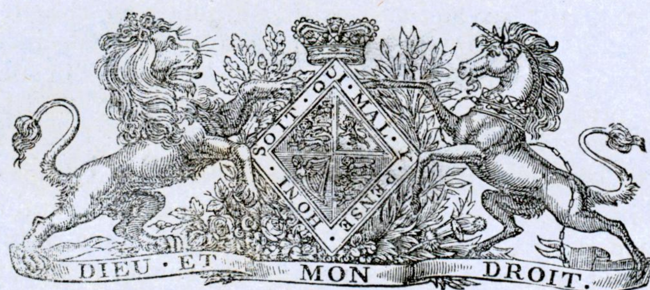
New South Wales.



ANNO VICESIMO

VICTORIÆ REGINÆ.

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No. XXXI.

An Act for the further amendment of the Process, Practice, and mode of Pleading at Law in the Supreme Court, and enlarging its Jurisdiction in Common Law Proceedings. [Assented to, 18th March, 1857.]

Preamble.

WHEREAS it is expedient further to amend the process, practice, and mode of pleading at law in the Supreme Court, and to enlarge its jurisdiction in Common Law proceedings: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales, in Parliament assembled, and by the authority of the same, as follows:—

Restricting use of Affidavits, &c., under 54 G. 3, c. 15, and 5 and 6 W. 4, c. 62.

1. No Affidavit or Solemn Declaration, made under the provisions of the Acts of the Imperial Parliament, passed in that behalf respectively in the fifty-fourth year of His Majesty King George the Third, and the sixth year of His Majesty King William the Fourth, or either of them, shall be received in evidence in any Court in this Colony, unless a copy of such Affidavit or Declaration, with notice of the intention to use the same, shall have been served on the party to be affected thereby, fourteen days at the least before the day of trial or other hearing.—And it shall be lawful for the Court, or any Judge thereof, to postpone such trial or hearing, on such terms as may be thought just, until the Deponent or Declarant shall have been examined, or cross-examined, under a Commission for that purpose.—And all Affirmations shall be equally within this enactment.

If action commenced after agreement to refer to arbitration, Court or Judge may stay proceedings.

2. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons

claiming

claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the Supreme Court, or any Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a Rule or Order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such Court or Judge may seem fit: Provided always, that any such Rule or Order may at any time afterwards be discharged or varied as justice may require.

On failure of parties or arbitrators, Judge may appoint single arbitrator or umpire.

3. If in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorizing the reference do not show that it was intended that such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one; then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to concur in appointing or to appoint, (as the case may be), an arbitrator, umpire, or third arbitrator respectively; and if within fourteen clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of the Supreme Court, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

When reference is to two arbitrators and one party fails to appoint.

4. When the reference is, or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorizing the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fourteen clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a Judge may revoke such appointment, on such terms as shall seem just.

Two arbitrators may appoint umpire.

5. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

6.

Award to be made in three months unless parties or Court enlarge time.

6. The arbitrator acting under any such document as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party, but the parties may, by consent in writing, enlarge the term for making the award; and it shall be lawful for the Supreme Court, or for any Judge thereof, for good cause to be stated in the Rule or Order for enlargement, from time to time to enlarge the term for making the award, and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month, and in any case where an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

Rule to deliver possession of land pursuant to award.

7. When any award made on any such submission or document as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any such party either forthwith or at any future time, or awards that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the Supreme Court to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under, or put in possession by him since the making the document authorizing the reference to deliver possession of the same to the party entitled thereto pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue and possession shall be delivered by the Sheriff as on a judgment in ejectment.

Submission in writing when may be made Rule of Court.

8. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a Rule of the Supreme Court on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a Rule of Court.

Power to adjourn trial.

9. It shall be lawful for the Court or Judge, at the trial of any cause where they or he may deem it right for the purposes of justice, to order an adjournment for such time and subject to such terms and conditions as to costs and otherwise as they or he may think fit.

Affirmation instead of oath in certain cases.

10. If any person called as a witness, or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation, in the words following, videlicet:—

"I, A. B., do solemnly, sincerely, and truly affirm and declare, "that the taking of any oath is, according to my religious belief, "unlawful; and I do also solemnly, sincerely, and truly affirm and "declare, &c."

Which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form, and the like provisions shall apply also to every person required to be sworn as a juror.

How far a party may discredit his own witness.

11. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the

the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Contradictory statements of adverse witness.

12. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Cross-examination as to previous statements in writing.

13. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

Attesting witnesses.

14. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto.

Comparison of disputed writing.

15. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and Jury as evidence of the genuineness, or otherwise, of the writing in dispute.

Payment of costs upon new Trial in matters of fact.

16. When a new Trial is granted on the ground that the verdict was against evidence, the costs of the first Trial shall abide the event, unless the Court shall otherwise order.

Subjects of Cross Action may be pleaded.

17. All matters, which at present are only the subject of a Cross Action, or may be made the subject of a Cross Action, between the parties, shall hereafter, by leave of a Judge, and on such terms as he shall think proper, be pleadable by way of Set Off.

Affidavits on new matter.

18. Upon Motions founded upon Affidavits it shall be lawful for either party, with leave of the Court or a Judge, to make Affidavits in answer to the Affidavits of the opposite party, upon any new matter arising out of such Affidavits, subject to all such rules as shall hereafter be made respecting such Affidavits.

Court or Judge to direct oral examinations of deponents.

19. Upon the hearing of any Motion or Summons it shall be lawful for the Court or Judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear, and be examined *vivâ voce*, either before such Court or Judge or before any Commissioner for taking Affidavits, and upon hearing such evidence or reading the deposition to make such Rule or Order as may be just.

Proceedings before and upon such examination.

20. The Court or Judge may by such Rule or Order, or any subsequent Rule or Order, command the attendance of the witnesses named therein for the purpose of being examined, or the production of any writings or other documents to be mentioned in such Rule or Order, and such Rule or Order shall be proceeded upon in the same manner, and shall have the same force and effect as a Rule of the Court under the Act of Council fifth Victoria, Number nine, and it shall be lawful for the Court or Judge or such Commissioner to adjourn the examination from time to time, as occasion may require, and the proceedings upon such examination

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tion shall be conducted, and the depositions taken down, as nearly as may be in the mode now in use with respect to the vivâ voce examination of witnesses under the last mentioned Act.

Examination of person who refuses to make an affidavit.

21. Any party to any civil proceeding or motion for a criminal information in the Supreme Court, requiring the Affidavit of a person who refuses to make an Affidavit, may apply by summons for an Order to such person to appear and be examined upon oath before a Judge or any Commissioner for taking Affidavits, to whom it may be most convenient to refer such examination as to the matters concerning which he has refused to make an Affidavit, and a Judge may, if he think fit, make such Order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination and costs of the application and proceedings thereon as he shall think fit.

Proceedings upon order for examination.

22. Such Order shall be proceeded upon in like manner as an order made under the hereinbefore mentioned Act of Council, fifth Victoria, Number nine, and the examination thereon shall be conducted and the depositions taken down and returned as nearly as may be in the mode now used on vivâ voce examinations under the said Act of Council.

Discovery of documents.

23. Upon the application of either party to any cause or other civil proceeding, upon an affidavit by such party or his attorney of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate that some Officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power, relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so on what grounds), to the production of such as are in his or their possession or power, and upon such Affidavit being made the Court or Judge may make such further order therein as shall be just.

Inspection by Jury or parties or witnesses.

24. Either party shall be at liberty to apply to the Court or a Judge for a Rule or Order for the inspection by the Jury or by himself, or by his witnesses, or by so many and such of the persons, summoned as Jurors for the trial, as may be thought desirable, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and it shall be lawful for the Court or a Judge, if they or he think fit, to make such Rule or Order, upon such terms as to costs and otherwise as such Court or Judge may direct: Provided always, that nothing herein contained shall affect the provisions of the Act of Council, eleventh Victoria, Number twenty, as to obtaining a view by a Jury: Provided also, that all Rules and Regulations now in force and applicable to the proceedings by view, shall be held to apply to proceedings for inspection by a Jury, under the provisions of this Act, or as near thereto as may be.

Rule or order for summoning Jury.

25. The Court or any Judge thereof may make all such Rules or Orders upon the Sheriff or other person as may be necessary to procure the attendance of a Special or Common Jury, for the trial of any cause or matter depending in such Court, at such time and place and in such manner as they or he may think fit.

Examination of judgment debtor as to his property.

26. It shall be lawful for any creditor who has obtained a judgment in the Supreme Court to apply to the Court or a Judge for a Rule or Order that the judgment debtor be orally examined as to his property or means available for the satisfaction of such judgment, and in particular as to any and what debts are owing to him, before a Judge or such Commissioner for taking Affidavits as the Court or Judge shall

appoint,

appoint, and the Court or Judge may make such Rule or Order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination under this Act.

Judge may order an attachment of debts.

27. It shall be lawful for a Judge, upon the ex-parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent Order it may be ordered that the garnishee shall appear before the Judge or such Officer of the Court, as such Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Order for attachment to bind debts.

28. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Judge shall direct, shall bind such debts in his hands.

Proceedings to levy amount due from garnishee to judgment debtor.

29. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Judge may, if he think fit, order execution to issue, and it may be sued forth accordingly, without any previous Writ or Process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

Judge may allow judgment creditor to sue garnishee.

30. If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by Writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a Writ of Revivor issued under "the Common Law Procedure Act of 1853."

Garnishee discharged.

31. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed.

Attachment Book to be kept by the Prothonotary.

32. There shall be kept at the office of the Prothonotary of the Supreme Court a Debt Attachment Book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered and otherwise; and copies of any entries made therein may be taken by any person, upon application to the Prothonotary.

Costs of Application.

33. The costs of any application for an Attachment of Debt under this Act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge.

Action for Mandamus to enforce the performance of duties.

34. The Plaintiff in any Action in the Supreme Court, except replevin and ejectment, may endorse upon the writ and copy to be served a notice that the Plaintiff intends to claim a Writ of Mandamus, and the Plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such Action, or separately, a Writ of Mandamus commanding the defendant to fulfil any duty in the fulfilment of which the Plaintiff is personally interested.

Declaration in Action for Mandamus.

35. The declaration in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the Plaintiff is personally interested therein, and that he sustains or may

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sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected.

36. The pleadings and other proceedings in any Action in which a Writ of Mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary Action for the recovery of damages.

Proceedings upon Claim for Mandamus.

37. In case judgment shall be given to the Plaintiff that a mandamus do issue, it shall be lawful for the Court, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory Writ of Mandamus to the Defendant commanding him forthwith to perform the duty to be enforced.

Judgment and execution.

38. The Writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary Writ of Execution, except that it shall be directed to the party and not to the Sheriff, and may be issued in Term or Vacation and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may upon sufficient grounds be allowed by the Court or a Judge, either with or without terms.

Form of peremptory Writ.

39. The Writ of Mandamus so issued as aforesaid shall have the same force and effect as a peremptory Writ of Mandamus, and in case of disobedience may be enforced by attachment.

Effect of Mandamus.

40. The Court may upon application by the Plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the Act required to be done may be done by the Plaintiff or some other person appointed by the Court at the expense of the Defendant, and upon the Act being done the amount of such expense may be ascertained by the Court either by Writ of Inquiry or reference to the Prothonotary, as the Court or a Judge may order; and the Court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

The Court may order the Act to be done at the expense of the Defendant.

41. Nothing herein contained shall take away the jurisdiction of the Supreme Court to grant Writs of Mandamus, nor shall any Writ of Mandamus issued out of that Court be invalid by reason of the right of the prosecutor to proceed by action for Mandamus under this Act

Prerogative Writ of Mandamus preserved.

42. Upon application by motion for any Writ of Mandamus, the Rule may in all cases be absolute in the first instance if the Court shall think fit, and the writ may bear test on the day of its issuing, and may be made returnable forthwith whether in term or in vacation, but time may be allowed to return it by the Court or a Judge either with or without terms.

Proceedings for Prerogative Writ of Mandamus accelerated.

43. The provisions of "The Common Law Procedure Act of 1853," and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a Prerogative Writ of Mandamus.

Proceedings on Prerogative Writ of Mandamus.

44. In all cases of breach of contract, or other injury, where the party injured is entitled to maintain and has brought an action, he may in like case and manner as hereinbefore provided with respect to mandamus, claim a Writ of Injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and he may also in the same action include a claim for damages, or other redress.

Claim of writ of injunction

45. The Writ of Summons in such action shall be in the same form as the Writ of Summons in any personal action, but on every such writ and copy thereof there shall be endorsed a notice that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a Writ of Injunction.

Form of Writ of Summons and endorsement thereon.

46. The proceedings in such action shall be the same as nearly as may be, and subject to the like control as the proceedings in an action

Form of proceedings and of judgment.

action to obtain a mandamus, under the provisions hereinbefore contained, and in such action judgment may be given that the Writ of Injunction do or do not issue as justice may require, and in case of disobedience such Writ of Injunction may be enforced by attachment by the Court, or where such Court shall not be sitting by a Judge.

Writ of injunction may be applied for at any stage of the cause.

47. It shall be lawful for the plaintiff at any time after the commencement of the action, and whether before or after judgment to apply ex parte to the Court or a Judge for a Writ of Injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right, and such writ may be granted or denied by the Court or Judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise as to such Court or Judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the Court, or out of Term by a Judge: Provided always, that an order for a Writ of Injunction made by a Judge, or any writ issued by virtue thereof may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order.

Equitable defence may be pleaded

48. It shall be lawful for the defendant or the plaintiff in replevin in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds to plead the facts which entitle him to such relief by way of defence, and the said Court is hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect.

Equitable defence after judgment.

49. Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *auditâ querelâ*.

Equitable replications.

50. The Plaintiff may, in answer to any plea, reply facts avoiding such plea upon equitable grounds: provided that the replication shall begin with the words "for reply on equitable grounds" or to that effect.

Court or Judge may strike out equitable plea or replication.

51. Provided always, that in case it shall appear to the Court, or any Judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a Court of law so as to do justice between the parties, it shall be lawful for such Court or Judge to order the same to be struck out on such terms as to costs and otherwise as to such Court or Judge may seem reasonable.

Proceedings in Equity saved.

52. Nothing in this Act shall alter or diminish the right of any party to proceed in equity in the same way as if this Act had not passed.

Actions on lost instruments.

53. In case of any action founded upon a Bill of Exchange, or negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court or Judge, or the Prothonotary, against the claims of any other person upon such negotiable instrument.

Writs of Ca. Sa. to fix Bail.

54. In any case in which a defendant shall have been arrested, or have given bail, upon a Writ of Capias ad Respondendum, a Writ of Capias ad Satisfaciendum may be issued to fix the Bail, or charge the Defendant in execution, as of course.

Scire facias on judgment of assets in futuro.

55. Proceedings against executors upon a judgment of assets in futuro may be had and taken in the manner provided by "The Common "Law Procedure Act of 1853," as to Writs of Revivor.

To compel continuance or abandonment of action in case of death.

56 Where an action would, but for the provisions of "The Common Law Procedure Act of 1853," have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that Act, the defendant or person against whom the action

may

may be so continued may apply by summons to compel the plaintiff or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act within such time as the Judge shall order; and in default of such proceeding the defendant or other person against whom the action may be so continued as aforesaid shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied of the goods of the testator or intestate.

Claimant in second ejectment for same premises against same defendant may be ordered to give security for costs.

57. If any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends, the Court or a Judge may, if they or he think fit, on the application of the defendant at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance, or by non-suit, or by judgment for the defendant.

Addresses by Counsel.

58. In every action the defendant's Counsel may reserve his address to the Jury, if he thinks fit so to do, until the close of the evidence for the defendant, and the right to reply shall be the same as at present.

Addresses by Counsel.

59. When the address to the jury on the part of the defendant is reserved as aforesaid, the evidence in reply, if any, on the part of the plaintiff must be given before such address.

Addresses by Counsel.

60. In cases where the Counsel for the defendant begins the Counsel for the plaintiff shall be entitled to reserve his address to the jury in like manner, and subject to the same conditions as hereinbefore provided with respect to the Counsel for the defendant.

Certain provisions of 17 Vict. No. 21 to apply to this Act.

61. The provisions of sections one hundred and seventy-four and one hundred and seventy-five of "The Common Law Procedure "Act of 1853," shall extend and apply to this Act, and all proceedings thereunder, except that it shall not be necessary, nor deemed to have been necessary, to lay any Rule, made under that or the present Act, before either House of the Imperial Parliament, at any time; nor before the Colonial Parliament at any time before the commencement of the operation of any such Rule.

Commencement of this Act.

62. The provisions of this Act shall come into operation on on the first day of May, one thousand eight hundred and fifty-seven.

Short Title of Act.

63. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law "Procedure Act of 1857."

By Authority: WILLIAM HANSON, Government Printer, Sydney, 1857.