1855-6.

No. 24.

An Act for the further Amendment of the Process, Practice, and Mode of Pleading of the Supreme Court.

[Assented to, June 18, 1856.]

BE it Enacted, by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council thereof, as follows:

Judge may, by consent, try questions of fact.

1. The parties to any cause may, by consent in writing signed by them or their attorney as the case may be, leave the decision of any issue of facts to the Court, provided that the Court upon a rule to show cause, or a Judge on summons shall in their or his discretion think fit to allow such trial, or provided the Judges of the Supreme Court shall, in pursuance of the power hereinafter given them, make any general rule or order dispensing with such allowance, either in all cases or in any particular class or classes of cases, to be defined by such rule or order, and such issue of fact may thereupon be tried and determined and damages assessed where necessary in open Court, either in term or vacation, by any Judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other Judge or Judges of the said Court, and such Judge shall have the same power to order a reference in such cause as though the same had been tried before him by a jury, and the verdict of such Judge or Judges shall be of the same effect as the verdict of a jury save that it shall not be questioned on the ground of being against the weight of evidence, and the proceedings upon and after such trial as to the power of the Court or Judge, the evidence and otherwise shall be the same as in the case of trial by jury.

Power to Court or Judge to direct arbitration before trial.

2. If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either

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either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit to decide such matter in a summary manner, or to order that such matter either wholly or in part be referred to an arbitrator, or arbitrators and umpires, appointed by the parties, or to an officer of the Court, or in country causes to any Special Magistrate, upon such terms as to costs and otherwise as such Court or Judge shall think reasonable, and the decision or order of such Court or Judge, or the award or certificate of such referee shall be enforceable by the same process as the finding of a Jury upon the matter referred.

Special case may be stated, and question of fact tried.

3. If it shall appear to the Court or Judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law, fit to be decided by the Court, or upon a question of fact, fit to be decided by a Jury, or by a Judge, upon the consent of both parties as hereinbefore provided, it shall be lawful for such Court or Judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the Court upon such case, and the finding of the Jury or Judge upon such issue or issues, shall be taken and acted upon by the Arbitrator as conclusive.

Arbitrator may state special case.

4. It shall be lawful for the Arbitrator, upon any compulsory reference under this Act, or upon any reference by consent of parties, where the submission is or may be made a rule or order of the Supreme Court, if he shall think fit, and if it is not provided to the contrary, to state his award as to the whole or any part thereof, in the form of a special case for the opinion of the Court; and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court.

If action, commenced by one party, after all have agreed to arbitration, Court or Judge may stay proceedings.

5. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall, nevertheless, commence any action-at-law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred to any of them, it shall be lawful for the Court in which such action or suit is brought, or a Judge thereof, on application by the defendant or defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was, at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs, and as to

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to such Court or Judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied, as justice may require.

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

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

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When reference is to two arbitrators and one party fail to appoint, other party may appoint arbitrator to act alone.

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

Two arbitrators may appoint umpire.

8. When the reference is to two arbitrators, and the terms of the document authorizing it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within

within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

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

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

Rule to deliver possession of land, pursuant to award, to be enforced as a judgment in ejectment.

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

Agreement or submission in writing, may be made rule of Court, unless a contrary intention appear.

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

Speeches to Jury.

12. Upon the trial of any cause the addresses to the Jury shall be regulated as follows:—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of

23. In every rule *nisi* for a new trial, or to enter a verdict, or nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein. Grounds to be stated in rule *nisi* for a new trial.

24. In all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted, and then discharged or made absolute, the party decided against may appeal to the Court of Appeal. If rule *nisi* refused, party may appeal.

25. In all cases of motions for a new trial, upon the ground that the Judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal to the Court of Appeal: Provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed. Appeal upon rule discharged or absolute.

26. No appeal shall be allowed unless notice thereof be given in writing to the opposite party, or his attorney, and to the Master or one of the Masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge. Notice of appeal.

27. Notice of appeal shall be a stay of execution, provided bail to pay the sum recovered, and costs, or to pay costs where the appellant was plaintiff below, be given in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the Sheriff. Bail.

28. The appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a Judge of the Court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Appeal. Form of appeal.

29. When the appeal is from the refusal of the Court below to grant a rule to show cause, and the Court of Appeal grant such rule, such rule shall be argued and disposed of in the Court of Appeal. Rule *nisi* granted on appeal, how disposed of.

30. The Court of Appeal shall, in all cases, whether in respect of appeals made before or after this Act shall come into operation, give such judgment as ought to have been given in the Court below, and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated. Judgment Court of Appeal.

31. The Court of Appeal shall have power to adjudge payment of costs and to order restitution. Powers of Court of Appeal as to costs, and otherwise.

32. Upon an award of a trial *de novo* by the Supreme Court, or by the Court of Appeal, upon matter appearing upon the record, an appeal Error upon award of trial *de novo*.

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

Cross-examination as to previous statements in writing.

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

Proof of previous conviction of a witness may be given.

19. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for either party to prove such conviction; and a certificate, containing the substance and effect only (omitting the formal part) of the indictment or information and conviction for such offence, purporting to be signed by the Clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, or by the deputy of such Clerk or officer (for which certificate a fee of Five Shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

Attesting witness need not be called, except in certain cases.

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

Comparison or disputed writing.

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

Error may be brought on, on a special case.

22. An appeal may be brought upon a judgment upon a special case, in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the Court of Appeal shall, as nearly as may be, be the same as in the case of a special verdict; and the Court of Appeal shall either affirm the judgment, or give the same judgment as ought to have been given in the Court in which it was originally decided, the said Court of Error being required to draw any inferences of fact from the facts stated in such special case which the Court where it was originally decided ought to have drawn.

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appeal may at once be brought, and if the judgment in such or any other case be affirmed on appeal, it shall be lawful for the Court of Appeal to adjudge costs to the defendant on such appeal.

Payment of costs upon new trial on matter of fact.

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

Affidavits on new matter.

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

Power to Court or Judge to direct oral examinations of witnesses.

35. Upon the hearing of any motion or summons, it shall be lawful for the Court or Judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents, as they or he may think fit, to be produced, and such witnesses, as they or he may think necessary, to appear and be examined *viva voce*, either before such Court or Judge, or before the Master, and upon hearing such evidence, or reading the report of such master, to make such rule or order as may be just.

Proceedings before and upon such examination.

36. The Court or Judge may by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order; and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect as a rule of the Court, under an Act passed in the first year of the reign of His late Majesty King William the Fourth, intituled "An Act to enable Courts of Law to order the examination of Witnesses upon interrogatories, or otherwise;" and it shall be lawful for the Court, or Judge, or Master, to adjourn the examination from time to time as occasion may require, and the proceedings upon such examination shall be conducted, and the depositions taken down, as nearly as may be, in the mode now in use with respect to the *viva voce* examination of witnesses under the last mentioned Act.

1 W. 4, c. 22.

Examination of person who refuses to make an affidavit.

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

38. Such

38. Such order shall be proceeded upon in like manner as an order made under the hereinbefore-mentioned Act passed in the first year of the reign of His late Majesty King William the Fourth; and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be in the mode used on *viva voce* examinations under the said Act of Parliament.

Proceedings upon order of examination.

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

Discovery of documents.

40. In all causes in the Supreme Court, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge, may at any other time deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called upon and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in the case of a body corporate any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit, to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought, within the above time or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of Court, and shall be liable to be proceeded against accordingly.

Power to deliver written interrogatories to opposite party.

41. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks that there is a good cause of action or defence upon the merits; and if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay: Provided that where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, the Court or Judge

Affidavits by party proposing to interrogate, and his attorney.

Judge may, if they or he think fit, upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

Oral examination of parties, when to be allowed.

42. In case of omission without just cause to answer sufficiently such written interrogatories, it shall be lawful for the Court or a Judge, at their or his discretion, to direct an oral examination of the interrogated party as to such points as they or he may direct, before a Judge or Master; and the Court or Judge may, by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon, and otherwise as to such Court or Judge shall seem just.

Proceedings upon such rule or order.

43. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner as an order made under the said hereinbefore-mentioned Act, passed in the first year of the reign of His late Majesty King William the Fourth.

Depositions upon such examinations to be returned to Master's office.

44. Whenever, by virtue of this Act, an examination of any witness or witnesses has been taken before a Judge of the said Court, or before a Master, the depositions taken down by such examiner shall be returned to and kept in the Master's office of the said Court, and office copies of such depositions may be given out, and the depositions may be otherwise used in the same manner as in the case of depositions taken under the hereinbefore-mentioned Act, passed in the first year of the reign of His late Majesty King William the Fourth.

1 W. 4, c. 22.

Examiner may make special report to the Court.

45. It shall be lawful for every Judge or Master named in any such rule or order, as aforesaid, for taking examinations under this Act, and he is hereby required to make, if need be, a special report to the said Court touching such examination and the conduct or absence of any witness or other persons thereon or relating thereto, and the Court is hereby authorized to institute such proceedings and make such order or orders upon such report as justice may require, and as may be instituted and made in any case of contempt of Court.

Costs of rule and examination to be in the discretion of the Court.

46. The cost of every application for any rule or order to be made for the examination of witnesses by virtue of this Act, and of the rule or order and proceedings thereon, shall be in the discretion of the Court or Judge by whom such rule or order is made.

Inspection by Jury of ~~jurors~~ or witnesses.

47. Either party shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection

tion of which may be material to the proper determination of the question in dispute, and it shall be lawful for the Court or a Judge, if they shall think fit, to make such rule or order upon such terms, as to costs and otherwise, as such Court or Judge may direct: Provided always, that nothing herein contained shall affect the provisions of the "Common Law Procedure Act, 1853," or any previous Act, as to obtaining a view by a jury: Provided also, that all rules and regulations now in force and applicable to the proceedings by view under the said last-mentioned Act shall be held to apply to proceedings for inspection by a jury under the provisions of this Act, or as near thereto as may be.

Rule or order for summoning Jury.

48. The said Court or any Judge thereof, may make all such rules or orders upon the Sheriff, or other person, as may be necessary to procure the attendance of a special or common jury for the trial of any cause or matter depending in such Court, at such time and place, and in such manner as they or he may think fit.

Examination of judgment debtor as to debts due to him.

49. It shall be lawful for any creditor, who has obtained a judgment in the said Court to apply to the Court, or a Judge, for a rule or order that the judgment debtor should be orally examined, as to any and what debts are owing to him, before a Master of the Court or such other person as the Court or Judge shall appoint, and the Court or Judge shall make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a Master under this Act.

Judge may order an attachment of debts.

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

Order for attachme to bind debts.

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

Proceedings to levy amount due from garnishee to judgment debtor.

52. 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

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 order execution to issue, and it may be sued forth accordingly, without any previous writ or process to levy the amount due from such garnishee, towards satisfaction of the judgment debt.

Judge may allow judgment creditor to sue garnishee.

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

Garnishee discharged.

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

Attachment book to be kept by the Masters of each Court.

55. In the Supreme Court, there shall be kept at the Master's office, 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 Master.

Costs of application.

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

Action for *mandamus* to enforce the performance of duties.

57. The plaintiff, in any action in the Supreme Court, except replevin and ejectment, may endorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of *mandamus*, and the plaintiff may thereupon claim in the declaration, either together with any other demand which now may 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*.

58. 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*.

59. 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

nearly as may be, and costs shall be recoverable by either party, as an ordinary action for the recovery of damages.

Judgment and execution.

60. In case judgment shall be given to the plaintiff that a *mandamus* do issue, it shall be lawful for the said Court, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of *mandamus* to the defendant commanding him forthwith to perform the duty to be enforced.

Form of peremptory writ.

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

Effect of writ of *mandamus*, and proceedings to enforce it.

62. The writ of *mandamus* so issued as aforesaid, shall have the same force and effect as a peremptory writ of *mandamus* issued out of the Court of Queen's Bench, at Westminster, 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.

63. The Court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff or some other person appointed by the Court at the expense of the defendant, and upon the act being done the amount of such expense may be ascertained by the Court either by writ of inquiry or reference to a Master as the Court or Judge may order, and the Court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

Prerogative writ of *mandamus* preserved.

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

Power of Court to grant *mandamus* extended to all cases in which elections may fail or become void.

65. All the powers vested in the said Court, in all cases where no election is made to any corporate office, under authority of a certain Ordinance No. 11 of 1849, "To constitute a Municipal Corporation for the City of Adelaide," shall extend to and be enjoyed and exercised by the said Court in all cases where any election to an office by law authorized to be made shall not have been made on the day appointed for such election or shall afterwards become void.

Proceedings for prerogative writ of *mandamus* accelerated.

66. Upon application by motion for any writ of *mandamus* in the said Court, the rule may in all cases be absolute in the first instance if the Court shall think fit, and the writ may bear *teste* on the day of its issuing

issuing and may be made returnable forthwith whether in term or in vacation, but time may be allowed to return it by the Court or a Judge, either with or without terms.

Proceedings on prerogative writ of *mandamus*.

67. The provisions of the "Supreme Court Procedure Amendment Act," and of this Act so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of *mandamus* issued by the said Court.

Specific delivery of chattels.

68. The Court or a Judge shall have power, if they or he see fit so to do, upon the application of the plaintiff, in any action for the detention of any chattel, or order that execution shall issue for the return of the chattels detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that if the said chattel cannot be found, and unless the Court or a Judge should otherwise order, the Sheriff shall distrain the defendant by all his lands and chattels, till the defendant render such chattel, or at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel: Provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest, in such action.

Claim of writ of injunction.

69. 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 endorsement thereon.

70. The writ of summons in such action shall be in the same as the writ of summons in any personal action; but on any such writ and copy thereof there shall be endorsed a notice, that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

Form of proceedings and of judgment.

71. 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 in such action, judgment may be given that the writ of injunction do or do not issue as justice may require; and in case of disobedience, such writ of injunction may be enforced by attachment by the Court, or when such Court shall not be sitting, by a Judge.

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

72. It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the

the defendant in such action, for the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the Court or Judge, upon such terms, as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the Court, or when such Courts shall not be sitting, by a Judge: Provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Equitable defence after judgment.

73. Any matter which, if it arose before or during the time for pleading, would afford an equitable defence to any action, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela.*

Application of clause of "Supreme Court Procedure Act" authorizing equitable defences.

74. The provision contained in the "Supreme Court Procedure Amendment Act," that in every action in the Supreme Court, it shall be lawful for any defendant, by leave of the said Court or any Judge thereof, to avail himself of any defence in equity to the claim sought to be enforced by such action, shall apply, and shall be taken and construed to have applied to actions of ejectment, as well as to all other actions.

S. 175 et seq 5/1853

Equitable replication.

75. The plaintiff may reply in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds, provided that such replication shall begin with the words, "for replication on equitable grounds," or words to the like effect.

Actions on lost instruments.

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

Jurisdiction under Shipowner's Act.

77. The Supreme Court, or any Judge thereof, may, upon summary application, by rule or order, exercise such and the like jurisdiction as may, under the provisions of an Act of Parliament, made and passed in the fifty-third year of the reign of His Majesty King George the Third, intituled "An Act to Limit the Responsibility of Shipowners in certain cases," be exercised by the said Court, under and by virtue of its Equitable Jurisdiction.

53 G. 3. c. 159.

False evidence.

78. Any person who shall, upon any examination upon oath or affirmation, or in any affidavit in proceedings under this Act, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm anything which shall be false, being convicted thereof shall be liable to the penalties of wilful and corrupt perjury.

79. Proceedings

Scire facias on judgment of assets in *futuro*.

79. Proceedings against executors upon a judgment of assets in *futuro* may be had and taken in the manner provided by the "Supreme Court Procedure Amendment Act" as to writs of revivor.

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

80. Where an action would, but for the provisions of the "Supreme Court Procedure Amendment Act," have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that Act, the defendant, or person against whom the action may be continued, may apply by summons to compel the plaintiff, or other person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said Act within such time as the Judge shall order; and in default of such proceeding, the defendant, or other person against whom the action may be continued as aforesaid, shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied of the goods of the testator or intestate.

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

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

Amendments.

82. It shall be lawful for the said Supreme Court and every Judge thereof, and for any Judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for.

General Rules may be made by the Judges.

83. It shall be lawful for the Judges of the said Courts from time to time to make all such General Rules and Orders for the effectual execution of this Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary and proper: Provided that nothing herein contained

tained shall be construed to restrain the authority or limit the jurisdiction of the said Court or of the Judges thereof, to make Rules or Orders, or otherwise to regulate and dispose of the business therein.

New forms of writs and other proceedings.

84. Such new or altered writs and forms of proceedings may be issued, entered, and taken, as may by the Judges of the said Court be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said Court are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this Act, shall 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.

Short title of Act.

85. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Supreme Court Procedure Act, 1855."

Commencement of Act.

86. This Act shall commence and come into operation on the first day of August next.

1855

ADELAIDE: Printed by authority, by W. C. COX, Government Printer, Victoria-square.