Henry Chapman: first Supreme Court judge of Wellington

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Henry Chapman was the second judge appointed to the Supreme Court of New Zealand. This essay outlines Chapman J's eight year judicial career in Wellington, and presents much previously unpublished material.

I. INTRODUCTION

On 22 December 1841, an ordinance was passed creating a Supreme Court of New Zealand, and on 28 February 1842 the first sessions of the Court were commenced at Auckland under Chief Justice William Martin.[1] As the only judge of the Supreme Court, Martin C J was also required to hold circuit courts in Wellington, and these commenced in late 1842.[2] However, the rapid growth in the Wellington settlement made it imperative that a resident judge be appointed there, and, in June 1843, Henry Samuel Chapman was chosen for this post.[3] On 1 February 1844, Chapman J arrived in Wellington to take up his position, and he was to remain there for the ensuing eight years.[4] During this period, he contributed to the development of New Zealand's emergent legal system in a wide range of areas, and established the foundations of Wellington's judicial system. I propose to outline Chapman's career before he arrived in New Zealand, and I shall then examine his judgeship in Wellington.

II. CHAPMAN'S EARLY LIFE AND CAREER (1803-1843)[5]

Chapman was born on 21 July 1803, in Kennington, Surrey, England, the son of an English civil servant, and the grandson of a merchant trader who had conducted an extensive trade with North America. Chapman grew up in a family with limited financial means, but with a high regard for education, and so, between the ages of eight and fifteen, he attended good schools in Kent and London. However, at the age of sixteen, Chapman was forced by the straightened financial circumstances of his family

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1 G Lennard *Sir William Martin* (Whitcombe and Tombs Ltd., New Zealand, 1961) 8.

2 Above n1, 53.

3 Henry Samuel Chapman (H S C) to Fanny Chapman, 7 June 1843. This letter, and other correspondence of Henry Chapman, are in the Rosenberg Collection, held in the home of Ann Rosenberg, great-grandaughter of Henry Chapman.

4 H S C to Henry Chapman (H C), 3 February 1844 and 25 April 1852.

5 Unless otherwise indicated, this survey is drawn from F R Chapman *Outline of the life of Henry Samuel Chapman* (unpublished manuscript, Rosenberg Collection, 1929) and F R Chapman *Memoranda of conversations with Henry Samuel Chapman* (unpublished manuscript, Rosenberg Collection).

to begin work as a junior clerk in a bank, and this was followed by a two-year period as clerk to a London bill broker. In 1823, Chapman was sent by his employer to Quebec. There he soon established his own merchant business, which he was to maintain for ten years. During this time he established for himself mercantile habits which were to remain with him throughout his life, and forged many links with Canadian and American figures. He developed a growing interest in, and support for, the popular French movement in Lower Canada, and in 1833 he abandoned his mercantile career, moved to Montreal, and established the first daily newspaper in British North America, in support of the radical cause. Here, while not attending to his editorial tasks and political concerns, he read for the Canadian bar, acquiring knowledge of Roman and French law.

In December 1834, Chapman was appointed as the London spokesman of the liberal majority in the Lower Canadian Assembly. His ensuing eight-and-a half-year career in London was spent in a variety of pursuits. In particular, Chapman fostered his links (established earlier when he was based in Canada) with the movement known as the philosophic radicals. This group, which featured such figures as John Stuart Mill and Arthur John Roebuck, advocated the creation of a democratic constitution, the rationalisation of all matters of government and law, the establishment of legal and educational systems to which all members of the community could have equal access, and economic growth to be brought about by capital accumulation and free trade.[6] Chapman wrote extensively in support of these ideals. He declared that the "object of Reform is to obtain good government, ... that which secures to the great body of the People the greatest aggregate of happiness". He lauded the United States of America as the "great federal democracy" which had "proved that a people which has once governed themselves can never afterwards be ruled", and where "real improvement is most rapid in its progress".[7] By 1837, Chapman's official appointment by the Canadian Assembly had lapsed, and he decided to complement his journalistic work with a return to the study of the law. On 17 March 1837, he entered the Middle Temple, and here his prodigious capacity for work earned him the maxim "Chapman *studet diligenter*" amongst his colleagues. On 12 June 1840, he was called to the bar, and then commenced a career in London and on the Northern Circuit which was moderately successful despite the disadvantages of a late start and the absence of capital. By this stage he had developed yet another field of interest: the promotion of plans for the colonisation of New Zealand. From 1840 to 1843, Chapman was the editor of the *New Zealand Journal*, and here he expounded the advantages of colonisation in general and in New Zealand in particular. He wrote of New Zealand as "this fine country", with land sufficient for a hundred times its existing population, and an indigenous race which, by its energetic character, "made it worth our while to civilise, rather than to destroy".[8]

6 R S Neale *A cap of liberty and a judge's wig* (unpublished thesis, University of New England, 1970), 37 (in Rosenberg Collection).

7 J A Roebuck (ed.) *Pamphlets for the People* (Charles Ely, 1835), volume I, pamphlet 22, 11; and H S Chapman *Essays and Articles* (Rosenberg Collection), volume II, "Transatlantic Travelling", 400 and 416.

8 H S Chapman above n7, volume III, 90.

By the summer of 1842, Chapman had decided to leave England for New Zealand. This decision was as a result of a number of factors. Chapman had by this stage married and fathered one child, and there was the prospect of more children to come. Chapman, who declared that he had "suffered too much from an imperfect education [himself]", was determined to give his children the best possible education. To achieve this without the advantages of accumulated capital or high birth, Chapman was condemned to a life of "incessant labour", without time even to enjoy the pleasure of his family. Chapman summed up his plight in England when he said: "I am at least ten years too late at the bar, I cannot live without a painful amount of labour, and if I remain here I may have a family too large to educate". On the other hand, New Zealand was a pleasant prospect, made even more attractive by letters from New Zealand settlers suggesting that he might make a considerable income from practice at the local bar.[9] On 30 July 1842, Chapman wrote to the Colonial Secretary on the inadequate state of the administration of justice in New Zealand, where the "eight thousand subjects of the Queen residing at the several settlements on Cook's Straits" were effectively deprived of satisfactory judicial remedy in serious criminal and a wide range of civil cases. He suggested the erection of a Supreme Court in Wellington in particular, which, he said, was "the metropolis of a producing and commercial population".[10] It was as a result of this that the office of judge at Wellington was created. Chapman, despite his limited legal experience and the controversial views he had expressed in his writings, had many factors weighing in favour of his appointment. He had recently met and favourably impressed Captain Robert Fitzroy, the newly-appointed Governor of New Zealand; he had established a good legal reputation for himself, especially in the fields of the law merchant and the law of real property; amongst lawyers, he had unsurpassed knowledge of and interest in New Zealand; and the salary attached to the judgeship was not such as to attract other barristers of higher standing to the position.[11] On 27 June 1843, Chapman left England with his wife and family, and reached Auckland nearly six months later.[12] On 26 December 1843, at Auckland, Chapman was sworn in as judge of the Supreme Court of New Zealand, before an assembly of colonists and Maori chiefs. Chapman then spent the next four weeks in consultation with Martin C J, revising the Supreme Court Act, making new Rules of Court, and settling the geographical boundaries of his jurisdiction. It was agreed that Chapman would have jurisdiction over New Zealand south of a line running through Tongariro and Mount Egmont. With these matters settled, Chapman and his family left for Wellington.[13]

9 H S C to Fanny Chapman, summer 1842.

10 *First Report of the Commissioners appointed...to enquire into and report upon a system of procedure suited to the Supreme Court of New Zealand (First Report)* (Rosenberg Collection, 19 January 1852), 12-16 and 20.

11 Editorial, *London Weekly Chronicle* (undated, copy in Rosenberg Collection).

12 H S C to H C, 26-27 June 1843 and 20 January 1844.

13 H S C to H C, 26 January 1844.

III. CHAPMAN'S ATTITUDE TO HIS LIFE AND WORK IN WELLINGTON

Chapman came to New Zealand determined to exercise his office to the best of his ability and in that way "promote peace and goodwill among all classes of my fellow Colonists".[14] He saw himself in the role of the detached and impartial judge, who would dispense rational justice without trace of personal bias or prejudice. To this end, he lived, throughout his stay in Wellington, away from the town (in the Karori area), so as to live "the life of a hermit ... apart from the angry passions and gossip" of the colonial community.[15] Already, on the voyage from England, he had devoted three hours every day to the study of the law, and two hours each day to the study of the Maori language.[16] Now, when he was not at court or on official business, he studied and worked at home for about six hours a day.[17] In a review of his first three months at work, Chapman claimed that, as far as he could learn, he gave "satisfaction to the public and the profession". He said that he kept his court "in good order", had the great advantage of knowing procedural law and pleading so that he was ready "with every point" that was brought before him, and was strong in mercantile contracts with which most of his civil litigation was concerned.[18] In his review over three years later, Chapman declared that "no one can have taken more pains to fill his office faithfully than I have done", that he endeavoured to do his work as well as his faculties and legal experience permitted, and that he guarded himself "publicly and privately from any act or demeanour unbecoming" his station.[19] Chapman genuinely delighted in analysing and expounding the law from his colonial bench. He declared that "[i]t is decidedly the pleasantest as well as the most important of my functions to settle the application of the law of England [in the colonial context] and whenever I have any case of the kind I generally go over the field of Continental and American law so as to make my judgement as instructive as I am capable of doing".[20] Crucial here was the development of his library of law books: he declared that "[t]hese are our tools - they are expensive but they do not wear out like some expensive machines and do not eat like horses and men servants". Chapman dedicated himself to a systematic plan of gradually building up an "excellent working library". This he hoped to do by supplementing his holdings of recent reports, statutes at large, Harrison's *Index*, Petersdorf's *Abridgement*, and other British and foreign law books (totalling about 240 volumes), with other reports and treatises of English, foreign and international law.[21] Beneath his carefully controlled judicial exterior, Chapman remained committed to his philosophic radical ideas. He said that he would always dispassionately but firmly adhere "to what I believe to be my duty

14 *New Zealand Journal*, 24 June 1843.
15 H S C to H C, 20 January 1844 and 26 January 1844, and to Aunts (Chapman), 13 February 1844.
16 H S C to H C, 12 August 1843 and 29 September 1843.
17 H S C to H C, 13 June 1844.
18 H S C to H C, 26 April 1844.
19 H S C to H C, 21 August 1847.
20 H S C to H C, 17 March 1849.
21 H S C to H C, 15 June, 1847.

and repel the least attempt at Executive interference with my perfect independence".[22] He continued to profess himself to be of the "New School", one who rejoiced in the 1848 revolts as a "wonderful change working in Europe", and one who hoped that the French revolution settled itself "into a well-working republic".[23] At the local level, he did what he could to promote the "only institution here for the promotion of the people", by becoming president of the Wellington Mechanics' Institute.[24]

Chapman continued to display his thorough dedication to duty despite the evident deficiencies in his environment. He complained that "[t]he human mind lies fallow in a Colony and yet is not invigorated".[25] Especially in his early years in Wellington, he missed "the friends parted with at home, and the pursuits of men of my class".[26] He wrote to his father that he led such a quiet, retired and regular life that he was sometimes at a loss for subjects, "and our world does not furnish so many as your great wood-paved, gas-lit, new-streeted, be-parked, be-gardened and be-shop-palaced world".[27] He reflected on his library, which, though it was "the best in the Colony", had imperfections which constituted "a great difficulty with me".[28] He remarked that he had to be content "with the streamlets of the law" (abridgements or short notes of the older cases), but that he "should be most happy once more to seek the fountains of the law in the cool recesses of the Temple library".[29] Chapman was also unhappy about the decline in court work that set in after his first year in office. He calculated that in 1844 he tried thirty-nine civil cases, in 1845, thirty-four, and in 1846 only eighteen or nineteen, and that the criminal business had fallen off in the same ratio.[30] This decline continued, rendering his office "almost a sinecure which I do not like".[31] Chapman viewed most members of his profession with disdain: after describing the incumbent Crown Solicitor (later Attorney-General) Daniel Wakefield, as being "in every respect a bad fellow, so destitute of principle, so mendacious and slanderous", he added that he was "as competent as the other practitioners for the office he held".[32] He described the local executive authorities as being "incapable, weak and suspicious", and Lieutenant-Governor Edward Eyre as a "perfect ninkumpoop".[33] Prior to the completion of the new court-house (in operation by November 1849), the local court facilities were shabby:

22 H S C to H C, 17 June 1849.
23 H S C to H C, 10 October 1848, and to Aunts, 18 May 1844.
24 H S C to H C, 20 August 1848.
25 H S C to H C, 20 May 1848.
26 H S C to H C, 24 August, 1844.
27 H S C to H C, 25 October 1845.
28 H S C to H C, 15 June 1847 and 17 April 1847.
29 H S C to H C, 15 June 1847. On one occasion, Chapman's efforts to improve his library were upset by the wreck of the ship bringing him Viner's *Abridgement* (HSC to H C, 18 July 1847).
30 H S C to H C, 7 March 1847.
31 H S C to H C, 4 March 1847, 7 March 1847 and 21 August 1847.
32 H S C to H C, 18 January 1848. See also H S C to H C, 26 April 1844 (criticism of Holroyd) and 14 August 1844 (praise of Hanson).
33 H S C to H C, 10 September 1847.

Chapman noted that the lawyers were in "very dismal circumstances, and that grass was discovered pushing its way through the floor of the court-house".[34]

Yet, to Chapman, the really "grand disadvantage" of New Zealand was the problem it posed about the education of his sons.[35] This problem grew more pressing with the birth of sons Charles (in 1844), Martin (in 1846), Ernest (in 1847) and Frederick (in 1849). Chapman lamented that "[t]he birth of boy after boy necessarily defeats all plans suited to a moderate income - especially in a country where education is scarcely possible at all".[36] He was haunted by the prospect that his sons would suffer the same disadvantage as he had, and have an incomplete education. He feared that, when his sons had outgrown parental instruction at home, there were "no means of educating them properly here", and he was not prepared to allow his sons to be reared as "coarse, rude and unenlightened" stockmen.[37] Therefore, he foresaw that he would have to send his sons to England to be educated, so that each might become "an educated gentleman - a better instrument of happiness to himself and others than a mere rude stockman".[38] This required an increase in his local salary ("£800 is not enough to educate a parcel of boys according to my degree"), a move to another colonial judgeship with a higher salary and more hopeful prospects (notably, Van Dieman's Land or Victoria), or "some law office" in England with a salary of not less than £1000.[39] To this end, Chapman wrote repeatedly to his friends in England, asking them to advance his cause in the Colonial Office.[40] While the hope of being moved may have had an unsettling effect on Chapman's frame of mind, it had the salutary consequence of spurring him on to greater effort in his role as judge at Wellington. In his attempts to produce well-researched judgements and reformed rules of court, Chapman had in mind the thought that his work would "advance my reputation as a Colonial Judge and lawyer", and so facilitate his promotion.[41]

However, in large measure compensating for the frustrations Chapman had in his work, and the fears he had for his sons' education, was the increasing personal happiness of Chapman and his family in their lives in Wellington. Chapman said that his position here was "an enormous gain when considered in reference to the life of labour I led in England".[42] Chapman now had a secure income, a position which he saw afforded him "a greater field for doing good" than he had in England, and sufficient leisure time to be with his family, savour the countryside and pursue his reading and other scholarly

34 H S C to H C, 4 March 1847 and *Wellington Independent*, 10 November 1849.
35 H S C to H C, 17 December 1845.
36 H S C to H C, 22 February 1848.
37 H S C to H C, 25 October 1845.
38 H S C to H C, 17 December 1845.
39 H S C to H C, 16 December 1846 and 11 June 1850.
40 H S C to H C, 3 February 1847, 17 April 1847, 22 February 1848 and 14 February 1849, and to Parkes, 11 June 1850.
41 H S C to HC, 26 April 1844, 5 September 1846, 15 June 1847, 24 August 1849, and 28 November 1949.
42 H S C to H C, 24 August 1844.

interests.[43] He reported on the "mild and equable climate", "our beautiful domain" in Karori, and the "flourishing condition of the colony".[44] He, his wife and his family enjoyed good health, and on one occasion his wife wrote of her "happy and contented" life in a country of "great perfection".[45] Chapman and his family established a good rapport with many of the colonists: Chapman noted that when his only daughter was born in 1850, "everybody of all classes seemed to rejoice as if they themselves had had a stroke of good fortune", and that this was "not the first time we have had proof of the sympathy and good will of the settlers".[46] By 1850/1, such was the "comfort and quiet happiness" of the Chapman family, that he had come round to the view that if his local salary was raised to £1000 he would "really scarcely wish to leave this Colony for another".[47] Ironically, however, his earlier persistent efforts to gain promotion out of the colony were then about to come to fruition.

IV. CHAPMAN J: JUDGE IN CIVIL CASES

On 15 February 1844, "a numerous attendance of the profession" witnessed the formal opening of the Wellington Supreme Court. The venue was described by Chapman as "a miserable building" which also housed the local church.[48] After preliminary formalities, the court addressed itself to the first motion, that of *Re Brandon*. This was an application for the admission of Alfred Brandon as a solicitor of the court, under section 16 of the Supreme Court Ordinance, which provided for the enrolment of such persons as "shall have established themselves in the exercise of their profession on or before 22 December 1841". It appeared that Brandon had appeared in court as an attorney and held himself out generally as a legal practitioner, but five members of the local profession opposed the application on the basis that Brandon had not legally established himself in the profession. Chapman J immediately revealed himself in the role of dispassionate, rational judge, when he declared that he had to apply the law as it clearly stood, regardless of its hardship or "impolicy". He stated that "[o]ur sole business is with the fair meaning of the Ordinance as apparent on its face, of which the Court is the expositor, and not the censor or critic". On the basis that the ordinance had evidently simply required an establishing in fact, Chapman J declared that Brandon should be admitted to the profession.[49]

43 *New Zealand Journal*, 24 June, 1843, and H S C to H C, 10 April 1846 and 13 May 1846.

44 H S C to H C, 12 July 1845, 17 December 1845, 14 March 1846, 25 March 1846, 14 April 1848, 5 July 1851, and 12 November 1851, and to Aunts, 9 April 1846 and 24 November 1846.

45 Catherine Chapman to H C, 30 November 1844.

46 H S C to H C, 18 October 1850.

47 H S C to H C, 6 May 1850, 29 March 1851, and 12 November 1851.

48 H S C to Aunts, 13 February 1844.

49 *Cases in the Supreme Court of New Zealand 1844-1852 (Cases)*, newspaper cuttings, C P 104 (Hocken Library), 1 - 3; and *Court Note Books 1844 - 1851 (C N B)*, MS 1 (Hocken Library), 411A.

On 2 April 1844, Chapman J addressed a civil jury for the first time. He drew attention to the "peculiarity" of the jurors' position as part of "a very limited community", which made it difficult to fulfil their duties without bias or private feeling. In a moralistic fashion, he suggested to them an expedient which he used to guard himself from "improper biasses": that when they were told of possible law-suits, they should determine that (in themselves) "such reports shall meet with an impassable barrier", and that they should "caution the report bearer that he also should not spread rumours the truth of which he cannot ascertain". In the ensuing trial, Chapman J advised the jury, in utilitarian fashion, that they must "harden their hearts" to the considerable hardship that would arise from a decision either way, and simply be guided by the facts in evidence and by his own direction.[50] The court was then occupied with two other cases arising out of the same circumstances as in the first trial, and in all these cases the jurors found for the plaintiffs. On 22 April, Chapman J heard an application for rules nisi for judgment to be arrested and new trials granted in all three cases. Chapman J decided to grant a rule in one of the cases, the strongest in favour of the defendant, so as "to save the parties the expense of three sets of affidavits and office copies, three rules, and three arguments, when one would do".[51] This attempt by Chapman J to reduce the expense and length of litigation proved to be a characteristic feature of his conduct in civil cases.[52] Chapman J's judgment on this application for new trials also contained a number of characteristic features: his exhaustive review of the facts and law, his extensive reliance on English case law and texts (including the "most elaborate and comprehensive work", Chitty's *General Practice of the Law)*, and his reluctance to interfere with the jury's assessment of factual issues and quantum of damages.[53] In relation to the last-named feature, in subsequent cases Chapman J would at times err on the side of not giving express directions to jurors on points at issue, for fear of usurping their function.[54] But, in a judgment delivered on 28 July 1845, he indicated that there were limits to his policy of non-intervention in the jury's assessment of fact. In deciding that there should be a retrial, Chapman J stated that, while "the verdict of a jury should not be disturbed except on very cogent grounds, ...we must be satisfied that the verdict fulfils the substantial justice of the case". He said that to allow parties to be bound by hasty decisions of a jury "suddenly formed from perhaps complicated and not very clear testimony" would render trial by jury "an intolerable nuisance".[55]

Many of Chapman J's judgments indicated elaborate preparation, in which he had canvassed a wide range of sources ranging from his experiences at the English bar to the principles of Roman, French and American law.[56] In particular, Chapman J believed that "incalculable advantage" could be derived from the jurisprudence of America, in his attempt to apply English law to "the circumstance of what is commonly called a new

50 *Cases,* 5 - 6.
51 *Cases,* 9.
52 *Cases,* 22.
53 *Cases,* 10-13.
54 *Cases,* 19.
55 *Cases,* 28-29.
56 *Cases,* 29-31 and 50-51.

country". He said that, in applying the principles of English law to the circumstances of New Zealand, he was "never quite satisfied unless [he had] succeeded in tracing those principles to their application in the United States, and certainly there is no author so well calculated to afford us assistance as the great and estimable judge [Story]".[57] Chapman J was rarely content with simply reproducing the law in the case and texts, and would commonly explain the nature of and principles behind legal rules. In a case of libel, Chapman J was at pains to explain the apparently anomalous rule of libel that the essential element was the tendency of the words to injure and not proof of actual damage to reputation. In a succinct and vivid account, he pointed out that if proof of actual damage to reputation were required, persons of unassailable character could be libelled with impunity and only those "whose good character gave good force and effect to their words" could be guilty of libel.[58]

Perhaps the most challenging and significant set of civil disputes which Chapman J was required to adjudicate upon concerned the cases relating to land ownership in New Zealand. By the time of Chapman J's arrival in the colony, the question of land ownership had become an extremely complex and vexed issue. By late 1839, Europeans had bought substantial areas of land from the Maori, and many of the transfers were for trivial amounts and were backed by questionable documentary titles. In January 1840, Governor George Gipps of New South Wales (having extended New South Wales jurisdiction to cover New Zealand) proclaimed that title to New Zealand land would be valid only if derived from or confirmed by the Crown, that commissioners would be appointed to investigate lands purchased, and that any further purchases would be null and void. In February 1840, the Treaty of Waitangi was signed by the new Lieutenant-Governor of New Zealand, Captain William Hobson, and local Maori chiefs. This guaranteed the Maori ownership of their lands, subject to a pre-emption clause (that the Crown has the sole right of buying Maori land). In August 1840, the New South Wales Council passed the New Zealand Land Claims Ordinance, to facilitate investigation of all land purchases made before 1840, and it provided, in principle, that only equitable claims up to 2560 acres would be allowed. Late in 1840, New Zealand was separated from the temporary jurisdiction of New South Wales and became a fully-fledged colony, but the substance of the New South Wales proclamation and ordinance concerning land claims was re-enacted in ordinances (of 1841 and 1842) of the New Zealand Legislative Council. In December 1843, Captain Robert Fitzroy became Governor of New Zealand. By this stage considerable opposition had been voiced, amongst the Maori and European settlers, to the pre-emption clause in the Treaty of Waitangi (in particular, would-be Maori sellers of land found that they were unable to sell their land to the Government, or asked to sell at an unfairly low price). In response to this opposition, Fitzroy issued two proclamations waiving the Crown's pre-emptive rights over Maori land. The second of these, issued in October 1844, permitted certain lands to be bought direct from the Maori, on payment of a fee of a penny per acre to the Crown. Fitzroy also re-opened many of the claims which has been settled by the land commissioners under Hobson and, in many cases, increased the grants already made. The result of these actions was that, by the time of Fitzroy's recall in 1845, there was

57 *Cases*, 52.
58 *Cases*, 23 and 43.

much uncertainty as to title to land in the Colony, and many of those who had acted according to Fitzroy's instructions were seen to have claims of strong moral but questionable legal validity.[59]

In 1847, the case of *R (at the suit of McIntosh)* v *Symonds* was brought to court. This case was prompted by the action of Governor George Grey (Fitzroy's successor), who wished to test the legal validity of land purchases made under his predecessor's "penny proclamation". In 1844, McIntosh had obtained Fitzroy's waiver of the Crown's right of pre-emption over an island in the firth of the Thames, and in 1845 he had bought the island from the Maori owners. On 22 April 1847, Grey made a deed of grant of this island from the Crown. This prompted McIntosh to obtain leave from the Government to use the Queen's name to sue out a writ of *scire facias*, to repeal or avoid the grant, thus placing the validity of the title squarely before the court. The case was argued on 4 May 1847, before Martin C J in Auckland. At the conclusion of the argument, Martin C J reserved judgment in order to consider the issues and to obtain the judgment of Chapman J. By the end of the month the Chief Justice had received from Chapman J his judgment and "a great number of notes and some books" for his guidance on the matter, and on 9 June Martin C J read out Chapman J's and his own concurring judgments.[60]

The main thrust of Chapman J's judgment was an assertion of the notion of the Queen as the exclusive source of private title, and on the basis of this he upheld Symonds's claim (founded on a fully valid grant from the Governor) over that of McIntosh (whose claim was founded on an instrument not under the seal of the colony). A subsidiary theme of the judgment was a sympathetic and benevolent treatment of the property rights of the Maori. This treatment was heavily dosed with notions of respect for rights, justice and "humanity", and here Chapman J indicated that the philosophic radical spirit within him was still at work. The judgment was fluently expressed and was based on a wide range of sources from England, Canada and America.[61] Governor Grey considered the judgment "an able and important judgment which will long continue a record of law upon the subject",[62] Sir Alfred Stephen, Chief Justice of New South Wales, ensured that Chapman J's judgment was published in the *Sydney Morning Herald* as "well deserving the compliment", and the introduction in this newspaper said that "it contained much research and learning not always met with in colonial courts".[63] In the longer term, Chapman J's judgment came to be regarded as a classic statement on New Zealand land tenure and Maori property rights. By 1938, such was the importance of the *Symonds* judgment and so great was the need to render it accessible, that the publishers

59 See C Orange *The Treaty of Waitangi* (Allen and Unwin, Wellington, 1987) 34 and 94-105; and J S Marais *The Colonisation of New Zealand* (Oxford University Press, London, 1927) 275-284.

60 *Cases,* 33-35; and H S C to H C, 15 June 1847.

61 *Cases,* 36-37.

62 H S C to H C, 14 April 1848.

63 H S C to H C, 21 August 1847.

of the *New Zealand Privy Council Cases* decided to include it in their work, and the judgment has been quoted by New Zealand and overseas judges, through to the 1980's.[64]

In the context of Chapman J's own time, the effect of the *Symonds* judgment was to deny validity to Fitzroy's "penny proclamation" and transfers made under it, on the basis that private title could be acquired only by grant from the Queen's representative in terms of letters patent under the colonial seal. During 1848 and 1849, Chapman J, acting on the same basis, felt obliged to *uphold* a number of grants of land made by Fitzroy, despite his private view that these grants were "improvident" and "anomalous".[65] In particular, the case of *R* v *Clarke* (heard in 1848 before Martin CJ in Auckland) concerned an action of *scire facias* to try the validity of a deed of grant of 4000 acres made (in May 1844) by Fitzroy to Clarke, under the public seal of the Colony. This grant had been made notwithstanding the recommendation of the land claims commissioners, appointed in terms of the Land Claims Ordinance, that only 2500 acres be granted, and despite the provision in the Ordinance that grants should not, in principle, exceed 2560 acres. Martin C J once again referred the matter to Chapman J, who decided that the Governor's prerogative to make grants of waste land was not restrained by the Land Claims Ordinance, and that, even if the Governor had departed from the spirit of the Ordinance, this did not affect the legality of grants so made.[66] Governor Grey was, according to Chapman J, astonished at the outcome of the *Clarke* case, and in due course an appeal was lodged with the Privy Council. However, this involved a lengthy process, and when, in July 1849, Chapman J gave a judgment on very similar lines, Grey felt obliged to take immediate and "vigorous action". He ensured the passage of the "Quieting Titles" Ordinance, which declared the grants of land by Fitzroy valid subject to certain conditions.[67] The disputed claims were settled only after 1856, when the New Zealand General Assembly appointed a commissioner to adjudicate upon the grants.[68]

V. CHAPMAN J: JUDGE IN CRIMINAL CASES

On 12 April 1844, Chapman J opened the first criminal sittings of his court at Wellington. For the first time in Wellington, a grand jury was sworn in, and Chapman J now addressed the grand jurors on the reason for the delay in the introduction of the institution and on its powers and duties. He noted that "in an infant community, the persons qualified to serve on Juries are few in number", and, had the common jury lists been sifted to provide for grand jurors, the character and "integrity" of the common jury would have been "materially impaired". Therefore, an indictment signed by the

64 *New Zealand Privy Council Cases* (1938) Introduction x. See *Nireaha Tamaki* v *Baker* (1901) NZPCC 371, 384; *Re The Ninety-Mile Beach* [1963] NZLR 461, 468; *Keepa* v *Inspector of Fisheries* [1965] NZLR 322, 326; *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 236-239; and *Te Weehi* v *Regional Fisheries* [1986] 1 NZLR 680, 687.

65 H S C to H C, 17 June 1849 and *Cases*, 47.

66 Judgment, Rosenberg Collection, 20. See also *Scott* v *Grace (Cases 48-52)*, *R* v *McDonald (Cases 60-62);* and *R* v *Taylor* (judgment, Rosenberg Collection).

67 H S C to H C, 24 August 1849.

68 Marais, above n59 283.

Attorney-General or Crown Prosecutor had been substituted for an indictment presented by a grand jury. However, the growth of the colony had now ensured that the jury lists of the several districts were "sufficiently large and respectable" to allow them to spare grand jurors, and so the new Supreme Court Ordinance had provided for the introduction of the grand jury. The main function of the grand jury was to ensure that "a case had been clearly made out for the prosecution", and so the institution afforded security to accused persons against the "publicity and harrarr" of an unwarranted trial. Chapman J then outlined, in high moral tones, other functions of the grand jurors, including the duty (by virtue of their station in society) "to repress and discountenance, not merely actual crime, but even all habits and practices calculated to exert a hurtful influence on the community". Thereafter Chapman J reviewed the cases on the calendar, and the grand jury then "retired to a room provided for them at Cooper's Inn, the miserable barn which is courteously called 'a Court-house' affording no accommodation for them".[69]

Chapman J's handling of criminal cases was characteristically scrupulous and fair. His addresses to the jury were generally balanced and dispassionate on factual issues, although, particularly when a case had been poorly prosecuted, he would occasionally give his decided views on the strength of the evidence against the accused.[70] Chapman J's attitude to the different kinds of crime presented to him was reflected in the wide range of sentences he imposed. He consistently awarded light prison sentences without hard labour for such offences as assault, breaking out of prison and keeping a disorderly house.[71] By contrast, Chapman J (with much anguish) imposed the death sentence on two occasions for murder and once for wounding with intent to murder.[72] Further, for rape and property-related offences such as robbery, wounding or killing of animals, and uttering, Chapman J regularly handed down sentences of transportation for seven years or more.[73] He was heard to describe the wounding of cattle as a "gross outrage", and before imposing the sentence of ten years' transportation for uttering he noted the "ruinous consequences which may arise from the unrestrained prevalence of forgery".[74]

In criminal cases, more than in civil cases, Chapman J was confronted starkly with the undeveloped nature of his colonial environment. At a circuit court in Nelson, the grand jury stated that the lightness of the criminal calendar (which had been seen by Chapman J as reflecting a sound state of society) was because of the "miserable state of the goal". This, the grand jury said, "had induced the magistrates in a very great many instances to take bail for the appearance of parties charged with the most serious felonies, rather than subject them to confinement in a place crowded to a degree sufficient to produce pestilence and death among those incarcerated in it", and such parties had "availed themselves of the facilities afforded for their escape and quitted the colony".[75] In Wellington, a grand jury on one occasion endorsed the charge of larceny

69 *Cases*, 14-15.
70 *Cases*, 85-86.
71 See, for example, CNB 411 J-L.
72 C N B, 411 L-N; and *Cases*, 68-69 and 86.
73 C N B, 411 I-P.
74 *Cases*, 14-15 and 31-32.
75 *Cases*, 18.

against a Maori, but the accused did not appear in court because he "was rescued from the constables by an armed body of natives".[76]

As this case indicates, it was in criminal cases that Chapman J had dealings with the indigenous population. Chapman J, acting no doubt from his desire to "civilise" the Maori, appeared determined to maintain strict legal standards, but at the same time he tried to make the proceedings as fair and as meaningful as possible to Maori who appeared before him. In the first criminal proceedings in Wellington, Chapman J refused to sanction the practice that had existed in the county court to take the evidence of non-Christian Maori without oath and then let the jury "give what credit to it they pleased". He said that "there was no authority for such a practice, and that, however desirable some relaxation of the rule might be, he could not break in upon the law as it at present stands".[77] In the case of *R* v *Wirimu and Kumete*, Chapman J tried to ensure that "everything was done to give solemnity to the trial". At the same time, he was at pains to ensure that counsel were assigned to the prisoners, and that a jury was chosen of people entirely unconnected with the place where the robberies in question had occurred. In sentencing the prisoner Kumete to ten years' transportation, Chapman J "told him that the crime of which he had been convicted was not merely an offence against the law of England but was equally so against the customs of his own people".[78]

VI. CHAPMAN J: LEGAL ADVISER AND REFORMER

On several occasions, Chapman J was called upon to give Governor Grey advice, "aid and support".[79] In April 1846, he had a three-hour interview with the Governor on his legal position regarding martial law and a new organisation of the police force, and, in September 1848, Chapman J reported that he had successfully mediated in the disputes between the government authorities, the New Zealand Company and the local settlers regarding land disputes.[80]

Of major long-term significance was Chapman J's work in formulating Rules of Court to regulate the procedure of the Supreme Court. In January 1844 and in December 1845, he met with Martin C J to frame Rules which were subsequently brought into operation.[81] Chapman J took great interest in framing these Rules, which aimed at clarifying and simplifying legal practice. He remarked in June 1844 that he intended "to make a reputation as a Colonial Judge and indirectly as a Legislator and Law Simplifier", and that Bentham's "spirit animates the procedure of the tribunals of a country unknown to him" as he had already done one or two things that would have delighted Bentham had he been alive.[82]

76 *Cases*, 16-17.
77 *Cases*, 15.
78 H S C to H C, 10 April 1846 and *C N B* 411 K.
79 H S C to H C, 13 August 1847.
80 H S C to H C, 10 April 1846 and 17 September 1848.
81 Ordinance, Session 4, number 1; and Ordinance Session 7, number 12.
82 H S C to H C, 4 June 1844.

Chapman J's work on legal procedure achieved its most comprehensive form as a result of the commission issued by Governor Grey to Martin C J and Chapman J on 19 November 1849. This commission was issued at the suggestion of Martin C J and Chapman J while the latter was on a visit to Auckland to confer with Martin C J.[83] The commission noted that the rules of practice and pleading in the several English courts (which had been adopted by the New Zealand Supreme Court) were "very various and conflicting, and in some respects wholly inapplicable to the circumstances of the colony, and especially unsuited to a single tribunal of general [common law and equity] jurisdiction." The commission directed Martin C J and Chapman J to enquire into the process, practice and pleading in civil remedies in use in the English courts and the Supreme Court, and to recommend what parts of these were applicable to the Supreme Court and what changes should be introduced, "having in view the union of the several English jurisdictions in New Zealand and the comfort and benefit of suitors".[84] The two judges had been at work on this "for some time", and they now continued their efforts, Martin C J on equity forms, and Chapman J on common law pleadings, with a view to their reform and fusion.[85] By 5 January 1852, they completed their first Report on a system of procedure suited to New Zealand, and this was ordered to be printed on 19 January. The Report, and particularly the sections on pleadings at common law prepared by Chapman J, indicate the work of a philosophic radical, seeking to replace archaisms with a rational and just legal system. It condemned the artificial, prolix, and expensive proceedings in England, and pledged itself to promote simpler and less technical pleadings and to facilitate the court's "scrupulous and reverential regard for truth".[86] The Report carefully reviewed the operation of the English rules of procedure with extensive reference to English decisions; it referred to procedure adopted in the courts of New South Wales, Bengal, Scotland, and New York; and it canvassed the views of text writers such as Story, Chitty and Stephen.[87] Arising out of the survey, a number of Rules were proposed. These included the abolition of the distinction between actions at law and suits in equity, so far as the practice of the court and pleadings were concerned; the prohibition of the use of all fictions in any action or pleading to any action; the statement of facts in all pleadings in ordinary and perspicuous language, without any repetition; the specific statement in the declaration of all such matters of fact as were material and necessary to constitute the plaintiff's right of action; and the trial by jury of issues of fact in all actions (including equity proceedings), unless the parties agreed to some other mode of trial according to the practice of the Supreme Court.[88] The Report stated that, in order to complete the review of procedure, "we have still to consider the classification and forms of actions, together with some existing rules applicable to particular actions, which seem to us to need reform". It noted that the materials on these matters had been collected, and that they would be contained in a second and final Report.[89] On 1 March 1852, Chapman J wrote to his father that he was at work on the

83 H S C to H C, 28 November 1849.
84 *First Report,* Introduction.
85 H S C to H C, 28 November 1849.
86 *First Report,* 4 and 9.
87 *First Report,* 54-112.
88 *First Report,* 125-126.
89 *First Report,* 124.

manuscript of the second Report and that it would be revised by Martin C J before publication. This Report was released on 31 December 1852: like its predecessor it revealed admirable diligence in research, and it too proposed the adoption of a number of rules of procedure.[90]

The 573 Rules advanced in the two Reports were brought into force by the Supreme Court Procedure Act 1856. Chapman J's son, Frederick, who began his legal practice under the 1856 Rules, acknowledged that they had grave defects. In particular, he noted that the practice of trying equity suits by jury broke down, as in "some complicated cases an immense number of questions had to be put to the jury and contradictory verdicts not really understood by the jurors themselves not infrequently resulted". He also noted that in many respects the Rules were still too cumbrous. However, in the latter respect, he acknowledged that the Rules were an advance on the then - existing English and Australian systems. He also noted that the Rules produced "almost unaided a unified judicature system twenty years before such a system came into force in England"; and that the system it enforced (with pre-trial settlement of issues and greater dependence on forms of pleading than in modern systems) called for greater accuracy on the part of judges but also lightened their work, and meant that the Supreme Court of that time was "a great training school for lawyers".[91] The Rules remained in operation until 1882, outliving Chapman J himself.

VII. CONCLUSION

In November 1851, the New Zealand newspapers carried a paragraph copied from the London *Observer* to the effect that Chapman had been appointed Colonial Secretary of Van Dieman's Land. This was the first news that Chapman had of his appointment, which had been organised on his behalf (and without his sanction) by his father in London. Chapman observed that he certainly had no wish to quit the Bench, and, by this stage, "none to leave the Colony provided I could get some increase of salary".[92] However, the appointment had already been gazetted and so Chapman felt himself bound to accept, and Governor Grey advised "acceptance under any circumstances - saying he felt sure [Chapman] would make it a step to something better".[93] Besides, the salary was a significant improvement on his existing salary (a rise to £1200 a year).

On 13 March 1852, Chapman and his family left Wellington for Hobart, having received tributes testifying to Chapman's "great ability", "valuable services", and "kindly interest" in the welfare of those around him.[94] His replacement in Wellington was Sidney Stephen, whom Chapman described as a "foolish and intemperate" figure, who

90 F R Chapman "The acquisition of the Sovereignty of New Zealand to the Queen, and a short history of the Supreme Court", in *The Budget*, 25 August 1923.

91 Ibid.

92 H S C to H C, 6 December 1851.

93 Ibid.

94 H S C to H C, 25 April 1852; and *New Zealand Spectator* 18 February 1852 and 17 March 1852.

was justly reputed to be "addicted to women".[95] However, the solid judicial structure that Chapman J had established easily survived the inadequacies of Stephen J, and were to be built upon by more competent successors such as Johnston J (1858-1875) and Prendergast C J (1875-1899). Chapman was to return to New Zealand in 1864, served as judge at Dunedin until 1875, and died there in 1881.

The people of Wellington had been fortunate indeed to have had Henry Chapman as their pioneer judge for eight years. His conscientious nature, moulded through years of self-discipline and self-education, ensured that Wellington litigants received a thorough and careful adjudication of their rights. His rich and varied background, particularly in North America, made him personally adaptable, and alive to the need to develop a flexible legal system in tune with the colonial environment. His idealistic, liberal outlook, fostered during years of active support for the philosophic radicals, spurred him on to "civilise" and rationalise his untamed new world. The open-ended nature of the colonial environment afforded him the space to formulate law and legal practice in new ways, freed from the archaicisms of the mother country. Chapman J's legacy lived on - through his example, his judgments, and his Rules of Court - long after he had departed from the Supreme Court in Wellington.

95 H S C to H C, 1 March 1852.