A.—No. 4.

PAPERS

RELATIVE TO

AMENDMENT OF COURT OF APPEAL ACT, 1862.

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

WELLINGTON.

1872.

PAPERS RELATIVE TO AMENDMENT OF COURT OF APPEAL ACT, 1862.

No. 1.

Mr. J. MACASSEY to the Hon. W. GISBORNE.

SIR,— Dunedin, Otago, N. Z., 22nd April, 1872.

I have the honor to forward you herewith a copy of a draft Bill to amend "The Court of Appeal Act, 1862." The Bill will probably be introduced into the Colonial Legislature by a private Member, unless the Government should intimate to me before the commencement of the Session their intention of adopting the Bill as their own.

Whether the Bill eventually receives the support of the Government or not, it is most desirable that the opinion of the Judges should be taken on it.

The strongest objections to the proposed measure are, I conceive, these: namely, that (1.) It dispenses with argument; (2) consultation among the Judges. Admitting that these are fairly arguable objections, my answer to them are: (1) That the Bill will be merely permissive in its operation; (2) that it will obviate the enormous delays which at present attend the hearing of appeals; and (3) the expense of an appeal will be reduced to about one-tenth of its present cost.

An Act of the Imperial Legislature, the 22 and 23 Vict. cap. 63, will be found to be somewhat similar in principle.

I may be permitted to say, as a member of the legal profession, and as one who possesses some knowledge of the operation of the Court of Appeal Act, that the proposed Bill will confer a signal boon on the public, although that will doubtless be at the expense of the profession.

I have, &c.,

The Hon. the Colonial Secretary, Wellington. J. S. MACASSEY.

Enclosure in No. 1.

COURT OF APPEAL AMENDMENT.

Preamble.

WHEREAS it is desirable to diminish the delay and expense attendant upon the hearing and determination of causes and appeals which the Court of Appeal of New Zealand is or shall be empowered by law to hear and determine:

Be it therefore enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short Title.

1. The Short Title of this Act shall be "The Court of Appeal Act Amendment Act, 1872."

Appeals or proceedings in error may be prosecuted in manner hereinafter provided.

2. In all judicial proceedings wherein there now is, or shall hereafter be, a right of appeal (in error or otherwise) to the Court of Appeal of New Zealand, or wherein the said Court of Appeal now is or shall hereafter be invested with an original jurisdiction to hear and determine the questions in controversy in such proceedings, such right of appeal may be exercised and such original jurisdiction may be invoked in manner hereinafter provided.

Option given to appellant to proceed under the Act or in any other mode provided by law.

3. The right of appeal created by "The Court of Appeal Act, 1862," or "The Court of Appeal Act Amendment Act, 1870," may, at the option of the party appellant, be prosecuted in the manner provided by the said Acts, or either of them, or in pursuance of the provisions herein contained.

Preliminary conditions of appeal not dispensed with.

4. Nothing contained in this Act shall be deemed to dispense with the conditions of appeal provided by "The Court of Appeal Act, 1862," or "The Court of Appeal Act Amendment Act, 1870," in regard to notice of appeal, the delivery of a memorandum in error, the leave of the Court, or security by the party appellant.

Appellant to give notice of his intention to proceed under this Act.

5. Whenever it shall be intended to prosecute an appeal under the provisions of this Act, the party appellant shall, within the time now or to be hereafter limited for giving notice of appeal, serve notice in writing, signed by himself, his solicitor or agent, upon the opposite party, and upon the Registrar or Deputy Registrar of the Supreme Court, or upon the Clerk of the District Court within the district where the appeal shall arise, of the intention of the party appellant to conduct and prosecute his appeal under "The Court of Appeal Act Amendment Act, 1872."

Case on appeal to be stated in writing.

6. Within one calendar month after the service of such notice, the party appellant, his solicitor or agent shall prepare, state, and deliver to the opposite party, his solicitor or agent, a case in writing, wherein shall be set forth a true copy of the record or pleadings (if any), and whenever necessary the evidence taken in the Supreme Court or District Court, whether given *vivâ voce* upon oath or by

affidavit or deposition, together with copies of all judgments, decrees, rules, orders, writs, informations, or other proceedings necessary for the purpose of such appeal. And such case shall also state the judgment or decision from which the appeal shall be brought, together with the reasons (if any) assigned therefor, and shall also contain a concise statement of the grounds of appeal; and it shall be competent for the party appellant to state, within the limits of five folios of seventy-two words, the reasons and authorities relied upon in support of such appeal, and for the party respondent, within the same limit, to state the reasons and authorities relied upon in answer to such appeal.

Case to be approved by respondent, or settled by the Judge in case of difference.

7. Such case shall, within ten days after the receipt thereof by the party respondent, his solicitor or agent, be returned approved or disapproved to the party appellant, his solicitor or agent; and in event of the case not being returned approved within the said period of ten days, the same shall, without any unnecessary delay, be settled by the Judge by whom the decision appealed against has been pronounced.

A copy of the case, when approved or settled, to be forwarded to each Judge.

8. When the case on appeal shall have been approved on behalf of the respondent, or settled, in the event of any difference between the parties, by the Judge, copies thereof, for the Judges of the Supreme Court, shall be delivered to the Registrar or Deputy Registrar of the Supreme Court, or the Clerk of the District Court for the District wherein the appeal shall have arisen, and one of such copies shall immediately thereafter be forwarded for each of the said Judges of the Supreme Court, to the Registrar of the Judicial District to which such Judge shall have been assigned.

Opinion to be given on case within two months by Judges, and returned to the Registrar, &c.

9. Within the period of two calendar months after the receipt of the case on appeal, the Judge by whom the same shall have been received shall, in writing under his hand, certify his opinion upon the case, and state his reasons at large therefor; and such opinion shall, within the said period of two calendar months, be forwarded to the Registrar or Deputy Registrar of the Supreme Court, or the Clerk of the District Court for the district wherein the appeal shall have arisen.

Delay not to affect appeal or decision.

10. The non-receipt by the said Registrar, Deputy Registrar, or the said Clerk, of the opinion of any of the said Judges, within the time hereinbefore prescribed, shall not affect the validity of the appeal or decision thereof.

Decision of appeal to be in accordance with the opinions of a majority of the Judges.

11. As soon as the opinions of all the Judges of the Supreme Court acting in and for the said Colony, shall have been returned to and received by the Registrar, or Deputy Registrar, of the Supreme Court, or the Clerk of the District Court as aforesaid, the same shall be publicly read in open Court, and, in accordance with the opinion of the majority of the said Judges, the decision appealed from shall be affirmed, reversed, or varied, as the case may be.

Judgment as affirmed, reversed, or varied, to be enforced.

12. Such proceedings shall be thereafter had and taken upon the decision when so affirmed, reversed, or varied, as if the same had been so orginally pronounced by the Court or Judge from whose decision the appeal shall have been brought and prosecuted.

Judge empowered, in frivolous or vexatious appeals, to require that appeals shall be prosecuted under this Act.

13. And in order to prevent and discourage vexatious and frivolous appeals, and the denial of justice which is thereby occasioned, be it enacted that whenever any appeal shall be brought or prosecuted not under the provisions of this Act, it shall be lawful for the Supreme Court, or the District Court, or the Judge who shall have pronounced the decision from which the appeal shall be so brought or prosecuted as aforesaid, by an order made upon hearing the parties, and proof to the satisfaction of the Court or Judge that such apppeal has been brought frivolously or vexatiously, to stay the proceedings upon such appeal, and to require the party appellant to prosecute his appeal under the provisions of this Act.

When Judge shall require appeal to be prosecuted under this Act, the time for giving notice of appeal shall be reckoned from date of order.

14. Whenever an order shall be made under or by virtue of the provisions contained in the last preceding section of this Act, the time for giving notice of appeal shall be calculated, and shall commence to run, from the date and making of such order, and all subsequent proceedings in connection with the appeal shall be had and completed within a time or times reckoned from the date and making of the said order, corresponding to the time or times calculated from the service of notice of appeal as is hereinbefore provided in regard to appeals voluntarily prosecuted under the provisions of this Act.

Judge empowered to dismiss appeals for want of prosecution.

15. In the event of any appeal being brought, whether voluntarily or compulsorily, under the provisions of this Act, or under "The Court of Appeal Act, 1862," or any amending Act thereof, and such appeal shall not be duly prosecuted, it shall be lawful for the Court or any Judge from whose decision such appeal shall be so brought, to order and direct (if necessary) that execution shall issue, or that such decision shall be enforced in due course of law.

Case may be stated in manner hereinbefore provided where the original jurisdiction of the Court of Appeal is invoked.

16. And be it further enacted, that in all cases, save and except in trials at bar, where the Court of Appeal has now or shall hereafter have an original jurisdiction to hear and determine questions in controversy in pending judicial proceedings, the judgment of the Court of Appeal may, at the option of any of the parties litigant, with the consent (by order made) of a Judge of the Supreme Court, or of the District Court, wherein the proceedings shall be depending be obtained upon a case to be prepared and stated in writing in manner herein provided in regard to appellate proceedings, and so far as the provisions hereinbefore contained can or may be applicable thereto.

Cost to be given to the successful party, save in exceptional cases.

17. The costs of the party in whose favour judgment shall be finally pronounced in any proceeding heard and determined under this Act shall be paid and borne by the party against whom such judgment shall be so pronounced, unless in the opinion of the Judges, or a majority thereof, special circumstances are disclosed in the proceedings to warrant the application of a different rule.

Interpretation clause.

18. This Act shall (save and except as to trials at Bar) apply to all judicial proceedings which the Court of Appeal is now or shall hereafter be empowered to hear and determine, and whether of a civil, criminal, or *quasi* criminal nature, and to applications made to the summary jurisdiction of the Supreme Court or District Court, and to applications for prerogatival writs to proceedings in error, as well as to procedings by way of appeal, and to proceedings in the original jurisdiction as well as in the apellate jurisdiction of the Court of Appeal.

Act to apply to proceedings undetermined and pending.

19. This Act shall also apply to all judicial proceedings now pending in the Supreme Court, or in any District Court, in respect of which a right of appeal is given by law, although no decision has been pronounced in such proceeding.

Fees payable.

20. The fees enumerated in the Schedule hereunder written shall be payable in all cases wherein recourse is had to the remedies provided by this Act.

This Act to be read in conjunction with "The Court of Appeal Act, 1862," &c.

21. This Act shall be read in conjunction with "The Court of Appeal Act, 1862," and "The Court of Appeal Act Amendment Act, 1870," and the remedies hereby provided are to be regarded as supplementary to and cumulative upon those provided by the said two mentioned Acts.

SCHEDULE.

FEES PAYABLE UNDER THE FOREGOING ACT.

	£	s.	d.
For lodging notice of appeal with the Registrar or Clerk of Court	0	10	0
For settling a case by the Judge in case of difference between the parties	2	0	0
For stating a case for the opinion of the Court of Appeal when reserved by the Judge with the consent of the parties	2	0	0
For the judgment of the Court of Appeal in all cases heard and determined under this Act	5	0	0

No. 2.

The Hon. W. GISBORNE to His Honor Sir G. A. ARNEY.

(No. 354, L. & J., 72–1,206.) Colonial Secretary's Office, (Judicial Branch), Wellington, 8th May, 1872.

SIR,—

I have the honor to enclose a copy of a letter dated the 22nd ultimo, from Mr. James Macassey, and of a draft Bill to amend "The Court of Appeal Act, 1862," enclosed therein.

The Government will be glad to learn the views of your Honor on the principle of the Bill, and on the Bill itself.

I have, &c.,

His Honor Sir G. A. Arney, Chief Justice, Wellington. W. GISBORNE.

Similar letter to the above sent to Judges Johnston, Gresson, Richmond, and Chapman.

No. 3.

The Hon. W. GISBORNE to the PRESIDENT of the LAW SOCIETY, Wellington.

(No. 355, L. & J., 72–1,206.) Colonial Secretary's Office, (Judicial Branch), Wellington, 8th May, 1872.

SIR,—

I have the honor to enclose a copy of a letter dated the 22nd ultimo, from Mr. James Macassey, and of a draft Bill to amend "The Court of Appeal Act, 1862," enclosed therein.

The Government will be glad to learn the views of the Law Society on the principle of the Bill, and on the Bill itself.

I have, &c.,

The President of the Law Society, Wellington. W. GISBORNE.

No. 4.

His Honor Sir G. A. ARNEY to the Hon. W. GISBORNE.

SIR,— Judges' Chambers, Wellington, 17th June, 1872.

I have the honor to inform you that the Judges of the Supreme Court have conferred together during the sittings of the Court of Appeal respecting the Bill proposed by Mr. Macassey, with regard to which you had previously invited them separately to express their opinion.

I have the honor to enclose a memorandum agreed to by all the Judges, and to state that if the Government should desire any further suggestions on the subject, Mr. Justice Johnston, being acquainted with their views, will be able and happy to communicate with you during the Session of the General Assembly.

I have, &c.,

The Hon. the Colonial Secretary (Judicial Branch). GEORGE ALFRED ARNEY, C.J.

Enclosure in No. 4.

MEMORANDUM respecting proposed Court of Appeal Bill.

1. The Judges of the Supreme Court having been severally invited to express their views respecting a Bill proposed to be introduced to the General Assembly during its approaching Session, with a view to simplify and render less expensive the proceedings of the Court of Appeal, take advantage of their meeting at the sitting of the Court of Appeal now being held at Wellington, to express their united opinion upon the subject in question.

2. They are fully aware of the obstacles which the paucity and irregularity of the means of conveyance from one centre of population to another throughout the Colony present to the usefulness of the Court of Appeal, although they have to remark that the profession and the suitors in the Supreme Court have but very rarely invited the Judges to reserve cases to be determined by the Court of Appeal, without argument of counsel, under the provisions of the 33rd section of "The Court of Appeal Act, 1862."

3. It might perhaps be advisable to give further facilities for this mode of appealing to the Court, and to enable a Judge of the Supreme Court to reserve a case after argument, and either before or after judgment in the Court below, upon the request of either party, to be determined by the Court of Appeal, without the presence of counsel, unless both parties should agree to be heard by counsel. If the parties should not agree to be heard by counsel, it might be provided that the case should contain a brief statement of the points relied upon on either side.

4. The Judges are convinced that a measure such as that proposed by the Bill, whereby the opinion of each Judge would be taken on a case stated by parties without any oral argument, or any consultation among the Judges, would be found impracticable, unsatisfactory, and mischievous.

5. The opinion of the Judges so taken would be of comparatively little judicial value, and could not serve as precedents for the declaring, interpreting, and applying of the law, which is one of the highest and most important functions of a supreme tribunal.

6. The Judges believe that the practical results of such a mode of proceeding would not give satisfaction to litigants. They are also confident that in the large proportion of cases, where the judgment would be subject to terms and conditions, the ascertainment of the net result of the opinions of five Judges so taken would be almost impossible, or at least so difficult as to create fresh disputes and protracted litigation.

7. They do not believe that the expense to the parties of the mode of proceeding proposed by the Bill would be materially less than that of such reserved cases as above mentioned.

8. With regard to the avoiding of delay, the Judges must point out how nugatory it would be for the Legislature to pass such an enactment as the proposed clause No. 8, as it might be physically impossible for them to comply with it, for the sittings of the Circuit Courts and of the Court of Appeal must from time to time engross their attention for considerable continuous periods. Moreover, during their judicial attendance at places not possessing a Law Library they could not with any safety or confidence discharge the duties imposed upon them.

9. If the Court of Appeal sits twice a year with at least three Judges present, it seems to us that by cases reserved for its consideration, as above-mentioned, litigants may procure quite as cheaply (and it would appear without more delay than the requirements of the proposed scheme would involve) regular judicial determinations more satisfactory to themselves, and of far more importance to the public, without such a radical innovation as would seriously affect the status of the Supreme Court and its Judges, and derogate from its proper character and its real utility, without bestowing any substantial boon upon the community.

Wellington, 17th June, 1872.

No. 5.

The Hon. W. GISBORNE to the ATTORNEY-GENERAL.

MR. PRENDERGAST,— 19th June, 1872.

Is the Law Society going to express an opinion on this subject? Would you read and remark on this, and then let Mr. Fountain have it for the Hon. Mr. Fox.

W. GISBORNE.

No. 6.

The ATTORNEY-GENERAL to the Hon. W. GISBORNE.

To the Hon. the Colonial Secretary. 20th June, 1872.

No opportunity has occurred of considering the matter formally, but all the members of the profession at the Court of Appeal to whom I spoke, and I believe I spoke to all, hold the same opinion, that the proposal ought not to be adopted.

J. PRENDERGAST.

No. 7.

MEMORANDUM on Mr. MACCASSEY'S proposed Bill to introduce a new method of Appeal to the Five Judges. (Transmitted in a semi-official letter to the Hon. W. Gisborne by His Honor Mr. Justice Chapman, with whose permission it is published.)

THE principal objections to the proposed method of submitting a case to the Judges, not collectively when assembled together (for that is already provided for) but individually, and then taking the decision of the majority as the final decision, appear to me to be the following:—

1. The loss of the advantage of that complete and thorough judicial investigation which arises when each party, by his skilled counsel, presents the strongest points of his own client's case and

exposes the weak points of that of his adversary. In doing this, decided cases are not only cited and distinguished, but their relative strength as authority discussed. No Judge of any experience will undervalue the assistance capable of being derived from counsel of average ability. They bring out in relief the salient points of the case. They ransack decided authorities for decisions, either closely, or remotely and indirectly applicable to their respective cases. Judges, in the course of the arguments, suggest difficulties, and points which they have to meet, and perhaps cite cases which they must distinguish or reconcile. In this way difficulties are often sifted down to few propositions, or to perhaps one single proposition upon which the decision will ultimately turn; and cases which at first sight bristle with unsettled points, are often reduced to a few comparatively narrow questions upon the decision, or it may be the application of which to the case under discussion, will finally rest. It is quite impossible to over-estimate the value of this exhaustive process. It makes all the difference between an opinion by an eminent counsel, and the decision of an equally able Judge. Nay, more, its value is so great, and is so generally acknowledged, that it imparts a value to the judicial decision, not possessed by the mere opinion of counsel, though the counsel be of larger experience, and greater learning and ability than the Judge. It is submitted that this is an advantage which can scarcely be exaggerated, and which it is submitted ought not to be lightly given up.

2. Besides this, the parties litigant would lose the advantage of the private conference and arguments of the Judges among themselves. Cases are frequently brought before the Judges of the Supreme Court, in their several districts, in which the law applicable to the facts admits of little or no doubt. These are not the cases that are sent to the Court of Appeal. Cases likely to be appealed usually present more or less of difficulty, coupled perhaps with a large stake, which renders it not only desirable but worth while to invoke the decision of a higher tribunal. When these cases have been argued, and the result of the argument has been to eliminate the doubtful points, the Judges often decide at once, unless from the importance of the case, or the magnitude of the stake, a carefully prepared judgment is deemed necessary. In such cases the deliberation of the Judges is merely as to the structure of the judgment. In every case of magnitude not only are the parties entitled to the best reasons which the Judges are able to give for their judgment, but such is the only method of rendering the judgment of any value as an authority in like cases, should any such arise. But the conference of the Judges is of far greater importance when at the close of the case they either differ or one or more of the number has not formed a very decided opinion. Then comes the value of what may be called a second argument, that is, the discussion of the Judges among themselves. Where, under the present Act, cases are submitted to the Judges to be decided "without argument," they are really decided after an argument more or less exhaustive. They have not the arguments of counsel, but they are not decided without the arguments of the Judges, and, if the nature of the case requires it, Judges will often put to each other, or suggest to their own minds, how the case can best be put from the defendant's point of view, and how, from that of the plaintiff. I can affirm, from my own experience of the practical working of the Court of Appeal, that cases not argued by counsel, for instance Crown cases reserved, are most carefully and exhaustively argued by the Judges. Whatever advantage is likely to be derived from this judicial process of discussion, will be lost, but the proposed method of collecting the individual opinions of the Judges, not only throws away this advantage, but also that which has been stated as the first objection.

3. Two questions arise upon the proposed Bill, namely, the saving of expense, and the saving of time. As to the first, the possibility of saving may be considered under two heads; (1), the saving of expense to the Government representing the public collectively; and (2), the saving of expense to suitors. Under the first head there cannot be any saving. The Court of Appeal must meet, as heretofore, to dispose of cases set down and argued as at present. If some such proportion of the present cost of the Court be saved by three only of the Judges meeting half-yearly, that saving has no connection with the proposed Bill. But there will be some such saving to suitors by the usual fees to counsel, but not to the extent which may possibly be anticipated. If the counsel be sent from the locality of the Court below, as has been usually done in appeals from Christchurch, and to a less extent from Dunedin, the expense is no doubt large; but it is always within the power of suitors to retain Wellington counsels to argue such cases; and then the items of counsels' fees add very little to the cost. The expense of preparing cases for the Judges, and all other proceedings, will be nearly the same under the new as under the old system. Nor will much time be saved. At present the Court meets twice a year, in May and November. The preliminary steps must be taken before the written or printed case is sent up to the Court at Wellington; so also these preliminary steps must be taken before the cases are sent by post to the Judges.

But cases occurring between the rising of one meeting of the Court and its next meeting—a period of five months—may, in some cases, be somewhat expedited, but even this will be reduced to a very moderate advantage. On leaving Wellington, the Judges have generally to hurry to their respective circuits, and within the five months' interval just mentioned, two and sometimes three circuits occur. During the criminal and civil sittings, and the sittings in Banco which follow, the Judge would have no time to consider the cases, and in very few cases would the proposed two months be enough, unless the Bill should contain a clause postponing all other business of the Supreme Court, civil and criminal, until the Judge had written his opinion on the case. If the time for giving the opinion be enlarged to three months, the advantage hoped for from rapidity of decision would be in a great measure lost. My own impression is, that it would often be impossible for a Judge to return the so-called judgment "with reasons" within the two months, unless all other judicial business were laid aside. Avoid this evil by enlarging the time from two to three months, and very little time would be gained.

4. Another advantage which would be lost by the proposed method of decision by the collection of individual opinions of the Judges, without argument and without judicial deliberation and discussion, would be that the cases so decided would have very little authority as precedents. Each opinion would have less weight than the decision of a single Judge pronounced after an exhaustive argument by counsel. In the case of a concurrence of opinion, the decision would have some weight, but it would be much less than a judgment under the present system. At present the cases sent up to the Court of Appeal are very fully and exhaustively argued, and are then carefully considered by the Judges; and the

judgments when reported become of considerable value as guides for the future. This is really no inconsiderable use of the Court of Appeal; and when the expense of the tribunal is thought of this compensation for that expense ought not to be lost sight of.

5. By "The Court of Appeal Act, 1862," parties are allowed to state a case for the decision of the Court of Appeal, without argument. It is somewhat significant that although the deliberation and discussion of the Judges is not lost, this privilege to suitors is very rarely resorted to. It shows the value which is attached to an exhaustive argument by counsel. This provision might be improved so as to secure something like argument by counsel, and this would mitigate the first objection, but it would only amount to a mitigation. It would have the advantage over the method proposed by the Bill, by securing the deliberation of the Judges, and preserving the value of the decisions as authority. The suggestion is this, that in case of a question reserved to be decided without argument, there should be transmitted, with the special case, a certified report of the judgment of the Court below, together with a report of the arguments of counsel in the Court below, with any additions which might occur to them, and a note of the cases upon which each party relies. This would have something of the value of an argument, though inferior to an exhaustive argument *vivâ voce*.

The above are the only observations which occur to me at present.

H. S. CHAPMAN.

I wish to add, in addition to my note on objection 1, that so great was formerly the importance attached to the argument of counsel, that all important cases were argued twice. In one case (I think in Febrigas *v.* Mostyn, but of this I am not quite certain) the Chief Justice said: "The case has been extremely well argued—let it stand over for another argument;" or it may have been in Campbell *v.* Hall, 20 State Trials, and Cowper's Reports.