Act No. 21, 1899.

An Act to consolidate the Enactments relating to the process, practice, and mode of pleading at law in the Supreme Court. [*20th November*, 1899.]

COMMON LAW PROCEDURE.

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:—

PART I.

PRELIMINARY.

Short title and division.

1. This Act may be cited as the "Common Law Procedure Act, 1899," and is divided into Parts, as follows:—

PART I.—*Preliminary*—*ss.* 1–3.

PART II.—*Writ of summons*—*ss.* 4–24.

PART

PART III.—*Appearance and proceedings in default of appearance—ss.* 25–33.

PART IV.—*Joinder of parties—ss.* 34-48.

PART V.—*Joinder of causes of action—ss.* 49–50.

PART VI.—*Determination of questions raised by consent without pleading—ss.* 51–57.

PART VII.—*Pleading—ss.* 58–101.

PART VIII.—*Discovery and inspection, and notices to admit and produce—ss.* 102–107.

PART IX.—*Change of venue—ss.* 108–109.

PART X.—*Countermand of trial, or default in proceeding thereto—ss.* 110–111.

PART XI.—*Proceedings at the trial—ss.* 112–116.

PART XII.—*Remitting issues and inquiries to subordinate tribunals—ss.* 117–129.

PART XIII.—*Judgment and execution—ss.* 130–139.

PART XIV.—*Interest and damages in the nature of interest—ss.* 140–143.

PART XV.—*Revivor, scire facias, &c.—ss.* 144–151.

PART XVI.—*Death or marriage of parties—ss.* 152–159.

PART XVII.—*New trial, arrest of judgment, and judgment non obstante veredicto—ss.* 160–164.

PART XVIII.—*Mandamus and injunction—ss.* 165–179.

PART XIX.—*Attachment of debts—ss.* 180–187.

PART XX.—*Absent defendants—ss.* 188–208.

PART XXI.—*Ejectment—ss.* 209–251.

PART XXII.—*Habeas Corpus—ss.* 252–254.

PART XXIII.—*Affidavits and Evidence—ss.* 255–258.

PART XXIV.—*Amendment—ss.* 259–260.

PART XXV.—*Costs—ss.* 261–267.

PART XXVI.—*Rules and Forms—ss.* 268–270.

Repeal.
First Schedule.

2. (1) The Acts mentioned in the First Schedule to this Act are to the extent therein expressed hereby repealed.

Officers under Acts hereby repealed.

(2) Every person appointed under any enactment hereby repealed and holding office at the time of the passing of this Act shall be deemed to have been appointed hereunder.

Rules of Court under Acts hereby repealed.

(3) All rules of Court made under the authority of any enactment hereby repealed, or applicable to any proceedings thereunder, and being in force at the time of the passing of this Act shall be deemed to have been made under the authority of, and shall apply to procedings under, this Act.

(4)

(4) Where in any such rule reference is made to the provisions of any enactment repealed and re-enacted with or without modification by this Act, such rule shall be read as if the reference had been to the provisions so re-enacted.

Interpretation.

3. In this Act, unless the context or subject-matter otherwise indicates or requires,—

"Court" means the Supreme Court of New South Wales.

"Judge" means a Judge of the Court.

"Prescribed" means prescribed by Rules of Court.

"Property" in Part XX includes land, money, securities for money, chattels, bills, bonds, and other property of whatsoever nature.

PART II.

Writ of summons.

Personal actions against defendant's within the jurisdiction. 17 Vic. No. 21, s. 2.

4. (1) Every personal action brought in the Court, if the defendant is residing or supposed to reside within the jurisdiction of the Court, shall be commenced by writ of summons in the Form No. 1 contained in the Second Schedule to this Act.

(2) In every such writ and in every copy thereof shall be mentioned the place of the residence or supposed residence of the defendant, or wherein the defendant is or is supposed to be.

(3) Such writ shall be issued by the prothonotary or such other officer as the Court directs.

No form or cause of action to be mentioned in writ. *Ibid.* s. 3.

5. It shall not be necessary to mention any form or cause of action in any writ of summons or in any notice of writ of summons issued under the authority of this Act.

Names of defendants. *Ibid.* s. 4.

6. Every writ of summons shall contain the names of all the defendants, and shall not contain the name or names of any defendant or defendants in more actions than one.

Date and test. *Ibid.* s. 5.

7. Every writ of summons shall bear date on the day on which the same is issued, and shall be tested in the name of the Chief Justice, or in case of a vacancy of such office then in the name of the Senior Puisne Judge.

Indorsement of name and abode of attorney, *Ibid.* s. 6.

8. (1) Every writ of summons shall be indorsed with the name and place of abode of the attorney actually suing out the same, and also when such attorney sues out the same as agent for an attorney in the country with the name and place of abode of such attorney in the country.

or of plaintiff person.

(2) If no attorney is employed to sue out the writ, it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

9.

Attorney on demand to declare whether writ sued out by his authority.
17 Vic. No. 21, s. 7.

9. (1) Every attorney whose name is indorsed on any writ of summons shall on demand in writing made by or on behalf of any defendant declare forthwith whether such writ has been sued out by him or with his authority or privity.

May be ordered to declare plaintiff's name and abode.

(2) If he answers in the affirmative then he shall also, if the Court or a Judge so orders, declare in writing within a time to be allowed by the Court or Judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of Court.

Stay of proceedings on writ issued without authority.

(3) If he answers in the negative, all proceedings upon such writ shall be stayed and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

Indorsement of debt and costs, and notice that proceedings will be stayed on payment.
Ibid. s. 8.

10. Upon every writ sued out for the payment of any debt, and upon every copy of such writ, shall be indorsed—

(*a*) the amount of the debt; and

(*b*) the amount the plaintiff's attorney claims for the costs of such writ, copy, and service, and attendance to receive debt and costs; and

(*c*) that upon payment thereof to the plaintiff or his attorney within the time limited for defendant's appearance further proceedings will be stayed.

Such indorsement shall be written or printed in Form No. 2 contained in the Second Schedule hereto, or to the like effect.

Notwithstanding such payment the defendant may have the costs taxed, and if more than one-sixth be disallowed the plaintiff's attorney shall pay the costs of taxation.

Concurrent writs.
Ibid. s. 9.

11. The plaintiff in any such personal action may at any time during six months from the issuing of the original writ of summons issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked by the prothonotary with the the word "concurrent" and the date of issuing the concurrent writ: Provided that such concurrent writ or writs shall only be in force for the period during which the original writ in such action is in force.

Currency of writ, and renewal.
Ibid. s. 10.

12. (1) No original writ of summons shall be in force for more than six months from the day of the date thereof including the day of such date.

(2) If any defendant therein named has not been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked by the proper officer with the date of such renewal upon delivery to him by the plaintiff or his attorney of a præcipe in such form as before the commencement of the Common Law Procedure Act of 1853 was required to be delivered upon the obtaining of an alias writ.

(3)

(3) A writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original writ of summons.

Renewal of writs issued before this Act. 17 Vic. No. 21, s. 11.

13. Where any writ of summons in any such personal action has been issued before and is in force at the commencement of this Act such writ may at any time before the expiration thereof be renewed under the provisions of and in the manner directed by this Act, and shall after such renewal have the same duration and effect for all purposes, and shall if necessary be subsequently renewed in the same manner as if it had originally issued under the authority of this Act.

Production of renewed writ evidence of commencement of action. *Ibid.* s. 12.

14. The production of a writ of summons purporting to be marked as aforesaid by the proper officer, showing the same to have been renewed according to this Act, shall be evidence of its having been so renewed and of the commencement of the action as of the first date of such renewed writ for all purposes.

Indorsement of service. *Ibid.* s. 13.

15. The person serving the writ of summons shall within three days after such service indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty in case of non-appearance to proceed under this Act.

Every affidavit of service of such writ shall mention the day on which such indorsement was made.

Service on corporations. *Ibid.* s. 14.

16. Every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, treasurer, clerk, or secretary of such corporation.

Proceedings where personal service cannot be effected. *Ibid.* s. 15.

17. The service of the writ of summons shall, wherever it is practicable, be personal, but where reasonable efforts have been made without success to effect personal service, a true copy of the writ may be left at the defendant's then usual place of abode with some competent person there then residing, to be named or otherwise sufficiently described in the affidavit of service hereinafter mentioned.

Actions against British subjects residing out of the jurisdiction. *Ibid.* s. 16.

18. (1) In case any defendant being a British subject is residing out of the jurisdiction of the Court, the plaintiff may issue a writ of summons in the Form No. 3 contained in the Second Schedule hereto, which writ shall bear the indorsement contained in the said form purporting that such writ is for service out of the jurisdiction.

(2) The time for appearance by the defendant to such writ shall be regulated by the distance from Sydney of the place where the defendant is residing.

(3) The Court or a Judge, upon being satisfied by affidavit—

(*a*) that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction; and

(*b*) that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge; and

(*c*) either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction in order to defeat and delay his creditors,

may from time to time direct that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the Court or Judge seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case:

Provided always that the plaintiff shall prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry or before the prothonotary of the Court in the manner hereinafter provided according to the nature of the case as the Court or Judge may direct, and the making such proof shall be a condition precedent to his obtaining judgment.

Actions against foreigners residing out of the jurisdiction.
17 Vic. No. 21, s. 17.

19. (1) In any action against a person residing out of the jurisdiction of the Court and not being a British subject, the like proceedings may be taken as against a British subject resident out of the jurisdiction, save that in lieu of the Form No. 3 in the Second Schedule, the plaintiff shall issue a writ of summons according to the Form No. 4 contained in the said Schedule, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant therein mentioned, which notice shall be in the form contained in the said Form No. 4.

(2) Such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the Court or a Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.

Amendment in case of omissions.
Ibid. s. 18.

20. If the plaintiff or his attorney omits to insert in or indorse on any writ of summons or copy thereof any of the matters required by this Act to be inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but it may be set aside as irregular or amended upon application to be made to the Court or to a Judge; and such amendment may be made upon any application to set aside the writ upon such terms as to the Court or Judge seem fit.

Amendment in case wrong form of writ used.
Ibid. s. 19.

21. If either of the Forms of writ of summons Nos. 1, 3, and 4, contained in the Second Schedule hereto, is by mistake or inadvertence substituted for any other of them, such mistake or inadvertence shall not be an objection to the writ or any other proceeding in such action; but the writ may, upon an *ex parte* application to a Judge whether before

before or after any application to set aside such writ, or any proceeding thereon, and whether the same or notice thereof has been served or not, be amended by such Judge with or without costs.

Writs for service within and without jurisdiction may be concurrent. 17 Vic. No. 21, s. 2.

22. A writ for service within the jurisdiction of the Court may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and a writ for service out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

Affidavits in certain cases may be sworn before a consul. *Ibid.* s 21.

23. (1) Any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a defendant residing out of the jurisdiction of the Court may be sworn before any consul general, consul, vice-consul, or consular agent for the time being appointed by Her Majesty at any foreign port or place.

(2) Every affidavit so sworn by virtue of this Act may be used, and shall be admitted in evidence, saving all just exceptions, provided it purport to be signed by such consul general, consul, vice-consul, or consular agent, upon proof of the official character and signature of the person appearing to have signed the same.

Special indorsement. *Ibid.* s. 22

24. (1) Where the defendant resides within the jurisdiction of the Court, and the claim is for a debt or liquidated demand in money with or without interest arising upon a contract express or implied, as for instance—

(*a*) 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; or

(*d*) on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note,

the plaintiff may make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim in the Form No. 5 contained in the Second Schedule hereto, or to the like effect.

Special indorsement to stand particulars of demand.

(2) Such special indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered unless ordered by the Court or a Judge.

PART

PART III.

APPEARANCE, AND PROCEEDINGS IN DEFAULT OF APPEARANCE.

Judgment in default of appearance where writ specially indorsed.
17 Vic. No. 21, s. 23.

25. (1) In case of non-appearance by the defendant where the writ of summons is indorsed in the special form hereinbefore provided, the plaintiff, on filing an affidavit of due service of the writ in accordance with the provisions of this Act and a copy of such writ, may at once sign final judgment in the Form No. 6 contained in the Second Schedule hereto for—

(*a*) any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) to the date of the judgment; and

(*b*) the sum prescribed for costs, unless the plaintiff claim more than such sum, in which case the costs shall be taxed in the ordinary way.

(2) The plaintiff may upon such judgment issue execution at the expiration of the time prescribed.

(3) Provided that the Court or a Judge may either before or after final judgment let in the defendant to defend, upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits.

Judgment in default of appearance where writ not specially indorsed.
Ibid. s. 24.

26. (1) In case of such non-appearance where the writ of summons is not indorsed in the special form hereinbefore provided, the plaintiff, on filing an affidavit of due service of the writ of summons in accordance with the provisions of this Act and a copy of the writ of summons, may file a declaration indorsed with a notice to plead in eight days and sign judgment by default at the expiration of the time to plead so indorsed as aforesaid.

(2) If no plea is delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for—

(*a*) any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any); and

(*b*) the sum prescribed for costs, unless the plaintiff claim more than such sum, in which case the costs shall be taxed in the ordinary way:

Provided always that in such case the plaintiff shall not be entitled to more costs than if he had made such special indorsement and signed judgment upon non-appearance.

Appearance to be entered at any time before judgment.
Ibid. s. 25.

27. The defendant may appear at any time before judgment, and if he appear after the time specified in the writ of summons he shall,

shall, after notice of such appearance to the plaintiff or his attorney, be in the same position as to pleadings and other proceedings in the action as if he had appeared in time:

Provided always that a defendant appearing after the time appointed by the writ shall not be entitled to any further time for pleading or any other proceeding than if he had appeared within such appointed time.

Appearance by the defendant in person to give address for service.

17 Vic. No. 21, s. 26.

28. (1) Every appearance by the defendant in person shall give an address at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service.

(2) If such address is not given the appearance shall not be received, and if an address so given is illusory or fictitious the appearance shall be irregular, and may be set aside by the Court or a Judge, and the plaintiff may be permitted to proceed by sticking up the proceedings in the prothonotary's office without further service.

Mode of appearance.

Ibid. s. 27.

29. The mode of appearance to every such writ of summons, or under the authority of this Act, shall be by delivering to the proper officer a memorandum in writing according to the Form No. 7 contained in the Second Schedule hereto, or to the like effect dated the day of the delivery thereof.

Proceedings mentioned in writ or notice may be had and taken.

Ibid. s. 28.

30. All such proceedings as are mentioned in any writ or notice issued under this Act may be had and taken in default of a defendant's appearance.

Proceedings where only some of the defendants appear to a writ specially indorsed.

Ibid. s. 29.

31. In any action brought against two or more defendants where the writ of summons is indorsed in the special form hereinbefore provided, if one or more of such defendants only appear and another or others of them do not appear, the plaintiff may sign judgment against the defendant or defendants so not appearing, and—

(*a*) before declaration against the other defendant or defendants issue execution thereupon, in which case he shall be taken to have abandoned his action against the defendant or defendants so appearing; or

(*b*) before issuing such execution, declare against the defendant or defendants so appearing, stating by way of suggestion the judgment obtained against the other defendant or defendants not appearing, in which case the judgment so obtained against the defendant or defendants not appearing shall operate and take effect in like manner as a judgment by default obtained before the commencement of the Common Law Procedure Act of 1853 against one or more of several defendants in an action of debt.

Proceedings against absent defendants sued as co-partners.

4 Vic. No. 6, s. 15.

18 Vic. No. 6, s. 2.

32. (1) In any action in which two or more defendants are sued as co-partners,—

(*a*) if any defendant is personally served with the writ of summons; and

(*b*) if the officer or person charged or entrusted with the service of the writ upon any other defendant makes an indorsement thereon to the effect that he has made diligent search for such defendant and has been unable to find him; and

(*c*) if at any time afterwards an affidavit is filed that to the best of the deponent's knowledge and belief the defendant served did in fact when the cause of action accrued carry on business within the jurisdiction of the Court as a co-partner jointly with the defendant or defendants as to whom such indorsement has been made, and that such last-mentioned defendant or defendants is or are out of the jurisdiction,

the plaintiff at his option may proceed against every such last-mentioned defendant (in case no appearance is entered for him) in the manner next hereinafter mentioned.

(2) Upon the filing of such affidavit, or as soon after as conveniently may be, the plaintiff shall cause a notice in the prescribed form, signed by himself or his attorney, to be published in the Gazette and in not less than one other Sydney newspaper, requiring every such defendant to appear.

(3) If on the day named in such notice (such day not being less than ten days next after the day of the publication of the same in the Gazette) no appearance be entered for such defendant or defendants, the plaintiff may cause such appearance to be entered and may proceed as if such defendant or defendants resided within the jurisdiction and had appeared to the action in person.

Similar proceedings against absent defendants not sued as co-partners.
4 Vic. No. 6, s. 16.

33. (1) The like appearance may be entered and proceedings had where two or more defendants are sued although not as co-partners (where as to any defendant such indorsement is made as aforesaid) upon an affidavit by or on behalf of the plaintiff that the cause of action against all the defendants accrued within the jurisdiction, and that the defendant or defendants as to whom such indorsement has been made is or are out of the jurisdiction.

(2) Provided that in addition to the publication of such notice as aforesaid the plaintiff shall give security by bond, before any such appearance is entered by him, to such amount and in such form as a Judge shall order, conditioned to repay all such sums as he shall recover in the action against any such absent defendant, together with all costs sustained by such defendant in the premises in case the judgment therein against him is afterwards vacated, reversed, or altered.

(3) Every such defendant shall have the like remedy, and the same proceedings may be taken on his behalf for procuring the reversal of such judgment so far as the same affects such defendant, as are hereinafter provided with respect to defendants against whose property there has been issued a writ of foreign attachment.

(4) The provisions of section two hundred and eight shall apply to applications and proceedings under this and the next preceding section. 4 Vic. No. 6, s. 25.

(5) This and the next preceding section shall not extend to any action of trespass or other action in tort (trover or detinue excepted), but shall extend only to actions on or arising out of contract. *Ibid.* s. 23.

PART IV.

JOINDER OF PARTIES.

34. (1) At any time before the trial of an action, the Court or a Judge may order that any person originally joined as plaintiff shall be struck out from such action if it appears to the Court or Judge that injustice will not be done by such amendment, and that the person to be struck out was originally introduced without his consent, or that such person consents either in person or by writing under his hand to be so struck out. Misjoinder of plaintiffs: amendment before trial. 17 Vic. No. 21, s. 30.

(2) Such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise as the Court or Judge thinks proper.

35. (1) If it appears at the trial of an action that there has been a misjoinder of plaintiffs, such misjoinder may be amended as a variance at the trial by the Court or a Judge in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances, if it appears to such Court or Judge that such misjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person to be struck out was originally introduced without his consent, or that such person consents either in person or by writing under his hand to be so struck out. Misjoinder of plaintiffs: amendment at trial. *Ibid.* s. 31.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) Every Circuit Court or officer presiding at any trial shall be deemed a Court or Judge within the meaning of this section.

36. (1) At any time before the trial of an action, the Court or a Judge may order that any person not joined as plaintiff shall be so joined, if it appears to the Court or Judge that injustice will not be done by such amendment, and that such person consents either in person or by writing under his hand to be so joined. Non-joinder of plaintiffs: amendment before trial. *Ibid.* s. 30.

(2) Such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise as the Court or Judge thinks proper.

(3) When any such amendment has been made, the liability of any person so added as co-plaintiff shall subject to any terms imposed as aforesaid be the same as if such person had been originally joined in such cause.

Nonjoinder of plaintiffs: amendment at trial.
17 Vic. No. 21, s. 31.

37. (1) If it appears at the trial of an action that some person not joined as plaintiff ought to have been so joined and the defendant has not at or before the time of pleading given notice in writing that he objects to such non-joinder, specifying therein the name of such person, such non-joinder may be amended as a variance at the trial by the Court or Judge in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances, if it appears to the Court or Judge that such non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that such person consents either in person or by writing under his hand to be so joined.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) When any such amendment has been made, the liability of any person added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined in such action.

(4) Every Circuit Court or officer presiding at any trial shall be deemed a Court or Judge within the meaning of this section.

Amendment after notice or plea of non-joinder of plaintiff.
Ibid. s. 32.

38. (1) If such notice is given, or if any plea in abatement of non-joinder of a person as co-plaintiff (in cases where such plea may be pleaded) is pleaded by the defendant, the plaintiff may, without any order, amend the writ of summons and other proceedings before plea by adding the name of the person named in such notice or plea, and may proceed in the action without any further appearance, on payment of the costs of and occasioned by such amendment only.

(2) In such case the defendant shall be at liberty to plead *de novo*.

Verdict and judgment against some only of several joint contractors.
4 Vic. No. 6, s. 19.

39. (1) If two or more persons are sued as joint contractors, the plaintiff shall be entitled to a judgment (or to a verdict and judgment, as the case may be) against such of the defendants as appear to be liable, although one or more of the defendants appear not to be liable.

(2) In every such case the defendant or defendants not liable shall have judgment, and be entitled to costs against the plaintiff, and to the like remedy for the same as a defendant has in any ordinary case.

Misjoinder of defendants: amendment before or at trial.
17 Vic. No. 21, s. 33.

40. (1) In case of the joinder of too many defendants in any action on contract, the Court or a Judge may at any time before the trial order that the name or names of one or more of such defendants be struck out if it appears to the Court or Judge that injustice will not be done by such amendment.

(2) Such amendment shall be made upon such terms as the Court or Judge thinks proper.

(3) If it appears at the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the Court or Judge or other presiding officer thinks proper.

Pleas in abatement for non-joinder of defendant.
4 Vic. No. 6, s. 20.

41. (1) No plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any action unless it is stated in the plea that such person is resident within the jurisdiction of the Court, and unless the place of his residence is stated with convenient certainty in an affidavit verifying such plea.

(2) To any such plea the plaintiff may reply that such person has been discharged under the provisions of any Act relating to bankruptcy, or the relief of insolvent debtors.

Amendment after plea in abatement for non-joinder of defendant.
17 Vic. No. 21, s. 34

42. In any action on contract, where the non-joinder of any person as a co-defendant is pleaded in abatement, the plaintiff may, without any order, amend the writ of summons and the declaration by adding the name of such person, and serve the amended writ upon such person, and proceed against the original defendant and such person:

Provided that the date of such amendment shall as between such person and the plaintiff be considered for all purposes as the commencement of the action.

Proceedings after such amendment.
Ibid. s. 35.

43. (1) If upon the trial of the action after such plea in abatement and amendment it appears that the person so named in such plea is jointly liable with the original defendant, the original defendant shall be entitled as against the plaintiff to the costs of such plea and amendment.

(2) If upon such trial it appears that any original defendant is liable, but that any person named in such plea is not liable, every defendant not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same together with the costs of such plea and amendment as costs in the cause against the defendant who has so pleaded the non-joinder of such person.

Proceedings where new action commenced after plea in abatement.
4 Vic. No. 6, s. 21

44. If after such plea in abatement the plaintiff without proceeding to trial commences another action against the original defendant and the person named in such plea, and if thereafter it appears, either by the pleadings in such action or upon the trial, that any original defendant is liable, but that any person named in such plea is not liable, every defendant not so liable shall have judgment and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against any defendant so liable who has so pleaded the non-joinder of such person.

Evidence in support of such plea.
4 Vic. No. 6, s. 21.
17 Vic. No. 21, s. 35.

45. Any defendant who has pleaded in abatement the non-joinder of any person as a co-defendant may at the trial adduce evidence of the liability of such person.

Co-partnerships all of whose members are not known.
4 Vic. No. 6, s. 17.

46. (1) In any case where business is carried on within the jurisdiction of the Court by persons in co-partnership, or by one individual or more assuming the style of a co-partnership, or acting as agent or agents for a co-partnership, if the names of the actual members of such co-partnership or of any of them are unknown, such co-partnership and the several members thereof, or the persons or person having carried on business under the style of any such co-partnership, may be sued in the name or names of—

(*a*) any one or more of the members of such co-partnership on behalf of all the members composing the same; or

(*b*) any such agent or agents for and on behalf of such co-partnership,

so that in all cases wherein it would have been necessary but for this enactment to mention the names of all the members composing such co-partnership, it shall be sufficient to mention only the name or names of such one or more member or members or of such agent or agents on behalf of such co-partnership.

(2) Every judgment obtained in any such action shall have the same effect and operation upon the property both real and personal of such co-partnership, and also upon the property and persons of the several members thereof when discovered, whether such property be joint or separate, as if every member of such co-partnership had been actually and in fact a defendant in the action.

Ibid. s. 23.

(3) This section shall not extend to any action of trespass or other action in tort (trover or detinue excepted) but shall extend only to actions on or arising out of contract.

Pleadings.
Ibid. s. 18.

47. Provided that in every writ of summons and other writ issued and declaration or other pleading filed on behalf of the plaintiff in any action brought under the provisions of the last preceding section, the style or firm of the co-partnership shall be specified, and it shall distinctly appear that the defendant sued is so sued either as a member or as agent for and on behalf of a co-partnership.

Liability of agent.
Ibid.

48. No agent so sued on behalf of a co-partnership shall, by reason only of his being so sued, be liable in person or in property to any judgment obtained in such action.

PART

PART V.

JOINDER OF CAUSES OF ACTION.

Joinder of different causes of action. 17 Vic. No. 21, s. 37.

49. (1) Causes of action of whatever kind, provided they are by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment.

(2) Where two or more of the causes of action so joined are local and arise in different districts, the venue may be laid in either of such districts.

(3) The Court or a Judge may prevent the trial of different causes of action together if such trial would be inexpedient, and in such case may order separate records to be made up and separate trials to be had.

Joinder of claims by husband and wife with claims in right of husband. *Ibid.* s. 36.

50. In any action brought by a man and his wife for an injury done to the wife in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated if the Court or a Judge thinks fit:

Provided that in the case of the death of either plaintiff such action so far only as relates to the causes of action (if any) which do not survive shall abate.

PART VI.

DETERMINATION OF QUESTIONS RAISED BY CONSENT WITHOUT PLEADING.

Trial of questions of fact without pleading. *Ibid.* s. 38.

51. (1) Where the parties to an action are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent and order of a Judge (which order any Judge may make upon being satisfied that the parties have a bonâ fide interest in the decision of such questions, and that the same are fit to be tried), proceed to the trial of any such questions of fact without formal pleadings.

(2) Such questions may be stated for trial in an issue in the Form No. 8 contained in the Second Schedule hereto.

(3) Such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action, and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the Court as in other actions.

Agreement for payment of money and costs according to result of issue. *Ibid.* s. 39

52. The parties may, if they think fit, enter into an agreement in writing, which shall be embodied in the said or any subsequent order, that upon the finding of the jury in the affirmative or negative of such issue a sum of money fixed by the parties or to be ascertained by

by the jury upon a question inserted in the issue for that purpose shall be paid by one of such parties to the other of them, either with or without the costs of the action.

Judgment and execution. 17 Vic. No. 21, s. 40.

53. Upon the finding of the jury in any such issue judgment may be entered for the sum so agreed or ascertained with or without costs, as the case may be; and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless the Court or a Judge otherwise orders for the purpose of giving either party an opportunity to move to set aside the verdict or for a new trial.

Record of proceedings and effect of judgment. *Ibid.* s. 41.

54. The proceedings upon such issue may be recorded at the instance of either party, and the judgment, whether actually recorded or not, shall have the same effect as any other judgment in a contested action.

Special case. *Ibid.* s. 42.

55. The parties may after writ issued and before judgment by consent and order of a Judge state any question or questions of law in a special case for the opinion of the Court without any pleadings.

Agreement as to payment of money and costs according to judgment upon special case. *Ibid.* s. 43.

56. (1) The parties may if they think fit enter into an agreement in writing, which shall be embodied in the said or any subsequent order, that upon the judgment of the Court being given in the affirmative or negative of the question or questions of law raised by such special case a sum of money fixed by the parties or to be ascertained by the Court or in such manner as the Court may direct shall be paid by one of such parties to the other of them, either with or without costs of the action.

Judgment and execution. *Ibid.*

(2) The judgment of the Court may be entered for the sum so agreed or ascertained with or without costs as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed.

Costs to follow the event unless otherwise agreed. *Ibid.* s. 44.

57. In case no agreement is entered into as to the costs of such action, the costs shall follow the event and be recovered by the successful party.

PART VII.

Pleading.

Language and form of pleadings in general.

Fictitious and needless averments not to be made. *Ibid.* s. 45.

58. In any pleading statements which need not be proved shall be omitted, such as—

(*a*) the statement of time, quantity, quality, and value, where these are immaterial;

(*b*) the statement of losing and finding and bailment in actions for goods or their value;

(*c*) the statement of acts of trespass having been committed with force and arms and against the peace of our Lady the Queen;

(*d*)

(*d*) the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements; and

(*e*) all statements of a like kind.

Demurrer, &c. 17 Vic. No. 21, s. 46.

59. (1) Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be.

(2) Where issue is joined on such demurrer the Court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form.

(3) No judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form.

No special demurrer. *Ibid.* s. 47.

60. No pleading shall be deemed insufficient for any defect, which before the commencement of the Common Law Procedure Act of 1853 could only be objected to by special demurrer.

Pleadings framed to embarrass may be struck out or amended. *Ibid.* s. 48.

61. If any pleading is so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the Court or a Judge to strike out or amend such pleading, and the Court or Judge shall make such order respecting the same and also respecting the costs of the application as the Court or Judge thinks fit.

Pleadings how entitled, dated and entered on record. *Ibid.* s. 49.

62. Every declaration and other pleading shall be entitled of the Supreme Court and of the day of the month and the year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

Profert and oyer abolished. *Ibid.* s. 50.

63. It shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading, and if profert is made it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document.

Setting out documents referred to in pleading. *Ibid.* s. 51.

64. A party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out.

Initials and contractions. 5 Vic. No. 9, s. 17.

65. In any action on a written instrument, where any party thereto is therein designated by any initial letter or letters, or other contraction of the first or other name or names, it shall be sufficient to designate such party by such initial letter or letters or other contraction.

Performance of conditions precedent may be averred generally.
17 Vic. No. 21, s. 52.

66. The plaintiff or defendant in any action may aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading any condition precedent the performance of which he intends to contest.

Forms of pleadings.
Ibid. s. 84.
Third Schedule.

67. The forms of pleadings contained in the Third Schedule to this Act shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity.

Signature of counsel.
Ibid. s. 78.

68. The signature of counsel shall not be required to any pleading.

Declaration.

Plaintiff to declare within a year.
Ibid. s. 53.

69. A plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons is returnable.

Forms of commencement, &c., of declaration.
Ibid. s. 54.

70. Every declaration shall commence in the Form No. 9 contained in the Second Schedule hereto, or to the like effect; and shall conclude in the Form No. 10 contained in the said Schedule, or to the like effect.

Commencement of declaration after plea of non-joinder.
Ibid. s. 55.

71. In all cases in which, after a plea in abatement of the non-joinder of another person as defendant, the plaintiff without having proceeded to trial on an issue thereon commences another action against the defendant in the action in which such plea has been pleaded and the person named in such plea as joint contractor, or amends by adding the omitted defendant, the commencement of the declaration shall be in the Form No. 11 contained in the Second Schedule hereto, or to the like effect.

Delcaration for libel or slander.
Ibid. s. 56.

72. In actions of libel and slander the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander, and where the words or matter set forth with or without the alleged meaning show a cause of action the declaration shall be sufficient.

Pleas and subsequent pleadings.

Time for pleading where defendant is within jurisdiction.
Ibid. s. 57.

73. Where the defendant is within the jurisdiction of the Court, the time for pleading in bar, unless extended by the Court or a Judge, shall be eight days, and a notice requiring the defendant to plead thereto in eight days, otherwise judgment, may, whether the declaration be delivered or filed, be indorsed upon the declaration or delivered separately.

74. (1) Express colour shall not be necessary in any pleading. Express colour, special traverses, formal commencements, and prayers of judgment unnecessary. 17 Vic. No. 21, ss. 58-60.

(2) Special traverses shall not be necessary in any pleading.

(3) In a plea or subsequent pleading it shall not be necessary to use any allegation of *actionem non*, or *actionem ulterius non*, or to the like effect, or any prayer of judgment, nor shall it be necessary in any replication or subsequent pleading to use any allegation of *precludi non* or to the like effect, or any prayer of judgment.

75. No plea in abatement for a misnomer shall be allowed in any action; but the defendant may cause the declaration to be amended at the cost of the plaintiff upon a Judge's summons founded on an affidavit of the right name. Misnomer not to be pleaded. 5 Vic. No. 9, s. 17.

76. (1) No formal defence shall be required in a plea or avowry or cognizance, and it shall commence in the Form No. 12 contained in the Second Schedule hereto, or to the like effect. Commencement of plea. 17 Vic. No. 21, s. 61.

(2) It shall not be necessary to state in a second or other plea or avowry or cognizance that it is pleaded by leave of the Court or a Judge, or according to the form of the statute, or to that effect; but every such plea, avowry, or cognizance shall be written in a separate paragraph and numbered, and shall commence in the Form No. 13 contained in the said Schedule, or to the like effect.

(3) No formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading. Formal conclusions unnecessary.

77. Any defence arising after the commencement of any action shall be pleaded according to the fact without any formal commencement or conclusion, and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action. Plea of matter subsequent to action. *Ibid.* s. 62.

78. (1) In cases in which, before the commencement of the Common Law Procedure Act of 1853, a plea *puis darrein continuance* was pleadable in Banco or at nisi prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, and such plea may when necessary be pleaded in vacation. Plea puis darrein continuance. *Ibid.* s. 63.

(2) No such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge otherwise orders.

79. All matters which, before the commencement of the Common Law Procedure Act of 1857, were only the subject of a cross action, or might be made the subject of a cross action between the parties, shall by leave of a Judge, and on such terms as he thinks proper, be pleadable by way of set-off. Subjects of cross action may be pleaded. 20 Vic. No. 31, s. 17.

80. (1) In all actions (except actions for malicious arrest or prosecution, or debauching of the plaintiff's daughter or servant) the defendant, Payment into Court. 5 Vic. No. 9, s. 22. 17 Vic. No. 21, s. 64. 50 Vic. No. 26, s. 2.

defendant, and by leave of the Court or a Judge, upon such terms as the Court or Judge thinks fit, one or more of several defendants, may pay into Court a sum of money by way of compensation or amends.

(2) Nothing in this section shall affect the provisions of any Act whereby one or more of several defendants may make such payment into Court without such leave.

Payment into Court, how pleaded.
17 Vic. No. 21, s. 65.

81. When money is paid into Court, such payment shall be pleaded in all cases as near as may be, *mutatis mutandis*, in the Form No. 14 contained in the Second Schedule hereto.

No order to pay money into Court.
Ibid. s. 66.

82. (1) No rule or Judge's order to pay money into Court shall be necessary except where leave is required in the case of one or more of several defendants; but the money shall be paid to the proper officer of the Court, who shall give a receipt for the amount in the margin of the plea.

Payment out.
Ibid.

(2) The said sum shall be paid out to the plaintiff, or to his attorney upon a written authority from the plaintiff, on demand.

Proceedings by plaintiff after payment into Court.
Ibid. s. 67.

83. After the delivery of a plea of payment of money into Court—

(*a*) the plaintiff may reply to the same by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and may in that case tax his costs of suit, and in case of non-payment thereof within forty-eight hours sign judgment for his costs of suit so taxed; or

(*b*) the plaintiff may reply that the sum paid into Court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit from the time of such plea.

Pleas to actions partaking both of breach of contract and wrong.
Ibid. s. 68.

84. Whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts: Any plea which is good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong.

Payment set-off and other pleadings to be construed distributively.
Ibid. s. 69.

85. Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon and so much thereof as is sufficient answer to part of the causes of action proved is found true by the jury, a verdict shall pass for the the defendant in respect of so much of the causes of action as is answered, and for the plaintiff in respect of so much of the causes of action as is not so answered.

Traverse of the declaration. 17 Vic. No. 21, s. 7

86. A defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, or may select and traverse separately any material allegation in the declaration although it might have been included in a general traverse.

Traverse of plea or subsequent pleading. *Ibid.* ss. 71, 72.

87. (1) A plaintiff may traverse the whole of any plea or subsequent pleading of the defendant by a general denial, or admitting some part or parts thereof deny all the rest, or deny any one or more allegations.

(2) A defendant may in like manner deny the whole or part of a replication or subsequent pleading of the plaintiff.

Joinder of issue. *Ibid.* s. 73.

88. (1) Either party may plead in answer to the plea or subsequent pleading of his adversary that he joins issue thereon, which joinder of issue may be in the Form No. 15 contained in the Second Schedule hereto, or to the like effect.

(2) Such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon.

(3) In all cases where the plaintiff's pleading is in denial of the pleading of the defendant or some part of it, the plaintiff may add a joinder of issue for the defendant.

Pleading and demurring together. *Ibid.* s. 74.

89. (1) Either party may by leave of the Court or a Judge plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney if required by the Court or Judge to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact, and that he is further advised and believes that the objections raised by such demurrer are good and valid objections in law.

(2) It shall be in the discretion of the Court or a Judge to direct which issue shall be first disposed of.

Several matters may be pleaded at any stage of the pleadings. *Ibid.* s. 75.

90. By leave of the Court or a Judge—

(*a*) the plaintiff may plead in answer to the plea or the subsequent pleading of the defendant as many several matters as he thinks necessary to sustain his action; and

(*b*) the defendant may plead in answer to the declaration or other subsequent pleading of the plaintiff as many several matters as he thinks necessary for his defence,

upon an affidavit of the party making such application or his attorney, if required by the Court or Judge, to the effect that he is advised and believes that he has just grounds to traverse the several matters proposed

proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance are respectively true in substance and in fact.

Objections to pleadings to be heard on summons to plead several matters.
17 Vic. No. 21, s. 76.

91. All objections to the pleading of several pleas, replications or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters.

Certain pleas may be pleaded together without leave.
Ibid. s. 77.

92. (1) The following pleas or any two or more of them may be pleaded together as of course without leave of the Court or a Judge, that is to say—

(*a*) a plea denying any contract or debt alleged in the declaration;

(*b*) tender as to part;

(*c*) the Statute of Limitations;

(*d*) set-off;

(*e*) bankruptcy of the defendant;

(*f*) discharge under the laws relating to bankruptcy;

(*g*) plene administravit;

(*h*) plene administravit præter;

(*i*) infancy;

(*j*) coverture;

(*k*) payment;

(*l*) accord and satisfaction;

(*m*) release;

(*n*) not guilty;

(*o*) a denial that the property an injury to which is complained of is the plaintiff's;

(*p*) leave and license;

(*q*) son assault demesne; and

(*r*) any other pleas allowed by rule of Court to be so pleaded.

Pleading several matters without leave.
Ibid. s. 79.

(2) Except in the cases herein specifically provided for, if either party plead several pleas, replications, avowries, cognizances, or other pleadings without leave of the Court or a Judge, the opposite party may sign judgment.

(3) Such judgment may be set aside by the Court or a Judge upon an affidavit of merits and upon such terms as to costs and otherwise as the Court or Judge thinks fit.

New assignment.
Ibid. s. 80.

93. One new assignment only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined by the particulars delivered in the action (if any), and shall state that the plaintiff proceeds for causes of action different

different from all those which the pleas profess to justify, or for an excess over and above what all the defences set up in such pleas justify, or both.

Pleas not to be repeated. 17 Vic. No. 21, s. 81.

94. No plea which has already been pleaded to the declaration shall be pleaded to such new assignment except a plea in denial, unless by leave of the Court or a Judge, and such leave shall only be granted upon satisfactory proof that the repetition of such plea is essential to a trial on the merits.

Equitable defence. 20 Vic. No. 31, s. 48.

95. (1) The defendant, or the plaintiff in replevin, in any action in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds may plead the facts which entitle him to such relief by way of defence, and the Court may receive such defence by way of plea.

(2) Such plea shall begin with the words "for defence on equitable grounds," or words to the like effect.

Equitable defence after judgment. *Ibid.* s. 49.

96. 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. *Ibid.* s. 50.

97. (1) The plaintiff may, in answer to any plea, reply facts avoiding such plea upon equitable grounds.

(2) Such replication shall begin with the words "for reply on equitable grounds," or words to the like effect.

Court or Judge may strike out equitable plea or replication. *Ibid.* s. 51.

98. If it appears to the Court or Judge 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, the Court or Judge may order the same to be struck out on such terms as to costs and otherwise as to the Court or Judge seems reasonable.

Proceedings in equity saved. *Ibid.* s. 52.

99. 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.

Form of demurrer and joinder in demurrer. 17 Vic. No. 21, s. 82

100. (1) Every demurrer shall be in the Form No. 16 contained in the Second Schedule hereto, or to the like effect, and in the margin thereof some substantial matter of law intended to be argued shall be stated.

(2) If any demurrer is delivered without such statement, or with a frivolous statement, it may be set aside by the Court or a Judge and leave may be given to sign judgment as for want of a plea.

(3) The form of a joinder in demurrer shall be in the Form No. 17 contained in the said Schedule, or to the like effect.

Time for pleading after amendment. *Ibid.* s. 83.

101. (1) Where an amendment of any pleading is allowed, no new notice to plead thereto shall be necessary, but the opposite party shall be bound to plead to the amended pleading within the time specified

specified in the original notice to plead, or within two days after amendment, whichever shall last expire, unless otherwise ordered by the Court or a Judge.

(2) If the amended pleading has been pleaded to before amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the Court or a Judge shall allow, the pleadings originally pleaded thereto shall stand and be considered as pleaded in answer to such amended pleading.

PART VIII.

Discovery and inspection, and notices to admit and produce.

Discovery of documents.
20 Vic. No. 31, s. 23.

102. (1) Upon the application of either party to any action or other 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, the Court or a Judge may order that—

(*a*) the party against whom such application is made; or

(*b*) if such party is a body corporate, 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 such documents or any of them are in, and whether he or they objects or object to the production of such as are in his or their possession or power, and if so on what grounds.

(2) Upon such affidavit being made the Court or Judge may make such further order thereon as shall be just.

Inspection of documents.
16 Vic. No. 14, s. 6.

103. Upon the application of either party to any action or other proceeding in any case in which, before the passing of the Act sixteenth Victoria number fourteen, a discovery might have been obtained by filing a bill, or by any other proceeding in a Court of Equity at the instance of such party, the Court or a Judge may order the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or proceeding, and if necessary to take examined copies of the same or to procure the same to be duly stamped.

Inspection of real or personal property.
20 Vic. No. 31, s. 24.

104. (1) Upon the application of either party, the Court or a Judge may make a rule or order upon such terms as to costs and otherwise as the Court or Judge thinks fit for the inspection by the jury or by such party or by his witnesses, or by so many and such

of

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.

(2) Nothing herein contained shall affect the provisions of the Act eleventh Victoria number twenty as to obtaining a view by a jury.

Notice to admit.
17 Vic. No. 21, s. 92.

105. (1) Either party may call on the other party by notice to admit any document saving all just exceptions.

(2) In case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the trial the Judge certifies that the refusal to admit was reasonable.

(3) No costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the prothonotary, a saving of expense.

Proof of admissions
Ibid. s. 93.

106. An affidavit of the attorney in the action or his clerk of the due signature of any admissions made in pursuance of such notice and annexed to the affidavit shall be sufficient evidence of such admissions.

Proof of notice to produce.
Ibid. s. 94.

107. An affidavit of the attorney in the action or his clerk of the service of any notice to produce, in respect of which notice to admit has been given, and of the time when it was served, with a copy of such notice to produce annexed to such affidavit, shall be sufficient evidence of the service of the original of such notice and of the time when it was served.

PART IX.

Change of venue.

Change of venue.
4 Vic. No 22, s. 15.

108. In any action or other proceeding, wheresoever pending—

(*a*) if it appears that a fair or unprejudiced trial of any issue cannot otherwise be had; or

(*b*) if for any other reason it appears expedient to the Court so to do,

the Court may change the venue and direct the trial to be had in such other district or at such particular place as the Court thinks fit, and may for that purpose make all such orders, and (where the venue is changed at the instance of either party) impose such terms and conditions as justice appears to require.

109.

Change of venue in ejectment.
17 Vic. No. 21, s. 133.

109. The Court or a Judge may, on the application of either party to an action of ejectment, order that the trial shall take place in any district other than that in which the venue is laid, and such order being suggested on the record the trial may be had accordingly.

PART X.

COUNTERMAND OF TRIAL OR DEFAULT IN PROCEEDING THERETO.

Rule for costs of the day.
Ibid. s. 89.

110. A rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit without motion.

Proceeding where plaintiff neglects to bring on the cause to be tried.
Ibid. s. 91.

111. (1) Where any issue is joined in any action, and the plaintiff neglects to bring such issue on to be tried according to the practice for the time being of the Court, whether the plaintiff in the meantime has given notice of trial or not, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice.

(2) If the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial although duly required so to do (which suggestion shall not be traversable but only be subject to be set aside if untrue), and may sign judgment for his costs.

(3) Provided that the Court or a Judge may extend the time for proceeding to trial with or without terms.

PART XI.

PROCEEDINGS AT THE TRIAL.

Adjournment.
20 Vic. No. 31, s. 9.

112. The Court or Judge may at the trial of any action where they or he may deem it right for the purposes of justice order an adjournment for such time, and subject to such terms and conditions as to costs and otherwise, as the Court or Judge thinks fit.

Addresses by counsel.
Ibid. s. 58.

113. 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.

114. 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. 20 Vic. No. 31, s. 59.

115. Where the counsel for the defendant begins, the counsel for the plaintiff may 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. Addresses by counsel. *Ibid.* s. 60.

116. (1) In all cases of variance between the proof and the record on the trial of any action, the Court or Judge or Circuit Court, instead of causing the record or document on which such trial is proceeding to be amended at such trial, may direct the jury to find the fact or facts according to the evidence. Variances between proof and record. 5 Vic. No. 9, s. 38.

(2) Such finding shall thereupon be stated on the said record or document, and, notwithstanding the finding on the issue or issues joined, the Court shall thereafter, if it appears to the Court that the variance was immaterial to the merits of the case and such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the right and justice of the case.

PART XII.

Remitting issues and inquiries to subordinate tribunals.

117. Where, in any action, the claim indorsed on the writ— Order for trial in District Court. 22 Vic. No. 18, s. 98. 22 Vic. No. 25, s. 2.

(*a*) does not exceed two hundred pounds; or

(*b*) though it originally exceeded two hundred pounds, is reduced by payment into Court or an admitted set-off or otherwise to a sum not exceeding two hundred pounds,

a Judge may, on the application of either party after issue joined or after any interlocutory judgment, if he thinks the action proper to be tried in a District Court, on such terms as he thinks fit, order that the action be tried in any District Court which he shall name.

118. The plaintiff shall thereupon lodge such order and the issue or the writ for the assessment of damages with the registrar of such District Court, and the Judge of such District Court shall appoint a day for the hearing of the action, notice whereof shall be sent by such registrar to both parties or their attorneys in the manner directed by the rules regulating practice in the District Courts. Proceedings therein. 22 Vic. No. 18, s. 98.

119. After such hearing such registrar shall certify the result to the prothonotary of the Court, and judgment in accordance with such certificate may be signed in the Court. Certificate of result and judgment thereon. *Ibid.*

120. (1) Where in any action brought in respect of any trespass to land the defendant by his pleas has admitted the plaintiff's title to and possession of the land alleged to have been trespassed upon, the plaintiff Recommencement of trespass action in District Court, where title and possession are admitted. 47 Vic. No. 7, s. 3.

plaintiff may begin his action *de novo* for not more than two hundred pounds in the nearest District Court of the district in which the alleged trespasses have been committed, which commencement of action in the District Court shall operate as a stay of proceedings in the Supreme Court action.

(2) In such District Court action the parties shall be bound by their pleadings in the Supreme Court action.

(3) All the costs incurred in the Supreme Court action up to such admission shall be costs in the cause to abide the event of the trial in the District Court.

(4) In any such action continued by the plaintiff in the Supreme Court after such admission, the plaintiff, if his verdict does not exceed two hundred pounds, shall recover only the same costs as he would have recovered in the District Court.

Writs of inquiry and trial.
4 Vic. No. 22, s. 26.
10 Vic. No. 10, s. 15.
15 Vic. No. 3, s. 11.
20 Vic. No. 8, s. 2.

121. (1) By leave of a Judge there may be issued out of the Court at the instance of either plaintiff or defendant—

(*a*) a writ of inquiry in any case where breaches have been suggested under the statute in such case made and provided; or

(*b*) a writ of inquiry or writ of trial in any other case where the debt, damages, or sum sought to be recovered does not in fact exceed one hundred pounds (notwithstanding any higher amount or sum inserted in the declaration), and where the Judge is satisfied that no difficult question of law or fact will arise,

directed to a commissioner of the Court, or the chairman of a Court of Quarter Sessions, or a barrister or attorney.

(2) The word commissioner hereinafter in this Part of this Act means the person to whom such writ is so directed.

Rules of Court.
4 Vic. No. 22, s. 26.

122. Such writ shall be issued under such Rules of Court as may be made for the determination of such matters in manner most conducive to the advantage of suitors and to the avoiding of expense and delay.

Hearing before commissioner and assessors.
5 Vic. No. 9, s. 20.
15 Vic. No. 3, s. 10.

123. (1) Every such inquiry or trial shall be by such commissioner and two assessors to be named and summoned by him from among the class of special jurors residing within ten miles of the place where the inquiry or trial is to be had.

Powers of Commissioner.
10 Vic. No. 10, s. 15.

(2) Every such commissioner shall for the purposes of such writ have the same powers as at the time of the passing of the Act tenth Victoria number ten were had or might have been exercised in England by a sheriff to whom a writ of trial was directed by one of Her Majesty's Courts or Judges at Westminster.

Verdict.
5 Vic. No. 9, s. 20.

124. The verdict of such commissioner and assessors or of the majority of them shall be of the like force as the verdict of a jury at *nisi prius*.

125. The commissioner shall return to the Court the writ with an indorsement of the verdict thereon, and his notes of the evidence on such inquiry or trial, and the Court or a Judge may permit any amendment of the said indorsement in accordance with such notes and not being repugnant to the verdict but so as to give effect to the same. Commissioner's notes of evidence, &c. 10 Vic. No. 10, s. 17.

126. On the return of such writ the party succeeding may tax his costs and sign judgment and issue execution forthwith unless— Judgment and execution. 5 Vic. No. 9, s. 20.

(*a*) the commissioner certifies to the Court that in his opinion an opportunity should be afforded to the unsuccessful party to move for a new trial or inquiry (as the case may be); or

(*b*) a Judge stays judgment or execution therein.

127. (1) Where justice appears to have been done by such verdict on the merits, the same shall not in any case be set aside or impeached for any mere omission to find any issue or for any technical defect or error whatsoever. Setting aside verdict, &c. 10 Vic. No. 10, s. 17.

(2) Where any application is made to the Court or a Judge either to set aside such verdict or to amend the indorsement thereof on the writ, such reasonable terms may be imposed on the parties and such order made respecting the costs as the Court or Judge thinks fit.

128. (1) The commissioner's fee for executing a writ of inquiry or of trial shall be two guineas, which shall include the charge for summoning assessors and returning the writ duly indorsed. Commissioner's and assessors' fees. 10 Vic. No. 10, s. 16. 15 Vic. No. 3, s. 10.

(2) Each assessor shall be entitled to a fee of ten shillings as compensation for his attendance on any such inquiry or trial.

(3) The commissioner's and assessors' fees shall be allowed as costs in the cause.

129. (1) In any action in which it appears to the Court or a Judge after judgment by default that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a Judge may direct that the amount for which final judgment is to be signed shall be ascertained by the prothonotary of the Court. Inquiry of damages before the prothonotary. 17 Vic. No. 21, s. 86.

(2) The attendance of witnesses and the production of documents before the prothonotary may be compelled by subpœna in the same manner as before a jury upon a writ of inquiry.

(3) The prothonotary may adjourn the inquiry from time to time as occasion requires.

(4) The prothonotary shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order with such indorsement to the plaintiff, and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment and otherwise, as upon the finding of a jury upon a writ of inquiry.

PART

PART XIII.

JUDGMENT AND EXECUTION.

Judgment by default for liquidated demands final. 17 Vic. No. 21, s. 85.

130. In actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final.

Judgment for money demands without distinction between debt and damages. *Ibid.* s. 87.

131. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

Saving as to certain provisions of 8 & 9 Wm. III, c. 11. *Ibid.* s. 88.

132. Nothing in this Act contained shall in any way affect the provisions of the Imperial Act eighth and ninth William the Third, chapter eleven, intituled "*An Act for the better preventing frivolous and vexatious suits*," as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches.

Incipitur of judgment. *Ibid.* s. 158.

133. It shall not be necessary before issuing execution upon any judgment under the authority of this Act to enter the proceedings upon any roll, but an incipitur thereof may be made upon paper shortly describing the nature of the judgment, and judgment may thereupon be signed, and costs taxed and execution issued:

Provided nevertheless that the proceedings may be entered upon the roll whenever the same may become necessary for the purpose of evidence or of an appeal.

Execution after trial. *Ibid.* s. 95.

134. A plaintiff or defendant having obtained a verdict may issue execution in the time prescribed, unless the Court or a Judge orders execution to issue at an earlier or later period with or without terms.

Expenses of execution. *Ibid.* s. 96.

135. In every case of execution the party entitled to execution may levy the poundage fees and expenses of the execution over and above the sum recovered.

Execution in actions for recovery of specific goods. *Ibid.* s. 97.

136. (1) When the action has been brought to recover specific goods, and the plaintiff has claimed a return of such goods or their value and damages for their detention, and has recovered a verdict and judgment in such action, the sheriff may, if so required by the plaintiff, demand and seize the specific goods claimed if they can be found by him, and deliver them to the plaintiff.

(2) If the sheriff does not find and seize the said goods, the Court or a Judge, on the application of the plaintiff, may order the actual return thereof, and enforce such order by process of attachment.

(3) If such application is refused, or if such order is not obeyed, the plaintiff may by leave of a Judge procure a separate writ of fieri facias to be issued for the value of the goods, without prejudice to his right to issue execution either before or after or concurrently therewith for his costs of suit and the damages awarded for the detention of the goods.

137.

Writs of execution to remain in force for one year only unless renewed. 17 Vic. No. 21, s. 98

137. A writ of execution if unexecuted shall not remain in force for more than one year from the teste of such writ unless renewed in the manner hereinafter provided.

Renewal. *Ibid.*

138. (1) Such writ may at any time before its expiration be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked by the prothonotary with the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff signed by the party or his attorney, and countersigned by the prothonotary.

(2) A writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof.

Evidence of renewal. *Ibid.* s. 99.

139. The production of a writ of execution purporting to be so marked, or of the notice renewing the same purporting to be so countersigned, showing the same to have been renewed according to this Act, shall be sufficient evidence of its having been so renewed.

PART XIV.

Interest and damages in the nature of interest.

Interest to be allowed on trials in certain cases. 5 Vic. No. 9, s. 23.

140. Upon all debts or sums certain recovered in any action, the jury on the trial of any issue or assessment of any damages may, if they think fit, allow interest to the creditor at a rate not exceeding eight per centum or (in respect of any bill of exchange or promissory note) at a rate not exceeding twelve per centum per annum—

(*a*) from the time when such debt or sum was payable (if payable by virtue of some written instrument, and at a date or time certain); or

(*b*) if payable otherwise, then from the time when demand of payment has been made in writing giving notice to the debtor that interest would be claimed from the date of such demand:

Provided that nothing herein contained shall extend to authorise the computation of interest on any bill of exchange or promissory note at a higher rate than eight per centum per annum where there has been no plea pleaded.

Damages in nature of interest. *Ibid.* s. 24.

141. The jury on any trial or assessment of damages may, if they think fit, give damages in the nature of interest—

(*a*) over and above the value of the goods at the time of the conversion in actions of trover or trespass concerning goods; and

(*b*) over and above the money recoverable in actions on policies of insurance, made after the twenty-eight day of September, in the year one thousand eight hundred and forty-one, being the date of the passing of the Act fifth Victoria number nine.

142.

Verdicts to carry interest.
24 Vic. No. 8, s. 1.

142. (1) Every plaintiff who obtains judgment upon a verdict shall be entitled to interest at the rate of eight per centum per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon.

(2) The amount of such interest shall be included in the judgment.

Judgment debts to carry interest.
Ibid. s. 2.

143. (1) Every judgment debt recovered in the Court shall carry interest at the rate of eight per centum per annum from the time of entering up the judgment until the same is satisfied.

(2) Such interest may be levied under a writ of execution on such judgment.

PART XV.

Revivor, scire facias, &c.

Execution in six years without revival.
17 Vic. No. 21, s. 101.

144. During the lives of the parties to a judgment, or those of them during whose lives execution might, before the commencement of the Common Law Procedure Act of 1853, have issued within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment.

Revival of judgment.
Ibid. s. 102.

145. (1) Where it becomes necessary to revive a judgment by reason either of lapse of time or of a change by death or otherwise of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either—

(*a*) sue out a writ of revivor in the form hereinafter mentioned; or

(*b*) apply to the Court or a Judge for leave to enter a suggestion upon the roll to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment and to issue execution thereupon.

(2) The application for such leave shall be made upon a rule to show cause or a summons in the Form No. 18 contained in the Second Schedule hereto, or to the like effect, to be served according to the present practice or in such other manner as the Court or Judge directs.

Proceedings upon application for suggestion to revive judgment.
Ibid. s. 103.

146. (1) Upon such application if it manifestly appears that the party making the same is entitled to execution, the Court or Judge shall allow such suggestion as aforesaid to be entered in the Form No. 19 contained in the Second Schedule hereto, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same.

(2) If it does not manifestly so appear, the Court or Judge shall discharge the rule or dismiss the summons with or without costs: Provided that in such last-mentioned case the party making such application may proceed by writ of revivor or action upon the judgment.

147.

Writ of revivor and proceedings thereon. 17 Vic. No. 21, s. 104.

147. (1) The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing, and after reciting the reason why such writ has become necessary it shall call upon the party to whom it is directed to appear within eight days after service thereof to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed, and it shall give notice that in default of appearance the party issuing such writ may proceed to execution.

(2) Such writ may be in the Form No. 20 contained in the Second Schedule hereto, or to the like effect, and may be served and otherwise proceeded upon whether in term or vacation in the same manner as a writ of summons.

(3) The venue in a declaration upon such writ may be laid in any district, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action.

Writs of scire facias *Ibid.* s. 105.

148. All writs of scire facias issued—

(*a*) against bail on a recognizance; or

(*b*) against members of a joint stock company or other body upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself; or

(*c*) by or against a husband to have execution of a judgment for or against a wife; or

(*d*) upon a suggestion of further breaches after judgment for any penal sum pursuant to the Imperial Act eighth and ninth William the Third, chapter eleven, intituled "*An Act for the better preventing frivolous and vexatious suits*,"

shall be tested, directed, and proceeded upon in like manner as writs of revivor.

Appearance to writ of revivor. *Ibid.* s. 106.

149. Notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance to a writ of revivor.

Rule or order for writ of revivor upon a judgment. *Ibid.* s. 107.

150. A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order, if more than ten years old not without a rule of Court or a Judge's order, nor if more than fifteen without a rule to show cause.

Scire facias on judgment of assets in futuro. 20 Vic. No. 31, s. 55.

151. Proceedings against executors upon a judgment of assets in futuro may be had and taken in the manner hereinbefore provided as to writs of revivor.

PART

PART XVI.

Death or marriage of parties.

Action not to abate by death. 17 Vic. No. 21, s. 108.

152. The death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.

Death of one or more of several plaintiffs or defendants. *Ibid.* s. 109.

153. If there be two or more plaintiffs or defendants, and one or more of them shall die, and the cause of such action survives to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated, but such death being suggested upon the record the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

Death of sole plaintiff or sole surviving plaintiff. *Ibid.* s. 110.

154. (1) In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may by leave of the Court or a Judge enter a suggestion of the death and that he is such legal representative, and the action shall thereupon proceed.

(2) If such suggestion is made before the trial, the truth of the suggestion shall be tried thereat together with the title of the deceased plaintiff.

(3) The same judgment shall follow upon the verdict in favour of or against the person making such suggestion as if such person were originally the plaintiff.

Death of sole defendant or sole surviving defendant. *Ibid.* s. 111.

155. (1) In case of the death of the sole defendant or sole surviving defendant where the action survives, the plaintiff—

(*a*) may make a suggestion, either in any of the pleadings if the pleadings have not arrived at issue, or in a copy of the issue if they have so arrived, of the death, and that a person named therein is the executor or administrator of the deceased; and

(*b*) may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice signed by the plaintiff or his attorney requiring such executor or administrator to appear within eight days after service of the notice inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator.

(2) The same proceedings may be had and taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which the action was brought.

(3) If no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time.

(4) If the plaintiff has declared but the defendant has not pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion.

(5) If the defendant has pleaded before the death, the new defendant may plead to the suggestion only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the Court or a Judge he is permitted to plead fresh matter in answer to the declaration.

(6) If the defendant has pleaded before the death, but the pleadings have not arrived at issue, the new defendant besides pleading to the suggestion shall continue the pleadings to issue in the same manner as the deceased might have done.

(7) The pleadings upon the declaration and the pleadings upon the suggestion shall be tried together.

(8) If the plaintiff recovers he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator.

Death between verdict and judgment.

156. The death of either party between the verdict and the judgment shall not prejudice the judgment, so as such judgment be entered within two terms after such verdict.

17 Vic. No. 21, s. 112.

Death after interlocutory and before final judgment.

157. (1) If the plaintiff in any action dies after an interlocutory judgment and before a final judgment obtained therein, the action shall not abate by reason thereof if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff.

Ibid. s. 113.

(2) If the defendant dies after such interlocutory judgment and before final judgment therein obtained, the action shall not abate if such action might be originally prosecuted or maintained against the executor or administrator of such defendant.

(3) The plaintiff, or if he be dead after such interlocutory judgment his executors or administrators, may sue out a writ of revivor in the Form No. 20 contained in the Second Schedule hereto, or to the like effect, against the defendant if living after such interlocutory judgment, or if he be dead then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them.

(4) If such defendant, his executors or administrators, appear at the return of such writ, and do not show or allege any matter sufficient to arrest the final judgment, or make default, a writ of inquiry of damages shall be thereupon awarded, or the amount for which final judgment is to be signed shall be referred to the prothonotary as hereinbefore provided.

(5) Upon the return of the writ or delivery of the order with the amount indorsed thereon to the plaintiff, his executors or administrators, final judgment shall be given for the said plaintiff, his executors or administrators prosecuting such writ of revivor against such defendant, his executors or administrators respectively.

To compel continuance or abandonment of action in case of death.
20 Vic. No. 31, s. 56.

158. (1) After the death of either party to an action, where the action may be continued under this Act, the defendant or person against whom the action 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 this Act within such time as the Judge shall order.

(2) In default of such proceeding, the defendant or other person against whom the action may be so continued as aforesaid may 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 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.

Marriage not to abate action.
17 Vic. No. 21, s. 114.

159. (1) The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment.

(2) Such judgment may be executed against the wife alone, or by suggestion or writ of revivor pursuant to this Act judgment may be obtained against the husband and wife and execution issue thereon.

(3) In case of a judgment for the wife, execution may be issued thereupon without any writ of revivor or suggestion.

(4) If in any such action the wife sues or defends by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence as if she had remained sole.

(5) Nothing in this section shall affect the provisions of the Married Women's Property Act or the Married Women's Property Act, 1893, and this section shall be read subject to the said Acts.

PART XVII.

New trial, arrest of judgment, and judgment non obstante veredicto.

Powers of Court on granting new trial.
5 Vic. No. 9, s. 42.

160. In any action in which a new trial is granted the Court may—

(*a*) impose such conditions on and direct such admissions to be made by either party for the purpose of such new trial as the Court thinks fit; and

(*b*)

(*b*) grant such new trial either generally or on some particular point or points only as the Court thinks fit; and

(*c*) order that the testimony of any witness examined at the former trial may be read from the Judge's notes instead of such witness being again examined in open Court; and

(*d*) for the several purposes aforesaid make all such orders, from time to time, as may be necessary.

Costs upon new trial on matters of fact. 20 Vic. No. 31, s. 16.

161. 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 otherwise orders.

Suggestion of omitted facts on motion in arrest of judgment, &c. 17 Vic. No. 21, s. 116.

162. (1) Upon any motion made in arrest of judgment, or to enter an arrest of judgment, or for judgment *non obstante veredicto*, by reason of the non-averment of some fact or matter or other cause, the party whose pleading is alleged or adjudged to be therein defective, may, by leave of the Court, suggest the existence of the omitted fact or matter, or that it was proved at the trial of the cause.

(2) Such suggestion may be pleaded to by the opposite party within eight days after notice thereof or such further time as the Court or a Judge may allow, and the proceedings for trial of any issues joined upon such pleadings shall be the same as in an ordinary action:

Provided that in cases in which the suggestion is that the omitted fact or matter was proved at the trial, if the Judge before whom the cause was tried certifies that such proof was given to his satisfaction, such certificate shall be conclusive upon the parties, and judgment shall be given in accordance therewith.

Judgment to follow result of suggestion. *Ibid.* s. 117.

163. (1) If the fact or matter suggested is admitted or found to be true, the party suggesting shall be entitled to such judgment as he would have been entitled to if such fact or matter had been originally stated in pleading and proved or admitted on the trial, together with the costs of and occasioned by the suggestion and proceedings thereon.

(2) If such fact or matter is found to be untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion and proceedings thereon, in addition to any other costs to which he is entitled.

Costs of abortive issues. *Ibid.* s. 118.

164. Upon an arrest of judgment, or judgment *non obstante veredicto*, the Court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact arising out of the pleading for defect of which such judgment is given upon which such party has succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance if any.

PART

PART XVIII.

MANDAMUS AND INJUNCTION.

Mandamus.

Action for mandamus. 20 Vic. No. 31, s. 34.

165. The plaintiff in any action except replevin and ejectment may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus; and he 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. *Ibid.* s. 35.

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

Proceedings upon claim for mandamus. *Ibid.* s. 36.

167. 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.

Issue of peremptory writ. *Ibid.* s. 37.

168. If judgment is given for the plaintiff that a mandamus do issue, the Court may, besides issuing execution in the ordinary way for the costs and damages, also issue a peremptory writ of mandamus to the defendant commanding him forthwith to perform the duty to be enforced.

Form of peremptory writ. *Ibid.* s. 38.

169. Such 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.

Return to writ. *Ibid.*

170. Such writ may be issued in or out of term and be made 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.

Effect of mandamus. *Ibid.* s. 39.

171. Such writ shall have the same force and effect as a peremptory writ of mandamus, and in case of disobedience may be enforced by attachment.

The Court may order the act to be done at the expense of the defendant. *Ibid.* s. 40.

172. (1) 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 at the expense of the defendant by the plaintiff or some other person appointed by the Court.

(2) Upon the act being done the amount of such expense may be ascertained by the Court either by writ of inquiry or reference

to

to the prothonotary as the Court or a Judge may order, and the Court may order payment of the amount of such expense and costs, and enforce payment thereof by execution.

Prerogative writ of mandamus preserved. 20 Vic. No. 31, s. 41.

173. Nothing herein contained shall take away the jurisdiction of the Court to grant writs of mandamus, nor shall any writ of mandamus issued out of the Court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this Act.

Proceedings for prerogative writ of mandamus accelerated. *Ibid.* s. 42.

174. Upon application by motion for any writ of mandamus the rule may in all cases be absolute in the first instance if the Court thinks fit, and the writ may bear teste on the day of its issuing and may be made returnable forthwith whether in or out of term, but time to return it may be allowed by the Court or a Judge either with or without terms.

Proceedings on prerogative writ of mandamus. *Ibid.* s. 43.

175. The provisions of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus.

Injunction.

Claim of writ of injunction. *Ibid.* s. 44.

176. 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.

Form of writ of summons and indorsement thereon. *Ibid.* s. 45.

177. 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 indorsed 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 proceedings and of judgment. *Ibid.* s. 46.

178. 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 to obtain a mandamus under the provisions hereinbefore contained, and 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 may be enforced by attachment by the Court, or where the Court is not sitting by a Judge.

Writ of injunction may be applied for at any stage. *Ibid.* s. 47.

179. (1) At any time after the commencement of the action, and whether before or after judgment, the plaintiff may 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

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.

(2) 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 the Court or Judge seems reasonable and just, and in case of disobedience such writ may be enforced by attachment by the Court or where the Court is not sitting by a Judge.

(3) 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.

PART XIX.

ATTACHMENT OF DEBTS.

Examination of judgment debtor as to his property. 20 Vic. No. 31, s. 26.

180. (1) Any creditor who has obtained a judgment in the Court may apply to the Court or a Judge for a rule or order that the judgment debtor be orally examined before a Judge or such Commissioner for taking affidavits as the Court or Judge shall appoint, 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.

(2) 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 a *viva voce* examination under the Act fifth Victoria number nine.

Judge may order an attachment of debts. *Ibid.* s. 27.

181. (1) 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 of the Court, a Judge may order that all debts owing or accruing from such third person (hereinafter in this part called the garnishee) to the judgment debtor shall be attached to answer the judgment debt.

(2) 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 the Judge appoints 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.

182. 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 directs, shall bind such debts in his hands. Order for attachment to bind debts. 20 Vic. No. 31, s. 28.

183. 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. Proceedings to levy amount due from garnishee to judgment debtor. *Ibid.* s. 29.

184. (1) 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. Judge may allow judgment creditor to sue garnishee. *Ibid.* s. 30.

(2) The proceedings upon such writ shall be the same as nearly as may be as upon a writ of revivor issued under this Act.

185. 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. Garnishee discharged. *Ibid.* s. 31.

186. There shall be kept at the office of the prothonotary of the 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. Attachment book to be kept by the prothonotary. *Ibid.* s. 32.

187. The costs of any application for an attachment of debt under this part of this Act, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge. Costs of application. *Ibid.* s. 33.

PART XX.

Absent defendants.

188. (1) If in any action the officer or person charged or entrusted with the service of the writ of summons upon any defendant makes an indorsement upon such writ to the effect that he has made diligent Proceeding against absent defendant by foreign attachment. 4 Vic. No. 6, s. 2. 18 Vic. No. 6, s. 2.

diligent search for such defendant and has been unable to find him, and if afterwards there is filed on behalf of the plaintiff an affidavit stating—

(*a*) the cause of action in full; and

(*b*) that such cause of action arose within the jurisdiction of the Court; and

(*c*) that to the best of the deponent's belief such defendant does not reside within the jurisdiction; and

(*d*) that to the best of the deponent's belief such defendant is possessed of or entitled to or otherwise beneficially interested in any property in the custody or under the control of any person within the jurisdiction named in such affidavit, or that any such person is indebted to such defendant,

the plaintiff may proceed against such defendant by process of foreign attachment in the manner hereinafter directed.

(2) Provided that by leave of a Judge (where it appears that plaintiff may sustain injury by the delay) such affidavit may be filed before such indorsement is made upon the writ of summons.

4 Vic. No. 6, s. 23.

(3) This section shall not extend to any action of trespass or other action in tort (trover or detinue excepted), but shall extend only to actions on or arising out of contract.

18 Vic. No. 6, s. 3.

(4) This section shall apply to a defendant who is not within the jurisdiction at the time of proceeding hereunder, notwithstanding that he may have been within the jurisdiction at the time of issuing such writ of summons: Provided that it appears by affidavit that reasonable efforts were made and with due diligence to serve such summons on him, but without effect.

Writ of attachment.

4 Vic. No. 6, s. 3.

189. At any time after the filing of such affidavit, a writ of foreign attachment, in the prescribed form, may be issued at the plaintiff's instance as of course, returnable into the Court either in or out of term on some day not less than fourteen days nor more than sixty days next after the date thereof.

Service of writ.

Ibid.

190. Such writ shall be served upon every person therein named (hereinafter called the garnishee) in whose hands it is intended thereby to attach any such property or debts, by delivering a copy thereof to such garnishee personally, or by leaving the same at his then or last usual place of abode.

Proviso as to proof where cause of action accrued.

Ibid.

191. (1) Final judgment shall in no case be signed in any such action until an entry has been made on the record of the issue of such writ, with a suggestion of the fact that the cause of action arose within the jurisdiction of the Court.

(2) If at any time it appears that the cause of action did not arise within the jurisdiction, the attachment shall be forthwith dissolved with costs, to be paid by the plaintiff to such parties, and in such manner as the Court or a Judge shall direct.

Public notice to be given.
4 Vic. No. 6, s. 4.

192. The plaintiff shall also cause a notice, in the prescribed form, of the issue of such writ of attachment, signed by him or his attorney, to be published in the Gazette, and not less than twice in one other Sydney newspaper, and the last of such publications shall be one week at the least before the day on which the writ is returnable.

Property and debts bound from the time attachment served.
Ibid. s. 5.

193. (1) From the time of the service of such writ upon any garnishee—

(*a*) all the property in the custody or under the control of such garnishee then belonging to such defendant, or to or in which such defendant is then legally or equitably entitled or otherwise beneficially interested (and whether solely or jointly with any person or persons); and

(*b*) all debts of every kind then due by such garnishee to such defendant, although the same or part thereof may be payable only at a future day,

shall to the extent of such defendant's right, title, and interest therein respectively be attached in the hands of such garnishee, and (subject to any *bonâ fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which, by the said writ, such garnishee has had notice.

(2) If, at any time after such service and before the said attachment is dissolved, any such garnishee without the leave of the Court or a Judge sells or otherwise knowingly disposes of or parts with any such property, or pays over any such debt or any part thereof, excepting only to or to the use of the plaintiff, he shall, upon the application in a summary way of such plaintiff to the Court or a Judge, and on proof of the facts, pay such damages to the plaintiff as the Court or Judge shall order.

Inquiry as to property in garnishee's hands.
Ibid. s. 6.

194. (1) Upon the return of such writ of attachment, or as soon after as conveniently may be, the Court or a Judge shall proceed to inquire and determine—

(*a*) whether in fact the plaintiff's cause of action arose within the jurisdiction of the Court, and if so; then,

(*b*) what property (sufficient, or not more than sufficient to satisfy the plaintiff's cause of action, together with his costs of suit), then is or was at the time of the service of the said writ in the custody or under the control of any such garnishee, belonging to such defendant, or to or in which he was at that time entitled or interested as aforesaid; and

(*c*) what debts were then due to such defendant from any such garnishee, and the particulars thereof, and

(*d*) whether such property and debts, or any part or parts thereof, are or can be made available for the purpose of making such satisfaction as aforesaid, and to what amount respectively.

(2) For the purposes of such inquiry and determination, the Court or Judge may in a summary way examine or permit the plaintiff to examine *viva voce* upon oath every such garnishee, together with such witnesses (if any) as the Court or Judge may think proper to be so examined, and for that purpose may make such orders and issue such summonses to the several garnishees and witnesses as may in that behalf be deemed expedient.

Attendance of garnishees and witnesses.
4 Vic. No. 6, s. 6.

195. (1) Any garnishee or witness who refuses or neglects to attend according to the exigency of such writ of attachment, or to obey any such order or summons, or refuses to be so examined, shall be liable to be summarily proceeded against as in cases of contempt of Court and to be punished accordingly.

(2) Provided that in any case where, under the circumstances, it appears to be reasonable or just so to do, the Court or a Judge may dispense with the attendance of any garnishee upon his submitting to be examined upon oath before a Commissioner of the Court, or upon such other terms as the Court or Judge shall impose.

(3) Where any garnishee attends in obedience to any such writ or summons, the Court or Judge may award him the reasonable expenses of such attendance, to be paid by the plaintiff.

Disposal of property by leave of Court.
Ibid. s. 7.

196. (1) If any garnishee in whose hands any such property or debt has been so attached is desirous of disposing of the same or any part thereof, or of receiving or paying (as the case may be) the amount of any bill, bond, or debt, or other chose in action, or any part thereof pending such attachment, the Court or a Judge, on the application of such garnishee, due notice thereof having been given to the plaintiff, may authorise such garnishee to sell or dispose of any such property or to receive or pay any such amount.

(2) The proceeds of such sale or disposal, or the amount so received or paid (as the case may be), shall be thereafter held by such garnishee, or be paid into Court or invested, or otherwise be detained or appropriated subject to such attachment as aforesaid, or otherwise for the satisfaction of the plaintiff as the Court or Judge shall order.

After attachment returned plaintiff may proceed in the action.
Ibid. s. 8.

197. At any time after the return day of any such writ of attachment, the plaintiff may cause an appearance to be entered for the defendant against whom such writ has so issued, and may proceed thereon in the action as if such defendant resided in Sydney and had appeared to such action in person: Provided that such bond as is hereinafter in that behalf prescribed has been first duly entered into.

Court to determine what property is to continue subject to attachment. 4 Vic. No. 6, s. 9.

198. (1) So soon as upon any such examination or inquiry as aforesaid it is ascertained by the Court or Judge what property and debts as aforesaid can (consistently with existing liens or prior claims thereon, to be determined by the Court or Judge) be made available for the purpose of making satisfaction to the plaintiff as aforesaid, the Court or Judge shall forthwith order the same (or such part or parts thereof respectively as the Court or Judge thinks proper in that behalf)—

(*a*) to be thenceforward holden for that purpose and to continue subject to such attachment accordingly; or

(*b*) to be sold or otherwise disposed of if the Court or Judge thinks fit, and the proceeds, or (in case of debts then payable) the amount of such debts, to be paid into the hands of some officer of the Court subject to such attachment as the Court or Judge may order.

(2) With respect to all and singular the property, debts, and other choses in action to which no such order as aforesaid is intended to apply, or as to which no such order can be made, the Court or a Judge may at any time direct that the said attachment shall be dissolved.

Proviso as to any second writ.

(3) Provided that where more than one writ of attachment has issued against the same garnishee, or the same property or debt has been attached at the suit of more than one plaintiff, the Court or a Judge may award and determine how much and what parts of the property or debt so attached or to what amount in value thereof shall be retained or holden under each of such writs, or be paid into Court or disposed of (as the case may be) for the separate benefit of each plaintiff.

(4) As to writs lodged with the sheriff on the same day the plaintiffs therein shall be entitled to satisfaction *pari passu*, but as to writs lodged with the sheriff on different days the plaintiffs shall be entitled to satisfaction respectively according to priority of each in such lodgment.

Plaintiff to enter into a bond to account, &c. *Ibid.* s. 10.

199. (1) Within fourteen days next after any such writ of attachment has issued, the plaintiff at whose suit the same has issued, or if he is absent some person on his behalf, shall before a Judge or a commissioner of the Court enter into a bond with two sufficient sureties to be approved of by such Judge or commissioner, acknowledging himself and themselves to be bound to the defendant against whom such writ has so issued in such sum as a Judge shall think fit to order, conditioned amongst other things to repay all such sums as the said plaintiff shall recover in the action in case the judgment therein is thereafter vacated, reversed, or altered, together with all costs sustained by such defendant.

(2)

(2) Such bond and condition shall be in the prescribed form, and in case of any breach or alleged breach of such condition such defendant may sue the parties to such bond thereon at any time.

(3) If such bond be not so entered into, the attachment shall be *ipso facto* dissolved.

After judgment plaintiff may issue fieri facias.
4 Vic. No. 6, s. 11.

200. At any time after such bond has been so entered into, and after the plaintiff has obtained final judgment, he may—

(*a*) cause a writ or writs of *fieri facias* upon such judgment to be from time to time issued as in any ordinary case for the amount of the debt or damages and costs thereby recovered; and

(*b*) cause to be taken in execution under any such writ (as against such defendant) not only all or any part of the property or debts so attached which then continue subject to such attachment as aforesaid, in whose hands soever such property then is (and whatever is the nature of such property whether ordinarily liable to be taken in execution or not, and although the same or part thereof is of the nature of a chose in action), but also any other property of or debts due to such defendant which the plaintiff is then able to find; and

(*c*) receive any such property in satisfaction or part satisfaction of such debt or damages and costs at an amount to be fixed by the sheriff, or cause all such property (except as next mentioned) to be sold under such writ or writs as in ordinary cases:

Provided that with respect to any such debt or other chose in action so taken in execution no sale or other disposition thereof shall take place except by order of the Court or a Judge.

Compelling payment of debts due to defendant under attachment.
Ibid.

201. Upon the application of the plaintiff the Court or a Judge may at any time in a summary manner—

(*a*) authorise an action for the amount of any such debt to be brought in the name of the creditor being such defendant as aforesaid; or

(*b*) cause the debtor to be summoned to attend the Court or a Judge to show cause why he should not forthwith pay the amount of such debt to the plaintiff, and if no sufficient cause be shown may order such payment accordingly, and enforce such order, together with all costs attending the same, by an attachment for a contempt as in other cases.

Provision for dissolving foreign attachment.
Ibid. s. 12.

202. (1) If pending any such writ of foreign attachment, or at any time before final judgment obtained in the action in which such writ issued, the defendant against whom such writ has issued, or any person on his behalf, enters before a Judge into a bond with two sufficient sureties to be approved of by such Judge, acknowledging himself and themselves to be bound to the plaintiff in such sum as the

the Judge thinks fit to order, conditioned to pay the plaintiff the amount of such debt or damages and costs as he shall at any time thereafter recover in such action, then such defendant or person upon entering an appearance (or if such appearance has previously been entered by the plaintiff then upon filing pleas therein) may defend such action, and upon giving notice thereof to the plaintiff may apply to the Court by motion as of course that the said attachment may be dissolved, and the same shall be dissolved accordingly.

(2) The action shall thereupon proceed to trial and judgment in the ordinary manner.

Absent defendant may come in and defend notwithstanding judgment. 4 Vic. No. 6, s. 13.

203. (1) If, after any final judgment obtained as aforesaid, an affidavit is made by the defendant against whom such writ has issued as aforesaid that such defendant had at the time of the obtaining of the said judgment, and still has a substantial ground of defence on the merits (either wholly or in part) to the plaintiff's action, and such affidavit is filed in the Court at any time before the expiration of three years next after such judgment, then upon motion made on behalf of the said defendant after due notice thereof given to the plaintiff (and security being entered into for the payment to the plaintiff of all costs by him at any time thereby sustained) the Court may cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form, either by a feigned issue between the parties or otherwise, and at such time and under such terms and conditions for the purpose of securing the substantial ends of justice as to the Court seems meet.

(2) Every such affidavit, if made out of the jurisdiction of the Court, shall be sworn before a Judge or Master of some Court of Law or Equity, or the Chief Magistrate of some city or corporate town certified under the hand and seal of such Magistrate.

Judgment in such cases. *Ibid.*

204. (1) The Court, after such inquiry and determination had, shall thereupon give such judgment in the matter for the reversal of the judgment in the original action either in the whole or in part, or shall from time to time make such order or orders in the premises between the parties as the justice of the case appears to require.

(2) Every such judgment and order may at any time (if the party succeeding thinks fit) be suggested upon or added to the record of the original action in which such final judgment has been so obtained as aforesaid.

Property in possession of any co-defendant, wife, &c. *Ibid.* s. 14.

205. (1) The property of any such absent defendant as aforesaid, may, under the provisions of this part of this Act, be attached and taken in the custody or power of the defendant's wife or of any co-defendant.

(2) No process of foreign attachment against any such absent defendant, nor any lien intended to be thereby created upon the property or debts thereby attached, shall be defeated by reason of such

co-defendant

co-defendant or any other garnishee as aforesaid being or claiming to be jointly interested with such defendant therein either as partner or otherwise.

(3) In all cases it shall be sufficient for the purposes of this part of this Act to attach property in the hands of the person having the actual care, custody, or control thereof for the time being.

Attachment and execution may be pleaded in bar.
4 Vic. No. 6, s. 22.

206. (1) Every writ of attachment upon which any order is made as aforesaid, where the same has been followed by execution levied, may be pleaded in bar by any person in whose hands any property or debt as aforesaid has been attached, to any action brought by or on behalf of the defendant for the recovery of such property or debt.

(2) If any such action is brought pending the attachment, the same shall be stayed by order of the Court or a Judge until the attachment is dissolved or the proceedings thereupon are otherwise determined.

(3) In such plea it shall be necessary only to state shortly that such writ of attachment was issued, and to set out the substance of the order finally made thereon, and then to allege that the property or debt sought to be recovered was taken under a writ of execution issued after such order.

Meaning of "absence."
Ibid. s. 24.

207. Absence from the jurisdiction of the Court shall for the purposes of this part of this Act be taken to mean absence for the time being whether the party has ever been within the jurisdiction or not.

Powers as to adjournments and costs.
Ibid. s. 25.

208. In all cases of applications made to or proceedings had or taken before or by authority of the Court or a Judge or otherwise under this part of this Act, the Court or a Judge may adjourn the case or proceedings from time to time, and award costs to be paid by such party to such party, or refuse costs, as the Court or Judge thinks fit.

PART XXI.

EJECTMENT.

Writ.

Ejectment to be brought by writ.
17 Vic. No. 21, s. 119.

209. Every action of ejectment shall be commenced by writ, directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty.

Form and duration of writ of ejectment.
Ibid. s. 120.

210. (1) The writ shall be in the Form No. 21 contained in the Second Schedule hereto, or to the like effect, and shall—

(*a*) state the names of all the persons in whom the title is alleged to be; and

(*b*)

(*b*) command the persons to whom it is directed to appear within sixteen days after service thereof in the Supreme Court to defend the possession of the property claimed, or such part thereof as they may think fit; and

(*c*) contain a notice that in default of appearance they will be turned out of possession.

(2) The writ shall bear teste of the day on which it is issued, and shall be in force for three months.

Indorsement of name and abode of attorney or claimant. 17 Vic. No. 21, s. 120.

211. The name and abode of the attorney suing out the writ, or if no attorney, the name and residence of the claimant, shall be indorsed thereon in like manner as hereinbefore enacted with reference to the indorsements on a writ of summons in a personal action, and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name is indorsed thereon, and who and what the claimant is and his abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.

Service of writ. *Ibid.* s. 121.

212. The writ shall be served in the same manner as an ejectment was served before the commencement of the Common Law Procedure Act of 1853, or in such manner as the Court or a Judge shall order, and in case of vacant possession by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property.

Appearance and proceedings in default of appearance.

Appearance of persons named in the writ. *Ibid.* s. 122.

213. The persons named as defendants in such writ or either of them may appear within the time appointed.

Appearance of persons not named. *Ibid.* s. 123.

214. Any person not named in such writ may by leave of the Court or a Judge appear and defend, on filing an affidavit showing that he is in possession of the property either by himself or his tenant.

Appearance and defence by landlord. *Ibid.* s. 124.

215. Any person appearing to defend as landlord in respect of property whereof he is in possession only by his tenant shall state in his appearance that he appears as landlord, and such person may set up any defence which a landlord appearing in an action of ejectment before the commencement of the Common Law Procedure Act of 1853 might have set up, and no other.

Notice to defend for part only. *Ibid.* s. 125.

216. (1) Any person appearing to such writ may limit his defence to a part only of the property claimed in the writ, describing that part with reasonable certainty in a notice intituled in the Court and action and signed by such person or his attorney, such notice to be served within four days after appearance upon the attorney whose name is endorsed on the writ if any, and if none then to be filed in the prothonotary's office.

(2) An appearance without such notice confining the defence to part shall be deemed an appearance to defend for the whole.

217.

Want of certainty cured by particulars. 17 Vic. No. 21, s. 126.

217. Want of "reasonable certainty" in the description of the property or part of it in such writ or notice shall not nullify them, but shall only be ground for an application to a Judge for better particulars of the property claimed or defended, which a Judge may order in all cases.

Defence by persons not in possession. 17 Vic. No. 21, s. 127.

218. The Court or a Judge may strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.

Judgment for default of appearance or defence. *Ibid.* s. 128.

219. If no appearance is entered within the time appointed, or if an appearance is entered but the defence is limited to part only, the claimant may sign a judgment that he shall recover possession of the property or of the part thereof to which the defence does not apply.

Such judgment if for all may be in the Form No. 22 contained in the Second Schedule hereto, or to the like effect, and if for part may be in the Form No. 23 contained in the said Schedule, or to the like effect.

Issue for trial.

Issue how made up. *Ibid.* s. 129.

220. (1) If an appearance is entered, an issue may at once be made up without any pleadings by the claimant or his attorney, setting forth the writ, and stating the fact of the appearance with its date, and the notice limiting the defence if any of each of the persons appearing, so that it may appear for what the defence is made, and directing the sheriff to summon a jury.

(2) Such issue in case defence is made for the whole may be in the Form No. 24 contained in the Second Schedule hereto, or to the like effect, and in case defence is made for part may be in the Form No. 23 contained in the said Schedule, or to the like effect.

Special case.

Special case may be stated. *Ibid.* s. 130.

221. By consent of the parties and by leave of a Judge a special case may be stated according to the practice used before the commencement of the Common Law Procedure Act of 1853.

Trial.

Trial of issue. *Ibid.* s. 131.

222. (1) The claimant may, if no special case be agreed to, proceed to trial upon the issue in the same manner as in other actions, and the particulars of the claim and defence if any, or copies thereof, shall be annexed to the record by him.

(2) The question at the trial shall, except in the cases hereafter mentioned, be whether the statement in the writ of the title of the claimants is true or false, and if true then which of the claimants is entitled and whether to the whole or part, and if to part then to which part of the property in question.

223. The entry of the verdict may be made in the Form No. 25 contained in the Second Schedule hereto, or to the like effect, with such modifications as may be necessary to meet the facts. Verdict. 17 Vic. No. 21, s. 131.

224. If the title of the claimant appears to have existed as alleged in the writ, and at the time of service thereof, but it also appears to have expired before the time of trial, the claimant shall notwithstanding be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit. Verdict when title appears to have expired before trial. *Ibid.* s. 132.

225. (1) If the defendant appears and the claimant does not appear at the trial, the claimant shall be nonsuited. Non-appearance at trial. *Ibid.* s. 134.

(2) If the claimant appears and the defendant does not appear, the claimant shall be entitled to recover without any proof of his title.

226. The jury may find a special verdict, or either party may tender a bill of exceptions. Special verdict and bill of exceptions. *Ibid.* s. 135.

Judgment and execution.

227. Judgment as in case of nonsuit may be given where the Court thinks fit. Judgment as in case of nonsuit. *Ibid.* s. 136.

228. Upon a finding for the claimant, judgment may be signed and execution issue for the recovery of possession of the property or such part thereof as the jury finds the claimant entitled to, and for costs, within such time as the Court or Judge before whom the cause is tried shall order, and if no such order be made then on the fifth day in term after the verdict or within fourteen days after such verdict whichever shall first happen. Judgment upon finding for claimant. *Ibid.* s. 137.

229. Upon a finding for the defendants or any of them, judgment may be signed and execution issue for costs against the claimant within such time as the Court or Judge before whom the cause is tried shall order, and if no such order be made then on the fifth day in term after the verdict or within fourteen days after such verdict whichever shall first happen. Judgment upon finding for defendant. *Ibid.* s. 138.

230. Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs at the election of the claimant. Execution for recovery of possession and costs may be joint or separate. *Ibid.* s. 139.

Defences by joint tenants, &c.

231. (1) If such an action is brought by some or one of several persons entitled as joint tenants, tenants in common, or coparceners, any other joint tenant, tenant in common, or coparcener in possession may at the time of appearance or within four days thereafter— Defence by joint tenants, tenants in common, or coparceners. *Ibid.* s. 140.

(*a*) give notice in the same form as in the notice of a limited defence that he defends as such, and admits the right of the claimant

claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property; and

(*b*) file an affidavit stating with reasonable certainty that he is such joint tenant, tenant in common, or coparcener, and the share of such property to which he is entitled, and that he has not ousted the claimant.

(2) Such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue the additional question of whether an actual ouster has taken place shall be tried.

Trial and judgment in such case.
17 Vic. No. 21, s. 141.

232. (1) Upon the trial of such issue as last aforesaid, if it is found that the defendant is joint tenant, tenant in common, or coparcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster is proved the defendant shall be entitled to judgment and costs.

(2) If it is found either that the defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the claimant shall be entitled to judgment for the recovery of possession and costs.

Death of parties.

Action not to abate by death.
Ibid. s. 142.

233. The death of a claimant or defendant shall not cause the action to abate, but it may continue as hereinafter mentioned.

Death before trial where right survives.
Ibid. s. 143.

234. (1) In case the right of the deceased claimant survives to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant.

(2) If such suggestion is made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid upon its appearing that he was entitled to bring the action either separately or jointly with the deceased claimant.

Death before trial where right does not survive.
Ibid. s. 144.

235. In case of the death before trial of one of several claimants whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant does not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant for such share of the property as he is entitled to and costs.

Death of one of several claimants having obtained a verdict.
Ibid. s. 145.

236. (1) In case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may

may, whether the legal right to the property survives or not, suggest the death in manner aforesaid and proceed to judgment and execution for recovery of possession of the entirety of the property and the costs.

(2) Nothing herein contained shall affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative, and the entry and possession of such surviving claimant under such execution shall be considered as an entry and possession on behalf of such legal representative in respect of the share of the property to which he is entitled as such representative, and the Court may direct possession to be delivered accordingly.

Death of claimant where right does not survive.
17 Vic. No. 21, s. 146.

237. (1) In case of the death of a sole claimant, or before trial of one of several claimants whose right does not survive to another or others of the claimants, the legal representative of such claimant may by leave of the Court or a Judge enter a suggestion of the death and that he is such legal representative and the action shall thereupon proceed.

(2) If such suggestion is made before the trial, the truth of the suggestion shall be tried thereat together with the title of the deceased claimant, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion as hereinbefore provided with reference to a judgment for or against such claimant.

(3) If such suggestion in the case of a sole claimant is made after trial and before execution executed by delivery of possession thereupon, and such suggestion is denied by the defendant within eight days after notice thereof or such further time as the Court or a Judge may allow, then such suggestion shall be tried; and if upon the trial thereof a verdict passes for the person making such suggestion, he shall be entitled to such judgment as aforesaid for the recovery of possession and for the costs of and occasioned by such suggestion; and in case of a verdict for the defendant, such defendant shall be entitled to such judgment as aforesaid for costs.

Death of one of several joint defendants.
Ibid. s. 147.

238. In case of the death before or after judgment of one of several defendants who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution.

Death of all the defendants before trial.
Ibid. s. 148.

239. (1) In case of the death of a sole defendant or of all the defendants before trial, a suggestion may be made of the death, which suggestion shall not be traversable but only be subject to be set aside if untrue, and the claimant shall be entitled to judgment for recovery of possession of the property, unless some other person appears and defends within the time to be appointed for that purpose by the order of the Court or a Judge made upon the application of the claimant.

(2)

(2) The Court or a Judge, upon such suggestion being made and upon such application as aforesaid may order that the claimant shall be at liberty to sign judgment within such time as the Court or Judge thinks fit, unless the person then in possession by himself or his tenant or the legal representative of the deceased defendant shall within such time appear and defend the action.

(3) Such order may be served in the same manner as the writ, and if such person appears and defends the same proceedings may be taken against such new defendant as if he had originally appeared and defended the action, and if no appearance be entered and defence made, then the claimant may sign judgment pursuant to such order.

Death of all the defendants after verdict.
17 Vic. No. 21, s. 149.

240. In case of the death of a sole defendant or of all the defendants after verdict, the claimant shall nevertheless be entitled to judgment as if no such death had taken place, and to proceed by execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs in like manner as upon any other judgment for money against the legal representatives of the deceased defendant or defendants.

Death before trial of defendant who defends separately for part.
Ibid. s. 150.

241. In case of the death before trial of one of several defendants who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimant may proceed against the surviving defendants in respect of the portion of the property for which they defend.

Death of defendant defending separately for property in respect of which others also defend.
Ibid. s. 151.

242. (1) In case of the death before trial of one of several defendants who defends separately in respect of property for which surviving defendants also defend, the Court or a Judge may at any time before the trial allow the person in possession of the property at the time of the death or the legal representative of the deceased defendant, to appear and defend on such terms as appear reasonable and just upon the application of such person or representative.

(2) If no such application be made or leave granted, the claimant suggesting the death in manner aforesaid may proceed against the surviving defendant or defendants to judgment and execution.

Discontinuance.

Claimant may discontinue by notice.
Ibid. s. 152.

243. The claimant may at any time discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice intituled in the Court and action and signed by the claimant or his attorney stating that he discontinues such action; and thereupon the defendant to whom such notice is given may forthwith sign judgment for costs in the Form No. 26 contained in the Second Schedule hereto, or to the like effect.

244.

244. If one of several claimants desires to discontinue he may apply to the Court or a Judge to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the Court or Judge may seem fit, and the action shall thereupon proceed at the suit of the other claimants.

Discontinuance by one of several claimants. 17 Vic. No. 21, s. 153.

Default in proceeding to trial.

245. If after appearance entered the claimant without going to trial suffers the time allowed for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant may give twenty days' notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial is not extended by the Court or a Judge, the defendant may sign judgment in the Form No. 27 contained in the Second Schedule hereto, and recover the costs of defence.

Judgment for not proceeding to trial after notice. *Ibid.* s. 154.

Judgment on confession.

246. The defendant may confess the action as to the whole or part of the property by giving the claimant a notice intituled in the Court and action and signed by the defendant, such signature to be attested by his attorney; and thereupon the claimant may forthwith sign judgment and issue execution for the recovery of possession and costs in the Form No. 28 contained in the Second Schedule hereto, or to the like effect.

Defendant may confess the action. *Ibid.* s. 155.

247. If one of several defendants who defends separately for a portion of the property for which the other defendants do not defend desires to confess the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

Confession by one of several defendants defending separately for part. *Ibid.* s. 156.

248. If one of several defendants who defends separately in respect of property for which other defendants also defend desires to confess the claimant's title, he may give a like notice thereof; and thereupon the claimant may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.

Confession by one of several defendants who defend for same property. *Ibid.* s. 157.

General provisions.

249. The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment before the commencement of the Common Law Procedure Act of 1853.

Effect of judgment. *Ibid.* s. 159.

250.

Jurisdiction of Courts and Judges.
17 Vic. No. 21, s. 171.

250. (1) The Court and Judges respectively shall and may exercise over the proceedings the like jurisdiction as was exercised in the action of ejectment before the commencement of the said Act so as to ensure a trial of the title and of actual ouster when necessary only, and for all other purposes for which such jurisdiction might have been exercised before the commencement of the said Act.

(2) The provisions of all laws and statutes not inconsistent with the provisions of this Act, which were in force at the time of the commencement of the said Act and have not since been repealed, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto.

Security for costs.

Claimant in second ejectment for same premises against same defendant may be ordered to give security for costs.
20 Vic. No. 31, s. 57.

251. If any person brings an action of ejectment after a prior action of ejectment for the same premises has 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, 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 disposed of by discontinuance, or by non-suit, or by judgment for the defendant.

PART XXII.

Habeas corpus.

Facilitating process in habeas corpus cases.
46 Vic. No. 17, s. 453.

252. Where the Court grants a rule to show cause why a writ of habeas corpus should not issue, the Court, on the return of such rule, and the appearance of the party called on to show cause, or on proof of service of such rule, may make all such orders as might be made after issue of the writ, and the bringing up of the body.

Provided that any such writ may be issued after the return of the rule, if the Court thinks fit.

Proceedings thereupon.
Ibid. s. 454.

253. (1) On the return of any such writ or rule, where the truth of the return, or any matter shown for cause is disputed, the Court may refer such return or matter to any officer of the Court, or Commissioner for Affidavits, for the taking of evidence thereon, orally or by affidavit, and, for the purposes of such reference, may make all necessary orders for the attendance of witnesses, and otherwise.

(2)

(2) On the completion of the evidence, the Court may dispose of the case as the circumstances appear to require, with costs to be paid by and to any party, or without costs, as the Court thinks fit.

254. The powers conferred by the last preceding two sections respectively may in vacation be exercised by a Judge, and the word "Court" shall for that purpose be taken equally to mean a Judge.

Power of a Judge therein in vacation. 46 Vic. No. 17, s. 455.

PART XXIII.

Affidavits and evidence.

255. Upon motions founded upon affidavits either party may with leave of the Court or a Judge make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of such affidavits, subject to any rule of Court respecting such affidavits.

Affidavits on new matter. 20 Vic. No. 31, s. 18.

256. Upon the hearing of any motion or summons, the Court or Judge may, upon such terms as the Court or Judge thinks reasonable, order any document to be produced, and any witness to appear and be examined *viva voce*, either before the Court or a Judge or before a commissioner for affidavits; and upon hearing such evidence or reading the deposition may make such rule or order as may be just.

Production of documents and examination of witnesses upon motions and summonses. *Ibid.* s. 19.

257. (1) The Court or Judge may by such rule or order, or by any subsequent rule or order, command the attendance of the witnesses named therein for the purpose of being examined or the production of any documents mentioned therein.

Proceedings before and upon such examination. *Ibid.* s. 20.

(2) Such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect as a rule or order under the provisions of the fifteenth section of the Act fifth Victoria number nine.

(3) The Court or Judge or such commissioner may adjourn the examination from time to time as occasion requires.

(4) The proceedings upon such examination shall be conducted and the depositions taken down as nearly as may be in the same manner as in the case of a *viva voce* examination under the said Act.

258. (1) Any party to any civil proceeding or motion for a criminal information 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 a commissioner for affidavits as to the matters concerning which he has refused to make an affidavit.

Persons refusing to make affidavits. *Ibid.* s. 21.

(2) A Judge may 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 thinks fit.

20 Vic. No. 31, s. 22.

(3) Such order shall be proceeded upon in the same manner as a rule or order under the provisions of the fifteenth section of the Act fifth Victoria number nine.

(4) The proceedings upon such examination shall be conducted and the depositions taken down and returned as nearly as may be in the same manner as in the case of a *viva voce* examination under the said Act.

PART XXIV.

Amendment.

Power of amendment.
12 Vic. No. 1, s. 3.

259. The Court or a Judge may amend any notice of motion, rule nisi, summons, writ, pleading, affidavit, jurat or title of affidavit, record, præcipe, or other proceeding used before the Court or Judge in any matters that appear to the Court or Judge not likely to mislead the opposite party on any point essential to the merits of the case, and may award such reasonable costs of such amendment as to the Court or Judge seem fit.

Power of amendment.
5 Vic. No. 9, s. 38.
17 Vic. No. 21, s. 172.

260. (1) The Court or a Judge or any Circuit Court may at all times amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not and whether the defect or error is that of the party applying to amend or not. All such amendments may be made with or without costs and upon such terms as to the Court or Judge seem fit.

(2) All such amendments as are necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.

PART XXV.

Costs.

Costs to one or more of several defendants. 5 Vic. No. 9, s. 26.

261. Where two or more persons are defendants in a personal action, any one of them in respect of whom a *nolle prosequi* is entered or who obtains a verdict shall have judgment for and recover his reasonable costs of suit.

Nolle prosequi. *Ibid.*

262. Where a *nolle prosequi* is entered on any count or as to part of a declaration, the defendant shall have judgment for and recover costs in that behalf.

Scire facias. *Ibid.*

263. In all writs of *scire facias* the plaintiff shall recover his costs as well upon a judgment by default as on a judgment after plea or demurrer.

Demurrer. *Ibid.*

264. Where judgment is given on a demurrer in any action whatever, the party in whose favour such judgment is given shall have judgment to recover his costs.

Distribution of costs. 17 Vic. No. 21, s. 75.

265. The costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues.

Scales of costs. 20 Vic. No. 8, s. 3.

266. The Judges may make rules establishing three separate scales of costs in actions, having regard severally to the amount sued for or the value of the matter sought to be recovered. The lowest scale shall extend to all cases not exceeding fifty pounds, the second scale to all cases above fifty and not exceeding one hundred pounds, and the highest scale to all other cases.

Costs when not more than £30 recovered. 22 Vic. No. 18, ss. 100, 101.

267. (1) If the plaintiff in any action recovers by judgment by default, verdict or otherwise, a sum not exceeding thirty pounds, then unless a Judge certifies—

(*a*) that the cause of action was one for which a plaint could not have been tried in any District Court without the defendant's consent; or

(*b*) that any officer of the District Court was a party (where the action is not in respect of any claim to goods and chattels taken in execution of the process of such District Court or the proceeds in virtue thereof); or

(*c*) that it appears to him that there was a sufficient reason for bringing or trying the said action in the Court,

the plaintiff shall have judgment to recover such sum only and no costs; and it shall not be necessary to enter any suggestion on the record to deprive him of costs.

(2) If a Judge certifies as aforesaid, the plaintiff shall have the same judgment to recover his costs as he would have had if this section had not been passed.

PART XXVI.

Rules and forms.

General rules may be made by the Judges.
4 Vic. No. 22, s. 23.
12 Vic. No. 1, s. 10.
17 Vic. No. 21, s. 174.
20 Vic. No. 31, s. 61.

268. (1) The Judges may make all such general rules and orders—

(*a*) for the effectual execution of this Act and of the intention and object hereof; and

(*b*) for fixing costs to be allowed for and in respect of the matters herein contained and the performance thereof, and

(*c*) for apportioning the costs of issues, and

(*d*) 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 authorised to be done, and substituting other days for the same,

as in their judgment shall be necessary or proper.

(2) The Judges may also from time to time exercise all the powers and authority given to the Judges at Westminster or any of them by the Imperial Act thirteenth and fourteenth Victoria, chapter sixteen, with respect to any matter herein contained relative to practice or pleading, anything in this Act to the contrary notwithstanding.

(3) The provisions of the said Imperial Act as to the rules, orders, or regulations made in pursuance thereof, shall be held applicable to any rules, orders, or regulations made in pursuance of this section, except that it shall not be necessary to lay any such rule before either House of the Imperial Parliament at any time or before the Colonial Parliament at any time before the commencement of the operation of any such rule.

(4) Nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the Court or Judges thereof to make rules or orders or otherwise to regulate and dispose of the business therein.

Rules under provisions relating to absent defendants and joint contractors.
4 Vic. No. 6, s. 25.

269. (1) This section shall apply only to the provisions contained in sections thirty-two, thirty-three, thirty-nine, forty-one, in sections forty-four to forty-eight, both inclusive, and in Part XX of this Act.

(2) Where the said provisions are insufficient or where no provision is made, the Court may for the purpose of facilitating or more

more effectually carrying into execution any of the objects of the said provisions, make such rules and orders touching—

(*a*) any of the matters intended to have been thereby provided for; and

(*b*) the manner of proceeding before or applying to the Court or a Judge; and

(*c*) the execution of writs and orders; and

(*d*) the allowance and taxation of costs,

as to the Court seems expedient.

(3) Such rules and orders may be either general or applicable to a particular case only, and may be made either upon an application made in a summary way, by or on behalf of any person interested in any matter intended to have been so provided for, or without such application.

(4) All rules and orders so made shall be of the same force and effect as if they had been inserted in this Act.

New forms of writs and other proceedings. 17 Vic. No. 21, s. 175.

270. (1) Such new or altered writs and forms of proceedings may be issued, entered, and taken as may by the Judges be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges from time to time think fit to order.

(2) Such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the Court before the commencement of the Common Law Procedure Act of 1853 were acted upon and enforced, or as near thereto as the circumstances of the case will admit.

(3) Any existing writ or proceeding, the form of which is in any manner altered in pursuance of this Act, shall 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.

SCHEDULES.

SCHEDULES.

FIRST SCHEDULE.

Reference to Act.	Title or Short Title.	Extent of repeal.
4 Vic. No. 6	An Act to consolidate and amend the laws relating to actions against persons absent from the Colony and against persons sued as joint contractors.	The whole, except so much of section 25 as relates to feigned issues.
4 Vic. No. 22	An Act to provide for the more effectual administration of justice in New South Wales and its dependencies.	Section 15, except so far as it relates to criminal proceedings, and section 26.
5 Vic. No. 9	An Act for the further amendment of the law, and for the better advancement of justice.	Sections 17, 20, 22, 23, 24, 26, 38, and so much of section 42 as relates to new trials.
10 Vic. No. 10	An Act to amend the law respecting the recovery of small debts in all parts of the Colony.	Sections 15, 16, and 17.
12 Vic. No. 1	An Act to simplify and alter the law in some respects.	All the unrepealed sections, except sections 5 and 8.
15 Vic. No. 3	An Act to amend in some respects the Act passed to consolidate the laws relating to juries.	Sections 9, 10, and 11.
16 Vic. No. 14	An Act to amend the law of Evidence ...	Section 6.
17 Vic. No. 21	The Common Law Procedure Act of 1853	The whole, except section 100, sections 160 to 168 both inclusive, and Form No. 18 of Schedule A.
18 Vic. No. 6	An Act to revive the Absent Defendants Act, and to amend the same.	The whole.
20 Vic. No. 8	An Act to restore writs of inquiry and writs of trial, and to authorise the establishment of separate scales of costs.	The whole.
20 Vic. No. 31	The Common Law Procedure Act of 1857.	The whole, except sections 10, 25, 53, and 54.
22 Vic. No. 18	The District Courts Act of 1858 ...	Sections 98, 100, and 101.
22 Vic. No. 25	An Act to amend the District Courts Act of 1858.	Section 2.
24 Vic. No. 8	An Act to amend the law with respect to verdicts and judgments in the Supreme Court.	The whole.
46 Vic. No. 17	Criminal Law Amendment Act of 1883	Sections 453, 454, and 455.
47 Vic. No. 7	Limitation of Actions for Trespass Act of 1884.	Section 3.

SECOND SCHEDULE.

FORMS.

No. 1.

Section 4.
17 Vic. No. 21.
Sched. A (1).

Writ where the defendant resides within the jurisdiction.

VICTORIA by the Grace of God, *&c.*

To C. D. of

We command you that within days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Supreme Court, at Sydney, in an action at the suit of A. B., and take notice that in default of your so doing the said A. B. may proceed therein to judgment and execution.

Witness, *&c.*

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (*six*) calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the writ before service thereof.

This writ was issued by E. F. of attorney for the said plaintiff, *or* this writ was issued in person by A. B., who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.*]

Indorsement to be made on the writ after service thereof.

This writ was served by X. Y. on L. M. [the defendant *or* one of the defendants] on *Monday*, the day of 18

(Signed) X. Y.

No. 2.

Section 10.
17 Vic. No. 21, s. 8.
Rule 5 of 12 April, 1856.

Indorsement of debt and costs, &c.

The plaintiff claims £ for debt, and £ for costs, and if those sums be paid to the plaintiff, or to his attorney, within the time limited for your appearance, further proceedings will be stayed.

No. 3.

Section 18.
17 Vic. No. 21.
Sched. A (2).

Writ where the defendant being a British subject resides out of the jurisdiction.

VICTORIA by the Grace of God, *&c.*

To C. D. of

We command you that within [*here insert a sufficient number of days within which the defendant might appear with reference to the distance he may be at from New South Wales*] days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Supreme Court at Sydney, in an action at the suit of A. B., and take notice that in default of your so doing the said A. B. may, by leave of the Court or a Judge, proceed therein to judgment and execution.

Witness, *&c.*

Memorandum

Memorandum to be subscribed on the writ.

N.B.—This writ is to be served within (*six*) calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the writ before the service thereof.

This writ is for service out of the jurisdiction of the Court, and was issued by E. F. of , attorney for the said plaintiff, *or* this writ was issued in person by A. B., who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.*]

The indorsement required by the 10th section should be made on this writ, but should allow the defendant the time limited for appearance to pay the debt and costs.

Section 19.
17 Vic. No. 21.
Sched. A (3).

No. 4.

Writ where the defendant not being a British subject resides out of the jurisdiction.

VICTORIA by the Grace of God, *&c.*

To C. D., late of

We command you that within [*here insert a sufficient number of days within which the defendant might appear with reference to the distance he may be at from New South Wales*] days after notice of this writ is served on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Supreme Court at Sydney, in an action at the suit of A. B., and take notice that in default of your so doing the said A. B. may, by leave of the Court or a judge, proceed therein to judgment and execution.

Witness, *&c.*

Memorandum to be subscribed on the writ.

N.B.—Notice of this writ is to be served within (*six*) calendar months from the date thereof, including the day of such date, and not afterwards.

Indorsements as in other cases.

Notice of the foregoing writ.

To G. H., late of [*Bathurst in the Colony of New South Wales*] *or* now residing at [*Auckland, in New Zealand.*]

Take notice that A. B., of , in the Colony of New South Wales, has commenced an action at law against you, C. D., in Her Majesty's Supreme Court of New South Wales, by a writ of that Court dated the day of A.D. 18 and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action by causing an appearance to be entered for you in the said Court to the said action, and in default of your so doing the said A. B. may, by leave of the Court or a judge, proceed thereon to judgment and execution.

[*Here state amount of claim as required by 10th section, but allowing the defendant the time limited for appearance to pay debt and costs.*]

(Signed) A. B. of *&c.*
or
E. F. of *&c.*
Attorney for A. B.

No.

No. 5. Section 24.

Special indorsement. 21 Vic. No. 21.

[*After the indorsement required by the tenth section of this Act this special indorsement may be inserted.*] Sched. A (4).

The following are particulars of plaintiff's claim:—

	£	s.	d.
1898.—June 20. Half-year's rent to this day of house and premises, in street, Sydney	25	10	0
Sept. 12. Ten sacks of flour, at 40s.	20	0	0
Dec. 1. Money received by defendant	17	0	0
	62	10	0
Paid	15	0	0
Balance due	47	10	0

Or,

To butcher's meat supplied between the 1st of January, 1898, and the 1st of January, 1899	52	0	0
Paid	20	0	0
Balance	32	0	0

[*If any account has been delivered it may be referred to, with its date, or the plaintiff may give such a description of his claim as in a particular of demand, so as to prevent the necessity of an application for further particulars.*]

Or,

£50, principal and interest, due on a bond dated the day of , conditional for the payment of £100.

Or,

£90, principal and interest, due on a covenant contained in a deed dated the day of to pay £100 and interest.

Or,

A penalty of £100, under the Statute 55 Geo. III, c. 137.

Or,

£85 on a bill of exchange for £100, dated the 2nd February, 1899, accepted, *or* drawn, *or* indorsed by the defendant.

Or,

£50 on a guarantee, dated the 1st of January, 1899, whereby the defendant guaranteed the due payment by E. F. of goods supplied or to be supplied to him.

[*To any of the above may be added, in cases where interest is payable*, the plaintiff also claims interest on £ of the above sum from the date of the writ until judgment.]

N.B.—Take notice, that if a defendant served with this writ, within the jurisdiction of the Court, do not appear according to the exigency thereof, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the sum above claimed [with interest at the rate specified], and the sum of for costs, and issue execution at the expiration of eight days from the last day for appearance.

No.

Section 25.
17 Vic. 21.
Sched. A (5).

No. 6.

Judgment in default of appearance where writ specially indorsed.

In the Supreme Court of New South Wales.—
On the day of , A.D. 1899.

[*Day of signing the judgment.*]

New South Wales }
to wit. }

A. B., in his own person [*or* by , his attorney], sued out a writ of summons against C. D., indorsed according to the Common Law Procedure Act, 1899, as follows:—

[*Here copy special indorsement.*]

And the said C. D. has not appeared. Therefore it is considered that the said A. B. recover against the said C. D. £ , together with £ for costs of suit.

Section 29.
Ibid. s. 27.

No. 7.

Appearance to writ of Summons.

A. B. plaintiff against C. D. / *or* / against C. D. and another / *or* / against C. D. and others — The defendant C. D. appears in person / *or* / E. F. attorney for C. D. appears for him.

[*If the defendant appears in person here give his address.*]

Entered the day of 18 .

Section 51.
Ibid. Sched. A (6).

No. 8.

Issue for trial of questions of fact without pleading.

In the Supreme Court of New South Wales.—
The day of in the year of our Lord 18 .
Sydney to wit.

Whereas A. B. has sued C. D. and affirms and denies that

[*Here state the question or questions of fact to be tried.*]

And it has been ordered by the Hon. Mr. Justice according to the Common Law Procedure Act, 1899, that the said question shall be tried by a Jury. Therefore let the same be tried accordingly.

Section 70.
Ibid. s. 54.

No. 9.

Commencement of declaration.

[Venue] A. B. by E. F., his attorney [*or* in person, *as the case may be*] sues C. D. for [*here state the cause of action*].

Section 70.
Ibid.

No. 10.

Conclusion of declaration.

And the plaintiff claims £ [*or if the action is brought to recover specific goods*—claims a return of the said goods, or their value, and £ for their detention].

Section 71.
Ibid. s. 55.

No. 11.

Commencement of declaration after plea of non-joinder.

[Venue] A. B. by E. F., his attorney [*or* in person *at the case may be*] sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. for, &c.

No.

No. 12. Section 76.

Commencement of plea, avowry, or cognisance. 17 Vic. No. 21, s. 61.

The defendant by M. N., his attorney [*or* in person *as the case may be*] says that [*here state first defence*].

No. 13. Section 76.

Commencement of plea, &c., after the first. *Ibid.*

And for a [*second*] plea [*or* avowry, *or* cognisance] the defendant says that [*here state second, &c., defence.*]

or if pleaded to part only—

And for a [*second*] plea [*&c.*] as to [*stating to what it is pleaded*] the defendant says that, &c.

No. 14. Section 81.

Plea of payment into Court. *Ibid.* s. 65.

The defendant by M. N., his attorney [*or* in person *as the case may be*] [*if pleaded to part, say* as to £ parcel of the money claimed] brings into Court the sum of £ and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

No. 15. Section 88.

Joinder of issue. *Ibid.* s. 73.

The plaintiff joins issue upon the defendant's first [*&c. specifying what or what part*] plea.

The defendant joins issue upon the plaintiff's replication to the first [*&c. specifying what*] plea.

No. 16. Section 100.

Demurrer. *Ibid.* s. 82.

The defendant [*or* plaintiff] by M.N., his attorney [*or* in person] says that the declaration [*or* plea, *&c.*] is bad in substance.

No. 17. Section 100.

Joinder in demurrer. *Ibid.*

The plaintiff [*or* defendant] says that the declaration [*or* plea *&c.*] is good in substance.

No. 18. Section 145.

Rule or summons where a judgment creditor applies for execution against a judgment debtor. *Ibid.* Sched. A (7).

[*Formal parts as at present.*]

C. D. show cause why A. B. [*or as the case may be*] should not be at liberty to enter a suggestion upon the roll in an action wherein the said A.B. was plaintiff, and the said C. D. was defendant, and wherein the said A. B. obtained judgment for £ against the said C. D. on the day of that it manifestly appears to the Court that the said A. B. is entitled to have execution of the said judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. the costs of this application to be taxed.

[*Note.—The above form may be modified so as to meet the case of an application by or against the representative of a party to the judgment.*]

No.

Section 146.
17 Vic. No. 21.
Sched. A (8).

No. 19.

Suggestion that the judgment creditor is entitled to execution against the judgment debtor.

And now on the day of it is suggested and manifestly appears to the Court that the said A. B. [*or* C. D. as executor of the last will and testament of the said A. B. deceased [*or as the case may be*] is entitled to have execution of the judgment aforesaid against the said E. F. [*or* against G. H. as executor of the last will and testament of the said E. F., *or as the case may be*] Therefore it is considered by the Court that the said A. B. [*or* C. D. as such executor as aforesaid *or as the case may be*] ought to have execution of the said judgment against the said E. F. [*or* against G. H. as such executor as aforesaid *or as the case may be*].

Section 147.
Ibid. Sched. A (9).

No. 20.

Writ of revivor.

VICTORIA, by the Grace of God, *&c.*, to E. F., of greeting.

We command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Supreme Court at Sydney to show cause why A. B. [*or* C. D. as executor of the last will and testament of the said A. B. deceased *or as the case may be*] should not have execution against you [*if against a representative here insert* as executor of the last will and testament of deceased *or as the case may be*] of a judgment whereby the said A. B. [*or as the case may be*] on the day of in the said Court recovered against you [*or as the case may be*] £ and take notice that in default of your doing so, the said A. B. [*or as the case may be*] may proceed to execution.

Witness, *&c.*

Section 210.
Ibid. Sched. A (10.)

No. 21.

Writ of ejectment.

VICTORIA, *&c.*, to X. Y. Z., and all persons entitled to defend the possession of [*describe the property with reasonable certainty*] in the parish of in the county [*or* district] of to the possession whereof A. B. and C. some or one of them claim to be [*or* to have been on and since the day of A.D.] entitled and to eject all other persons therefrom. These are to command you, or such of you as deny the alleged title within sixteen days after service hereof to appear in person or by attorney in Our Supreme Court at Sydney to defend the said property, or such part thereof as you may be advised in default whereof judgment may be signed, and you turned out of possession.

Witness, *&c.*

Section 219.
Ibid. Sched. A (11).

No. 22.

Judgment in ejectment in case of non-appearance.

In the Supreme Court of New South Wales—
The day of 18
[*Date of writ.*]

Cumberland }
to wit. }

On the day and year above written, a writ of our Lady the Queen issued forth of this Court in these words, that is to say:—

VICTORIA, by the Grace of God [*here copy the writ*] and no appearance has been entered, or defence made to the said writ. Therefore, it is considered that the said A. B. [*the claimant*] do recover possession of the land in the said writ mentioned with the appurtenances.

No.

No. 23. Section 219.

Judgment and issue in ejectment when defence limited to part. 17 Vic. No. 21. Sched. A (12).

In the Supreme Court of New South Wales—
On the day of , A.D. 18
Cumberland }
to wit. }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the day of appeared by his attorney [*or* in person] to the said writ, and has defended for a part of the land in the writ mentioned, that is to say [*here state the part*], and no appearance has been entered or defence made to the said writ except as to the said part. Therefore it is considered that the said A.B. [*the claimant*] do recover possession of the land in the said writ mentioned except the said part with the appurtenances, and that he have execution thereof forthwith, and as to the rest let a jury come, &c.

No. 24. Section 220.

Issue in ejectment where the defence is for the whole *Ibid.* Sched. A (13).

In the Supreme Court of New South Wales.
On the day of , A.D. 18
Cumberland }
to wit. }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the day of appeared by his attorney [*or* in person] to the said writ, and defended for the whole of the land therein mentioned. Therefore let a jury come, &c.

No. 25. Section 223.

Entry of verdict in ejectment. *Ibid.* Sched. A (14).

Afterwards on the day of , A.D. before come the parties within mentioned, and a jury being sworn to try the matters in question between the said parties upon their oath, say that A. B. [*the claimant*] within mentioned on the day of , A.D. was and still is entitled to the possession of the land within mentioned as in the writ alleged. Therefore, *&c.*

No. 26. Section 243.

Judgment for defendant in ejectment on discontinuance. *Ibid.* Sched. A (15).

In the Supreme Court of New South Wales—
On the day of , 18
[*Date of Writ.*]
Cumberland }
to wit. }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the day of , appeared by his attorney [*or* in person] to the said writ, and A. B. has discontinued the action. Therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £ for his costs of defence.

No.

Section 245.
Sched. A (16).

No. 27.

Judgment for defendant in ejectment on failure to proceed to trial.

In the Supreme Court of New South Wales—
The day of , 18
Date of Writ.

Cumberland }
to wit. }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the day of , appeared by his attorney [*or* in person] to the said writ, and A. B. has failed to proceed to trial, although duly required so to do. Therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £ for his costs of defence.

Section 246.
Ibid. Sched. A (17).

No. 28.

Judgment for claimant in ejectment on confession.

In the Supreme Court of New South Wales—
The day , 18
Date of writ.

Cumberland }
to wit. }

On the day and year above written a writ of our Lady the Queen issued forth of this Court in these words, that is to say,

VICTORIA, by the Grace of God [*here copy the writ*], and C. D. has on the day of , appeared by his attorney [*or* in person] to the said writ, and the said C. D. has confessed the said action [*or* has confessed the said action as to part of the said land, that is to say, *here state the part*]. Therefore it is considered that the said A. B. do recover possession of the land in the said writ mentioned [*or* of the said part of the said land] with the appurtenances and £ for costs.

Section 67.
17 Vic. No. 21.
Sched. B.

THIRD SCHEDULE.

FORMS OF PLEADINGS.

STATEMENTS OF CAUSES OF ACTION.

On contracts.

Goods sold.
1. Money payable by the defendant to the plaintiff for [*these words* money payable, &c., *should precede money counts like* 1 *to* 13 *but need only be inserted in the first*] goods bargained and sold by the plaintiff to the defendant.

Work and materials.
2. Work done and materials provided by the plaintiff for the defendant at his request.

Money lent.
3. Money lent by the plaintiff to the defendant.

Money paid.
4. Money paid by the plaintiff for the defendant at his request.

Money received.
5. Money received by the defendent for the use of the plaintiff.

Account stated.
6. Money found to be due from the defendant to the plaintiff on accounts stated between them.

For an estate sold.
7. A messuage and lands sold and conveyed by the plaintiff to the defendant.

For goodwill.
8. The goodwill of a business of the plaintiff sold and given up by the plaintiff to the defendant

For the use of a house and land.
9. The defendant's use by the plaintiff's permission of messuages and lands of the plaintiff.

For the use of a fishery.
10. The defendant's use by the plaintiff's permission of a fishery of the plaintiff.

11.

11. The hire of [*as the case may be*] by the plaintiff let to hire to the defendant. For hire of goods, &c.

12. Freight for the conveyance by the plaintiff for the defendant at his request of goods in ships. For freight.

13. The demurrage of a ship of the plaintiff kept on demurrage by the defendant. For demurrage.

14. That the defendant on the day of A.D. by his promissory note now overdue promised to pay to the plaintiff £ [*two*] months after date but did not pay the same. Payee against maker of note.

15. That one A. on *&c.* [*date*] by his promissory note now overdue promised to pay to the defendant or order £ [*two*] months after date, and the defendant indorsed the same to the plaintiff, and the said note was duly presented for payment and was dishonoured, whereof the defendant had due notice but did not pay the same. Indorsee against indorser of note.

16. That the plaintiff on *&c.* [*date*] by his bill of exchange now overdue directed to the defendant required the defendant to pay to the plaintiff £ [*two*] months after date, and the defendant accepted the said bill but did not pay the same. Drawee against acceptor of bill.

17. That the defendant on *&c.* [*date*], by his bill of exchange directed to A., required A. to pay to the plaintiff £ [*two*] months after date, and the said bill was duly presented for acceptance and was dishonoured, of which the defendant had due notice, but did not pay the same. Payee against drawer.

18. That the plaintiff and defendant agreed to marry one another and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant yet the defendant has neglected and refused to marry the plaintiff. Breach of promise of marriage.

19. That the plaintiff and defendant agreed to marry one another on a day now elapsed, and the plaintiff was ready and willing to marry the defendant on that day, yet the defendant neglected and refused to marry the plaintiff. Breach of promise of marriage.

20. That the defendant by warranting a horse to be then sound and quiet to ride sold the said horse to the plaintiff yet the said horse was not then sound and quiet to ride. Warranty of a horse.

21. That the plaintiff and the defendant agreed by charter-party that the plaintiff's ship called the "Ariel" should with all convenient speed sail to R. or so near thereto as she could safely get, and that the defendant should there load her with a full cargo of tallow or other lawful merchandise which she should carry to H. and there deliver on payment of freight £ per ton, and that the defendant should be allowed ten days for loading and ten for discharge and ten days for demurrage, if required, at £ per day, and that the plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said ship at R., and that the time for so doing has elapsed, yet the defendant made default in loading the agreed cargo. For not loading pursuant to charter-party.

22. That the plaintiff let to the defendant a house, No. 40, George-street, Sydney, for seven years to hold from the day of A.D. at £ a year payable quarterly of which rent quarters are due and unpaid. Upon a lease for rent.

23. That the plaintiff by deed let to the defendant a house, No. 40, George-street, Sydney, to hold for seven years from the day of A.D. and the defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term [*according to the covenant*] yet the said house was during the said term out of good and substantial repair. Upon a covenant to repair.

For wrongs independent of contract.

24. That the defendant broke and entered certain land of the plaintiff called the Big Field and depastured the same with cattle. Trespass to land.

25. That the defendant assaulted and beat the plaintiff gave him into custody to a policeman and caused him to be imprisoned in a Police Office. Assault battery and false imprisonment.

26. That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, iron, hops, household furniture [*or as the case may be*]. Wrongful conversion of goods.

27. That the defendant detained from the plaintiff his title-deeds of land called Belmont in the county of that is to say [*describe the deeds*]. 28. Wrongful detention of property, &c.

Diverting water from a mill.

28. That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant by cutting the bank of the said stream diverted the water thereof away from the said mill.

Infringement of a patent.

29. That the plaintiff was the first inventor of a certain new manufacture that is to say of "certain improvements in the manufacture of sulphuric acid" for which he obtained letters patent for the term of fourteen years from the day of A.D. subject to a condition that the plaintiff should within six calendar months cause to be enrolled an instrument in writing particularly describing the nature of his said invention, and the plaintiff did within the time prescribed fulfil the said condition, and the defendant during the said term did infringe the said patent right.

Defamation of character.

30. That the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "he is a thief,"

(*a*) Slander.

[*if there be any special damage here state it with such reasonable particularity as to give notice to the defendant of the peculiar injury complained for instance*]

whereby the plaintiff lost his situation as overseer in the employ of A.

(*b*) Libel.

31. That the defendant falsely and maliciously printed and published of the plaintiff in a newspaper called " " the words following, that is to say, "he is a regular prover under bankruptcies," the defendant meaning thereby that the plaintiff had proved, and was in the habit of proving fictitious debts against the estates of bankrupts with the knowledge that such debts were fictitious.

Pleas.

Pleas in action on contracts.

Denial of debt.

32. That he never was indebted as alleged.

[*This plea is applicable to declarations like those numbered* 1 *to* 13.]

Denial of contract.

33. That he did not promise as alleged.

[*This pleas is applicable to other declarations on simple contracts not on bills and notes such as those numbered* 18 *to* 21. *It would be unobjectionable to use* "did not warrant" "did not agree" *or any other appropriate denial.*]

Denial of deed.

34. That the alleged deed is not his deed.

Statute of Limitations.

35. That the alleged cause of action did not accrue within six years [*state the period of limitation applicable to the case*] before this suit.

Payment.

36. That before action he satisfied and discharged the plaintiff's claim by payment.

Set-off.

37. That the plaintiff at the commencement of this suit was and still is indebted to the defendant in an amount equal to the plaintiff's claim for [*here state the cause of set-off, as in a declaration see forms ante*], which amount the defendant is willing to set-off against the plaintiff's claim.

Release.

38. That after the alleged claim accrued, and before this suit, the plaintiff by deed released the defendant therefrom.

Pleas in actions for wrongs independent of contract.

Not guilty.

39. That he is not guilty.

Leave and license.

40. That he did what is complained of by the plaintiff's leave.

Self-defence.

41. That the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defence.

Right of way.

42. That the defendant, at the time of the alleged trespass, was possessed of land the occupiers whereof for twenty years before this suit enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land of the plaintiff to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of the said way.

43. That the defendant, at the time of the alleged trespass, was possessed of land the occupiers whereof for thirty years before this suit enjoyed, as of right and without interruption, common of pasture over the said land of the plaintiff for all their cattle, levant and couchant, upon the said land of the defendant at all times of the year as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common. Right of common.

REPLICATIONS.

44. The plaintiff joins issue upon the defendant's 1st, 2nd, &c., pleas. Joinder of issue.

45. The plaintiff, as to the second plea, says [*here state the answer of the plea as in the following forms*]. Replication to pleas containing new matter.

46. That the alleged release is not the plaintiff's deed. To plea of release.

47. That the alleged release was procured by the fraud of the defendant. *Id.*

48. That the alleged set-off did not accrue within six years before this suit. To plea of set-off.

49. That the plaintiff was possessed of land whereon the defendant was trespassing and doing damage, whereupon the plaintiff requested the defendant to leave the said land, which the defendant refused to do, and thereupon the plaintiff gently laid his hands on the defendant, in order to remove him, doing no more than was necessary for that purpose, which is the alleged first assault by the plaintiff. To self-defence.

50. That the occupiers of the said land did not for twenty years before this suit enjoy, as of right and without interruption, the alleged way. To right of way.

NEW ASSIGNMENT.

51. The plaintiff, as to the and pleas, says that he sues, not for the trespasses therein admitted, but for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions and for other purposes than those referred to in the said pleas. To the pleas of right of way and right of common.

[*If the plaintiff replies and new assigns, the new assignment may be as follows*—]

52. And the plaintiff, as to the and pleas, further says that he sues, not only for the trespasses in those pleas admitted, but also for, *&c.*

[*If the plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows*—]

53. And the plaintiff, as to the and pleas, further says that he sues, not for the trespasses in the pleas [*the pleas not replied to*] admitted, but for the trespasses in the pleas [*the pleas replied to*] admitted, and also for, *&c.*