The making of the New Zealand Criminal Code Act of 1893 : A sketch

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The Criminal Code Act of 1893 is the foundation of New Zealand's criminal law. Yet it took ten years, and the expenditure of much parliamentary effort, between the completion of the New Zealand Statutes Revision Commissioners' "Report on the Criminal Code" and the enactment of legislation based upon it. Few people nowadays know where an original copy of the report can be found. In this article, Stephen White traces the parliamentary history of the passing of the Criminal Code Act 1893, and indicates the nature and location of certain archival material relating to the Criminal Code.

I. INTRODUCTION

In producing his most recent edition of Garrow's "Criminal Law",[1] Professor Caldwell took the opportunity of reintroducing to the introduction and main text substantial passages from the report on a draft criminal code which the United Kingdom Criminal Code Commissioners had produced in 1879. Passages from this report had first been inserted in the third edition of Garrow by Charles Evans-Scott because there were "apparently only two or three copies of this report in New Zealand",[2] but they were excised by the editor of the fifth edition, J. D. Willis. Evans-Scott also rounded off his introduction to the third edition with a short extract from the New Zealand Statutes Revision Commissioners' "Report on the Criminal Code" and this extract Professor Caldwell has also reproduced. This report was published in 1883 and the draft bill appended to it was the basis for the Criminal Code Act passed, after numerous attempts, ten years later. The report was reprinted in volume 2 of the 1908-31 reprint of the Public Acts of New Zealand "because of the light it throws on the present law and also for its intrinsic historical interest", and it was from here that Evans-Scott copied his extract. Yet a visitor to New Zealand, interested in the development of the criminal law here, would be extremely fortunate to find someone, even among teachers of and writers on the subject, able to give directions to an original[3] copy of the report, draft bill and, perhaps most

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1 Garrow and Caldwell *Criminal Law in New Zealand* (6 ed., Butterworths, Wellington, 1981).

2 Charles Evans-Scott *Garrow's Criminal Law in New Zealand* (3 ed., Butterworths, Wellington, 1950) vii.

3 By "original" I mean one produced when the report was first published.

interesting of all, the Commissioners' notes accompanying the text of the draft bill and explaining its individual provisions. It was in quest of the report, draft bill and notes that the research reported in this article was initially undertaken and the article's main purpose is simply to inform those interested in the development of the criminal law in New Zealand of the whereabouts and nature of archival material relating to the passing of the first Criminal Code.

II. THE STATUTES REVISION COMMISSIONERS

The Statutes Revision Commission was established in 1878. The Reprint of Statutes Act of that year empowered the Governor to appoint a commission of three persons, one being a judge of the Supreme Court, to prepare a new edition of the statutes of the colony. The Commissioners appointed were Alexander James Johnston, a judge since 1858, Walter Scott Reid, Solicitor-General since 1875, and John H. Shaw, a newly qualified Victorian barrister, apparently recruited specifically for the work.[4] The Secretary to the Commission was John Curnin, who had been appointed Law Draftsman in 1877.[5] The powers conferred on the Commissioners by the Act, as the Commissioners rightly appreciated, were very limited and intentionally so. The Act did not permit them even to consolidate the law, let alone to correct or amend it. Several legislators who debated the measure before it was enacted criticised it for not permitting this but the government spokesman in the Legislative Council, while stating that the object of the bill was "to pave the way for codification", made it quite clear that reprinting alone was all that the government was prepared to allow at that moment.[6]

It is therefore, perhaps, somewhat surprising that the Commissioners found it popularly assumed, even among those who had passed the Act, that they were empowered to consolidate and correct the statutes. Realising too that their work would inevitably generate ideas for improving the condition of the statute law, the Commissioners suggested a reconsideration of their powers.[7] As a result the 1878 Act was repealed and replaced by the Revision of Statutes Act of 1879. This Act enlarged the tasks and powers of the Commissioners, though only Johnston and Reid were reappointed. Whereas the 1878 Act had empowered the Governor to appoint three (but, apparently, not less) commissioners, its 1879 replacement empowered him to appoint not more than three and the new government took the opportunity, despite Shaw's protests, of dispensing with his services on the Commission. Since being appointed a commissioner he had, apparently, also been appointed to the Crown Law Office, and the reasons

4 I infer this from the correspondence, referred to below, relating to the termination of Shaw's commission.

5 For biographical details of Johnston and Reid see Robin Cooke *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Reed, Wellington, 1969) and G. H. Scholefield (ed.) *A Dictionary of New Zealand Biography* (Department of Internal Affairs, Wellington, 1940).

6 N.Z. Parliamentary Debates, Vol. 28, p. 75 (H.R., 6 August 1878) and 179 (L.C., 13 August 1878).

7 See the Commissioners' *Interim Report,* dated 5 June 1879, New Zealand Parliament, House of Representatives, Appendix to the Journals, 1879, H20.

given him for not reappointing him to the new Commission were, first, the maintenance of the strength, as far as possible, of the office and, secondly, the opening of the way for the appointment of someone independent of the government should a third Commissioner be appointed. Shaw protested that he had been recruited to work specifically on the Commission and that Stout, the former Attorney-General, had indicated that he would not have to resign from the Commission on his appointment to the office. Shaw even offered to resign from the office to retain his place on the Commission, but in vain.[8] Curnin remained as secretary to the Commission.

III. THE UNITED KINGDOM BACKGROUND

Section 4(7) of the new Act allowed the Commissioners to[9]

> examine and report on the bill lately introduced into the Imperial Parliament to establish a code of indictable offences and the procedure thereto, and . . . , if they think fit, adopt the said bill for enactment by the General Assembly.

The Imperial Bill referred to was the Criminal Code (Indictable Offences) Bill.[10] Initially prepared by James Fitzjames Stephen, this had been introduced into the House of Commons in 1878[11] and referred by the House to a Royal Commission of three judges and Stephen himself, who was appointed a judge while the Commission sat. The Commission completed its report on 12 June 1879.[12] The renewed presentation of the bill, as amended by the Commission,[13] in 1879 was the occasion for the publication of a letter by Cockburn, the Lord Chief Justice, to Holker, the Attorney-General. The letter, while approving the principle of

8 See the correspondence between Shaw and Hall, National Archives IA: 83/376, 80/5263.

9 Should the subsection have read "adapt" rather than "adopt"? I am unaware that there was any formal Commission procedure of "adoption".

10 What follows is no more than a sketch of the United Kingdom background which forms one of the contexts of the enactment of the New Zealand Act, although I have elaborated on two matters of detail unremarked on by previous writers. For full accounts of the U.K. background see M. L. Friedland "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 Oxford Journal of Legal Studies 307, reprinted in Martin L. Friedland *A Century of Criminal Justice: perspectives on the Development of Canadian Law* (Carswell, Agincourt, Ont., 1984) I; A. H. Manchester "Simplifying the Sources of the Law: An Essay in Law Reform II — James Fitzjames Stephen and the Codification of the Criminal Law of England and Wales" (1983) 2 Anglo-American Law Review 527; J. P. C. Roach *Sir James Fitzjames Stephen: A Study of His Life and Thought* (1953, Ph.D. thesis, University of Cambridge); James A. Colaiaco *James Fitzjames Stephen and the Crisis of Victorian Thought* (MacMillan, London, 1983).

11 H.C. Bill No. 178, H.C. Papers 1878-79, v.2, 5; see too *Memorandum by Sir James Stephen showing the Alterations proposed to be made in the existing Law of the Criminal Code (Indictable Offences) Bill, if Amended, as proposed by the Attorney-General,* H.C. Papers 1878, v.63, 159.

12 *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences: with an Appendix containing a Draft Code embodying the suggestions of the Commissioners,* 1879, C.2345, H.C. Papers, 1878-79, v.20, 169; see too *Memorandum showing the principal Changes proposed to be made in the existing Law by the Criminal Code (Indictable Offences) Bill, as settled by the Criminal Code Commissioners,* 1878-79, v.59, 225.

13 H.C. Bill No. 117, 1878-79, v.2, 175.

codification and applauding the Commissioners' endeavour, made numerous detailed criticisms of it in support of his conclusion that more harm than good would come of its enactment.[14] The bill was discharged before completing its passage through the House. Cockburn had a reputation for vanity and Stephen thought his criticisms had been made out of pique at having been omitted from the Criminal Code Commission.[15] He declined the suggestion of Holker, his sponsor, that he should hold Cockburn up to ridicule[16] but nevertheless responded to Cockburn's letter in the following January's issue of *The Nineteenth Century*. Its detailed criticisms Stephen welcomed but he denied that, even if justified, the faults they revealed flawed the whole enterprise and he charged Cockburn with demanding standards in codification that were simply unattainable. The bill, Stephen maintained, even if flawed in matters of detail would be an immeasurable improvement on the current state of the law.[17]

Shortly after the appearance of his *Nineteenth Century* article Stephen went on circuit with Cockburn. In letters to Lord Lytton he explained he was looking forward to this opportunity of studying Cockburn and winning him over to the code by "judicious flattery".[18] But hardly a week had passed before Stephen had fallen under Cockburn's spell. "I do not know much about converting him", he wrote, "but we have become the best of friends and get on like houses on fire"[19] and subsequent letters sing Cockburn's praises. The fact that Cockburn's

14 See *Letter from the Lord Chief Justice of England, dated this 12th day of June 1879, containing Comments and Suggestions in relation to the Criminal Code (Indictable Offences) Bill* H.C. Papers, 1878-79, v.59, 233. In this letter Cockburn wrote that he intended to compose three letters, the first on matters of general principle relating to codification and the general provisions of the bill, the second on the substantive law of crime, and the third on procedure. Writers on codification usually state that this first was the only one of the letters that Cockburn actually wrote and I, certainly, have never seen any others referred to. But Cockburn's second letter was published in (1880) 22 Law Journal at pp. 184 and 202 (10 and 17 April). The letter is dated 7 February 1880 and in it Cockburn stated that he would need at least three letters to detail his criticisms of the bill's provisions about substantive criminal law, one for those relating to Offences against the State and Public, one for those about Offences against the Person, and one for those about Offences against Property. His letter dealt with the first of these. Whether Cockburn completed any further letters is unknown but as the codification measure was lost in the following month it is likely that he did not bother. The New Zealand Commissioners' notes on the provisions of their 1883 bill show that they were well aware of the contents of Cockburn's second letter but the notes contain no references to any criticisms made by Cockburn of the imperial bill's provisions relating to Offences against the Person and Property or to Procedure.

15 See letters from Stephen to Lord Lytton, 8 July and 29 August 1879, *Stephen Papers,* Add. 7349/14, Cambridge University Library. A selection of extracts from Stephen's papers in the Cambridge University Library will be found very usefully, though not completely accurately, transcribed in "James Fitzjames Stephen: Some of his Correspondence" and "Some Additional Letters relating to Codification and James Fitzjames Stephen" at (1982) 2 Now and Then at pages 63 and 106 respectively.

16 See letter from Holker to Stephen, 8 July 1879, *Stephen Papers,* Add. 7349/15/95.

17 James Fitzjames Stephen "The Criminal Code (1879)" (1880) 7 The Nineteenth Century 136.

18 See letters from Stephen to Lytton, 18 and 29 December 1879 and 9 January 1880, *Stephen Papers,* Add. 7349/14.

19 See letter from Stephen to Lytton, 20 January 1880, ibid.

second letter is dated 7 February 1880 suggests Stephen either desisted from his efforts to persuade Cockburn or failed in them. Be that as it may, the bill, amended once again, was reintroduced on the very same day.[20]

At the same time as this bill was introduced in 1880 an alternative and rival bill, the Criminal Code (Indictable Offences) Bill (No. 2), was introduced by private members.[21] This bill has been totally overlooked by those who have written about the attempt to codify the English criminal law around the 1880s, though both Professors Friedland[22] and Parker[23] have drawn attention to its previous appearance in book form.[24] This oversight is surprising as the second bill is to be found immediately following the first in the House of Commons Papers. Perhaps the reason for it is that the second bill went entirely unremarked in the legal periodicals of the time.[25] The bill was, like Stephen's, a single-handed effort. Its author was Edward Dillon Lewis, a London solicitor, who had started drafting it in 1877, when he saw "no prospect of the task being otherwise undertaken".[26] Its presentation to Parliament may well have been due, in part, to trades' union influence for Lewis was critical of Stephen's bill, not least because of what he regarded as its limitations on rights of peaceful assembly and demonstration and told the Trades Union Congress in 1878 so.[27] Both Lewis's bill and the government bill failed, though the latter was given a second reading by the House of Commons. In 1882 a codification bill was presented in the Queen's speech[28] and a couple of private members' Criminal

20 H.C. Bill No. 2, H.C. Papers, 1880, v.2, 1.
21 H.C. Bill No. 47, H.C. Papers, 1880, v.2, 223.
22 Friedland, supra n.10, 323.
23 Graham Parker "Criminal Law — Statutory Construction — Use of Parliamentary Debates — Comparison of Judge and Historian — Homicide — Provenance of the Code Sections on Homicide — Codification of General Principles of Criminal Law" (1982) 60 Can. B.R. 502, 509.
24 E. D. Lewis *A Draft Code of Criminal Law and Procedure* (London, Beccles, 1879). I am grateful to Professor Friedland for first drawing my attention to Lewis's book and suggesting a possible connection between it and the second Criminal Code bill of 1880.
25 It is not easy to locate a copy of Lewis's book even now. I have so far found only two locations of it in the U.K. and one of the copies was still uncut when I obtained it. The records of its publisher shows that 500 copies were printed and that by mid 1883 only 252 had been disposed of as follows: 98 to the author, 32 for review and gifts, 47 destroyed by fire and 69 sold. An entry on 30 May 1884 records "Debt wiped off. Book becomes our property", see the Archives of Routledge and Kegan Paul Ltd. (1853-1973), University College, London.
26 Lewis, supra n.24, p. xxiv and lxix. Stephen had recieved an order for a draft bill sometime between 19 July and 2 August 1877, see his letters to Lord Lytton of those dates, *Stephen Papers,* Add. 7349/14 and *Criminal Law — Codification of,* P.R.O.L.C.O. I/42.
27 E. D. Lewis *A Paper on the codification of the Criminal Law* (London, Bristol, 1878). On the trades union influence on criminal law codification see Friedland, supra n.10, 323 and the Report of the Twelfth Annual Trades Union Congress and other papers in *Trades Union Congress: List of Subjects on which the Working Classes Urgently Require Reform,* H.O. 45/9593/93821.
28 P.Debs. (U.K.), ser. 3, v.266, col. 6 (H.L., 7 February 1882).

Procedure Bills were given second readings.[29] In the following year bills to codify criminal law and procedure and to provide a court of criminal appeal were promised by the government[30] and procedure[31] and appeal[32] bills were introduced, read a second time and committed to a Standing Committee of the Commons which was given permission to amalgamate them. The committee dealt with the appeal bill but after prolonged wrangling gave up the attempt to examine the procedure bill at clause 12.[33] Thereafter efforts continued to be made to reform particular matters dealt with in the draft code. So, finally, in 1898 the accused was made a competent witness on his or her own behalf and in 1907 a Court of Criminal Appeal was established. But after 1883 there were no further attempts at large-scale codification. Such, in short, was the United Kingdom background before which the codification of the New Zealand criminal law was enacted.

IV. DRAFTING THE CRIMINAL CODE

There had been no equivalent provision in the 1878 Act to section 4(7) of the 1879 one. Exactly when it was decided or by whom it was first suggested that the Commissioners should review the imperial bill is not known. But there is, in the archives, a printed copy of the draft of a bill which became the 1879 Act.[34] This copy bears a Crown Law Office stamp dated 25th October 1879 and it does not contain any such provision. Given the Commissioners' subsequent obvious lack of enthusiasm for the assignment it is extremely unlikely that the suggestion came from them. An informed guess would be that the initiative came from the incoming Hall government, which had been commissioned at the beginning of October 1879, and from the Attorney-General, Frederick Whitaker, in particular.[35] When, at the beginning of February 1880, the Commissioners sought the government's suggestions about "any particular subjects with respect to which it is, in their opinion, desirable that Bills for the consolidation of the existing law should be promptly submitted to the Legislature",[36] it was Whitaker who suggested to Hall that the most important work for the Commission to begin with would be the criminal law and that the form in which that could

29 Criminal Procedure and Appeal Bill 1882, H.C. Bill No. 15, H.C. Papers, 1882, v.1, 1; Criminal Procedure Bill 1882, H.C. Bill No. 47, ibid. 81. See too the Death Sentences (Appeal) Bill 1882, H.C. Bill No. 81, H.C. Papers, 1880, v.2, 155.

30 P.Debs. (U.K.), ser. 3, v.376, col. 5 (H.C., 15 February 1883).

31 Criminal Code (Indictable Offences Procedure) Bill 1883, H.C. Bill No. 8, H.C. Papers, 1883, v.2, 249.

32 Criminal Appeal Bill 1883, H.C. Bill No. 9, H.C. Papers, 1883, v.2, 211.

33 *Special Reports and Reports on the Criminal Code (Indictable Offences Procedure) Bill and the Court of Criminal Appeal Bill with the Proceedings of the Standing Committee on Law and Courts or Justice and Legal Procedure,* H.C. Paper No. 225, H.C. Papers, 1883, v.11, 219.

34 National Archives IA: 83/376, 79/3066.

35 More light on this, and on Whitaker's subsequent frequent involvement with the Code, might be shed by the Hall papers in the General Assembly Library and the Whitaker papers in the Auckland Museum library. Unfortunately I did not have time to search these.

36 Letter from Commissioners to Colonial Secretary, 9 February 1880, National Archives IA1: 83/376, 80/644.

best be dealt with was that suggested by "the proposed English Code of which there is a copy in the General Assembly Library".[37] A draft reply to the Commissioners incorporating this point was prepared in the Colonial Secretary's Office,[38] but before it was sent Hall — whether at his own or the Commission's instigation is unknown — had discussed the Commission's programme with Reid. Shortly after, Reid sent Hall an "unofficial" memo designed to give further explanation of the purpose of the Commission's request to the government. That part of the memo which deals with the criminal law is worth reproducing in full, since the points it made were to be so often repeated, and not only by the Commissioners themselves, during the next thirteen years. Reid wrote:[39]

> I also understood from you that the Government thought the Code Bill should be proceeded with. On their appointment, and after taking into careful consideration the various duties imposed on them, the Commissioners decided that this particular subject should not, at present, be proceeded with.
>
> It was thought that as the Bill, although called a Code was by no means complete, introduced new principles of Criminal Law (notably the right of the accused to be examined as a witness), had not become law in England, and would probably undergo many modifications before it did so, it would be premature to adopt it to the state of the law in this Colony.
>
> As you are perhaps aware since its introduction in England the Bill has been severely criticised by Lord Chief Justice Cockburn, and in an article in the "Nineteenth Century" for January last, one of the authors of the Bill (Sir J. Fitzjames Stephen) admits many of these criticisms to be fair. Looking at all these facts, the Commissioners thought it would be imprudent to attempt to deal with the subject till its principles and details had been settled in England, more especially as there is no pressing need for amendment of the existing Criminal Law in this colony.

The Government accepted the advice. In a formal reply to the Commissioners, while reiterating the Government's desire to take up the consolidation of the criminal law "as early as possible" and expressing that the best lines for such a consolidation would be those of the bill "recently laid" before the Imperial Parliament, Thomas Dick, the Minister of Justice, accepted that "it will be better to postpone dealing with the subject until it has been more fully considered by the Mother Country."[40] The Commissioners, therefore, got on with other business while the Imperial Parliament struggled with the Criminal Code (Indictable Offences) Bill.[41]

One of the reasons for delaying consideration of codification until a measure had been passed by the Imperial Parliament was the desirability of having as much uniformity between imperial and colonial statute law as possible so that decisions of the courts of Britain about interpretation could be used in the colony, whose size prevented it generating sufficient precedents for itself. The failure of the imperial bill in 1880, with little prospect of its revival, meant

37 Memo from Whitaker to Hall, 16 February 1880, National Archives IA1: 83/376, 80/802.
38 National Archives IA1: 83/376.
39 Memo from Reid to Hall, 4 March 1880, National Archives IA1: 83/376, 80/802.
40 Letter from Dick to Commissioners, 30 March 1880, National Archives IA1: 4/47, 457.
41 See the *Revision of Statutes Commission (Report of)*, dated 27 May 1880, New Zealand Parliament, House of Representatives, Appendix to the Journals, 1880 A-9.

that a decision had to be taken whether to go ahead without imperial guidance or to shelve the project until such time as it was revived in Britain. It is a fair inference from remarks made by the Commissioners that their preference was for the latter course. Nevertheless in a report dated 6 June 1881, they asserted that they would be able to produce a draft code before the next session of the General Assembly "if the Legislature should deem it desirable that such a code should be prepared for their consideration without waiting for the final decision of the Imperial Parliament."[42] And in the preface to their collection of Imperial Acts in force, which they reported being ready for the press,[43] they gave as their reason for excluding any statutes relating to indictable offences the "contemplation of the speedy presentation of a Bill for the codification of the law on the matter".[44] The selection must have been published by October 1881 because a copy of it in the Victoria University Library has an inscription by Hugh J. Finn, the member of the House of Representatives for Wakatipu, which is dated 27 September of that year.

Reluctant though they were to proceed, the Commissioners must have been instructed to do so. The 1879 Act required them to examine and adopt the bill lately introduced into the Imperial Parliament. This would have been the 1879 bill criticised by Cockburn. By the time the Commissioners actually began work on the project the most recent bill was the 1880 one, and, though the Commissioners were obviously familiar with its previous manifestations, it was the 1880 bill that they set to work to adapt. There is nothing in any of their reports which suggests that they were aware of Lewis's bill of 1880, nor that they were familiar with R. S. Wright's Model Penal Code for Jamaica which had been published in a paper presented to the Imperial Parliament on 9 August 1877[45] and which, it can be fairly guessed, would probably have been circulated to all the colonies.[46]

42 *Report of the Statutes Revision Commission,* 2, New Zealand Parliament, House of Representatives, Appendix to the Journals, 1881, A-7.

43 Ibid. 1.

44 *A selection from the Acts of the Imperial Parliament apparently in Force in New Zealand and of General Interest and Importance prepared by the Commissioners under 'The Revision of Statutes Act 1879',* 1881, iii.

45 *Draft of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica with an Explanatory Memorandum by R. S. Wright Esq., Barrister at Law. To Which is Added a Memorandum of Preliminary Consideration by Sir Henry Taylor K.C.M.G. and Correspondence on the Subject,* C. 1893, H.C. Papers, 1877, v.61, 355.

46 For a full account of the origins and fate of Wright's draft code see Friedland, supra n.10. While Leslie Stephen may have been part of what appears to be a Stephen family conspiracy to denigrate or wipe from the record Wright's efforts at codification, I cannot concur with Friedland in finding evidence of this in Leslie Stephen's probable choice of Herbert Stephen, James Fitzjames' son, as author of the entry on Wright in the *Dictionary of National Biography,* see Friedland, supra n.10, 1981, p. 346 and 1984, p. 45. In the first place Leslie Stephen died some six months before Wright; and in the second, according to the account of the compilation of the dictionary printed at the beginning of the first volume it would appear that the list of names beginning with "W" for inclusion in the biography was not compiled until after Leslie had retired from the editorship. Leslie continued to write entries for the biography until shortly before he died and may have been consulted by Sidney Lee, the new editor. But the choice of Herbert Stephen to write on Wright must have been Lee's.

The Commissioners' work took longer than anticipated because of the unexpected occupation of one of the Commissioners on "extraordinary judicial duties" and his subsequent ill-health, and before it was finished the Criminal Appeal and Criminal Law Procedure Bills had been introduced into the Imperial Parliament.[47] The completion of the draft code was recorded in the Commissioners' annual report dated 11 June 1883[48] and the report on the Code itself is dated 8 June 1883.[49]

V. PASSING THE CODE

The report consists of three parts, the report itself, a draft bill showing the exact way in which its provisions differ from the imperial bill of 1880, and a set of notes accompanying the clauses of the bill explaining such matters as the reasons for departing from the imperial model or the respects in which the clauses would change the existing law. Just eleven days after the Commissioners had signed the report the bill was introduced into the Legislative Council by Whitaker, who had now become Premier.[50] On the following day, 20 June, it was given a second reading and referred to the Joint Statutes Revision Committee.[51] The committee amended the bill and reported back to the council recommending that it be passed.[52] But it was recognised that the bill was more than a mere consolidation measure and, as there was no chance of its completing all the necessary stages, Whitaker agreed to withdraw it, contenting himself with the hope that members of the council would acquaint themselves with its provisions during the recess in preparation for passing it next session.[53] In the following year Whitaker had not reintroduced the bill before he lost both the Premier and Attorney-Generalship in a government reshuffle but the bill was introduced into the Council by Hart, a private member, who had spoken in favour of it in the previous year. The bill never received a second reading, however, being discharged on 17 June.[54]

Shortly afterwards, two administrations having been commissioned and as quickly dissolved following a general election, the problem of what to do about the bill fell into the lap of Tole, the new Minister of Justice. His first move

47 *Statute Revision Commission (Report of the),* 15 May 1882, New Zealand Parliament, House of Representatives, Appendix to the Journals, 1882, A-7, 2.

48 *Statute Revision Commission (Report of the),* 11 June 1883, New Zealand Parliament, House of Representatives, Appendix to the Journals, 1883, A-7.

49 *Statute Revision Commission, Report of the Criminal Code,* 1883 in *Bills Thrown Out,* 1883. The Appendix to this article lists places in Wellington where the report and first draft of the code and subsequent versions of it until its final passage in 1893 can be found.

50 N.Z. Parliamentary Debates, Vol. 28, 7 (L.C., 19 June 1883).

51 Ibid. 43 (L.C., 20 June 1883).

52 Legislative Council Journals, 1883, 69 (7 August 1883). There is a copy of the report of the Joint Statutes Revision Committee in the National Archives J. 85/75 and also in the volumes of Bills Thrown Out for 1884 and 1885.

53 N.Z. Parliamentary Debates, Vol. 45, 578 and v.46, 105 (L.C., 14 and 21 August 1883).

54 Ibid., Vol. 47, 7 and 143 (L.C., 10 and 17 June 1884); Legislative Council Journals, 1884, 9 and 18 (10 and 17 June 1884).

was to send copies of it to the four judges for their comments on it.[55]

I have been unable to find any reply from Richmond. Gillies promised to return his comments when he had had time to study the bill but I have not discovered any from him. Williams disowned any right to criticise the bill unless he bestowed the same labour on its study as its framers had bestowed on its compilation and this, he implied, he was not prepared to do. He did opine, however, that it would be better to follow the Commissioners' advice and do nothing until the Imperial Parliament had finally dealt with the matter. Johnston took the opportunity of repeating his own advice as to that, adding that

> There is no branch of the law which is, in my opinion, so little in want of consolidation at present as the criminal law. The Code proposes to introduce a variety of important changes respecting which public opinion is likely to be divided, and the delays which have occurred in England in promoting the measure in whole or in part are to my mind evidence of grave doubts as to the propriety of its adoption.

He further pointed out that though the Commissioners had discharged their duty of preparing a bill:

> They are not to be taken to have recommended its immediate adoption; and there are not a few provisions which they have inserted from the English bill as to the expediency of which they have expressed doubts in their notes.

In the New Year Tole forwarded the file to Stout, the Premier and Attorney-General, with the advice to follow "the suggestions of the judges", that is, presumably, to wait until the issues of codification had been disposed of finally in the U.K.[56] But Stout disagreed. "I think the Code should be passed", he wrote. "If forwarded to me I shall amend and then the amendments can be considered in Cabinet and then the Colonial Secretary can introduce in Council."[57] Stout made a few amendments to the bill designed to decriminalise blasphemy and presented the bill to the Cabinet with a memo to the effect that "I think this Code should be introduced omitting all reference to Blasphemy which in my opinion is not an offence."[58] Cabinet agreed that the bill should be reintroduced but in the form in which it had been reported from the Joint Statutes Revision Committee in 1883.[59] Buckley, the Colonial Secretary, introduced the bill into the Legislative Council where it was given a first[60] and second reading[61] and ordered it to be printed. It was once again referred to the Joint Statutes

55 Letter from Tole, 8 September 1884, National Archives J. 85/75. Prendergast, the Chief Justice, must have been on leave because a copy was, apparently, not sent to him and Johnston was at the time Acting Chief Justice. The replies of Gillies, Williams and Johnston are in J. 85/75, dated 19, 11 and 15 September respectively.

56 Minute by Tole, 9 February 1885, National Archives J. 85/75.

57 Minute by Stout, 5 March 1885, ibid.

58 Memo by Stout, 16 March 1885, ibid. On Stout's rationalism and his opposition to State support of religion see Waldo Hilary Dunn and Ivor L.M. Richardson *Sir Robert Stout; A Biography* (Reed, Wellington, 1961), 37-38, 86-88 and 179-184. Stout might well have envisaged himself on the receiving end of a charge of blasphemy.

59 Minute by Fox, 28 March 1885, ibid.

60 N.Z. Parliamentary Debates, Vol. 51, p. 4 (L.C., 12 June 1885).

61 Ibid., 56 (L.C., 19 June 1885).

Revision Committee which recommended its passage as printed.[62] The bill passed its remaining stages in the Council unamended,[63] and was sent to the House of Representatives. There, in an attempt to counter the objection that insufficient time had been left to consider a vast bill which admittedly did more than merely restate the existing law, Tole suggested that the bill be passed without amendment but that its coming into operation be delayed for as much as a year for the necessary preparation of a consequential repeals bill.[64] In that hiatus, Tole suggested, those who wished to alter the bill would be able to attempt to do so.[65] As an alternative device, Edward Connolly suggested that though the bill was not a consolidation measure the procedure for passing such measures be employed, namely that only those clauses should be considered in committee about which members had given advance notice.[66] The bill was read a second time and committed to a committee of the whole House but was then allowed to lapse.[67]

Next year, in 1886, the bill was introduced once more, but into the House of Representatives.[68] Tole explained that it had been revised somewhat in the interval and that the revision had the approval of Johnston.[69] This time Tole took Connolly's suggestion of the previous year to heart and proposed that only those clauses of the bill which were indicated by him as involving innovations and any others specified by members in advance should be considered in committee.[70] The bill passed its second reading and was committed to a committee of the whole House on the terms suggested by Tole.[71] Exactly what happened next is somewhat difficult to discern. It appears that Sir George Grey, egged on by Thomas Hislop, gave notice that he wished every clause to be considered in committee.[72] This caused acrimonious debate and when the time came for the House to decide whether actually to resolve itself into a committee, Seddon proposed that instead the bill be referred to a Joint Select Committee of both Chambers.[73] In the end it was not decided either to go into committee or to commit the bill to a joint select committee[74] and this impasse prevented the bill making any further progress. Consequently no progress was made with a separate Indictable Offences Repeal Bill which had been prepared ready for presentation in the event of the Criminal Code Bill being passed.

62 Legislative Council Journals, 1885, 62 (23 July 1885).
63 N.Z. Parliamentary Debates, Vol. 52, pp. 204 and 277 (L.C., 24 and 27 July 1884).
64 Johnston had drawn attention to the need for this in his letter of 15 September 1884, National Archives J. 85/75.
65 N.Z. Parliamentary Debates, Vol. 53, p. 409 (H.R., 1 September 1885).
66 Ibid., 412.
67 N.Z. Parliamentary Debates, Vol. 52, p. 283 and v.53, pp. 407 and 417 (H.R., 28 July and 1 September 1885); Jnls. H.R., 280 (1 September 1885) and xxxvii. It is for this reason that the report of the Joint Statutes Revision Committee of 1883 appears in the volumes of Bills Thrown Out for 1884 and 1885.
68 N.Z. Parliamentary Debates, Vol. 54, p. 126 (H.R., 26 May 1886).
69 N.Z. Parliamentary Debates, Vol. 55, p. 75 (H.R., 23 June 1886).
70 Ibid., 76.
71 Ibid. 78; Jnls. H.R., p. 104 (23 June 1886).
72 Ibid. 453 (H.R., 9 July 1886).
73 Ibid. 449 (H.R., 8 July 1889).
74 Ibid. 459 (H.R., 8 July 1886); Jnls. H.R., p. 171 (9 July 1886).

There was a gap of two years and another election before the draft Criminal Code reappeared. As a result of the election the Stout administration, of which Buckley had been a member, had been replaced by one in which Whitaker was once more Attorney-General. Two days after Whitaker had told the Legislative Council that the government had no intention of reintroducing the bill,[75] Buckley, with Whitaker's support, introduced it in the Council.[76] The bill was not, as Buckley told the Council,[77] the same as the one that had left the Council in 1885. Nor was it identical to the bill introduced into the House of Representatives in 1886. It contained slight changes both of form and substance. It was read a second time[78] and, together with the repeals bill, referred to a select committee. The committee recommended very few changes to the bill, the one requiring most redrafting being the formal abolition of penal servitude as a punishment. More interestingly the committee reported that the bill presents "in a codified form, the criminal law of the colony as at present existing", a comment belied by the Commissioners' notes on its provisions in their 1883 report. The committee also recommended the amalgamation of the bill and the repeals bill.[79] To these amendments the full Council added one more[80] and the bill was sent to the House of Representatives. There, however, it was withdrawn before being given a second reading.[81]

Another election and, this time, a gap of three years occurred before the bill reappeared in the General Assembly. Buckley was once more in the Cabinet, combining the offices of Colonial Secretary and Attorney-General. The two bills had now been amalgamated and the result was introduced once more into the Legislative Council.[82] Although Buckley told the council that the bill was that reported by the select committee of the Council in 1888, this was not completely true. Penal servitude, for example, had been restored to the bill. The bill was read a second time[83] and referred to the Joint Statutes Revision Committee which recommended a few minor amendments to it.[84] These were accepted and a few more made by the Council in committee.[85] The bill was then passed and sent to the House of Representatives where, once more, it lapsed but not before receiving a second reading.[86]

75 N.Z. Parliamentary Debates, Vol. 60, p. 27 (L.C., 15 May 1888).
76 Ibid., 88 (L.C., 17 May 1888).
77 Ibid. 197 (L.C., 22 May 1888).
78 Ibid. 197 (L.C., 22 May 1888).
79 N.Z. Parliamentary Debates, Vol. 61, p. 1 (L.C., 13 June 1888); Jnls. L.C., p. 41 (13 June 1886).
80 Ibid., 61, 142 and 276 (L.C., 19 and 26 June 1886); Legislative Council Journals, pp. 53 and 55 (20 and 21 June 1888).
81 N.Z. Parliamentary Debates, Vol. 63, p. 206 (H.R., 20 August 1888).
82 N.Z. Parliamentary Debates, Vol. 71, p. 69 (L.C., 17 June 1891).
83 Ibid. 136 (L.C., 19 June 1891).
84 Legislative Council Journals, 1891, p. 17 (30 June 1891). The Minutes of the Committee can be found in National Archives Le I/1891/14.
85 N.Z. Parliamentary Debates, Vol. 1, p. 468 (L.C., 2 July 1891): Jnls. L.C., 22 (2 July 1891).
86 Ibid. 516 (H.R., 3 July 1891); N.Z. Parliamentary Debates, Vol. 72, pp. 311 and 319 (H.R., 17 July 1891); House of Representatives Journals, 1891, xlvi.

In the interval before the next session of Parliament, Buckley and Reeves, the Minister of Justice, circulated copies of the bill to the judges and law societies. The purpose was to forestall any argument by opponents of the measure that it had not been considered by them.[87] I have been unable to discover the responses of the law societies but among the judges, those of Denniston, Connolly and Richmond are preserved. Denniston replied that he did not have time to examine the bill in detail but, on the assumption that it merely codified and did not amend the existing law of the colony, he welcomed it. "The importance", he wrote

> to those who have to make the law, and to those who have to administer it, and to those who have to obey it, of having a clear and intelligible statement of the law as it exists cannot easily be underrated.

He was not opposed to amending the law but thought that any attempt to combine restatement with amendment would be bound to fail. Far better to pass the bill without alteration and then allow it to be amended.[88] Connolly also welcomed the measure and proposed several detailed amendments to it. Unlike Denniston, he quite understood that the code was not simply a restatement of the law.[89] The longest reply came from Richmond who, while welcoming the bill as "a most valuable proposal for the reform of our criminal law", was opposed to its enactment. He wrote:

> It has not, however, as you are aware, escaped the adverse criticism of at least one eminent person in England whose habitual temper and disposition were certainly not those of a timid Conservatism; nor has the Imperial Parliament yet seen fit to adopt it as the law of England, although it has now been before the country since 1879. I myself have not formed, and if I had formed, should hardly venture to express an opinion upon the intrinsic merits of the Bill. It is a subject on which no one can be entitled to speak who is not thoroughly versed in the theory and practice of our Criminal Law, and who has not, moreover, made a careful study of the Code itself — which I cannot pretend to have done. The new definitions of offences which it contains are quite beyond popular comprehension. Not only are they abstruse in themselves, but they are framed with necessary references to the existing law, without which they are not intelligible. None but an English lawyer could guess the purpose of many provisions; and even English lawyers will require in the ordinary routine of business to be aided by commentaries of some sort, and by illustrative examples.
>
> As the proposed measure lays anew the foundations of the criminal law it is impossible to say what questions, if it becomes law, may be raised by even the simplest case. The beaten tracks, in following which everyone concerned in the administration of justice felt secure, will be effaced, and a new practice will have to be gradually established. It is inevitable that omissions and ambiguities should be discovered in the practical application of a law dealing with so difficult a subject, and the ingenuity of Prisoners' counsel is certain to be exercised abundantly in raising questions on things settled by former decisions which will have become inapplicable. In a populous country the decisions of the Courts would, it may be supposed, within no very long period, settle the interpretation of the code in regard to the more ordinary cases. But in a country like ours this must necessarily be a slow and difficult process.

87 Memo from Buckley to Reeves, 30 October 1891, National Archives J1/1891/1022.
88 Letter from Denniston to Reeves, date unknown, National Archives J1/1891/1022.
89 Letter from Connolly to Reeves, 10 June 1892, National Archives J1/1891/1022.

> On the ground just indicated I confess I am apprehensive that the present introduction of the Code as the law of this Country will be attended with considerable inconvenience, and will tend for a time, perhaps for a long time, to render the administration of the Criminal Law far more uncertain than it is at present.

Like Connolly, Richmond was well aware that the code did more than restate the law but, unlike Connolly's, Richmond's letter contains few detailed criticisms of individual provisions of the code. The part he most welcomed was that relating to pleading and procedure and to the power to order a retrial after the quashing of a conviction on a technicality. The main part of his letter concentrated on the uncertainty of the effects that would follow from the code's provisions on appeals which, in his opinion, would be likely to "afford frequent employment to the legal advisers of any prisoners who can command the necessary funds." For this reason he observed that "members of the profession who should oppose this Bill from interested motives would, from their own point of view, be making a great mistake."[90]

In 1891 the bill had lapsed after receiving a second reading in the House of Representatives and it was to the House that it was reintroduced in 1892, this time by Seddon.[91] It was given a comparatively trouble free, and quick, second reading possibly because of the unusually accommodating tone that Seddon adopted to opponents of the measure, which compared more favourably with the combative style of Reeves.[92] Seddon almost went as far as to suggest that he did not approve of the measure himself and was proposing it only in order to be able to change it.[93] The bill was referred to a select committee and it was to this committee that such of the judges' proposed amendments as the government was prepared to accept were put. In fact these were few, almost all of Connolly's suggestions being ignored by the government. The select committee was inquorate on several occasions but eventually reported the bill back with a few amendments.[94] The House, however, would not complete the committee stage of the bill and eventually the bill was withdrawn,[95] meeting its fate, as Buckley put it in the following year "in the general slaughter of the innocents".[96]

90 Letter from Richmond to Reeves, 20 June 1892, National Archives J1/1891/1022.

91 N.Z. Parliamentary Debates, Vol. 75, p. 281 (H.R., 7 July 1892).

92 For this reason and because they either ignore or impliedly belittle the efforts of those who had repeatedly pushed for codification since 1883 too much credit is given to Reeves by Drummond and Sinclair for the enactment of the Code, see James Drummond *The Life and Work of Richard John Seddon, Premier of New Zealand 1906: With a History of the Liberal Party in New Zealand* (Whitcombe & Tombs, Christchurch, 1907) 202 and Keith Sinclair *William Pember Reeves: New Zealand Fabian* (Clarendon Press, Oxford, 1965) 181.

93 He also coined an adage whose Ciceronian echo might have made it the motto for the most idealistic of codifiers: "in the simplicity of the law lies the safety of the people", N.Z. Parliamentary Debates, Vol. 77, 104 (H.R., 16 August 1892).

94 House of Representatives Journals, 1892, p. 264 (21 September 1892). The Minute book and report of the Committee together with a copy of the bill as reported are in National Archives Le I/1892/2.

95 House of Representatives Journals, 1892, pp. 308 and 402 (23 September and 10 October 1892) and N.Z. Parliamentary Debates, Vol. 77, p. 242 and v.78, p. 475 (H.R., 23 August and 28 September 1892).

96 N.Z. Parliamentary Debates, Vol. 79, 180 (L.C., 4 July 1893).

Finally in 1893 the bill was passed. For the fourth time it was introduced into the Legislative Council by Buckley.[97] It was read a second time[98] and, after being referred to the Joint Statutes Revision Committee, amended.[99] In the House of Representatives some members of the previous year's select committee on the bill complained that no notice had been taken of the amendments made by that committee. It was explained that, though the bill introduced into the Council had not been the bill as it had been reported by the committee, yet all the amendments made by the committee had been considered by the Joint Statutes Revision Committee.[100] The House further amended the bill[101] in a manner acceptable to the Council[102] and on 6 October 1893, just over ten years after first being introduced, it received the Royal Assent.

VI. THE BILLS AND ACT COMPARED

The result of the ten years of parliamentary activity was that a Criminal Code of 454 clauses and two schedules and an Indictable Offences Repeal Bill of four clauses and three schedules had been reduced to one Criminal Code Act of 424 sections and three schedules. The greater part of the reduction in the bill's size was due to the omission of clauses 218-238, 398 and 415 dealing with defamatory libel. This appears to have been the result of an oversight. There was some disagreement, which was never satisfactorily resolved, about whether the bill's provisions about defamatory libel accurately stated the law.[102a] Moreover, in 1887 the first of a number of libel bills was introduced whose object was to extend to publishers the protections afforded by the imperial acts of 1883, 1887 and 1891. The bill was not passed and further unsuccessful attempts to pass it were made in 1889, 1890, 1891, 1892 and 1893. Until 1892 the provisions of the libel bills and those of the criminal code bill were considered alongside each other but in 1892 the clauses relating to defamatory libel were removed from the criminal code bill, possibly because they were thought to duplicate those of the libel bill.[103] Thereafter the House of Representatives and Legislative Council, almost annually, vied with each other in attempts to pass (newspaper) libel bills right into the new century, and sometimes these measures were admixed with complete defamation codes. The only defamation bill that reached the statute book during this period, however, was the Slander of Women Act in 1899.

97 Ibid. 57 (L.C., 28 June 1893).
98 Ibid. 180 (L.C., 4 July 1893).
99 Legislative Council Journals, 1893, pp. 19 and 23 (6 and 7 July 1893); N.Z. Parliamentary Debates, Vol. 79, 286 (L.C., 7 July 1893).
100 Ibid. 286 (H.R., 7 July 1893); N.Z. Parliamentary Debates, Vol. 81, 590 (H.R., 4 September 1893).
101 House of Representatives Journals, 1893, p. 320 (27 September 1893); N.Z. Parliamentary Debates, Vol. 82, 875 (H.R., 27 September 1893).
102 Legislative Council Journals, 1893, 190 (L.C., 28 September 1893).
102a N.Z. Parliamentary Debates, Vol. 55, 70 and 454 (H.R., 23 June and 9 September 1886) and Vol. 72, 327 (H.R., 17 July 1891).
103 See Seddon's explanation, N.Z. Parliamentary Debates, Vol. 77, 105 (H.R., 16 August 1892) and the headnote to the Bill as reported by the Statutes Revision Committee, 21 September 1892. Unfortunately I have been unable to examine the provisions of the Libel bills.

The result of all this fruitless activity was a lacuna in the criminal code which was not revealed until the Court of Appeal's decision in the unsuccessful prosecution of Mabin[104] in 1901. A Criminal Code Amendment Act was hurriedly passed to fill the gap and four years later another one to create an offence of criminal defamation (slander).

Another sizeable reduction in the number of sections in the bill was made when the material of Parts XXXIX (Procedure after Appearance of Accused) and XL (Place and Mode of Trial), consisting of 35 clauses, was rearranged into 28 sections. It was in these two parts of the bill that the greatest reordering of material took place, although the sections relating to indecent assaults and sexual offences against children and young people were also rearranged to some extent. On this latter subject developments in the U.K. were very carefully watched. Other changes that had been dropped by the time the 1883 bill became an Act were clauses 80 (assaults on the Queen)[105]; 111 (disobedience to court orders)[106]; 113 (neglect to aid peace officers in suppressing riot)[106]; 114 (selling things unfit for foot)[107]; 179 (neglecting to obtain assistance in childbirth)[106]; 193 and 364 (sending unseaworthy ships to sea)[107]; 245(1)(b) and (c) and 264 (stealing post bags and letters and stopping the mail)[108]; 308 and 309 (forging trademarks)[108]; 360 (conviction of certain crimes to be a disqualification for offices)[107]; 366 (a provision allowing the inquisition by justices of persons suspected of being able to give evidence about the commission of crimes)[106]; and 451 (costs of prosecution).[107]

The last half of what became section 204(5) of the 1893 Act, dealing with bigamy, was omitted to take account of the case of *Tolson*,[109] which was decided after the bill's first publication. The sub-clause originally read:

> No one commits bigamy by going through a form of marriage if he or she has been continually absent from his or her wife or husband for seven years then past, and is not proved to have known that his wife or her husband was alive at any time during those seven years; but, unless there be such an absence, a belief on any grounds whatever that a wife or husband is dead shall be no defence to a charge of bigamy, if he or she was in fact alive when the form of the marriage was gone through.

104 *R.* v. *Mabin* (1902) 20 N.Z.L.R. 451. For a detailed exposition of the alleged misunderstandings of this decision see Atkinson's speech on the second reading of the Criminal Code Amendment Bill of 1901, N.Z. Parliamentary Debates, Vol. 119, 773 (H.R., 25 October 1901). In *Mabin* Stout C.J. speculated that the omission may have been a deliberate response to the English judges' contemporary criticisms of private prosecutions for libel by way of information.

105 This was recommended by the Commissioners and was first actually omitted in the bill introduced by Tole in 1886. The Commissioners' reason was "It can hardly be expected ever to become applicable in the colony". I am unable to say whether they meant that the Queen would never visit New Zealand or that she would never be assaulted if she did. Either way, recent events have confounded their expectation.

106 Effected by the Select Committee of the Committee of the Whole House of Representatives in 1892 and 1893, see Le I/1892/2 and Journals of House of Representatives 320 (27 September 1893).

107 This was first omitted in the bill introduced by Tole in 1886.

108 This was either omitted from the bill introduced in 1888 or the omission was effected by the Legislative Council in that year.

109 *Tolson* (1893) 23 Q.B.D. 168.

The Commissioners, noting the existence of differing opinions on the "dispunishability" of persons who, believing their spouses dead, remarried before a seven year absence, "thought it right to affirm distinctly" that such a belief would be no defence if the spouse was alive. Cases of hardship, which the Commissioners admitted could occur, could be catered for by an exercise of the new power of discharging an offender on indictment without verdict to be made available by clause 13. "They think that a person marrying within the seven years must do so at his or her own peril; that otherwise there would be too great a temptation to commit bigamy". The second part of the sub-clause was omitted in 1891 but, if the intention of the omission was to give effect to the decision in *Tolson,* it must be said that it was a hazardous way of doing it because the contrast between paragraphs (a) and (b) of section 204(1) of the 1893 Act could suggest that bigamy by a person already married was still an offence of strict liability. When in *Carswell*[110] the New Zealand Court of Appeal, by a majority of five to four, declined to follow *Wheat and Stocks,*[111] the minority went so far as to suggest that *Tolson* might not be applicable to bigamy in New Zealand. Although there was much discussion in *Carswell* of the reasons for the difference between the England and New Zealand definitions of bigamy it is clear that no one was properly informed of the evolution of the New Zealand provision.

Less had been inserted than had been omitted. Sections 7-10 and 15 of the Act were included to effect the formal abolition of penal servitude[112] and to deal with some of the effects of the abolition of the distinction between felony and misdemeanour. The abolition of penal servitude also required numerous amendments to other provisions of the 1883 bill which attached such a sentence to an offence. Section 343 of the 1893 Act was added to abolish deodands[113] and sections 299 and 401 were introduced to take account of the fact that in 1889 a Criminal Evidence Act had been passed making an accused and the spouse of an accused competent witnesses.[114] The 1889 Act was passed shortly after and, it was later said,[115] because of, the controversial trial and conviction of Chemis for murder.[116] The outcome of the trial might certainly have been

110 *Carswell* (1926) 45 N.Z.L.R. 321.

111 *Wheat and Stocks* [1921] 2 K.B. 119.

112 First removed from the bill in 1888, penal servitude reappeared in the 1891 bill to be removed in 1892.

113 This was added in 1888.

114 The provisions relating to the accused and the accused's spouse giving evidence were entirely omitted from the 1888 bill but were reinserted in the 1891 version. The 1893 Act repealed the whole of the 1889 one except in so far as it related to summary and committal proceedings.

115 N.Z. Parliamentary Debates, Vol. 81, 259 (H.R., 22 August 1893) and Vol. 87, 406 (H.R., 5 July 1895).

116 For an account, though incomplete, of the Chemis trial and the prolonged campaign to have Chemis exonerated of the murder of which he had been convicted see D. G. Dyne *Famous New Zealand Murders* (Collins, Auckland, 1969) 1-14. See too *Regina v Chemis (papers relating to the Case of),* New Zealand Parliament, House of Representatives, Appendix to the Journals, 1889, H-33, and *Public Petitions A-L Committee (Report of, on the Petition of Annie Chemis of Kaiwara, together with Petition, and Minutes of Evidence and Appendix),* New Zealand Parliament, House of Representatives, Appendix to the Journals, 1892, I-1B.

different had Chemis and his wife been allowed to give evidence in support of Chemis's alibi. The provisions of the bill, however, had been introduced in the previous year and the debates during its passage, though they contain references to the case, do not substantiate this account of the bill's origins. The case was responsible, however, for the Criminal Code Amendment Act of 1895 which allowed Chemis to apply to the Court of Appeal for a new trial as if he had been convicted after the coming into operation of the Criminal Code. His application to the court revealed a further lacuna in the Code,[117] which survived efforts in the following year to remove it.[118] Of the words and phrases inserted into particular provisions throughout the Act, the addition of "indigenous or tussock grass" to the list of plants firing of which was made an offence[119] is perhaps one of the best examples of adapting the imperial bill to New Zealand conditions.

The bill's provisions on blasphemous libel, though criticised,[120] were retained. Stout, it will be recalled, had wanted them omitted from the bill. Others wanted blasphemy relegated to being a summary offence, others again wanted it to remain a common law misdemeanour, and yet others, while apparently not wishing to abolish the offence, wished not to draw attention to its existence by including it in the bill. Those who wished to retain the offence as a common law one apparently overlooked the fact that this would be rendered impossible by the provision which was in the bill from the very start and became section 6 of the 1893 Act.

The copy of the 1883 bill in the National Archives contains Stout's proposed amendments to its blasphemy provisions.[121] These included the total omission of clause 135, which dealt with blasphemous libel, the retention of clause 136, which protected ministers of religion from assaults or attempts to prevent them carrying out their duties, and the amendment of clause 137 which prohibited the disruption of lawful religious gatherings and the disturbance of those officiating at them. Stout proposed that this offence should become one simply of disrupting any lawful assembly and of disturbing not only those officiating but those speaking as well. As has been recounted, the Cabinet decided to introduce the bill without these amendments. In the bill introduced in 1891, however, the protection afforded by clause 136 (now 137) was extended to "ethical lecturers" speaking in halls and that by clause 137 (now 138) to assemblies for religious or ethical purposes. But the Joint Statutes Revision Committee recommended the rejection of these changes on the grounds of their not "fairly coming within the scope of a codifying

117 See *Chemis* v. *The Queen* (1895) 14 N.Z.L.R. 395 and N.Z. Parliamentary Debates, Vol. 92, 295 (H.R., 24 June 1896).

118 This gap would, arguably, not have appeared had the original formulation of the provision not been amended. For the original formulation see Jnls. H.R., p. 265 (13 September 1894).

119 Effected by the Legislative Council in 1891, see Legislative Council Journals, 1891, 23 (2 July 1891).

120 N.Z. Parliamentary Debates, Vol. 45, 578 (L.C., 14 August 1883); Vol. 51, 57 (L.C., 19 June 1885); Vol. 52, 207 and 277 (L.C., 24 June and 28 July 1885); Vol. 55, 70 (H.R., 23 June 1886); and Vol. 61, 142 and 143 (L.C., 19 June 1888).

121 National Archives J 85/75.

bill", a good reason for the committee's recommendation in view of its remit, but hardly a good reason for the acceptance of that recommendation by the Legislative Council[122] since the bill contained many provisions which altered the law. Concessions were, however, made to critics of these provisions. The Legislative Council in 1888 added what became section 133(4) requiring the consent of the Attorney-General to a prosecution for blasphemous libel.[123] And in 1893 the House of Representatives reduced the proposed penalty for disturbing public worship from £40 to forty shillings.[124]

VII. PROBLEMS IN PASSING THE BILL

Since the Act finally passed differed so little from the bill first introduced, why did its enactment take so long? An answer to this question must attend research extending far beyond the confines of that reported in this article. But if the debates on the bill alone are considered and, in the absence of such research, what was said in them is taken at its face value, some comments can be ventured about the causes of the delay.

Anyone familiar with debates on codification in Westminster style legislatures would not be in the least surprised by the debates in the New Zealand General Assembly. The fact is that such legislatures are not best adapted for the passage of a codification measure containing some 450 clauses, especially when the measure is recognised to affect everyone's personal liberty in the most direct way as criminal law does. For those opposed to the measure there was never a right time for its introduction. If introduced at the beginning of the session they complained that they had not had time to read it. If introduced towards the end of a session, they said there would not be time to pass it and so they did not read it. Not that not having read it prevented members passing judgment upon it.[125] To some extent these difficulties could be overcome by letting the bill lapse towards the end of a session and giving notice that it would be reintroduced at the beginning of the next one, hoping that in the meantime members would have familiarised themselves with its provisions. This was only partially successful. Moreover, as time passed, the composition of the General Assembly and of the committees that considered the bill changed. Consequently there was always the danger that a new member of either might object to taking up one year where matters had been left in a previous one.

Another obstacle arose from the fact that the bill was not simply a consolidating measure as, for example, the Juries Act of 1880, the Justices of the Peace Act of 1882 and the Police Offences Act of 1884. As the Commissioners' task was to adapt the imperial draft code the bill inevitably proposed changes to the law. Attention has already been drawn to some of these, notably the establishment

122 House of Representatives Journals, 1891, 17 and 23 (30 June and 2 July 1891).
123 House of Representatives Journals, 1888, 55 (21 June 1888).
124 House of Representatives Journals, 1893, 320 (2 September 1893).
125 The most egregious example of this was the criticism of the bill for not providing for a court of criminal appeal, which even a mere perusal of the table of contents of the bill would have suggested was mistaken, see N.Z. Parliamentary Debates, Vol. 72, 323 (H.R., 17 July 1891).

of a criminal appeal court, the ordering of retrials and making the defendant a competent witness in his or her own defence. Among the other changes proposed were the abolition of the distinction between felony and misdemeanour; the introduction of the sentence of police supervision (clause 16 of the 1883 bill); the abolition of the defence of coercion (clause 22(2)); the extension of legal immunities to those exercising powers of arrest, executing court orders, or suppressing riots (clauses 21-51); changes in the law of perjury (clauses 115 and 116); changes in the formulation of murder and manslaughter (parts 16 and 17); changes in the formulation of the law of theft (parts 24 and 25); and the abolition of the suspension of civil remedies in respect of crimes (clause 357). Some of these proposed changes were almost universally welcomed but several were not. Moreover, to the extent that the bill was a consolidation it was criticised by some for being unnecessary, the paucity of appeals in criminal cases being cited as evidence for this[126] despite the fact that under the then existing procedure appeals required the leave of the trial judge; and others criticised its consolidating provisions apparently in ignorance that they merely restated the law. Small wonder that in 1893 one member could remark that "we are playing the same old game again, the very same old game",[127] or that in 1891 Reeves should observe, as if in desperation:[128]

> on the one side I am condemned because the Bill is said not to be the existing law, and on the other side I am condemned because the Bill is the existing law.

A notable example of criticism of the bill apparently in ignorance that it merely restated the existing law was the opposition to the penalties it proposed. Many thought these too severe or unprincipled and objected in particular to the amount of flogging and whipping the bill would have allowed.[129] To one member of the House of Representatives[130]

> Page after page is disfigured with a species of Draconian legislation absolutely written in blood — provisions of the most ferocious and terrible character throughout page after page of the bill

while to another, who incidentally felt flogging the panacea for the country's "criminal system" of jurisprudence and "burlesque" or "masquerade of justice", the bill[131]

> is simply bristling with monstrous punishments . . . it is a piece of barbarity. It almost carries one back to the Dark ages . . . this bill seems to be the work of some fiend incarnate . . . The provisions of the Bill are wide and elastic and . . . sharp as an eagle's talons and savage as an untamed wild beast . . . the bill . . . is simply saturated with blood.

126 N.Z. Parliamentary Debates, Vol. 44, 45 (L.C., 20 June 1883); Vol. 45, 478 (L.C., 14 August 1883); Vol. 52, 267 (L.C., 24 June 1885).
127 N.Z. Parliamentary Debates, Vol. 81, 592 (H.R., 4 September 1893).
128 N.Z. Parliamentary Debates, Vol. 72, 330 (H.R., 17 July 1891).
129 N.Z. Parliamentary Debates, Vol. 52, 207 (L.C., 24 June 1885); Vol. 53, 413 (H.R., 1 September 1885); Vol. 55, 67, 77 and 455 (H.R., 23 June and 9 September 1886); Vol. 72, 323 and 328 (H.R., 17 July 1891); Vol. 79, 181 and 182 (L.C., 4 July 1893); Vol. 81, 592 (H.R., 4 September 1893).
130 N.Z. Parliamentary Debates, Vol. 72, 324 (H.R., 17 July 1891).
131 Ibid., 327 (H.R., 17 July 1891) and N.Z. Parliamentary Debates, Vol. 81, 594-5 (H.R., 4 September 1893).

Although Reeves assured the House in 1893 that the only increased penalty provided by the bill was flogging for boys endangering the railway and that several punishments had been modified,[132] a comparison of the punishments in the 1883 bill with those in the 1893 Act would, I believe, show that on the whole the punishments had been increased in severity during the ten years. In particular many more of the offences carried a liability to whipping and flogging.

Since the bill was not merely a consolidation its progress was bound to be hindered by argument about whether it would not be better first to consolidate the law and then amend it or, conversely, to amend the law first and then consolidate it rather than attempt to do the two things together. In the end the problem posed by combining consolidation with amendment was surmounted by adopting consolidation procedures for all clauses of the bill except for those identified by the government as involving alterations to the law and any others about which members gave notice in advance of the committee stage — Stout's "little game" as one member called it.[133] But the first time this was tried, as has been seen, Grey sabotaged it by giving notice of all clauses.

It was always a difficulty for the promoters of the bill that the draft code was not passed in the United Kingdom. Of course the promoters could, and did, take the point that there was no reason why New Zealand should not lead, rather than follow, the Mother Country in the matter of codification as she had in other matters, especially by 1893. But there was no real answer to the point that differences between the law of the United Kingdom and New Zealand, if not strictly necessary, would needlessly deprive New Zealand of a large stock of precedents. And the fact that the measure was never passed in England meant that the suspicion that there was something inherently deficient in the enterprise could never be completely dispelled.

The eminence of those who had considered the imperial draft and Stephen's prowess as a scholar and authority on criminal law were prayed in aid to offset this:[134]

> The work of which this Bill is the outcome was first undertaken by that eminent lawyer Sir James Fitzjames Stephen, to whom the credit for undertaking such a task is almost entirely due . . . all those gentlemen who have read the Bill . . . must have been struck with the remarkable lucidity of its language and the perfection of its arrangement. For a Bill of this kind it is perfect in its simplicity . . . It produces order out of chaos in regard to the criminal law . . . Every student of jurisprudence acknowledges that one of the highest works to which the mind of a civilised nation can devote itself is the codification of its law . . . It has conferred immortality upon Justinian, and has rescued the name of Napoleon from oblivion, and it makes the name of Sir James Fitzjames Stephen . . . memorable.

132 Ibid. 590 (H.R., 4 September 1893). But see the observation by Seddon, N.Z. Parliamentary Debates, Vol. 77, 105 (H.R., 16 August 1892).
133 N.Z. Parliamentary Debates, Vol. 81, 592 (H.R., 4 September 1893).
134 N.Z. Parliamentary Debates, Vol. 72, 320 (H.R., 17 July 1891).

But the fact that Cockburn LCJ had criticised it was long remembered,[135] and critics of the bill could either point out that it was not Stephen's[136] or, after 1892, observe that Stephen had turned insane and had been forced to resign from the Bench.[137]

One of the reasons often put forward for the failure of the attempt to codify in the United Kingdom is the opposition of the common lawyers. Certainly some lawyers in New Zealand were opposed to the bill and the New Zealand debates are punctuated by unflattering references to lawyers.[138] But these references are few and the debates do not give the impression that there was a group of lawyers protecting a vested interest. Indeed, in so far as lawyers' interests were likely to be affected by the bill, it was implied that, if anything, they would be advanced because, without imperial precedents to guide its interpretation, the new law would generate litigation.[139] That the measure was eventually passed was due in part to the fact that, despite the instability of ministries between 1883 and 1893, the leading lawyers in the government, especially when holding the posts of Premier, Colonial Secretary, Attorney-General and Minister of Justice, were, on the whole, in favour of codification. Stout, Whitaker, Buckley and Reeves all supported it and the Attorney-General, whoever he happened to be, always did so. So the bill was constantly reintroduced and slowly opposition was worn down. As Wilson, a former Crown Prosecutor who had opposed the measure from the beginning, said:[140]

> I have hitherto not been in favour of this bill, but I am not now disposed to oppose its introduction.

So long had the enactment of the code taken that Buckley's boast that "it was the first perfect Criminal Code passed in the British Colonies"[141] was false from the start, even if one overlooks the Indian Penal Code which had been passed in 1862 and codes descended from it. If experience is the test, though we have more of it than Buckley had, perfection in the codification of the criminal law, while approachable, is unattainable and the New Zealand code

135 N.Z. Parliamentary Debates, Vol. 52, 207 (L.C., 24 July 1885).

136 "This is not the Code as prepared by Mr. Justice Stephen. I was curious to know whose Code it was, and I was not surprised to hear that it was the Code of Mr. Justice Johnston. I am bound to say that information does not commend the Code to my mind. We have a better model in that of Mr. Justice Stephen." N.Z. Parliamentary Debates, Vol. 72, 322 (H.R., 17 July 1891).

137 N.Z. Parliamentary Debates, Vol. 77, 106 (H.R., 16 August 1892).

138 N.Z. Parliamentary Debates, Vol. 52, 206 (L.C., 24 June 1885); Vol. 72, 320, 326 and 331 (H.R., 17 September 1891); Vol. 77, 106 (H.R., 16 August 1892).

139 N.Z. Parliamentary Debates, Vol. 44, 45 (L.C., 20 June 1883); Vol. 45, 578 (L.C., 11 August 1883); Vol. 52, 207 (L.C., 24 July 1885); Vol. 53, 412 (H.R., 1 September 1885); Vol. 71, 468 (2 July 1891).

140 N.Z. Parliamentary Debates, Vol. 71, 136 (L.C., 19 June 1891). For Wilson's earlier opposition, see N.Z. Parliamentary Debates, Vol. 44, 44 (L.C., 20 June 1883).

141 N.Z. Parliamentary Debates, Vol. 82, 796 (L.C., 28 September 1893). The most fulsome praise of the bill came from a non-lawyer: "I think it is the utmost perfection of Bill-drawing ever laid before the Legislature. . . . It is a work of art. It is homogenous. . . . There is no possibility of altering it without injuring it. It is like a beautiful piece of mosaic — each part fits in with the other", N.Z. Parliamentary Debates, Vol. 53, 417 (H.R., 1 September 1885).

would no doubt admit, mutatis mutandis, of the same criticisms that Friedland has directed at Stephen's draft code.[142] As for chronological priority, by 1893 codes based on Wright's code had been passed[143] and, the year before, Canada, with far less trouble, had passed a code based on the same model as New Zealand's.[144]

142 Friedland, supra n.10.
143 Idem and Parker, supra n.23.
144 For the fullest account of the passage of the Canadian measure, see Graham Parker "The Origins of the Canadian Criminal Code" in David H. Flaherty (ed.) *Essays in the History of Canadian Law* (University of Toronto Press, Toronto, 1981) vol. 1, 249. See also Friedland, supra n.10, Parker, supra n.23 and R. C. Macleod "The Shaping of Canadian Criminal Law, 1892 to 1902" (1978) Historical Papers 64.

APPENDIX

The following list shows where the various manifestations of the Criminal Code Bill between the first draft of the bill and its eventual enactment may be found in Wellington:

Criminal Code Bill 1883	B.T.O. (U) 1883; B.T.O. (G.A.) 1883
Criminal Code Bill 1883 as reported by the Joint Statutes Revision Committee 7 August 1883	N.A. J 85/75; B.T.O. (G.A.) 1884; B.T.O. (G.A.) 1885; B. (G.A.) 1885
Criminal Code Bill 1884 as reported by the Joint Statutes Revision Committee 7 August 1883	N.A. J 85/75; B.T.O. (G.A.) 1884; B.T.O. (G.A.) 1885; B. (G.A.) 1885
Criminal Code Bill 1885 as reported by the Joint Statutes Revision Committee 7 August 1883	N.A. J 85/75; B.T.O. (G.A.) 1884; B.T.O. (G.A.) 1885; B. (G.A.) 1885
Criminal Code Bill 1885 as passed by the Legislative Council	B.T.O. (G.A.) 1885
Criminal Code Bill 1886	B.T.O. (G.A.) 1886
Criminal Code Bill 1888[1]	B.T.O. (U) 1888; B.T.O. (G.A.) 1888
Criminal Code Bill 1888 as reported from the Select Committee of the Legislative Council 13 June 1888	B.T.O. (U) 1888; B.T.O. (G.A.) 1888
Criminal Code Bill 1888 as passed by the Legislative Council	B.T.O. (U) 1888; B.T.O. (G.A.) 1888; B. (G.A.) 1886[2]
Criminal Code Bill 1891	B.T.O. (G.A.) 1891
Criminal Code Bill 1891 as passed by the Legislative Council	B.T.O. (G.A.) 1891; B. (G.A.) 1891
Criminal Code Bill 1892	N.A. Le I/1892/2; B.T.O. (U) 1892; B.T.O. (G.A.) 1892; B. (G.A.) 1892
Criminal Code Bill 1892 as reported from the Criminal Code Bill Committee of the House of Representatives 21 September 1892	B.T.O. (U) 1892; B.T.O. (G.A.) 1892; B. (G.A.) 1892
Criminal Code Bill 1893	B. (G.A.) 1893
Criminal Code Bill 1893 as passed by the Legislative Council	B. (G.A.) 1893

Key

N.A.:	National Archives
B.T.O. (U):	Volumes of "Bills Thrown Out" in the University Library
B.T.O. (G.A.):	Volumes of "Bills Thrown Out" in the General Assembly Library
B. (G.A.):	Volumes of Bills in the General Assembly Library

1 The first copy of the 1888 bill has "1886" in the short title but the printer's date is 1888.

2 The bill printed in the volume of bills for 1886 in the General Assembly Library is quite clearly the bill sent from the Legislative Council to the House of Representatives in 1888. In the volume of bills for 1888 there is a blank page where the Criminal Code Bill should be.