1874.

NEW ZEALAND.

ON PROPOSED LAW REFORMS.

(CORRESPONDENCE BETWEEN THE GOVERNMENT AND THEIR HONORS SIR G. A. ARNEY, CHIEF JUSTICE, AND MR. JUSTICE JOHNSTON, RELATIVE TO A PROPOSED CONSOLIDATION OF THE STATUTE LAW OF NEW ZEALAND, AND AN AMELIORATION OF THE PRACTICE AND PROCEDURE OF THE SUPREME COURT.)

Presented to both Houses of the General Assembly by command of His Excellency.

No. 1.

His Honor the CHIEF JUSTICE to the Hon. the PREMIER.

(No. 61B.)

SIR,— Auckland, 1st December, 1873.

In compliance with the wish which you were pleased to express during our recent conversation at Wellington, I brought to the notice of the Judges of the Supreme Court, who met together at the late sitting of the Court of Appeal, those matters connected with what is termed Law Reform, upon which you desired that the Judges should be consulted.

The more prominent of those subjects were the consolidation of the Statute Law of New Zealand, and the amelioration of the practice and procedure of the Supreme Court, with a view to diminish delay and expense to the suitors.

The Judges are ready and anxious to lend to the Government all the assistance which is in their power to afford, in order to facilitate these or any other improvements in the law, although the extent to which any one Judge may be able to assist therein must of course depend upon the degree to which his time may be engrossed by strictly judicial work in his particular Court, or Chambers. His Honor Mr. Justice Johnston has written a full memorandum, expressing his views on the different subjects, which he will forward direct to the Government. His Honor Mr. Justice Gresson did not attend the recent sittings of the Court of Appeal, and could not therefore be consulted; and it was not found practicable for the Judges to pledge themselves respectively to the work which they could either separately or collectively undertake, until they should be informed more specifically what are the views and purposes of the Government. This is especially requisite with reference to the work of consolidation of the Statutes. The consolidation of the entire statute law of New Zealand might prove a more extensive undertaking than the Judges might be able to accomplish, although they might be able, by distributing certain selected classes of Statutes among themselves having reference to particular subjects, each to prepare a Consolidated Act upon one or more particular subject-matter or matters. His Honor Mr. Justice Johnston has already, in his edition of the *Regulæ Generales*, done much of the work preparatory to a consolidation of the Statutes having reference to the constitution, practice, and procedure of the Supreme Court and Court of Appeal; and I believe that learned Judge would not be unwilling to complete the consolidation of that class of enactments. In reference, however, to consolidation generally, I believe the Judges are agreed that upon some subjects consolidation would be at present either needless or premature. In certain classes of Statutes which more directly concern the administration of justice, the General Assembly has already done much, *e.g.* by the Justices of the Peace Acts and those relating to the Resident Magistrates' Courts, as also in the Native Land Act and the Prisons Act of the last Session. In regard to the Bankruptcy Acts, a general impression has for some time prevailed that the Government contemplated the introduction of a new scheme of Bankruptcy Law, to be founded upon more recent Imperial legislation; and if this be so, the consolidation of the existing New Zealand Statutes on this branch of law would involve a waste of time and money. The same may be said of any attempt to consolidate immediately the Statutes connected with another subject, viz. the Law of Evidence. We all know, speaking generally, that we take most of our law from England; while the judicial decisions of the Courts at Westminster upon the interpretation and application of that law serve as authorities for the guidance of the people and Courts of the colony. To consolidate even the statute law of Evidence would prove a task of great extent and complexity if it reached beyond the Statutes of New Zealand simply, and if limited to the latter would be of small service. But as there is every reason to anticipate, that a general Act of the kind may be introduced at the next Session of the Imperial Parliament, you will probably agree that we had better wait upon its passing. And, generally, I think the Judges will be able to see their way better in this matter of consolidation when they know to what particular classes of Statutes their attention is more especially invited.

As to the simplifying and cheapening the procedure of the Supreme Court, I believe the Judges are agreed that, before we attempt a sweeping change in our own *Regulæ Generales*, it would be desirable that we should see the working of the system which is being adopted in the High Court of Judicature in England, a system framed with the avowed object of effecting that fusion of law and equity towards which New Zealand, however tentatively and with but partial effect, yet in fact has led the way. We should be glad also to know and understand what is the character and efficacy of the change which it has been said has been recently enacted in Victoria. Referring to the Supreme Court of Judicature Act of England, there probably will be found no difficulty in adopting meanwhile some of the provisions and Rules of Procedure under that Act, and the Schedule thereto. The system of compulsory reference to official referees, and the calling in the aid of assessors in causes that involve mercantile or scientific questions of either novelty or difficulty,—these provisions may possibly be found applicable in heavy and important cases, where large interests are at stake; but this only provided the colony is prepared to pay for the aid of properly qualified referees and assessors, either by fees to be imposed on the suitors, or from the public revenue. Of course the system is less easy of application where the Supreme Court is located in a series of small communities; and I am bound to admit that I found practical difficulties in the way of employing mercantile assessors under "The Debtors and Creditors Act, 1862," which, however, may not be found insuperable in causes raised *inter partes*. Some, also, of the Rules of Procedure which are scheduled to the Imperial Act may perhaps be found available in this Supreme Court; *e.g.* the special indorsement on the writ of summons in lieu of a formal declaration (perhaps), unless and until the defendant shall himself demand a formal declaration of the plaintiff's cause of action,—the enabling a Judge to dispense with all but necessary parties to the act in in cases where he does not deem their joinder to be indispensable, as also to compel the parties to such fair disclosures as may avoid the multiplication of issues; such additional rules of practice as may enable a defendant to avail himself in the same action of an equitable counter-claim connected with the plaintiff's cause of action as effectually as if he were himself plaintiff in a cross action for specific relief. Perhaps, before the next Session of the General Assembly, the Judges may be in a position to supplement the present *Regulæ Generales* with rules to provide for such of these objects, and others of a kindred nature, as may be deemed best, and as may be within their powers, and may also report to the Government upon such improvements as may require special legislation. But it must be remembered that we see at present but the skeleton of that great body of practice by which the High Court of Judicature will seek to work out its scheme of procedure; while it is not unreasonable for us to hold that if we wait until that scheme is in operation before we attempt any sweeping changes in our own procedure, we may find a safe and useful guide in the wisdom of the British Parliament and Judicature itself.

Meanwhile, it must not be forgotten that the means are already provided, both by Statute and by Rules of Procedure, for a more speedy and less extensive determination of litigated rights, if the litigant spirit of parties would allow themselves to adopt them, under the present scheme of procedure in the Supreme Court. And it may possibly be found practicable, by giving fresh powers to the Judge, to induce or compel parties in some cases to apply those means for raising and determining issues, whether of law or of fact, as the case may be.

Further, if it should be deemed advisable that the Judges in the Supreme Court should try certain classes of actions under the practice now established in the District Courts, I need not assure you that it will be our duty to give effect to the will of the Legislature, as may be declared for that purpose.

I am, however, fully persuaded that in many suits, especially for equitable relief, that practice will be found ineffectual; and that, whether the action be commenced by way of plaint and summons or by writ and declaration, cases will frequently occur in which the Court will be unable to ascertain and determine the rights of different parties to an action, so as to do complete justice between them, without calling in aid a practice and procedure of a character like to, although it may be an improvement upon that of which the skeleton is traced in those rules of the Supreme Court practice which immediately concern equitable relief; and I believe the Judges will agree that they find the Common Law rules of pleading and practice materially insufficient for the purposes of equitable relief.

It was found impossible for the Judges to debate and to arrive at any common conclusion upon the above complicated subjects at their recent sitting of the Court of Appeal, engaged as they were in the actual business of the Court up to within two or three hours of the time when two of their number were obliged to hasten, myself included, to their judicial districts. But we are anxious to assist the Government to the utmost of our power in the work of law improvement. The subjects themselves have, I presume, been under the special consideration of the Minister of Justice; and perhaps that Minister may be willing to inform the Judges somewhat more specifically what objects the Government have immediately in view, and what are the means, generally, by which it is suggested that those objects may be attained.

You were good enough to mention also the matter of serving notices and processes by means of the electric telegraph. This is matter of detail upon which I should prefer to consult one or two experienced members of the profession upon the difficulties which they encounter, before I presumed to offer any suggestions thereon.

I have, &c.,
GEORGE ALFRED ARNEY,
Chief Justice.

The Hon. the Premier, Wellington.

No. 2.

His Honor Mr. Justice JOHNSTON to the Hon. the COLONIAL SECRETARY.

(No. 153.)

SIR,— Judges' Chambers, Wellington, 4th December, 1873.

I have the honor to inform you that I have just received a communication from His Honor the

Chief Justice, in which he tells me that he has addressed a letter to the Hon. the Premier, respecting certain subjects connected with legal reforms, on which, at the Premier's suggestion, he had conferred with the Judges present at the late sitting of the Court of Appeal; and that he has intimated therein that I had prepared a memorandum of some length on those subjects, which I would forward to the Government direct.

I have now the honor of enclosing the memorandum in question, and of intimating to the Government that if they approve of my suggestions, I shall be willing to undertake, as an initiatory measure, the preparation of a Bill for a Statute consolidating and amending the Law relating to the constitution, jurisdiction, and procedure of the Supreme Courts (as stated in the Memorandum), on the principles and in the manner indicated in that document.

I have, &c.,

The Hon. the Colonial Secretary. ALEXANDER J. JOHNSTON.

Enclosure in No. 2.

MEMORANDUM on the CONSOLIDATION of the STATUTE LAW of the COLONY and the AMENDMENT of the PROCEDURE of the SUPREME COURT.

REFERRING to His Honor the Chief Justice's report of a conversation with the Hon. Mr. Vogel on the interesting subjects of the consolidation of the Statute Law of the Colony, and the improvement of the procedure of the Supreme Court, so as to render it more accessible, and its action less dilatory and expensive, I think it desirable to digest on paper a few remarks and suggestions with the prospect of further discussion.

I feel as anxious as I know the rest of the Judges to be, to offer my best assistance to the Government, the Legislature, and the community, in any sober, intelligent, well-directed attempts to improve the law and its administration; and I should be well pleased if any efforts of mine connected with those branches of law reform to which I have had occasion for many years to pay particular attention could sensibly contribute to the attainment of those important objects.

I assume that the real desire and intention of the Government is not to make political capital out of a hasty, crude, ill-digested series of pretended reforms, projected for the purpose of conciliating popular favour—but to grapple with those difficulties and objections and deficiencies which unquestionably do exist in our statute law and procedure, and which are within the reach of present remedy.

Now, it seems to me that the first initiative step to be taken towards reformatory legislation is to discover what real grievances and mischiefs exist, what is their extent, what are their causes, and whether or not it is practicable at present to remove them.

It is never to be forgotten that peoples with free institutions are always prone to grumble and find fault with the practical operation and effects of them, and that it is not unusual to attribute to laws and regulations and systems, evils and mischiefs which would be more properly assigned to the ignorance, prejudice, negligence, and unreasonableness of individuals and classes. A greater and more common delusion than the possibility of establishing among a people advanced in civilization, a simple, plain, easily intelligible body of law and system of procedure, which "Every one who runs can read" without the assistance of expert students and practitioners, has never existed in the history of popular errors. It is hardly credible how many educated men there are who believe that the Pandects of Justinian and the five codes of Napoleon I., and other modern codes, contain bodies of law self-interpreting, and sufficiently plain and easy of comprehension to enable the mass of the people to know their rights and liabilities, and to conduct their legal affairs, without professional assistance.

The works of Tribonian and his sixteen coadjutors—for which Justinian gets credit—though hasty and ill-arranged—were efforts of the highest professional skill, moulding the materials supplied by the experience and learning of thirteen centuries, made operative by absolute despotic legislative power, and intended not for the direct instruction of the people, but specially for the education of experts, became the law of the Empire only on the eve of its dissolution. The comments upon that body of law by the jurisprudents of those modern nations which have based their legal systems upon it, far exceed in bulk the limits of an ordinary English law library: and before half a century had elapsed after the promulgation of the codes of Napoleon—which even then did not by any means contain the whole of the law of France—they were overrun with comments; and the new laws passed during that period contained in the "Bulletin des lois" had substantially affected their text, and had gathered to a bulk bidding fair to rival that of the English Statute Book.

Indeed, it seems probable that the very best modern specimens of codification of particular subjects, such as some of the recent Indian codes, although greatly superior, in respect of arrangement, simplicity, and clearness of expression, to the average statute law of England, will be found to be little more easy of comprehension by the general mass of the community than ordinary text-books now in use amongst lawyers.

The utopian ideal of a code intelligible without assistance by the whole body of the people must be dismissed as impracticable; and it is an open question whether a complete codification of the whole *Common* and *Statute* Law is or is not desirable, if practicable.

It is very clear, however, that the colony cannot expect to be able, under the most favourable circumstances, to undertake so gigantic a work for a very considerable period; and it would seem to be a great waste of its energies and resources, if, with its present scanty appliances, it were to embark upon portions of this enormous task which will probably be undertaken and carried out in England in respect to some important branches of law within a comparatively short period. There is one important branch of law peculiarly suitable for codification, namely, the Law of Evidence, which the English Government has already undertaken to consolidate, after the example of Mr. Stephen's Indian Act;* and it seems probable that some branches of the criminal law, both common and statute law,

* NOTE.—I find that the Attorney-General, at the close of the recent Session of Parliament, withdrew this measure for want of time, announcing that, by the liberality of the Treasury, he had been enabled to employ Mr. Fitzjames Stephen in its preparation.

will further be made the subjects of experimental codification by the English Legislature. There will probably be little difficulty in adapting such codes to the circumstances of New Zealand.

But with regard to the statute laws of the colony itself, there seems to be no reason why immediate steps should not be taken to consolidate and amend them.

Before proceeding to consider the mode in which this process ought to be conducted, I would call attention to a matter of very considerable importance and difficulty, which will require the attention of the Legislature. As the whole of the statute law of England in force on the 14th January, 1840, so far as it is applicable, is law in the Colony,—and as the British Parliament has, since that date, and especially in later years, expunged from its Statute Book a vast proportion of those laws, and has consolidated many of them,—it would seem most unwise if the Colonial Legislature were not to profit by the great reformatory labours of the mother country, and get rid of those statutory *incubi* which England has thrown off, adopting at the same time such of the consolidated Acts as may be suited to our local circumstances. It might be supposed that the former of these operations would easily be effected by the wholesale adoption of the Imperial Law Revision Acts; but a little reflection will suffice to prove that minute examination and scrutiny would be necessary, in order to justify the recommendation to the Legislature of the colony of such an apparently simple proceeding. [It is not desirable that I should make a digression at present to justify this remark.]

Assuming that consolidation of the colonial statutes is necessary, we have to consider what portions require it, what is the order in which the work should be done, and what particular method it is desirable to adopt.

Now, in the first place, there are several important heads of law with respect to which the work of consolidation has already been effectually performed, as, for instance, the "Law of the Justices of the Peace and Resident Magistrates" by the Acts of 1866, 1867, and 1868, and others. And it is to be remarked here, that it would be ridiculous and mischievous to reconstruct at once such Acts as these, merely for the purpose of introducing a few amendments made since the consolidation, although in publishing a new edition of the Statutes it might be desirable to group the amendment Acts, and to afford reciprocal references.

The best Consolidation Acts which can be produced will certainly be subject to amendments from time to time, and most probably soon after their first enactment. Whether it might not be desirable to adopt hereafter the system of never amending an Act at all, but instead thereof of repealing it, and substituting a new Act containing the old Act as amended, is a matter worthy of consideration.* In cases of comparatively small amendments of long statutes, the mode of amending by enacting that certain words shall be struck out, and certain others inserted, is a convenient one.

I come now to the grave question of the mode of consolidation to be adopted.

Mere consolidation, it may almost be assumed, would be entirely insufficient for the desired purposes. By "mere consolidation," I mean the collection and collocation of all existing statutory provisions upon a given subject, according to the subdivision and arrangements of which it may be capable. To construct this species of tesselated composition, representing the whole existing body of the written law on a particular subject, which the Legislature could be advised and might choose to declare to be the whole law, would be found in some cases impossible, and in few practicable; and it could never be confidently affirmed that the change of place and context effected in the language of the various enactments would not affect its interpretation, while the very collocation of provisions in *pari materia* would often manifest or suggest inconsistency, and create uncertainty.

It would appear, therefore, that to consolidate written laws with any advantage, it would be requisite to permit such *alteration of language* as would be necessary, in order to express in the clearest manner the ultimate will of the Legislature on each particular point. Indeed, the improvement of the expression of the laws would seem to be the most material object of a reformatory consolidation.

But the adoption of this improved expression by the Legislature implies more than mere assent to a legislative declaration of existing law, and in this respect the right of each branch, and each member of the Legislature, to oppose any proposed alteration, may be exercised so as to make comprehensive and extensive consolidation with amendment next to impossible.

It is, therefore, a matter of the highest importance that measures of this sort, proposed to the Legislature, should have previously been examined with strict scrutiny, and approved by persons or bodies whose opinions are likely to have most weight with the members of the Legislature, in respect of competency, independence, and freedom from party motives or other prejudicing influences.

If, therefore, a very careful preparation of such measures be desirable, in order to insure amendment of expression along with consolidation of enactment, it would seem that the opportunity thus afforded of also suggesting *substantial amendments* in the law should not be lost sight of. And it would be very easy so to arrange the drafts and reports on a proposed measure, that the existing law, the improved expression of it, and the substantial amendments or additions suggested, should be at once discernible by the Legislature for whose approval the ultimate Consolidating Bill should be submitted before its introduction.

Before proceeding to a practical suggestion of the manner in which a system of consolidation with amendment might be carried out, I should like to say a few words upon the question of the improvement of legal language, or the mode of expressing the legislative will.

I have reasons for knowing that there is a crude notion abroad in the colonies, and not uncommon at home, that law might be made more clear and intelligible by using popular language only, and in what is called popular sense.

This, I believe, to be a dangerous error, inasmuch as the "popular" sense of a word is generally the most vague and uncertain, and the language of the law ought to be as definite and precise, and incapable of misinterpretation, as possible; and it is to be noticed that our English language, copious as

* NOTE.—In passing, I would suggest that if such a system should be adopted, it would be unwise to alter the numeration of the sections; but when a new section is substituted for an old one, it should have some mark attached to the number; and when a section is added, it should be as a rider—*e.g.*, "Sec. 2 (*a*)"—in the appropriate place. Practical lawyers will at once understand the force of this suggestion.

it is, being derived from many sources, is singularly deficient in that precision and definitiveness which characterise other languages, both ancient and modern; and that, in popular use, the real distinction between words erroneously called "synonyms" is constantly ignored. It cannot be denied that our own language is not well adapted for legal expression. There can be no doubt, however, that in respect of expression and composition, the language of a great portion of the Imperial and Colonial Statute Books is a real source of "*opprobium*" to our civilization. The needless tautology, involution, complexity, and prolixity in the structure of sentences in many of our Acts, are fair subjects for popular invective and for critical denunciation.

But it is easier to criticise than to construct, easier to see faults than to find remedies for them; and it will be no light task for the Legislature of an age more enlightened and more free from the burnt-in prejudices of old times than ours, to discover a mode of investing the language of the people with such definite and specific meanings, when used in the laws of the country, as shall convey to the general body of the community absolutely precise information capable of application by themselves to their own rights and duties.

It is no doubt a most desirable object, as Bentham as indicated (vol. iii. p. 207), that the style of a law should be such, that at every moment in which it ought to influence the conduct of a citizen, he may have presented to his mind an exact idea of the will of the Legislature. And since it may be true, as the same learned writer says, that "life, liberty, property, honour, everything which is dear to us, depends upon the choice of words," he may well add, that "the words of the law ought to be weighed like diamonds."

In his "practical directions" for a true style in laws, intended to insure force, harmony, and nobleness of expression, he gives four practical directions, to which it may be well to allude in passing. They are—1st. To avoid, as far as possible, putting into the laws other legal terms than those which are familiar to the people. 2nd. When it is necessary to employ technical terms, to define them in the body of the laws 3rd. To use for the terms of such definitions common and known words, or at least to provide that a chain of definitions, more or less known, should always finish by a link formed of such words. 4th. That the same ideas should be conveyed by the same words, and that none but a single and the same word should be employed for expressing a single and the same idea.*

Whether, therefore, ordinary words or terms of art are to be used, it is necessary that their sense should be definitely ascertained. Mr. Livingstone, in preparing the Louisiana Penal Code—one of the most able and successful attempts which have been made at codification of an important branch of law—adopted the system of annexing a book of definitions, and enacting that words occuring in the code, and printed in a specified type, should be interpreted according to the definition in that book. And it would appear desirable that in consolidating our statute law, the fullest advantage should be taken of the General Interpretation Act, and that special interpretation clauses, where necessary, should be introduced into the Consolidating Act, framed with a due regard to ascertained principles.

I come now to the consideration of the question how the work of consolidation and amendment can be most effectually carried out.

I think, in the end, it will be found most convenient, if not necessary, to establish a permanent Commission (to the constitution of which I shall presently advert), for the purpose of carrying out the primary consolidation desired, and for keeping up a system tending to preserve uniformity and facility of access in new laws to be incorporated with or added to the existing Statute Book in each successive Session of the Legislature.

I am of opinion, however, that it would be wise, before the establishment of such an institution, to make some tentative experiments, by which the best practical mode of carrying out principles previously determined upon could be tested.

Supposing a particular branch or head of law to be selected as especially and most urgently requiring legislation, the first operations of search, collation, collocation, and fusion of re-arrangement and amendment of expression, ought to be intrusted to one mind.

This work, as Mr. Fitzjames Stephen has said in an essay on the subject, is a work of art, and must be done by one person, as much as the painting of a picture. The draftsman, however, would have to report on the materials he had used, the way he had dealt with them, and the alteration by suppression, addition, or amendment of language which he suggested, and would further make suggestions as to amendments in substance, expressed in language suitable for introduction into the Act.

The draft, with the reports, ought then to be submitted to at least two separate competent persons for minute examination and criticism, and to be returned to the draftsman with notes and reports. The draftsman should then introduce such additions, or make such alterations, suggested by the examiners, as he assents to, or reports afresh; and in the end the draft, with previous reports, should be submitted to the Government and its legal advisers, and a Bill framed thereon (either with or without the previous reports) should be circulated among the members of the Legislature, and those classes of the community which are most interested in the subject, before it should be finally introduced.

Facilities should be given for conference between the draftsman and examiners, and between both and the law officers of the Government.

When the time should have come for appointing a permanent Commission, it would seem that it ought to include (say) two Ministers, all the Judges, and the law officers of the colony, and (say) three competent professional draftsmen—two, probably, being practising lawyers—with necessary clerical assistance. By proper subdivision of subjects and selection of Committees out of the members of the Commission, the work might be effectually done in a moderate time. I would, however, recommend an initiatory experiment, such as I shall presently propose, and in which I shall be glad to offer personal assistance.

Before I proceed to that particular matter, I must say a few words upon the second proposed object of Law Reform, namely, the simplification of procedure, and the reduction of the cost, and increase in the despatch of the business of the Supreme Court.

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* NOTE.—Montesquieu says that the style of a law ought to be concise, simple, and direct, and that its words should awake the same ideas in the minds of all men.

I am well aware that on this subject a great deal of misconception and mistake exists among the public; that exaggerations have been resorted to, tending to bring the Court into popular discredit; and that the public themselves refuse or fail to take advantage of provisions of the law intended to obviate these very mischiefs.

I would especially call attention to the fact that the minor jury system, introduced pursuant to the recommendation of the Judges of the Supreme Court into the "The Supreme Court Amendment Act, 1862," has been for eleven years virtually a dead letter—not, as far as I know, on account of any fault or imperfection discovered in it, but simply because the public and the profession have not chosen to avail themselves of it; and yet under that system a great variety of cases can be tried at comparatively small cost and without pleadings, either by a jury of six, or by the Judge of the Supreme Court himself.

That system, I emphatically declare, has never had a trial. I have no doubt that if it had been tried it would have been found at all events to some extent successful, and would to some extent have obviated the objections which are now indiscriminately urged against the efficiency of the Court; and by this time the extent of the jurisdiction under it would have probably been increased, and the proceedings still further simplified and cheapened. Indeed it seems to me that one of the best reforms which could now be made would be by extending that system, and making it imperative in a large number of cases.

The only real grievances that I am acquainted with, regarding the procedure of the Court, have respect to (1) costs, (2) the want of professional skill in technical pleading, and (3) the insufficiency of our own rules and machinery in respect of equitable relief.

With regard to the suggested enormity of costs charged to litigants, I have had, till very recently, scarcely any personal information. I have heard of very extravagant bills, but I have scarcely ever had any specific complaint that unlawful charges were made; and I understand that the taxation in all parts of the colony is conducted on the same principles as in England, subject to a scale settled some years since as a reasonable one. But if there are real grievances on this subject, as I suppose there must be, I think it is most desirable that they should be inquired into and a remedy provided. For this purpose it would seem desirable that the public should be invited to give information, so that the minds of the Judges should be specifically directed to the particular mischiefs to be remedied by rules or legislation. There is no doubt that unnecessary costs are often incurred through laxity and rashness in pleading, entailing applications in Chambers for amendments, and the striking out of pleadings as embarrassing, and so forth; and I cannot help thinking that it would be desirable that the Judges should make some rules whereby the costs of such proceedings, when clearly attributable to the negligence or unskilfulness of practitioners, should be made payable by them, and not by their clients.

One of the greatest causes of unnecessary costs and delay, within my experience, arises from the reluctance of practitioners to demur to pleadings obviously insufficient in law. The heavy costs of preparing for trial, of the trial itself, and of proceedings after it, possibly including a new trial, all proving futile in the end, are not unfrequently incurred in cases where an early discussion of the legal merits on demurrer would have settled the whole matter at a comparatively trifling expense.

It seems to me that it might be desirable to give the Judges larger powers than they have, to force parties to raise the real questions of law involved in a dispute; and especially to order an argument in Court or at Chambers as to the validity of pleadings not demurred to, before settling issues of fact to be decided at a trial. It is to be remembered that the validity of a pleading, in substance, generally determines the very right of the party pleading.

Again, as it really is not the decision of questions of law, but the determination of matters of fact, that is the most expensive part of the proceedings, it would seem desirable that the Judges should have ampler powers of examining parties, and forcing discovery and admission of facts, before settling issues of trial, than they now have. Probably, too, more care should be used in the taxation to disallow the costs of unnecessary matter copied in briefs and cases, and that the assent of opposing solicitors in respect of such matters ought not to be taken as conclusive.

Next, with regard to the equitable jurisdiction of the Court, it cannot be denied that the application of the rules of Common Law Pleading to actions for specific relief is sometimes quite impracticable and often embarrassing, and that some amendment of our rules in this respect, giving more elasticity to the system, and larger powers of inquiry and adjustment to the Judges than they now possess, and more simple and effective modes of settling matters of account and detail, is highly expedient; and, indeed, it may be expedient that some portion of the machinery adopted in England for the Equity jurisdiction of the County Courts, such as was indicated for our District Courts in a Bill of last Session, should be introduced into the Supreme Court.

But however beneficial some such amendments of our procedure may be, and however urgent may be the necessity for them, I do not think that the time has yet arrived when it would be wise to attempt any extensive alteration of our system of procedure. Experiments have just been commenced on the largest scale in England, and on smaller scales in some other portions of the British Empire, the result of which it would be wiser for us to wait for than attempt to anticipate. The Legislature of Great Britain, and that of one at least of her more important colonies, have initiated new schemes of judicature and procedure, such as the Colony of New Zealand had long before foreshadowed by an attempt which certainly has not been wholly unsuccessful; and while it would be weakness for the Legislature and Judges of the colony to refrain from such immediate improvements in the details of her judicial system as may be manifestly and urgently required in the meantime, it would seem most short-sighted and foolish to attempt a radical reformation of our whole system before the experience of a few years has tested the merits, both general and specific, of those great reforms to which I have alluded. The new English Supreme Court of Judicature Act, which is to come into operation in the end of next year, has yet to be completed by the adoption of a body of rules of procedure to be made pursuant to its provisions. But it contains in its Schedule some very important rules, many of them similar to our own, and others which may be deemed fit for immediate introduction into the procedure of our Supreme Court.

I shall conclude by a suggestion for the consideration of my brother Judges, and, subject to their approval, to the Government of the colony.

Having personally had some experience of the work of consolidation under "The English Statute Law Consolidation Commission," I am willing to undertake to draft a consolidation of the Acts respecting the constitution, jurisdiction, and procedure of the Supreme Court. I would propose to prepare a draft and report during the vacation, and to submit them to the other Judges before our meeting for the Court of Appeal in May, so that, at our Conference in May, all the Judges might be able to discuss the Bill, and the old rules of procedure consolidated with new ones, and with such statutory provisions of the existing law as should seem more proper to be placed among the rules, so that the Bill should be complete and its Schedule should contain a complete system of procedure.

The experience of the Judges in the preparation of this Bill would indicate to them practical conclusions enabling them to offer recommendations to the Government respecting the best mode of carrying out a comprehensive scheme of consolidation and amendment.

Should the Government in the meantime desire to undertake the consolidation of some other heads of Statute Law, they might employ a qualified draftsman, and submit his drafts and reports to qualified examiners for criticism and report, and the net results for general circulation before the opening of the Session of the General Assembly.

But I feel convinced that it would not be desirable to undertake too much, till experience indicates the best course for using all available materials for a permanent Commission or Board of Revision of Legislation and Legal Reforms.

N.B.—There are several of the provisions contained in the English Supreme Court of Judicature Act to which I shall venture to direct the attention of the Judges, for the purpose of amending or modifying our rules of practice, at our next meeting.

Wellington, 17th November, 1873. ALEXANDER J. JOHNSTON.

No. 3.

The Hon. Mr. BATHGATE to His Honor Mr. Justice JOHNSTON.

(No. 684).

SIR,— Colonial Secretary's Office, Wellington, 18th December, 1873.

I have to acknowledge the receipt of your Honor's letter of 4th instant, and accompanying Memorandum on the Consolidation of the Statute Law of the Colony.

Your letter and memorandum have been perused with much interest. The consolidation of the Colonial Acts is a matter of very great importance and will receive careful consideration from the Government, with the view of the subject being hereafter brought before Parliament. In the meantime, it is highly desirable that the valuable suggestion made by you, that you should prepare a draft of a consolidation of the Acts respecting the constitution, jurisdiction, and procedure of the Supreme Court in the colony, should at once be carried into effect. There is no doubt, as appears from returns received by the Government, that the public are becoming more and more disinclined to resort to the Supreme Court. Whether this arises from the complicated and technical nature of the procedure, the heavy costs, the delay and uncertainty, or any other cause, the Government have no means of knowing. But you and the other Judges will render signal service if, by simplifying the procedure and securing a less expensive and more expeditious administration of the law, the Supreme Court can be made more useful to the public. One point in practice deserves special consideration: A motion for a new trial ought not to be heard before a single Judge. The uncertainty which arises from the present practice, has been very mischievous, and has tended more than anything to the prejudice of the Court. Your large experience, coupled with a consideration of the provisions of the English Judicature Act, will aid you in framing a measure of much benefit. In doing so, it will be well to bear in mind that in proposing any statutory alterations in practice, it is not expedient to wait in order to follow in the wake of the Imperial Parliament. The circumstances of the colony are peculiar, and there are fewer chances of opposition from vested interests. In our Land Transfer Act and other Statutes, the Colonial Parliament has wisely considered what was beneficial to the public, and have taken a step in advance, which the Imperial Parliament will not be able to do for years to come. The whole question should be grappled with in this spirit, and there is little doubt but that Parliament will be ready to adopt at once such provisions as the united experience of the Bench may propose, in order to carry out the most desirable end in view.

I have, &c.,
JOHN BATHGATE,
(for the Colonial Secretary).

His Honor Mr. Justice Johnston, Wellington.

No. 4.

His Honor Mr. Justice JOHNSTON to the Hon. the COLONIAL SECRETARY.

(No. 157.)

SIR,— Judge's Chambers, Wellington, 23rd December, 1873.

I have the honor to acknowledge the receipt of the letter dated the 18th December, relating to my memorandum respecting the consolidation of the Colonial Acts, and my offer to prepare a draft of a Supreme Court Consolidation Act.

In answer, I have the honor to state that I shall, at the earliest practicable time, commence my preparations for that work.

In the meantime, I should be glad to be informed of the nature and contents of the returns received by the Government, from which it is inferred that the public are becoming more and more disinclined to resort to the Supreme Court.

The point of practice to which the letter draws my particular attention, viz. the impropriety of a motion for a new trial being heard by a single Judge, is one to which my attention has not previously been specifically called. I have not heard of the uncertainty caused thereby, which, it is said, has tended more than anything to the prejudice of the Court, but I shall be glad to have information on the subject. No doubt it would be very desirable that motions for new trials should be heard by more than one Judge—one, at least, not being the Judge before whom the first trial took place. In my opinion, however, it is very desirable that the Judge who tried the case should be one of the Judges who hear the motion. But I cannot see how this sort of difficulty is to be removed until fresh arrangements can be made respecting the residence and meetings of the Judges. It will certainly be desirable that the practice should be made as elastic as possible, in order that the fullest advantage may be taken of every means which the Government can command for enabling two or more Judges to sit together as frequently as possible. But no positive rules can well be made on the subject till such means are established.

I should feel much obliged for any information as to specific complaints that have been made by individuals or classes respecting cost, delay, and complication of system, in order that I may apply my mind to the task of suggesting means for remedying the mischiefs indicated.

I have, &c.,

The Hon. the Colonial Secretary. ALEXANDER J. JOHNSTON.

No. 5.

The Hon. Mr. BATHGATE to His Honor Mr. Justice JOHNSTON.

(No. 694.)

SIR,— Colonial Secretary's Office, Wellington, 29th December, 1873.

I have to acknowledge the receipt of your Honor's letter of the 23rd instant, and, in reply to express satisfaction in learning that you intend, at the earliest practicable time, to commence your preparation towards framing a Bill for the consolidation of the law affecting the Supreme Court.

In regard to the returns received by the Government referring to the Supreme Court, I append an abstract showing the number of civil cases tried in the Supreme Court during the year ended 30th June, 1873. From that it appears that, excepting at Auckland, Dunedin, and Christchurch, there has been almost no business of that kind, and even in the towns named the number of cases is far below what it was a few years ago. As an index of the falling off of business before the Supreme Court, it may be mentioned that the Sheriffs' fees in the judicial district of Otago and Southland have fallen within ten years from £1,400 to £37 per annum. The total amount of Sheriffs' fees received throughout the Colony for the year ended 30th June last was only £309, while the salaries paid amounted to £1,621. These results indicate that the public are becoming disinclined to resort to the Supreme Court; and owing to the decrease of fees, the cost to the Colony of the judicial establishments is annually increasing.

That such should be the case is not attributable in any way to the able Judges who preside in the different districts. A great deal must be laid at the door of the cumbrous, technical, and expensive system of procedure in use. It allows solicitors to multiply steps in procedure for the sake of costs, and thus the public is deterred from resorting to the Court. To illustrate this, a single case which was tried in Wellington last October may be quoted. A comparatively trifling suit for £108, the value of a horse, buggy, and harness, was tried, and the jury found for the plaintiff. The plaintiff's untaxed costs amounted to £113 3s. It may be assumed that the defendant's costs would be at least £80. To settle a case of £108, costs to the amount of, say, £200 have been incurred. This case presented no special difficulty or source of expense, as the witnesses must have been resident in the neighbourhood. From such a result it is apparent that it must be safer to pay a demand, however unjust it may be considered, than run the risk of an action in the Supreme Court. The majority of the people have not the means at present necessary either to vindicate their rights or resist an oppressive demand, and therefore they try to keep out of Court. In a recent Dunedin case the costs will, it is said, exceed £3,000. Occasionally subscription lists have been circulated in Dunedin to aid persons ruined by expensive litigation in the Supreme Court, and these could not fail to impress the citizens generally with a sentiment prejudicial to the administration of justice.

In addition to the costs, there is the feeling of uncertainty as to the finality of the result. A wealthy man has the power of damaging a poorer opponent by means of a new trial. In an Otago case a bank was sued, and a verdict given to the plaintiffs for £1,500. A new trial took place, in which the bank was successful. The plaintiffs had not the means to follow the case farther, and were obliged, against the advice of their counsel, to submit to what they believed was wrong. Few men now care to oppose a bank or wealthy plaintiff, and the majority, in the event of a dispute with moneyed parties, endeavour to effect a compromise rather than submit to the arbitrament of the Court. Some solicitors trade upon the knowledge of the existence of this feeling, and many times carry their point by sheer bullying and threats of legal proceedings.

That the present practice and procedure of the Supreme Court are not suited to the circumstances of the colony, is a fact which has gained very general credit. Indeed, the profession complain that the Court business has much fallen off. No step could be taken which would confer a greater benefit on the profession than one which, by simplifying procedure and enabling cases to be speedily and economically dealt with, would induce the public to resort to the arbitrament of the Court for the settlement of their disputes.

The matter is one of very high importance, and I feel assured the united wisdom of the Judges will devise some remedy for the evils complained of.

It has been suggested as deserving of consideration whether *ad valorem* scales of costs should not be adopted, or whether it would not be expedient to limit the amount of fees according to the sum in the verdict. The latter principle is in force in the Resident Magistrates' Courts, and also in the District Courts. It is likewise adopted in "The Immigration and Public Works Act, 1872" (No. 23,

sec. 24). This would remove the temptation to solicitors to multiply steps in procedure for the sake of costs. Solicitors should also be empowered to contract with suitors, who would thus be better able to judge the risk incurred. It is believed by several leading men in the profession that this would lead to satisfactory results.

Referring to the point of a motion for a new trial not being tried before a single Judge, I may observe that the new Judicature Act requires all such motions to be heard before a division of the Court. Some arrangement seems to be desirable to enable at least two of the Judges to sit together for the despatch of important business.

From what is before mentioned, you will notice that the cost, delay, and complications of the present system are rather leading the public to give up the use of the Court than to complain formally to the Government on the subject.

Of the existence of a wide-spread feeling, especially in the large mercantile centres, that something should be done in the way of amendment, there is no doubt whatever. There is reason to believe that their Honors the Judges themselves are fully aware of the necessity for some improvement; and I am assured that although they are, from position and the habit of being guided by precedent, naturally and properly cautious and conservative, they will not hesitate, after due consideration, to recommend such changes as will increase the respect in which they are held, and prove beneficial in the administration of justice.

I have, &c.,
JOHN BATHGATE,
(for the Colonial Secretary).

His Honor Mr. Justice Johnston, Wellington.

ABSTRACT of RETURNS of CIVIL CASES before JURIES heard in the SUPREME COURT of NEW ZEALAND during Year ended 30th June, 1873.

	Number of Cases.	Motions for New Trial.
Auckland	17	6
Dunedin	16	3
Christchurch	7	2
Wanganui	2	...
Napier	1	...
Marlborough	1	...
Invercargill	1	...
Taranaki	Nil.	...
Wellington	Nil.	...
Nelson	Nil.	...
Westland	Nil.	...

No. 6.

His Honor Mr. Justice JOHNSTON to the Hon. the COLONIAL SECRETARY.

(No. 1.)

SIR,— Judge's Chambers, Wellington, 7th January, 1874.

I have the honor to acknowledge the receipt of the letter of the 29th of December from the Hon. J. Bathgate, *pro* Colonial Secretary, in answer to my letter of the 23rd December.

I am much obliged for the information it contained, upon which it is unnecessary that I should offer any comments at present.

I have, &c.,
ALEXANDER J. JOHNSTON.

The Hon. the Colonial Secretary.

No. 7.

His Honor the CHIEF JUSTICE to the Hon. the PREMIER.

(No. 39B.)

SIR,— Wellington, 8th June, 1874.

Referring to my letter to yourself of the 1st December, 1873 (No. 61), and to the memorandum of Mr. Justice Johnston, forwarded, after conference thereon with the Judges of the Supreme Court, to the Government, touching certain desired improvements in the practice and procedure of the Supreme Court, I have the honor to inform you that the subject has again been considered in conference by the Judges, during the recent sitting of the Court of Appeal. Meanwhile, His Honor Mr. Justice Johnston has been at the labour of preparing, and has laid before the Judges, various documents, including,—

(1.) Draft of a Bill for consolidating the existing Statutes relating to the constitution, jurisdiction, and practice of the Supreme Court, with amendments; together with certain additions to the Rules of Practice and Procedure of that Court, derived principally from those fundamental rules of law and equity that are embodied in the English Supreme Court of Judicature Act, and from the still limited scheme of procedure comprised in the Schedule to that Act.

(2.) A rough draft to serve as a basis for a more comprehensive enactment, founded both upon the New Zealand Statutes affecting the Supreme Court and Court of Appeal, and upon the English Supreme Court of Judicature Act,—the Bill to be supplemented by one uniform code of procedure, and the whole to be substantially in accordance with the system established by the English Act.

The Judges are unanimous in their opinion that the latter course of legislation should be adopted. But in order safely to legislate in that direction, it is necessary first to be provided with the complete

code of procedure contemplated by the Parliament of England as essential to the successful working of its High Court of Judicature. That code has not arrived in the colony; and there seems some reason to think, that the Judges and their fellow-Commissioners in England require further time to complete their Rules of Procedure, if they have not applied to Parliament to pass a special Act for the purpose of enlarging that time. We may reasonably expect that within a few months we shall receive that complete code of rules; and if so, it will be practicable to prepare a comprehensive measure, together with a scheme of procedure founded thereon and adapted to the circumstances of this colony, in such time that the whole may be printed and circulated to be considered by the profession and by members of the General Assembly before the meeting of that Assembly in 1875.

This course the Judges recommend, and we entertain the hope that our view accords with that of yourself and of the Government.

It is possible that the Legislature of Victoria may have been actuated by some similar motive in its dealing with the Bill to which you were pleased to invite my attention on a former occasion. I allude to the Bill entitled "An Act to consolidate the various Jurisdictions of the Supreme Court, and for other purposes relating to the better administration of Justice in Victoria." The nature of that proposed enactment seems not to have been rightly understood. Far from abolishing inferior Courts, it provides for appeals from those Courts; and the only jurisdiction which it imports into the Supreme Court of Victoria, in addition to those already vested in that Court, appear to be two, viz., that of the Circuit Courts, created by one of the Victorian Statutes, and that of the Court of the Chief Judge of Courts of Mines. It indeed reconstitutes the Supreme Court of Victoria under two heads, viz., of its original, and of its appellate jurisdiction; and it provides for the administration of law and equity concurrently. But in order to effectuate these objects, it enacts in terms the leading provisions of the English Supreme Court of Judicature Act; and in its Schedule, after adapting with slight variations a few of the Rules of Procedure from the Schedule to the English Act, it adopts *iisdem verbis* the bulk of the remainder of those rules, as supplementary to its own existing code of procedure. For meanwhile it enacts expressly that the existing practice and procedure in criminal cases, including that in Crown cases reserved, shall continue in force; and it also saves and keeps in operation all its existing rules of Court, and all its forms and methods of procedure, except so far as they are by that Bill expressly varied. Further, although the Bill was introduced in the Victorian Parliament during last year, it enacts that, except as to special provisions, the Act should not come into operation until the 1st July of the present year. Yet, notwithstanding this considerate method of legislation, the Legislative Council appear to have deemed it prudent to postpone the passing of that measure, and it was postponed accordingly. So far, therefore, as the example of the Victorian Parliament extends, it confirms the Judges in the conclusion which they have formed.

I have, &c.,

GEORGE ALFRED ARNEY,

Chief Justice.

The Hon. the Premier.

By Authority: GEORGE DIDSBURY, Government Printer, Wellington.—1874.

Price 9d.