CONSTRUCTION AND REFORM:

The establishment of the New Zealand Supreme Court *

In the late 1830's the British Government decided to intervene in New Zealand to protect the Maoris and to bring under British law the British subjects who were trading and settling there in increasing numbers. It was to introduce law and order that the Government sent Hobson to New Zealand in 1840. British authority was not established by troops and policemen. It was effective in the white settlements because Hobson posted magistrates there, and the Europeans were prepared to accept their authority. The full benefits of the law, however, could not be made available until there was a superior court in the colony. In 1841/2, as soon as a Chief Justice arrived from England, a Supreme Court was established. In the next twenty to twenty-five years the courts were modified and changed until an effective and permanent court system appropriate to the needs of New Zealand had become established. These years are the most important in the history of the New Zealand Supreme Court.

Under Crown Colony government there was no clear distinction in New Zealand between executive, legislature and judiciary. A judge's status, his tenure of office during the Crown's pleasure, his age and experience when appointed, and his salary were all comparable to those of other colonial officials. In 1852 Judge Chapman of New Zealand was "promoted" to the post of Colonial Secretary of Van Diemen's Land (Tasmania). There could be no comparison made between a colonial and an English judge. In the mid 1850's H. S. Selfe, growing impatient of obtaining a New Zealand judgeship accepted the position of Thames Police Magistrate in London.[1]

Although steps were taken by the first judges to unify the systems

* This article is an amended version of Chapter 15 of an unpublished thesis, "The political structure of New Zealand 1858 to 1861", copies of which are deposited in the Hocken and Knox College Libraries, Dunedin, and the Victoria University of Wellington Library.

1. See below note 10 and compare the complaints of the New South Wales judges, an enclosure in Snodgrass to Glenelg no. 16. 2 Feb 1838, *Historical Records of Australia* ser. 1 vol. XIX 256 f; on Selfe see correspondence between the Canterbury Association and the Colonial Office in British Parliamentary Papers 1852-3 lxv (HC 206) 40 f, and correspondence in the Selfe Papers in the Hocken Library.

of law and equity, the most important developments in the New Zealand Supreme Court came in the late 1850's and early 1860's. The introduction of responsible government in New Zealand in 1856 led in the following years to a rationalisation of the system of government, one of the effects of which was the up-grading of the position of Supreme Court judges. Political functions were separated from administrative and judicial. Instead of government by autocratic Governor assisted by a group of officials, there was government by Governor, ministers with seats in parliament, and permanent officials organised in departments of state outside parliament. The judiciary became independent. Judges and stipendiary magistrates were disqualified from being members of the legislature. Experienced lawyers were appointed judges, their salaries were increased and paid from statutory appropriation, and they could no longer be dismissed at will. The main problem in this period was to find a new method of appointing judges instead of their being sent out by the Colonial Office. This was settled by an Act of 1858. The final stage in the creation of a superior court system was the passage of a Court of Appeal Act in 1862.

New Zealand's first Supreme Court judge, William Martin, arrived in the colony in 1841. Aged about 34, he had been called to the Bar only four years previously and was but a "briefless barrister" who had never entered a law chambers, having practised as an equity draughtsman and conveyancer.[2] But he was an enthusiastic campaigner for freeing the new courts from the heavy weight of English legal tradition. Together with Thomas Outhwaite, who became Registrar of the Supreme Court at Auckland, he had sailed in the same ship as William Swainson the new Attorney-General. All three were in their thirties and comparatively inexperienced in the practice of law. During the long voyage out they drew up a series of ordinances quite daring in their simplicity. As a result the next session of the New Zealand Legislative Council saw a flood of measures designed to create a complete judicial system. A Supreme Court and County Courts were established, and provision was made for the formation of juries, for the regulation of summary proceedings before magistrates and for that ubiquitous official of early New Zealand, the Police Magistrate (later Resident Magistrate and eventually Stipendiary Magistrate).

The ordinances show the far-sightedness of Martin and Swainson and their reforming zeal. They sought simplicity in their legislation. They drew upon the recommendations of English law reformers to abolish useless forms and subtleties in conveyancing; they introduced a simpler and uniform course of practice for summary proceedings. But the ordinances also show their inexperience. Several ordinances offended the British authorities; all had shortly to be amended or repealed. The legislation also reflects the major work then facing the courts: their

2. Carleton, New Zealand Parliamentary Debates (NZPD) 1856 297; *Dictionary of New Zealand Biography;* C. G. Lennard, *Sir William Martin. The Life of the first Chief Justice of New Zealand (1961).*

main duty was to protect property, and the greatest need was to provide means for the settlement of debts in the small trading townships. Hence there was provision for the transfer of real property, the creation of courts to handle debts and a general simplification in the proceedings of the courts. It was in these fields that the most effective law reforms were introduced in New Zealand's first decades.

In a society lacking a leisured class, attempts to create a satisfactory system of lower courts were bedevilled by the difficulty of adopting from England a system which relied on a body of unpaid amateurs to administer justice on a part-time basis. It was a comparatively straightforward matter to adapt for the colony the English superior courts which were manned by full-time professional lawyers. Although the multiplicity of superior courts of justice in England clearly was inapplicable to New Zealand, the colony was able to draw on the experience of New South Wales and other Crown Colonies.

By the Supreme Court Ordinance 1841 a Supreme Court was set up and invested with the "powers usually given by the *Charter of Justice* in other colonies."[3] As in New South Wales the small number of court cases necessitated the formation of one unified supreme court performing all the functions of the various superior English courts. The New Zealand Supreme Court had the jurisdiction of the common law courts in England as well as equitable and ecclesiastical jurisdiction in relation to wills, and the power to appoint and control guardians of infants and lunatics. The Court might not take cognizance of any crime committed before 14 January 1840—the date on which Governor Gipps of New South Wales issued a proclamation extending his jurisdiction to include the Queen's dominions in the islands of New Zealand.[4]

The ordinance was disallowed. Among the criticisms made by the Secretary of State for the Colonies were that it was not expressly stated that the Queen alone—and not the Governor—could appoint permanent judges, and that their tenure of office was dependent on the Queen's pleasure. In 1844 therefore a new Supreme Court Ordinance was passed, amending the 1841 ordinance in accordance with the Colonial Secretary's instructions. In addition the Governor was empowered to divide the colony into Supreme Court districts to which he could assign one or more judges. Provision was also made for the admission as barristers and solicitors of people educated in New Zealand. It had already been provided by the 1841 ordinance that qualified barristers, solicitors or proctors of the United Kingdom might be admitted to law practice. The omission of local men—pointed out by the Colonial Secretary—was typical of the assumption in early New

3. Enclosure in Hobson to Stanley no. 28, 29 March 1842, Archives of the Governor-General G 30/2.

4. It may be noted that at this time the Queen had no dominions in the islands of New Zealand.

Zealand that law would be practised by immigrants trained in the United Kingdom.[5]

The ordinances of 1841 and 1844 have remained the basis of the Supreme Court's jurisdiction as it exists today.[6] Certain features of the Court as then established were determined by the dispersed population of the colony. A judge sitting alone could exercise the full powers of the court in his district, no property qualification was required for jurors, and solicitors were empowered to act as barristers and *vice versa*. Experience and necessity, as well as changing views for example on the merits of property-holding, have led to the continuance of these features. A further important feature can be attributed to the judges' reforming zeal and to the use made of contemporary English proposals for law reform: the unification of proceedings.

In late 1843 a second Supreme Court judge had been sent out from England. H. S. Chapman, aged about forty, had a long record of interest in the colonies and in reform. Like Martin he had had little experience as a lawyer, having been called to the Middle Temple but three years earlier.[7]

The first rules for proceedings in the Supreme Court had been simple and short with the judge exercising a direct control over the proceedings. A complete and detailed code of proceedings was necessary. In 1849 on the recommendation of Chief Justice Martin the two judges were commissioned "to enquire into the course of proceeding

5. See Stanley to Hobson no. 10, 31 Jan 1843, Archives of the Governor-General G 1/7. The disallowance was never published in New Zealand. Governor Hobson had been dead many months when the despatch arrived and his officials decided that no suspicion of the disallowance should exist until the Legislative Council met to pass amending legislation. This did not take place until Governor FitzRoy arrived some months later. Governor FitzRoy referred to the disallowance in his opening speech to the Council on 9 January 1844 and the new ordinance became law on 13 January. In February an attempt was made to upset a recent judgment of the Supreme Court on the grounds that the judgment was made after the Governor's speech and before the enactment of a new ordinance and that therefore the Court had acted under a disallowed ordinance. Judge Chapman neatly avoided the problem by refusing to accept the Governor's speech as sufficient announcement of the disallowance. *(New Zealand Gazette and Wellington Spectator* 24 Feb 1844).

   The Secretary of State was also highly critical of a provision adopted from New South Wales, whereby "for the purpose of bringing a criminal case under the cognizance of the Court, an indictment duly signed by the Attorney-General or Crown Prosecutor . . . shall be holden as valid and effectual in all respects as if the same had been presented by a grand jury" (s. 20 of the 1841 ordinance). The section was therefore deleted from the 1844 ordinance, thereby introducing the grand jury. The Government abolished the office of crown prosecutor. Thereafter in cases of felony or misdemeanour the aggrieved party himself had to prosecute, as was the custom in England (see notice in the *New Zealand Gazette,* 3 March 1845).

6. See J. L. Robson ed, *New Zealand. The Development of its Laws and Constitution* (2nd Ed. 1967) 77-80.

7. *Dictionary of New Zealand Biography;* Miller, K. E., "Henry Samuel Chapman: Colonizer and Colonist", unpublished thesis, Canterbury University (1956).

in actions and other civil remedies now in use in the several Superior Courts in England" and in the New Zealand Supreme Court. The judges issued reports in 1852 and 1854. As was explicitly stated in the Governor's commission, they sought "a uniform, simple and efficacious system of procedure." Their aim was to abolish the distinction between actions at law and suits in equity and to eliminate the fictions and technical forms of the English courts. Their critical comments on the procedure of the English courts were robust and unequivocal and amply supported by quotations from English Commissioners' reports and other sources. As a supplement to their reports the judges produced in 1855 a complete code of civil procedure amounting to 104 printed foolscap pages. This, they believed, would be the first attempt within the British Empire to have all rules "collected in one volume and promulgated by authority."[8]

In 1856 the General Assembly gave statutory authority to the new rules after a select committee of lawyers in the House of Representatives had declared their enthusiastic approval of the judges' work. In a House in which lawyers played a leading part such law reform had a good hearing. The new rules were in part and in more detailed form a continuation of the earlier rules which they superseded. English practice was eliminated except where expressly retained, there was to be the same mode of commencement for all actions, and both plaintiff and defendant were required at the outset in pleadings to make specific material statements without fictions and technical forms—henceforth pleadings were to be in "ordinary language." In suits in equity witnesses were to be examined *viva voce* before the judge, and a jury was to determine all issues of fact. A generation later a committee set up to draft a new set of procedure rules found that in endeavouring to bring about a fusion between the systems of law and equity they were merely "following in . . . [the] footsteps" of the first judges who had "done so much towards bringing about the desired result."[9]

The Supreme Court Procedure Act 1856 was but one of the important measures passed by the second New Zealand parliament which sat between 1856 and 1860. The late 1850's was the next period of major re-construction of the judicial system after the legislation of 1841/2. Responsible government was introduced in 1856, bringing to office settlers with accumulated grievances against the old regime who were determined to establish government on a better footing. It was a legalistic age and apart from electoral legislation the main reforms introduced by settlers when they came to govern were in the field of law.

8. *Report of the Commissioners appointed . . . to inquire and report concerning a system of procedure . . .* , Auckland 1854. The quotation is from page 108. *Supreme Court of New Zealand, Supplement to the Reports of the Commissioners,* Auckland 1855. By 1854 many of the Commissioners' comments in their first report had been rendered obsolete by reforms proposed or effected in England. In 1852 Chapman was replaced as a Commissioner by Judge Stephen.
9. *Votes and Proceedings of the House of Representatives . . .* (V & P, HR) 1856 D-7; Robson op. cit. 79.

There were three rapid changes of government in 1856 and thus governments had little opportunity to formulate a legislative programme. But it was possible for the Government to lead the House in the assertion of important constitutional principles and in seeking from the Imperial parliament power to amend various clauses of the 1852 Constitution Act. Government resolutions on the Constitution Act and on the Supreme Court were passed by both houses of the General Assembly in the latter part of the session. "The tenure of Judges of the Supreme Court," it was resolved, "ought to be assimilated as nearly as may be to that of Judges in England"; they should be appointed by the Queen on the recommendation of an English judge, designated for that purpose by the New Zealand Government; a third judge should be appointed; and judges' salaries should be increased.[10] The resolutions on the Supreme Court were intended to establish the independence of the judges by giving them security of tenure of office and salaries which placed them above ordinary temptations, and by keeping appointments out of the hands of the local government. The latter intention, although no doubt laudable in theory, was not only impracticable but showed the politicians' lack of confidence in themselves. Indeed it also showed a lack of confidence in the local bar, for the obvious implication was that an English judge would nominate an English lawyer. A delay of many months before a judge could be appointed and travel to New Zealand was taken for granted.

Only the resolution on judges' salaries was put into immediate effect, by the Governor sending down supplementary estimates. Instead of introducing legislation, the Government sent the resolutions to England suggesting that they be incorporated in the proposed Imperial Act to amend the New Zealand constitution. The British Government's reaction to this attempt to use the Queen and Imperial parliament to maintain the independence of the New Zealand judiciary was predictable. The Secretary of State commended the colony for its excellent intentions but he could not agree to binding the Queen to follow the recomendations of an English judge, an individual responsible neither to the British nor New Zealand legislatures. It was the policy of the Colonial Office, as far as possible, to be guided by the local advisers of the Crown in the selection of judges and other officers in colonies under responsible government. He invited the New Zealand General Assembly to pass its own legislation on the subject.[11]

In the course of 1857 the administration of justice in the Supreme

10. NZPD 1856 297-8, 299-301, 356-7. On the need for a third judge see V & P, HR 1856 A-11 and D-3, and NZPD 1856 315. The salary of the Chief Justice was increased from £1,000 p.a. to £1,400, and that of a puisne judge from £800 to £1,000. In the same year the Governor's salary was increased from £2,500 to £3,500; in 1858 ministerial salaries became £800 and salaries of permanent heads of departments were fixed at £400. In England, metropolitan police magistrates received £1,200, county court judges £1,200 to £1,500, puisne judges £5,000 and the Chief Justices £8,000. (see British Parliamentary Papers 1857-8 xlvii (HC 478)).
11. Browne to Labouchere 2 Oct 1856 and enclosure, Labouchere to Browne 19 Dec 1856, *Appendices to the Journals of the House of Representatives...* (AJHR) 1858 D-5.

Court almost collapsed as a result of illness and deaths and the ineffectiveness of the resolutions of 1856. In 1850 Sidney Stephen had been appointed a third judge. He was stationed in the new settlement of Otago but found no cases to try. When in 1852 Judge Chapman was appointed Colonial Secretary of Van Diemen's Land, Stephen was moved to Wellington to cover not only the old Cook Strait settlements but also the rest of the South Island. The colony reverted to having only two judges although there was now a settlement in Canterbury. In late 1855 Chief Justice Martin left New Zealand on eighteen months sick leave, and Stephen took over as acting Chief Justice, for his health's sake moving to the warmer climate of Martin's district of Auckland.[12] Daniel Wakefield, a brother of Edward Gibbon Wakefield, was appointed temporary puisne judge for Wellington and the South Island. In March 1857 Daniel Wakefield fell ill and Stephen in the following months had to act as sole judge for the whole colony. It was not until December 1857 that the Government appointed a replacement for Wakefield, H. B. Gresson of Christchurch. Within a fortnight however the death of Judge Stephen restored the *status quo*. The ailing Wakefield also finally died.

Doubtless Government's delay in appointing Gresson was due to uncertainty as to whether Chief Justice Martin would return to take up his duties, and if he were not returning, what arrangements would be made to fill his place. In June 1857, while still in England, Martin forwarded his resignation to the Colonial Office. Fortunately, instead of referring the question to the New Zealand Government—which would have led to months elapsing before action could be taken—the Secretary of State consulted with a New Zealand minister who was in England negotiating a loan, and decided to act in the spirit of the 1856 resolutions. On the recommendation of Mr Justice Coleridge, a backer of the Canterbury Association, George Alfred Arney of the English common law bar was appointed new Chief Justice of New Zealand.[13] Arney was already on the seas when acting Chief Justice Stephen died on 13 January 1858. Hence although the colony was again reduced to one Supreme Court judge the situation was not as bad as it might have been. Arney assumed his new duties on the 1st March 1858 and in the meantime, guided by the resolutions of 1856, the New Zealand Government had requested the Imperial authorities to choose another permanent judge as a replacement for Stephen. Advised this time by Baron Bramwell the British Government appointed A. J. Johnston and by the end of 1858 Johnston had arrived to take up the position.[14]

Not since Chief Justice Martin held his first courts in early 1842 had the Supreme Court been as inadequately staffed as it was in 1857/8.

12. See Martin to (New Zealand) Colonial Secretary 18 Oct 1855, etc., Justice Department Archives J 1/1 58/1.
13. Labouchere to Browne 18 Aug 1857, AJHR 1858 D-5; Sewell to Stafford 10 July 1857, Sewell to Browne 31 Aug 1857, Stafford Papers in the Turnbull Library folder 43. (Ironically, Sewell the New Zealand minister consulted in England was himself hoping for appointment as a judge, see Lyttelton to Stafford 5 June 1857, Stafford Papers loc. cit.
14. AJHR 1858 D-5; NZPD 1861 280.

When the General Assembly met in April 1858 the colony again had two judges—even if Gresson was but a temporary judge—with the expectation of a permanent puisne judge arriving shortly to join the new Chief Justice. But it was evident that arrangements would have to be made to prevent such difficulties arising in the future, and legislation was required to give effect to the resolutions of 1856. The Secretary of State had made it clear that New Zealand ministers would have to accept at least nominal responsibility for the appointment of judges. Eventually it would be realised that however closely New Zealand remained tied to English law, judges would have to be appointed from the local bar.

1858 was the only year in the first decade of responsible government in which a ministry met the General Assembly with a prepared legislative programme and remained in office to guide it through parliament. After a recess of nearly eighteen months the Stafford Government came to the Assembly armed with a series of bills, of which a major group consisted of reforms of the legal system. Unlike some of their other measures these were adopted by the General Assembly with little discussion. The Supreme Court Judges Act stated that judges were to hold office during good behaviour, with the safeguard that the Governor could remove a judge upon the address of both houses of the General Assembly. Judges over sixty who retired for health reasons were to receive superannuation, and by the Civil List Act the revised judges' salaries, including salary of a third judge, were secured on the Civil List. The Disqualification Act disqualified members of the judiciary from being elected to the House of Representatives or to the provincial legislatures.[15]

The second section of the Supreme Court Judges Act empowered the Governor to appoint judges on behalf of the Queen, with no limit on the number who might be appointed.[16] Some years later the premier, now in opposition, asserted that it was not thereby intended that the Governor should act on his ministers' advice, but on the recommendation of an English judge in accordance with the resolutions of 1856. Perhaps for this reason, unlike appointment of temporary judges, power was granted to the Governor alone and not to the Governor-in-Council. In 1862, however, the House of Representatives upheld the principle of ministerial responsibility, and in practice the Act opened the way to political patronage and to the appointment of local lawyers to the

15. A useful if rather flippant summary of the main legal measures of the 1858 session is given in *Wellington Independent*, 18 Sept 1858. Martin was granted an annuity for life by a separate Act. Judicial officials and other government employees were not disqualified from membership of the Legislative Council until 1870. Chief Justice Arney was appointed a Legislative Councillor on his arrival in New Zealand and remained a member until 1866.

16. The power of the Governor, deriving from s. 2 of the 1858 Act, to appoint a judge without prior appropriation was successfully challenged in 1891. See *Attorney General* v. *Mr Justice Edwards* (1891) 9 N.Z.L.R. 321, [1892] A.C. 387; *In re Aldridge* (1897) 15 N.Z.L.R. 361. *(Butterworths Case Annotations of New Zealand Statutes 1908-1957* Vol. 1 490 gives the wrong dates for the reports in N.Z.L.R.).

Supreme Court. The Stafford Government itself set the precedent for appointment of local men by retaining Gresson on the bench as a third permanent judge after Johnston arrived—although apparently it failed to make a formal permanent appointment. This, indeed, was symptomatic of the casual manner in which appointments could be made. Gresson was judge in the district in which he had previously practised as a barrister. After the discovery of gold in the Otago province in 1861 there was increasing pressure for the appointment of a fourth judge to be resident in Dunedin. In 1862 the premier announced in parliament that Government would offer the position to C. W. Richmond, a partner in a Dunedin law firm, and Richmond was formally appointed shortly afterwards. Richmond was a minister from 1856 to 1861 and had been deeply involved in bitter political controversies. In 1861 he was leader of the opposition in the House of Representatives. In subsequent years other politicians were made judges. The reappointment in 1864 of H. S. Chapman, who for some years had been engaged in Australian politics, was the last example of a judge being imported from outside the colony.[17]

Despite the possibility of political patronage, the appointments and legislation of the late 1850's marked the change from having as judges young lawyers sent out by the Colonial Office, to having an independent judiciary staffed by experienced legal practitioners. As a result, perhaps, the Supreme Court became a more conservative body than it had been in the 1840's. Chief Justice Arney, aged about 47 when appointed, had been previously recorder at Winchester and had had many years' experience on the Western Circuit. "A pleasant, gentlemanlike man" he was probably a better lawyer than Martin, and perhaps more lenient on the bench. His speeches in the Legislative Council and elsewhere suggest a stickler for propriety. Gresson, also in his late forties, was a mild, well-educated and conscientious lawyer who had at one time been a member of the Irish Chancery Bar. Johnston had for some years practised on the Northern Circuit. Appointed in his late thirties, he was "a fat little jovial, sharp, hard-working Judge." These men could not compare in reforming zeal with Martin and Chapman, nor show towards the Maoris the deep sympathy and concern which made Martin in his retirement one of the leading critics of the Government's role in the Taranaki war. It is unlikely in fact that any of the other early New Zealand judges shared Martin's belief in the injustices of the war. Such reforms as the judges might now produce were likely to be aimed at maintaining the standing and professional competence of the Supreme Court, and in moving closer to the traditional ways of England.[18]

17. NZPD 1862 591-4; NZPD 1861 278 f; AJHR 1862 A-7 and A-7A; NZPD 1862 659.

18. On Arney see C. C. Bowen to H. S. Selfe 13 March 1863, Letters &c Canterbury Association (filed as 1864), Selfe Papers; *The Colonial Law Journal* Nov 1875 Part 11 19 f; and Sewell to Browne 31 Aug 1857, Stafford Papers folder 43. On Gresson: *Dictionary of New Zealand Biography* and NZPD 1861 280. On Johnston: Bowen to Selfe 13 March 1863, Selfe Papers loc. cit. W. Martin to Browne 11 Sept 1858, Gore Browne Papers in the National Archives 1/2 18; C. W. Richmond to Emily Richmond 22 Feb 1862, *Richmond–Atkinson Papers* (ed G. H. Scholefield) Vol. 2 24.

Under the Supreme Court Procedure Act 1856 which introduced the new code of civil proceedings judges were empowered to make new rules. It became customary for them to meet annually to discuss rules and other matters relating to the administration of justice, including questions referred to them by the Government. The judges were responsible for the various technical improvements to the Supreme Court Ordinance 1844 made by the Supreme Court Act 1860, for improvements in the jury system, and for Government requesting Judge Johnston to produce a manual for Justices of the Peace which proved invaluable. The judges were less successful in their attempts to promote prison reform. In 1861 for example they presented a scathing memorandum on the condition of gaols and Chief Justice Arney wrote a detailed criticism of the Auckland gaol in which he commented that the destruction of the buildings "would be a blessing to the community."[19]

In 1861 a Law Practitioners Act was passed after the judges had pointed out the "defective" law relating to the qualification and admission of solicitors in the Supreme Court. Despite provisions in the 1861 Act, however, the judges did not achieve their wish to have the professions of solicitor and barrister separated. In 1863 the judges issued Regulae Generales governing the admission of barristers and solicitors and prescribing examination in "the theory and practice of the Civil and Criminal Law of England, and of the Colony of New Zealand, the Law of Nations and the Conflict of Laws." Examination in general knowledge was to include "Ancient and Modern History, the Feudal System, the British Constitution, the Latin Classics, and the Greek, French, or German Language, the Etymology of the English Language and English Composition, and some portion of Euclid's Elements and of Algebra."[20]

After their 1861 conference the judges presented at the Government's request a report on the constitution and jurisdiction of a Court of Appeal. Provision of such a court was clearly necessary and desirable, especially when one New Zealand judge was able to exercise the powers of an English bench. British subjects in the colonies had the right to appeal to the Queen-in-Council. But even after an Imperial Act of 1844 gave statutory validity to the Crown's prerogative right to hear appeals from colonial courts, there was no actual provision made for direct appeals from the New Zealand Supreme Court to the Judicial Committee of the Privy Council. As a preliminary step an appeal required "a Petition to the Queen, with its expense and grievous delay."[21] Not

19. Reports of the judges, AJHR 1860 A-2, 1861 D-2A no. 3, 1860 A-3, 1861 D-2A no. 5; letter from the Chief Justice 21 May 1861, AJHR 1861 D-2A no. 6 12. See also extracts from the Chief Justice's letter quoted in Robson op. cit. 376.

20. AJHR 1860 A-1; NZPD 1861 12; Regulae Generales of 9 Nov 1863, *New Zealand Gazette* 1864 62-4.

21. Enclosure in FitzRoy to Earl Grey 24 Aug 1847, *Historical Records of Australia* ser. 1 Vol. XXV 715.

surprisingly, few suitors availed themselves of this right—there was one appeal by a private individual in New Zealand in the years 1840 to 1860. It was not until 1860 that an Order in Council made provision for direct appeals from the Supreme Court to the Judicial Committee in respect of sums of more than £500.[22]

By the Supreme Court Amendment Ordinance 1846 it was enacted that until there should be sufficient judges to constitute a Court of Appeals, the Governor and Executive Council should be a "Court of Appeals" in civil cases where the sum at issue amounted to £100 or more, provided that the Court could only reverse a jury verdict "for error of law apparent on the record." The ordinance was never invoked for local appeals and was repealed in 1860. It was doubtful whether the Governor and Council could have acted as a Court of Appeals. The ordinance was not proclaimed nor did it receive the Queen's assent, the Secretary of State considering that it had been rendered obsolete by the New Zealand Government Act passed by the Imperial parliament in 1846. Moreover, as the judges pointed out in 1861, to commence proceedings in error it was necessary to obtain a Writ of Error, which in England was issued from the common law side of the Court of Chancery. Until the Supreme Court Act 1860 there was no legislation granting the New Zealand Supreme Court the common law jurisdiction of the Court of Chancery.[23]

As a result of the report of the judges in 1861 a local Court of Appeal was established by an Act of 1862. Consisting of all the Supreme Court judges, the new court was to be a general court of error and appeal in both civil and criminal matters, although by modern standards its functions and jurisdiction were severely limited. Supreme Court judges continued to comprise the Court of Appeal until 1957.

In the late 1850's and early 1860's New Zealand completed the transition from the institutions of Crown Colony days to a court system resembling that which still exists today. The stipendiary magistrates exercising both civil and criminal jurisdiction had already become firmly established at the expense both of Justices of the Peace and of separate inferior civil courts, and the formation of a Court of Appeal was the last step in the creation of a complete tier of New Zealand courts. English traditions were blended with reform and expediency to give the country a unified Supreme Court, manned by independent and well-paid judges, each wielding the full power of the court in his own district, and together constituting a Court of Appeal. The period of construction and reform had come to an end.

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22. *Bunny* v. *Hart*, (1857) *New Zealand Privy Council Cases*, 1840–1932 (ed *H.F. von Haast)* 15. The Crown appealed in *The Queen* v. *Clarke* (1849–1851), ibid. 516. Imperial Order in Council of 10 May 1860, *New Zealand Gazette* 3 Oct 1860. See also Orders in Council of 11 Aug 1842 and 13 June 1853, *Gazette* 29 March 1843 and 20 Jan 1854.
23. NZPD 1858–60 64; AJHR 1861 D-2.