REPORT

OF THE

JUDGES OF THE SUPREME COURT

UPON THE CONSTITUTION

OF A

COURT OF APPEAL FOR THE COLONY.

PRESENTED TO BOTH HOUSES OF THE ASSEMBLY BY COMMAND
OF HIS EXCELLENCY.

GENERAL INDEX

OF THE CONTENTS OF A REPORT MADE BY THE JUDGES OF THE SUPREME COURT OF NEW ZEALAND, TO THE GOVERNOR

CONCERNING

THE CONSTITUTION, JURISDICTION, AND PROCEDURE OF A COURT OF APPEAL, &c.

INDEX OF CONTENTS OF REPORT IN DETAIL.

PART I.

REPORT OF THE JUDGES
UPON THE
CONSTITUTION OF A COURT OF APPEAL FOR THE COLONY.

WHEREAS the Judges of the Supreme Court of New Zealand, assembled in Conference at Auckland, were requested by Your Excellency to report upon the Constitution, Jurisdiction, and Procedure of a Court of Appeal for the Colony ; Preamble.

We, the Chief Justice and the Puisné Judges of the said Court, have the honor of presenting to Your Excellency the following

REPORT.

INTRODUCTION.

1. The recent "Court of Appeals" of the Colony, consisting of the Governor for the time being, and the Executive Council (excepting the Attorney General), was established by the "Supreme Court Amendment Ordinance," Session VII., No. 3, "until (sec. 3) there shall be "within the Colony a sufficient number of Judges to constitute a Court of Appeals"; but that tribunal has ceased to exist since the "Supreme Court Act, 1860," came into operation. The recent "Court of Appeals."

2. As there are now a Chief Justice and two Puisné Judges of the Supreme Court holding their appointments by a permanent tenure, the time seems to have arrived when the community may reasonably expect that a tribunal, such as seems to have been contemplated by the Ordinance, should be established, and when the Judges of the Supreme Court may reasonably be called upon to undertake the additional labours and responsibilities of Judges of a Court of Appeal. Contemplated time for creation of new Court arrived.

CONSTITUTION, &C.

3. With respect to the Constitution of such a Court, we think it should be composed of the Chief Justice and the Puisné Judges for the time being, whatever their number, and whether appointed, and holding office during good behaviour, or appointed for a temporary purpose, during the Governor's pleasure, under the 7th section of the "Supreme Court Judges' Act, 1858"; that the Chief Justice should preside in such Court ; and that the judgment of the Court should be according to the majority of voices. Constitution of new Court of Appeal. Judges. Majority.

4. While there continue to be but three Judges of the Court, we think that, in case of the illness or unavoidable absence of one of the three, the two others should have power to act ; but in order to provide for cases in which the two Judges so acting differed in opinion, power should be given them to reserve their judgment, and state a case in writing for the opinion of the third Judge, and to cause judgment to be given, after the expression of the opinion of such third Judge in writing, according to the opinion of the majority. Provision for absence of one of three Judges.

5. It would be premature to provide for the case of an equality in the number of voices, when the number of the Judges shall have been increased ; as it is but reasonable to contemplate the probable necessity for emendatory legislation in the course of a few years, arising from changes in the circumstances, and from the newly accruing requirements, of a young and rapidly progressing community. Probable increase in number of Judges hereafter.

We take the liberty of referring your Excellency to a Memorandum accompanying this report, expressing our opinion as to the present position of the Judges, and their sufficiency in point of number for the present wants of the Colony.

6. With respect to the time for holding the sittings of the Court, we are of opinion that, regard being had to the extent, character and variety of jurisdiction with which we are prepared to recommend that the Court of Appeal should be invested, the full benefits to be expected from the tribunal could hardly be secured to the public without providing for two sittings at least in the year ; but we think that for the present, considering the means of communication and the expense, a single sitting in the year might be sufficient. We are of opinion that certainty as to the time, as well as the place of meeting, is indispensable to the wholesome and beneficial operation of the Court. The times fixed should be such as not to clash with any of the proclaimed sittings of the Circuit Courts in the various Provinces, and also such that business arising from the proceedings of the Circuit Courts last held might be then disposed of. Times of sitting.

Moreover, it seems very desirable for the sake of the Judges, the profession and the public, that a period of vacation such as is contemplated by the existing Rules of the Supreme Court, and which now extends from the 20th March to the 30th April, should not be interfered with. Persons conversant with the profession in England are well aware to what extent the Bench and the Bar are dependent upon the "long vacation," for that refreshment of mind and body which is essential in order to enable them to perform their duties to the public with certainty and vigour. Vacation.

If, for some time to come, there should be but little business brought into the Appeal Court, the meeting together of the Judges for the purpose of conference, would, of itself, be of great utility both to them and to the Colony.

Place of sitting.

7. With regard to the place or places at which the sittings of the Court should be held hereafter, we do not feel that it comes within the scope of our present report to offer any single specific recommendation. The determination of this matter may in some measure depend on questions of policy upon which it would be improper for us to enter.

We shall, therefore, merely indicate some of the different arrangements which might be adopted, premising that it seems to us essential to the due operation of the tribunal, that ample notice of the place as well as of the time of its sittings, should be given throughout the whole Colony.

8. Whether this question ought to be determined by considerations relating to geographical position, and the means of inter-communication among the several Provinces of the Colony, or by speculation as to the localities from which the greatest amount of the business of the Court may be expected to emanate, or by both, it is not easy to decide. We suppose, however, that the existing means for inter-communication among the Provinces, or similar means, are likely to continue, while it seems impossible for us even to conjecture at present from which of the Provinces the greatest part of the business of the Court of Appeal is likely, even after the lapse of a few years, to proceed.

9. Any of the following courses is open for adoption:—

The Sittings might be held—

(1.) At one fixed place, being either the Seat of Government, or the chief town of a central Province,—say Auckland, Wellington, or Nelson;

(2.) Alternately, at the chief town of a Province in the North and the Middle Islands,—say Auckland or Wellington for the former, and Nelson or Christchurch for the latter;

(3.) Time about, in the Provinces where the Judges usually reside, in fixed order,—say Auckland, Wellington, and Christchurch; or

(4.) At such place as the Governor should, by Proclamation, appoint specially for each Sitting; or

(5.) The Judges might meet first at one place, and then go on to others, in case there should be notice of any business at such other places,—say that they should meet at Auckland, and proceed to Wellington, Christchurch, Nelson, &c., in case notice of any business should have been given.

10. By the fourth of these courses, the Chief Town of that Province might be appointed for each Sitting in which the greatest part of the business for the decision of the Court should have arisen; which would, no doubt, be the least costly and the most convenient course for the majority of the suitors. But the practical inconveniences and difficulties which would arise in ascertaining the amount of business to be dealt with, and giving notice to the Judges and the suitors throughout the whole Colony of the place of sitting, and the consideration that, between the time when notice of pending business could be sent to the Governor for the purpose of his selecting the place of sitting and the time for holding the Court, a large amount of fresh business might accrue, with other obvious incidents tending to create uncertainty and delay, induce us to believe that this plan would be found quite impracticable.

Probable amount of business.

11. It will be for the Legislature to deliberate and decide on this important question; and we would only further remark with respect to it, that, in forming an opinion as to the probable amount of business—since we suggest, as will presently be seen, that the tribunal should not be a mere Court of Error, but should combine with the functions of a Court of Error and Appeal, some of the functions of the Supreme Court, concurrently with that Court—a very considerable amount of business would probably be brought into it ere long, if all reasonable facilities were afforded to suitors for carrying their cases thither.

Officers.

12. With respect to the necessary officers of the Court, it seems probable that the existing officers of the Supreme Court at the place or places determined upon for the Sittings, would be able, for some time to come, to undertake in the Appeal Court duties similar to their present ones; for which they ought, of course, to receive due remuneration.

Meetings of Court at first.

12*a*. We feel disposed to suggest that, your Excellency should be empowered to determine, by Proclamation, the time and place when and where the Court of Appeal shall be held; and, assuming that one sitting in the year might be sufficient at first, we think that Nelson, as a central place to which the present means of communication converge, would be the most convenient for the present.

We think it would be very desirable to give the Judges power to make an interchange of circuits before or after each sitting of the Court of Appeal, so as to procure for the Colony, to some extent, the advantages experienced in England from not restricting the Judges to particular districts. At a later period, and with increased facilities of communication, the system of changing the Judges on circuits might be carried out more fully.

JURISDICTION GENERALLY.

Court of Error and Appeal, and jurisdiction concurrently with Supreme Court.

13. We come now to consider the jurisdiction which ought to be granted to the Court; and we are of opinion, in the first place, as above indicated, that the new tribunal ought not to be a mere Court of Error and Appeal in the ordinary sense, but that it might, with great advantage

to suitors, and to the interests of justice, participate in some portion of the powers of the Supreme Court concurrently with that Court.

N.B.—It appears to us that as difficult questions arise, and are likely to arise, in consequence of the division of the Colony into judicial districts, it would remove many difficulties if each Judge had the same power throughout the Colony which he now possesses in his own district. There seems no danger of collision or conflict in consequence of such arrangement. Some such provision would be necessary to enable Judges to go on Circuits, and to perform other judicial functions, out of their own district; and they might retain the exclusive right of making local rules of practice within their own district, as at present provided.

At present, single Judges have all jurisdiction. No provision for Judges assisting each other.

14. According to the present arrangements of the Supreme Court, all of its functions are discharged by single Judges, each of whom has the whole power of the Court within his own district, and there is not, either in the Ordinances and Acts of the Colony, or in the Rules of Procedure of the Supreme Court, any provision for enabling the Judges practically to sit together or to have the benefit of each other's assistance in cases of doubt and difficulty, although in point of law they may have power to do so.

Importance of having more Judges than one to decide difficult and important questions.

15. The extent and variety of the jurisdiction of the Supreme Court, and the grave and difficult character of the questions to which the circumstances of the Colony must necessarily give rise, (as experience has already abundantly proved) render it most desirable that the greatest practicable facilities should be afforded for procuring the application of several judicial minds to the decision of the more important questions of principle which may occur. One of the Judges may be more peculiarly conversant with one branch of law, and another with another; and it seems desirable that the community should be enabled to derive the fullest advantage from the combined experience and attainments of all. It is, indeed, all but impossible that any one mind can deal satisfactorily with all the cases—so various in kind—which may come within the scope of the Supreme Court's jurisdiction. But for the physical difficulties presented by the distances of the residences of the Judges from one another, it would be extremely desirable for the public and the Court, that the Judges should frequently sit together *in banco*; but since it seems impossible at present to insure that advantage, we would, in the meantime, recommend that the Court of Appeal should have power to entertain, by consent or otherwise, certain matters hereafter to be mentioned, which, according to the English practice, would be proper subjects for a Court sitting *in banco*; and with respect to these matters, the Appeal Court might have concurrent jurisdiction with the Supreme Court.

Criminal cases, error, and reserved cases.

Exclusive jurisdiction of Queen's Bench in England.

16. With regard to *criminal jurisdiction*, we think the Court of Appeal should have both the functions of a Court of Error, and also those of a tribunal like that which was created in England, for Crown cases reserved, by the statute 11 & 12 Vict., cap. 78. And with regard to all those powers which the Court of Queen's Bench possesses exclusively of the other Courts in England, so far as they are possessed by the Supreme Court of New Zealand (as being applicable to the circumstances of the Colony) it might be desirable that a concurrent jurisdiction should be given to the Court of Appeal.

Power to Judges to reserve cases civil as well as criminal.

17. Besides the above mentioned subjects of jurisdiction, it seems to us but fair to the Judges of the Supreme Court to allow them a discretion, when sitting alone, to reserve questions in civil as well as criminal cases, for the opinion of the Court of Appeal, even without the consent of parties; care being taken to make the course of proceeding as little dilatory and expensive to the suitors as possible.

Appeal on matters of fact.

Discretion of Court, determined by facts.

18. We think the Court of Appeal ought not to be allowed to entertain appeals on matters of fact which have been decided by a Jury; but with respect to matters on which the Supreme Court has power to exercise a discretion, in civil matters to be determined by facts, it might be advisable to give to the party a right of appeal, or to the Judge, a power of reserving the question; yet not so as to operate as a stay of proceedings, in case of appeal, if the ground of appeal should appear to the Judge frivolous. This provision ought not to be applied to criminal cases, so as to raise questions upon the *quantum* of punishment awarded by a Judge.

Under this head of jurisdiction, it might be desirable to provide that a single Judge should not proceed to strike a Barrister or Solicitor off the rolls for any cause, but only to grant a rule calling upon him to show cause before the Court of Appeal why he should not be struck off the rolls, and to suspend him from practice till the Court of Appeal should have heard the case; and to give that Court power to act conclusively in the matter.

Appeals from District Courts.

19. There is one other matter connected with the subject of the jurisdiction of the Court of Appeal which requires consideration; and it relates to the District Courts created by the Act of 1858. The first question which arises is whether power should be given to the Court of Appeal to review the decisions of the Supreme Court on appeals from the District Courts, in matters both civil and criminal, or either, or whether the decisions of the Supreme Court ought to be taken as final; and the second question is whether parties aggrieved by a decision of a District Court might not be allowed to appeal direct to the Court of Appeal. As to the first question, we think it would be but right in principle that parties should have the means of having recourse to the highest tribunal; but keeping in view the maxim "*Interest reipublicæ ut sit finis litium*," we think limits should be placed upon the right, so as to prevent the growth of frivolous or oppressive litigation.

With regard to the second question, we think it might be proper, in case the District Judge should be of opinion that the party wishing to appeal had a ground of appeal involving a question of considerable difficulty or importance, that the Judge should have power to grant the party leave, subject, if necessary, to his giving security for costs, and for the execution of the judgment if adverse to him, to appeal in the first instance to the Court of Appeal.

Summary.

20. To sum up, therefore, We think the Court of Appeal ought to be a general Court of Error and Appeal in matters both Civil and Criminal;—that it should have concurrent jurisdiction with the Supreme Court in the matters hereinafter specified;—that it should entertain cases reserved by the Judges of the Supreme Court;—that it should have power to review the exercise of discretion by single Judges in particular cases;—and specially have conclusive jurisdiction in striking Barristers and Solicitors off the Rolls;—and that it should be empowered to hear appeals from the District Courts directly, under certain circumstances.

What provisions to be made by Statute, and what by rules. Many formal and practical matters to be provided for by Act.

21. In considering the details of the jurisdiction and procedure of the new Court of Appeal, it is not easy to lay down any general maxim as to what ought more properly to be the subjects of express statutory provisions, and what of rules of practice to be settled by the Judges. Everything necessary to define the jurisdiction, at all events, ought to be contained in the Act of the Legislature; but there is also much besides, of a formal and practical character, which it seems desirable to introduce into it, rather than to provide for by ancillary rules. For instance, to enact merely that the Court of Appeal should be a Court of Error, and to leave it for the Judges to determine by rules everthing connected with the practice of the Court, might be very inconvenient; and, with respect to several of the subjects of appeal, it would be far from easy to distinguish, for this purpose, the formal from the substantial. We are the more willing to recommend specific provisions in the Act with respect to the practice and procedure of the Court, because we find that, with regard to several parts of the system of appeal, adaptations from the provisions of the English Common Law Procedure Acts of 1852 and 1854 may be advantageously adopted for the Court of Appeal of New Zealand.

N.B.—It will be found that in many instances when we come to specific practical suggestions, we have thrown them into the shape of proposed clauses ; but we wish it to be understood that we do not offer them as maturely settled provisions, ready for adoption by the Legislature, but rather as rough drafts indicative of the provisions which we deem desirable.

Division of subjects.

22. In proceeding to the division of the subjects which we have to consider, we think it will be found convenient to treat the *Civil Jurisdiction* first, and the *Criminal* afterwards.

Civil Cases. Order of subjects.

With respect to *Civil Cases*, we shall consider them in the following order :—

(1.) Matters in which we propose that the Appeal Court should have concurrent jurisdiction with the Supreme Court;
(2.) Appeals from the Supreme Court in respect of matters not subjects of "Error";
(3.) Cases reserved by the Judges of the Supreme Court ;
(4.) Final jurisdiction in striking Barristers and Solicitors off the Rolls of the Supreme Court;
(5.) "Error," and proceedings thereon ; and
(6.) Appeals from the District Courts.

PART II.

Civil Jurisdiction.

I. JURISDICTION CONCURRENT WITH SUPREME COURT.

1. Concurrent jurisdiction with Supreme Court. In what cases.

23. The first question to be considered under this division of the subject, is, to what extent the Court of Appeal ought to have concurrent jurisdiction with the Supreme Court in civil matters.

The cases in which this jurisdiction might beneficially be given, would be, chiefly, such as the Superior Courts of Common Law at Westminster entertain at their sittings *in banco*, or Courts of Equity deal with in the final stages of a Suit ; but it would be by no means necessary or desirable to give the Appeal Court jurisdiction in all such cases, or otherwise than by consent of the parties.

Rules *nisi*.

Rules *nisi*, should, at all events, in all cases, be moved before the Supreme Court in the first instance, subject to the right of appeal hereafter to be provided for in case of refusal.

Shewing cause in the Appeal Court in the first instance.

24. It might be very proper, in many cases, that the parties, if willing, should have an opportunity of arguing questions raised by such rules, in the Appeal Court, without cause having previously been shewn in the Supreme Court ; but we think there ought to be some efficient check to prevent parties from unnecessarily occupying the time of the Court of Appeal with questions of a frivolous or unimportant kind.

On the whole, it seems to us it might be fairly provided, that on a rule *nisi* being granted,—if both parties should intimate to the Judge, before the time for shewing cause, that they are desirous of having the case argued before the Supreme Court in the first instance, the Judge might, if he considered the question at issue of sufficient importance, remove the case to the Appeal Court, which should then adjudicate on the matter in the same way as the Supreme Court would have had power to do,—with the exception, of course, that its decision should be final as regards the tribunals of the Colony.

25. A similar course might be adopted with respect to demurrers, special cases, and special verdicts. Demurrers, &c.

26. Moreover, the parties in actions for specific relief, when the proceedings were ripe for a final decree, might, in like manner, be allowed—by consent, and by leave of the Supreme Court—to go at once to the Court of Appeal. Decrees in actions for specific relief.

27. We have taken into consideration the propriety of allowing cases such as we have just been speaking of, to be carried to the Court of Appeal, on the motion of *one* of the parties, with the approval of the Judge, and on terms as to security for costs ; but we are of opinion that, in all cases, either party, insisting upon it, ought to be entitled to have the decision of the Supreme Court at its ordinary sitting in the first instance. Whether one party should be entitled to carry case at once to the Court of Appeal.

28. Clauses to the following effect would carry out the recommendations of the last five paragraphs :— Proposed clauses on the foregoing heads.

1. "Whenever a rule *nisi* shall have been granted by the Supreme Court—if it "shall be made to appear to the satisfaction of such Court, or of a Judge at Chambers, at "any time before the day mentioned in such rule as the day for shewing cause against it, "that the party who has obtained such rule and the party who is thereby called upon to "shew cause, have consented that cause shall be shewn in the Court of Appeal ; and if "the Supreme Court, or such Judge at Chambers shall be of opinion that the questions "or question to be raised on the shewing cause against such rule, are or is of sufficient "difficulty or importance, such last mentioned Court or Judge may, at its or his discretion, "order the proceedings to be removed, and the same shall then be removed into the "Court of Appeal, which Court shall thereupon have the same power and authority to "adjudicate upon such rule as the Supreme Court would have had but for such removal." When cause may be shewn against a rule in the Court of Appeal, in the first instance.

2. "Whenever issue shall have been joined on a demurrer, or a special case shall have "been stated, or a special verdict been found according to the practice of the Supreme Court; "if it shall be made to appear to the satisfaction of such Court or a Judge at Chambers, "at any time before the hearing of such demurrer, special case, or special verdict, that all "the parties thereto have consented that the same shall be heard in the Court of Appeal, "and if the Supreme Court or such Judge at Chambers shall be of opinion that the "questions or question to be raised on such hearing are or is of sufficient difficulty or "importance, such last mentioned Court or Judge may, at its or his discretion, order the "proceedings to be removed, and the proceedings shall then be removed into the Court of "Appeal ; which Court shall thereupon have the same power and authority to adjudicate "on such demurrer, special case, or special verdict, as the Supreme Court would have "had but for such removal." For removing demurrers, special cases, and special verdicts from Supreme Court into Appeal Court.

3. "Whenever, in any action in the Supreme Court for specific relief, the cause is "ready for a final hearing, or either party has given notice of his intention to move such "Court for a decree, which, according to the practice of such Court, would be a final "decree ; if it shall be made to appear to the satisfaction of the Court or a Judge at "Chambers, at any time before such hearing or motion, that all the parties to the action "have consented, by themselves or their Solicitors, that the same shall be heard in the "Court of Appeal, and if the Supreme Court or such Judge at Chambers shall be of "opinion that the questions or question to be raised on such hearing or motion are or is "of sufficient difficulty or importance, such last mentioned Court or Judge may, at its or "his discretion, order the proceedings to be removed, and the same shall then be removed "to the Court of Appeal, which Court shall thereupon have the same power and "authority to adjudicate on such case or motion, as the Supreme Court would have had, "but for such removal." For removing final hearing on motion for final decree, in actions for specific relief into the Court of Appeal.

4. "On the removal of any case from the Supreme Court to the Court of Appeal "under Section [ ] of this Act, the decision of the Court of Appeal shall "be final as regards the tribunals of the Colony ; and the same judgment shall be entered "up in the Supreme Court, and the same execution and other consequences and proceed-"ings shall follow thereon as if the decision had been given in the Supreme Court." Effect of decision of Court of Appeal in such cases.

5. "As soon as the Supreme Court or a Judge at Chambers shall have made an "order for the removal of any case under Section [ ] to the Court of Appeal, "the Registrar of the Supreme Court for the Judicial District in which such order was "made, shall forthwith transmit to the Registrar of the Court of Appeal, the pleadings, "cases, rules, and affidavits, and all other documents and proceedings in the action or "motion ; and after the decision of the said Court of Appeal thereon, the Registrar of "such Court of Appeal shall remit the same along with a note of the decision of such "Court thereon, certified by the presiding Judge, to such Registrar of the Supreme "Court as aforesaid." Transmission of pleadings, documents, &c. from Supreme Court to Appeal Court, and remission by Court of Appeal.

28*a*. We have suggested above that concurrent jurisdiction should be given to the Appeal Court in all matters in which the Court of Queen's Bench has exclusive jurisdiction in England, and a clause might be inserted to this effect.

(*b.*) "In all causes, actions, matters, and things, in which Her Majesty's Court of "Queen's Bench, at Westminster, hath jurisdiction exclusively of the other Courts at "Westminster, and in which the Supreme Court of New Zealand hath juris- "diction within the Colony of New Zealand, the Court of Appeal hereby constituted and "created shall have concurrent jurisdiction, power, and authority, with the said Supreme "Court, except as herein is otherwise provided."

II.—APPEALS FROM SUPREME COURT.

Appeals from the Supreme Court to the Court of Appeal.

29. We come now to consider the jurisdiction of the Court, in Civil Cases, as to matters more strictly in the nature of Appeal—but not properly included within the comprehensive head of "Error."

In what cases.

With respect to the questions for appeal arising out of a trial of issues of fact, it seems to us expedient to adopt, *mutatis mutandis*, the proceedings of the Common Law Procedure Act, 1854, (17 & 18 Vic., c. 125.) ss. 34-42. The provision in Section 33 requiring a statement in the rule *nisi* for a new trial or to enter a verdict or non-suit, of the grounds of the rule, has already been adopted into the New Zealand practice by rule 358 of the General Rules of Practice and Procedure. But it will be necessary also to provide for appeals in cases where the decision of the Supreme Court has not been given on the argument of a rule, and where the question does not necessarily arise on the record so as to be the subject of Error—as in cases of decrees in actions for specific relief, injunctions, rules, and orders in summary proceedings. A slight addition to the clauses of the "Common Law Proceedure Act, 1854," will effect this object.

Common Law Procedure Act, 1854, ss. 34, 42.

30. The clauses in the Appeal Court Bill might be as follows :—

Instead of Section 34:

Appeal on rules *nisi* on point reserved at trial.

1. "In every case of a rule to enter a verdict or nonsuit upon a point reserved at "the trial, if a rule to shew cause be refused, or be granted and then discharged, or "made absolute by the Supreme Court, the party decided against may appeal to the "Court of Appeal."

For Section 35 :

On motion for new trial.

Rule refused, made, absolute, or discharged.

Decree in action for specific relief.

2 (Note *a.*) "In every case of a motion in the Supreme Court for a new trial on the "ground that the Judge has not ruled according to law, or upon matter of discretion in "respect of which a new trial may by law be granted by the Supreme Court, or in case of "any other motion for a rule to shew cause, if the rule to shew cause be refused, or, having "been granted, be discharged or made absolute by such Court, and in every case of a "decree in an action for specific relief, or a rule or order for an injunction, or a rule or "order on petition, or on application to the summary jurisdiction of the Court, where the "matter complained of is not a proper subject for proceedings in Error under this Act, "(Note *b.*) the party decided against may appeal to the Court of Appeal, provided the "Supreme Court shall be of opinion that there is a reasonable ground of appeal, and shall "grant leave to such party to appeal, subject to such terms, as to costs and otherwise, as the "said Supreme Court shall direct."

NOTE (*a.*) This clause differs considerably from section 35 of the English Act, on the ground that the Supreme Court of New Zealand consists practically of one Judge ; and the power of appeal is given in that section when one Judge in *banco* in England dissents from the opinion of the others, or the Court thinks fit, in its discretion to grant leave to appeal. We think it would not be wise to allow the unsuccessful party to appeal in all cases, without any control or leave of the Court, as this might lead to the protraction of litigation, especially by unsuccessful defendants, to the manifest delay of justice and damage to the community ; but by giving the Supreme Court a power to grant leave to appeal, if an apparently arguable point should be suggested, we believe sufficient facility of appeal will be afforded to the unsuccessful party. The proviso in the 35th section of the English Act which prevents an appeal in cases where the application for a new trial is upon matter of discretion only, as for instance on the ground that the verdict was against the weight of evidence, or otherwise, does not seem applicable here ; inasmuch as the probable reason for that proviso is that if the majority of the Court in *banco* in England think, as a matter of discretion, that it would be unwise to allow the case to be re-opened, it is not desirable that the litigation should be allowed to be carried farther. But in New Zealand, where the discretion of one Judge only has been brought to bear on the subject, it might be deemed hard that the parties should be conclusively bound by it. We have therefore altered the wording of this section so as to meet the circumstances of the Colonial tribunals.

NOTE (*b.*) These words seem to include everything which ought to be applicable ; and the danger of frivolous appeals seems to be provided against by the necessity of obtaining leave to appeal.

Petition to Court of Appeal where leave to appeal refused.

30*a*. Although we think that leave to appeal to be granted by the Judge of the Supreme Court will be a wholesome check to frivolous appeals, it would be well to guard against the possibility of any jealous suggestion that a Judge had improperly refused leave to appeal, and to provide as follows :—

3. "In any case in which an appeal would lie from the Supreme Court according to the pro- "visions of the last Section, if the Court granted leave to bring such appeal, but the Court refuses "to grant the same, the party desiring to appeal may give notice in writing to the other party, "within six days of such refusal, of his intention to present a Petition to the Court of Appeal at

"its next sitting for leave to appeal, and in the meantime a case shall be stated in like manner as "if leave to appeal had been granted by the Supreme Court; and if the Court of Appeal on hear- "ing the said Petition shall be of opinion that the Supreme Court ought to have granted the party "leave to appeal, it shall then hear and determine the matter of the appeal; and all such proceed- "ings shall be had thereupon as if leave to appeal had been granted by the Supreme Court; but if "the Court of Appeal shall be of opinion that the Supreme Court properly refused to grant leave "to appeal, it may dismiss the petition and give the other party single or double costs, including "the costs of such party's appearance in the Court of Appeal and of his preparation for arguing the "matter of such proposed appeal."

31. (The 36th Section of the Common Law Procedure Act, 1854, is inapplicable to the Colony.)

Instead of the 37th Section, it might be provided—

Notice of appeal.

4. "No appeal shall be allowed, under the [ ] Sections of this Act, unless "notice thereof be given in writing to the opposite party or his Solicitor within "[ ] days after the decision complained of, or such further time as may be allowed "by the Supreme Court or a Judge at Chambers."

32. The 38th Section may be adopted with a slight addition :—

When stay of execution.

5. "Notice of appeal shall, except in cases of a decree or rule for an injunction to "stay or prevent irreparable injury, be a stay of execution, provided bail to pay the sum "recovered and costs, or to perform the judgment, decree, or order of the Court, and to "pay the costs, or to pay costs where the appellant was plaintiff below, be given in like "manner and to the same amount as bail in error [as hereinafter is provided] within [ ] "days after the decision complained of, or before execution delivered to the Sheriff."

33. The mode of bringing the case before the Court of Appeal provided for by the 39th Section of the English Act may be conveniently adopted, thus :—

Case to be stated for Court of Appeal.

6. "The appeal in Section [ ] of this Act mentioned shall be upon a case "to be stated by the parties (and in case of difference, to be settled by the Supreme "Court or a Judge at Chambers), in which case shall be set forth so much of the plead- "ings and evidence and the ruling or judgment objected to as may be necessary to raise "the questions for the decision of the Court of Appeal."

34. The 40th Section may also be adopted, as follows :—

Argument on rule *nisi* granted by Court of Appeal.

7. "When the appeal is from the refusal of the Supreme Court to grant a rule "to shew cause, if the Court of Appeal shall grant such rule, such rule shall be argued "and disposed of in the Court of Appeal."

35. The 41st Section may be slightly varied, thus :—

Judgment of Court of Appeal.

8 "The Court of Appeal shall give such judgment as ought to have been given "in the Supreme Court; and all such further proceedings may be taken thereupon as if "the judgment had been given in the said Supreme Court."

36. The last provision of this series in the English Act is Section 42, which may also be adopted.

Power of Court of Appeal to give costs and award process, &c.

9. "The Court of Appeal shall have power to adjudge payment of costs and to "order restitution; and on such appeals as in Sections [ ] mentioned, it shall have "the same powers of awarding process, and otherwise, as hereinafter provided in case of "proceedings in Error."

37. We are of opinion that the Court of Appeal ought not to be obliged to consider any case of appeal, unless the party appealing appear, in person or by Counsel, to support the appeal; but in the absence of such party, it ought to affirm the judgment of the Supreme Court, and give costs to the other party, if he should appear. A Clause, therefore, may be introduced to this effect:

Court of Appeal to affirm judgment if appellant do not appear, and give other party costs.

Proposed clause.

10. "The Court of Appeal shall not be bound to consider the matter of the Appeal, "unless the party appealing duly appear, in person or by counsel, to support such Appeal; "and in case such party do not appear, the Court shall give judgment affirming the "judgment of the Supreme Court; and if in such case the party appealed against appear "in person or by counsel, it shall be lawful for the Court of Appeal, in its discretion, also "to give judgment to such last mentioned party for the costs of the appeal, against the "party appealing."

III.—CASES RESERVED BY JUDGES.

38. The matter next to be considered is how far a Judge of the Supreme Court ought to have power to reserve questions for the opinion of the Court of Appeal, *without the consent of parties.*

Cases reserved by Judges without consent of parties.

What power the Judges ought to have in this respect.

We have already called attention to the serious difficulties and the too great responsibilities to which Judges, acting singly in the capacity of the Supreme Court, must often be exposed; but yet, with a lively consciousness of the liability of Judges so acting, to err, both in respect of law, and of the exercise of the discretion vested in them, we do not feel at liberty to propose that they should

be entitled to divest themselves altogether of this responsibility, or to diminish it, by having recourse to their learned brethren for assistance and advice, in all cases, without any limitation.

In the application of the complex machinery of a highly refined and minutely modified system of legal administration, to the circumstances of a new society with a small population spread over a large extent of territory, imperfections and defects, mistakes and errors, must necessarily occur: and the good sense of the Community must make allowance for occasional inevitable failures, and be ready to excuse minor errors where no great principles are affected.

Still we think the Judges have a right to look to each other for assistance and counsel; and in cases where they entertain substantial doubts, involving questions either of much importance to the parties concerned or of any considerable interest to the Community in respect of principle, we think they ought to have a discretion to reserve their judgment in order that they may take the opinion of their brethren in the Court of Appeal,—even without the consent of the parties interested.

How far the Judges ought to have power to reserve questions.

Indeed, if there were no statutory provision to this effect, a Judge might, in any case, with perfect propriety, take such time to consider his judgment that he might be able, in the meantime, privately to consult his fellows; but in such case the responsibility of the judgment would still rest on himself, and the decision would not be final; and, theoretically speaking, the Judges might sit together as a Court in *banco* to hear a case re-argued.

Discretion.

In reserving a case for the Court of Appeal, without the consent of the parties, a Judge would naturally allow his discretion to be governed by the consideration of such circumstances as delay and inconvenience to the parties; and we think the *onus* of stating a case for the consideration of the Court above, ought to be thrown upon himself (subject to any suggestion of the parties). Moreover, the Court of Appeal ought to be bound to consider such case and give judgment upon it, even if neither party should appear to argue it.

Stating case.

Proposed clauses.

39. The following Clauses might suffice to provide for this part of the system:—

Case stated by Judge of Supreme Court for opinion of Court of Appeal.

(1.) "If in the course of any proceedings before the Supreme Court, a single "Judge presiding therein shall be of opinion that any question of law or of the exercise "of discretion which has arisen therein is a fit question for the consideration of the "Court of Appeal, due regard being had to the interests of the parties concerned, it shall "be lawful for such Judge to state a case in writing for the decision of such Court of "Appeal, and to transmit the same to such Court; and the said Court of Appeal shall be "bound to hear the parties, or either of them, or their counsel; but if neither party "shall appear in person or by counsel before such Court, it shall nevertheless take the "case into consideration, and shall pronounce its decision thereon, which shall be forth-"with intimated to the Registrar of the Supreme Court for the district in which such "Judge as last aforesaid was acting; and thereupon such judgment shall be entered, and "such execution and other proceedings shall be had therein, as if such decision had "been given in the Supreme Court: Provided that such decision shall be final as regards "the tribunals of the Colony."

Provision for amending the case if parties dissatisfied.

(2.) "The Judge who shall state such case as in the last section mentioned shall, "before transmitting the same to the Court of Appeal, cause the same, on application for "that purpose to the Registrar of the Supreme Court, to be shewn and a copy to be "given to the parties interested, or their Solicitors; and if such parties or either of them "shall, within [ ] days after such case shall have been so shewn, object to the "statement of the case by the Judge, such Judge shall cause the parties to come before "him at Chambers, by summons, and shall, if he think fit, on hearing the parties or either "of them who may appear before him, amend or alter such case, or finally adopt the "same."

IV.—STRIKING BARRISTERS AND SOLICITORS OFF THE ROLLS.

Powers to be retained by Supreme Court.

40. We have previously alluded to the propriety of reserving for the Court of Appeal the exercise of final jurisdiction in striking Barristers and Solicitors of the Court off its rolls.

Striking off roll.

Although we are of opinion that the power of dealing summarily with Barristers and Solicitors, in most respects, must still be left with the Supreme Court, subject to appeals by leave, or to the reservation of questions by a single Judge, and that the Supreme Court should have the power of suspending any Barrister or Solicitor till the next sitting of the Court of Appeal, we think it desirable that the conclusive step of striking a Barrister or Solicitor off the rolls should be reserved for the Court of Appeal, acting in this respect like the full Court *in banco* in Westminster Hall.

It will be for your Excellency's Advisers to determine whether a provision to this effect should be introduced into the Appeal Court Bill, or into the Bill which we are informed it is the intention of your Excellency's Government to present to the consideration of the Legislature with respect to the qualification and admission of Barristers and Solicitors. It seems to us that it might, perhaps, be more proper to introduce the provision into the Court of Appeal Bill, inasmuch as the whole extent of the jurisdiction of the new tribunal may properly be looked for in that Bill; but care ought to be taken that due reference be made from the one to the other; and it will be necessary to modify the clause (par. 41) proposed by us in our report of May, 1859, with respect to the power of the Supreme Court to strike Solicitors off the Rolls.

Reference to Report on Solicitors, May 1859.

(Whether the meetings of the Court of Appeal might not be taken advantage of for the examination and admission of Solicitors is a question worthy of consideration; but probably, the terms of the provisions in the Law Practitioners Bill will be such as to leave it open to the Judges to adopt that course if they should think it desirable.)

The clause for carrying out the proposed provision as to Barristers and Solicitors might run as follows :—

If Supreme Court think rule to strike Barrister or Solicitor off the roll should be made absolute, or doubts, case to be sent to Court of Appeal.

(1.) "Whenever a rule *nisi* has been granted by the Supreme Court, calling upon a "Barrister or Solicitor on the rolls thereof to shew cause why he should not be struck "off the Rolls, if, upon cause being shewn, the said Supreme Court shall be of opinion that "such rule ought to be made absolute, or shall entertain any doubt whether the rule "ought to be discharged or made absolute, such Court shall reserve the case for the "consideration of the Court of Appeal at its next sitting, and shall cause such rule and "all affidavits made in support of or against such rule, and all other proceedings referred "to in such rule to be forthwith transmitted to the Registrar of such Court of Appeal; "and the Court of Appeal shall, at its next sitting, whether the party or his counsel "appear in support of or against such rule, or not, decide thereupon, and order such rule "to be made absolute, or to be discharged, as it shall think fit.

Nothing to prevent Supreme Court from discharging the rule.

"Provided that nothing herein contained shall prevent the Supreme Court from "discharging the rule *nisi* hereinbefore mentioned, on cause being shown before it, if it "should think fit.

"Provided also, that nothing herein contained shall prevent the Supreme Court from "directing and ordering, but such Court may direct and order, if it shall think fit, on "cause being shown against such rule, that the Barrister or Solicitor against whom it "has been granted shall be suspended from acting as a Barrister or Solicitor, and "enjoying all or any of the privileges of such Barrister or Solicitor until the decision "of the Court of Appeal upon such rule."

NOTE.—By these provisions, although the power of striking off the rolls is reserved for the Judges acting together, power is still preserved to the Supreme Court, on the one hand, to dispose of a frivolous and insufficient charge, and on the other, to prevent a Barrister or Solicitor, against whom a strong case is made, from going on to do further mischief in the interval between the shewing cause and the decision by the Court of Appeal.

V.—ERROR.

41. We come now to consider the important subject of Error.

Semble. No power to bring Error in New Zealand previously to Supreme Court Act, 1860.

Inasmuch as by the English law in force on the 14th January, 1840, the Writ of Error, which was then the necessary commencement of proceedings in Error, was a writ which issued from the Common Law side of the Court of Chancery; and as the Supreme Court of New Zealand was not, by the Supreme Court Ordinance of 1844, or by any other Ordinance or Act of the Colony, invested, in terms, with the common law jurisdiction of the Court of Chancery it seems to us that, till the recent Supreme Court Act, 1860, came into operation, the suitors of the Supreme Court had no power to bring Error, strictly speaking ; although it would appear that "Error in Law" was contemplated as a ground of appeal to the Court of Appeals established by the Ordinance, Sess. VII., No. 3, since it is provided therein (sec. 3) that upon an appeal from the judgment of the Supreme Court on the verdict of a Jury, the Court shall not enquire into the same except for "Error of Law" apparent on the record.

Expedient to give power.

42. At all events, the question whether the law of England as to Error, in existence on the 14th January, 1840, was part of the law of New Zealand before the last Supreme Court Act, as having been *then* "applicable to the circumstances of the Colony," under "The English Laws Act, 1858," although no Court of Error was then in existence, and the Supreme Court probably had not the power to issue a Writ of Error, was too arguable to be safely left open. We cannot hesitate to affirm that in a system of jurisprudence of which by far the greatest part, or nearly the whole, is borrowed from that of England, so important a branch as the law of Error ought to be incorporated with it. And this observation applies equally to criminal and civil cases.

But inasmuch as we propose to treat civil cases first, we suggest that it will be proper to begin this part of the Bill by enacting or declaring to the following effect :—

Proposed clause.

1. "Error shall lie to the Court of Appeal upon any judgment of the Supreme Court (*a*), "whether given in the ordinary course of an action, or on a special case (*b*), and upon any "award of a trial *de novo* by the Supreme Court or Court of Appeal upon matter appearing "on the record (*c*), in respect of any such ground as Error would have lain from any of the "Superior Courts of Common Law at Westminster (*d*), to any Court of Error in England, "on the 14th January, A.D., 1840 (*e*.)

For what, Error will lie.

Notes to clause.

NOTES, (*a*.). As there is an appeal from the District Court to the Supreme Court, and we propose to give certain powers for removing questions from the District Court to the Appeal Court, it seems undesirable to give the power of bringing Error direct from the District Court to the Appeal Court.

(*b*.) It seems desirable to introduce these words, as Error did not lie in England on a special case stated without pleadings, prior to the "Common Law Procedure Act."

(*c*.) This is taken from the "Common Law Procedure Act 1854," sec. 43.

(*d*.) Although Error lies in England from all Courts of Record, this definition will be found practically sufficient, and may save some embarassment.

(*e*.) Where it is necessary to legislate with reference to English Law generally, it seems desirable to keep to the time fixed by "The English Laws Act, 1858."

Proceedings in Error.

43. With respect to the proceedings in Error, although we have proposed for uniformity's sake that the grounds of Error should be tested by the Law of England as it stood in 1840, so as to avoid the necessity for referring, on that subject, to any more recent English Law, we do not recommend that the practice then in existence should be adopted, but we think that a mode of proceeding should be introduced, similar to and taken from that which was made the Law of England by the Common Law Procedure Act of 1852.

Taken from Common Law Procedure Act, 1852.

By that system, the old Writ of Error was abolished, and the proceedings in Error were made more simple and less dilatory and expensive. There are, however, certain provisions in that Act which refer to the old system, and which it would, therefore, be very inexpedient to retain.

Endeavouring, therefore, to remove such objectionable portions of the new English system and to adapt the other parts of it to the circumstances of the Colony; we proceed to specify the series of provisions which we recommend for introduction into a Court of Appeal Bill, following the order in the Common Law Procedure Act, 1852, secs. 146 to 167 inclusive.

Common Law Procedure Act, 1852, s. 146. Limitation of proceedings.

44. The 146th section of the Act provides a limitation of the time within which error is to be brought in these words :—

(*a.*) "No judgment in any cause (1) shall be reversed or avoided for any error or "defect therein (2) unless Error (3) be commenced, or brought and prosecuted with effect "within six years (4) after such judgment signed or entered of record (5).

NOTES (1.) "Cause" is a word used generally rather with reference to the trial than to the record—"Action" seems more correct; and as we have spoken of Error on an award of *venire de novo* it seems as well to add "Award" to "judgment;" but as there may be judgments on matters of record not before the Court in the form of an action, it might be as well to add also the word "Proceeding."

(2.) "Defect therein." These words cannot be intended to mean only errors and defects in the judgment, but must apply to errors and defects in the course of the proceedings, on the face of the record, and such errors or defects as are proper subjects of proceedings in Error.

(3.) The word "Error" here is used in a different sense from that in which it was used immediately before: Semble, "proceedings in Error" would be more proper.

(4.) "Six years." As the English periods of limitation before 1852, are those of New Zealand, also in respect of bar to actions, it may be therefore advisable to follow the English practice as to Error. Before the Common Law Procedure Act, 1852, Error might have been brought at any time within twenty years. But with due regard to the wholesome maxim "*Interest Reipublicæ ut sit finis litium,*" it may be considered doubtful whether even six years is not too long a period for taking proceedings to reverse a judgment.

(5.) "Signed or entered of record": Why this alternative, as judgment must be signed in every case; at all events in New Zealand practice the signature of the judgment by the Registrar is the only entering of it on the record.

Proposed clause.

We therefore propose a clause to the following effect :—

Time for bringing Error.

2. "No judgment or award in any action or proceeding shall be reversed or avoided "for any error or defect, unless proceedings in Error be commenced and prosecuted with "effect, within [ ] years after such judgment signed, or award made."

Common Law Procedure Act, 1852, s. 147.

45. The next section of the Procedure Act, No. 147, contains a proviso for disabilities in these terms :—

Disabilities.

"If any person that is or shall be entitled to bring Error as aforesaid, is or shall be "at the time of such title accrued (2) within the age of 21 years, *feme covert, non compos* "*mentis* or beyond the seas (3), then such person shall be at liberty to bring Error as afore-"said, so as such person commences or brings and prosecutes the same with effect, within "six years after coming to, or being of full age, discovert, of sound memory, or *return* (4) "from beyond the seas (5), *and* if the opposite party shall, at the time of the judgment signed "or entered of record, be beyond the seas, then Error may be brought, provided the proceed-"ings be commenced *and* prosecuted with effect, within six years after the return of such "party from beyond seas."

NOTES, (1.) This is taken from the 3rd and 4th W. 4th., ch. 42, sec. 4, and is the law of New Zealand as to disabilities with respect to the limitation of time for bringing actions. Whether the same privileges should be given to persons, who, having been in the Colony personally, or by representative, when the action was brought, were absent when the title to Error accrued, as are given to persons who were absent from the Colony when a right of action accrued, or whether to either class in the Colony the same rule should apply as in England, are questions of policy which might be worthy of consideration. There certainly does not seem to be the same amount of probability of persons having rights of action or right to bring Error in New Zealand returning to the Colony, that there is with regard to Englishmen abroad returning to England; and it does not seem desirable to encourage stale claims.

(2.) "Time of such title accrued": Must not that mean "time of judgment, signed award, &c.," and if so, would it not be better to say so?

(3.) The words "beyond the seas" in an English Act have a specific meaning, which makes them inapplicable directly to a Colony. But the words "out of the Colony" or "out of the jurisdiction of the Supreme Court" would probably give the proper relative effect. In the case of *Her Highness Ruckmaboye Looloobhoy Mottichund* (8 Moore, P.C. 4), it was held that the English Statute of Limitations was applicable to India, and that the words "beyond the seas" in it must be construed as meaning beyond the territory of British India.

(4.) & (5.) These clauses are singularly ill-constructed and ungrammatical. The meaning evidently is "six years after coming to full age, being discovert, becoming of sound memory, or returning from beyond seas." The 3rd and 4th W. 4th, ch 42, sec. 4, has the word "returned," but it also is awkwardly worded.

The following clause seems to us a proper substitute :—

Proposed clause. Provision for disabilities.

3. "If any person entitled to bring Error be at the time of the judgment signed or award made, "within the age of 21 years, or a married woman, or of unsound mind, or out of the Colony "of New Zealand, such person shall be at liberty to commence proceedings in Error at any "time within [ ] years after coming to the age of 21 years, or ceasing to be a married "woman, or becoming of sound mind, or coming into the Colony, respectively; or if the "opposite party be out of the Colony at the time of the judgment signed, Error may be brought "against him, provided the proceedings in Error be commenced and prosecuted with effect "against him within [ ] years after he has come into the Colony."

46. We think the 148th section of the English Act abolishing the writ of Error, may be adopted as follows :— Common Law Procedure Act, 1852, s. 148.

Writ of error abolished.

4. "No Writ of Error shall be required in any case for the commencement of "proceedings in Error."

47. The 149th and the 152nd Sections provide for the commencement of proceedings for Error in law, by filing a memorandum and entering a suggestion; but it seems to us unnecessary to take both steps; and, moreover, we think it would be convenient to give notice, at once, of the grounds of Error. *Mutatis mutandis*, the clause would then stand thus :

Proposed clause. Memorandum and grounds of Error.

5. "Either party alleging Error in law may deliver to the Registrar of the "Supreme Court a *Memorandum* in writing, in the form contained in the Schedule "to this Act annexed, marked No. , or to the like effect, alleging that there "is Error in law in the record and proceedings, and stating the grounds of Error intended "to be relied on : whereupon the Registrar shall file such memorandum, and deliver te "the party lodging the same—who shall thereafter be called the Plaintiff in Error—a "note of the receipt thereof; and a copy of such note and of the memorandum and "statement of grounds of Error shall within [ ] days after the delivery of such note "to the Registrar be served upon the opposite party—who shall thereafter be called the "Defendant in Error, or to his Solicitor."

The form in the Schedule referred to may be to this effect :

Form of Memorandum.

"In the Supreme Court "of New Zealand."

"The day of A.D.

"A. B. *v.* C. D. [The day of lodging the Memorandum.]

"Plaintiff. Defendant.

"The Plaintiff (or Defendant, *i.e.* in the original action), says that there is Error "in law in the record and proceedings in this action; and the following are the grounds "of Error which the plaintiff [defendant] intends to argue :—[Here state the grounds of Error.]

(Signed) "A. B., Plaintiff,"

[or C. D., Defendant, or E. F., Solicitor for Plaintiff or Defendant.]

48. The 150th Section of the "Common Law Procedure Act, 1852," seems applicable almost in its own words, thus : Common Law Procedure Act, 1852, s. 150.

Proposed clause. Proceedings when supersedeas of execution

6. "Proceedings for Error in law shall be deemed a *supersedeas* of the execution "from the time of the service of the copy of such note and of the memorandum and "statement of the grounds of Error, as last aforesaid, until default in putting in bail, or "an affirmance of the judgment, or discontinuance of the proceedings in Error, or until "the proceedings in Error shall be otherwise disposed of, without a reversal of the "judgment: Provided always that if the grounds of Error shall appear to be frivolous, "the Court or a Judge may, on summons, order execution to issue."

49 The 151st Section, *mutatis mutandis*, will run as follows :— Common Law Procedure Act, 1852, s. 151

Proposed clause. Giving bail in Error.

7. "Upon any judgment hereafter to be given in the Supreme Court, execution shall "not be stayed or delayed by proceedings in Error either in law or in fact, or *supersedeas* "thereupon, without the special order of such Court or a Judge, unless the person in "whose name such proceedings in Error *are* brought, with two, or by leave of the Court "or a Judge more than two, sufficient sureties, such as the Court or a Judge shall allow "of, shall within [4] clear days after lodging the memorandum alleging error, or after the "signing of the judgment, whichever shall last happen, or before execution executed, be "bound unto the party for whom any such judgment is or shall be given, by recognizance "acknowledged in the said Court or before a Judge at Chambers, in double the sum "adjudged to be recovered by the said judgment (except in case of a penalty), and in "case of a penalty in double the sum really due and double the costs, to prosecute the "proceedings in Error with effect, and also to satisfy and pay—(if the said judgment be "affirmed, or the proceedings in Error be discontinued by the plaintiff therein)—all "money and costs adjudged upon the former judgment, and also costs and damages to

" be also awarded for the delaying of execution, and shall give notice thereof to the " defendant in Error or his Solicitor."

Common Law Procedure Act, 1852, s. 152.

50. The 152nd Section of the English Act provides for the abolition of the assignment of Error and joinder in Error in law, and the substitution of a suggestion in lieu thereof, with a proviso that when the defendant in Error intends to rely on a plea that Error is barred by lapse of time, or release, or other matter of fact, Error is to be assigned after notice by the defendant, and the defendant is to plead in 8 days, and thereupon such proceedings are to be had as before the Act.

Suggestion of Error.

Now there is nothing to be gained—but a great deal of inconvenience must necessarily be produced—if the practice of New Zealand were to incorporate, by relation, the English practice before 1852 ; and it seems to be the more reasonable plan to adopt a simple suggestion of Error in all cases, and to provide—in case of the defendant wishing to plead pleas in fact—for the trial of such facts in the ordinary way, as incidental to the action ; and inasmuch as great delay might be caused by waiting for the trial of such issues of fact till the next sittings, power might properly be given to the Court in its discretion, on the application of the party interested, to direct the Sheriff to summon a Jury at a given time to try the issues in the Court below. If the issues on the pleas should be decided substantially against the defendant in Error, then on payment of costs or security given by him within a certain time, the case might be set down for argument in the Appeal Court, in the same manner as if no pleas had been pleaded—otherwise at the expiration of that time the plaintiff in Error should be entitled to the reversal or other judgment which he asks for.

There seems to be no necessity for the memorandum in Section 148, and also the suggestion on the roll, except for the purpose of removing the roll into the Court of Error ; but in our Supreme Court there is no judgment roll ; and provision can be made for sending up all the proceedings to the Court of Appeal.

The 153rd Section provides for making up the roll and entering the suggestion by the plaintiff, otherwise for judgment of *non pros.*

Proposed clause.

51. It seems to us that the following Clause will provide sufficiently in New Zealand for all the matters covered by the 152nd and 153rd sections of the Common Law Procedure Act :—

Pleas and Joinder in Error.

8. " Within [14] days after the service of a copy of such note as in section " mentioned by the Plaintiff in Error on the defendant in Error, the defendant in Error " shall either deliver to the Registrar a joinder in Error which the said Registrar shall " then file, or shall deliver to the Plaintiff in Error or his Solicitor a plea or pleas to the " effect that the proceeding in Error is barred by lapse of time, or by release of Error, or " of some other like matter of fact ; and in default of the defendant in Error delivering " such joinder or plea within such time as last aforesaid, the judgment shall be reversed " by the Supreme Court or a Judge at Chambers on application on behalf of the plaintiff " in Error, notice of such Application having been previously given to the defendant in " Error or his Solicitor : Provided always that such Court or Judge may enlarge the " time for delivering such joinder or plea on reasonable cause being shewn, or may, on " the hearing of such application for a judgment of reversal, on reasonable cause being " shewn, grant to such defendant in Error further time to deliver such joinder or plea, " on such terms as to costs or otherwise as to such Court or Judge shall seem fit."

This clause seems to preserve everything essential in the Common Law Procedure Act which is necessary in the Colony, and at the same time to give a little more of that elasticity in operation which is desirable for the circumstances of the Colony. The defendant in Error, if conscious of a bad case, ought not to be allowed to put the plaintiff to the expense of going to the Court of Appeal to get the judgment reversed ; and the provision here is in accordance with the English rule of H. T. 4 W. 4, r. 13.

Finding of issues of fact on Pleas in Error.

52. It is now necessary to provide for the trial of the issues of fact raised on pleas in Error, and the judgment founded on it, should the verdict be for the defendant ; and moreover it would seem to be required by the general spirit of our practice that the defendant, if he should fail in establishing his pleas, should be allowed to go on to dispute the matters of law relied on by the plaintiff in Error. The following clauses seem to supply these *desiderata:*—

Disposing of issues of law and fact in a plea in error.

9. " After the delivery by the defendant in Error of a plea in Error as hereinbefore " last mentioned, the pleadings thereupon shall proceed as in the ordinary course of an " action, and if in such pleadings an issue of law be raised by demurrer, the case shall be " set down for argument as hereinafter is provided for when there has been a joinder in " Error ; but if in such pleadings an issue or issues of fact be raised, the Supreme Court " or a Judge shall, on the application of either party, settle the issue or issues to be tried, " and summon a Jury to try such issue or issues on such day as such Court or Judge may " think fit, and the said Judge or any other Judge of the Supreme Court shall preside at " such trial."

Result of verdict on pleas in error.

10. " If at the trial of such issues or issue of fact a verdict shall be found for the " defendant in Error, the Court shall forthwith, on motion by such defendant, direct that " the judgment already given by the Court shall be affirmed ; and no further proceedings " in Error shall be taken on the judgment. But if the verdict be for the plaintiff in " Error on the issue, if there be but one, or on all the issues if there be several, then the " case shall be set down for argument as if there had been a joinder in Error."

53. The provisions of the 154th section of the Common Law Procedure Act might be modified as follows, since there is no existing practice in Error in New Zealand to be got rid of. Common Law Procedure Act, 1852, s. 154

11. "In case Error be brought upon a judgment given against several persons, and one "or some of them only shall proceed in Error, the memorandum alleging Error, and the "note of the receipt of such memorandum shall state the names of the persons by whom "the proceedings are taken, and the proceedings shall be continued in *their names*; but "if the others elect to join before the case is set down for argument in the Court of "Appeal, they may give notice thereof to the Registrar, who shall thereupon enter a "suggestion to that effect, and they shall then become "Plaintiffs in Error." Error by several joint parties.

54. The 155th section provides for bringing the Judgment Roll into the Court of Error. The following would be an analagous provision:— Common Law Procedure Act, 1852, s. 155

12. "Upon the receipt by the Registrar of the Supreme Court of the joinder in "Error, he shall cause the case to be set down for argument in the Court of Appeal at its "next practicable sitting, and he shall, as soon as may be, transmit to the Registrar of "the said last mentioned Court the pleadings and judgment and all other proceedings in "the action or matter within the custody of the Court; and the Court of Appeal may "and shall thereupon review the proceedings, and give judgment as it shall be advised "thereon; and such proceedings and judgment, as altered or affirmed, shall be re-"mitted by the Registrar of the Court of Appeal to the Registrar of the Supreme Court, "by whom the same had been transmitted; and such further proceedings as may be "necessary thereon shall be awarded by the Supreme Court." Argument and judgment in Error.

N.B.—A rule of practice ought to be made by the Judge to provide for furnishing the Judges with copies of the proceedings and grounds of Error.

55. The 156th section of the English Act gives the Courts of Error power to quash proceedings &c., but it refers to the jurisdiction which they would have had, if the proceedings in Error had been commenced by Writ of Error, and any reference of this kind in a New Zealand Act would cause embarrassment and complication much to be deprecated. It would probably be found quite sufficient for the purposes of the Colony if instead of the 156th and 157th sections of the Act, a section were introduced to this effect. Common Law Procedure Act, secs. 156-7.

13 "The Court of Appeal shall have power to quash the proceedings in Error in "all cases in which Error does not lie, or where they have been taken against good faith; "and it shall have power in all cases except as hereinbefore provided, to give such "judgment, and award such process as the Supreme Court ought to have done, without "regard to the party alleging Error." Quashing of proceedings and judgment by new Court of Appeal.

56. The 158th section provides for proceedings in Error in fact, and directs proceedings to be had after suggestion as formerly after allowance of a Writ of Error. This kind of legis ation by reference, will not, we think, suit the requirements of the Colony; and a special provision must be made for this branch of the subject. But inasmuch as this is Error which in England would be *Coram nobis*, or *vobis*, and might be dealt with by the Court in which it arose, not being the Error of the Court, it would seem that this may be dealt with by the Supreme Court itself; and although for that reason, the provisions in respect of it might with propriety have been introduced into the Supreme Court Act; yet as this Bill deals with the whole subject of Error, it seems desirable to introduce them here; and the following Clause might be adopted:— Common Law Procedure Act, s. 158.

Error in fact.

14. "Either party alleging Error in fact may deliver to the Registrar of the Supreme "Court a memorandum in writing intituled in the Court and Cause, and signed by the "party or his Solicitor, alleging that there is Error in fact in the proceedings, "together with an affidavit of the matter of fact in which the alleged Error consists, (which "the Registrar shall then file in the said Court,) and may serve upon the other party a "copy of such memorandum or affidavit; and such other party may demur or plead to the "matter contained in such memorandum, and the pleadings after such memorandum, shall "be conducted in the same manner as if the said memorandum were the first pleading in "an action, and every issue of law or fact arising in such pleadings shall be disposed of in "the same way as issues of law or fact in the ordinary course of an action, and after "such issue or issues of law or fact or both has or have been disposed of, the Court "shall give judgment of affirmance or reversal, or cause a *venire de novo* to issue, or give "such other judgment as the circumstances of the case may require." Proceedings on Error in fact.

57. The remaining sections of the Common Law Procedure Act of 1852 on the subject of Error, being sections 159 to 167 inclusive may be adopted with so slight changes that it is not necessary for us to call special attention to them. Remaining sections of Common Law Procedure Act, secs. 159—167.

The form of them may be as follows.

(*a*) "The Plaintiff in Error, whether in fact or law, shall be at liberty to discontinue "his proceedings, by giving to the Defendant in Error a notice, headed in the Court and "Cause, and signed by the Plaintiff in Error or his Solicitor, stating that he discontinues "such proceedings; and thereupon the Defendant in Error may sign judgment for costs "of, and occasioned by, the Proceedings in Error, and may proceed upon the judgment "on which the Error was brought." Plaintiff may discontinue Proceedings in Error.

(*b*) "The Defendant in Error, whether of fact or Law, shall be at liberty to "confess Error and consent to the reversal of the judgment, by giving to the Plaintiff in "Error a notice, headed in the Court and Cause, and signed by the Defendant in Error "or his Solicitor, stating that he confesses the Error, and consents to the reversal of the "judgment; and thereupon the Plaintiff in Error shall be entitled to and may forthwith "sign a judgment of reversal." Defendant may confess Error and consent to reversal of Judgment.

Death of Plaintiff in Error no abatement.

(*c*) "The death of a Plaintiff in Error after service of the note of the receipt of the "memorandum alleging Error, with a statement of the grounds of Error, shall not cause "the proceedings to abate, but they may continue as hereinafter mentioned."

Death of one of several Plaintiffs in Error.

(*d*) "In case of the death of one of several Plaintiffs in Error, a suggestion may be "made of the death, which suggestion shall not be traversable, but shall only be subject "to be set aside if untrue, and the Proceedings may be thereupon continued at the Suit "of, and against the surviving Plaintiff in Error, as if he were the sole Plaintiff."

Death of sole Plaintiff or of all the Plaintiffs in Error.

(*e*) "In case of the death of a sole Plaintiff or of several Plaintiffs in Error, the legal "representative of such Plaintiff, or of the surviving Plaintiff, may, by leave of the Court "or a Judge, enter a suggestion of the death, and that he is such legal representative, "which suggestion shall not be traversable, but shall only be subject to be set aside if "untrue, and the proceedings may thereupon be continued at the Suit of, and against such "legal representative, as the Plaintiff in Error; and, if no such suggestion shall be made, "the Defendant in Error may proceed to an affirmance of the judgment according to the "practice of the Court, or take such other proceedings thereupon as he may be entitled to."

Death of Defendant in Error no abatement.

(*f*) "The death of a Defendant in Error shall not cause the Proceedings to abate, "but they may continue as hereinafter mentioned."

Proceedings upon death of one of several Defendants in Error.

(*g*) "In case of the death of one of several Defendants in Error, a suggestion "may be made of the death, which suggestion shall not be traversable, but only be subject "to be set aside if untrue; and the proceedings may be continued against the surviving "Defendant."

Proceedings upon death of sole Defendant or of all the Defendants in Error.

(*h*) In case of the death of a sole Defendant or of all the Defendants in Error, the "Plaintiff in Error may proceed, upon giving ten days notice of the Proceedings in Error, "and of his intention to continue the same, to the representatives of the deceased "Defendants, or if no such notice can be given, then by leave of the Court or a Judge, "upon giving such notice to the parties interested, as it or he may direct."

Marriage not to abate Proceedings in Error.

(*i*) "The marriage of a woman, Plaintiff or Defendant in Error, shall not abate the "proceedings in Error, but the same may be continued in like manner as herein before "provided with reference to the continuance of an Action after marriage."

Review of subject of Error.

58. On a review of this part of our subject it will be found that a complete system of proceedings in Error both in fact and in law may be established by means of the suggested enactments, as free from complication, as little dilatory in operation, and as little expensive to suitors as the nature of the matter will permit. It seems to us that no more simple or summary process could be introduced without depriving the community of the Colony of the power of taking advantage of some grounds of Error on which their English fellow subjects might have relied at the time up to which it seems to have been the intention of the Imperial Government and the Colonial Legislature that the rights of Colonists and of Englishmen should as far as practicable be deemed identical.

VI.—APPEALS FROM DISTRICT COURTS.

59. There is but one topic remaining relative to the civil jurisdiction of the Appeal Court, and that refers to appeals either direct, or intermediately through the Supreme Court, from the District Courts established by the Act of 1858.

Appeal from Judgment of Supreme Court on an appeal from District Court.

We have stated in our preliminary observations, that we think, on principle, the suitors of the District Courts ought to be empowered to go to the Court of Appeal if dissatisfied with the judgment of the Supreme Court, provided there seemed to be some fair ground for carrying the case further; and in order to give effect to this suggestion, it will be necessary, in the first place, to repeal so much of the 102nd section of "The District Courts Act, 1858," as makes the orders of the Supreme Court (as a Court of Appeal) final.

It might then be provided, as a simple, practical course, that, on notice of Appeal being given to the Registrar of the Supreme Court, the case transmitted to him by the parties, under the District Courts Act, should be sent on by him to the Registrar of the Court of Appeal, along with a memorandum of the Judgment of the Supreme Court thereupon. The following clause might carry out these suggestions:—

Proposed clause.

Part of s. 102 of the District Courts Act, 1858, repealed.

1. "So much of the 102nd section of "The District Courts Act, 1858," as directs "that the Orders made by the Supreme Court on appeals from any District Court shall "be final, is hereby repealed."

Proceedings for removing Appeal from Supreme Court to the Court of Appeal.

2. "It shall be lawful for any party against whom any order of the Supreme "Court shall have been made under the 102nd section of the last mentioned Act, on "an appeal from any District Court, to give notice within [ ] days after such order "shall have been made, to the other party or his Solicitor, and to the Registrar of the "Supreme Court, of his wish to appeal to the Court of Appeal on some ground or grounds "to be specifically alleged by him in such notice, and if the Judge who made such order "shall certify in writing that in his opinion the grounds or ground alleged in such "notice are, or that some one ground is fit to be argued in the Court of Appeal, and if "such party so wishing to appeal shall within [ ] days after the granting of such "certificate, give security for the costs of such appeal, and for the amount of the judg-"ment, if he be the defendant, to the satisfaction of the Registrar of the Supreme Court; "then, on proof of notice that such certificate and security have been given, having "been served upon the party appealed against, the said Registrar shall transmit to the "Registrar of the Court of Appeal, the case agreed upon or settled under the 103rd

"section of the last mentioned Act, along with a Memorandum of the Order of the "Supreme Court thereon, certified by the Judge who pronounces the same; and the "said Court of Appeal, on hearing the parties or their Counsel, or such party orthe "Counsel of such party, as shall appear before it shall proceed to adjudicate upon "such case, and its judgment thereon shall be final."

60. There remain the cases to which also we adverted in our prefatory observations, in which the District Judge may think that the questions involved in proceedings before him, were of such importance that it would be desirable to have them carried at once to the Court of Appeal, without being first taken to the Supreme Court. Appeal direct from District Court to Court of Appeal.

Such a course of proceeding ought not to be unnecessarily encouraged; and the District Judges ought not to give leave to appeal directly to the Court of Appeal, except in cases of considerable difficulty or importance.

The following clause, altered from "The District Courts Act, 1858," s. 102, will probably meet the requirements of the case:—

3. If either party in any cause in any District Court shall be dissatisfied with the "determination or direction of the Court in point of law, or upon the admission or "rejection of any evidence and shall intimate the same, and state the ground or grounds of "dissatisfaction to the Judge of the said Court, either at the hearing of the cause or "within [ ] days after such determination or direction, and the Judge shall certify, "under his hand, such ground or grounds of dissatisfaction, and that such ground or "grounds seem or seems in his opinion, to involve some question of law of considerable "difficulty or great importance, the party so dissatisfied may appeal directly to the Court "of Appeal; and on notice of such appeal, and of such certificate and grounds being given "to the other party or his Solicitor, and also on security being given as in the 102nd "section of the said Act is provided, such proceedings shall be had, such case stated and settled, "and such judgment or order shall be made by the said Court of Appeal, as if the said "Appeal had been made under the provisions of that Act to the Supreme Court; and the "judgment of the Court of Appeal on the said Appeal shall be final. Proposed clause.

61. Then, inasmuch as the Court of Appeal ought not to be called upon to consider the case unless the party appealing appear to support his Appeal; and if such party (10) do not appear, the other party appearing ought to have costs, the following provisions should be made in respect of the (2) previous sections.

4 "If the party appealing under either of the last two sections do not appear in "person or by Counsel before the Court of Appeal, such Court shall affirm the order or "judgment appealed against; and if the party appealed against shall appear, in person or "by Counsel, the Court of Appeal may in its discretion, make an order that the costs of "the Appeal shall be paid by the appellant; and the judgment of the said Court of "Appeal shall have the same effect and consequences and the same proceedings may be "taken therein as if the judgment had been given in the District Court and the said last "mentioned Court had jurisdiction to give such judgment." Judgment of Court of Appeal where appellant does not appear.

NOTE.—The last words seem necessary in case the amount recovered by the judgment along with the Costs should be more than the District Court could give judgment for, exclusive of the costs of that Court.

PART III.

Criminal Jurisdiction.

I. PRELIMINARY.

62. The Criminal jurisdiction of the Court of Appeal now claims our attention; and we feel that in reporting upon it on this occasion, we ought to guard your Excellency against the supposition that our suggestions embrace all, or any very large proportion of the topics connected with the Criminal Law and its administration, which we contemplate as subjects proper for the consideration of the Legislature of the Colony either at the present time or hereafter. Introductory.

63. A report which we had the honor of presenting to your Excellency in May 1859, referred to certain matters of practical and urgent importance with respect to the institution and conduct of prosecutions, to which we need not further advert at present, except for the purpose of observing that if any measure founded upon it, should be introduced into the Legislature contemporaneously with the Court of Appeal Bill, it will be necessary to take care to secure harmony in the provisions of the Acts. Report, May 1859.

64. With regard to the many moot points which have recently been raised and ventilated in England by Advocates of Criminal Law Amendment, such, for instance, as the abolition of the distinction between felonies and misdemeanours, the granting of new trials in cases of felony, Lord Brougham's proposal for the admission of the evidence of parties accused, upon Oath, and so forth; we believe it would be premature in us to offer any opinion or suggestions at present. We feel that it would be presumptuous in us to decide upon these questions—without some urgent reasons—till we see the results of the labours of those learned and experienced persons in England, who have devoted so much of their time and talents to the elucidation and settlement of these interesting topics. Besides they do not necessarily belong to the subject of a Court of Appeal. Proposed amendments of Criminal Law in England.

Note.—This would probably be a change beyond the powers of the Colonial Legislature, inasmuch as it would affect the rights of the Crown.

Principle on which the following suggestions are based.

65. The principle upon which we think our present suggestions ought to be based is simply this, that with respect to the administration of Criminal Law, on the one hand, Colonial society has a right to look for as much security to life and limb, liberty, property, and character, as the society of the mother Country, and on the other hand, the Colonial subject accused of breaking the law, is entitled to as much protection in substance and by form as his fellow subject in England.

Defects of the Criminal Administration in New Zealand, for which remedies suggested.

66. In its existing condition in New Zealand, the Criminal Law as compared with that of England, seems deficient in the following matters, in respect of which we would suggest remedies.

Cases for *Certiorari*.

1. In the first place it seems at least doubtful whether an Indictment can be removed by *certiorari* from the Circuit Court into the Supreme Court sitting in any other capacity, and if it can, whether any practical benefits can be derived from the operation. But there are advantages accruing from the removal of an Indictment by *certiorari* in England which it may be but just to extend to persons accused of offences in New Zealand. and besides Indictments, there are convictions and orders of a penal character removable by *certiorari*, in respect of which it might be desirable to give the Court of Appeal jurisdiction, either exclusive or concurrent with that of the Supreme Court.

Crown cases reserved.

2 In the second place, we think the Court of Appeal should be invested with the same powers and duties as the Court for Crown cases reserved constituted in England under the 11th and 12th Vic., c. 78, which superseded the old, anomalous, inconvenient, and faulty practice of reserving cases for the opinion of the 12 or 15 Judges, such opinions being given extrajudicially, and acted upon if necessary, by the exercise on the part of the Executive of the Regal prerogative of mercy.

Error.

3. In the third place, the Court of Appeal seems the proper tribunal for the decison of proceedings in Error in Criminal Cases as well as in Civil.

Whether parties convicted ought to be allowed to appeal with respect to matters which are not properly grounds of Error, and where the Judge refuses to reserve a case for the opinion of the Court of Appeal, is one of those questions on which we do not feel called upon to give an opinion at present. Too great facility of appeal in criminal cases would be attended with the greatest inconvenience, and we should be slow to recommend any innovations in Criminal Law not sanctioned by experience or authority in England. On the other hand it does seem somewhat inconsistent that there should be greater facilities for appeal in Civil than in Criminal cases. On the whole, we think that the machinery now proposed will be found to afford adequate protection to innocent persons unjustly accused.

Spirit of English law to be followed.

67. With regard to all these branches of jurisdiction, we do not think it necessary that the Legislature of New Zealand should assign to the Court of Appeal the precise limits of the English tribunals; but we would recommend that in all their provisions, they should be bound rather by the spirit than the letter of the English Law and practice.

How advantages of *Certiorari* to be secured.

68. We have to consider first under the Law, what steps require to be taken in order to ensure to the Colonial community the same practical advantages as are possessed by the British subject in England, in respect of the removal of Indictments for misdemeanour, convictions and penal orders into the Court of Queen's Bench. As regards Indictments, we cannot well see how, at present, an Indictment found at the Circuit Court, could be removed with any advantage into the Supreme Court, if it could be said not to be already in that Court.

As to Indictments,—use of *Certiorari* in England.

In England a *certiorari* is rarely granted, at the discretion of the Court, regulated by the Statute 5 and 6, W. 4, c. 33, to remove an Indictment from the cognizance of Justices of Gaol delivery.

The only objects for the removal of an Indictment from such a tribunal would be either to obtain a trial at Bar before the full Court, a proceeding justified only in cases of extraordinary difficulty and importance, or to have the trial conducted according to the course of *Nisi Prius* practice.

The principal advantage of the latter mode of proceeding is that a special Jury may be obtained.

II. TRIAL AT BAR.

Trial at bar.

69. It may therefore be proper, for carrying out the principles upon which this portion of our Report is based, to provide that the Court of Appeal should be invested with the same powers as the Court of Queen's Bench, for the trial of extraordinary cases presenting great legal difficulties, at Bar, before all the Judges. And with respect to the question of a special jury, it would seem desirable that instead of parties being obliged to move for a *certiorari* the Supreme Court should be empowered, on sufficient affidavit, to grant a rule *nisi* for a special jury, either on the motion of the prosecutor or of the prisoner, and to make the same absolute if no sufficient cause should be shewn against it. This, we think, would be a most important provision, and in some cases it would ensure what is at present scarcely rendered certain, in all cases, that a man should be tried by his *peers*; still as there are classes who might feel a jealousy about being tried by persons occupying a higher position than themselves in the social scale, it would not be advisable that this course should be adopted except for very urgent or clearly satisfactory reasons.

III. SPECIAL JURY.

On removing indictments by *Certiorari*, grant of special jury.

70. Next, in order to give a similar discretion in the case of Indictments removed from the District Courts (or of some other inferior tribunals which may hereafter be constituted for the trial of indictable offences) it would be well to provide that the Supreme Court, in case it should

see good ground for doing so, might, on granting the *Certiorari*, direct that the Indictment should be tried at the ordinary Circuit Court of the Supreme Court, either with a common or a special jury, providing that the party applying for the *Certiorari*, if he desired to have a special jury, should give due notice to the other side of his intention to apply.

70*a*. It is to be remarked with respect to the two last paragraphs that the suggestions are not connected with the functions of a Court of Appeal, and that the suggestions contained in them might more properly be carried out in a Supreme Court Bill; but as our attention has necessarily been called to the matter by the surrounding subjects, we consider it proper that we should offer our suggestions upon it at present.

Removal of Convictions and General Orders into Court of Appeal.

71. In the next place, with respect to convictions and orders of a Penal character removable from inferior tribunals, it would seem advisable to permit the parties, if they agree and the Supreme Court think fit, to have the matter removed directly into the Court of Appeal; but if the case should be removed in the first instance into the Supreme Court, any party deeming himself to be aggrieved, ought to be at liberty to appeal from that Court to the Court of Appeal. It seems unnecessary to notice the "Summary Proceedings Ordinance," or "Summary Proceedings Amendment Ordinance," which gave an appeal to the Supreme Court in case the fine imposed should exceed £5, or the imprisonment adjudged should exceed one month, further than to observe that the "Summary Proceedings Improvement Act, 1860," gives an appeal to the Supreme Court from the determination of one or more Justices of the Peace, upon a case stated and signed by such Justices, in manner therein mentioned, and further provides (sec. 11) that no writ of *certiorari*, or other writ, shall be required for the removal of a conviction, order, or other determination in relation to which a case is stated under the Act, or otherwise for obtaining the judgment of the Court, on such case under the Act, and the appeal given by the above mentioned Ordinance is taken away in cases falling within the last mentioned Act.

Proposed Clauses.

72. The following clauses seem to us to contain the provisions necessary for carrying out these suggestions.

Trial at bar.

1. "When any Bill of Indictment hath been found in the Supreme Court or at a Circuit "Court thereof, or any inquisition hath been found, or any criminal information been granted "against any person for any crime or misdemeanour; if it shall be made to appear to the "Supreme Court on affidavit, on the part of the accused or of the prosecutor, that the case "is one of extraordinary importance or difficulty, and that it is desirable that it should "be tried before the Judges at bar, the Supreme Court may grant a rule *nisi*, and if "no sufficient cause be shown, may make the same absolute for the removal of such In-"dictment, inquisition, or information, and the proceedings thereon, into the Court of "Appeal, and for the trial of the same at Bar at the next or other sitting of such Court of "Appeal, and may direct that a Special or Common Jury, as the Supreme Court shall "think fit, be summoned from the Province in which the alleged offence was committed "or the accused was apprehended, (or from some other Province, if sufficient reason be "shewn to the Court), to serve upon such trial; and such proceedings, as nearly as "may be, shall thereupon be had as upon a trial at Bar in England; and the said Court "of Appeal shall have the same jurisdiction, authority, and power in respect thereof, as "the Court of Queen's Bench hath in England in respect of a trial at Bar."

Special Jury on Bill found.

2. "When any Bill of Indictment hath been found in the Supreme Court or at a "Circuit Court thereof, or any inquisition hath been found, or any criminal information "hath been granted to be tried in the Supreme Court or at a Circuit Court thereof, "against any person for any misdemeanour, the accused or the prosecutor may, after "notice given to the other party, apply on affidavit to the Supreme Court or the Judge "presiding in a Circuit Court of the Supreme Court, for an order that such Indictment, "inquisition, or information be tried by a Special Jury; and such Court or Judge may, "after hearing the objections, if any, of the other party, direct, if it or he think that "there are good grounds for so doing, and that it is practicable consistently with the "public convenience to do so, that a Special Jury be summoned from the Province in "which the alleged offence was committed or the accused was apprehended, (or from some "other Province if sufficient reason be shown to the Court) (*a*) to serve upon the trial, "and that the trial take place in the Province from which such Jury shall be summoned, on "some day to be specially fixed for such trial by such Court or Judge (*b*).

Striking, &c., of Special Jury.

3. "The Special Jury directed to be summoned under either of the two last sec-"tions shall be struck and summoned in like manner as Special Juries are struck and "summoned in civil actions."

NOTES. (*a*.) Provision is made in these clauses for cases where, on account of political excitement or other good cause, it might be important, either for the sake of the accused or for the interests of public Justice, that the Jury should not be taken from the Province where the fact occurred or the accused resided, but that the trial should take place in and the Jury be summoned from another Province.

(*b*.) By the provision here introduced, if an indictment should be found at one of the several Circuit Courts, and an application should be made for a Special Jury, which the Court thought fit to grant, directions might be given for summoning the Jury to attend at an adjourned sitting of the same Circuit Court, to suit the convenience of the public and to prevent undue delay detrimental to the accused.

Special Jury may be granted on granting *Certiorari*.

4. "If any indictment information [or inquisition] be removed by *certiorari* from "any inferior tribunal (*a*) into the Supreme Court, it shall be lawful for the Supreme "Court, on granting the *certiorari* to order that such indictment, information or inquisi-"tion] shall be tried either by a special or common Jury as it may think fit."]

Removal of Convictions and Orders on *Certiorari* to the Court of Appeal at once. Proposed clause.

IV. REMOVAL OF CONVICTIONS AND ORDERS TO COURT OF APPEAL.

72*a*. With respect to convictions or orders of a Penal character which are removable by *certiorari* it might be provided as follows.

5. "Whenever the Supreme Court grants a *certiorari* to bring up a conviction or "order of a Penal nature from an inferior Court, or in any case of Appeal on such "conviction or order, such Supreme Court may, if the parties interested shall so agree, "order that such conviction or order shall be removed directly into the Court of Appeal, "which shall thereupon have such authority to hear and determine the same, and give "such judgment thereon as the Supreme Court would have had, if it had been removed "into it."

Appeal from Judge of Supreme Court on Conviction or Order, removed to the Court of Appeal.

6. "Any party aggrieved by the judgment of the Supreme Court on any conviction "or order removed into such Court by *certiorari*, or on an appeal against any such order, "may appeal to the Court of Appeal, and the same proceedings shall be taken for the "transmission of the documents into such last mentioned Court, and for the hearing and "determining of such Appeal, as in civil cases, and the said Court of Appeal shall have "power to give such judgment upon such appeal as the said Supreme Court might "have done, besides judgment for the costs of the Appeal."

V. CASES RESERVED BY THE JUDGES.

Whether District Court Judges should have power to reserve questions directly for Court of Appeal.

73. We now come to consider the proceedings necessary for enabling Judges to reserve questions of law arising on the trial of criminal cases for the consideration of the Court of Appeal.

The first matter to be determined under this head, is whether this power should be confined to the Judges of the Supreme Court, or should be extended also to the Judges of the District Courts. According to the existing law, the Judges of the District Courts may reserve any point of law arising in a criminal case, and take the opinion of the Supreme Court upon it; but it seems doubtful from the wording of the section of "The District Courts Act, 1858," which confers such power on the Judge (sec. 152) whether the "opinion" to be expressed by the Supreme Court is of such a kind as might properly be appealed from. We think that means ought to be afforded for obtaining the decision of the Court of Appeal in such case, and we would therefore suggest that on any point of law being reserved by a Judge of a District Court for the opinion of the Supreme Court, the Supreme Court may reserve it for the consideration of the Court above, as if it had arisen in the Supreme Court itself.

Mode of reserving cases.

74. The mode of reserving questions in criminal cases by the Judges of the Supreme Court may be similar to that which has been already suggested for civil cases (par. 38); with necessary additions, which can be conveniently taken from the English Statute, 11 & 12 Vic., c. 78, under which the Court for crown cases reserved was established.

Proposed clauses.

Clauses to the following effect might be introduced into the Bill:—

Power to Judge of Supreme Court to reserve cases.

1. "When any person shall have been convicted of any treason, felony, or misde- "meanour before any Court presided over by a Judge of the Supreme Court, such Judge "may, in his discretion, reserve any question of law which shall have arisen on the trial, "for the consideration of the Court of Appeal, and thereupon he shall have authority to "respite execution of the judgment on such conviction, or postpone the judgment until "such question shall have been considered and decided, as he may think fit; and in either "case the Court in its discretion shall commit the person convicted to prison, or shall take "a recognizance of bail with one or two sufficient sureties, and in such sum as the "Court shall think fit, conditioned to appear at such time as the Court shall direct, and "receive judgment, or to render himself in execution, as the case may be."

Bail.

Mode of stating case.

2. "The provisions contained in sections [ ] for the statement, amendment "and hearing of a case when a Judge reserves a question of law in civil actions shall be "applied, so far as they are applicable, to criminal cases."

Power of Court of Appeal and proceedings thereon.

3. "The Court of Appeal shall have full power and authority to hear and finally "determine every such question of law as last mentioned; and thereupon to reverse, "affirm or amend any judgment which shall have been given on the Indictment, information "or inquisition on the trial whereof such question has arisen, or to avoid any such judg- "ment, and to order an entry to be made on the record that in the judgment of the said "Court of Appeal the party convicted ought not to have been convicted, or to arrest the "judgment, or to order judgment to be given thereon at the next sittings of the Court "in which the case was tried, if no judgment shall have been given before that time, as it "shall be advised, or to make such other order as justice may require; and such judg- "ment and order, if any, of the said Court of Appeal shall be certified under the hand of "the presiding Judge to the Registrar of the Court in which the case was tried, who "shall enter the same on the record in proper form; and a certificate of such entry under "the hand of such Registrar shall be delivered or transmitted by him to the gaoler in "whose custody the person convicted shall be, if he has not been admitted to bail, or to "whose custody he ought to be committed if the conviction should be affirmed; and if the "judgment shall have been reversed, avoided, or arrested, such certificate shall be a "sufficient warrant to the said gaoler to discharge the person so convicted, if in custody, "out of his custody; or if the person convicted shall have been admitted to bail, the "Court which shall have so admitted him, shall, on the production of such certificate, "vacate the recognizances of bail; and if the judgment shall have been affirmed, or so "altered that execution is to follow thereon against the party convicted, such certificate "shall be sufficient warrant to such gaoler as aforesaid to execute and carry out such "judgment so affirmed or so altered as aforesaid; and if the Court of Appeal shall di- ct

" the Court before whom such person was convicted to give judgment, then such last " mentioned Court shall. at its next sittings, on the production of such certificate, proceed " to give judgment accordingly.'

MEM.—The Judges ought to settle the forms of certificates in such cases.

4. " On the hearing of any question so reserved as last aforesaid, the Court of Appeal " shall hear the party convicted and the party prosecuting, or their Counsel, or either of " them, if they or either of them then appear, and shall pronounce judgment in open " Court, whether the parties, or either of them, have appeared in person or by Counsel, or " not."

Hearing parties. Judgment though non-appearance.

75. In providing for the reservation by the Supreme Court of questions which have been reserved by the Judges of the District Courts, it is to be noticed that the 152nd section of the " District Courts Act 1858," does not provide for the mode in which the prisoner is to be dealt with between the trial and the expression by the Supreme Court of its " opinion" on the case; but it directs that judgment is to be deferred for that opinion and is to be given in pursuance of it.

Judge of Supreme Court may reserve for Court of Appeal questions reserved by District Court Judge for Supreme Court.

A clause to the following effect would probably be sufficient.

Proposed clause.

1. " In case the Judge of any District Court shall have reserved any question of Law for " the opinion of the Supreme Court, under the provision of the 152nd section of "The " District Courts' Act, 1858," the Judge of the Supreme Court before whom such " question shall be brought, may if he think fit, either before or after argument, reserve " the same for the consideration and determination of the Court of Appeal, and the same " proceedings, so far as they are applicable, shall thereupon be had, as if the question had " been reserved by the Judge of the Supreme Court at a sitting of the Circuit Court " before him :"

" Provided that in every such case, the said Court of Appeal on hearing and " determining such question shall direct the Judge of the District Court to give judgment, " at his next sittings, and he then shall give judgment, pursuant to the determination of " the Court of Appeal thereon."

VI. CASES LEFT FOR TRIAL IN SUPREME COURT BY DISTRICT COURT JUDGE.

76. With respect to cases sent originally to the District Court, but left by the Judge of that Court for trial in the Supreme Court, under the provisions of "The District Courts' Act 1858," we think it ought to be provided that they shall be treated in all respects as if the Bill of Indictment had been originally found in the Supreme Court. Some embarrassment is created in this matter by the language employed in the 145th and the 153rd sections of the Act

Cases left by Judge of District Court for trial by Supreme Court. District Courts Act, 1858. secs. 145, 153.

By the former of these sections it is provided that, " for the purpose of bringing a Criminal " Case under the cognizance of the Court," an indictment is to be signed by the Attorney General, or by the Crown Prosecutor of the District, which is to be as valid and effectual, in all respects, as if it had been presented by a Grand Jury. Then the 153rd section enacts that if the District Court Judge thinks any offence brought before it, such from its nature, magnitude, or difficulty, that it ought to be tried by the Supreme Court, he is empowered " *to leave the case for trial before the Supreme* " *Court,*" and to take recognizances for the appearance of the parties and witnesses thereat.

Now it is by no means clear what is meant by " leaving the case for trial" before the Supreme Court, whether it is intended that the Judge of the District Court, on looking at the depositions, should bind the parties to prosecute and give evidence, in the ordinary course, at the Supreme Court, which includes the preferring of an indictment before the Grand Jury, a course sometimes pursued by the Courts of Quarter Sessions in England; or whether it is intended that the indictment signed by the Attorney General or Crown Prosecutor, should go up to the Supreme Court, and the party should be tried there upon that indictment In the former case, it would seem necessary to give the District Court Judge the power of quashing the indictment in his Court, as it would otherwise remain hanging over the accused; in the latter, it would be desirable to make some provision for transmitting the indictment from the District Court to the Supreme Court without issuing a *certiorari.*

We are not aware of any special reason in favour of the one course of proceeding rather than the other, save this, that it would seem inconsistent that the Supreme Court should try a prisoner transmitted to its jurisdiction by an inferior Court, upon an act of accusation less solemnly sanctioned than the ordinary practice of the Supreme Court requires.

We think that some provision on this subject should be made by the Legislature.

VII. ERROR.

77. As we have already pointed out in paragraphs 41 and 42, it seems doubtful in criminal cases, as in civil, whether a Writ of Error could have been issued in New Zealand, previously to the recent Supreme Court Act, 1860. In criminal cases, more particularly than in civil, does it seem desirable that the colonial subject should have all those substantial and formal protections which the law of England bestows upon his fellow subject at home.

Writ of Error.

78. In England, the writ of Error has not been abolished in criminal cases nor has the procedure in Error been altered to correspond with the alterations in the civil procedure to which we have referred at large in a former part of our report.

The English practice.

79. But it seems to us that the practice in criminal cases might with great advantage to the community be as far as possible assimilated to that which we propose in civil cases.

Desirable to assimilate practice in Civil and Criminal cases.

Necessity for *fiat* of Attorney-General.

80. We meet, however, with a difficulty at the very threshold. The writ of Error in England does not seem, strictly, to be grantable in treason and felony *ex debito justitiæ*, but only *ex gratiâ*; nor is it granted in misdemeanours as a matter of course, but in all cases under the *fiat* of the Attorney-General, on probable ground being shown, and on the certificate of Counsel; and it might be suggested that the abolition of the Writ of Error in criminal cases, and the granting of power to parties to bring Error without the *fiat* of an Officer of the Crown might imply a diminution or infraction of the Prerogative of the Crown, within the Royal instructions of 9th February, 1855, s. 7, which might prevent your Excellency's Government from proposing a Bill containing a provision to that effect, or oblige your Excellency to reserve the Act for the signification of Her Majesty's pleasure.

We doubt whether this suggestion would be found, on consideration, to present any very formidable objection The necessity for the Attorney-General's *fiat* in England probably acts only as a wholesome check upon frivolous proceedings in Error, but were the authority of the Attorney-General of New Zealand indispensable in all cases here, much more delay and inconvenience might be engendered than seems desirable.

Attorney-General or Commissioner may grant *fiat* on proceedings in Error.

81. If a general system of public prosecution were adopted, with local Crown prosecutors under the control of the Attorney-General, that officer might depute his authority in the matter to the local prosecutors, who might be empowered or directed to grant leave in all cases where any probable cause should be shewn for the commencement of proceedings in Error; the decision of the local prosecutors being liable to review by the Attorney-General.

Necessary provisions.

82. The provisions to be introduced into the Bill for the conduct of the proceedings may be taken with due alterations and modifications from the clauses proposed for Error in civil cases, and from the clauses regulating the hearing and determining, and the giving of judgment, and carrying out execution, in cases where questions of law have been reserved by the Judges.

Proposed clauses.

83. It might first be provided—

For what Error will lie.

1. "Error will lie to the Court of Appeal upon the judgment of the Supreme Court "or of any inferior Court, on any indictment, inquisition, or information, for any treason, "felony, or misdemeanour, for or in respect of any matter, thing, or ground of Error for "which Error would have lain in England on the 14th January, A.D. 1840."

Power of Court of Appeal.

2. "The Court of Appeal shall have all such power, authority and jurisdiction in "respect of such proceedings in Error as last aforesaid, as any Court of Error had in "England on the said 14th January, A.D. 1840."

Obtaining *fiat* of Attorney-General.

3. "The party wishing to commence such proceedings in Error as last aforesaid, "shall obtain from the Attorney-General, or any person thereunto authorised by him, a "*fiat* granting leave to such person to commence proceedings in Error, upon a statement "of some grounds of Error, and the certificate of Counsel that he is of opinion that there "is a good ground for commencing such proceedings."

Writ notnecessary.

4. "No writ of Error shall be necessary to commence proceedings in Error."

Then the proceedings might go on by delivery of a memorandum and grounds of Error, as in civil cases (par. 47).

Delivery of *fiat*. Memorandum and grounds.

5. "The party alleging Error may deliver to the Registrar of the Supreme Court "the *fiat* last mentioned, and also a memorandum in writing alleging that there is Error in "law in the record and proceedings, and stating the grounds of Error to be relied on; "whereupon the said Registrar shall file such *fiat* and such memorandum, and deliver to "the party lodging the same a note of the receipt thereof; and a copy of such note of the "receipt of the *fiat* and memorandum shall within [ ] days of the delivery thereof to "the Registrar, be served by the party alleging Error upon the prosecutor."

Provisions for misdemeanant's bail during proceedings in Error.

84 According to the law of England since 1845, persons found guilty of misdemeanour may be let out on bail during the pendency of proceedings in Error, and in case of the affirmance of the judgment, the period for which they may have been imprisoned before the proceedings in Error commenced is to be taken into consideration in reckoning the time of punishment. These provisions

8 & 9 Vic. c. 68, secs. 1, 2, 3, and 4.

are made by the 8th and 9th Vict., c. 68, the 1st, 2nd, 3rd and 4th sections of which we would recommend *mutatis mutandis* to be introduced into the Bill.

Joinder in Error.

85. The provision for joinder in Error contained in proposed section 8, par. 51, page 18, may be modified for criminal cases, the portion relating to pleas of a bar or release of Error being omitted as inapplicable to criminal cases.

Setting down case and sending documents.

86. With respect to setting down the case for hearing in the Court of Appeal, the transmission of documents, the argument and judgment, a slight modification of proposed section 12, par. 54, page 19, will probably be sufficient.

Hearing and Judgment.

87. With respect to the hearing and judgment, it will probably be sufficient to provide that the Court shall have the same powers as are contained in "proposed section" 12 ante par. 54, page 19, in cases of questions reserved by the Judges.

11 & 12 Vic. c. 78, s. 15. Remitting case to Court below for judgment after reversal.

88. The provision of 11 and 12 Vic., c. 78, s. 15, for enabling the Court of Error to remit a case to the Court below for judgment, when the judgment has been reversed on Error, may also be introduced with such slight change as will be necessary.

These seem to be all the provisions which it will be necessary to make by statute for the proceedings in Error in criminal cases.

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89. As regards matters of procedure and practice of a subordinate character both criminal and civil, which may have been overlooked in the foregoing report, it will be necessary to give to the Judges of the Court of Appeal, ample powers to make and publish from time to time, such Rules as they may find desirable for more fully carrying out the provisions of the Act, to have the same effect as if contained in the Act.

89*a*. Power ought to be given to the Judges, to make tables of fees in respect of all proceedings under this Act; and the amount thereof should have relation to the amount of work thrown upon the Officers of the Court. Fees.

CONCLUSION.

90. We have now exhausted all the topics connected with the constitution, jurisdiction, and procedure of a Court of Appeal, which we seem called upon to consider at present. Concluding remarks on the contents of the report.

There are, doubtless, many things, in respect of which our Report will, on more mature consideration, be found to be faulty or incomplete; and many useful additions, condensations, emendations, and substitutions will naturally suggest themselves to the minds of those on whom may devolve the duty of finally settling the draft of a Bill for the consideration of the Legislature.

In the meantime, we would again emphatically disavow the intention of affirming, with regard to the suggestions offered in the shape of "proposed clauses," that the language therein employed is the fittest to express effectually the objects of the suggestions, or that the practical provisions of which we have given sketches, are in all cases and in all respects, the most desirable and convenient for carrying out the principles, the adoption and development of which it has been our principal duty and desire to recommend.

91. The extent and variety of the subjects which it has been incumbent on us to investigate, the brief space of time which we have been able to dedicate to the work, and our inablility to have frequent meetings and consultations together, at intervals, (which would have so much facilitated our progress, and tended to secure precision and security in the results of our labours), must form our apology to your Excellency, if strict but candid criticism should discover, as well may be, no small amount of crudeness, oversight and imperfection in the foregoing pages.

GEORGE ALFRED ARNEY, C.J.
ALEXANDER J. JOHNSTON, J.
HENRY B. GRESSON, J.