certiorari – thus bringing the conviction before the Supreme Court – though not at that stage quashing it.
The reports of this hearing were accompanied in the *NZ Spectator* of 29 September by what is I think the most remarkable incident in the whole publicity campaign – the publication (apparently sanctioned by the writer) of a letter from Abraham Hort, one of the JPs who sat in the original trial in the Resident Magistrate's Court. The letter indicates that Baker had sought, and received, the leave of the Resident magistrate, St Hill, that Baker might canvass the minority of the bench to disclose their reasons for voting for acquittal. Hort described this as placing the minority in an invidious position – not least because St Hill himself had declined to give his reasons – but Hort while acknowledging that this disclosure was most unusual and would be open to criticism, was prepared in the interests of justice as he saw them.. (These reasons given shed an interesting light on at least one contemporary view of such offences, as Hort gave as his first reason for believing the charge ill-founded that there was a difference of evidence (unspecified) between Miss Burbridge's evidence and that of Mary Schroder; the second that Mary Schroder had made no complaint to Baker's housekeeper when she had the opportunity. The other reasons all have to do with the conduct of Mary's

[36] Gresson J was not sympathetic to the complaint that C D R Ward should not have sat, on the basis that the statute relied on by King (Baker's counsel) was is limited to England and Wales, and in any case would not be applicable where, as in New Zealand, that status as solicitor was conferred on a barrister by the NZ fused profession rules (see *Wellington Independent*, 13 October 1858). Baker was later to allege that Gresson had in passing remarked that he himself had declined appointment as a JP in conformity with the English practice (see *Wellington Independent*, 3 and 6 November, letter by Baker) but no newspaper report of the Supreme Court proceedings includes any such remark. Given Gresson's Irish, rather than English, background, Baker's allegation seems less than credible.

[37] Pharazyn clearly was opposed to Baker, but it must have been on personal or political grounds, not religious ones. Only a few years later, but after Baker's departure, Pharazyn was to serve as Treasurer of the Parish Committee for the erection of a new St Paul's Church for the parish formerly in Baker's charge; see Thatcher papers MS0265108 NLNZ .

sisters in associating further with Baker even though pressed to do so by Burbridge "at their age when fully cognizant (if properly trained) of the modesty and propriety essential to, and the safeguard of, the female character" – from which Hort apparently deduces the sisters did not believe Mary's account. [38] What is perhaps the more remarkable is that the *NZ Spectator* saw no objection to the procedure, nor a reluctance to publish the result of Baker's enquiries.

Part 7: The opposition finds its voice; the case becomes factionalised.
Up until the end of September, therefore, the expressions of opinion, and the apparent probability of a successful challenge to the conviction, suggest some considerable degree of public support for Baker, and relatively little feeling the other way.

This was to change, and throughout October and most of November 1858 the case became a true cause celebre, with the two political factions, and the two newspapers, in strident opposition over the case and over its developments. The *Independent* quickly showed its hand with the publication of a letter, ostensibly a reader self-styled as "Scrutator".[39] The letter was clearly written by someone with both considerable knowledge of the case (to an extent that it suggests it was written by one of the majority JPs) and by someone who was either a lawyer or conversant with the law, however the identity of the writer cannot be determined.[40]

Whatever his identity, "Scrutator" was clearly in no doubt as to the propriety of the verdict. While prophesying that the verdict would be set aside on the grounds of bias, Scrutator echoed in very strong terms the point made by Travers after the trial – any allegation of bias affecting the judgment of one or more of the majority could be overwhelmingly countered by the overt bias shown by St Hill and others of Baker's supporters in the minority.

Scrutator went on to attack Baker for the manner in which the trial had been conducted (particularly the very lengthy cross-examination of Mary Schroder – which the writer suggested justified a decision not to remit the matter for trial in the Supreme Court, where such cross-examination could be repeated). Scrutator then took issue with the assessment of the evidence offered by Hort in his letter to the *Spectator* and then, in a novel fashion, proceeded to attack Baker on the basis of matters not before the court, instanced as the exculpatory pamphlet containing letters from Burbridge[41] and a statement by Baker in that pamphlet that he had been in the habit of kissing all the Misses Schroder:

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[38] Hort to Baker, printed in *NZ Spectator* 29 September 1858
[39] *Wellington Independent*, 2 October 1858, letter by "Scrutator" .
[40] fn The principal candidates are Fitzherbert, or more likely, the two barristers William Fox and CDR Ward. A collaborative effort should not be ruled out. Fox, who perhaps not coincidentally was the publisher of the *Independent* may be the favoured candidate. As is mentioned below, n46, Fox was in a contemporary case to acknowledge authorship of material appearing without attribution in he Independent. JDS Mackenzie has made a cogent case that Fox had on other occasions published his own opinions in without attribution, see NZJH, vol 1, 1967, p199.
[41] See p 4 above.

> "…and a pathetic lamentation that a clergyman 'could not salute with a holy kiss, young children whom he dearly loved', without being subject to such sad misrepresentation. Correspondent points out that the elder Misses Schroder were 15 and 16 " At what age has Mr Baker been accustomed to drawing the kissing line?"

Part 8: The conviction set aside

Whatever the force of the arguments marshaled by "Scrutator" and whatever their effect on the minds of readers, the legal position was about to shift significantly in Baker's favour. On 5 October, Gresson J made the rule nisi absolute – that is, formally quashed the conviction.[42] From the plethora of objections urged by Baker's counsel – some of which Gresson apparently considered might have had merit – the judge singled out the issue of bias, and held that, whatever the reason for Pharazyn's conduct, it revealed bias on his part.[43] Relying on reputable English authority,[44] Gresson held that bias by a single justice tainted the proceedings, without the court needing to enquire whether that Justice's views had affected the rest of the bench, and he therefore quashed the conviction. Curiously for a system where normally costs follow the event, he did not make an award of costs in Baker's favour.

The judgment of Gresson J seems only to have made the debate as to Baker's conduct more spirited and partisan, although Baker's own behaviour undoubtedly contributed significantly to the asperity of the exchanges.
On the day after reporting briefly the outcome of the case before Gresson's judgment, , the *Independent* for the first time gave explicit editorial comment on the case, in a long editorial which criticised many of the grounds of appeal taken, and while acknowledging the bias shown by Pharazyn pointed out once more the extent to which similar criticisms could be made of St Hill and the minority. To a large extent the Independent seems to have been taking issue with allegations in the *Spectator* of political conspiracy by the majority justices,[45] by suggesting the minority had as great or greater reason to allow political ties to warp their judgment. The *Independent* went on, in words later to be controverted by Baker, to say the majority for conviction included JPs of all shades of political opinion.

The *Independent*, not coincidentally, also broadened its attacks to include John King, Baker's principal counsel. King was also involved, together with Henry Bunny (Baker's brother-in-law) as counsel in other litigation brought by members of the anti-Featherston coalition against the printers of the *Independent* for libel.[46] Those proceedings, which were also to be resolved by jury trial in Christchurch rather than Wellington, resulted in a triumphant win

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[42] See *NZ Spectator* October 6 1858; *Wellington Independent* 13 October 1858.
[43] Pharazyn was later to argue in unrelated proceedings brought against him that, on the basis of the "doctrine of a political bias... laid down by the Rev. Arthur Baker" St Hill should not have sat alone to determine the case against Pharazyn; see *New Zealand Spectator* 8 October 1858, letter by Pharazyn to editor. His conduct in interviewing Mrs Langley was the subject of vituperative editorial comment in the *Spectator,* 29 September 1858.
[44] *R v Hertfordshire Justices* 6 QB Rep 753.
[45] *NZ Spectator* 2 October 1858.
[46] *Bowler v McKenzie & Muir* 18 November 1858 NZNA CAHX CH 53/21 Minute Book Supreme Court 1852-1860, reported *Lyttelton Times* 20 November 1858. Fox, as counsel for the printers, informed the jury that he, as editor of the paper, had personally written the allegedly defamatory material.

for the *Independent* and its editor, Fox. The fact of this suit and the involvement of King and Bunny undoubtedly contributed to the *Independent*'s anti-Baker stance.

King was an apparently easy target, as at the same time as Baker's case was argued, proceedings were brought to "attach" King (that is, to take him into custody as a debtor) for moneys owed to the heirs of an estate of which King was executor.[47] He was only to escape debtor's prison after friends agreed to pay part of his debts on condition the heirs accepted the lesser sum.[48] . The *Independent* took delight in pointing out that in England King's conduct would be punishable as theft from the estate; and urging the enactment in New Zealand of the same statutory provisions.[49]
Given that Henry Bunny was to become the first lawyer struck off in New Zealand (for, inter alia, forgery of a document concerned with his legal practice in England before he came to New Zealand)[50], the ethical qualities of Baker's legal advisers reflects little credit on him – to paraphrase Oscar Wilde – the misfortune of having a dishonest lawyer may happen to anyone; to have two dishonest lawyers looks a little like negligence.

The Baker forces also apparently took steps to try to discover the identity of "Scrutator" whose letter had been earlier published in the *Independent* –to the extent not only of visiting the newspaper's offices[51] but also of King specifically asking C D R Ward, during the hearing in the Supreme Court, whether he was "Scrutator" – although no response was forthcoming.[52].

It would appear that at least some of Baker's supporters were beginning to waver in the face of the multifarious objections he had made. In early October both newspapers published a letter by Henry St Hill in which the Resident Magistrate replied to criticisms of the Bench made in the *Spectator*,[53] and denied the judgment had been hasty or ill-considered, and St Hill personally took responsibility for any defects in the formal documents in the case, as he has drafted them.[54]

Baker clearly regarded the first ruling, on the order nisi, as removing not only any legal but also any moral stigma attaching to him – or so it would seem from not only his own letters (of which more anon) but from his public behaviour. This was described thus, by the extremely unfriendly but able pen of "Scrutator":

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[47] *Wellington Independent* 6 October 1858.
[48] *Wellington Independent* 6 October 1858.
[49] *Wellington Independent* 9 October 1858.
[50] *Bunny v Judges of Supreme Court of New Zealand* (1862) NZPCC 302, 303-304. Indeed the allegations against Bunny included a claim that, having been adjudged bankrupt in England he had emigrated to New Zealand without the knowledge of his creditors. Bunny had only been admitted to the New Zealand profession in 1858; Arthur Baker having provided an affidavit that Bunny was a "proper person to be admitted as an attorney".
[51] *Wellington Independent* 9 October 1858.
[52] *Wellington Independent* 9 October 1858, letter by Scrutator.
[53] *NZ Spectator*, 2 October 1858.
[54] *NZ Spectator*, 6 October 1858; letter by St Hill; the letter was re-published by the *Wellington Independent,* 9 October 1858.

"On the verdict of guilty being returned by the Bench, Mr Baker wrote a letter to the Archdeaconry Board, stating that he should consider himself suspended form all clerical functions until after the arrival of the decision of the Bishop. In accordance with this resolution, he did solemn penance at the vestry door – of course in full view of the whole congregation - on the three Sundays subsequent to the trial. But when the rule for a certiorari was granted, his heart rejoiced within him, and he resolved forthwith to abandon the vestry, to array himself in a gorgeous robe, and once more to take post in the pulpit. Of course his friends vehemently remonstrated against such a course, pointing out the promise of suspension contained in his letter to the Archdeaconry Board. But equally of course the Reverend Arthur stopped his ears against the voice of the charmers - although he[sic] charmed wisely in the present instance. He answered that promises were like pie-crust, made to be broken, and that he, as senior parson of the Province, was the fittest person in all creation to break them. Whereupon he ascended into the pulpit as aforesaid. Diver of the congregation left the church in disgust; others who were standing at the door refused to enter and many of those who kept their seats through respect for the church declared their intention of discontinuing their attendance in future, as long as Mr Baker officiated. This was on Sunday last morning. In the evening the sensation was still greater. Many small boys who attend evening service were informed that if Mr Baker performed they might leave the church. Of course as soon as he made his appearance they arose and fled swiftly. Let it be well remembered that at this time the conviction was still unquashed; that the verdict of guilt was , even legally, still in force. Would an innocent man have willfully caused such scandal in the church? … he presented himself at the meeting of the Archdeaconry Board on Thursday last, and endeavoured to force himself into his former post of chairman. He was reminded of his promise of suspension:- he replied that he withdrew the letter containing it, but this he was informed he would not be permitted to do. He was next reminded of his conviction:- he replied that it was quashed. Even supposing it had been so, the moral stigma, the dark brand fixed upon him by the verdict of guilty must remain till cleared up. Lastly he was told that … the Archdeaconry Board would not allow their names to be associated with his, or to proceed to any business while he was present. Finding it impossible to force his way, he withdrew.

On these scenes it is needless to comment. No persons condemn Mr Baker's share in them more than the respectable portion of those who have hitherto supported him. Be Mr Baker innocent or guilty of the assault, his ministry here is ended on Bishop Selwyn's arrival; for nothing can justify the scandal his conduct is now causing to the church.[55]

[55] *Wellington Independent* 9 October 1858, letter by "Scrutator".

Clearly Baker had lost the support of at least a proportion of his parishioners and, very probably, had alienated others formerly in his corner. Others however may have been drawn to his support by Gresson's judgment.[56]

Turning attention to Baker's ecclesiastical position was not without its dangers. The *Independent* was somehow lured into error in publishing on 13 October that Bishop Selwyn had suspended Baker.[57] Baker was quick to refute this, asserting that Selwyn had in fact said that he would not be justified in inflicting any ecclesiastical censure upon Baker based on the finding of the bench of Magistrates in his case, and that "Mr Baker cannot be advised to acquiesce in the decision of the magistrates if he is conscious of being unjustly convicted."[58]

Had Baker simply left matters there, he might have attracted some sympathy. However he then proceeded, in characteristically tendentious fashion, to claim a vindication which had not occurred:

> For my own part I cannot sufficiently express my contempt for the verdict, which has been set aside in the Supreme Court as worthless, on the grounds of its injustice ."[59]

Baker should by now have had a better idea of the caliber of his opponents. The *Independent* was quick to remark, in an editorial comment printed below Baker's own letter an apology for the "misstatement" as to suspension, while further pointing out that in his reply to Toomath and the other memorialists, Selwyn had also said that Baker had "..acted very judiciously is suspending himself for the present at least, from his clerical duties". The Editor then, pointedly added "

> we feel compelled to point out that Mr Baker's assertion, in the above letter, that the Supreme Court has set aside the decision of the Bench as worthless *on the grounds of its injustice* is incorrect. The question of Mr Baker's guilt or innocence never came before the Supreme Court at all."[60]

Part 9: Challenging history

After this, there seems to have been a lull for some days, until the *Independent* referred to the matter in an editorial at the end of October, repeating its earlier assertion that the margin for conviction had been 10-6. This drew a remarkable response from Baker, who in a lengthy letter, published over two issues of the *Independent*, proceeded to challenge the 'received history" of the proceedings. Baker claimed that an account in another newspaper, the *Nelson Examiner*,[61] had stated that of the 16 JPs, only nine had voted for conviction, seven for acquittal. In his letter, he listed

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[56] *NZ Spectator* 8 October 1858, letter by "A lawyer born not bred".
[57] *Wellington Independent* 13 October 1858, "Local Intelligence" .
[58] *Wellington Independent* 16 October 1858, letter by Baker.
[59] *Wellington Independent* 16 October 1858, letter by Baker.
[60] *Wellington Independent* 16 October 1858.
[61] The only relevant item would appear to be in *Nelson Examiner* 15 September 1858.

the JPs he alleged had voted , and claimed that one of these, a Mr Hickson, had earlier voted against Baker being committed for trial.[62] He repeated his allegation of political bias, claiming the majority were, with the exception of the aberrant Hickson, were all his political opponents. His letter went on, if stirring periods to claim that there was not "

> A single precedent in English jurisprudence where an accused party, pronounced "not guilty" by six sitting magistrates was summarily convicted, when the conviction involved … a loss of £500 a year and the ruin of his earthly prospects."[63]

He then proceeded to argue that the evidence had never established his guilt, and that those in favour of conviction would, in his opinion, now accept that they had been carried to a verdict not justified by the evidence by the inevitable prejudice , away by the prejudice such charges inevitably brought with them.

The editor of the *Independent* replied immediately to Baker's letter. His comments were trenchant – as might be expected from William Fox who, as one of the JPs involved in the hearing, might be expected to have the facts clear in his mind. First to be challenged was Baker's assertion of a 9-7 vote; the Independent repeating that on the question of guilt or innocence, there had been a 10-6 vote; that only when the question was whether the matter be remitted to the Supreme Court for trial did the margin shift. Further, Fox challenged Baker's listing of the voting for guilt – claiming that one of those listed by Baker (a Mr Carkeek) had voted guilty – and that Baker must know this. In a wonderfully apt, if dated, summary, the newspaper urged:

> "We strongly recommend Mr Baker to refrain from these little, carping, captious, quibbling and jesuitical defences that do not touch the main case . They do him no credit and we can assure him that his repeated misstatements as to the bare majority – as to Mr Gresson's having quashed the conviction "on the grounds of its gross injustice" and other matters equally foreign to the truth have prejudiced his case very much in the eyes of many who would gladly if they could have believed him innocent. Neither he nor his 'legal adviser' have yet been able to explain away the consistent and clear evidence on which he was convicted….. "

Because that letter from Baker was published over two issues of the Independent, there is the remarkable feature that the second part of it was to appear alongside the a fresh letter from Baker in reply to the editorial rebuttal. Here Baker took issue with the allegation he was misrepresenting the voting; claiming that Carkeek himself had assured Baker he voted to dismiss the case, rather than entertain it – Baker then attempted at length, but most unconvincingly, to argue that those voting for him to be committed for trial could not, on a separate vote, have properly voted he be convicted. For good

[62] Hickson's behaviour would appear amenable to the analysis that he preferred the JPs did not investigate the matter but, once it had been investigated, he found the charge proved.
[63] *Wellington Independent* 3 November 1858, letter by Baker.

measure he repeated his earlier claim that Gresson had found the verdict "worthless and unjust".

The *Independent* replied editorially to that letter, declining further correspondence and urging Baker to await the decision of the Supreme Court on the civil suit to come before it.[64]

Part 10: The civil suit in the Supreme Court.

As indicated earlier, the civil suit for assault which Baker had commenced was transferred, apparently by mutual consent, to the Canterbury settlement, on the basis that no unbiased jury could be empanelled in Wellington. Despite this change of venue, the suit came to trial speedily. An order was on the 26th October 1858 made in the Supreme Court in Lyttelton for a special jury to be empanelled[65] to try the case on the 2nd of November, although that date could not be met as the parties and witnesses did not arrive in time from Wellington. The trial began on 19th November, with King calling Baker to give evidence, which he did for only a part of the first day of the trial. The Supreme Court Minute Book makes it clear that the jurors asked questions of Baker, a fact not brought out in the newspaper reports.[66] The defence sought to call Elizabeth Burbridge first, Mary Schroder being ill, but "the Court" considered Mary Schroder should go first, and the case was adjourned until the following day, when Mary's evidence and cross-examination took up not only the whole of Saturday 20 November but also a portion of the following Monday , during which time the jury requested Gresson ask questions of Mary Schroder.[67] Elizabeth Burbridge was then called and again was cross-examined at length, her evidence spanning two hearing days (in which time she was once more questioned as to her correspondence with Baker, this time the questions coming from the jury.[68] Late on this fourth day of the trial GW Schroder was called. After a day's delay occasioned by the illness of a juror (who was fined the comparatively large sum of £20 for his default).[69] Travers then called Mary's sister Catherine, who again was extensively questioned by both counsel and by the jury. On the sixth day of the hearing, King called two witnesses in rebuttal – though why one of them, the housekeeper, was not called as part of the original case is not clear.

Counsel then summed up their cases, and on the following day, the seventh of the trial, Gresson summed up, apparently strongly in favour of Baker. The jury returned briefly to request they be given the judge's notes of evidence – a request refused because it was " not the course"[70] – and the jury resumed

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[64] Wellington Independent l6 November 1858 Fox's comments might be thought appropriate: "We really cannot indulge Mr Baker with any further opportunities for damaging his own cause. His letters are extremely well adapted to show the public how smart an attorney he would have made if circumstances had placed him in that condition in life; but they certainly are by no means calculated to impress anyone with an opinion of his innocence."

[65] Minute Book Supreme Court 1852-1860, 26 October 1858 NZNA CAHX CH 53/21.

[66] Minute Book Supreme Court 1852-1860, 19 November 1858, NZNA CAHX CH 53/21.

[67] Minute Book Supreme Court 1852-1860, 20 and 22 November 1858, NZNA CAHX CH 53/21.

[68] Minute Book Supreme Court 1852-1860, 23 November 1858, NZNA CAHX CH 53/21.

[69] Minute Book Supreme Court 1852-1860, 24 November 1858, NZNA CAHX CH 53/21. His absence from illness may have been connected with the jurors request, recorded in the Court minutes, on the following day that they be permitted to sit on the opposite side of the courtroom, because of the "dilapidation of the jury box and the gusts of wind".

[70] Minute Book Supreme Court 1852-1860, 27 November 1858, NZNA CAHX CH 53/21.

their deliberations. At 12.30 they reported they were deadlocked and could not reach agreement, but were nevertheless sent back for further deliberation, and after a further 90 minutes returned a delphically ambiguous verdict recorded as :

> "Verdict for the plaintiff £50 in vindication of the law. They consider it quite hopeless to arrive at a special verdict having reference to the alleged assault brought forward by the defendant in mitigation of damages".[71]

Given that the whole thrust of Baker's case had been that substantial damages were necessary to blot out the stain on his character caused by Mary's allegation and her father's assault, the verdict fell well short of a resounding exoneration. Indeed, in the circumstances of earlier deadlock, it smacks of a compromise verdict. Indeed, Travers, Schroder's lawyer, was to set out in alter to the *Independent* that despite Gresson's strong summing up in favour of Baker, Travers was informed

> "..that of the jury seven were in favour of one farthing damages, one would express no opinion as to the charge against Mr Baker, two were for some middle ground, and two were for giving him the £500 claimed, believing Mr Baker to be innocent of the charge brought against him."[72]

The *Independent*, not surprisingly, considered that Baker had clearly failed to establish his innocence – despite the alleged advantage for him of trial in the "Anglican" Canterbury settlement.[73] Few more mentions of the case appear in either Wellington newspaper. the *Spectator*, long Baker's champion, appears to have weakened in its stance, as the last mention of Baker's case is a truncated report of the proceedings in the Supreme Court civil action.[74] The Independent effectively closed its discussion with an lengthy editorial, discussed below, on the respective merits of jury trail or trial by Justices of the Peace[75].

The later history of George and Mary Schroder is not known. Baker appears however to have been fatally handicapped in his career by the failure to win a clear verdict in the Supreme Court. After the lawsuits, Baker was reinstated by the newly elevated Bishop Hadfield in March 1859, but served for only a few months before quitting the colony in October 1859 to return with his bride of five months[76] to England, where he served again as a curate in various parishes till his death in July 1868.

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[71] Minute Book Supreme Court 1852-1860, 27 November 1858, NZNA CAHX CH 53/21.
[72] *Wellington Independent* 1 December 1858, letter by Travers.
[73] *Wellington Independent* 1 December 1858.
[74] *NZ Spectator* 8 December 1858.
[75] *Wellington Independent* 11 December 1858. A last shot was fired by the *Independent* on 15 December 1858, noting there had been some criticism in Canterbury of the degree to which Gresson J's summing up had favoured Baker.
[76] "Notices of intention to marry" Wellington NA BDM20/4 p101/24; 13 April 1859 , advising of the intention of Arthur Baker, bachelor, Clerk in Holy Orders, of full age, of Goddes Hill, Wellington and resident in Wellington 4-5 years to be married to Harriet Emma Lockhart Cox, spinster, of full age. No more is known of Miss Cox.

Part 11: Attitudes to legal institutions and customs.
The progress of this case through its varied legal stages and the ongoing publicity allows a rare opportunity to consider attitudes of early New Zealand settlers to legal institutions and practices, and it is clear that, in this case at least, there may be very great divergence between received wisdom as to public perceptions of legal processes and institutions and the attitudes revealed by their conduct here. Apart from minor matters adverted to in passing, such as the undesirability of lengthy cross-examination of vulnerable witnesses, three features are deserving of comment.

A. Publicity . Legal processes such as trials are usually thought of as requiring considerable restraint on disclosure of events – which is why there are rules as to jury secrecy and the like. It is obvious throughout the proceedings that Arthur Baker was not in the slightest concerned to observe any such conventions. What is surprising is that this appears to have drawn little negative comment from others involved. Although Henry St Hill declined to publicly state his reasons for voting to acquit Baker, he appears to have at least acquiesced in Baker approaching other JPs. Moreover while Abraham Hort clearly was not happy to be asked for his reasons, he did agree in the end to their publication – and the *Spectator* was prepared to put them in print. No-one, not even the critical *Independent* seems to have been prepared to make any public criticism of Baker's conduct, or that of Hort, in this regard. One may assume, therefore, that this was not seen as incorrectly or unjustifiably infringing on any social norm. A parallel may be drawn with Travers's publication of disclosure of the divisions within the jury in the Supreme Court civil action – again, a matter than appears not to have drawn adverse comment then, but would almost certainly be frowned on now.

(b) Inability of a criminal defendant to testify One of the great curiosities of the ongoing public debate about this case is the way in which reference to the different rules of evidence in civil and criminal cases, and the inability of a defendant in a criminal case to give evidence disappears from the argument. The matter was raised by Baker in a letter to the newspapers published, at his request, in the same issue as reported the trial in the Resident Magistrate's Court. The only other reference to the issue is in a Memorial to the Bishop of New Zealand launched by Baker's supporters shortly after the trial[77] in which the memorialists advanced as an objection to the verdict:

> Thirdly, That the charge was of so peculiar a nature as to render it next to impossible to be disproved by the accused. A verdict of condemnation ought not therefore to have been given by such a tribunal as decided the case merely on the assertion of the accuser.

Logically pursued, the argument of both Baker and the memorialists would mean that sexual offences should not be tried in any proceeding in which the defendant could not give evidence. Perhaps the reason for the issue being

[77] See p 12 above.

rapidly dropped form the debate is that, given that at the time no criminal defendant could give evidence, to insist on the unfairness of the procedure would be to impugn the contemporary conception of impartial British justice – to which Baker and his supporters often later appealed. It is notable that Baker was in effect later compelled to argue that investigation of the matter by way of a criminal prosecution in the Supreme Court before a jury would have been proper (as Mr Justice Gresson was later to suggest should have been the procedure) – and of course in such a trial he could not have given evidence. We may add that it may be doubted a criminal jury would have necessarily been swayed by Baker's evidence – it clearly failed to satisfy the whole of the panel of Canterbury jurors later.

(c) The jury or JPs as tribunal of fact. A notable feature of the latter stages of the saga is that attention shifted to the question of whether the JPs or a jury were a more appropriate tribunal of fact in cases such as this. The issue is first touched on by the *Spectator* in an editorial comment[78] where, in criticising the verdict against Baker the newspaper drew unfavourable comparisons with the trial of fact by a jury. This drew a considered but firm response from St Hill, who noted that, while he did not wish to discuss comparisons which had been made between a Bench of JPs and a grand jury or a petty (trial) jury, he thought a bench of magistrates "quite as able to balance evidence as a jury."[79]

The issue was ventilated at considerably greater length in almost the final exchange in the drama, when the *Independent* set itself to challenge criticisms made by Gresson J of the mode of proceedings initially adopted by the JPs.[80] Gresson J had taken the view that the JPs should not have tried the matter summarily, but rather committed Baker for trial in the Supreme Court so that the matter could be fully investigated. Gresson had apparently considered the summary trial had led to the matter being before the civil jury in "an embarrassingly indirect way", and that the JPs should simply not have exercised their jurisdiction, instead of leaving the matter to a jury.[81]

Again, it is no surprise that the *Independent* took a different view of the matter. Not unreasonably, it was urged that the course taken by the JPs had resulted in a thorough investigation of the matter, that any inconsistency in the results might well have occurred had there been both civil and criminal trials in the Supreme Court, and that as JPs were by statute given the jurisdiction to hear such cases, they should do so. Interestingly, the Independent urged as one reason for the summary criminal trial the avoidance of a process whereby "the unfortunate child and numerous female witnesses would have been subjected to a second stretching on the rack of examination and cross-examination."

As the last and principal objection to Gresson's views, the *Independent* indicated Gresson was in essence arguing that a jury was a better tribunal of

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[78] *NZ Spectator* 2 October 1858.
[79] *NZ Spectator*, 6 October 1858; letter by St Hill; the letter was re-published by the *Wellington Indepdent,* 9 October 1858.
[80] *Wellington Independent* 11 December 1858.
[81] *NZ Spectator* 6 October 1858, letter by St Hill.

fact than the magistrates could be. Given the ritual obeisance to jury trial in most legal discourse of the time, it is perhaps surprising, but very interesting, to find the rebuttal urging that the JPs were at least as good a tribunal:

> First, who were the Magistrates? They were sixteen of the colonists of Wellington, best esteemed for their position, character and ability. Three at least were members of the English Universities – two were English barristers, members of the Inner and Middle Temple. The rest were merchants, flockowners, the Collector of Customs of the Port of Wellington, several members of the General Assembly, several of the Provincial Council, and so forth. Now a special jury of the Supreme Court at Lyttelton is no doubt a very respectable body of men, but are they more so than 16 such persons as we have indicated - are they more capable of coming to a conclusion on a question of fact such as this?

And, of course, as the *Independent* noted, both the JPs and the jury had been divided in their views.[82]

It is almost an article of faith among lawyers, if not necessarily among historians, that Victorian jurists considered the primacy of the jury as a tribunal of fact to be a cornerstone of the entire legal system, with Gresson's views thus being in the mainstream of legal thought. If nothing else, the public attitudes revealed in the controversy surrounding *Baker v Schroder* suggest that members of the social elite did not necessarily share the lawyers' views in this regard, as they did not share lawyers views as to secrecy of court proceedings or, in a less clear-cut fashion, the silencing of criminal defendants.

[82] *Wellington Independent* 11 December 1858, quoting at length from *Lyttelton Times* 1 December 1858.