

(No. 2.)

Legislative Council.

51^o VICTORIÆ, 1887.

A BILL

For the further Amendment of the Law and for the better Administration of Justice.

[MR. SALOMONS;—21 December, 1887.]

WHEREAS it is expedient to make provision for the improve- Preamble.
 ment of the process, practice, and mode of pleading in the
 Supreme Court at common law, and for the further amendment of the
 law, and the better administration of justice in New South Wales:
 5 Be it therefore 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:—

PRELIMINARY.

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Short Title.

SHORT TITLE.

1. This Act may be cited as The Common Law Procedure Act of 1888.

Commencement and Application of Act.

COMMENCEMENT AND APPLICATION.

2. That this Act shall come into operation on the Thirtieth day 30 April, 1888.
 15 of April, One Thousand Eight Hundred and Eighty-eight (hereinafter
 referred to as the commencement of this Act), and shall apply so far

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as

Application to proceedings pending. as is practicable to all actions, matters, and proceedings then pending in the Supreme Court as well as to such as shall be thereafter commenced, but not to motions or applications founded upon any verdict returned or trial had before that date.

Only sections specified to apply to equity jurisdiction:— ss. 102, 106, 136, 137, 138, 142, 143, 144, 146, and 147. Provided that only the following Sections shall be held to apply to the Supreme Court in its equity jurisdiction, that is to say:— Sections One Hundred and Two, One Hundred and Six, One Hundred and Thirty-six, One Hundred and Thirty-seven, One Hundred and Thirty-eight, One Hundred and Forty-two, One Hundred and Forty-three, One Hundred and Forty-four, One Hundred and Forty-six, and One Hundred and Forty-seven. 5 10

REPEAL.

Repeal.

3. From and after the commencement of this Act there shall be repealed—

- Acts in Schedule. (1) The Acts specified in the Schedule to this Act, to the extent in the Third Column of that Schedule mentioned, without prejudice to anything done or suffered before the commencement of this Act under the enactments hereby repealed; also, 15
- Inconsistent enactments. (2) Any other enactment inconsistent with this Act. 20

SAVING CLAUSES.

Saving Clauses.

Saving of—

4. Nothing in this Act, or in any repeal effected thereby, shall be held to repeal—

Procedure on bills under 20 Vic. No. 30, and 22 Vic. No. 3.

- (1) The provisions of the Act of the Twentieth year of Her present Majesty Number Thirty, being an Act to facilitate the remedies on Bills of Exchange and Promissory Notes, and of the Act of the Twenty-second year of Her present Majesty Number Three. 25

Provisions of 46 Vic. No. 17.

- (2) Any provision of The Criminal Law Amendment Act of 1883.

Where no new provision, existing practice to remain in force.

5. Where no other provision is made by this Act, or by any Rules or Orders which may be made by the Judges in pursuance of the powers conferred on them in that behalf, the present procedure and practice shall remain in force. 30

INTERPRETATION.

Interpretation.

6. In this Act, unless the context otherwise requires— 35

Applicant.

“Applicant” means, in interpleader proceedings, the person seeking relief by way of interpleader.

Claimant.

“Claimant” means, in interpleader proceedings, any person who makes claim to the debt, money, goods or chattels in respect of which the applicant is, or expects to be, sued, and any person (other than the person against whom process has issued) who makes claim to any money, goods, or chattels taken, or intended to be taken, in execution under such process, and includes the person issuing such process or execution creditor. 40 45

Court.

“Court” means the Supreme Court.

Decision.

“Decision” includes any judgment, decree, ruling, determination, direction, or order, or refusal to make an order.

Judge.

“Judge” means a Judge of the Supreme Court.

Prescribed.

“Prescribed” means fixed or ordered by, or by virtue of, any general Rules or Orders of Court. 50

SPECIAL

SPECIAL INDORSEMENT OF WRIT.

SPECIAL INDORSEMENT OF WRIT.

7. In the following cases, when the defendant resides within the jurisdiction of the Court, the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy to which he claims to be entitled, that is to say:—
- (1) In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - (a) On a contract, express or implied, (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); or
 - (b) On a bond or contract under seal for payment of a liquidated amount of money; or
 - (c) On a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty; or
 - (d) On a guarantee, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only.
 - (2) In actions of ejectment, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant.

In actions for debt or liquidated demand arising upon—

A simple contract.

A specialty contract.

A statute.

A guarantee.

In ejectment against tenant holding over.

Such special indorsement shall be to the effect of such of the Forms applicable to the case, as may be ordered to be used by the Judges in accordance with the provisions of this Act; and where any writ is so indorsed, it shall not be necessary to indorse on it the Form required by Section Eight of the Common Law Procedure Act of 1853.

8. Where the writ of summons is specially indorsed under the last preceding Section, no further declaration shall be filed or delivered, but the indorsement on the writ shall, in actions other than actions of ejectment, be deemed to be the declaration.

Forms.

Special indorsement to be deemed to be the declaration.

SUMMARY PROCEDURE WHERE WRIT SPECIALLY INDORSED.

SUMMARY PROCEDURE ON SPECIALLY INDORSED WRIT.

9. Where any defendant appears or has appeared to a writ of summons specially indorsed either under Section Seven of this Act, or under Section Twenty-two of the Common Law Procedure Act of 1853, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply in such manner and within such time as shall be prescribed, to a Judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of possession of the land (with or without rent or mesne profits), as the case may be, and costs. The Judge may thereupon, unless the defendant by affidavit or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

Application for final judgment.

10. The defendant may show cause against such application by affidavit, or (except in actions of ejectment) by offering to bring into Court the sum indorsed on the writ. Such affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff's claim. And the Judge may, if he think fit, order the defendant, or, in the case of a corporation, any officer

Defendant may show cause.

officer thereof, to attend and be examined upon oath; or to produce any leases, deeds, books, or documents, or copies of or extracts therefrom.

Defence as to part of claim.

11. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the Sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim. 5 10

Good defence by one of several defendants.

12. If it appears to the Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former. 15

Leave to defend absolute or conditional.

13. Leave to defend may be given unconditionally or subject to such terms as to giving security or otherwise as the Judge may think fit. 20

Time to plead where leave given.

14. Where leave to defend has been given, the defendant shall, in actions other than actions of ejectment, plead within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within such time as shall be prescribed. 25

Judge may by consent dispose finally of action.

15. The Judge may, in any case arising under Sections Nine to Fourteen with the consent of all parties, dispose of the actions finally and without appeal in a summary manner, and on such terms as to costs or otherwise as the Judge shall think just. 30

DEFAULT OF APPEARANCE TO WRIT FOR LIQUIDATED DEMAND.

DEFAULT OF APPEARANCE TO WRIT FOR LIQUIDATED DEMAND.

Failure of defendant to appear to writ indorsed for liquidated demand.

16. Where the writ of summons is indorsed for a debt or liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail, to appear thereto, the plaintiff may enter final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), or (if no rate be specified) at the rate of eight per centum per annum, to the date of the judgment, and costs. 35

One defendant appearing to such writ, others not.

17. Where the writ of summons is indorsed for a debt or liquidated demand, whether specially or otherwise, and there are several defendants, of whom one or more appear to the writ, and another or others of them fail to appear, the plaintiff may enter final judgment, as in the last preceding Section, against such as have not appeared, and may issue execution upon such judgment, without prejudice to his right to proceed with the action against such as have appeared. 40 45

Setting aside or varying judgment.

18. Where judgment is entered pursuant to the provisions of Sections Sixteen or Seventeen it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may be just. 50

PARTIES.

PARTIES.

Joinder of plaintiffs.

19. All persons may be joined as plaintiffs in whom any right of action is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to any remedy or relief, for such remedy or relief as he or they may be entitled to, without any amendment. 55

amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to any remedy or relief unless the Court or a Judge in disposing of the costs shall otherwise direct.

5 20. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

Wrong plaintiff by mistake.

15 21. Where in an action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has pleaded a set-off, he may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

In case of misjoinder of plaintiffs defendant to have benefit of set-off.

20 22. All persons may be joined as defendants against whom any right of action is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Joinder of defendants.

25 23. The plaintiff may, at his option, join as parties to the same action all or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes.

Joinder of several defendants in action on one contract.

30 24. Where the plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties; and in every such case the Court or a Judge may make such order as to costs or otherwise as may seem just.

Several defendants in cases of doubt.

PAYMENT INTO AND OUT OF COURT AND TENDER.

PAYMENT INTO AND OUT OF COURT AND TENDER.

35 25. Where any action is brought to recover a debt or damages, any defendant may, at the time of pleading, or at any later time by leave of the Court or a Judge, pay into Court a sum of money by way of confession and satisfaction, and such payment shall be taken to admit the claim or cause of action in respect of which it is made; or he may (except in actions for libel or slander) pay money into Court, and plead in the alternative denying his liability.

Payment into Court in satisfaction.

In the alternative.

45 Provided that in an action on a bond under the Statute of the Eighth and Ninth years of King William the Third, Chapter Eleven, payment into Court shall be admissible to particular breaches only, and not to the whole action.

In action on bond. 8 and 9 Wm. 3, c. 11.

26. With a defence setting up a tender before action, the sum of money alleged to have been tendered must be brought into Court.

Payment in with defence of tender.

50 27. When the liability of the defendant as regards the claim or cause of action in respect of which the payment into Court has been made, is denied in the pleas—

Where payment into Court in alternative.

(a) The plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in, in which case he shall be entitled to have the money paid out to him in accordance with the provisions of Section Twenty-eight, notwithstanding the

Plaintiff may accept in satisfaction, whereupon stay of proceedings;

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the

the defendant's denial of liability, whereupon all further proceedings, in respect of such claim or cause of action, except as to costs shall be stayed ; or

or may refuse, whereupon money remains in.

(b) The plaintiff may refuse to accept the money in satisfaction and reply accordingly, in which case the money shall remain 5 in Court subject to the provisions of Section Twenty-nine.

Payment out to plaintiff accepting in satisfaction.

28. (1) If the plaintiff accepts in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum paid in, he shall be entitled to have the money paid out to himself on his request, or to his attorney on the plaintiff's written 10 authority, unless the Court or a Judge shall otherwise order.

Costs on accepting in satisfaction of entire claim.

(2) In case the payment into Court is in respect of the entire claim or cause of action, and whether made by way of confession and satisfaction or with a plea or pleas denying liability, the plaintiff, if he accepts in accordance with the provisions of this Section the sum so 15 paid in, shall be at liberty to tax his costs at such time as shall be prescribed, unless the Court or a Judge shall otherwise order, and in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed.

On non-acceptance by plaintiff, money to remain in Court.

29. (1) If the plaintiff does not accept, in satisfaction of the 20 claim or cause of action in respect of which the payment into Court has been made, the sum paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in Court and be subject to the order of the Court or a Judge, and shall not be paid out of Court except in pursuance of an order. 25

If plaintiff recover less, balance to defendant.

(2) If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof—

(a) In case the plaintiff recovers less than the amount paid into Court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, but subject 30 to any order the Judge may make as to the payment out of the sum so recovered of the defendant's costs or any part thereof, and the balance shall, under such order, be repaid to the defendant ; and

If defendant succeed after denying liability, repayment to him.

(b) In case the defendant succeeds in respect of such claim or 35 cause of action or part thereof, after having by a plea denied his liability in respect of the same, the whole amount shall, under such order, be repaid to him.

Payment in where consolidation of actions.

30. Where money is paid into Court in two or more actions which are consolidated, and the plaintiff proceeds to trial in one, and 40 fails, the money paid in and the costs in all the actions shall be dealt with in the same manner as in the action tried.

Payment into Court under orders.

31. Money paid into Court under an order of the Court or a Judge shall not be paid out of Court unless in pursuance of an order of the Court or a Judge, except to a plaintiff who shall have obtained 45 a judgment for an amount equal to or in excess of the sum so paid in.

Appropriation in plea of money paid in under Sections 9 to 15.

Provided that, where before he pleads, money has been paid into Court by the defendant pursuant to an order under the provisions of Sections Nine to Fifteen inclusive of this Act, he may (unless the Court or a Judge shall otherwise order), by his plea appropriate the 50 whole or any part of such money, and any additional payment if necessary, to the whole or any specified portion of the plaintiff's claim ; and the money so appropriated shall thereupon be deemed to be money paid into Court pursuant to the preceding Sections relating to money paid into Court, and shall be subject in all respects to the provisions 55 of those Sections.

MATTERS ARISING PENDING THE ACTION.

MATTERS ARISING
PENDING ACTION.

32. Any ground of defence to a claim or cause of action, which has arisen after action brought, but before the defendant has pleaded, and before the time limited for his doing so has expired, may be raised by the defendant in his pleas, either alone or together with other grounds of defence.
33. Where any ground of defence arises after the defendant has pleaded, or after the time limited for his doing so has expired, the defendant may, within such time as shall be prescribed or at any subsequent time by leave of the Court or a Judge, file and deliver pleas or further pleas (as the case may be) setting forth the same.
34. Whenever the defendant, or any one or more of several defendants, in his or their pleas, or in any further pleas as in the last Section mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may file and deliver a confession of such defence, and may thereupon enter judgment for his costs up to the time of the pleading of such defence, unless the Court or a Judge shall, either before or after the filing and delivery of such confession, otherwise order.
35. Any ground of defence to a set off, which has arisen after the defendant has pleaded, but before the plaintiff has replied, and before the time limited for his doing so has expired may be raised by the plaintiff in his replication, either alone or together with any other grounds of reply.
36. Where any ground of defence to a set-off arises after replication, or after the time limited for replying has expired, the plaintiff may, within such time as shall be prescribed or at any subsequent time by leave of the Court or a Judge, file and deliver a replication or a further replication (as the case may be) setting forth the same.

Matter arising after
action and before
plea.Matter arising after
time for pleading.Confession of
defence.Matter arising after
set-off pleaded and
before replication.Matter arising after
time for replying.

PROCEEDINGS IN LIEU OF DEMURRER.

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37. No demurrer shall be allowed; but any party shall be entitled without leave of the Court or a Judge to raise by his pleading, either alone or together with any pleading heretofore allowed, any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.
- Provided that by consent of the parties, or by order of the Court or a Judge on the application of either party, to be made by motion on notice, as the case may be, the same may be set down for hearing and disposed of by the Court or a Judge at any time before the trial.
38. If, in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, or matter of reply therein, the Court or Judge may thereupon dismiss the action, or make such other order therein as may be just.
39. The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or defence, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Demurrers abolished;
points of law may
be pleaded, and
disposed of at or
after trial.Or by consent or
order before trial.Dismissal of action
where decision on
law disposes of it.Striking out
pleadings.

AMENDMENT.

AMENDMENT.

40. The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any indorsement or pleading, or any matter in any indorsement or pleading which may be unnecessary, unjustifiable,

Amending and
striking out plead-
ings.

ADMISSIONS.

ADMISSIONS.

52. Any party to an action or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Notice of admissions.

5 53. (1) Any party may, by notice in writing, within such time as shall be prescribed, call on any other party to admit, for the purposes of the action, matter, or issue only, any specific fact or facts mentioned in such notice.

Notice to admit facts.

10 (2) In case of refusal or neglect to admit such fact or facts within the time so prescribed, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the action, matter, or issue may be, unless at the trial or hearing the Court or a Judge certify that the refusal to admit was reasonable, or unless the Court or a Judge shall at any time otherwise order or direct.

Costs of proving facts not admitted.

15 (3) Any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular action, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice.

Admission for purpose of action only.

20 (4) The Court or a Judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Admission amended or withdrawn by leave.

25 54. An affidavit of the attorney or his clerk, of the due signature of any admissions made in pursuance of any notice to admit facts, shall be sufficient evidence of such admissions, if evidence thereof be required.

Proof of admissions.

30 55. Any party may at any stage of an action or matter, where admissions of fact have been made either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment, as the Court or Judge may think just.

Judgment on admissions.

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TRIAL.

Mode of Trial.

TRIAL.

56. (1) In all actions and issues, other than actions of ejectment, and issues under the Real Property Act or any Act amending or extending it, any party thereto (including in interpleader proceedings the Sheriff) may, in such manner and within such time as shall be prescribed, give notice of his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried.

In actions and issues other than ejectment and issues under R. P. Acts, parties by giving notice may have trial with jury.

45 Provided nevertheless that the Court or a Judge may direct the trial without a jury, and either with or without assessors, of any action or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury.

But trial without jury may be ordered in certain cases.

50 (2) In actions of ejectment, and in issues directed to be tried under the Real Property Act or any Act amending or extending it, the mode of trial shall be by a Judge without a jury, any party thereto shall in such manner and within such time as shall be prescribed, apply to a Judge for a trial with a jury of the action, or of any issue or issues of fact, and upon such application the Judge, if in his opinion it is expedient, may order that such action or issue or issues, or any one or more of such issues be tried with a jury; and from such order there shall be no appeal.

In action of ejectment, or issues under R. P. Acts, no jury, unless Judge deeming it expedient make order.

Unless jury desired by parties or ordered by Court, trial to be without jury.

(3) Subject to the foregoing provisions of this Section, the mode of trial in all actions and issues shall be by a Judge without a jury.

Provided that in any case the Court or a Judge may at any time order any action, matter, or issue to be tried by a Judge with a jury, or, (unless one of the parties has under Subsection One given notice of his desire for a trial with a jury) by a Judge sitting with assessors and without a jury. 5

Assistance of Experts.

Judge may obtain assistance of experts.

57. A Judge may in any case obtain the assistance (whether 10 as assessors or otherwise) of merchants, engineers, actuaries, accountants, scientific experts, or other persons, the better to enable him to determine any matter at issue in any action or proceeding, and may act upon the advice or certificate of any such person.

Countermanding Notice of Trial.

Countermanding notice of trial.

58. No notice of trial shall be countermanded except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs or otherwise as may be just. 15

Postponement.

Postponement or adjournment of trial.

59. The Judge may, if he think it expedient for the interests 20 of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit.

Cross-examination.

Restriction on cross-examination.

60. The Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to 25 him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter.

Questions for Jury.

Judge may leave questions of fact to be answered by jury.

61. The Judge upon the trial of any action with a jury may in his discretion leave to the jury any questions of fact which are in his 30 opinion pertinent to the issues; and the jury shall be bound to determine such questions, unless relieved therefrom by the Judge.

11 Vic., No. 20, s. 29, as to finding of three-fourths after six hours extended to such questions.

And the provisions of Section Twenty-nine of the Act of the Eleventh year of Her present Majesty Number Twenty as to the 35 decision of three-fourths in number of the jury being taken as the verdict of all in case of the jury not agreeing shall, so far as applicable, extend to a case where the jury shall not agree as to any question of fact which has been left to them by a Judge as aforesaid.

Reserving Case or Point for Court.

Reserving cases and points for Court.

62. The Judge may at the trial reserve any case, or any point 40 in a case, for the consideration of the Court, or may at any time direct any case, or point in a case, to be argued before the Court; and the Court shall have power to hear and determine any such case or point so reserved or so directed to be argued, and to order judgment to be entered for either party, or make such other order as it may think fit. 45

JUDGMENT.

JUDGMENT.

JUDGMENT.

63. No judgment shall be entered after a trial without the order of the Court or a Judge, or the certificate of the Registrar of a District Court given under or by virtue of Section ninety-eight of The District Courts Act of 1858. No judgment after trial without order or certificate. 22 Vic. No. 18, s. 98.

64. The Judge may, at or after a trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to apply to him for judgment; and in either case may, if he think fit, order a judgment of non-suit to be entered. Judgment at or after trial, or adjournment for further consideration, or parties left to apply for judgment.

65. Except where by this Act it is otherwise provided, judgment shall be obtained by motion for judgment, to be made to the Judge who presided at the trial of the action or issues in respect of which such motion for judgment is made. Motion for judgment.

66. (1) Where at the trial the Judge abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. Where no judgment at trial.

(2) If the plaintiff does not set down such a motion and give notice thereof to the other parties within such time as shall be prescribed, then any defendant may set down a motion for judgment, and give notice thereof to the other parties.

67. (1) Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such issues or questions have been determined. Motion for judgment on issues.

(2) If the plaintiff does not set down such a motion, and give notice thereof to the other parties within such time as shall be prescribed, then any defendant may set down a motion for judgment, and give notice thereof to the other parties.

68. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down a motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms (if any) as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other issues of fact. Motion where some issues determine result.

69. No motion for judgment shall, except by leave of the Court or a Judge, be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do. Motion to be within one year.

EXECUTION.

EXECUTION.

70. Every order of the Court or a Judge in any action or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. Orders may be enforced like judgments.

71. No writ of execution shall be issued without the production to the Officer by whom the same should be issued of the judgment or order upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. Judgment or order to be produced.

Time for issuing execution for money or costs.

72. Every person to whom any sum of money or any costs shall be payable under a judgment or order shall, so soon as the money or costs shall be payable, be entitled to sue out one or more writ or writs of *fiери facias* to enforce payment thereof, subject nevertheless as follows :

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Payment postponed.

(a) If the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period :

Stay of execution.

(b) The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

Separate writs for money and costs.

73. Upon any judgment or order for the recovery or payment of a sum of money and costs, there may be, at the election of the party entitled thereto, either one writ or separate writs of execution for the recovery of the sum and for the recovery of the costs, but a second writ shall only be for costs, and shall be issued not less than *eight* days after the first writ.

Time for issuing execution in ejectment, where judgment signed under s. 9.

74. Where a landlord, in an action of ejectment brought against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant, has specially indorsed his writ of summons under Section Seven of this Act, and has obtained an order under Section Nine empowering him to enter final judgment for the recovery of possession of the land or of part thereof (with or without rent or mesne profits), he may enter judgment accordingly and issue execution forthwith, unless the Court or a Judge, at or after the time of making such order, stay execution until such time as they or he shall think fit.

Time for issuing execution in certain cases.

75. A party who has obtained judgment or an order, not being a judgment for payment of money or costs, or for the recovery of possession of land, may issue execution in fourteen days, unless the Court or a Judge shall order execution to issue at an earlier or later date with or without terms.

Corporation.

76. Any judgment or order against a Corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property.

ATTACHMENT OF DEBTS.

ATTACHMENT OF DEBTS.

Court may refuse to interfere.

77. In proceedings to obtain an attachment of debts, the Court or a Judge may, in their or his discretion, refuse to interfere, where from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

Order for third person to appear.

78. Whenever in proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

Court may bar claim of third person and make orders.

79. After hearing the allegations of any third person under such order as in the last preceding Section mentioned, and of any other person whom by the same or any subsequent order the Court or a Judge may order to appear, or in case of such third person not appearing when ordered, the Court or Judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of The Common Law Procedure Act of 1857, and may bar the claim

of

of such third person, or make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Court or Judge shall think just and reasonable.

5 80. The provisions of The Common Law Procedure Act of 1857 so far as they are applicable shall apply to any order made under or in pursuance of either of the two last preceding Sections, and to any proceedings taken thereon. Provisions of C.L.P. Act, 1857, to apply to orders under ss. 78 and 79.

TRANSFER OF ACTIONS FROM SUPREME COURT TO DISTRICT COURT. TRANSFER OF ACTIONS TO DISTRICT COURT.

10 81. Where in any action of contract brought in the Supreme Court the claim indorsed on the writ does not exceed two hundred pounds, or where such claim, though it originally exceeded two hundred pounds, is, either before or after action brought, reduced by payment into Court, payment, an admitted set-off, or otherwise, to 15 sum not exceeding two hundred pounds, the defendant in the action, may, within such time as shall be prescribed, if the whole or part of the demand of the plaintiff be contested, call on the plaintiff by summons to show cause, before a Judge in Chambers, why such action should not 20 be tried in a District Court; and on the hearing of such summons the Judge may, if he shall think the action proper to be tried in a District Court, and on such terms (if any) as he shall think fit, make an order that such action be tried in any District Court named in such order.

Certain actions of contract may be ordered to be tried in District Court.

And the action shall thereupon be transferred to such District Court; and the plaintiff shall thereupon lodge with the Registrar of 25 such District Court the order, or a duplicate thereof, and the writ, and a copy of any affidavits on which the order was made, and also a statement of the names and addresses of the several parties to the action or matter, and their attorneys (if any), and copies of a concise statement of the particulars of the demand or cause of action, such as 30 would be required upon entering a plaint, signed by the plaintiff or his attorney. And the Registrar shall thereupon enter the action or matter for trial and give notice to the parties, or their attorneys, of the time and place appointed for such trial, by post or otherwise, and shall annex to the notice to the defendant a copy of the particulars. 35 And the action and all proceedings therein, and any appeal from a decision therein of the Judge of the District Court, shall be heard and taken as if the action could have been, and had been, originally brought in such District Court, anything in the District Courts Act 22 Vic. No. 18. of 1858 to the contrary notwithstanding.

40 Subject to any terms as to costs imposed by the order of the Judge of the Supreme Court, the costs of the action and of all proceedings therein shall be paid by or apportioned between the parties, and be recoverable in like manner as if the action could have been, and had been, originally brought in such District Court, except that the costs 45 of the parties in respect of the proceedings subsequent to the order of the Judge of the Supreme Court shall be allowed according to the scale of costs in use in the District Court, and the costs of the proceedings previously had in the Supreme Court shall be allowed according to the scale in use in the Supreme Court.

Costs.

50 82. It shall be lawful for any person against whom any action of tort may be brought in the Supreme Court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a Judge shall have power to make an order that unless the 55 plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of the Prothonotary, or satisfy the Judge that he has a cause of action fit to be prosecuted in the

In actions of tort Judge may order stay of proceedings unless plaintiff give security for costs, or show cause is fit to be tried in Supreme Court, or may remit cause to District Court.

the Supreme Court, all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the Judge as aforesaid, that such action be tried in any District Court named in such order.

And the action shall thereupon be transferred to such District Court; and the plaintiff shall thereupon lodge with the Registrar of such District Court the order, or a duplicate thereof, and the writ, and a copy of any affidavits on which the order was made, and also a statement of the names and addresses of the several parties to the action or matter, and their attorneys (if any), and copies of a concise statement of the particulars of the demand or cause of action, such as would be required upon entering a plaint, signed by the plaintiff or his attorney. And the Registrar shall thereupon enter the action or matter for trial and give notice to the parties or their attorneys of the time and place appointed for such trial, by post or otherwise, and shall annex to the notice to the defendant a copy of the particulars. And the action and all proceedings therein, and any appeal from a decision therein of the Judge of the District Court shall be heard and taken as if the action could have been, and had been, originally brought in such District Court, anything in the District Courts Act of 1858 to the contrary notwithstanding.

22 Vic., No. 18.

Costs.

Subject to any terms as to costs imposed by the order of the Judge of the Supreme Court, the costs of the action and of all proceedings therein shall be paid by or apportioned between the parties, and be recovered in like manner as if the action could have been, and had been, originally brought in such District Court, except that the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the Supreme Court shall be allowed according to the scale of costs in use in the District Court, and the costs of the proceedings previously had in the Supreme Court shall be allowed according to the scale in use in the Supreme Court.

MANDAMUS AND
INJUNCTIONS.

When to be granted
by interlocutory
order.

MANDAMUS AND INJUNCTIONS.

83. A mandamus or an injunction may be granted by an interlocutory order of the Court or a Judge in all cases in which it shall appear to the Court or Judge to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge shall think just, and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court or Judge shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

INTERLOCUTORY
ORDERS FOR INTERIM
CUSTODY OR SALE.

Order for preserva-
tion or interim
custody of property.

INTERIM CUSTODY OR SALE OF PROPERTY.

84. When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

Order for sale of
perishable goods.

85. It shall be lawful for the Court or a Judge, on the application of any party, to make any order for the sale by any person or persons named in such order, and in such manner, and on such terms

as

as the Court or Judge may think desirable, of any goods, wares, or merchandise, which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

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INTERPLEADER.

INTERPLEADER.

86. Relief by way of interpleader may be granted,—

In what cases relief granted.

(a) Where the person seeking relief is under liability at law for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued at law by two or more parties making adverse claims thereto.

Ordinary interpleader.

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(b) Where the applicant is the Sheriff or other officer charged with the execution of process by or under the authority of the Supreme Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued.

Sheriff's interpleader.

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87. The applicant must satisfy the Court or a Judge by affidavit or otherwise—

Conditions of relief.

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(a) That the applicant claims no interest in the subject-matter in dispute, other than for charges or costs; and

(b) That the applicant does not collude with any of the claimants; and

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(c) That the applicant is willing to pay or transfer the subject-matter into Court or to dispose of it as the Court or a Judge may direct.

88. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another.

Where adverse titles of claimants.

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89. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

Summons.

90. Where the applicant is a defendant in an action, application may be made at any time after service of the writ of summons; and the Court or Judge may thereupon stay all further proceedings in the action.

Time.

Stay, on application of defendant.

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91. If the claimants appear in pursuance of the summons, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.

Order to make claimant defendant, or issue be tried.

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92. Where in any interpleader proceeding in the Supreme Court (whether pending at, or instituted after, the commencement of this Act) the amount or value of the matter in dispute does not exceed two hundred pounds, if it shall appear to the Court or a Judge that such proceeding may be more conveniently tried and determined in a District Court, the Court or Judge may at any time make an order to transfer such proceeding to any District Court named in such order.

Where subject-matter not above £200, proceeding may be transferred to District Court.

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And the proceeding shall thereupon be transferred to such District Court; and the claimant who is ordered to be plaintiff shall thereupon lodge with the Registrar of such District Court such order, or a duplicate thereof, together with a copy of all affidavits used on the application to the Court or Judge, and a copy of the issue (if any) directed to be delivered between the parties by any order of the Court

or

or Judge, and also a statement in writing setting forth the names and addresses of the several parties to such proceeding and their attorneys (if any) and concisely the nature of the proceeding transferred, together with a request to enter the same for hearing. And the Registrar shall thereupon enter the proceedings for hearing, and give 5 notice to the applicant and the claimants of the time and place appointed for the hearing; and such District Court shall have full jurisdiction and authority to proceed therein. And the proceeding shall be tried in such manner and under such conditions as may be directed by the order of the Court or Judge; and in the event of no 10 directions as to the mode of trial being given in such order, the proceeding shall be tried in the same manner as interpleader proceedings instituted and taking place wholly in a District Court, but the Sheriff or any of the parties to the proceeding may apply to the Registrar of such District Court for any special direction as to the 15 mode of trial which the Sheriff or the said parties may desire, or as to any proceeding with reference to the property seized, or as to the evidence.

Costs.

Subject to any terms as to costs imposed by the order of the Judge of the Supreme Court, the costs of the proceeding shall be paid 20 by or apportioned between the parties and be recoverable in like manner as if the whole proceeding could have taken place, and had taken place, in such District Court, except that the costs of the parties in respect of so much of the proceeding as was subsequent to the order of the Judge of the Supreme Court shall be allowed according to 25 the scale of costs in use in the District Court, and the costs of so much of the proceeding as was previously had in the Supreme Court shall be allowed according to the scale in use in the Supreme Court.

Summary decision.

93. The Court or a Judge may, with the consent of both claimants or on the request of any claimant, if, having regard to the 30 value of the subject-matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

Question of law, how decided.

94. Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question 35 without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under The Common Law Procedure Act of 1853.

Claimant not appearing to be barred.

95. If a claimant, having been duly served with a sum- 40 mons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or, having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a Judge may make an order declaring him and all persons claiming under him, for ever barred against the applicant, and 45 persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

Judgment final and conclusive, unless Court give leave to appeal or otherwise order.

96. Except where otherwise provided by Statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a 50 summary way under Section Ninety-three, shall be final and conclusive against the claimants, and all persons claiming under them, unless the Court or Judge, as the case may be, shall give leave to appeal, or shall otherwise order.

Power to order sa'e.

97. When goods or chattels have been seized in execution by 55 the Sheriff or other officer charged with the execution of process of the Supreme Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt,

debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

98. The provisions of this Act contained in Sections Fifty-six to Sixty-nine inclusive shall with the necessary modifications, apply to an interpleader issue; and the Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

99. All rules, orders, matters and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment.

100. The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable.

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AMENDMENT OF LAW AS TO CERTAIN MATTERS.

AMENDMENT
OF LAW.*Merger.*

101. There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

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Assignment of Legal Choses in Action.

102. Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor:

Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the hands of the Master in Equity under and in conformity with the provisions of the Acts for the relief of trustees.

Stipulations not of the Essence of Contract.

103. Stipulations in contracts, as to time or otherwise, which would not, before the commencement of this Act, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.

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Rules

Rules of Law to apply to Inferior Courts.

Rules of law to apply
to Inferior Courts.

104. The several rules of law enacted and declared by Sections One Hundred and One to One Hundred and three inclusive of this Act shall from and after the commencement of this Act be in force and receive effect in all Courts whatsoever in New South Wales, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. 5

**RELIEF AGAINST
FORFEITURE.**

Relief against forfei-
ture for non-pay-
ment of rent.

RELIEF AGAINST FORFEITURE.

105. (1) In the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a Judge shall have power, upon rule or summons, to give relief in a summary manner, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in a Court of Equity; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease. 15

Minute of relief
granted.

(2) Where such relief shall be granted, the Court or Judge shall direct a minute thereof to be made by indorsement on the lease or otherwise. 20

Restrictions on and
relief against forfei-
ture of leases.

106. (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. 25 30

Form, address, and
service of notice.

(2) Such notice shall be in writing, and shall be sufficient although only addressed to the lessee by that designation without his name, or generally to the persons interested without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained; and shall be sufficiently served if it is left at the last known place of abode or business in the Colony of the lessee; or is affixed or left for him on the land or any house or building comprised in the lease; or in case of a mining lease, is left for the lessee at the office or counting house of the mine; or is sent by post in a registered letter addressed to the lessee by name at the aforesaid place of abode or business, office or counting house, and if that letter is not returned through the Post Office undelivered; and the service so made by letter shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered. 35 40

Relief may be given
to lessee.

(3) Where a lessor is proceeding whether at law, in equity, or in any other manner to enforce such a right of re-entry or forfeiture, the lessee may in any action, suit, or other proceeding at law or in equity (if any) commenced by the lessor, or in any action, suit, or other proceeding at law or in equity commenced by himself against the lessor, apply to the Court or a Judge for relief; and the Court or Judge, having regard to the proceedings and conduct of the parties under the foregoing provisions of this Section, and to all the other circumstances, may grant or refuse relief, as the Court or Judge may think fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court or Judge, in the circumstances of each case, may think fit. 45 50 55 (4)

- (4) This Section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament. Section applies to statutory rights.
- (5) For the purposes of this Section a lease limited to 5 continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such breach. Leases until breach, how construed.
- (6) This Section does not extend—
- 10 (a) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or Exclusion of certain covenants and conditions from provisions of Section
- 15 (b) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.
- (7) For the purposes of this Section— Definition of terms.
- 20 "A lease" includes an original or derivative under lease, also a grant securing a rent by condition; and Lease.
- "A mining lease" includes a lease for mining purposes, that is 25 the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or license for mining purposes; and Mining lease.
- "A lessee" includes an original or derivative under-lessee, and 30 the heirs, executors, administrators, and assigns of a lessee, also a grantee under such grant as aforesaid, his heirs and assigns; and Lessee.
- "A lessor" includes an original or derivative under-lessor, and 35 the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns; and Lessor.
- "Bankruptcy" includes insolvency, and any other act or proceeding in law having, under any Act for the time being in 40 force, effects or results similar to those of bankruptcy or insolvency. Bankruptcy.
- (8) This Section applies to actions, suits and proceedings 45 pending at the time of the commencement of this Act, and to leases made either before or after the commencement of this Act, and to breaches committed after, and also (if the lessor has not already re-entered) to breaches committed before the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. Application of Section.
- (9) This Section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. Section not to apply to non-payment of rent.

MOTIONS TO THE COURT.

MOTIONS TO THE COURT.

Motions Generally.

107. In the following cases no motion or application for a rule *nisi* or order to show cause shall after the commencement of this Act 50 be made, but every application in such cases to the Court or a Judge shall be made by motion; that is to say—
- (a) In any action, or issue (whether such issue be under the Real Property Act or any Act amending or extending it, or otherwise), including an application for a new trial; or In actions and issues and applications for new trials.
- 55 (b) To set aside, remit, or enforce an award; or To set aside, remit or enforce awards.
- (c) For attachment; or For attachment.
- (d)

To answer affidavits.
To strike off the rolls.
Against Sheriff.
In appeals from District Courts.

- (d) To answer the matters in an affidavit ; or
- (e) To strike off the rolls ; or
- (f) Against the Sheriff to pay money levied under an execution ; or
- (g) In any appeal from a District Court which before the commencement of this Act would have been by motion to the Supreme Court for a rule nisi or order to show cause. 5

Motion for mandamus or injunction.

108. An application for a mandamus or an injunction under Section Eighty-three of this Act may be made to the Court or a Judge by any party. If made by a plaintiff it may be made either *ex parte* or with notice, and if made by any defendant then on notice to the plaintiff and at any time after appearance by the defendant making the application. 10

No motion to be made without notice except in certain cases.

109. No motion shall be made without previous notice to the parties affected thereby, except in the following cases, namely :—

- (a) Where, according to the practice existing at the time of the commencement of this Act, any order or rule might be made absolute *ex parte* in the first instance ; and 15
- (b) Where, according to the provisions of Section One Hundred and Eight of this Act, any order or rule may be made absolute *ex parte* in the first instance ; and 20
- (c) Where, notwithstanding the provisions of Section One Hundred and Seven of this Act, a motion or application may be made for an order to show cause only.

Unless Court dispense with notice.

Provided that the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court or Judge may think just ; and any party affected by such order may move to set it aside. 25

Contents of notice of motion.

110. Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application ; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. 30

Copy of affidavits.

Amendment of notice.

111. Every notice of motion, and any ground of application stated therein, may be amended at any time by leave of the Court or a Judge on such terms as the Court or Judge may think just, in order to insure the determination on the merits of the real questions intended to be raised, or which are in controversy between the parties. 35

Failure to give notice.

112. If on the hearing of a motion or other application the Court or a Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think just. 40

Service by leave on defendant before time for appearance.

113. The plaintiff may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the writ of summons, or at any time after service of the writ of summons and before the appearance of such defendant, and the expiration of the time limited for his appearance. 45

Service on defendant appearing, or after time has expired, on defendant not appearing.

114. The plaintiff may, without leave of the Court or a Judge, serve any notice of motion or other notice or any summons upon any defendant, who has appeared, or after the expiration of the time limited for appearance, upon any defendant who has been duly served with a writ of summons to appear, but has not appeared. 50

Court may obtain assistance of experts.

115. The Court or a Judge may in any case obtain the assistance of merchants, engineers, actuaries, accountants, scientific experts, or other persons, the better to enable the Court or Judge to determine any matter at issue in any action or proceeding, and may act upon the advice or certificate of any such person. 55

116. Upon every motion or application made to the Court or a Judge, whether by way of appeal or otherwise, the Court or Judge shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

Power of Court to draw inferences and make judgment or order.

(2) The powers aforesaid may be exercised by the Court or Judge, notwithstanding that the notice served may be a notice of motion that part only of the decision or finding may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision or finding.

Extent of powers of Court.

117. (1) Upon every motion or application made to the Court (except a motion by way of appeal from a District Court, the Court shall have full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before a commissioner.

When Court may receive further evidence.

(2) Such further evidence may be allowed, as to matters which have occurred after the date of the decision from which the appeal is brought.

Further evidence may be allowed as to new occurrences.

(3) Such further evidence shall be admitted on special grounds only, and not without special leave of the Court, upon any motion to set aside a judgment after the trial, or hearing, of any action or matter upon the merits, or upon any appeal from such judgment.

When admissible on special grounds only.

25 *Motions to set aside Judgment.*

MOTIONS TO SET ASIDE JUDGMENT.

118. Where, at or after a trial, either with or without a jury, the Judge has directed that any judgment be entered, any party may apply to the Court to set aside such judgment and to enter any other judgment.

Motion to set aside judgment entered.

119. Upon a motion to the Court to set aside a judgment, and to enter any other judgment, the Court may, if it shall think fit order judgment of non-suit to be entered, or may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, either order a new trial, or direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, and in any case make such other order as it may think fit.

Powers of Court on such motion.

Motions for New Trial.

MOTIONS FOR NEW TRIAL.

120. Every notice of motion for a new trial shall state the grounds of the application, and whether the applicant complains of all or part only of the verdict or findings, and shall be served within such time as shall be prescribed.

Notice must state grounds of application and extent of complaint.

121. Upon a motion for a new trial, the Court may, if it shall think fit, order judgment of non-suit to be entered, or may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, either order a new trial, or direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made, and in any case make such other order as it may think fit.

Powers of Court on motion for new trial

Restrictions upon granting new trials.

122. A new trial shall not be granted on the ground of misdirection, or of non-direction, or of the improper admission or rejection of evidence, or because the verdict of the jury (if any) was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appear to the Court that such wrong or miscarriage affects part only of the matter in controversy, or some, or one, only of the parties, the Court may give final judgment as to part thereof, or as to some, or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties, or may make such further or other order as it may think fit. 5 10

New trial may be granted or refused on terms.

123. The Court may grant or refuse a new trial upon such terms as to increase or reduction of damages, or as to costs or otherwise, as the Court may think just. 15

New trial as to part.

124. A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.

Not granted on stamp objection.

125. A new trial shall not be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp. 20

APPEALS FROM A JUDGE.

Appeals from a Judge.

Decisions by a Judge to be subject to appeal.

126. Any decision by a Judge under this Act shall, unless the contrary is by this Act expressly enacted, be subject to appeal to the Court. 25

What decisions shall not be subject to appeal.

127. No decision given by a Judge where the parties consent to his deciding the matter in a summary way, or as to costs only which by law are left to the discretion of the Judge, shall be subject to appeal, except by leave of the Judge giving such decision.

APPEALS FROM DISTRICT COURTS.

Appeals from District Courts.

Notice must state grounds of appeal and extent of complaint.

128. Every notice of motion by way of appeal from a District Court shall state the grounds of the appeal, and whether all or part only of the decision is complained of, and shall be served within such time as shall be prescribed. 30

Entry of appeal.

129. Every appeal from a District Court shall be entered with the Prothonotary within such time as shall be prescribed, and the entry shall be made by lodging a copy of the notice. 35

Motion to be made to Judge when Supreme Court not sitting.

130. If the Supreme Court be not sitting on such day as shall be prescribed for the hearing of such motion, then such motion may be made to a Judge. And if no Judge can conveniently hear the motion on the day so prescribed, then such motion may be made to the Court or a Judge on as early a day thereafter as can conveniently be fixed by the Court or a Judge for hearing the motion. 40

Appeal no stay of execution.

131. An appeal shall not operate as a stay of proceedings under the decision appealed from, unless the Judge of the District Court shall so order, or unless within such time as shall be prescribed, the appellant shall deposit such sum as such Judge shall fix, or give security to the satisfaction of such Judge or of the Registrar of such Court. 45

Provided that the sum so fixed as aforesaid shall not exceed the amount of the money or the value of the property affected by the decision or finding appealed from, and the costs then payable by the appellant. 50

Appeal from District Court dismissed if no substantial wrong done.

132. No motion by way of appeal from a District Court shall succeed on the ground merely of misdirection, or of non-direction, or of the improper admission or rejection of evidence, or because 55

because the verdict of the jury (if any) was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Supreme Court or of a Judge of the Supreme Court, some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appears to the Court or Judge that such wrong or miscarriage affects part only of the matter in controversy, or some, or one, only of the parties, the Court or Judge may give final judgment as to part thereof, or as to some, or one, only of the parties, and direct a new trial as to the other part only, or as to the other party or parties, or may make such further or other order as the Court or Judge may think fit.

133. The provisions of this Act contained in Sections One Hundred and Twenty-three to One hundred and Twenty-five inclusive shall so far as applicable extend to motions by way of appeal from a District Court.

New trial granted or refused on terms, or as to part, and not granted on stamp objection.

TIME.

TIME.

134. In all cases where a time is limited or specified by this Act, or fixed by any Rule of Court or by any order limiting or extending time, for doing any act or taking any proceeding whatsoever, the Court shall have power by general Rules and Orders, and the Court or a Judge shall have power by order in any case or cases, to extend or abridge the time so limited, specified, or fixed as aforesaid, upon such terms (if any) as the justice of the case may require, and any such extension may be ordered, although the application for the same is not made until after the expiration of the time so limited, specified, or fixed.

Extension or abridgment of time.

135. The time for filing, delivering, or amending any pleading, or other document may be extended by consent in writing, without application to the Court or a Judge.

Extension of time by consent.

30

RULES AND FORMS.

RULES AND FORMS.

Power to make Rules and Forms.

136. It shall be lawful for the Judges, or for the greater number of them (of whom the Chief Justice, or in case of his absence or illness or of a vacancy of such office the senior Puisne Judge, shall be one), from time to time to make all such general Rules and Orders for the effectual execution of this Act, and of the intention and object hereof, and for fixing costs to be allowed for and in respect of the matters herein contained and the performance thereof, and for apportioning the costs of issues, and also for altering the number of days by this Act limited for the return of any Writ, or for the doing of anything by this Act prescribed or authorized to be done, and substituting other days for the same, as in their judgment shall be necessary or proper.

General Rules may be made by the Judges.

And it shall further be lawful for the said Judges from time to time to exercise all the powers and authority given to them or any of them, by the Common Law Procedure Act of 1853, and the Common Law Procedure Act of 1857, with respect to any matter herein contained relative to practice or pleading, anything in this Act to the contrary notwithstanding; and the provisions of those Acts, as to the Rules, Orders, or Regulations made in pursuance thereof, shall be held applicable to any Rules, Orders, or Regulations, which shall be made in pursuance of this Act.

17 Vic. No. 21, ss. 174, 175.
20 Vic. No 31, s. 61.

And all such general Rules and Orders shall be laid before both Houses of Parliament within fourteen days after the making thereof, if Parliament be then sitting, and if Parliament be not then sitting, within fourteen days after the next meeting of Parliament.

Rules to be laid before Parliament.

Provided

Provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the Court or of the Judges to make rules or orders, or otherwise to regulate and dispose of business.

New Writs, proceedings and Forms.

137. Such new or altered Writs may be issued and proceedings 5 taken, as may by the said Judges in the last preceding Section mentioned be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and such new or altered Forms may be used in all actions, matters, and proceedings in the Supreme Court as the said Judges shall from time to time think fit to order, 10 and such Writs and proceedings shall be acted upon and enforced in such and the same manner as Writs and proceedings of the Court are now acted upon and enforced, or as near thereto as the circumstances of the case will admit, and any existing Writ or proceeding, the Form of which shall be in any manner altered in pursuance of this Act, shall 15 nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Act.

New Forms to be sufficient, but may be varied.

138. Any Forms ordered by the said Judges under this Act shall where applicable be sufficient, anything in The Common Law 20 Procedure Act of 1853, The Common Law Procedure Act of 1857, or in this Act to the contrary notwithstanding; and those and the like Forms may be used with such variations as circumstances require; but it shall not be deemed erroneous or irregular to depart from the letter of such Forms, so long as the substance is expressed 25 without prolixity.

Costs of prolixity.

Provided that the costs occasioned by any prolixity shall be disallowed to or borne by the party employing such prolixity, as the case may be.

COUNCIL OF JUDGES.

Council of Judges.

30

Council of Judges to consider procedure and administration, and to report.

139. A Council of the Judges of the Supreme Court of which due notice shall be given to all the said Judges, shall assemble once at least in every year, on such day or days as shall be fixed by the Chief Justice, for the purpose of considering the operation of this Act and of the Rules of Court and Forms for the time being in force, and also 35 the working of the several offices and the arrangements relative to the duties of the officers of the Supreme Court, and of enquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the Supreme Court; and they shall report annually to the Colonial Secretary what (if any) 40 amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice. Any extraordinary 45 Council of the said Judges may also at any time be convened by the Chief Justice.

COSTS.

COSTS.

Costs in discretion of Court.

140. Subject to the provisions of this Act, and of Sections One Hundred, and One Hundred and One of the District Courts Act 50 of 1858, the costs of and incident to all proceedings in the Supreme Court in its common law jurisdiction, shall be in the discretion of the Court or Judge.

Jury cases.

Provided that, where any action, matter, or issue is tried with a jury, the costs shall, subject to the provisions aforesaid, follow the 55 event, unless the Judge by whom such action, matter, or issue is tried, or the Court, shall, for good cause, otherwise order.

Provided

Provided also that nothing in this Section shall be held to repeal Section One of the Act of the Fiftieth year of Her Majesty Number Twenty-six.

In defamation verdict for plaintiff for less than forty shillings not to carry costs.
50 Vic., No. 26, s. 1.
Costs of issues in law and fact.

141. When issues are raised in any action or other proceeding at law, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.

THE SUPREME COURT AND THE JUDGES.

CONSTITUTION OF THE FULL COURT.

Constitution of the Full Court.

142. The Full Court in whatever jurisdiction sitting shall for all purposes be constituted of at least three Judges.

Full Court to consist of at least three Judges, unless parties consent to two only.

Provided that if the parties consent thereto an appeal or motion may be heard and determined by two Judges only.

143. Subject to the provisions of the last preceding Section, the Full Court may sit in two or more divisions at the same time; and each division of the Court constituted in accordance with the provisions of this Act, shall be deemed to be the Full Court and shall exercise the same power, jurisdiction, and authority as might be exercised by the Supreme Court constituted of all or of any two or more of the Judges thereof.

Full Court may sit in divisions.

144. Where any appeal, motion, or question of law, civil or criminal, has been argued or partly argued before the Supreme Court constituted of three or of two Judges, in accordance with the provisions of this Act, the Judges so constituting the Court, or a majority of them, may if they think it expedient, order that the appeal, motion, or question of law shall be re-argued or argued before the Court constituted of a larger number of Judges.

Argument may be ordered before more than three Judges.

145. No Judge of the Supreme Court shall sit on the hearing of any motion for a new trial in any action or matter tried before himself.

Judge who tried case not to sit.

146. No Judge of the Supreme Court shall sit on the hearing of an appeal from, or on a motion to vary or set aside any decision given by himself, unless such decision was given *pro formá* by consent of parties.

Judge who gave decision not to sit.

One Judge acting for another.

ONE JUDGE ACTING FOR ANOTHER.

147. In all cases where any application ought to be made to, or any jurisdiction exercised by, the Judge by whom any action or matter has been tried, or any particular Judge, if such Judge shall die or cease to be a Judge of the Supreme Court, or if for any other reason it shall be impossible or inconvenient that such Judge should act in the matter, the application may be made to, and the jurisdiction exercised by any other Judge.

On death or retirement of Judge, another Judge may exercise jurisdiction.

EXTENSION OF ACT.

EXTENSION OF ACT.

148. It shall be lawful for the Governor with the advice of the Executive Council from time to time by order to be published in the *Gazette* to direct that all or any part of the provisions of this Act or of the Common Law Procedure Acts of 1853 and of 1857 respectively, or of the rules made or to be made in pursuance of the same, shall from a future day specified in such order apply to all or any Courts of record in the Colony; and from and after the said day such provisions and rules respectively shall extend and apply in manner directed by such order, and any such order may be in like manner from time to time altered and annulled; and in and by any such order the Governor may

The Governor may extend any part of C.L.P. Acts to other Courts.

17 Vict. No. 21.
20 Vict. No. 31.

may direct by whom any powers or duties incident to the provisions applied under this Act, or the Common Law Procedure Acts of 1853, and of 1857 respectively, shall and may be exercised with respect to matters in such Court or Courts, and may make any order or regulations which may be deemed requisite for carrying into operation in such Court or Courts the provisions so applied. 5

SCHEDULE.

Session and Number.	Title.	Extent of Repeal.
17 Vic. No. 21	The Common Law Procedure Act of 1853	Sections Forty-six, Seventy-four, Eighty-two, and Ninety-five. 10
26 Vic. No. 12	Trust Property Act of 1862 ...	Sections Five to Ten inclusive.
44 Vic. No. 30	District Courts Act further Amendment Act of 1881.	In Section One the following words "at any time within eight days after the same shall have been made or given," and also the words "to be <i>ex parte</i> in the first instance and," and also the words "and if pending such eight days or at the time of their expiration the Court shall not be sitting in banc such motion may be made before any Judge thereof." 15 20
48 Vic. No. 13	An Act to regulate Appeals to and the Constitution of the Supreme Court sitting in Banco.	The whole. 25

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