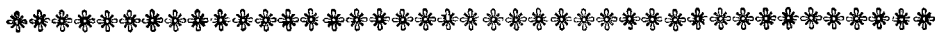


ANNO DECIMO-NONO

VICTORIÆ REGINÆ,

No. 16.



*By His Excellency SIR HENRY EDWARD FOX YOUNG, Knight,
Captain-General and Governor-in-Chief of the Island of Van
Diemen's Land and its Dependencies, with the Advice and
Consent of the Legislative Council.*

*AN ACT for the further Amendment of the Process,
Practice, and Mode of Pleading in the Supreme Court
of Van Diemen's Land in its Common Law Jurisdic-
tion, and for enlarging such Jurisdiction.*

[11th September, 1855.]

BE it enacted by His Excellency the Governor of Van Diemen's Land, by and with the Advice and Consent of the Legislative Council, as follows :—

1 The Parties to any Cause may, by Consent in Writing, signed by them or their Attorneys, as the Case may be, leave the Decision of any Issue of Fact 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 herein-after given to 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 in such Rule or Order ; and such Issue of Fact may thereupon

Judge may, by
Consent, try
Questions of Fact.

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 Court; 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 upon 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 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 appointed by the Parties, or, if they do not concur in such Appointment to an Arbitrator appointed by the Court or a Judge, or to an Officer of the Court, 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 a 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 herein-before 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.

Power to Judge to direct Arbitration at Time of Trial, when Issues of Fact left to his Decision.

5 If upon the Trial of any Issue of Fact by a Judge under this Act it shall appear to the Judge that the Questions arising thereon involve Matter of Account which cannot conveniently be tried before him, it shall be lawful for him, at his Discretion, to order that such Matter of Account be referred to an Arbitrator appointed by the Parties, or, if they do not concur in such Appointment, to an Arbitrator appointed by the Judge, or to an Officer of the Court, upon such Terms as to Costs, and otherwise, as such Judge shall think reasonable; and the Award or Certificate of such Referee shall have the same Effect as herein-before provided as to the Award or Certificate of a Referee before Trial; and it shall be competent for the Judge to proceed to try

and dispose of and other Matters in question, not referred, in like Manner as if no Reference had been made.

6 The Proceedings upon any such Arbitration as aforesaid shall, except otherwise directed hereby or by the Submission or Document authorising the Reference, be conducted in like Manner, and subject to the same Rules and Enactments, as to the Power of the Arbitrator and of the Court, the Attendance of Witnesses, the Production of Documents, enforcing or setting aside the Award, and otherwise, as upon a Reference made by Consent under a Rule of Court or Judge's Order.

Proceedings before and Power of such Arbitrator.

7 In any Case where Reference shall be made to Arbitration as aforesaid the Court or a Judge shall have Power at any Time, and from Time to Time, to remit the Matters referred, or any or either of them, to the Re-consideration and Re-determination of the said Arbitrator, upon such Terms, as to Costs and otherwise, as to the said Court or Judge may seem proper.

Power to send back to Arbitrator.

8 All Applications to set aside any Award made on a compulsory Reference under this Act shall and may be made within the First Seven Days of the Term next following the Publication of the Award to the Parties, whether made in Vacation or Term; and if no such Application is made, or if no Rule is granted thereon, or if any Rule granted thereon is afterwards discharged, such Award shall be final between the Parties.

Application to set aside the Award.

9 Any Award made on a compulsory Reference under this Act may, by Authority of a Judge, on such Terms as to him may seem reasonable, be enforced at any Time after Seven Days from the Time of Publication, notwithstanding that the Time for moving to set it aside has not elapsed.

Enforcing of Awards within Period for setting them aside.

10 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 of the Parties so agreeing, or any Person claiming through or under him, shall nevertheless commence any Action at Law or Suit in Equity against any of the other Parties, or against any Person claiming through or under him in respect of the Matters so agreed to be referred, or any of them, it shall be lawful for the Court in which Action or Suit is brought, or a Judge thereof, on Application by the Defendant after Appearance and before Plea or Answer, upon being satisfied that no sufficient Reason exists why such Matters cannot be or ought not to be referred to Arbitration according to such Agreement as aforesaid, and that the Defendant was at the Time of the bringing of such Action or Suit and still is ready and willing to join and concur in all Acts necessary and proper for causing such Matters so to be decided by Arbitration, to make a Rule or Order staying all Proceedings in such Action or Suit, on such Terms as to Costs and otherwise as to such Court or Judge may seem fit: Provided always, that any such Rule or Order may at any Time afterwards be discharged or varied as Justice may require.

If Action commenced by One Party after all have agreed to Arbitration, Court or Judge may stay Proceedings.

11 If in any Case of Arbitration the Document authorising the Reference provide that the Reference shall be to a single Arbitrator, and all the Parties do not, after Differences have arisen, concur in the Appointment of an Arbitrator; or if any appointed Arbitrator refuse

On Failure of Parties or Arbitrators, Judge may appoint single

Arbitrator or
Umpire.

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 authorising the Reference do not show that it was intended that such a Vacancy should not be supplied, and the Parties or Arbitrators respectively do not appoint a new one; then in every such Instance any Party may serve the remaining Parties or the Arbitrators, as the Case may be, with a written Notice to 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 a Judge of the Supreme Court, upon Summons to be taken out by the Party having served such Notice as aforesaid, to appoint an Arbitrator, Umpire, or Third Arbitrator, as the Case may be, and such Arbitrator, Umpire, and Third Arbitrator respectively shall have the like Power to act in the Reference and make an Award as if he had been appointed by Consent of all Parties.

When Reference
is to Two Arbitra-
tors and One
Party fail to ap-
point, other Party
may appoint
Arbitrator to act
alone.

12 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 authorising the Reference show that it was intended that the Vacancy should not be supplied; and if on such a Reference One Party fail to appoint an Arbitrator, either originally or by way of Substitution as aforesaid, for 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 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.

13 When the Reference is to Two Arbitrators, and the Terms of the Document authorising it do not show that it was intended that there should not be an Umpire, or provide otherwise for the Appointment of an Umpire, the Two Arbitrators may appoint an Umpire at any Time within the Period during which they have Power to make an Award, unless they be called upon by Notice as aforesaid to make the Appointment sooner.

Award to be made
in Three Months,
unless Parties or
Court enlarge
Time.

14 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 Supreme Court, where such Submission, Document, or Order is or may be made a Rule or Order of the Court, or for any Judge

thereof, for good Cause to be stated in the Rule or Order for Enlargement, from Time to Time to enlarge the Term for making the Award; and if no Period be stated for the Enlargement in such Consent or Order for Enlargement, it shall be deemed to be an Enlargement for One Month; and in any Case where an Umpire shall have been appointed it shall be lawful for him to enter on the Reference in lieu of the Arbitrators, if the latter shall have allowed their Time or their extended Time to expire without making an Award, or shall have delivered to any Party or to the Umpire a Notice in Writing stating that they cannot agree.

15 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 Court of which the Document authorising the Reference is or is made a Rule or Order 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 authorising 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.

Rule to deliver Possession of Land pursuant to Award to be enforced as a Judgment in Ejectment.

16 Every Agreement or Submission to Arbitration by Consent, whether by Deed, or Instrument in Writing not under Seal, may be made a Rule of the Supreme Court on the Application of any Party thereto, unless such Agreement or Submission contain Words purporting that the Parties intend that it should not be made a Rule of Court.

Submission may be made Rule of Court, unless contrary Intention appear.

17 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 the Case of the Party who begins his Intention to adduce Evidence, to address the Jury a second Time at the Close of such Case, for the Purpose of summing up the Evidence; and the Party on the other Side, or his Counsel, shall be allowed to open the Case, and also to sum up the Evidence (if any); and the Right to reply shall be the same as at present.

Speeches to the Jury.

18 It shall be lawful for the Court or Judge, at any Trial, where they or he may deem it right for the Purposes of Justice, to order an Adjournment for such Time, and subject to such Terms and Conditions as to Costs, and otherwise, as they or he may think fit.

Power to adjourn Trial.

19 If any Person called as a Witness, or required or desiring to make an Affidavit or Deposition, shall refuse or be unwilling from alleged conscientious Motives to be sworn, it shall be lawful for the Court or Judge or other presiding Officer, or Person qualified to take Affidavits or Depositions, upon being satisfied of the Sincerity of such

Affirmation instead of Oath in certain Cases.

Objection, to permit such Person, instead of being sworn, to make his or her solemn Affirmation or Declaration in the Words following; *videlicet*,

‘I *A.B.* do solemnly, sincerely, and truly affirm and declare, That the taking of any Oath is, according to my religious Belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare, &c.’

Which solemn Affirmation and Declaration shall be of the same Force and Effect as if such Person had taken an Oath in the usual Form.

Persons making a false Affirmation to be subject to the same Punishment as for Perjury.

20 If any Person making such solemn Affirmation or Declaration shall wilfully, falsely, and corruptly affirm or declare any Matter or Thing, which, if the same had been sworn in the usual Form, would have amounted to wilful and corrupt Perjury, every such Person so offending shall incur the same Penalties as by Law are or may be enacted or provided against Persons convicted of wilful and corrupt Perjury.

How far a Party may discredit his own Witness.

21 A Party producing a Witness shall not be allowed to impeach his Credit by general Evidence of bad Character, but he may, in case the Witness shall in the Opinion of the Judge prove adverse, contradict him by other Evidence, or, by Leave of the Judge, prove that he has made at other Times a Statement inconsistent with his present Testimony; but before such last-mentioned Proof can be given, the Circumstances of the 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.

Proof of contradictory Statements of adverse Witness.

22 If a Witness, upon Cross-examination as to a former Statement made by him relative to the Subject Matter of the Cause, and inconsistent with his present Testimony, does not distinctly admit that he has made such Statement, Proof may be given that he did in fact make it; but before such Proof can be given, the Circumstances of the supposed Statement, sufficient to designate the particular Occasion, must be mentioned to the Witness, and he must be asked whether or not he has made such Statement.

Cross-examination as to previous Statements in Writing.

23 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.

24 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 the opposite 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.

25 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.

Attesting Witness need not be called, except in certain Cases.

26 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.

Comparison of disputed Writing.

27 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 New Trial.

28 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.

Payment of Costs upon new Trial on Matter of Fact.

29 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.

Affidavits on new Matter.

30 Upon the Hearing of any Motion or Summons it shall be lawful for the Court or Judge, at their or his Discretion, and upon such Terms as they or he shall think reasonable, from Time to Time to order such Documents as they or he may think fit to be produced, and such Witnesses as they or he may think necessary to appear, and be examined *vivâ voce*, either before such Court or Judge, or before the Master, and upon hearing such Evidence, or reading the Report of such Master, to make such Rule or Order as may be just.

Power to Court or Judge to direct oral Examinations of Witnesses.

31 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 a Statute passed in the First Year of 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 *vivâ voce* Examination of Witnesses under the last-mentioned Act.

Proceedings before and upon such Examination.

1 W. 4. c. 22.

Examination of
Person who refuses
to make an
Affidavit.

32 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 the Matters concerning which he has refused to make an Affidavit; and a Judge may, if he think fit, make such Order for the Attendance of such Person before the Person therein appointed to take such Examination, for the purpose of being examined as aforesaid, and for the Production of any Writings or Documents to be mentioned in such Order, and may therein impose such Terms as to such Examination, and the Costs of the Application and Proceedings thereon, as he shall think just.

Proceedings upon
Order for
Examination.

33 Such Order shall be proceeded upon in like Manner as an Order made under the herein-before mentioned Statute passed in the First Year of 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 now used on *vivá voce* Examinations under the said Act of Parliament.

Discovery of
Documents.

34 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 of such Body Corporate, shall answer on Affidavit, stating what Documents he or they has or have in his or their Possession or Power relating to the Matters in dispute, or what he knows as to the Custody they or any of them are in, and whether he or they objects or object (and if so, on what Grounds,) to the production of such as are in his or their Possession or Power; and upon such Affidavit being made the Court or Judge may make such further Order thereon as shall be just.

Power to deliver
written Interrogatories
to opposite
Party.

35 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 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 the Court, and shall be liable to be proceeded against accordingly.

Affidavits by
Party proposing
to interrogate, and
his Attorney.

36 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 Deponent 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 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.

37 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 upon Oath of the interrogated Party, as to such Points as they or he may direct, before a Judge, Master, or a Commissioner of the Supreme Court; and the Court or Judge may by such Rule or Order, or any subsequent Rule or Order, command the Attendance of such Party 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.

Oral Examination of Parties, when to be allowed.

38 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 herein-before mentioned Statute passed in the First Year of King *William* the Fourth.

Proceedings upon such Rule or Order.

39 Whenever, by virtue of this Act, an Examination of any Witness has been taken before a Judge of the Supreme Court, or before a Master, or a Commissioner of the Supreme Court, the Depositions taken down by such Examiner shall be returned to and kept in the Master's Office or in the Office of such Officer as the Court may by any general Rule direct; 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 herein-before mentioned Statute passed in the First Year of King *William* the Fourth.

Depositions upon such Examinations to be returned to Master's Office.

1 W. 4. c. 22.

40 It shall be lawful for every Judge, Master, or Commissioner 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 Court touching such Examination, and the Conduct or Absence of any Witness or other Person thereon or relating thereto; and the Court is hereby authorised to institute such Proceedings and make such Order and Orders upon such Report as Justice may require, and as may be instituted and made in any Case of Contempt of the Court.

Examiner may make special Report to the Court.

41 The Costs 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.

Costs of Rule and Examination to be in the Discretion of the Court.

42 Either Party shall be at liberty to apply to the Court or a

Inspection by

Jury, of Parties,
or Witnesses.

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 of which may be material to the proper Determination of the Question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such Rule or Order, upon such Terms as to Costs and otherwise as such Court or Judge may direct: Provided always, that nothing herein contained shall affect the Provisions of "*The Common Law Procedure Act*," 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.

43 The Court, or any Judge thereof, may make all such Rules or Orders upon the Sheriff or other Person as may be necessary to procure the Attendance of a 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.

44 It shall be lawful for any Creditor who has obtained a Judgment in the Supreme Court to apply to the Court or a Judge for a Rule or Order that the Judgment Debtor should be orally examined as to any and what Debts are owing to him before a Judge, or the Master, or a Commissioner of the Court, or such other Person as the Court or Judge shall appoint; and the Court or Judge may make such Rule or Order for the Examination of such Judgment Debtor, and for the Production of any Books or Documents, and the Examination shall be conducted in the same Manner as in the Case of an oral Examination of an opposite Party under this Act.

Judge may order
an Attachment of
Debts.

45 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 (herein-after 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 to show Cause why he should not pay the Judgment Creditor the Debt due from him to the Judgment Debtor, or so much thereof as may be sufficient to satisfy the Judgment Debt.

Order for Attach-
ment to bind
Debts.

46 Service of an Order that Debts due or accruing to the Judgment Debtor shall be attached, or Notice thereof to the Garnishee, in such Manner as the Judge shall direct, shall bind such Debts in his Hands.

Proceedings to
levy Amount due
from Garnishee to
Judgment Debtor.

47 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 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.

48 If the Garnishee disputes his Liability, the Judge, instead of making an Order that Execution shall issue, may order that the Judgment Creditor shall be at liberty to proceed against the Garnishee by Writ, calling upon him to show Cause why there should not be Execution against him for the alleged Debt, or for the Amount due to the Judgment Debtor, if less than the Judgment Debt, and for Costs of Suit; and the Proceedings upon such Suit shall be the same, as nearly as may be, as upon a Writ of Revivor issued under "*The Common Law Procedure Act.*"

Judge may allow Judgment Creditor to sue Garnishee.

49 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.

50 A Debt Attachment Book shall be kept in the Office of the Registrar of the Supreme Court at *Hobart Town*, 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 said Registrar.

Attachment Book to be kept by the Registrar.

51 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.

Costs of Application.

52 The Plaintiff in any Action in the Supreme Court, except Replevin and Ejectment, may endorse upon the Writ and Copy to be served a Notice that the Plaintiff intends to claim a Writ of Mandamus, and the Plaintiff may thereupon claim in the Declaration, either together with any other Demand which may now be enforced in such Action, or separately, a Writ of Mandamus commanding the Defendant to fulfil any Duty in the Fulfilment of which the Plaintiff is personally interested.

Action for Mandamus to enforce the Performance of Duties.

53 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 Nonperformance of such Duty, and that Performance thereof has been demanded by him, and refused or neglected.

Declaration in Action for Mandamus.

54 The Pleadings and other Proceedings in any Action in which a Writ of Mandamus is claimed shall be the same in all respects, as nearly as may be, and Costs shall be recoverable by either Party, as in an ordinary Action for the Recovery of Damages.

Proceedings upon Claim for Mandamus.

55 In case Judgment shall be given to the Plaintiff that a Mandamus do issue, it shall be lawful for the Court in which such Judgment is given, if it shall see fit, besides issuing Execution in the ordinary Way for the Costs and Damages, also to issue a peremptory Writ of Mandamus to the Defendant, commanding him forthwith to perform the Duty to be enforced.

Judgment and Execution.

56 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

Form of peremptory Writ.

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.

57 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 in *England*, 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.

58 The Court may, upon Application by the Plaintiff, besides or instead of proceeding against the disobedient Party by Attachment, direct that the Act required to be done may be done by the Plaintiff, or some other Person appointed by the Court, at the Expense of the Defendant ; and upon the Act being done, the Amount of such Expense may be ascertained by the Court, either by Writ of Inquiry or Reference to the Master or some other Officer of the Court, as the Court or a Judge may order ; and the Court may order Payment of the Amount of such Expenses and Costs, and enforce Payment thereof by Execution.

Prerogative Writ of Mandamus preserved.

59 Nothing herein contained shall take away the Jurisdiction of the Supreme Court to grant Writs of Mandamus ; nor shall any Writ of Mandamus issued out of that Court be invalid by reason of the Right of the Prosecutor to proceed by Action for Mandamus under this Act.

Proceedings for Prerogative Writ of Mandamus accelerated.

60 Upon Application by Motion for any Writ of Mandamus in the Supreme 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, 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.

61 The Provisions of "*The Common Law Procedure 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 Supreme Court.

Specific Delivery of Chattels.

62 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, to order that Execution shall issue for the Return of the Chattel 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 in the Colony, 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.

63 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 herein-before 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.

64 The Writ of Summons in such Action shall be in the same Form as the Writ of Summons in any Personal Action, but on every such Writ and Copy thereof there shall be endorsed a Notice that in default of Appearance the Plaintiff may, besides proceeding to Judgment and Execution for Damages and Costs, apply for and obtain a Writ of Injunction.

Form of Writ of Summons and Endorsement thereon.

65 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 herein-before 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 the Court shall not be sitting, by a Judge.

Form of Proceedings and of Judgment.

66 It shall be lawful for the Plaintiff at any Time after the Commencement of the Action, and whether before or after Judgment, to apply *ex parte* to the Court or a Judge for a Writ of Injunction to restrain the Defendant in such Action from the Repetition or Continuance of the wrongful Act or Breach of Contract complained of, or the Committal of any Breach of Contract or Injury of a like kind, arising out of the same Contract, or relating to the same Property or Right; and such Writ may be granted or denied by the Court or Judge upon such Terms as to the Duration of the Writ, keeping an Account, giving Security, or otherwise, as to such Court or Judge shall seem reasonable and just, and in case of Disobedience such Writ may be enforced by Attachment by the Court, or, when the Court 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.

Writ of Injunction may be applied for at any Stage of the Cause.

67 It shall be lawful for the Defendant, or for the Plaintiff in replevin, in any Cause in the Supreme Court in which, if Judgment were obtained, he would be entitled to Relief against such Judgment on equitable Grounds, to plead the Facts which entitle him to such Relief by way of Defence, and the said Court is hereby empowered to receive such Defence by way of Plea; provided that such Plea shall begin with the Words "For Defence on equitable Grounds," or Words to the like Effect.

Equitable Defence may be pleaded.

68 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 Defence after Judgment.

69 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.

Equitable Replication.

Court or Judge may strike out equitable Plea or Replication.

70 Provided always, that in case it shall appear to the Court, or any Judge thereof, that any such equitable Plea or equitable Replication cannot be dealt with by a Court of Law so as to do Justice between the Parties, it shall be lawful for such Court or Judge to order the same to be struck out on such Terms as to Costs and otherwise as to such Court or Judge may seem reasonable.

Actions on lost Instruments.

71 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 the Master, against the Claims of any other Person upon such negotiable Instrument.

Jurisdiction under Shipowners Act.

72 The Supreme Court in its Common Law Jurisdiction, or any Judge thereof may, upon Summary Application, by Rule or Order, exercise such and the like Jurisdiction as may, under the Provisions of the Ninth Part of "*The Merchant Shipping Act, 1854*," relating to Liability of Shipowners be exercised by a Court of Equity.

False Evidence.

73 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.

Execution to fix Bail.

74 Writs of Execution to fix Bail may be tested and returnable in Vacation.

Scire facias on Judgment of Assets in futuro.

75 Proceedings against Executors upon a Judgment of Assets *in futuro* may be had and taken in the Manner provided by "*The Common Law Procedure Act*," as to Writs of Revivor.

To compel Continuance or Abandonment of Action in case of Death.

76 Where an Action would, but for the Provisions of "*The Common Law Procedure 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 so continued may apply by Summons to compel the Plaintiff, or Person entitled to proceed with the Action in the Room of the Plaintiff, to proceed according to the Provisions of the said Act within such Time as the Judge shall order; and in default of such Proceeding the Defendant or other Person against whom the Action may be so continued as aforesaid shall be entitled to enter a Suggestion of such Default, and of the representative Character of the Person by or against whom the Action may be proceeded with, as the Case may be, and to have Judgment for the Costs of the Action and Suggestion against the Plaintiff, or against the Person entitled to proceed in his Room, as the Case may be, and in the latter Case to be levied of the Goods of the Testator or Intestate.

In Actions on Bills of Exchange, &c., Execution may issue forthwith.

77 In Actions on Bills of Exchange, Promissory Notes, and Cheques, where the Writ of Summons is indorsed in the special Form provided in "*The Common Law Procedure Act*," the Plaintiff, upon signing final Judgment in default of Appearance, may issue Execution forthwith, anything in the Twenty-fifth Section of the said Act to the contrary notwithstanding.

78 The Enactments contained in the Proviso to the Twenty-ninth Section of "*The Common Law Procedure Act*" shall extend and apply to any Party to a Bill of Exchange, Promissory Note, or Cheque, against whom an Action is brought upon such Bill, Note, or Cheque.

Proviso to Sec. 29 of 18 Vict., No. 9, to apply to all Parties to Bills of Exchange, &c.

79 Where, in any Action in which the Sum indorsed on the Writ of Summons as being sought to be recovered exceeds Fifty Pounds, the Plaintiff recovers a Verdict for a Sum not exceeding Fifty Pounds, it shall be lawful for the Judge presiding at the Trial, if he is of opinion that the Plaintiff did not *bonâ fide* seek to recover in such Action a Sum exceeding Fifty Pounds, to certify such Opinion on the Back of the Record, and the Plaintiff shall not, in any Case in which the Judge shall so certify as aforesaid, be entitled to any Costs from the Defendant in such Action.

Where Writ *malâ fide* indorsed above £50 Plaintiff deprived of all Costs.

80 If any Person shall bring an Action of Ejectment after a prior Action of Ejectment for the same Premises has been or shall have been unsuccessfully brought by such Person, or by any Person through or under whom he claims against the same Defendant, or against any Person through or under whom he defends, the Court or a Judge may, if they or he think fit, on the Application of the Defendant at any Time after such Defendant has appeared to the Writ, order that the Plaintiff shall give to the Defendant Security for the Payment of the Defendant's Costs, and that all further Proceedings in the Cause shall be stayed until such Security be given, whether the prior Action has been or shall have been disposed of by Discontinuance, or by Nonsuit, or by Judgment for the Defendant.

Claimant in Second Ejectment for same Premises against same Defendant may be ordered to give Security for Costs.

81 To any Plea in Abatement of the Non-joinder of another Person, the Plaintiff may reply that such Person has been declared and is an Insolvent Debtor under any Law in force relating to Insolvent Debtors, or that such Person has been discharged under such Law.

Insolvency may be replied to Plea of Non-joinder.

82 After the Return-day of any Writ of Foreign Attachment under the Act of Council passed in the Fifth Year of King *William* the Fourth, No. 3, the Pleadings and Proceedings in the Action shall be regulated by the Provisions of "*The Common Law Procedure Act*," and of this Act, so far as they are applicable

Proceedings in Action under 5 W. 4, No. 3, (Foreign Attachment Act) to be regulated by Common Law Procedure Acts.

83 Every Action of Replevin brought in the Supreme Court shall be commenced by Writ of Summons in the same Form as other personal Actions, anything in the Act of Council of the Seventh *Victoria*, No. 1, to the contrary notwithstanding.

Writ of Summons in Actions of Replevin to be the same as in other personal Actions.

84 The Supreme Court may appoint and hold Sittings either in Banc, or for the Trial of Issues in Fact by Judge or Jury, at any Time or Times, whether in Term or Vacation, not being between the Tenth of *February* and the Twenty-fourth of *April*.

Courts may appoint Sittings.

85 It shall be lawful for the Supreme Court, and every Judge thereof, and 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.

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.

86 It shall be lawful for the Judges of the said Court, from Time to Time, to make all such General Rules and Orders for the effectual Execution of this Act, and of the Intention and Object hereof, and for fixing 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 or proper : Provided that nothing herein contained 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.

87 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 herein-before contained, and in such Forms as the said 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 as far as the Effect thereof may be varied by this Act.

Interpretation of
Terms.

88 In the Construction of this Act the Word " Court " shall be understood to mean the Supreme Court of Van Diemen's Land in its Common Law Jurisdiction, and the Word " Action " shall be understood to mean any Personal Action in the said Court.

Enactments in ss.
18 to 26 to apply
to every Court of
Judicature in the
Colony.

89 The Enactments contained in Sections Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, and Twenty-six of this Act shall apply and extend to every Court of Judicature, whether Civil or Criminal, in this Colony.

Commencement of
Act.

90 The Provisions of this Act shall come into operation on the First day of *October*, One thousand eight hundred and fifty-five.

Short Title of Act.

91 In referring to this Act it shall be sufficient to use the Expression "*The Common Law Procedure Act, No. 2.*"

MICHAEL FENTON, *Speaker.*

Passed the Legislative Council this fifth
day [of September, one thousand eight
hundred and fifty-five.

FR. HARTWELL HENSLOWE,
Clerk of the Council.

IN the name and on the behalf of Her Majesty I assent to this Act.

H. E. F. YOUNG,
Governor.

Government House, Hobart Town,
11th September, 1855.