

## SUPREME COURT ACT 1928.

An Act to consolidate and amend the Law  
relating to the Supreme Court.

19 GEORGE V.  
No. 3783.

[12th February, 1929.]

**B**E it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

1. This Act may be cited as the *Supreme Court Act 1928*, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*, and is divided into Parts and Divisions as follows:—

PART I.—Introductory ss. 3–5.

PART II.—Constitution, Jurisdiction, Powers and Duties of Court and Judges ss. 6–33.

PART III.—Sittings and Distribution of Business ss. 34–55.

PART IV.—Bailiwicks. Local Jurisdiction Unlimited ss. 56 and 57.

PART V.—Application of Act to Inferior Courts ss. 58–60.

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Division 1.—General ss. 62–66.

Division 2.—Fires ss. 67 and 68.

Division 3.—Contracts of Infants ss. 69–71.

Division 4.—Sureties. Co-contractors. Co-debtors ss. 72.

PART VII.—Division 5.—Apportionment ss. 73–76.

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Division 8.—Standard Time s. 91.

Division 9.—Actions by Solicitors for Costs &c. s. 92.

*Supreme Court  
Act 1915.*

Short title  
commencement  
and division.

*Supreme Court  
Act 1916.*

**PART VII.—  
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Division 1.—Special Proceedings relating to Agreements between Solicitors and Clients ss. 100-103.

Division 2.—Bills of Costs—Taxation ss. 104-114.

Division 3.—Proceedings before the Chief Clerk ss. 115-120.

Division 4.—References to and Business before the Master-in-Equity ss. 121 and 122.

Division 5.—Assistance of Assessors and Experts ss. 123-126.

Division 6.—Actions for Recovery of Land. Relief from Forfeiture for not paying Rent ss. 127-136.

**PART VIII.—  
Miscellaneous  
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Division 7.—Replevin s. 137.

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Division 9.—Arrest in Pending Actions ss. 140-154.

Division 10.—Foreign Attachment ss. 155-172.

Division 11.—Judgment and Execution ss. 173-178.

Division 12.—Reciprocity in the Enforcement of Judgments ss. 179-185.

Division 13.—Charging Stock and Shares ss. 186-188.

Division 14.—Quashing By-laws &c. s. 189.

**PART IX.—  
Officers of the  
Court.**

Division 1.—General Provisions—Fees ss. 190-195.

Division 2.—The Sheriff ss. 196-218.

Division 3.—Master-in-Equity ss. 219-225.

Division 4.—Chief Clerk ss. 226 and 227.

Division 5.—Deputy Prothonotaries s. 228.

Division 6.—Taxing Master s. 229.

**PART X.—Appeal to Privy Council ss. 230-232.**

*Repeal.  
First Schedule.  
Ib. s. 2.*

2. The Acts mentioned in the First Schedule to this Act to the extent thereby expressed to be repealed are hereby repealed. Such repeal shall not affect any action cause suit matter or proceeding duly begun, or any appeal pending, or any transfer of jurisdiction effected, or any rule of Court regulation order examination affidavit declaration affirmation contract agreement lease reference report or appointment made, or any certificate given, or any salary allowance or emolument due or payable, or any fee fixed, or any bail given or taken, or any recognisance or security entered into, or any costs incurred, or any case reserved, or the rights (if any) of salaried bailiffs in respect of fees under the said Acts or any of them before the commencement of this Act.

Except so far as is expressly enacted nothing herein contained shall be construed to take away lessen or impair any statutory or other jurisdiction power or authority of the Court or the Judges thereof. *Supreme Court Act 1925.*

Except so far as is expressly enacted nothing herein contained shall in any way limit or abridge the force and operation of any rules of Court in force at the commencement of this Act or shall alter any practice or procedure of the Court or any practice or usage of or connected with any of the offices of the said Court or the officers thereof which were sanctioned by any of the Acts hereby repealed and were in force at the commencement of this Act.

#### PART I.—INTRODUCTORY.

3. In this Act unless inconsistent with the context or subject-matter :—

- "Action" means a civil proceeding commenced by writ or in such other manner as prescribed by Rules of Court, and does not include a criminal proceeding by the Crown : *Interpretation. 1b. s. 3. The Judicature Act 1883 s. 3. "Action."*
- "Cause" includes any action suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown : *"Cause."*
- "Chief Justice" includes "Acting Chief Justice," and in the absence of the Chief Justice and the Acting Chief Justice from duty means the senior puisne Judge for the time being present : *"Chief Justice."*
- "Court" means the Supreme Court : *"Court."*
- "Defendant" includes every person served with any writ of summons or process or served with notice of or entitled to attend any proceedings : *"Defendant."*
- "Full Court" means all the Judges of the Supreme Court or not less than any three of them or where it is expressly so provided any two of them in each case sitting as a Court. *"Full Court."*
- "Judgment" includes decree : *"Judgment"*
- "Matter" includes every proceeding in the Court not in a cause : *"Matter."*
- "Order" includes rule : *"Order."*
- "Party" includes every person served with notice of or attending any proceeding, although not named on the record :<sup>(a)</sup> *"Party."*
- "Petitioner" includes every person making any application to the Court either by petition motion or summons otherwise than as against any defendant : *"Petitioner."*
- "Plaintiff" includes every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding whether the same is taken by action suit petition motion summons or otherwise : *"Plaintiff."*
- "Pleading" includes any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to the defence or to any counter-claim of a defendant : *"Pleading."*

( a ) A garnishee is a party, and is entitled to costs.—*Beecham v. Pater*, 16 V.L.R., 13.

*Supreme Court Act 1915.*

"Rules of Court."

"Rules."

"Solicitor"

"Suit."

Construction with other Acts &c.

*Id.* s. 4.

*The Judicature Act 1883* s. 4.

"Rules of Court" and "Rules" include forms:

"Solicitor" means attorney solicitor or proctor:

"Suit" includes action.

4. Where any Act or document refers to any enactment repealed by this Act or by any of the Acts hereby repealed or any corresponding previous enactment or to any mode of procedure or form of pleading under any such enactment, the Act or document shall be construed and shall operate as if it referred to the corresponding provisions of this Act and of the Rules.

Rules of evidence and laws relating to juries not affected.

*Id.* s. 5.

*Id.* s. 25.

36 & 39 Vict.

s. 77 s. 20.

15 & 16 Geo. V.

s. 49 s. 101.

5. Nothing in this Act and subject as hereinafter in this section expressly provided nothing in Rules of Court made or for the time being in force under this Act or any corresponding previous enactment shall affect the mode of giving evidence by the oral examination of witnesses in trial with a jury or the rules of evidence or the law relating to jurymen or juries:

Provided that nothing in this section shall—

- (a) prejudice the operation of any Rules of Court made in pursuance of the express power conferred by this Act to make Rules of Court for regulating and directing the means by which particular facts may be proved and the mode in which evidence thereof may be given and for regulating and directing the means by which and the mode in which an account may be taken and vouched; or
- (b) affect the power of the Court for special reasons to allow depositions or affidavits to be read.

County Court procedure &c. not affected.  
*Supreme Court Act 1915* s. 5.

And save so far as is expressly enacted herein nothing in this Act shall be deemed to affect or alter the practice procedure or fees of any County Court or to take away any right to have any class of cases heard and determined in a County Court.

## PART II.—CONSTITUTION, JURISDICTION, POWERS AND DUTIES OF COURT AND JUDGES.

*Supreme Court of the State of Victoria*

*Id.* s. 6.

*Act 15 Vict.*

No. 10 s. 2.

6. A Court shall be held in and for Victoria and its dependencies which shall be styled "The Supreme Court of the State of Victoria." The Court formerly styled "The Supreme Court of the Colony of Victoria" shall by virtue of the *Supreme Court Act 1915* be deemed to have become "The Supreme Court of the State of Victoria."

Judges.

*Id.* s. 7.

*Id.* s. 3.

*Act 19 Vict.*

No. 13 s. 1.

*Act No. 437 s. 1.*

*The Administration of Justice Act*

1886 s. 3.

7. The Court shall consist of and be held by and before a Judge or Judges not exceeding six in number, each of whom shall be a practising barrister of England or Ireland or advocate of Scotland of not less than eight years' standing, or a practising barrister of the Court not previously admitted in any of the superior Courts of England Ireland or Scotland of not less than eight years' standing. Such Judges shall be appointed by the Governor with the advice of the Executive Council; and the salaries of such Judges as set out in section twelve shall be paid to each of them so long as their commissions remain in force respectively.

8. One of the said Judges shall be styled "The Chief Justice of the Supreme Court of the State of Victoria," and until His Majesty's pleasure is known he shall have rank and precedence above and before all persons whomsoever in Victoria excepting the Governor and Lieutenant-Governor thereof, and except all such persons as by law or usage take place in England before the Lord Chief Justice of England.

*Supreme Court Act 1915 s. 8.*  
Chief Justice.

9. When and so often as the Chief Justice of the Court for the time being is absent on leave or in consequence of sickness or for any reason is temporarily unable to perform the duties of his office, the Governor in Council may if he thinks fit appoint a puisne Judge of the Court to be Acting Chief Justice thereof for the period, during which the said Chief Justice is temporarily absent or unable to perform the duties of his office and no longer.

Governor in Council may appoint Acting Chief Justice.  
*ib. s. 9.*

Such puisne Judge so appointed shall during such period have the same powers and jurisdiction as by law the Chief Justice now has or may hereafter have.

10. If by reason of death resignation or removal<sup>(a)</sup> or otherwise the office of a Judge of the Court becomes vacant a new judge may be appointed by the Governor in Council.

Filling vacancies.  
*Comp. Supreme Court Act 1915 s. 10.*

11. When and so often as any Judge of the Court is absent on leave or in consequence of sickness or for any other reason is temporarily unable to perform the duties of his office, the Governor in Council may if he thinks fit appoint a fit and proper person qualified as hereinbefore required to be an acting Judge of the Court for the period during which such Judge of the Court is temporarily absent or unable to perform the duties of his office and for no longer. Such acting Judge shall hold office for such period as a Judge of the Court for all purposes whatsoever, and shall during such period have the same powers and jurisdiction as a puisne Judge of the Court: Provided that every such acting Judge shall during the period for which he is so appointed be liable to be removed from office in such manner and upon such grounds as Judges of the said Court are by law liable to be removed therefrom.<sup>(a)</sup>

15 Vict. No. 10 s. 6.  
15 & 16 Geo. V. c. 49 s. 11.  
Qualified person may be appointed temporarily in place of any Judge of Supreme Court.  
*ib. ss. 10, 11.*  
Tenure of office.

12. The Judges of the Court shall be entitled to the annual salaries following (that is to say): The Chief Justice to a salary of Three thousand pounds, and each puisne Judge to a salary of Two thousand five hundred pounds; and such salaries in so far as the same may be additional to the salaries of the Supreme Court Judges set apart by *The Constitution Act* shall be paid out of the consolidated revenue of Victoria, which is hereby appropriated for that purpose accordingly.<sup>(a)</sup>

Salaries of Judges.  
*ib. s. 12.*  
*Act No. 452 s. 1.*  
Judges' Salaries Act 1895.

13. No Judge of the Court shall be capable of accepting taking or performing the duties of any other office or place of profit or emolument within Victoria excepting such office as is granted to such Judge by His Majesty's sign manual or the office of Judge of a Vice-Admiralty Court; and any such acceptance taking or performance of the duties of any such other office shall be deemed in law an avoidance of his office of Judge, and his office and commission shall be thereby in fact superseded and his salary thereupon cease.

Judges not to hold any other place of profit.  
*Supreme Court Act 1915 s. 13.*  
*Act 15 Vict. No. 10 s. 6.*

(a) See *The Constitution Act*, section XXXVIII., as to the commissions, tenure, and removal of judges, and section XXXIX. of that Act and section 12 of this Act as to salaries.

*Supreme Court Act 1915 s. 14.*

Court to be a court of record and to have a seal.

14. The Court shall be a court of record, and shall have and use as occasion may require a seal bearing an impression of the Royal Arms of England having inscribed thereon the words "The seal of the Supreme Court of the State of Victoria;" and such seal shall be kept in the custody of the Chief Justice of the Court.

*Act 15 Vict. No. 10.*

All impresses of the seal formerly used having inscribed on a label the words "The seal of the Supreme Court of the colony of Victoria" whether made before or after the commencement of the *Supreme Court Act 1915* shall be as valid and effective as if that Act had not been passed and shall be judicially and officially noticed as heretofore.

Forging or counterfeiting seal or process of the Court felony.

And every person who forges or counterfeits either of such seals or the impression of either of such seals or any process document or writing of or issuing from the Court or any copy thereof, or who serves or enforces any such forged process document writing or copy knowing the same to be forged, shall be guilty of felony, and be liable to imprisonment with or without hard labour for a term of not more than ten years.

Powers and jurisdiction of the Court.  
*ib. s. 15.*

*Act No. 502 s. 2.*  
*9 Geo. IV. c. 83 s. 3.*

15. The Court shall have cognisance of all pleas civil criminal or mixed, and (subject to any enactment now in force to the contrary) shall have jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in Victoria and its dependencies as the Courts of Queen's Bench Common Pleas and Exchequer at Westminster or any of them had by the common law in England at or previously to the commencement of the Act No. 502;<sup>(a)</sup> and the Judges of the Court shall (subject as aforesaid) have and exercise such and the like jurisdiction and authority in Victoria as the Judges of the Courts of Queen's Bench Common Pleas and Exchequer in England or any of them had and exercised by the common law before such date and as shall be necessary for carrying into effect the several jurisdictions powers and authorities committed to the Court, and such Court and the Judges thereof shall also continue to have and exercise all powers jurisdiction and authority conferred upon them by any enactment in force after the commencement of the said Act.

Equitable powers and jurisdiction of the Court.

*Supreme Court Act 1915 s. 16.*  
*Act 15 Vict. No. 10 s. 14.*

16. The Court shall have equitable jurisdiction within Victoria and its dependencies, and such power and authority to do exercise and perform all acts matters and things necessary for the due execution of such equitable jurisdiction as was possessed by the Lord High Chancellor of England in the exercise of similar jurisdiction within the realm of England on or before the sixth day of January One thousand eight hundred and fifty-two;<sup>(b)</sup> and also to do all such other acts matters and things as could and might be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging at or before such date, and to appoint guardians and

(a) The Act No. 502 came into operation on 4th January, 1875. The *English Judicature Act 1873* did not come into operation until 1st November, 1875.

(b) This is the date of the commencement of the Act 15 Vict. No. 10.

This section does not confer that power on the Judges of this Court which the Lord Chancellor

of England and the Master of the Rolls possess only by virtue of the statute law. Judges here possess their power under similar authority to that which the Lord Chancellor of England exercises in equity and at common law, but not the powers given by express statute to the Lord Chancellor.—*In re Hunter*, A.R., 7th and 8th Sept., 1859.

committees of the persons and estates of infants<sup>(a)</sup> and of natural-born fools lunatics<sup>(b)</sup> and persons deprived of understanding and reason by the act of God and unable to govern themselves or their estates; and for that purpose to inquire into hear and determine by inspection of the person the subject of such inquiry, or by examination on oath or otherwise of the party in whose custody or charge such person is or of any other person or persons, or by such other ways and means by which the truth may be best discovered; and to act in all cases whatsoever as fully and amply to all intents and purposes as the said Lord High Chancellor or the grantee from the Crown of the persons and estates of infants and lunatics natural-born fools and persons deprived of understanding as aforesaid might lawfully have done at such date.

*Supreme Court Act 1915.*

17. The Court shall have probate jurisdiction within Victoria and its dependencies, and shall have power and authority to grant probate under its seal of the last will of any person who dies leaving real or personal estate within Victoria and to commit letters of administration under its seal of all the real and personal estate whatsoever within Victoria of any person who dies intestate<sup>(c)</sup> and to commit letters of administration under its seal with the will annexed of all the real and personal estate whatsoever within Victoria of any person who has made a will without having named an executor thereof or without having named an executor thereof resident within Victoria or where the executor being duly cited does not appear and sue forth probate thereof, with reservation nevertheless in the first of the two last-mentioned cases to revoke such letters of administration and to grant probate of the said will to the executor therein named when he duly appears and sues forth such probate: And shall also have all such powers and authorities in respect of such jurisdiction as are given to the Court by

*Probate jurisdiction of the Court.*  
*Id. s. 17.*  
*15 Vict. No. 10 s. 15.*

(a) For some cases in which the Court has exercised this jurisdiction over infants, see *In re Hunter* (ubi supra); *In re Sherry*, 1 V.L.R., 69; *In re Pennington*, 1 V.L.R. (Eq.), 97.

(b) "The jurisdiction of this Court as to lunatics under this section is conferred only by express reference to the powers of the Lord Chancellor in England."—*Per Webb, J.*, *In re Crozier*, 13 V.L.R., 364.

See *Lunacy Act 1928*.

(c) It was held that 15 Vict. No. 10, s. 15, with which this section corresponds, and which defined the ecclesiastical jurisdiction of the Court, did not confer upon the Court jurisdiction to determine matters of fact arising under the administration of the assets of an intestate.—*In the goods of Holdsworth*, 2 W. & W. (I.E. & M.), 113; but see the *Administration and Probate Act 1928*.

The Court has a discretion as to whether it will grant administration *de bonis non* to the next of kin of the deceased or the representatives of the administrator.

The foundation of every application for administration is the advertisement; if, therefore, the advertisement states that the applicant, a trustee company, is applying on the authority of one of the next of kin, who is not himself entitled to a grant, and the application is opposed, the applicant is not entitled to rely on the support of other of the next of kin as being in any sense equivalent

to prior authority from him.

The authority conferred by general words in a power of attorney is restricted to what is necessary for the proper execution of the special powers contained therein, and general words are construed as enlarging the special powers where necessary, and only where necessary, for the accomplishment of the purposes for which the authority is given.

A power of attorney authorized A. to apply for and obtain letters of administration, to take steps to compel a proper administration, &c., and generally to act as attorney in Australia in relation to the premises, and to execute and do all instruments, acts, and things as fully and effectually in all respects as the grantor could himself do if personally present.

Held, that the attorney had no power to support the application of another person for letters of administration *de bonis non* to the intestate's estate.—*In re Hoarey*, 1906 V.L.R., 437.

"This section gives this Court power to grant administration to persons whether next of kin or not; but that has been practically construed to enable such grants to be made to persons who, according to the English practice, would have no right to them, not to disturb the preferences between persons having the same right usual in England."—*Per Molesworth, A.C.J.*, *In the estate of Whitney*, 11 V.L.R., 752; *Re Buckley*, 3 A.J.R., 131; *Re Nimmo*, 4 A.J.R., 142.

*Supreme  
Court Act 1915.*

*As to accounts.*

*Court may make  
orders for  
administration  
of effects of  
deceased  
persons.  
Id. s. 18.  
15 Vict. No. 10  
s. 16.*

any Act in force in Victoria at the time of the commencement of this Act.<sup>(a)</sup> And such letters of administration shall be committed by the Court to any person whether of kin to or a creditor of the person so dying as aforesaid or not as to the Court seems meet: And in every case in which letters of administration are granted by the Court it shall have power and authority to sequester all the real and personal estate whatsoever within Victoria of the person so dying as aforesaid in cases allowed by law as the same was and might be used in the province of Canterbury previously to the sixth day of January One thousand eight hundred and fifty-two: And the Court shall have power and authority to require hear examine and allow and if necessary to disallow and reject the accounts<sup>(b)</sup> of the persons to whom probates may be granted and letters of administration committed in such manner and form and as fully and amply to all intents and purposes whatsoever as might have been done in the province aforesaid at such date, subject nevertheless to such orders and directions as may be made by the Court either generally as applicable to all cases or specially with reference to any case in particular or to such Rules of Court as are made as provided in any Act.<sup>(c)</sup>

18. It shall be lawful for the Court to make all such orders as are necessary for the due administration of the assets of any such estate to all persons entitled thereunto, and also for the payment out of such assets to the persons administering the same of any costs charges and expenses which have been lawfully incurred by them, and also such commission or percentage as is just and reasonable for their pains and trouble therein.<sup>(d)</sup> And if any such executor or administrator neglects to pass his accounts or to pay deposit or dispose of the goods chattels and credits belonging to the estate of any deceased person at the time and in the manner directed, it shall be lawful for the Court on the application of any person aggrieved by such neglect to order and direct that such executor or administrator shall pay interest at a rate not exceeding Eight pounds per centum per annum for such sums of money as from time to time have been in his hands and the costs occasioned by the application.

(a) The Court has jurisdiction under this section to order that a will of which probate has been granted, shall be proved *per testes*.

Probate of a will having been granted to the executor named therein, one of the next of kin who was interested under the will, having heard that another of the next of kin intended at some future time to contest the validity of the will, applied for an order that the will should be proved *per testes*. One of the witnesses to the will was dead. There were altogether four next of kin who would be the only persons entitled to share in the distribution of the estate in case of an intestacy.

*Held*, that the executor should be ordered to prove the will *per testes*.—*In the will of England*, 6 A.L.R., 186.

(b) This section empowers the Court to require security to be given in any case or class of cases in which the rendering of accounts by an executor could not readily be enforced unless security were given, or in which for any other reason it should seem to the Court that such an order would be reasonable and necessary.—*In re Knight*, 17 V.L.R., 413; and see the *Administration and*

*Probate Act 1928.*

(c) In the case of a disputed will the Court has jurisdiction to order the parties to make discovery of testamentary scripts, including anything in the nature of instructions or drafts.—*In the will of Andrew Colter*, 1907 V.L.R., 78. See *Probate Rules 1916*, rule 32.

(d) The Supreme Court has, under this section (section 16 of 15 Vict. No. 10), jurisdiction to grant commission both past and future to executors, administrators, and trustees for their pains and trouble, and this jurisdiction is not limited in its exercise by the provisions of section 59 of the *Administration and Probate Act 1928* empowering the Court to grant commission in a summary way to executors, administrators, and trustees on passing their accounts. An order granting such commission may be made in an administration action.—*Nissen and others v. Grunden and others*, 14 C.L.R., 297; or on an originating summons.—*In the will of Cameron*, *McIndoe v. Were*, 1918 V.L.R., 346; and see *Strauss v. Wykes*, 1915 V.L.R., 200; *In re Gilott*, 1917 V.L.R., 249; and see section 59 of the *Administration and Probate Act 1928*, and cases there cited.



19. The Court shall have jurisdiction in respect of dissolution of marriage, judicial separation suits of nullity of marriage or factitation of marriage, and in all causes, suits and matters matrimonial, except in respect of marriage licences.

*Supreme Court Act 1915 s. 19.*  
Jurisdiction over causes matrimonial to be exercised by the Court.  
*Act No. 125 s. 3.*  
Power to make rules.  
*ib. s. 37.*

The Court shall have power to make such rules and regulations concerning the practice and procedure in relation to the matters mentioned in this section, and from time to time to revoke or alter such rules and regulations as it from time to time considers expedient.

20. Save as by this Act or by any Rules of Court otherwise provided, all forms and methods of procedure which before the commencement of *The Judicature Act 1883* were in force in the Central Criminal Court or in Courts of Assize or in the Court of the Chief Judge of Courts of Mines under or by virtue of any law general order or rules whatsoever, and which are not inconsistent with this Act or with any Rules of Court, may continue to be used and practised in the Court in such and the like cases and for such and the like purposes as those to which they would have been applicable if *The Judicature Act 1883* had not been passed.

Saving of existing procedure as to transferred jurisdictions.  
*Supreme Court Act 1915 s. 20.*  
*The Judicature Act 1883 s. 40.*  
*38 & 39 Vict. c. 77 s. 21.*

21. The practice and procedure of the High Court of Justice in England existing at the time of the passing of *The Judicature Act 1883*, whether established in England by Act of Parliament or by Rules of Court or by usage, shall so far as applicable and so far as not inconsistent with this Act or the Rules of Court<sup>(a)</sup> except as to Probate<sup>(b)</sup> Admiralty and Divorce and Matrimonial Causes respectively, be adopted and followed in the Court; but such practice or procedure may be repealed or altered by rules made or to be made in pursuance of this Act or any corresponding previous enactment.

English practice to prevail where not inconsistent  
*ib. s. 21.*  
*ib. s. 41.*

22. Where any Act of Parliament in force in England on the twenty-fifth day of July in the year of our Lord One thousand eight hundred and twenty-eight and applicable to the colony of New South Wales, or any Act of Parliament adopted and directed to be applied in the said colony authorizes and directs any proceeding act matter or thing to be had done performed or executed by or before His Majesty's

Supreme Court authorized to perform acts directed to be done by English Courts.  
*Supreme Court Act 1915 s. 22.*  
*6 Wm. IV. No. 12 s. 1.*

(a) Where the Rules have omitted to make provision, this section applies to practice and procedure of the English Court, if such practice and procedure are not inconsistent with the said rules.—*Rodgers v. Heymanson*, 14 V.L.R., 300.

The English practice in regard to the appointment of a special guardian was followed in *Osborne v. Osborne*, 10 A.L.T., 160; and see *Connors v. McCarthy and others*, 17 A.L.T., 187.

An action was commenced by three plaintiffs as beneficiaries under a will claiming damages and other relief for alleged breaches of trust. After the action had proceeded for some time one of the plaintiffs alleged that she had given no authority to the solicitor to institute such an action, and refused to take any steps to further the proceedings or to join in any application. The other co-plaintiffs were not able to proceed in the action in consequence of the position thus

taken up by the third plaintiff, and they applied by summons for an order striking out the name of such plaintiff as a plaintiff and joining her as a defendant.

Held, that the "Rules of the Supreme Court 1884" did not contemplate such an application, but that the Judge had jurisdiction to make such an order under the practice and procedure in force in England prior to the passing of *The Judicature Act 1883*, No. 761.—*Henty v. Henty*, 25 V.L.R., 151.

Compare *Mullen v. Phillips*, 1 W. & W. (L.), 15; *Scott v. Scott*, R. J., 1848, p. 31, *ex parte Staughton*, 3 W.W. & A.B. (Eq.), 96; *R. v. Ryan*, 3 V.R. (L.), 77.

(b) A proceeding to revoke probate cannot be taken by way of action, but must be commenced by rule nisi.—*Wrigley v. Buxton and others*, 19 V.L.R., 37.

*Supreme Court Act 1915.*

Courts at Westminster or the respective Judges thereof in the administration of justice, every such proceeding act matter and thing subject to any express enactment to the contrary and to any Rules of Court made or for the time being in force shall be and shall from the sixth day of January One thousand eight hundred and fifty-two be deemed to have been and the same is hereby authorized and directed to be had done executed and performed by the Court and the respective Judges thereof in like manner as if the same had been in and by any such Act of Parliament expressly authorized and directed to be had done executed and performed by the said Court or the respective Judges of the Court.

*Criminal procedure.*

*Ib. s. 23*

*The Judicature Act 1883 s. 33.*

*38 & 39 Vict.*

*c. 77 s. 19.*

23. Subject to any express enactment to the contrary and to any Rules of Court made or for the time being in force the practice and procedure in all criminal causes and matters<sup>(a)</sup> whatsoever in the Court, shall be the same as the practice and procedure in similar causes and matters before the first day of July One thousand eight hundred and eighty-four: Provided that writs of error and the powers and practice existing in the Supreme Court prior to the commencement of the *Criminal Appeal Act 1914* in respect of motions for new trials or the granting thereof in criminal cases shall except so far as the contrary is expressly enacted be deemed by that Act to have been abolished.

*Demise of the Crown not to vacate certain commissions.*

*Supreme Court Act 1915 s. 24.*

*The Common Law Procedure Stat. 1865*

*s. 445.*

*11 Geo. IV. & 1 Wm. IV.*

*c. 43 s. 4.*

*Power to make and alter Rules.*

*Supreme Court Act 1915 s. 25.*

*The Judicature Act 1883 s. 34.*

*Act 15 Vict.*

*No. 10 s. 32.*

*38 & 39 Vict.*

*c. 77 s. 17.*

*57 & 58 Vict.*

*c. 16 s. 3.*

*15 & 16 Geo. 5*

*c. 49 s. 99.*

24. All commissions heretofore or hereafter granted for the taking of examinations affidavits and depositions to be made use of and read in the court or for the taking of recognisances of bail shall notwithstanding the demise of the Crown remain and continue in force until the same are revoked or otherwise avoided.

25. The Judges of the Court may alter and annul any Rules of Court for the time being in force in its various jurisdictions, and make any further or additional Rules of Court for carrying this Act or any amendment thereof into effect, and in particular for all or any of the following matters, that is to say:—

- (a) For regulating the sittings of the Court and of the Judges of the Court sitting in Chambers.
- (b) For regulating the pleading practice and procedure of the Court in its various jurisdictions, and the initiating actions and proceedings therein.
- (c) For regulating and directing the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceedings or in any application in connexion with or at any stage of the proceedings and in relation to the purposes aforesaid for allowing examinations affidavits or depositions to be read at any trial or hearing or in any cause

(a) A proceeding by way of *certiorari* in a case of criminal contempt is itself a criminal cause or matter in the broad sense of that phrase and (*semble*) is a criminal cause or matter within the meaning of this section.—*Ex parte Dunn, ex parte Aspinall*, 1906 V.L.R., 584.

It was held under section 25 of the *Supreme*

*Court Act 1890* (corresponding with this section) that the taxation of a bill of costs in criminal proceedings should proceed upon the scale adopted under *The Common Law Procedure Statute 1865*.—*In re Wren*, 26 V.L.R., 557. But see now Order 65, rule 8.

or matter and for providing that the Court or a Judge may give special directions or make special orders in relation thereto. Supreme Court Act 1916.

- (d) For regulating and directing the means by which and the mode in which an account may be taken and vouched and for providing that the Court or a Judge may give special directions or make special orders in relation thereto. The Judicature Act 1883 s. 39.
- (e) For prescribing in what cases trials in the Court are to be with a jury and in what cases they are to be without a jury.
- (f) For regulating or making provision with regard to any other matters which were regulated or with respect to which other provision was made by the Rules of Court in force prior to the commencement of this Act.
- (g) For regulating the procedure for the service on any person in Victoria of any process or citation where in any civil matter pending before a Court or Tribunal of a foreign country a letter of request from such Court or Tribunal for service of any process or citation on any person in Victoria is transmitted to the Court by the Attorney-General of Victoria with an intimation that it is desirable that effect should be given to the same. Rules relating to the service in Victoria of process issuing out of foreign courts.
- (h) For giving effect in Victoria to the provisions of the Act of the Imperial Parliament of the United Kingdom of Great Britain and Ireland called the *Foreign Tribunals Evidence Act 1856* and for regulating the procedure under the same. Rules relating to evidence in matters before Foreign Tribunals. See 19 & 20 Vict. c. 113.
- (i) Generally for regulating any matters relating to the practice and procedure of the Court or to the duties of the officers thereof or to the costs of proceedings therein.<sup>(a)</sup> Act 15 Vict. No. 10 s. 32.

The power given by the preceding sub-sections shall extend and apply to all matters with respect to which rules of procedure might have been made under any enactment repealed by *The Judicature Act 1883* and to all proceedings by or against the Crown.

26. Whenever by this or any other Act it is provided expressly or in effect that the Court or the Judges of the Court may make Rules such power may be exercised at any time and from time to time and shall in the absence of any provision to the contrary be exercised by a majority of the Judges at a meeting for that purpose held and shall be deemed to include the power to alter annul or add rules and to prescribe alter annul or add forms. Manner of making rules. Supreme Court Act 1915 s. 26.

(a) The Court has an inherent jurisdiction, apart from the rules, to set off at any time one judgment against another, and to direct judgment to be entered for the balance.—*Bank of New South Wales v. Preston*, 20 V.L.R., 1.

The combined effect of this section and of Rules 7 and 8A of Order XXX. of the Supreme Court Rules 1916 is to authorize a Judge, upon a summons in chambers, to enable a party to an action to

establish by evidence of information and belief a matter which cannot be proved by any direct evidence available to the party in Victoria. Order made upon summons in chambers enabling proof of incorporation of a foreign corporation to be given at the trial (the action being part heard) upon affidavit of information and belief.—*Murine Eye Remedy Co. v. Eldred*, 1926 V.L.R., 425.

*Supreme Court Act 1915 s. 27.*

Rules &c. of Court to be published and laid before Parliament.

27. (1) All rules regulations or orders made by the Court or any Judges thereof by virtue of the provisions of any Act now or hereafter in force conferring power on the Court or any Judges thereof to make rules regulations or orders for the purpose of carrying any enactment into effect shall be published in the *Government Gazette* and shall take effect from such publication or from any later date prescribed in any such rule regulation or order. All such rules regulations and orders shall be laid before each House of Parliament within forty days next after they are so published if Parliament is then sitting or if Parliament is not sitting then within forty days after the commencement of the next ensuing session.

Power of Governor in Council to suspend Rules &c. during period within which they may be annulled.

(2) When any such rules regulations or orders are published as aforesaid the Governor may thereupon by Order in Council published in the *Government Gazette* suspend the operation of any such rule regulation or order until the expiration of the next subsequent fourteen days on which each House has sat after such rules regulations or orders have been so laid before each House of Parliament, and any rule regulation or order so suspended shall while so suspended be void and of no effect but without prejudice to the validity of any proceedings which may in the meantime before such suspension have been taken under the same.

Power to annul on Address by either House.

(3) After any such rules regulations or orders have been laid before each House of Parliament if an Address is presented to the Governor by either House of Parliament within the next subsequent fourteen days on which such House has sat praying that any rule regulation or order so laid before such House may be annulled the Governor may thereupon by Order in Council published in the *Government Gazette* annul the same; and any rule regulation or order so annulled shall thenceforth become void and of no effect but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

Council of Judges.  
*ib. s. 28.*  
*The Judicature Act 1883 s. 64.*  
*36 & 37 Vict.*  
*c. 66 s. 75.*

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

29. (1) Any Judge whether sitting in Court or in Chambers may if he thinks fit make an order prohibiting the publication of a report of any proceedings or any part thereof in any cause or matter civil or criminal being heard or which has been heard before him which in his opinion on the grounds of public decency or morality ought not to be published: Provided that nothing herein contained shall prevent the publication of a report of such parts of or of the facts connected with such proceedings as are not so prohibited. When any such order has been made as aforesaid a copy thereof shall be posted by the associate on one of the outer doors of the court house in which such cause or matter is then being heard or in some other conspicuous place where notices are usually posted at such court house.

*Supreme Court Act 1915 s. 29.*

*Judge may prohibit publication of report of proceedings which have taken place before him.*

*The Administration of Justice Act 1885 s. 6.*

*Copy of order to be posted on door of court house.*

Every person publishing a report of any such proceedings or any part thereof in respect of which any such order as aforesaid has been made and posted shall be guilty of an offence against this Act, and shall be liable to a penalty of not more than One hundred pounds or to imprisonment for a term of not more than three months.

*Penalty for disobeying order.*

- (2) (a) Any Judge may if it appear desirable on grounds of public decency and morality order that all or any persons or any class or description of persons shall be excluded from the Court during all or any part of the proceedings in any cause or matter civil or criminal then being heard before such Judge.
- (b) Nothing in this sub-section contained shall be construed to authorize the exclusion from the Court of any female friend of any prisoner or party to or witness actually being examined in such cause or matter or of any counsel or solicitor.
- (c) Nevertheless all witnesses in any cause or matter may at any time be ordered to leave the Court in the same manner as though this sub-section had not been passed.

*Power to exclude the public from Court on grounds of public decency.*

30. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance contract or other document or to indorse any negotiable instrument the Court may on such terms and conditions (if any) as may be just order that the conveyance contract or other document shall be executed or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose and a conveyance contract document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

*Execution of instruments by order of Court. 15 & 16 Geo. V. c. 49 s. 47.*

31. Proceedings in *quo warranto* shall be deemed to be civil proceedings whether for purposes of appeal or otherwise.

*Quo warranto. Ib. s. 48.*

32. (1) Subject to the provisions of this Act and to Rules of Court and to the express provisions of any other Act the costs of and incidental to all proceedings in the Court including the administration of estates and trusts shall be in the discretion of the Court or Judge and the Court or Judge shall have full power to determine by whom and to what extent the costs are to be paid.

*Costs. Ib. s. 50.*

(2) Nothing in this section shall alter the practice in any criminal cause or matter.

Restriction on  
institution of  
vexatious  
actions.  
15 & 16 Geo. V.  
c. 49 s. 51.

33. (1) If on an application made by the Attorney-General under this section the Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings whether in the Court or in any inferior Court and whether against the same person or against different persons the Court may after hearing that person or giving him an opportunity of being heard order that no legal proceedings shall without the leave of the Court or a Judge thereof be instituted by him in any Court and such leave shall not be given unless the Court or Judge is satisfied that the proceedings are not an abuse of the process of the Court.

(2) If the person against whom an order is sought under this section is unable on account of poverty to retain counsel the Court shall assign counsel to him.

(3) A copy of any order made under this section shall be published in the *Government Gazette*.

### PART III.—SITTINGS AND DISTRIBUTION OF BUSINESS.

Business to be  
disposed of by  
the Full Court.  
*Supreme  
Court Act 1915  
s. 30.  
The Judicature  
Act 1883 s. 10.*

34. (1) The Full Court shall hear and determine—

- (a) All motions for new trials:
- (b) All appeals from a single Judge whether sitting in Court or Chambers:
- (c) All appeals from the Court of Insolvency:
- (d) All appeals from County Courts:
- (e) All appeals from Courts of Mines:
- (f) All motions on points reserved whether civil or criminal:
- (g) All rules returnable before the Full Court:
- (h) All business which under or by virtue of the provisions of any Act is by a single Judge whether sitting in Court or in Chambers referred to or reserved for the consideration of or directed to be brought for argument before the Full Court:
- (i) All trials at Bar:
- (j) And generally all causes and matters which by any Act or Rule of Court are required to be heard or disposed of by the Full Court.

(2) The Full Court may sit in two divisions at the same time.

Judges not to sit  
on appeal from  
their own  
judgments.  
*Id. s. 31.  
Id. s. 60.*

35. Except so far as is otherwise expressly enacted no Judge shall sit as a Judge on the hearing of an appeal from any judgment or order made by such Judge or of any motion for a new trial of a cause tried before such Judge.<sup>(a)</sup>

Power for two  
Judges to hear  
appeals.  
*Supreme Court  
Act 1915 s. 32.  
See 62 Vict. c. 6.*

36. (1) If all parties to an appeal before the hearing file a consent to the appeal being heard and determined before two Judges of the Court the appeal may be heard and determined accordingly, and such two judges sitting as a Court shall be deemed to be a Full Court.

(a) This section does not apply to an application under section 481 of the *Crimes Act 1928* for a rule nisi calling upon a Judge to show cause why he should not state a special case with respect to

questions arising on the trial of a prisoner convicted before him. *Semble*, it applies only to civil matters.—*R. v. Ludlow*, 4 A.L.R., 140.

(2) In all causes and matters to which any infant or person of unsound mind, whether so found by inquisition or not, or person under any other disability is a party no such consent shall be given by the next friend guardian committee or other person acting on behalf of the person under disability so as to have the same force and effect as if such party was under no disability and had given such consent unless with the previous consent of the Court or a Judge, nor so as to make such consent valid as between any committee of a lunatic and the lunatic unless with the previous sanction of the Court or a Judge.

(3) If two Judges having heard an appeal differ in opinion the appeal shall be reheard before the Full Court consisting of three Judges.

37. Any case or point in a case which for any reason may be deemed fit to be re-argued before decision or to be re-heard before final judgment may be so re-argued or re-heard before the Full Court, if such Court so direct. The Full Court shall have power to hear and determine any such case or point so directed to be re-argued or re-heard.

Re-hearing of case or point.  
Id. s. 33.  
The Judicature Act 1883 s. 26.

38. Whenever the Full Court is equally divided in opinion, the judgment of the Court shall except where the contrary is expressly provided be given in accordance with the opinion of the Chief Justice or in his absence of the senior Judge then present.

Judgments when opinions are equally divided.  
Id. s. 34.  
Id. s. 12.

39. No order made by the Court or any Judge thereof, by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order.<sup>(a)</sup>

What orders shall not be subject to appeal.  
Id. s. 35.  
Id. s. 27.  
36 & 37 Vict. c. 63 s. 40.

40. (1) No appeal shall lie to the Full Court—

(a) from an order allowing an extension of time for appealing from a judgment or order, or—

(b) without the leave of the Judge<sup>(b)</sup> or of the Full Court<sup>(c)</sup> from any interlocutory order or interlocutory judgment

Restriction on appeals.  
Supreme Court Act 1915 s. 36.

(a) There cannot be a re-hearing merely on a question of costs.—*Jordan v. Walker*, 11 V.L.R., 346.

The Full Court has no jurisdiction to hear an appeal on a question of costs only, where they are by law left to the discretion of the Court below, whether it has exercised its discretion from right or wrong reasons, or has exercised no discretion at all, unless the leave of the Court or Judge making the order appealed from has been first obtained.—*Bank of Australasia v. Herrick*, 12 V.L.R., 832; but as to appeals where costs are ordered to be paid out of a fund not liable or by a party who ought not to pay them, see *London Chartered Bank v. Lempriere*, 4 A.J.R., 136; and see also *Abrahams v. Savings Bank Commissioners* (decided in 1913, unreported), where the Full Court did entertain an appeal on the ground that the primary Judge was said to have exercised

his discretion wrongly. The appeal was dismissed.

An appeal seeking to vary that portion of a judgment awarding to the respondent the costs of an issue on the ground that the issue should have been found in favour of the appellant is not an appeal as to costs only.—*Brown v. Higgins*, 21 A.L.T., 49.

(b) On an appeal from an *ex parte* interlocutory order, an affidavit showing that leave to appeal has been granted by the Judge should be filed.—*Hooper v. Chalmers*, 27 V.L.R., 301.

(c) On an application for special leave to appeal to the Full Court from an interlocutory order the onus lies on the applicant to satisfy the Full Court, not only that the decision of the primary Judge is wrong, but also that substantial injustice will be done by leaving such erroneous decision un-reversed.—*Perry v. Smith*, 27 V.L.R., 66.

*Supreme Court  
Act 1915.*

made or given by a Judge except in the following cases namely—

- (i.) when the liberty of the subject or the custody of infants is concerned, and
- (ii.) cases of granting or refusing an injunction or appointing a receiver, and
- (iii.) any decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the *Companies Act 1928* in respect of misfeasance or otherwise, and
- (iv.) the granting or refusal of any decree *nisi* in a matrimonial cause, and
- (v.) such other cases to be prescribed by Rules of Court as may in the opinion of the authority making such rules be of the nature of final decisions.

(2) Any order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory judgment within the meaning of this section.

(3) No appeal shall lie from an order of a Judge giving unconditional leave to defend an action.

(4) An application for leave to appeal may be made *ex parte* unless the Judge or the Full Court otherwise directs.

41. Every order made by a Judge in Chambers except as provided by the two last preceding sections or by any other express enactment may be set aside varied or discharged upon notice by the Full Court.<sup>(a)</sup>

42. Any single Judge sitting in Court may, subject to appeal<sup>(b)</sup> in civil or mixed matters<sup>(c)</sup> to the Full Court, hear and determine all motions causes actions matters and proceedings not required under any Act or Rules of Court to be heard and determined by the Full Court.

*As to discharging orders made in Chambers.*  
*Ib. s. 37.*  
*The Judicature Act 1883 s. 28.*  
*36 & 37 Vict. c. 66 s. 50.*  
*Business to be disposed of by a single Judge.*  
*Ib. s. 38.*  
*Ib. s. 11.*

(a) This section does not deprive a Judge of the power to set aside or vary an order which he was tricked into making, or which was made on a consent fraudulently obtained.—*Tuckett v. Blake*, 14 V.L.R., 264.

Where a party is affected by an order obtained *ex parte* he may move to vary or reverse such order.—*McNamara v. Cameron*, 16 V.L.R., 108.

It was held that no appeal would lie from a summary decision of a Judge in an interpleader matter.—*The Mercantile Finance, &c., Coy. v. Hall*, 19 V.L.R., 233. But see the next case.

Whenever a Judge has power as a court to determine in any civil or mixed matter any question whatever then, by virtue of section 42, his decision upon such question is liable to be appealed from to the Full Court.

Under whatever Act a Judge obtains his jurisdiction to decide a matter in Chambers, then, by virtue of this section, his decision upon any such matter (with the exceptions mentioned therein) is liable to be appealed from to the Full Court upon such notice as the Rules of the Su-

preme Court prescribe.—*In re Glassford, ex parte The Ferntree Gully and Gembrook Extension Trust*, 27 V.L.R., 584.

(b) On a motion to set aside a notice of appeal, an objection that no appeal lies may be taken though not set out in the motion.—*Abraham v. Della Ca* (No. 2), 23 V.L.R., 454.

Where an order of the Court had been made by a Judge under a misapprehension as to a fact and the order had been passed and entered, *quære*, whether the Judge could set aside such order.—*Hall v. Harris*, 25 V.L.R., 455.

(c) An application by a party against whom a criminal charge has been made for an attachment against a person, not connected with the criminal proceedings for contempt of court in the publication of comments calculated to prejudice the fair trial of the charge, is a criminal matter and no appeal from an order made upon such an application can be brought to the Full Court.—*In re James W. Thompson*, 19 V.L.R., 286.

Proceedings for *habeas corpus* by an accused person who has been committed to prison under *The Fugitive Offenders Act 1881* do not



43. Any Judge of the Court may, subject to any Rules of Court and to the provisions herein contained, exercise in Court or in Chambers<sup>(a)</sup> all the jurisdiction vested in the Court in all such causes and matters and in all such proceedings in any causes or matters as before the passing of *The Judicature Act 1883* might have been heard in Court or in Chambers respectively by a single Judge of the Court or by a Judge of Assize or by a Judge of the Central Criminal Court, or as may be directed or authorized to be so heard by any Rules of Court to be hereafter made or for the time being in force; in all such cases any Judge sitting in Court shall be deemed to constitute the Court.

*Supreme Court Act 1915 s. 40.*  
Powers of one Judge.  
*The Judicature Act 1883 s. 22.*  
*33 & 39 Vict. c. 77 s. 89.*

44. Subject to any Rules of Court, any Judge of the Court sitting in the exercise of its jurisdiction may at the request of one of the parties but (except the contrary is expressly enacted) not otherwise reserve any case or any point in a case for the consideration of the Full Court, or direct any case or point in a case to be argued before the Full Court;<sup>(b)</sup> and the Full Court shall have power to hear and determine any such case or point so reserved or so directed to be argued.

Cases and points may be reserved.  
*Ib. s. 41.*  
*Ib. s. 25.*  
*36 & 37 Vict. c. 65 s. 46.*

45. Subject to any Rules of Court, the Court and the Judges thereof respectively shall have power to sit and act at any time<sup>(c)</sup> and at any place for the transaction of any part of the business of such Court or of such Judges, or for the discharge of any duty which by any Act of Parliament or otherwise is required to be discharged during or after term.

Time and place of sitting.  
*Ib. s. 42.*  
*Ib. s. 14.*

46. A Judge of the Court shall not be incapable of acting in his judicial office on any proceeding by reason of his being as one of several ratepayers or as one of any other class of persons liable in common with others to contribute to or to be benefited by any rate or tax which may be increased diminished or in any way affected by that

Power of Judges to act in cases relating to rates and taxes.  
*15 & 16 Geo. V. c. 49 s. 17.*

involve a mixed matter within this section, and an appeal will not lie from the decision of a Supreme Court judge upon such proceedings discharging the accused person.—*In re Marshall*, 27 V.L.R., 205.

Proceedings instituted under section 186 of the *Marine Act 1915* were held to be criminal proceedings, and no appeal will lie to the Full Court from the decision of a Judge granting a writ of *certiorari* to have such proceedings quashed.—*In re Medley*, 28 V.L.R., 475.

Where an act or omission constitutes both an offence against the criminal law and a civil wrong, proceedings taken to vindicate the public by punishing the wrong-doer are criminal proceedings; proceedings taken to remedy the civil wrong are civil proceedings, and may be the subject of an appeal.—*The King v. Watt, ex parte Slade*, 1912 V.L.R. 225.

(a) A Judge sitting in Chambers has power to commit for contempt of court.—*Weedow and others v. Phillips and others*, 12 A.L.T., 166.

Where, by the *Insolvency Act*, the Judge of the Supreme Court was empowered in respect of certain matters and the Court in respect of other matters, it was held that this section did not enable the Judge to exercise the powers which

by the *Insolvency Act* were to be exercised by the Court.—*In re Artuckle*, 23 V.L.R., 242.

This section enables the Judge to exercise with respect to costs the same powers and discretions as are given by the Rules to the Court.—*Fahey v. Ivey*, 6 A.L.T., 26.

*Per Williams, J.*—"A Judge in Chambers has power to deal with costs under this section."—*Covillon v. Campbell*, 6 A.L.T., 89.

(b) *Per Higinbotham, C.J.*—"The extended power given by this section and by the Rules of Court to a Judge at the trial was not intended, I think, to include a power to the Full Court upon consideration of points reserved of disregarding or overruling the special findings of the jury."—*Slade v. The Victorian Railways Commissioners*, 15 V.L.R., 190.

Where, on the hearing of an action by a Judge without a jury, the Judge reserved the whole case for the consideration of the Full Court, the Full Court, having determined the case, ordered judgment to be entered up.—*James v. Gibson*, 17 V.L.R., 104.

(c) The Rules of the Court do not prevent the Court sitting in vacation, if the exigency of public business requires it.—*Speight v. Syme*, 20 V.L.R., 107.

*Supreme Court Act 1915.*

proceeding. In this sub-section the expression "rate or tax" means any rate tax duty or assessment whether public general or local and also any fund formed from the proceeds of any such rate tax duty or assessment or applicable to the same or like purposes to which any rate tax duty or assessment might be applied.

*Continuous sittings of Full Court.*

*Id. s. 43.*  
*The Judicature Act 1884 s. 15.*

47. Subject to any Rules of Court, the Full Court shall sit in Melbourne on such days as are necessary for the continuous and prompt despatch of the business of such Court, excepting from the twentieth day of December to the first day of February following, and excepting upon Sundays public holidays and during the time when the business of the Court prevents the number of Judges requisite to form the Full Court from attending.

*Holding of Courts &c.*

*Id. s. 44.*  
*Id. s. 16.*

48. All such arrangements as are necessary or proper for the transaction of the business from time to time pending before the Full Court and for constituting and holding such Court shall be made by and under the direction of the Judges of the said Court, and in case of difference among them in such manner as a majority of the said Judges, of whom the Chief Justice shall be one, shall determine.

*Chief Justice may request attendance of other Judges.*

*Id. s. 45.*  
*Id. s. 17.*

49. The Chief Justice may by writing addressed to any Judge request the attendance at any time of such Judge at any sitting of the Full Court; and the Judge whose attendance is requested shall attend accordingly.

*When and where Courts to be held.*

*Id. s. 46.*  
*Id. s. 16.*  
*Second Schedule.*

50. The Court shall be held in the city of Melbourne, and on such days as the Governor in Council from time to time appoints at the several places in that behalf mentioned in the Second Schedule to this Act; but if from any cause any Court is not opened or held on a day appointed for that purpose, it may be opened and held on any subsequent day, and the proceedings shall be as valid as if such delay had not taken place.

*Criminal trials.*  
*Act No. 502 s. 18.*

Sittings for the hearing of criminal trials shall be held at such times and such places as are now or hereafter fixed by law.

*Power of Governor in Council to alter Court towns.*  
*Supreme Court Act 1916 (No. 3) s. 2.*

51. Notwithstanding anything in the last preceding section the Governor in Council by Order may direct that the Court shall cease to be held or shall be held (as the case may be) at the places mentioned in any such Order and the same shall cease to be held or shall be held accordingly.

*Sittings in Melbourne.*  
*Supreme Court Act 1915 s. 43.*  
*The Judicature Act 1883 s. 15.*

52. Subject to any Rules of Court, sittings shall be held in Melbourne for the trial of causes on such days and by so many Judges as are necessary for the trial of causes so soon as possible after they are ready for trial, excepting from the twentieth day of December to the first day of February following, and except on Sundays public holidays and during the time when sittings in other places prevent the attendance of a Judge in Melbourne for the trial of causes.

*Urgent business.*  
*Id. s. 49.*  
*Id. s. 19.*

53. Provision shall be made by Rules of Court for the hearing in Melbourne at all times by a Judge of the Court of all such applications as may require to be immediately or promptly heard.<sup>(a)</sup>

(a) "I am of opinion that section 19 of *The Judicature Act 1883* (re-enacted in this section) was intended to take the place of section 19 of

the Act 15 Vict. No. 10, by enabling Rules of Court to be made by which a Judge of the Court should be empowered to entertain all applications

54. The division of the legal year into terms<sup>(a)</sup> shall be deemed to have been abolished as from the commencement of *The Judicature Act 1883* so far as relates to the administration of justice, and there shall no longer be terms applicable to any sitting or business of the court; but in all other cases in which under the law existing at such commencement the terms into which the legal year was divided were used as a measure for determining the time at or within which any act was required to be done, the same may continue to be referred to for the same or the like purpose unless and until provision is otherwise made by any lawful authority.

*Supreme Court Act 1916 s. 60.*  
Abolition of terms in administration of justice.  
*The Judicature Act 1883 s. 13.*

55. For such last-mentioned purposes there shall be deemed to be four terms in every year, which shall begin and end as follows (that is to say):—Easter Term shall begin on the twenty-first day of March and end on the fourth day of April; Trinity Term shall begin on the twentieth day of June and end on the fifth day of July; Michaelmas Term shall begin on the first day of September and end on the fourteenth day of the same month; and Hilary Term shall begin on the twenty-first day of November and end on the seventh day of December.

Retention of terms as measure of time.  
*Supreme Court Act 1916 s. 60.*  
11 Geo. IV. and 1 Wm. IV. c. 70 s. 6

#### PART IV.—BAILIWICKS. LOCAL JURISDICTION UNLIMITED.

56. Victoria shall be and from the commencement of the Act No. 502<sup>(b)</sup> shall be deemed to have been divided into bailiwicks, but notwithstanding such division Victoria except so far as the contrary is expressly enacted shall in relation to the Court be deemed and taken to be one jurisdiction for all purposes of venue local description trial judgment execution and otherwise.

Bailiwicks.  
*Ib. s. 51.*  
*Act No. 518 s. 2.*  
4 & 5 Wm. IV. c. 96 s. 3.

57. The central bailiwick shall comprise and include and from the commencement of the Act No. 502<sup>(b)</sup> shall be deemed to have comprised and included such parts of Victoria as are not comprised in any other bailiwick and the several other bailiwicks specified in the Third Schedule to the *Supreme Court Act 1890* shall from the commencement of the Act No. 502 until the commencement of the *Supreme Court Act 1891* be deemed to have comprised and included such parts of Victoria as are mentioned or described in that behalf in the said Third

Names and limits of bailiwicks.  
*Ib. s. 52.*  
*Ib. s. 3.*

whatsoever, whether within his jurisdiction as a Judge of this Court or not, provided such applications were such as might require to be immediately or promptly heard. On this view of section 19 (of *The Judicature Act 1883*) provision is made for all cases of urgency, and the possibility of injustice seems to be guarded against by the provision allowing an appeal at all times to be made similar to that provided in section 19 of 15 Vict. No. 10."—*Per Higinbotham, J.*, in *ex parte Peck*, 10 V.L.R. (L.), at page 330.

In a proceeding upon or connected with a caveat it was contended that it should have been brought in the Full Court, and that a single Judge had no jurisdiction to deal with it. *Held*, nevertheless, it would be assumed by the Full Court

until the contrary is shown that the Judge who heard the application considered it to be one that required to be immediately heard, and in such a case, according to the decision in *Ex parte Peck* (*ubi supra*), a single Judge would have jurisdiction. —*Ex parte Davies and Inman*, 11 V.L.R., 780; and see *Treewe v. Barry*, 16 V.L.R., 711, at page 714.

(a) Under *The Judicature Act 1883* and the rules framed thereunder, the sittings of the Full Court were intended to be substituted for terms for the purpose of determining the time within which acts should be done.—*In re Husbands v. Husbands*, 10 V.L.R. (L.), 208.

(b) This Act commenced on the fourth day of January, 1875.

*Supreme Court Act 1915.*

Third Schedule.

Schedule and from the commencement of the *Supreme Court Act 1891* to the commencement of the *Bailiwicks Boundaries Act 1900* the said Third Schedule shall be read as amended by the *Supreme Court Act 1891* and from and after the commencement of the *Bailiwicks Boundaries Act 1900* such several other bailiwicks shall respectively comprise and include and be deemed to have comprised and included such parts of Victoria as are mentioned or described in that behalf in the Third Schedule to this Act. All offences committed and all causes of action accrued before any such alteration in boundaries as is referred to in this section may be inquired of heard and dealt with as if the boundaries of the bailiwick had not been altered.

#### PART V.—APPLICATION OF ACT TO INFERIOR COURTS.

Power of inferior Courts having equity jurisdiction.  
*Ib. s. 53.*  
*The Judicature Act 1883 s. 56.*  
*36 & 37 Vict. c. 66 s. 89.*

58. Every inferior Court<sup>(a)</sup> which now has or which may after the passing of this Act have jurisdiction in equity or at law and in equity shall as regards all causes of action within its jurisdiction for the time being have power to grant and shall grant in any proceedings before such Court such relief redress or remedy or combination of remedies either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the next succeeding section), in as full and ample a manner as might and ought to be done in the like case by the Court.

Counter-claims in inferior Courts and transfers therefrom.  
*Ib. s. 54.*  
*Ib. s. 57.*  
*Ib. s. 90.*

59. Where in any proceeding before any such inferior Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction thereof, such defence or counter-claim shall not affect the competence or the duty of such Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which such Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim<sup>(b)</sup>. Provided always that in such case it shall be lawful for the Court<sup>(c)</sup> or any Judge thereof if it or he thinks fit on the application of any party to the proceeding to order that the whole proceeding

(a) *Semble*, this section gives the County Court a jurisdiction and enjoins its exercise, to give effect to a counter-claim, though by section 5 the practice in so doing is to be that of the County Court. *Per Cur.*—"Section 56 (this section) seems to direct that the main purpose of the Act (i.e., *The Judicature Act 1883*) should take effect in the County Court. The main purpose of the Act was to combine the application of the principles of law and equity in one proceeding. Previously these principles had been separated in their application, now they are to be combined in one action as far as possible. It is the intention of section 56 that any inferior Court which has jurisdiction in equity, or at law and in equity, shall have the power and the obligation of granting in any proceeding before it the like redress or remedies or combination of remedies legal and equitable, and of giving like effect to every defence or counter-claim, as in the Supreme Court."—*Griffin v. Ross*, 11 V.L.R., 183.

Since *The Judicature Act 1883*, the Supreme Court has no power to stay proceedings in actions

in the County Court pending proceedings which are being taken in the Supreme Court.—*Steel v. The East Mitcham, &c., Co.*, 15 V.L.R., 291.

See *O'Connor v. Pilcairn* in note to section 61.

"A Court of Petty Sessions does not come within the description of an inferior Court contained in this section." *Per Schutt, J., Griffiths v. Palmer*, 1926 V.L.R., 504.

(b) This section does not give jurisdiction to the Supreme Court to order that a proceeding in a Court of Petty Sessions be transferred to the Supreme Court.—*Griffiths v. Palmer*, 1926 V.L.R., 504.

(c) "Court" means not the inferior Court but the Supreme Court; and if either party to the proceeding in the County Court desires to have the case transferred to the Supreme Court or a Judge thereof, the onus of taking the necessary steps lies upon him. He must go before the Supreme Court or a Judge thereof, upon due notice, and must satisfy such Supreme Court or Judge that good cause exists for transferring the proceedings.—*Beech v. Martin*, 12 V.L.R., 571.

be transferred from such inferior Court to the Court; and in such case the record or other documents or papers in such proceeding shall be transmitted by the registrar or other proper officer of the inferior Court to the Court; and the same shall thenceforth be continued and prosecuted in the Court as if it had been originally commenced therein.<sup>(a)</sup>

*Supreme Court Act 1915.*

60. The several rules of law enacted by Part VII. of this Act shall unless express provision is otherwise made<sup>(b)</sup> be in force and receive effect in all Courts whatsoever so far as the matters to which such rules relate shall be respectively cognisable by such Courts.

*Rules of law to apply to inferior Courts.*

*Ib. s. 55.  
The Judicature Act 1883 s. 58.  
36 & 37 Vict.  
c. 60 s. 91.*

#### PART VI.—CONCURRENT ADMINISTRATION OF LAW AND EQUITY.

61. Subject to any express enactment to the contrary in every civil cause or matter commenced in the Court law and equity shall be administered by the Court according to the rules following:—

*Law and equity to be concurrently administered.*

- (1) If any plaintiff or petitioner claims to be entitled to any equitable estate or right or to relief upon any equitable ground<sup>(c)</sup> against any deed instrument or contract or against any right title or claim whatsoever asserted by any defendant or respondent in the cause or matter, or to any relief founded upon a legal right which before the passing of *The Judicature Act 1883* could only have been given by a court of Equity, the Court and every Judge thereof shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court in its equitable jurisdiction in a suit or proceeding for the same or the like purpose properly instituted before the passing of the said Act.

*Ib. s. 50.  
Ib. s. 8.  
Ib. s. 24.  
Equities of plaintiff.*

- (2) If any defendant claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed instrument or contract or against any right title or claim asserted by any plaintiff or petitioner in the cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the Court and every Judge thereof shall give to every equitable estate right or ground of relief so claimed and to every equitable defence so alleged the same effect by way of defence against the claim of the plaintiff or petitioner as the Court in its equitable jurisdiction ought to have given if the same or

*Equitable defences.*

(a) Where an action was removed from the County Court to the Supreme Court, under section 52 of the *County Court Act 1890*, it was held there was jurisdiction to issue letters of request under Order XXXVII., r. 6a, for the examination of witnesses.—*Smyth v. Brunning Proprietary Limited* (No. 3), 19 A.L.R., 360. See now the *Evidence Act 1928*.

(b) See *Cooper v. Dawson*, 1916 V.L.R., 331, cited in note to heading of Division 7.

(c) On an application for an order under section 64 of *The Judicature Act 1883* (see now section 186

of this Act) charging certain mining shares held by the defendant, for a debt due by her for calls to the plaintiff company, for which she had given a cheque, which was dishonoured, the defendant alleged that she held the shares in trust for her husband. *Higinbotham, J.*, took into consideration the equitable claim under the power conferred by this sub-section, and, considering that on the facts the claim was not established, made the order absolute.—*Long Tunnel G.M. Co. v. Zimmer*, 6 A.L.T., 25.

*Supreme  
Court Act 1916.*

the like matters had been relied on by way of defence in any suit or proceeding instituted for the same or the like purpose before the passing of *The Judicature Act 1883*.

*Defendant's  
counter-claim*

- (3) The Court and every Judge thereof shall also have power to grant to any defendant in respect to any equitable estate or right or other matter of equity and also in respect of any legal estate right or title claimed or asserted by him all such relief against any plaintiff or petitioner as such defendant has properly claimed by his pleading and as the Court or any Judge thereof might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter and in like manner claimed against any other person whether already a party to the same cause or matter or not who has been duly served with notice in writing of such claim pursuant to any Rule of Court or any order of the Court as might properly have been granted against that person if he had been made a defendant to a cause duly instituted by the same defendant for the same purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter with the same rights in respect of his defence against the claim as if he had been duly sued in the ordinary way by the defendant.

*Bringing in third  
party.*

*Equities  
appearing  
incidentally.*

- (4) The Court and every Judge thereof shall take notice of all equitable estates titles and rights and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same manner in which the Court in its equitable jurisdiction would have taken notice of the same in any suit or proceeding duly instituted therein before the passing of *The Judicature Act 1883*.

*Actions not to  
be stayed by  
injunctions.*

- (5) No cause or proceeding at any time pending in the Court shall be restrained by prohibition or injunction;<sup>(a)</sup> but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if *The Judicature Act 1883* had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always that nothing in this Act contained shall disable the Court if it thinks fit so to do from directing a stay of proceedings<sup>(b)</sup> in any cause or matter pending

*Stay of  
proceedings*

(a) This section abolishes the old practice under which a party could commence a new action for the purpose of obtaining an injunction to stay proceedings, there being an action pending in which that relief could have been obtained, and the provisions of the sub-section apply at any stage of the proceedings.—*Meredith Creamery Co. v. Commercial Bank and others*, 17 A.L.J., 240.

(b) Where parties to an action have agreed

generally upon terms of settlement of the matters in dispute, the Court may enforce such agreement and stay further proceedings in the action.—*Swain v. Reynolds*, 21 V.L.R., 150.

A defect of parties, although usually a matter of amendment merely, may constitute a ground for summarily staying an action where the Court is satisfied that by no possible amendment can the plaintiff add parties against whom the

before it; and any person whether a party or not to any such cause or matter who would have been entitled if *The Judicature Act 1883* had not passed to apply to the Court to restrain the prosecution thereof or who may be entitled to enforce by attachment or otherwise any judgment decree rule or order in contravention of which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the Court by motion in a summary way for a stay of proceedings in such cause or matter either generally or so far as may be necessary for the purposes of justice and the Court shall thereupon make such order as is just.<sup>(a)</sup>

action would be maintainable. Where the subject-matter of an action, even if not strictly *res judicata*, has been so dealt with in former actions that, under the circumstances, it would be inequitable to allow it to be again raised, the Court, in the exercise of its inherent jurisdiction to prevent oppression, will stay the action.—*Merry v. Fraser and others*, 5 A.L.R., 5.

Order XIV. (A), r. 1, of the Rules of Supreme Court does not limit the jurisdiction of the Court to stay proceedings which are vexatious or oppressive.

Where two actions are pending between the same parties in respect of the same cause of action—one in the Supreme Court and the other in the County Court—the plaintiff will not be allowed to elect which action should continue, but the Court will decide the matter on a consideration of all the circumstances.—*O'Connor and another v. Pitcairn*, 27 V.L.R., 53. See note to section 58.

Where an agreement was entered into by the solicitors for the parties to compromise an action, and the plaintiff refused to carry it out, an order was made staying the action and directing the plaintiff to sign the agreement.—*Vale v. Vale*, 5 A.L.R. (C.N.), 65.

Where foreclosure proceedings in reference to a mortgage upon a sheep station in New South Wales had been brought in that State, and the mortgagor subsequently commenced proceedings in Victoria for redemption, the Supreme Court on the application of the mortgagor refused to stay the foreclosure proceedings.—*Osborne v. Goldsbrough, Mort, and Co.*, 4 A.L.R. (C.N.), 85.

Where an action was brought within the jurisdiction of the Supreme Court of Victoria in respect of a cause of action arising out of the jurisdiction:

*Held*, that a stay was properly refused, the injustice which would be occasioned to the plaintiffs by a stay being as great as the injustice which would be occasioned to the defendants by allowing the action to proceed.

Judgment of Supreme Court (*a Beckett, J., Geelong Harbor Trust Commissioners v. Maritime Insurance Company*, 1908 V.L.R., 257) affirmed; *Maritime Insurance Company Limited v. Geelong Harbor Trust Commissioners*, 6 C.L.R., 194.

Where the facts in a statement of claim are such as, if established at the trial, would reasonably justify a jury in finding for the plaintiff, or where an action, being brought on sufficient materials, seeks to raise and put in train for decision an im-

portant and difficult question of law, it should not be dismissed *in limine* as frivolous and vexatious under Order XIV. (A.) of the Rules of the Supreme Court of Victoria.

*Per Barton, J.*—The summary power for dealing with an action under Order XIV. (A.) should be reserved for exercise as to actions that are hopeless.

*Per O'Connor, J.*—The Court, on an application under Order XIV. (A.) must assume with respect to disputed facts, that the plaintiff can establish at the trial the facts which he alleges in his claim, unless there is something in the evidence before it to show that that is impossible.—*Bayne v. Blake*, 14 A.L.R., 426.

An action will not be stayed on the ground that an appeal to the Privy Council is pending in an action involving the same subject-matter between the plaintiff and another party.—*Australian Gold Recovery Co. v. Irvine*, 5 A.L.R. (C.N.), 73.

Where the defendant in an action had made arrangements to leave Victoria before action brought, the Court declined to stay proceedings during her absence.—*James v. Parry*, 3 A.L.R. (C.N.), 17.

(a) See *Ronald v. Harper*, 1913 V.L.R., 311.

An action was brought by the plaintiff company against M. for infringement of letters patent by importing a certain article, and by consent an order was made that M. should keep accounts of his sales of the article until the trial. While such action was pending, a writ was issued by the plaintiff company against the defendant, who was the master of a ship which was carrying some of the article for M., claiming an injunction restraining him from importing the article into Victoria. The defendant consented to judgment, which was signed against him in default of defence, but before the time for defence had expired. Prior to this, however, the article in the defendant's ship was delivered to M. in another State. The plaintiff company sent letters to various ship-owners notifying them of the injunction, and intimating that proceedings would be taken against any of them carrying the article. The result was that several firms refused to carry the article for M., who was thereby injured and obstructed in his business.

M. applied to set aside the judgment against the defendant, and for permission to defend the action.

*Held*, that an objection by M. that judgment had been signed before the time for defence had expired

*Supreme Court Act 1916.*  
Common law and statutory rights and duties to be recognised.

Multiplicity of legal proceedings to be avoided.

Entire controversy to be decided.

- (6) Subject to the provisions of this Act for giving effect to equitable rights and other matters of equity the Court and every Judge thereof shall give effect to all legal claims and demands and all estates titles rights duties obligations and liabilities existing by the Common Law or created by any Statute in the same manner as the same would have been recognised and given effect to if *The Judicature Act 1883* had not passed.
- (7) The Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such terms and conditions as to such Court seems just all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible all matters so in controversy between the said parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided.<sup>(a)</sup>

## PART VII.—MISCELLANEOUS RULES OF LAW.

### DIVISION 1.—GENERAL.

Rules of law upon certain points.

*Ib.* s. 57.

*The Judicature Act 1883* s. 9.

26 & 37 Vict.  
c. 66 s. 25.

Statutes of Limitations inapplicable to express trusts.

*Supreme Court Act 1915* s. 57 (2).

*Ib.* s. 25.

No action open to objection because merely declaratory judgment sought thereby.

*Ib.* s. 57 (5A).

15 & 16 Vict.  
c. 86 s. 50.

62. The law to be hereafter administered as to the matters next hereinafter mentioned shall unless the contrary is expressly provided by some enactment be as follows:—

- (1) Except as provided by the *Trustee Act 1928* no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations:
- (2) No action shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.<sup>(b)</sup>

must fail, inasmuch as M. could not take up a stronger position than the defendant, who had consented to that course.

*Held*, that as M. had obtained delivery of his goods from the defendant prior to the signing of the judgment, the injunction did not affect him directly, but only indirectly and commercially, and therefore he ought not to be permitted to interfere.—*Acetylene Gas Company of Australasia Limited v. Ross*, 27 V.L.R., 189.

(a) Where a party to an action claims specific performance or damages, and obtains specific performance after action brought but before trial, he is not entitled to judgment for specific performance; and, as he has obtained what he asked for, he is not entitled to proceed on the alternative claim for damages.—*Munro and Baillieu v. Adams*, 17 V.L.R., 703.

The plaintiff brought an action for specific performance of a contract by the defendant to purchase land. After the delivery of the statement of claim, the plaintiff agreed to accept a certain sum of money from the defendant and to transfer the land to the defendant upon receipt of the money. The money was accordingly duly paid by the defendant, but the plaintiff refused to transfer the land. The defendant then proceeded by way of motion in the action for an order directing the plaintiff to carry out the agreement of compromise. *Held*, that the Court had jurisdiction to entertain the motion under this sub-section.—*Hyde v. Grieve*, 19 V.L.R., 27.

(b) "This section cannot be so construed as to extend the jurisdiction of any of the inferior Courts."—*Ives v. Lalor*, 13 V.L.R., per *Webb, J.*, at page 944.



- (3) A mandamus<sup>(a)</sup> an injunction<sup>(b)</sup> or a writ of *ne exeat coloniā* may be granted or a receiver<sup>(c)</sup> appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just; and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste

*Supreme Court Act 1915 s. 57 (8).*  
Mandamus injunction and appointment of receivers.  
38 & 37 Vict. c. 66 s. 25.

(a) The issue of the prerogative writ of mandamus will be restricted to cases where justice would otherwise fail, or where some real interest of the applicant is involved, and might suffer if the writ were refused. It will not be granted merely in order to decide some question of abstract right.—*Carolin v. Curnow*, 29 V.L.R., 273.

Upon an application for an order directing a writ of mandamus to issue against the president and members of the Board of Veterinary Surgeons, commanding them to cause an applicant to be registered as a veterinary surgeon in a case where the board has passed a resolution certifying to the qualifications of the applicant, the Court has power to receive evidence upon affidavits to show that the applicant was not in fact duly qualified.

*Held*, further, that if the applicant has reached the preliminary stage on which he based his claim to registration by means of fraud practised on the board, the Court will not in its discretion grant a writ of mandamus in order to enable him to perfect his title.—*In re Batchelor*, 1905 V.L.R., 579; and see *The King v. Watt*, 1912 V.L.R., 225.

(b) The *Judicature Act 1883* did not extend the powers of the Court to grant injunctions.—*Attorney-General v. The President, &c., of the Shire of Huntly*, 13 V.L.R., 66.

An equitable owner of the fee-simple of land is entitled to a perpetual injunction against the infringement of rights affecting such land.—*Vinnicombe v. MacGregor*, 28 V.L.R., 144.

In an action for ejectment an interlocutory injunction restraining the defendant from trespassing upon the land in question will not be granted unless some urgency is shown, or it is shown that some irreparable damage will be done to the land if the application be not granted.—*Metropolitan Bank Limited v. Christensen*, 21 V.L.R., 288.

(c) Before appointing a receiver, the Court must be satisfied that the plaintiff has done all he can to get satisfaction at law, and that means that he must do all he can in Victoria to get satisfaction of his judgment.—*Ellershank v. Russell*, 6 A.L.T., 140.

In every case in which an application is made for the appointment of a receiver by way of equitable execution under this sub-section, the Court or a Judge, in determining whether it is just or convenient that such appointment should be made, may have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, or to the probable costs of his appointment, and

may, if it or he shall so think fit, direct any inquiries on these or other matters before making the appointment.

The rules of practice provided by the English Rules of the Supreme Court 1883, Order L., r. 15 (A.) followed.—*Sandford v. King*, 26 V.L.R., 387.

Judgment in an action was recovered in 1894, but the judgment remained unsatisfied; in 1898 the defendant became entitled to an interest in the estate of his mother, and the plaintiff thereupon applied by way of motion giving the usual notice for the appointment of a receiver. An objection was taken that as no proceedings had been taken in the cause for one year one month's notice was necessary under Order LXIV., r. 13, before the plaintiff could proceed. *Held*, that an application for a receiver was not a proceeding in the cause within the meaning of that rule.—*Loneragan v. Dixon*, 23 V.L.R., 8, distinguished.

Judgment having been recovered in an action and the judgment to a large amount remaining unsatisfied, the plaintiff four years afterwards, having ascertained that the defendant was entitled as one of the sons to a fourth share in his mother's intestate estate, applied by way of motion for the appointment of a receiver. Administration of the estate had not been granted. The plaintiff filed an affidavit stating that there were no other assets on which legal execution could issue, and that the defendant had no means of satisfying the judgment except through his interest in the estate of his mother. *Held*, that a receiver should be appointed of the interest of the defendant in the estate.—*The Bank of Australasia v. Whitehead*, 24 V.L.R., 308.

Where a receiver has been appointed for the benefit of all parties to the action, his remedies should not be confined to those against the unsuccessful party in the action.—*The Hawk Newspaper Co. Ltd. v. Williams and others*, 17 A.L.T., 142.

Leave to serve notice of motion for the appointment of a receiver out of the jurisdiction granted where the judgment was obtained in this State and the property sought to be affected was also situated here.—*English, Scottish, and Australian Bank Limited v. Hoban*, 24 V.L.R., 451.

Where a judgment was obtained, and the property affected was within the jurisdiction, leave was granted to serve notice of motion for the appointment of a receiver on the judgment debtor out of the jurisdiction.—*Watt v. McCunnie*, 5 A.L.R. (C.N.), 13.

Supreme  
Court Act 1915.

or trespass, such injunction may be granted if the Court thinks fit whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable:

Power to award  
damages in  
addition to or  
in substitution  
for an injunction  
or specific  
performance.  
21 & 22 Vict.  
c. 27 s. 2.

- (4) In all cases in which the Court entertains an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant contract or agreement the Court may if it thinks fit award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court directs.

Nothing in this sub-section shall limit or affect the jurisdiction or powers which the Court has apart from this sub-section.

Infants  
Ib. s. 57 (10).  
36 & 37 Vict.  
c. 66 s. 25.

- (5) Subject to the express provisions of any other Act, in questions relating to the custody and education of infants, the Rules of Equity shall prevail: (a)

Cases of conflict  
not enumerated.  
Ib. s. 57 (11).  
Ib. s. 25.

- (6) Generally (subject to the express provisions of any other Act) in all matters not hereinbefore particularly mentioned in which there was before the passing of *The Judicature Act 1883* any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail: (b)

Month in all  
transactions to  
mean calendar  
month.  
Ib. s. 59.

63. The term "month" where used in any conveyance transfer mortgage lease underlease agreement contract or any document or transaction whatsoever whether relating to property or not shall be deemed to mean calendar month unless the circumstances otherwise require.

Rule as to  
division of loss.  
Commonwealth  
Navigation Act  
1912 s. 259.

64. (1) Where by fault of two or more vessels damage or loss is caused to one or more vessels to their cargoes or freight or to any property on board the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

(a) On a question of who should have the custody of a child the dominant matter is the welfare of the child.—*Moule v. Moule*, 13 C.L.R., 267. See the *Marriage Act 1928*, Part VII.

(b) *Semble*, the principle that where common law and equitable principles conflict the latter are to prevail, does not apply to matters of practice. Matters of practice are settled by the Rules of Court.—*Powell v. Wilson and MacKinnon*, 1908 V.L.R., 674.

The Supreme Court in its equitable juris-

diction may grant relief against a mistake in law if there is any equitable ground which makes it, in the particular facts of the case, inequitable that the party who receives money should retain it. But the Court will not grant relief in the case of a simple money demand by one person against another, there being between the two persons no fiduciary relation whatever, and there being no equity to supervene by reason of the conduct of either of the parties.—*Kelly v. The King*, 27 V.L.R., 522.

Provided that if having regard to all the circumstances of the case it is not possible to establish different degrees of fault the liability shall be apportioned equally.

(2) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed.

(3) Nothing in this section shall affect the liability of any person under a contract of carriage or any contract or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law or as affecting the right of any person to limit his liability in manner provided by law.

(4) For the purposes of this section the expression "freight" includes passage money and hire and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses consequent upon that fault recoverable at law by way of damages.

(5) In this and the two next succeeding sections "vessel" includes any ship boat or any other description of vessel used for any purpose on the sea or in navigation.

65. (1) Where loss of life or personal injuries is or are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels the liability of the owners of the vessels shall be joint and several.

(2) Nothing in this section shall be construed as depriving any person of any right of defence on which independently of this section he might have relied in an action brought against him by the person injured or any person or persons entitled to sue in respect of such loss of life or shall affect the right of any person to limit his liability in cases to which this section relates in the manner provided by law.

66. (1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels and a proportion of the damages is recovered against the owner of one of the vessels which exceeds the proportion in which she was in fault he may recover by way of contribution the amount of the excess from the owners of the other vessels to the extent to which those vessels were respectively in fault:

Provided that no amount shall be so recovered which could not by reason of any statutory or contractual limitation of or exemption from liability or which could not for any other reason have been recovered in the first instance as damages by the persons entitled to sue therefor.

(2) In addition to any other remedy provided by law the persons entitled to any contribution as provided by sub-section (1) of this section shall for the purpose of recovering the contribution have subject to the provisions of this Act the same rights and powers as the persons entitled to sue for damages in the first instance.

#### DIVISION 2.—FIRES.

67. It shall be lawful to and for the respective governors and directors of any insurance office or persons granting policies of insurance for insuring houses or other buildings against loss by fire and they are hereby authorized and required on the request of any person interested in or entitled to any house or other building which hereafter is burnt down demolished or damaged by fire to cause the

*Commonwealth  
Navigation Act  
1912.*

*1 & 2 Geo. V.  
c. 57 s. 1.*

*Damages for  
loss of life or  
personal  
injuries.  
Ib. s. 260.  
Ib. s. 2.*

*Right of  
contribution.  
Ib. s. 261.  
Ib. s. 2.*

*Money insured  
on houses burnt  
may be laid out  
in re-building.  
Imperial Acts  
Application Act  
1922 Part III.  
Div. 6.  
14 Geo. III.  
c. 78 s. 32.*

*Imperial Acts  
Application Act  
1922.*

money for which such house or building has been insured by the occupier thereof or by any other person to be laid out and expended as far as the same will go towards re-building reinstating or repairing such house or other building so burned down demolished or damaged by fire; (a) unless the person claiming such insurance money within thirty days next after his claim is adjusted gives a sufficient security to the governors or directors of the insurance office where such house or other building is insured that the same insurance money will be laid out and expended as aforesaid; or unless the said insurance money is in that time settled and disposed of to and amongst all the contending parties to the satisfaction and approbation of such governors or directors of such insurance office or such persons aforesaid respectively.

No action to lie  
against person  
on whose estate  
a fire  
accidentally  
begins.

*Id.* Part III.  
Div. 6.

14 Geo. III.  
c. 78 s. 86.

*Melbourne  
Building Act  
1849 s. 68.*

68. No action suit or process whatever shall be had maintained or prosecuted against any person in whose house chamber stable barn or other building or on whose estate any fire accidentally begins and no recompence shall be made by such person for any damage suffered thereby any law usage or custom to the contrary notwithstanding. And in such case if any action be brought the defendant may plead the general issue and give this Act and the special matter in evidence at any trial thereupon to be had; provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

(a) S. being the registered proprietor of certain land upon which there were buildings, mortgaged the property to certain mortgagees, and pursuant to a clause in the mortgage, procured an insurance company to issue to S. as owner and the mortgagees as such a policy of insurance against loss by fire in respect of the buildings. The property was subsequently purchased by M. subject to the mortgage, but before the transfer to him was registered and while S. was still the registered proprietor, the buildings were destroyed by fire. The insurance company did not pay the insurance money to any one, but agreed with the mortgagees to indemnify them against any loss on the realization of their security. Afterwards M., having then become the registered proprietor of the property, gave notice to the insurance company requesting it to cause the insurance money to be laid out and expended as far as the same would go towards rebuilding or reinstating the buildings. The insurance company did not comply with the notice.

*Held, by Knox, C.J., Isaacs and Starke, JJ. (Higgins and Rich, JJ., dissenting),* that by virtue of this section M. had a right as against the insurance company to have the buildings rebuilt so far as the insurance moneys would go subject to the proviso to that section; and that he was entitled in an action against the insurance company to a declaration of that right.

*Mylius v. Royal Insurance Co. Ltd., 38 C.L.R., 477.*

The plaintiffs were insured against fire under two policies of insurance with the defendant company. Each of the policies contained a clause in the following terms:—"The company may, at its option, reinstate or replace the property

damaged or destroyed or any part thereof, instead of paying the loss or damage . . . but the company shall not be bound to reinstate exactly or completely but only as circumstances permit, and in reasonably sufficient manner, and in no case shall the company be bound to expend more in reinstatement than it would have cost to reinstate such property as it was at the time of the occurrence of such loss or damage, nor more than the sum insured by the company thereon." The property having been injured by fire, the plaintiffs gave to the company written notice under this section requiring it to cause the insurance money to be expended so far as it would go towards rebuilding, reinstating or repairing the property. The company replied that under the clause of the policies it exercised its option to reinstate the building to the amount of the actual loss or damage as determined by arbitration.

Upon originating summons to determine whether reinstatement under the clause was limited by the contract between the parties to an amount not exceeding the amount of the loss or damage suffered by the insured.

*Held, as per McArthur and Lowe, JJ. (Cussen, J., dubitante):*—(1) That such reinstatement was not so limited, (2) That the company had in fact exercised its option under the policies, if in law it were capable of so doing, and that therefore a severable question of construction arose which was not merely hypothetical, but one which the Court might properly answer, and should answer, on originating summons, although the answer might not finally settle the litigation.—*Swift v. New Zealand Insurance Co. Ltd., 1927 V.L.R., 249.*

## DIVISION 3.—CONTRACTS OF INFANTS.

69. All contracts, whether by specialty or by simple contract, entered into by infants on or after the fourth day of January One thousand nine hundred and ten for the repayment of money lent or to be lent, or for payment for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future Statute, or by the rules of common law or equity, enter, except such as immediately before the date aforesaid by law were voidable.

*Supreme Court Act 1918 s. 68.*  
Contracts by infant except for necessities to be void.  
87 & 88 Vict. c. 62 s. 1.

70. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there was or was not any new consideration for such promise or ratification after full age.<sup>(a)</sup>

No action to be brought on ratification of infant's contract.  
*Id.* s. 64.  
*Id.* s. 2.

71. If any infant who has contracted a loan a contract for the repayment of which is void in law under this Division agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan and is not a new advance, such agreement and any instrument negotiable or other given in pursuance of or for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan shall, so far as it relates to money which represents or is payable in respect of such loan and is not a new advance, be void absolutely as against all persons whomsoever except as against a *bona fide* holder or assign for value and without notice of such instrument: Provided that in the event of any person recovering from any such infant the amount secured by any such instrument such infant may recover from the person to whom he gave the same the amount thereby secured.

Avoiding contract for payment of loan advanced during infancy.  
*Id.* s. 65.  
55 & 56 Vict. c. 43 s. 1.

For the purposes of this section any interest commission or other payment in respect of such loan shall be deemed to be a part of such loan.

## DIVISION 4.—SURETIES. CO-CONTRACTORS. CO-DEBTORS.

72. Every person who being surety for the debt or duty of another or being liable with another for any debt or duty pays such debt or performs such duty, shall be entitled to have assigned to him or to a trustee for him every judgment specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment specialty or other security is or is not deemed at law to have

Surety discharging the liability to be entitled to assignment of all securities held by the creditor.  
*Id.* s. 67.

(a) A person may be liable on a new promise made after full age. As to the circumstances in which a new promise will be held to have been established.—*Watson v. Campbell*, 1920 V.L.R., 347. And as to this and the last section generally, where the contract was one to take shares, see

*Vickery's Motors Pty. Ltd. v. Tarrant*, 1924 V.L.R., 195.

The mere fact that an alleged new promise is identical in terms with the old one does not necessarily prevent its being a new promise.—*Id.*

*Supreme Court Act 1915.*

*The Instruments and Securities Statute 1864 s. 55.*

*19 & 20 Vict. c. 97, s. 5.*

been satisfied by the payment of the debt or performance of the duty;<sup>(a)</sup> and such person shall be entitled to stand in the place of the creditor and to use all the remedies and (if need be and upon a proper indemnity) to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety co-contractor or co-debtor (as the case may be) indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety co-contractor or co-debtor shall be entitled to recover from any other co-surety co-contractor or co-debtor by the means aforesaid more than the just proportion to which, as between those parties themselves, such last-mentioned person is justly liable.

#### DIVISION 5.—APPORTIONMENT.

*Rents &c. to accrue from day to day and be apportionable in respect of time.*

*Supreme Court Act 1915 s. 58.*

*33 & 34 Vict. c. 85 s. 2.*

*Apportioned part of rent &c. to be payable when the next entire portion shall have become due.*

*Ib. s. 59.*

*Ib. s. 3.*

73. From and after the thirty-first day of January One thousand nine hundred and five all rents annuities dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall like interest on money lent be considered as accruing from day to day and shall be apportionable in respect of time accordingly.<sup>(b)</sup>

74. The apportioned part of any such rent annuity dividend or other payment shall be payable or recoverable in the case of a continuing rent annuity or other such payment when the entire portion of which such apportioned part forms part becomes due and payable and not before, and in the case of a rent annuity or other such payment determined by re-entry death or otherwise when the next entire portion of the same would have been payable if the same had not so determined and not before.

*Persons to have same remedies for recovering apportioned parts as for entire portions.*

*Ib. s. 70.*

*Ib. s. 4.*

75. All persons and their respective executors administrators and assigns and also the executors administrators and assigns respectively of persons whose interests determine with their own deaths shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid

(a) When judgment has been recovered by the creditor against the surety as a sole defendant, such surety is not entitled on satisfying such judgment to have it assigned to him; the Act gives him only what may be useful to him in enforcing contribution.—*Hardy v. Johnston*, 6 V.L.R. (L.), 190.

A surety who has paid the debt of the principal debtor is entitled, under this section, to an assignment by deed of all the securities which the creditor holds, including a promissory note of which the creditor is holder and payee, and is not bound to take the note indorsed by the creditor without recourse. A bill of exchange or promissory note may be a "security" within this section.—*Everingham v. Waddell*, 7 V.L.R. (L.), 180.

A co-debtor who has paid the damages and costs in respect of which judgment has been re-

covered against himself and the other co-debtors is entitled to an assignment of the judgment to enable him to sue his co-debtors for their several contributions; and in an action against the judgment creditor for refusing to assign such judgment the onus of proving the inability of the plaintiff's co-debtors to pay their several contributions in reduction of the amount of damages sought to be recovered by the plaintiff, as paid by him in satisfaction of such judgment, lies upon the defendant. In such an action the plaintiff need not lay special damage.—*Embling v. McEwan*, 3 V.R. (L.), 52.

(b) *Seemle*, this and the succeeding sections do not apply to the profits of a partnership.—*Hughes v. Fripp*, 30 C.L.R., 508, at p. 520, *per Starke, J.*

if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure and the same lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent including such apportioned part shall be recovered and received by the person who if the rent had not been apportionable under this Division or otherwise would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such person by the executors or other parties entitled under this Division to the same by action at law or suit in equity.

*Supreme Court Act 1915. Proviso as to rents reserved in certain cases.*

**76. (1) In this Division—**

The word “rents” includes rent-service rent-charge and rent-seck and all periodical payments or renderings in lieu of or in the nature of rent.

*Interpretation of terms. Ib. s. 71. 53 & 54 Vict. c. 35 s. 5.*

The word “annuities” includes salaries and pensions.

The word “dividends” includes (besides dividends strictly so-called) all payments made by the name of dividend bonus or otherwise out of the revenue of trading or other public companies divisible between all or any of the members of such respective companies whether such payments shall be usually made or declared at any fixed time or otherwise; and all such divisible revenue shall for the purposes of this Division be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made; but the said word “dividend” does not include payments in the nature of a return or reimbursement of capital.

(2) Nothing in this Division contained shall render apportionable any annual sums made payable in policies of assurance of any description.

*Act not to apply to policies of assurance. Ib. s. 72.*

(3) The provisions of this Division shall not extend to any case in which it is expressly stipulated that no apportionment shall take place.

*Ib. s. 6. Nor where stipulation to the contrary. Ib. s. 73. Ib. s. 7.*

**DIVISION 6.—INTEREST ON MONEYS OR BY WAY OF DAMAGES.**

**77.** Subject to the provisions of the *Money Lenders Act 1928* there shall be no limit to the amount of interest which any person may lawfully contract to pay; and in all cases where interest for the loan of money or upon any other contract may be lawfully recovered or allowed in any action suit or other proceeding in any court of law or equity but where the rate of such interest has not been previously agreed upon by or between the parties, it shall not be lawful for the party entitled to interest to recover or be allowed in any such action suit or other proceeding above the rate of Eight pounds for the interest or forbearance of One hundred pounds for a year; and so after that rate for a greater or lesser sum or for a longer or shorter time.

*Any interest may be contracted to be paid but if no contract not more than eight per cent. may be allowed. Ib. s. 74. 17 & 18 Vict. c. 90.*

*Supreme Court Act 1915 s. 75.*  
Interest to be allowed on trial in certain cases.  
2 & 4 Will. IV. c. 42 s. 28.

78. Upon all debts or sums certain<sup>(a)</sup> hereafter to be recovered in any action, the Court at the hearing or the jury on the trial of any issue or on an assessment of any damages may if the Court or jury think fit allow interest to the creditor at a rate not exceeding eight per cent. or (in respect of any bill of exchange or promissory note) at a rate not exceeding twelve per cent. per annum from the time when such debt or sum was payable (if payable by virtue of some written instrument and at a date or time certain); or if payable otherwise then from the time when demand of payment has been made in writing giving notice to the debtor that interest would be claimed from the date of such demand: Provided that nothing herein contained shall extend to authorize the computation of interest on any bill of exchange or promissory note at a higher rate than eight per cent. per annum where there has been no defence pleaded.

Damages in the nature of interest in certain actions.  
Ib. s. 76.  
Ib. s. 29.

79. The Court at the hearing or the jury on any trial or assessment of damages may in all actions of trover or trespass concerning goods give damages in the nature of interest if the Court or jury thinks fit over and above the value of the goods at the time of the conversion, and over and above the money receivable in all actions on any policies of insurance.

#### DIVISION 7.—LIMITATION OF TIME FOR COMMENCING ACTIONS.<sup>(b)</sup>

Exception of cases provided for by other Acts.  
Ib. s. 77.

80. Nothing in this Division shall apply to any action suit or other proceeding the time for commencing which is limited by the provisions of Part IX. of the *Property Law Act 1928* or by any special enactment specially limiting the time for commencing any action suit or other proceeding.

Actions on penal Statutes.  
Ib. s. 78.  
31 Eliz. c. 5 s. 5.

81. All actions suits and other proceedings for any forfeiture upon any Statute penal whereby the forfeiture or benefit is limited to His Majesty or to His Majesty His heirs and successors shall be commenced within two years after the offence committed and all actions suits and other proceedings for any forfeiture upon any such Statute whereby the forfeiture or benefit is limited to His Majesty or His Majesty his heirs and successors and to any person who prosecutes in that behalf, shall be commenced by any such person within one year after the offence committed and in default thereof may be commenced by His Majesty his heirs and successors at any time within two years after that year ended, and all actions suits and other proceedings for any forfeiture upon any such Statute whereby the forfeiture or benefit is limited to any person who shall prosecute in that behalf shall be commenced by such person within one year after the offence committed, and any

(a) Interest claimed under the provisions of this section arises by way of damages, and not upon contract express or implied, and it is, therefore, not an amount certain, and a claim for such interest cannot properly be included in a specially indorsed writ.—*Coone and Grant v. The Thomas Bent Land Company*, 17 V.L.R., 198; and see *In re Australian Metal Company Limited*, 33 C.L.R., 329.

(b) The Statute of Limitations, 21 Jac. I. c. 16,

was held not to apply to the Crown, so that the Crown can neither take advantage of nor be bound by such Statute.—*Fisher v. The Queen*, 26 V.L.R., 460; affirmed on appeal, 1903 A.C., 158.

The lapse of six years is no bar to proceedings by way of a summons to a debtor under the Imprisonment of Fraudulent Debtors Act where the proceedings are based on an order of a court of petty sessions on a simple contract debt.—*Cooper and Sons v. Dawson*, 1916 V.L.R., 381.



action suit or other proceeding brought after such times respectively shall be void and of no effect. *Supreme Court Act 1915.*

82. (1) Subject to the provisions of this Division actions suits or other proceedings as herein set out shall be commenced within the times herein expressed after the causes of such actions suits or other proceedings respectively:— *Limitation of time for commencing actions. 16. s. 79. 21 Jac. I. c. 16. 3 & 4 Wm. IV. c. 42 s. 3.*

- (A) (I.) Actions for penalties damages or sums given by any enactment to the party grieved. *The Common Law Procedure Act, 1855 s. 408. 19 & 20 Vict. c. 97 s. 9.*
- (II.) Actions for slander: Two years. *Id. s. 225.*
- (B) Actions for trespass to the person menace assault battery wounding or imprisonment: Four years.<sup>(a)</sup>
- (C) (I.) Actions of debt upon any award where the submission is not by specialty.
- (II.) Actions for money levied under any *fiery facias*.
- (III.) Actions of account other than such accounts as concern the trade of merchant and merchant their factors or servants.
- (IV.) Actions of account or for not accounting and suits for such accounts as concern the trade of merchandise between merchant and merchant their factors and servants. *Id. s. 225.*
- (V.) Actions in the nature of actions for—  
Trespass *quare clausum fregit*.  
Trespass to goods.  
Detinue.  
Trove.
- (VI.) All other actions founded on any simple contract including a contract implied in law.<sup>(b)</sup> *21 Jac. I. c. 16.*
- (VII.) All other actions founded on tort.
- (VIII.) All other actions in the nature of actions on the case: Six years.
- (D) (I.) Actions of covenant or debt upon any bond or other specialty except actions for arrears of interest.<sup>(c)</sup>
- (II.) Actions in the nature of actions of debt or *scire facias* upon any recognisance: Fifteen years.

(2) In actions or suits falling within paragraphs (III.) or (IV.) of sub-section (c) no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be free from the restriction imposed by such sub-section by reason only of some other matter of claim comprised in the same account having arisen within six years before the commencement of such action or suit.

(3) In this section the word "actions" means such actions as are in the nature of actions at common law but in references to this section contained in the succeeding sections of this Division the word "actions" shall be construed as including "actions" or "actions

(a) See section 202 as to limitation of actions against the sheriff.

(b) When a contract is contained in an instrument in the form prescribed by the Transfer of Land Act which is unregistered, it should be considered for the purpose of this section as a

simple contract notwithstanding that that Act provides that an instrument under it is to be of the same efficacy as if under seal.—*Visbord v. Irvine*, 1922 V.L.R., 562.

(c) See *In re Warren*, 1918 V.L.R., 209.

*Supreme Court Act 1915.*

and suits" or "actions, suits and other proceedings" where any of such meanings is necessary in order to give a complete reference to the matters set out in sub-section (1) of this section.

Arrears of interest not recoverable after six years.  
*Id.* s. 80.

83. Notwithstanding anything contained in the last preceding section no arrears of interest in respect of any sum of money and whether payable under a covenant or otherwise or in respect of any legacy or any damages in respect of such arrears shall be recovered by any action suit or other proceeding but within six years next after the same respectively became due or next after an acknowledgment of the same in writing has been given to the person entitled thereto or his agent signed by the person chargeable or his agent duly authorized.<sup>(a)</sup>

Persons under disability allowed time from removal of disability.  
*Id.* s. 81.  
*The Common Law Procedure Stat. 1865* s. 422.  
s. 4 Wm. IV. c. 42 s. 4.

84. If any person entitled to any such action as is referred to in sub-section (1) of section eighty-two or in section eighty-three was at the time the cause of action accrued within the age of twenty-one years or insane then such person may commence the same within such time as is before limited after being of full age or sane as if that was the time at which the cause of action accrued.

21 Jac. I. c. 16 s. 7.  
Extension of time where person liable is beyond the seas.  
*Supreme Court Act 1915* s. 82.  
s. 4 & 6 Anno c. 3 s. 19.

85. If any person against whom there is any such cause of action as is referred to in sub-section (1) of section eighty-two or in section eighty-three was at the time the cause of action accrued beyond the seas the party entitled to such action may commence the same within such time as is before limited after the return of such person from beyond the seas as if that was the time at which the cause of action accrued.

Meaning of expression "beyond the seas."  
*Id.* s. 83.

86. No part of the Australasian States or Colonies or of the islands adjacent thereto being part of the dominions of His Majesty shall be deemed to be "beyond the seas" within the meaning of that expression in this Division.

*The Common Law Procedure Stat. 1865* s. 405.

19 & 20 Vict. c. 97 s. 11.

No extension of time against a joint debtor not beyond the seas when other joint debtor beyond seas.

*Id.* s. 84.  
*Id.* s. 405.  
*Id.* s. 13

87. When any such cause of action as is referred to in sub-section (1) of section eighty-two or in section eighty-three has accrued against two or more joint debtors the person having such cause of action shall not be entitled to any additional time within which to sue one or more of such joint debtors who was or were not beyond the seas by reason only that some one or more of such joint debtors was or were at such time beyond the seas; and such person so entitled shall not be barred from commencing against one or more of such last-mentioned joint debtors after his or their return from beyond the seas by reason only that judgment has already been recovered against one or more of such first-mentioned joint debtors.

Effect of acknowledgment &c. preserved except in certain cases.

*Supreme Court Act 1915* s. 85.  
9 Geo. IV. c. 14.

88. (1) Except as expressly provided in this Division nothing herein contained shall take away or lessen the effect of any acknowledgment or promise by words or of any acknowledgment by part payment or satisfaction on account of principal or interest due and except as aforesaid any such acknowledgment or promise shall have the same effect as if this Division or any corresponding previous enactment had not been passed.

(a) See *National Bank of Tasmania Limited v. Mackenzie*, 1920 V.L.R., 411.

(2) No indorsement or memorandum of any part payment or satisfaction written or made upon any bill of exchange cheque or promissory note by or on behalf of the person to whom such part payment or satisfaction is made shall be deemed sufficient proof of such payment or satisfaction to take the case out of the operation of sub-section (1) of section eighty-two or section eighty-three.

*Supreme Court Act 1915.*

Indorsement of payments by creditor on bills of exchange not sufficient.

9 Geo. IV. c. 14 s. 2.

(3) In actions in the nature of actions founded upon simple contract no acknowledgment or promise by words shall be deemed sufficient evidence of any new or continuing contract whereby to take any case out of the operation of section eighty-two or section eighty-three or to deprive any party of the benefit thereof unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable<sup>(a)</sup> or by his agent duly authorized; and where there are two or more joint contractors or executors or administrators of any contractor no such joint contractor executor or administrator shall lose the benefit of section eighty-two or section eighty-three so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them.

Acknowledgment not sufficient unless in writing.

(4)<sup>(b)</sup> In actions of covenant or debt upon any bond or other specialty and in actions of debt or *scire facias* upon any recognisance if any acknowledgment has been made either by some writing signed by the party chargeable or his agent duly authorized or by part payment or satisfaction the person entitled to such action may commence his action for the money remaining unpaid and so acknowledged within fifteen years after such acknowledgment or in case any person entitled to such action at the time of such acknowledgment is under disability as aforesaid or the party making such acknowledgment is then beyond the seas then within fifteen years after such disability has ceased or such party has returned from beyond the seas (as the case may be).

Effect of acknowledgment in actions of covenant &c.

*The Common Law Procedure Stat. 1885 s. 423.*  
3 & 4 Wm. IV. c. 42 s. 6.

(5) Where there are two or more co-contractors or co-debtors whether in respect of a simple contract or not and whether bound or liable jointly only or jointly and severally or executors or administrators of any contractor no such co-contractor or co-debtor executor or administrator shall lose the benefit of section eighty-two or section eighty-three so as to be chargeable in respect or by reason only of payment or satisfaction of any principal interest or other money by any other or others of them.

Part payment by one contractor not to prevent bar in favour of another.

10 s. 406.  
19 & 20 Vict. c. 97 s. 14.

89. In actions against any two or more defendants whether co-contractors or co-debtors or not if it appears that the plaintiff though barred by the provisions of this Division as to one or more of such defendants is not barred by such provisions as to any other or others of them judgment may be given for the plaintiff as to the defendant or defendants against whom he is entitled and for the other defendant or defendants against the plaintiff.

Judgment may be recovered against some co-defendants.

*Supreme Court Act 1915 s. 86.*  
9 Geo. IV. c. 14 s. 1.

(a) Where a debtor in writing to his creditor uses language which amounts to an acknowledgment of his whole indebtedness, but expressly limits his promise (if any) to payment of part only of such indebtedness, the Court will not imply a promise to pay the whole.—*Union Bank v. Meyer*,

5 A.L.R., 43.

For cases in which it was held that there was a sufficient acknowledgment, see *National Bank of Tasmania Limited v. Mackenzie*, 1920 V.L.R., 411; and *Hepburn v. McDonnell*, 25 C.L.R., 199.

(b) See *In re Warren*, 1918 V.L.R., 209.

*Supreme Court Act 1916 s. 87.*  
Limitation to apply to counter-claim and set off.  
9 Geo. IV. c. 14 s. 5.

90. The provisions of this Division shall apply to any counter-claim or set off alleged by the defendant in all cases and to the like extent and for the same purpose in to or for which they respectively would apply if the defendant had instituted an action against the plaintiff or plaintiffs in respect of the same matter.

#### DIVISION 8.—STANDARD TIME.

The time of the 150th meridian to be standard time.  
16. s. 88.

91.<sup>(a)</sup> On and from the first day of February One thousand eight hundred and ninety-five the mean time of the one hundred and fiftieth meridian of longitude east of Greenwich in England shall be deemed and is hereby declared to have been and to be standard time throughout Victoria.

The time mentioned in Acts rules or instruments to mean standard time.  
Comp. 45 & 44 Vict. c. 9.

Whenever any expression of time occurs in any Act Order in Council rule regulation or by-law or deed or in any instrument whatsoever and whenever the doing or not doing anything at a certain time of day or night or during a certain part of the day or the night has an effect in law, such time shall unless it is otherwise specifically stated be held on and from the date aforesaid to have been and to be standard time throughout Victoria as declared by this section.

#### DIVISION 9.—ACTIONS BY SOLICITORS FOR COSTS ETC.<sup>(b)</sup>

Bill of costs to be delivered one month before action.  
16. s. 69.

*The Common Law Procedure Stat. 1865 s. 387. 6 & 7 Vict. c. 73 s. 37.*

92. Subject to the provisions of Division eleven of this Part of this Act no solicitor nor any executor administrator or assignee of any solicitor or the trustee of his estate shall commence or maintain any action or suit for the recovery of any fees charges or disbursements for any business done by such solicitor until the expiration of one month after such solicitor or executor administrator or assignee or trustee has delivered to the party to be charged therewith or sent by the post to or left for him at his counting house office or place of business dwelling house or last-known place of abode a bill of such fees charges and disbursements subscribed by such solicitor in his proper handwriting (or in case of partnership by any of the partners either with his own name or with the name and style of such partnership) or by the executor administrator or assignee of such solicitor or the trustee of his estate.<sup>(c)</sup>

(a) But see the *Daylight Saving Act 1916*, which does not come into force until proclaimed, and which has not yet been proclaimed.

(b) *Semble*, these provisions regard actions between solicitor and client only, and not between the solicitor and a third party guaranteeing to pay the bill.—*In re Lawler*, 4 V.L.R. (L.), 8.

(c) Where a solicitor has been employed in business not clearly professional, it is a question for the jury whether the employment was as solicitor, so as to require the delivery of a signed bill of costs.—*Chambers v. Green*, 2 V.L.R. (L.), 194.

A client is entitled as of right to ask for and obtain a bill of costs from his solicitor without any condition being attached to such delivery as to the bill being taxed.

A solicitor, upon being asked by his client the amount of costs chargeable in respect of work done, informed him that the costs were about £40 and would probably tax at a higher sum, and said that if the client chose to pay a smaller sum, naming it, and would waive taxation, he would take such smaller sum in satisfaction. The client agreed to this, and paid the amount sug-

gested. Some months afterwards, the relationship of solicitor and client having ceased, the client demanded the delivery of a bill of costs, and the solicitor said he would deliver one on condition that such bill were taxed and the difference paid. The client demanded the delivery of the bill unconditionally.

*Held*, that the client was entitled as of right to have a bill of costs delivered unconditionally.—*In re A.B. (a solicitor), ex parte Davies*, 29 V.L.R., 111.

In a court of petty sessions a solicitor is entitled to set off against the complainant's debt or demand his bill of costs against the complainant, although such bill of costs has not been delivered in accordance with this section. Upon admission or proof of retainer, the justices may themselves tax the bill, or refer it for taxation to the proper officer, adjourning their decision meanwhile.—*Robinson v. Vale*, 1905 V.L.R., 405.

A., a solicitor who had acted for many years in that capacity for the defendant, was asked by the defendant to procure a partner for him in his trade. A. said that if he did so he

It shall not in any case be necessary in the first instance for such solicitor executor administrator assignee or trustee in proving a compliance with this section to prove the contents of the bill he has delivered sent or left but it shall be sufficient to prove that a bill of fees charges or disbursements subscribed in the manner aforesaid was delivered sent or left in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered sent or left was not such a bill as constituted a *bonâ fide* compliance with this section:

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Provided that it shall be lawful for a Judge of the Supreme Court to authorize a solicitor to commence and maintain such an action or suit although such month has not expired on proof to the satisfaction of the Judge that there is probable cause for believing that the party chargeable is about to quit Victoria.

*When party leaving Victoria. The Common Law Procedure Stat. 1855 s. 390 s. 6 & 7 Vict. c. 73 s. 59.*

#### DIVISION 10.—SOLICITORS REMUNERATION IN RESPECT OF CONVEYANCING BUSINESS.

93. In this Division unless inconsistent with the context or subject-matter—

*Interpretation. Supreme Court Act 1927 s. 3.*

"Client" includes any person and any body of persons corporate or unincorporate—

*"Client." Comp. 44 & 45 Vict. c. 44 s. 1; (N.S.W.) 1910 No. 6 s. 205.*

(a) who or which, as a principal or on behalf of another, or as trustee or executor, or in any other capacity has power, express or implied, to retain or employ and retains or employs or is about to retain or employ a solicitor; or

(b) for the time being liable to pay to a solicitor for his services any costs remuneration charges expenses or disbursements.

"The Institute" means the Law Institute of Victoria within the meaning of the *Law Institute Act 1928*.

*"The Institute."*

94. The Chief Justice or any other judge of the Court nominated by him, two persons nominated by the Governor in Council, and two members of the council of the Institute (to be nominated by the said council), or any three of them, the Chief Justice or the judge of the court nominated by him being one—

*Power to make orders for remuneration in conveyancing. Ib. s. 4. Comp. ib. s. 2 Ib. s. 206.*

(a) may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with—

(i.) sales purchases leases mortgages wills settlements formation and registration of companies deeds of arrangement and other matters of conveyancing and in respect of other business not being business in any action or transacted in any court

would require a commission of £50; the defendant said that that would be a fair charge. A. procured a partner, and sued the defendant in the police court for the £50 as and for work and labour done. The justices dismissed the complaint, on the ground that, inasmuch as the relationship of solicitor and client was existing between A. and the defendant, the former could not maintain a claim in such form.

*Held*, that the mere fact that A. was a solicitor and the defendant was his client was not by itself a sufficient answer to the claim for work and labour done.—*Sharp v. Southern*, 1905, V.L.R., 223.

For a case in which a document purporting to be a bill of fees, charges, and disbursements was held not to be a proper bill, see *Stephens v. Fyffe*, A.R., 30 March, 1860.

*Supreme Court  
Act 1927.*

or in the chambers of any judge or in the offices of the Master-in-Equity Prothonotary or other officer of any court and not being otherwise contentious business; and

- (ii.) negotiating for or procuring an agreement for a loan whether such agreement is made with the solicitor either alone or jointly with any other person or with a person retaining and employing the solicitor, provided that any such general order may differentiate between the remuneration in such respective cases; and

(b) may revoke or alter any such order.

*Communication  
to the Institute.  
Ib. s. 6.  
Comp. 44 & 45  
Vict. c. 44 s. 3;  
(N.S.W.) 1919  
No. 6 s. 207.*

95. (1) One month at least before any such general order is made the Chief Justice or the judge of the court nominated by him as aforesaid shall cause a copy of the regulations and provisions proposed to be embodied therein to be communicated in writing to the council of the Institute, who may submit such observations and suggestions in writing as they think fit to offer thereon.

(2) The Chief Justice or such other judge and the other persons hereby authorized to make such order—

- (a) shall take into consideration any observations or suggestions so submitted to them within one month from the day on which such communication to the said council was made as aforesaid; and
- (b) after duly considering the same may make such order either in the form or to the effect originally communicated to the said council or with such alterations additions or amendments as seem fit.

*Principles of  
remuneration.  
Ib. s. 6.  
Comp. Ib. s. 4;  
Ib. s. 208.*

(3) Any general order under this Division may—

- (a) as regards the mode of remuneration, prescribe that it shall be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode and partly in another or others; and
- (b) as regards the amount of the remuneration, regulate the same with reference to all or any of the following among other considerations :—
- (i.) The position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like;
  - (ii.) The place district and circumstances at or in which the business or part thereof is transacted;
  - (iii.) The amount of the capital money or of the income or rent to which the business relates;
  - (iv.) The skill labour and responsibility involved therein on the part of the solicitor;
  - (v.) The number and importance of the documents prepared or perused, without regard to length; and

(vi.) (With respect to business connected with negotiating for or procuring an agreement for a loan, in addition to the matters mentioned in subparagraphs (i.) to (v.) of this paragraph)—

*Supreme Court Act 1927.*

the time and expenditure involved therein on the part of the solicitor; and

the fact whether or not the borrower or intending borrower has agreed to pay any other person for services rendered in respect of such business.

96. (1) Notwithstanding anything in section ninety-eight any agreement in respect of business connected with a mortgage or negotiating or procuring an agreement for a loan shall so far as it provides for the payment of remuneration of the solicitor for his services in respect of such business greater than the remuneration prescribed pursuant to section ninety-four be void.

Remuneration in respect of mortgages and negotiating &c. loans not to exceed that prescribed hereunder.  
*Ib. s. 7.*

(2) The provisions of section twenty-seven shall extend and apply to any general order under this Division as though such general order were made by the Court or Judges thereof only.

Orders to be laid before Houses of Parliament.  
*Ib. s. 8.*

(3) So long as any general order under this Division is in force the taxation of bills of costs of solicitors shall be regulated thereby.

Comp. 44 & 45 Vict. c. 44 s. 6; (N.S.W.) 1919 No. 6 s. 210.  
Effect of order as to taxation.  
*Ib. s. 9.*

97. (1) Any solicitor to whom either alone or jointly with any other person a mortgage is made or the firm of which such solicitor is a member shall (subject in the case mentioned in paragraph (a) hereunder to the provisions of any general order under the preceding sections of this Division) be entitled to receive for all business transacted and acts done by such solicitor or firm in—

Comp. 1b. s. 7; *Ib. s. 211.*  
Charges &c. where mortgage is made with solicitor.  
*Ib. s. 10.*  
Comp. 58 & 59 Vict. c. 25 s. 2; (N.S.W.) 1919 No. 6 s. 213.

(a) negotiating for or procuring an agreement for the loan;

(b) deducing and investigating the title to the property; and

(c) preparing and completing the mortgage—

all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor and such person had retained and employed such solicitor or firm to transact such business and do such acts.

This sub-section applies only to loans and mortgages made after the commencement of this Act.

(2) Any solicitor to or in whom either alone or jointly with any other person any mortgage is made or is vested by transfer or transmission or the firm of which such solicitor is a member shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised all such usual professional charges and remuneration as he or they would have been entitled to receive if—

Right of solicitor with whom mortgage is made to recover costs &c.  
*Ib. s. 11.*  
Comp. 1b. s. 8; *Ib. s. 214.*

(a) such mortgage had been made to and had remained vested in a person not a solicitor; and

(b) such person had retained and employed such solicitor or firm to transact such business and do such acts.

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This sub-section applies to mortgages made and business transacted and acts done either before or after the thirteenth day of December One thousand nine hundred and twenty-seven.

#### DIVISION 11.—AGREEMENTS BETWEEN SOLICITORS AND CLIENTS.

Power for a solicitor and client to agree on form and amount of remuneration.

*Supreme Court Act 1915 s. 90.*  
44 & 45 Vict. c. 44 s. 8.

98. (1) It shall be competent for a solicitor to make an agreement with his client, and for a client to make an agreement with his solicitor before or in the course of the transaction of business done or to be done by such solicitor, whether as a solicitor, or in matters of conveyancing for the remuneration of the solicitor for his services in respect of such business, to such amount and in such manner as the solicitor and the client think fit, either by a gross sum or by commission or percentage or by salary or otherwise, and it shall be competent for the solicitor to accept from the client and for the client to give to the solicitor remuneration accordingly.<sup>(a)</sup>

Agreement to be in writing.

*Ib. s. 91.*

*Ib.*

Agreement may include or be irrespective of disbursements.

*Ib. s. 92.*

*Ib.*

Agreement may be sued on or set aside &c.

*Ib. s. 93.*

*Ib.*

(2) The agreement shall be in writing signed by the person to be bound thereby or by his agent in that behalf.<sup>(b)</sup>

(3) The agreement may if the solicitor and the client think fit be made on the terms that the amount of remuneration therein stipulated for either shall include or shall not include all or any disbursements made by the solicitor.

(4) The agreement may be sued and recovered on or impeached and set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor.

(a) The provisions of sections 482 and 484 of the *Crimes Act 1928* do not prevent a person charged with a crime from making an agreement with his solicitor, pursuant to this section, for remuneration, and if such agreement is made the provisions of this Division apply, and the client is deprived of his right to have a bill of costs delivered and taxed.—*In re Poulton*, 23 V.L.R., 273.

If an agreement between solicitor and client, purporting to be for the payment by the client of a gross sum for costs and charges, is in reality in respect of costs and also of advances, it is not within the provisions of this section, and delivery of a bill of costs will be ordered.—*In re Doria*, *ex parte Vickery*, 11 A.L.R., 97.

This section does not relate to agreements between solicitor and client as to the amount of the solicitor's professional remuneration for work wholly past. Such agreements are governed by the rules of common law and equity.

A verbal agreement was entered into between a solicitor and client in respect of work to be done. After the completion of the work, disputes arose as to the terms of the agreement and the amount of remuneration the solicitor was entitled to. In order to obtain his papers the client paid, under protest, the amount demanded. Subsequently, the relationship of solicitor and client having terminated, in consideration of the solicitor making a refund and agreeing to assist in some other proceedings, the client executed a release under seal releasing the solicitor from all claims and demands and from delivering

a bill of costs.

*Held*, the release was not an agreement to pay the solicitor a lump sum for work wholly past, and was an answer to an application by the client for an order for the delivery of a bill of costs.—*Bear v. Waxman*, 1912 V.L.R., 292.

An agreement by a solicitor with his client to conduct the proceedings in an action without expense to the client, in consideration of a promise by the client to pay to the solicitor, or to allow him to retain, one-half of any money that may be recovered in the action; and an agreement by a solicitor with his client to conduct the proceedings in an action, in consideration of a promise by the client to pay to the solicitor, or allow him to retain, one-half of any money that may be recovered in the action irrespective of any costs that may be recovered from the defendant, are both champertous agreements, and neither is an agreement within the meaning of this section. The Court has power to order the plaintiff's solicitor to pay the defendant's costs where it is satisfied that the action would not have been brought but for such solicitor's misconduct; and it is misconduct on his part to enter into a champertous agreement with his client.—*Reilly v. The Melbourne Tramway and Omnibus Company Limited*, 19 V.L.R., 461.

(b) This and the succeeding section do not invalidate agreements for special remuneration not in writing which would have been valid without the Act.—*Re Barrett, ex parte Male*, 14 V.L.R., 153.



(5) Such an agreement<sup>(a)</sup> shall not affect the amount of or any rights or remedies for the recovery of any costs recoverable from the client by any other person or payable to the client by any other person, and any such other person may require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of such costs unless such person has otherwise agreed: Provided always that the client who has entered into such agreement shall not be entitled to recover from any other person under any order for the payment of any costs which are the subject of such agreement more than the amount payable by the client to his own solicitor under the same.

*Supreme Court Act 1915 s. 94. Saving interests of third parties. 33 & 34 Vict. c. 28 s. 5.*

(6) Nothing in this Division shall be construed to give validity to any purchase by a solicitor of the interest or any part of the interest of his client in any suit action or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which a solicitor retained or employed to prosecute any suit or action stipulates for payment only in the event of success in such suit action or proceeding.

*Prohibition of certain stipulations. Ib. s. 95.*

99. A solicitor may accept from his client and a client may give to his solicitor security for the amount to become due to the solicitor for his costs fees charges and disbursements and for interest on such amount, but so that interest is not to commence till the amount due is ascertained either by agreement or taxation. A solicitor may charge interest at Six pounds per centum per annum on his disbursements and costs from the expiration of one month from demand from the client. And in cases where the same are payable by an infant or out of a fund not presently available, such demand may be made on the parent or guardian or the trustee or other person liable.

*Security may be taken for costs and interest may be charged. Ib. s. 96.*

#### PART VIII.—MISCELLANEOUS PROCEEDINGS.

##### DIVISION 1.—SPECIAL PROCEEDINGS RELATING TO AGREEMENTS BETWEEN SOLICITORS AND CLIENTS.

100. If it appears to the Court or a Judge upon motion by the client that he was induced to enter into an agreement made in pursuance of the provisions of Division eleven of Part VII. of this Act by fraud or misrepresentation of the solicitor the Court or Judge may upon proof thereof order such agreement to be cancelled, or may direct any question of fact to be decided by a jury in the same manner as a Court of Equity might prior to the passing of *The Judicature Act 1883* have directed a question of fact to have been decided by a jury; and the Court or a Judge may give all such directions necessary or proper for the purpose of carrying such order into effect or otherwise consequential thereon as to the Court or Judge may seem fit.

*Power upon motion to cancel agreement between solicitor and client for fraud &c. Ib. s. 97. 44 & 45 Vict. c. 44 s. 8.*

101. If it appears to the Court or a Judge thereof upon motion by the client that the solicitor has been guilty of default negligence delay or other improper conduct in the performance of his duties under any such agreement, the Court or Judge shall have power to order the cancellation of the agreement, and to give all such directions necessary or proper for the purpose of carrying such order into effect or otherwise consequential thereon as to the Court or Judge may seem fit.

*Provision in case of default negligence or delay on part of solicitor. Ib. s. 98. 33 & 34 Vict. c. 28 s. 14.*

(a) This section only applies as between solicitor and client, and not between party and party:—*Aitken v. Etherbank*, 7 A.L.T., 16.

*Supreme Court Act 1913 s. 99.*

Provision in case of the death or incapacity of the solicitor.

33 & 34 Vict. c. 28 s. 13.

102. Where a solicitor has made any such agreement with his client and anything has been done by such solicitor under the agreement and before the agreement has been completely performed by him such solicitor dies or becomes incapable to act, the amount due in respect of the past performance of the agreement shall in case of dispute be ascertained by taxation,<sup>(a)</sup> and the Taxing Master in ascertaining such amount shall have regard so far as may be to the terms of the agreement, and payment of the amount found to be due may be enforced in the same manner as if the agreement had been completely performed by the solicitor.

Agreements to be exempt from taxation.

16 s. 100.

16 s. 15.

103. Except as hereinbefore provided, the bill of a solicitor for the amount due under any such agreement shall not be subject to any taxation.<sup>(a)</sup>

#### DIVISION 2.—BILLS OF COSTS<sup>(b)</sup>—TAXATION.

Taxation of bills within a month.

16 s. 101.

*The Common Law Procedure Stat. 1865 s. 387.*

6 & 7 Vict.

c. 73 s. 37.

104. Upon the application of the party chargeable by any bill of fees charges or disbursements delivered or sent to or left for him by a solicitor or the executor administrator or assignee of such solicitor or the trustee of his estate within one month of such bill being so delivered sent or left or with the written consent of such solicitor or his executor administrator assignee or of such trustee after such month an appointment for taxation of the same may be obtained as of course and without order of a Judge from the Taxing Master in every case including conveyancing lunacy and criminal business and though the business or part of the business contained in such bill has not been transacted in the Court;<sup>(c)</sup> and thereupon such bill and

(a) *In re Poulting*, referred to in note (a) to section 98.

(b) A solicitor should be allowed for "ordinary attendances" in all cases where his own personal skill and knowledge or the personal skill and knowledge of his clerk may be involved, and the Taxing Officer in disallowing charges for "attendance" should specify special reasons for such disallowance.

A solicitor who takes a mortgage from his client to himself cannot charge the client for the costs of preparing the same unless the client has agreed to pay such costs (but see now section 97).

Where a solicitor hands moneys to the client for the purpose of the client himself applying them in a certain way, he is not entitled to charge for the same in his bill of costs as disbursements, *secus* where the solicitor himself applies the money to the particular purposes.—*In re Rowbotham, ex parte Skinner*, 22 V.L.R., 135.

The Adelaide solicitors of a plaintiff who resided in South Australia employed a firm of solicitors in Melbourne to conduct an action in the Supreme Court of Victoria against two defendants. One of the defendants indorsed upon his entry of appearance a notice, under Order LXV., rule 29 (a) of the Rules of the Supreme Court 1916, that he intended to proceed under the special scale of costs in Appendix N. Judgment in the action was entered for the defendants. The Melbourne firm rendered to the Adelaide solicitors a bill of costs containing charges for work done in conducting the litigation against

both defendants jointly. The Taxing Master held that the bill was not taxable under the special scale.

On a summons to review the taxation, purporting to have been taken out on behalf of the plaintiff and of his Adelaide solicitors.

Held, that the solicitors were the proper persons to procure the review of the taxation and that, the indorsement being by one of the defendants only, the bill was not taxable under the special scale.—*In re Maddock Jamieson and Lonte*, 1927 V.L.R., 410.

See *Hayes v. Jones*, noted to section 10 of the *Legal Profession Practice Act 1928*.

(c) A bill of costs for work done' as a parliamentary agent is taxable under this section.—*Ex parte Hopkins*, 3 V.L.R. (L.), 115.

A solicitor is bound by the bill of costs which he delivers to his client, whether it is signed or not.—*In re Hopkins*, 17 V.L.R., 85.

A solicitor delivering a bill of costs is not allowed to substitute another, unless the delivering of the first bill has been clearly and legitimately conditional or accompanied by a distinct intimation that such bill is not that of which payment is sought, and is incomplete, and subject to amendment.—*Id.*

See *In re A.B. (a solicitor), ex parte Davies*, 29 V.L.R., 111, referred to in note (c) to section 92.

A solicitor when delivering his bill of costs to a client is not entitled to withdraw the bill if not paid, and to send in a corrected account unless he at the time of delivery of the first bill makes clear

the demand of such solicitor executor administrator assignee or trustee shall be taxed and settled by such Taxing Master without any money being brought into Court; and the Court or a Judge thereof shall restrain such solicitor or executor administrator or assignee of such solicitor or the trustee of his estate from commencing any action or suit touching such demand pending such taxation; and the costs of such taxation shall as hereinafter provided be paid according to the event of such taxation.

105. In case no such application as aforesaid has been made within such month as aforesaid and no such consent has been given, then it shall be lawful for the Court or a Judge thereof, either upon the application of the solicitor or the executor administrator or assignee of the solicitor or the trustee of his estate whose bill has been so delivered sent or left as aforesaid or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court or Judge making such reference thinks proper, to refer such bill and the demand of such solicitor or executor administrator or assignee of such solicitor or the trustee of his estate thereupon to be settled and taxed by such Taxing Master;<sup>(a)</sup> and in case any such reference as aforesaid is made on the application of the party chargeable by such bill, then without any money being brought into Court; and such Court or Judge may restrain such solicitor or the executor administrator or assignee of such solicitor or the trustee of his estate from commencing or prosecuting any action or suit touching such demand pending such reference upon such terms as are thought fit: Provided always that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such

*Supreme Court Act 1915.*

Taxation after one month.

*Id.* s. 102.

*The Common Law Procedure Stat. 1865 s. 388. 6 & 7 Vict. c. 73 s. 37.*

Taxation after twelve months.

to the client that the charges in the delivered bill are not enforceable.—*In re Michie*, 24 V.L.R., 440.

After services had been completed, it was verbally agreed between solicitor and client that a detailed bill of costs should not be delivered. No particular lump sum was then mentioned. Thereafter a bill for a lump sum was delivered. No application to tax was made within a month, or at all.

Upon complaint before justices to recover the amount of the bill, the defendant relied as a defence upon non-delivery of a "taxable" bill. The complainant then replied waiver, stating the above verbal agreement. The defendant did not amend his defence, or deny the waiver. No evidence of the waiver was given by complainant. The justices ultimately made an order for the amount of the bill.

*Held*, that the order was right.—*Sharp v. Dane*, 9 A.L.R., 155.

Where A., a solicitor, and B. expressly agreed that A.'s bill of costs should be paid by B. subject to adjustment, but that such adjustment was not to include taxation, and B. did pay A.'s bill: *Held*, that, in the absence of exceptional circumstances, under this and the next section, A.'s bill could not be referred for taxation.—*In re Brodribb, Crisp, and Lewis*, 1 V.R. (L.), 214.

A notice of appeal from an order setting aside the service of a writ, on the ground that the defendant was out of the jurisdiction, was served on the solicitor who had represented the defendant.

During negotiations, the solicitor for the defendant wrote that he had no authority to accept service of the notice, and the solicitor for the plaintiff subsequently abandoned the appeal, and agreed to pay the defendant's taxed costs. The appeal coming on for hearing, the plaintiff did not appear, but counsel appeared as for the defendant, and the appeal was dismissed with costs to be taxed. *Held*, by *Williams and Hodges, J.J.* (a *Beckett, J.*, dissenting), that the costs incurred by the solicitor who appeared as for the defendant were not the defendant's costs, and that the Taxing Officer should, on taxation, under the order on appeal, have disallowed all costs.—*Pearce v. Tower Manufacturing and Novelty Co.* (No. 2), 24 V.L.R., 757.

(a) A bill of costs will be ordered to be delivered under the Act only in case where a bill, if delivered, could be referred to taxation, and where a bill has been paid and more than a year has afterwards elapsed, it cannot be ordered for taxation.—*In re Chambers, ex parte Speed*, 6 A.L.T., 125.

The Supreme Court has power to refer to the Taxing Master for taxation a bill of costs as between solicitor and client, although most of the work charged for in the bill was done in the police court, and there is no scale of costs in the police court. The right to taxation is determined not by the particular Court in which the services were rendered, but by the fact that the person who does the work is a solicitor, and as such amenable to the summary jurisdiction of the Court.—*Ex parte Beck*, 21 V.L.R., 362.

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bill after a verdict has been obtained judgment signed or a writ of inquiry executed in any action for the recovery of the demand of such solicitor or executor administrator or assignee of such solicitor or the trustee of his estate or after the expiration of twelve months<sup>(a)</sup> after such bill has been delivered sent or left as aforesaid, except in special circumstances to be proved to the satisfaction of the Court or a Judge thereof to whom the application for such reference is made.

*Payment of costs of taxation.*

*fb. s. 103*

*The Common Law Procedure Stat. 1365 s. 389. 6 & 7 Vict. c. 73 s. 37.*

103. Upon every such appointment or reference if either the solicitor or executor administrator or assignee of the solicitor or trustee of his estate whose bill has been delivered sent or left or the party chargeable with such bill having due notice refuses or neglects to attend such taxation, the Taxing Master may proceed to tax and settle such bill and demand *ex parte*; and in case any appointment or reference as aforesaid is obtained or made upon the application of the party chargeable with such bill or upon the application of such solicitor or the executor administrator or assignee of such solicitor or trustee of his estate and the party chargeable with such bill attends upon such taxation, the costs<sup>(b)</sup> of such appointment or reference shall, except as hereinafter provided for, be paid for according to the event of such taxation (that is to say): if such bill when taxed is less by a sixth part than the bill delivered sent or left,<sup>(c)</sup> then such solicitor or executor administrator or assignee of such solicitor or trustee of his estate shall pay such costs; and if such bill when taxed is not less by a sixth part than the bill delivered sent or left, then the party chargeable with such bill making such application or so attending shall pay such costs. And every order to be made for obtaining such appointment or such reference as aforesaid shall direct the Taxing Master to whom such reference is made to tax such costs of such appointment or reference to be so paid as aforesaid, and to certify what upon such taxation is found to be due to or from such solicitor or executor administrator or assignee of such solicitor or trustee of his estate in respect of such bill or demand and of the costs of such appointment or reference (if payable): Provided always that the Taxing Master shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation; and the Court or Judge shall in all cases be at liberty to make thereupon such order as such Court or Judge thinks right respecting the payment of the costs of such taxation: Provided also that where such reference as aforesaid is made as hereinbefore provided, then the said Court or Judge shall be at liberty (if it is thought fit) to give any special directions relative to the costs of such reference: And provided further that the Court or Judge may make such order for the delivery by any solicitor or the executor administrator or assignee of any solicitor or trustee of his estate of such bill as aforesaid<sup>(d)</sup> and for the delivery up of deeds

(a) Where a party proceeds to tax his costs after the lapse of one year since the last proceedings in the action, he must give the other side one month's notice of his intention to proceed with such taxation.—*Loneragan v. Dixon*, 23 V.L.R., 8; and see *Bank of Australasia v. Whitehead*, 24 V.L.R., 308.

(b) Where, upon an order for taxation as between solicitor and client, more than one-third of the bill was taxed off, the Court, upon that ground alone, gave to the client the costs of the summons and order for taxation.—*In re Hardy*, 7 V.L.R.

(L.), 450.

(c) Where several bills are referred together for taxation under an appointment obtained within a month after their delivery, a bill struck off altogether, on the ground that it had been paid, is to be computed in ascertaining whether one-sixth is disallowed.—*Re Phelps*, 6 V.L.R. (L.), 417.

(d) Under this section the Court has discretion to refuse to order the delivery of a bill of costs.—*Bear v. Waxman*, 1912 V.L.R., 292.

documents or papers in his custody possession or power or otherwise touching the same in the same manner as has heretofore been done as regards such solicitor by such Court or Judge where any such business had been transacted in the Court.<sup>(a)</sup>

107. In taxing any bill for preparing or drawing any deed contract case or other document, it shall be lawful for the Taxing Master and he is hereby required in estimating the proper sum to be charged for such transaction to consider the skill and labour properly employed and the expense and responsibility incurred in the preparation thereof.

*Supreme Court Act 1915.*

*Skill and responsibility to be considered. Ib. s. 104. The Common Law Procedure Stat. 1865 s. 391.*

108. Where any person not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained is liable to pay or has paid such bill either to the solicitor his executor administrator or assignee or the trustee of his estate or to the party chargeable with such bill as aforesaid<sup>(b)</sup> it shall be lawful for such person his executor administrator or assignee or the trustee of his estate to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon and the same course pursued in all respects as if such application was made by the party so chargeable with such bill as aforesaid: Provided always that in case such application is made when under the provision herein contained a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or Judge to whom such application is made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application.

*Third parties applying for taxation. Ib. s. 105. Ib. s. 392. 6 & 7 Vict. c. 73 s. 88.*

109. It shall be lawful in any case in which a trustee executor or administrator has become chargeable with any such bill as aforesaid for a Judge of the Court if in his discretion he thinks fit, upon the application of a party interested in the property<sup>(c)</sup> out of which such trustee executor or administrator has paid or is entitled to pay such bill,<sup>(d)</sup> to refer the same and such solicitor's or executor's administrator's

*Bills against trustees or executors. Ib. s. 106. Ib. s. 393. Ib. s. 39.*

(a) For form of order, where the plaintiffs changed their solicitors who had a lien on their client's papers for costs, see *Falkingham and others v. Victorian Railways Commissioners*, 4 A.L.R. (C.N.), 33.

(b) A client paid to trustees a sum of money to be applied by them (*inter alia*) in payment of costs due to his solicitors. The solicitors delivered to the trustees a bill of costs. *Held*, the trustees were not entitled to have the bill taxed.—*In re Bennett and Attenborough*, 2 V.R. (L.), 203.

On the compromise of an action the defendant agreed to pay the taxed costs of the plaintiffs as between solicitor and client.

*Held*, that this was not a contract of indemnity, and that on such a taxation the only charges which should be allowed are those which the party would have been compelled to pay his own solicitor, and which fair justice to the other party permitted.

*Held*, that charges for briefing two counsel on interlocutory proceedings and for drawing plead-

ings, &c., where the client was not warned that these charges might not be allowed on taxation were unreasonable, and should not be allowed.—*Smith v. Smith*, 1906 V.L.R., 78.

(c) Where administration of an intestate estate has been granted, a person who has unsuccessfully propounded an alleged will of the intestate, but whose costs have been ordered to be paid out of the estate, is not a "party interested in the property" within the meaning of this section, and is not entitled to apply under this section to have the administrator's bill of costs referred for taxation.—*In re Jones*, 5 A.L.R. (C.N.), 41.

(d) A solicitor acting for executors delivered a bill of costs amounting to £39 2s. 4d.; the bill contained an offer to reduce such amount by £5. The residuary legatee obtained an order for taxation.

*Held*, that the order for taxation should be to tax the full amount of the bill, and not the reduced amount.—*In re Passenger*, 26 V.L.R., 194.

*Supreme  
Court Act 1915.*

or assignee's demand or the demand of the trustee of his estate thereupon to be taxed and settled by the Taxing Master aforesaid, with such directions and subject to such conditions as such Judge thinks fit, for the payment of what may be found due and of the costs of such reference to or by such solicitor or the executor administrator or assignee of such solicitor or the trustee of his estate by or to the party making the application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill so far as the same are applicable to such cases; and in exercising such discretion as aforesaid the said Judge may take into consideration the extent and nature of the interest of the party making such application: Provided always that where any money is so directed to be paid by such solicitor or the executor administrator or assignee of such solicitor or the trustee of his estate, it shall be lawful for such Judge (if he thinks fit) to order the same or any part thereof to be paid to such trustee executor or administrator so chargeable with such bill instead of being paid to the party making such application; and when the party making such application pays any money to such solicitor or executor administrator or assignee of such solicitor or the trustee of his estate in respect of such bill, he shall have the same right to be paid by such trustee executor or administrator so chargeable with such bill as such solicitor or executor administrator or assignee of such solicitor or the trustee of his estate had.

*Delivery of bill  
to third parties.  
Ib. s. 107.  
The Common  
Law Procedure  
Stat. 1865 s. 394.  
6 & 7 Vict.  
c. 73 s. 40.*

110. For the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid or of a party interested as aforesaid, it shall be lawful for the Court or a Judge thereof to order any such solicitor or the executor administrator or assignee of any such solicitor or the trustee of his estate to deliver to the party making such application a copy of such bill upon payment of the costs of such copy.

*Re-taxation.  
Ib. s. 108.  
Ib. s. 395.  
Ib. s. 40.*

111 No bill which has been previously taxed and settled either under an appointment or order of reference shall be again referred, unless under special circumstances the Court or Judge to whom such application is made shall think fit to direct a re-taxation: Provided nevertheless that where a bill of costs has been taxed, an order for review<sup>(a)</sup> of the taxation may subject to compliance with any Rules of Court in that behalf be made upon summons to show cause by a Judge; and it shall be lawful for such Court or Judge (in case he thinks fit) thereupon to direct the Taxing Master to review and correct such taxation;<sup>(b)</sup> and whether the order applied for be granted or refused, the costs of the application shall be in all cases in the discretion of the Court or Judge.

*Review of  
taxation.*

(a) The Court will not direct a review of taxation at the instance of the solicitor, where he has allowed more than twelve months to elapse, and further steps to be taken based on the results of the taxation, before making his application.—*Re Phelps*, 6 V.L.R. (L.), 344.

(b) "Re-taxation" and "review and correction of taxation" in sections 111 and 112 are not

synonymous terms; nor does the latter include the former.

There is no power to make an order under section 111 for review of taxation of a bill of costs on the application of a stranger to the bill, even though he be a party interested in the property out of which the bill was paid.

The assignee of trust property out of which a

112. The payment<sup>(a)</sup> of any such bill as aforesaid shall in no case preclude the Court or Judge from referring such bill for taxation, if the special circumstances of the case in the opinion of such Court or Judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or Judge seem right.<sup>(b)</sup> Provided always that the application for such reference is made within twelve months after payment<sup>(c)</sup>

*Supreme Court Act 1916 s. 109.*

*Taxation of bill after payment.*

*The Common Law Procedure Stat. 1865 s. 396, 6 & 7 Vict. c. 73 s. 41.*

113. The Taxing Master may in any case request and receive the advice and assistance of any officer of the Court on or in connexion with any such taxation as aforesaid.

*Assistance of other officers.*

*Ib. s. 110.*

*Ib. s. 397.*

*Ib. s. 42.*

114. All applications<sup>(d)</sup> made under this Act to refer any such bill as aforesaid to be taxed and settled and for the delivery of such bill and for the delivery up of deeds documents and papers shall be made in the matter of such solicitor; and upon the taxation or re-taxation and settlement of any such bill the certificate of the officer by whom such bill has been taxed shall (unless set aside or altered by judgment or order) be final and conclusive as to the amount thereof; and payment of the amount certified to be due and directed to be paid may be enforced according to the course and practice of the Court;<sup>(e)</sup> and it shall be lawful for such Court or a Judge thereof to order judgment to be entered up for such amount with costs unless the retainer<sup>(f)</sup> is disputed or to make such other order thereon as such Judge deems proper.

*Applications for taxing bill of costs how to be made.*

*Ib. s. 111.*

*Ib. s. 395.*

*Ib. s. 43.*

*Certificate of taxation to be final.*

*Judgment may be entered.*

solicitor's bill of costs had, after taxation but prior to the assignment, been paid took out a summons calling upon the solicitor "to show cause why his bill should not be again referred to the proper officer for review and correction of his previous taxation."

*Held, by Lloyd, J. (who dismissed the summons), that the assignee was not a party interested in the property out of which the bill was paid.*

*Held, by the Full Court (Madden, C.J., and Holroyd, J.; a Beckett, J., dissenting), on appeal, that the summons was rightly dismissed, inasmuch as (a) the summons was a summons for an order to review taxation, and not for an order for re-taxation, and (b) an order to review taxation could not be made on the application of a stranger to the bill.*

*Held, further, that, inasmuch as at the date of the hearing more than twelve months had elapsed since the bill had been paid, the defect could not be cured by amendment.—Re Isaacs, ex parte The Original Mont de Piété Limited, 1905 V.L.R., 585.*

(a) In order that there may be such a payment of a bill of costs, as to constitute a settlement the money must be paid after the bill is delivered and after there has been an opportunity for the client to investigate the items in it.—*Ex parte Beck, 21 V.L.R., 362.*

(b) Large items in a bill of costs, which themselves require explanation, afford sufficient evidence of special circumstances to enable the client to obtain an order for taxation of the bill after payment.—*In re Bennett, 3 V.L.R. (L.), 220.*

The Court has power to order delivery of his bill by a solicitor, whether or not it has been

paid, and whether or not it is one which it would have jurisdiction to refer to taxation.—*Duffett v. McEvoy, 10 App. Cases, 300.*

(c) This proviso is an absolute bar to taxation after the expiration of twelve months from payment; but, if paid within twelve months preceding the application, special circumstances may induce the Court to have the bill taxed.—*In re Hardy, 7 V.L.R. (L.), 266; and see Re Isaacs, ex parte The Original Mont de Piété Limited, referred to in note (b) to preceding section.*

(d) An application for leave to have costs taxed and for delivery up of documents may be made on summons.—*Falkingham and others v. Victorian Railways Commissioners, 4 A.L.R. (C.N.), 33.*

(e) The Court can order that judgment be entered up for the amount certified in an allocatur, where balance is found to be due by the solicitor.—*In re Hardy and Madden, ex parte McIver, 7 V.L.R. (L.), 324.*

The power given by this section to order judgment to be entered for the amount of a taxed bill of costs applies only to cases where the bill has been referred for taxation by order of the Court or a Judge, and does not apply to cases where the bill has been taxed by appointment without an order of the Court or a Judge. Where an application under this section is improperly headed, the irregularity is merely a matter for amendment.—*Neighbour v. Russell, 23 V.L.R., 459.*

(f) Where a client has obtained the common order to tax he cannot, by baldly stating that he disputes the retainer, deprive the Court of its jurisdiction to make an order under this section.—*In re Woolf, ex parte Spillane, 16 A.L.T., 134.*

## DIVISION 3.—PROCEEDINGS BEFORE THE CHIEF CLERK.

*Supreme Court Act 1915 s. 112.*

Power to Judges to direct what matters shall be heard by themselves and what by the Chief Clerk.

*The Judicature Act 1883 s. 45.*  
15 & 16 Vict.  
c. 80 s. 29.

115. Any Judge of the Court may (subject to any general Rules of the Court) order what matters and things shall be investigated by and before the Chief Clerk, either with or without the direction of a Judge during their progress, and what matters and things shall be heard and investigated by the Judge himself, and particularly if any Judge so orders, the Chief Clerk shall take such accounts and make such inquiries as under the practice of the Court existing before the passing of *The Judicature Act 1883* have usually been or might have been prosecuted before the Master-in-Equity, and settle draft conveyances mortgages settlements leases conditions of sale or other instruments; and the Judge shall give such aid and directions in every or any such account or inquiry as he thinks proper, but subject nevertheless to the right hereinafter provided for the suitor to bring any particular point before the Judge himself.

Power to Chief Clerk to issue advertisements administer oaths &c.

*Ib. s. 113.*

*Ib. s. 46.*

*Ib. s. 30.*

116. The Chief Clerk shall, for the purpose of any proceedings directed by any Judge to be taken before him, have full power to issue advertisements to summon parties and witnesses to administer oaths to take affidavits to receive affirmations to examine parties and witnesses *vivâ voce* and to receive evidence upon affidavit.<sup>(a)</sup>

Parties &c. not attending liable to process &c.

*Ib. s. 114.*

*Ib. s. 47.*

*Ib. s. 31.*

117. Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of contempt in like manner as parties or witnesses are now liable to in case of disobedience to any order of the Court, or in case of default in attendance in pursuance of any order of the Court or of any writ of subpoena *ad testificandum*, and all persons swearing or affirming before any such Chief Clerk shall for any wilful and corrupt false swearing or affirming be liable to the penalties of perjury.

Result of proceedings before Chief Clerk to be embodied in form of short certificate.

*Ib. s. 116.*

*Ib. s. 48.*

*Ib. s. 32.*

118. The directions to be given by any Judge for or touching any proceedings before the Chief Clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the Judge signed by the Chief Clerk, and shall not be embodied in a formal report unless in any case the Judge sees fit so to direct, and when the Judge approves of such certificate or report he shall sign the same in testimony of his adopting the same.

No exceptions to lie to certificate. Parties may take opinion of Judge on any particular point.

*Ib. s. 116.*

*Ib. s. 49.*

*Ib. s. 33.*

119. No exceptions shall lie to any certificate or report of the Chief Clerk although signed and adopted by the Judge; but any party shall either during the proceedings before such Chief Clerk or within such time after such proceedings have been concluded and before such certificate or report has been signed and adopted as may be prescribed by the Rules of Court be at liberty to take the opinion of the Judge upon any particular point or matter arising in the course of the

(a) The same rules apply to an examination before the Chief Clerk as apply to an examination in Court. Accordingly, where an order has been made for the cross-examination of a witness who gives evidence by affidavit in an inquiry before

the Chief Clerk, the deponent may be cross-examined as to any matter which is in issue in the inquiry or relevant to the issues of the inquiry, and also as to his credit.—*Muir and others v. Harper and others*, 25 V.L.R., 534.



proceedings or upon the result of the whole proceeding when it is brought by the Chief Clerk to a conclusion.<sup>(a)</sup>

*Supreme Court Act 1916.*

120. When any certificate or report of the Chief Clerk has been signed and adopted by the Judge, the same shall be filed by the proper officer, and shall thenceforth be binding on all parties unless discharged or varied either at Chambers or in Court, according to the nature of the case, upon application by summons or motion within such time as may be prescribed in that behalf by any Rule of Court; and nothing herein contained shall prejudice or affect the power of the Court at any time to open any such certificate or report upon the same or like grounds as any report of the Master-in-Equity which had been absolutely confirmed might before the commencement of *The Judicature Act 1883* have been opened.

Certificate signed and adopted by Judge binding on all parties unless discharged or varied.  
*Ib. s. 117.*  
*The Judicature Act 1883 s. 50.*  
*15 & 16 Vict. c. 80 s. 84.*

#### DIVISION 4.—REFERENCES TO AND BUSINESS BEFORE THE MASTER-IN-EQUITY.

121. No reference<sup>(b)</sup> shall be made by the Court or a Judge to the Master-in-Equity except in cases in which from some previous reference in the cause or matter or in some other cause or matter connected therewith the Court or a Judge thinks it expedient to make such reference, and except in any case in which it is expressly enacted that a reference shall or may be made to the Master-in-Equity: Provided that the Master-in-Equity shall prosecute all business which at the commencement of *The Judicature Act 1883* was depending before him, and also all the references which before the commencement of the said Act have been made under decrees or orders of the Court, or which on or after that time have been or are made in relation to such excepted matter as aforesaid and shall prosecute such business as nearly as may be in the manner in which similar business is conducted in Judge's Chambers, save only that the Master instead of communicating directly with the Judge is to report shortly the result of his inquiries to the Court.

No fresh references to Master-in-Equity except in cases already before him and in cases arising under certain Acts.  
*Ib. s. 118.*  
*Ib. s. 23.*  
*Ib. s. 10.*

122. In case a vacancy occurs in the office of the Master-in-Equity before he has finally disposed of all causes and matters depending before or referred to him, the same shall be proceeded with and prosecuted before or as is directed by the Court.

How business disposed of in case of vacancy.  
*Ib. s. 119.*  
*Ib. s. 24.*

#### DIVISION 5.—ASSISTANCE OF ASSESSORS AND EXPERTS.

123. The Court or a Judge may in any cause or matter (other than a criminal proceeding by the Crown) in which it or he thinks it expedient so to do call in the aid of one or more assessors<sup>(c)</sup> specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors, but the Court or Judge shall not be bound by the opinion or finding of any such assessors. The remuneration (if any) to be paid to such assessors shall be determined by the Court or Judge.

Assessors.  
*Ib. s. 120.*  
*Ib. s. 29.*  
*36 & 37 Vict. c. 56 s. 50.*

(a) Where, in the administration of an estate under the direction of the Court, a claim has been made against the estate and adjudicated upon by the Chief Clerk, either party may take the opinion of the Judge on the adjudication before the Chief Clerk has made his certificate.—*Godfrey v. Hen-*

*nelly*, 19 V.L.R., 70.

(b) Sales of settled estates will be with the approbation of the Chief Clerk in place of the Master-in-Equity.—*In re Quinn*, 10 V.L.R. (En.), 336.

(c) As to calling in a medical assessor, see *Ferrier v. Ferrier*, 3 A.L.R., 33.

*Supreme Court Act 1915 s. 121.*  
*Power to Judges to take opinion of counsel.*  
*The Judicature Act 1883 s. 61.*  
*36 & 37 Vict. c. 66 s. 40.*

124. The Court or any Judge thereof when sitting at Chambers may require or receive the opinion of counsel for its or his aid and assistance in the investigation of the title to an estate with a view to an investment of money in the purchase or on mortgage thereof or with a view to a sale thereof, or in settling the draft of a conveyance mortgage settlement conditions of sale or other instrument, and in such other cases as are directed by any Rule of Court, but it shall be competent for any party to object to any opinion of any such counsel when he deems it open to objection, and thereupon the point in dispute shall be disposed of by the Court or by the Judge sitting in Chambers according to the nature of the case.

*Power to obtain assistance of accountants merchants &c.*  
*1b. s. 122.*  
*1b. s. 52.*  
*16 & 18 Vict. c. 80 s. 42.*

125. The Court or any Judge thereof in such way as it or he thinks fit may obtain the assistance of accountants merchants engineers actuaries or other scientific persons the better to enable such Court or Judge to determine any matter at issue in any action or proceeding, and may act upon the certificate of such persons.

*Fees to counsel &c.*  
*1b. s. 123.*  
*1b. s. 63.*  
*36 & 37 Vict. c. 66 s. 43.*

126. The allowances in respect of fees to such counsel accountants merchants engineers actuaries and other scientific persons shall be regulated by the Taxing Master of the said Court, subject to an appeal to any Judge, whose decision shall be final.

#### DIVISION 6.—ACTION FOR RECOVERY OF LAND. RELIEF FROM FORFEITURE FOR NOT PAYING RENT.<sup>(a)</sup>

*Proceedings by landlord where no sufficient distress.*  
*Supreme Court Act 1915 s. 126.*  
*15 & 16 Vict. c. 76 s. 210.*  
*4 Geo. II. c. 28 s. 2.*

127. In all cases between landlord and tenant as often as it happens that one half-year's rent is in arrear and the landlord or lessor to whom the same is due has right by law to re-enter for the non-payment thereof, such landlord or lessor may without any formal demand or re-entry serve a writ for the recovery of the demised premises; which service shall stand in the place or stead of a demand and re-entry. And in case of judgment against the defendant for non-appearance if it appears to the Court by affidavit or is proved upon the trial in case the defendant appears that half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made; and in case the lessee or his assignee or other person claiming or deriving under the said lease permits and suffers judgment to be had and recovered on such trial and execution to be executed thereon without paying the rent and arrears together with full costs and without proceeding for relief on equitable grounds within six months after such execution executed, then and in such case the said lessee his assignee and all other persons claiming and deriving under the said lease shall be barred and foreclosed from all relief or remedy other than by appeal; and the said landlord or lessor shall thenceforth hold the same demised premises discharged from such lease: Provided that nothing herein contained shall extend to bar the right of

*Lease voided unless relief be sought within six months after execution.*

(a) Relief against forfeiture was held to apply between the Crown and its tenants.—*The King v. Dale*, 12 A.L.R., 549.

any mortgagee of such lease or any part thereof who is not in possession, so as such mortgagee within six months after such judgment obtained and execution executed pays all rent in arrear and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and performs all the covenants and agreements which on the part and behalf of the first lessee are and ought to be performed.

*Supreme Court Act 1915.*  
Mortgagee of lessee may within six months after execution pay rent and costs.

128. In case the said lessee his assignee or other person claiming any right title or interest of in or to the said lease within the time aforesaid proceeds for relief in the Court, such person shall not have or continue any stay of proceedings in the action for the recovery of the land unless within such time or such enlarged time as may be fixed by a Judge he brings into Court and lodges with the proper officer such sum of money as is due and in arrear over and above all just allowances (such sum in case of dispute between the parties to be fixed by the Judge) and also the costs taxed in the said action for the recovery of land, there to remain till the hearing of the cause or to be paid out to the lessor or landlord on good security subject to the decree of the Court. And in case such proceedings for relief are taken within the time aforesaid and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he really and *bona fide* without fraud deceit or wilful neglect makes of the demised premises from the time of his entering into the actual possession thereof; and if what is so made by the lessor or landlord happens to be less than the rent reserved on the said lease, then the said lessee or his assignee before he is restored to his possession shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

Lessee not to have relief without payment of rent and costs.  
*Ib. s. 127.*  
*The Common Law Procedure Stat. 1855 s. 178.*  
*15 & 16 Vict. c. 76 s. 211.*  
*4 Geo. II. c. 23 s. 3.*

129. If the tenant or his assignee or other person claiming or deriving under the said lease at any time before the hearing in such action for the recovery of the land pays or tenders to the lessor or landlord his executors or administrators or his or their solicitor in that cause or pays into Court all the rent and arrears together with the costs, then and in such case all further proceedings in the said action shall cease and be discontinued; and if such lessee his executors administrators or assigns upon such proceedings as aforesaid are relieved, he and they shall have hold and enjoy the demised lands according to the lease thereof made without any new lease.

Tenant paying rent with costs proceedings to cease.  
*Ib. s. 128.*  
*Ib. s. 179.*  
*Ib. s. 212.*  
*Ib. s. 4.*

130. Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands tenements or hereditaments for any term or number of years certain or from year to year has expired or been determined either by the landlord or tenant by regular notice to quit, and such tenant or any one holding or claiming by or under him refuses to deliver up possession accordingly after lawful demand in writing made and signed by the landlord or his agent and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord thereupon proceeds by action for the recovery of such lands tenements or hereditaments, it shall be lawful for him to address a notice to such tenant or

Action by landlord against tenant holding over after expiration or determination of tenancy.  
*Ib. s. 129.*  
*Ib. s. 130.*  
*Ib. s. 213.*  
*1 Geo. IV. c. 87 s. 1.*

*Supreme Court Act 1915.*  
*Tenant to give security.*

*If tenant shall not do so judgment to be for the landlord.*

*Who may take security.*

*Ib. s. 130.*

*The Common Law Procedure Stat. 1865*

*s. 182.*

*15 & 16 Vict.*

*c. 76 s. 216.*

*1 Geo. IV.*

*c. 37 s. 4.*

*At hearing of action between landlord and tenant damages for mesne profits may be given.*

*Ib. s. 131.*

*Ib. s. 131.*

*Ib. s. 214.*

*Ib. s. 2.*

person requiring him to give such security (if ordered by the Court or a Judge) and for such purposes as are hereinafter next specified; and upon the appearance of the party on an affidavit of service of the writ and notice it shall be lawful for the landlord, producing the lease or agreement or some counterpart or duplicate thereof and proving the execution of the same by affidavit and upon affidavit that the premises have been actually enjoyed under such lease or agreement and that the interest of the tenant has expired or been determined by regular notice to quit (as the case may be) and that possession has been lawfully demanded in manner aforesaid, to move the Court or apply to a Judge at Chambers for a summons for such tenant or person to show cause within a time to be fixed by the Court or Judge on a consideration of the situation of the premises why such tenant or person should not enter into a recognisance by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages which are recovered by the plaintiff in the action; and it shall be lawful for the Court or Judge upon cause shown or upon affidavit of the service of the notice of motion or summons in case no cause is shown to make the same absolute in the whole or in part, and to order such tenant or person within a time to be fixed upon a consideration of all the circumstances to give such security with such conditions and in such manner as are specified in the said notice of motion or summons or such part of the same so made absolute; and in case the party neglects or refuses so to do and lays no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such order has been made and served and not complied with shall be at liberty to sign judgment for recovery of such lands tenements or hereditaments and costs.<sup>(a)</sup>

**131.** All securities given as last aforesaid may and shall be taken respectively in such manner and by and before such officers as the Court or a Judge directs but no action or other proceedings shall be commenced upon any such security after the expiration of six months from the time when possession of the premises or any part thereof has actually been delivered to the landlord.

**132.** Wherever it appears on the trial of any action for the recovery of land at the suit of a landlord against a tenant that such tenant or his solicitor has been served with due notice of hearing, the Judge before whom such cause comes on to be heard shall (whether the defendant appears upon such hearing or not) permit the claimant on the hearing, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the claim, to go into evidence of the mesne profits thereof which accrued or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the judgment given or to some preceding day to be specially mentioned therein; and judgment shall be given upon the whole matter both as to the recovery of the whole or any part of the premises and also as to the amount of the damages to be

(a) "I think this section ought to be brought into operation only when it appears there is no defence to the action. . . . This section con-

templates a case where there is no dispute about the tenancy."—*Per Hodges, J., Hopkins v. Kelly*, 11 A.L.J., 147.

paid for such mesne profits;<sup>(a)</sup> and in such case the landlord shall have judgment at the time hereinbefore provided not only for the recovery of possession and costs but also for the mesne profits found: Provided always that nothing herein contained shall be construed to bar any such landlord from bringing any action for the mesne profits which accrue from the judgment or the day so specified therein down to the day of the delivery of possession of the premises recovered in the action.

133. Nothing hereinbefore contained shall be construed to prejudice or affect any other right of action or remedy which landlords possess in any of the cases hereinbefore provided for otherwise than hereinbefore expressly enacted.

134. Where an action is brought by any mortgagee his heirs executors administrators or assignees for the recovery of any mortgaged lands tenements or hereditaments and no action is then depending for or touching the foreclosing or redeeming of such mortgaged lands tenements or hereditaments, if the person having right to redeem such mortgaged lands tenements or hereditaments and who appears and becomes defendant in such action at any time pending such action pays unto such mortgagee or in case of his refusal brings into Court all the principal moneys and interest due on such mortgage and also all such costs as have been expended in any action upon such mortgage (such money for principal interest and costs to be ascertained and computed by the Court or by the proper officer by such Court to be appointed for that purpose), the moneys so paid to such mortgagee or brought into such Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly and shall and may by order of the same Court compel such mortgagee at the costs and charges of such mortgagor to assign or reconvey such mortgaged lands tenements and hereditaments and such estate and interest as such mortgagee has therein and deliver up all deeds evidences and writings in his custody relating to the title of such mortgaged lands tenements and hereditaments unto such mortgagor who has paid or brought such moneys into the Court his heirs executors or administrators or to such other person or persons as he or they for that purpose nominate or appoint.

135. Nothing in the last preceding section contained shall extend to any case where the person against whom the redemption is prayed (by writing under his hand or the hand of his solicitor or agent to be delivered before the money is brought into Court to the solicitor or agent for the other side) insists either that the party praying a redemption has not a right to redeem or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage or are admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in

(a) After a forfeiture for breach of covenant in a lease mesne profits may be recovered in an action for the recovery of land under this section.—*Hume v. Dodgshun*, 9 V.L.R. (L.), 83.

*Supreme Court Act 1915.*

*Saving of former remedies.*  
*Ib. s. 192.*

*The Common Law Procedure Stat. 1885*  
*s. 188.*

*15 & 16 Vict.*  
*c. 76 s. 213.*

*1 Geo. IV.*  
*c. 87 s. 7.*

*Action for recovery of land by mortgagee.*

*Ib. s. 183.*

*Ib. s. 184.*

*Ib. s. 219.*

*7 Geo. II.*

*c. 20 s. 1.*

*Not to extend to certain cases.*

*Ib. s. 194.*

*Ib. s. 185.*

*Ib. s. 220.*

*Ib. s. 3.*

*Supreme Court Act 1916.*

question in any action is controverted or questioned by or between different defendants in the same action; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance.

Relief against forfeiture for non-payment of rent.

*Id.* s. 134.

*The Common Law Procedure Stat. 1855* s. 399.

23 & 24 Vict.

c. 126 s. 1.

15 & 16 Geo. V.

c. 49 s. 46.

**136.** In the case of any action for a forfeiture brought for non-payment of rent the Court or a Judge shall have power upon motion or summons to give relief in a summary manner, subject to the same terms and conditions in all respects as to payment of rent costs and otherwise as would formerly have been imposed by the Court in the exercise of its equitable jurisdiction;<sup>(a)</sup> and if the lessee his executors administrators or assigns are so relieved, they shall hold the demised lands according to the terms of the lease and without the necessity of any new lease.

#### DIVISION 7.—REPLEVIN.

Writ of replevin.

*Id.* s. 140.

*Id.* s. 138.

13 & 14 Vict.

c. 18 s. 12.

Fourth

Schedule.

**137.** When any action of replevin has been commenced in the Court, it shall be lawful for the plaintiff therein to sue out of such Court a writ, to be called a writ of replevin, directed to the sheriff requiring him to replevy the goods and chattels under distress; and the Court is hereby authorized to issue such writ, which shall be in the form contained in the Fourth Schedule to this Act and shall have the same effect as any process or proceedings for such purpose heretofore in use; and the said sheriff shall in cases not otherwise by law provided for upon good security (by the bond of the plaintiff and two responsible persons as sureties conditioned to prosecute the suit with effect and without delay) being given to him execute such writ and return the said writ with a correct and proper statement indorsed thereon of the manner in which the same has been executed or the cause why the same has not been executed to the Court within a reasonable time next after such writ has been delivered to him: Provided always that the value of the property so distrained shall be ascertained by the said sheriff in like manner as the value of goods distrained is now ascertained in taking security in replevins; and that the said bonds shall be assignable under like circumstances and in like manner and shall be available to the assignee thereof as by law now authorized and directed with reference to bonds in replevin.

#### DIVISION 8.—SERVICE OUT OF THE JURISDICTION.

Provision as to service out of the jurisdiction.

*Supreme Court Act 1922* s. 3.

Fifth Schedule.

**138.** The Rules of Court in the Fifth Schedule to this Act shall as to all matters to which they extend regulate the proceedings in the Court.<sup>(b)</sup>

(a) See sections 127-129. An injunction to restrain proceedings before justices in petty sessions for the recovery by a landlord of possession was refused where the hearing before the justices had been concluded but the decision had not been given.—*Mitchell v. Spong*, 24 V.L.R., 685.

(b) A cause of action under the former section was held to mean the particular act or omission causing the injury complained of, not every material fact to be proved in order to enable the plaintiff to succeed.—*In re Chidzey*, 1920 V.L.R., 558.

For a case in which it was held there was a breach within the jurisdiction of a contract, see *Wainwright and Sons Pty. Ltd. v. Gibson*, 1921 V.L.R., 8.

As to the practice under the section, see *McCull v. Peacock*, 1924 V.L.R., 102.

A plaintiff applied for and was granted leave to serve a writ out of the jurisdiction, in Palestine, a country under British mandate. Later, the petitioner applied for an order for substituted service on the ground that the whereabouts of the defendant in Palestine were unknown save to

**139.** The power to make Rules of Court conferred by Part II. of this Act shall include power to alter annul or add to the Rules in the Fifth Schedule to this Act and to make any other rules for regulating service out of the jurisdiction of the Court.

*Supreme Court Act 1922 s. 4.*  
Power to make Rules relating to foreign procedure.  
Fifth Schedule.

#### DIVISION 9.—ARREST IN PENDING ACTIONS.

**140.** No person shall be arrested upon mesne process in any civil action in the Court.

Arrest on mesne process abolished.  
*Supreme Court Act 1915 s. 146.*

**141.** If a plaintiff in any action in the Court in which the defendant was prior to the third day of October One thousand eight hundred and thirty-nine<sup>(a)</sup> liable to arrest, whether upon the order of a Judge or without such order, by the affidavit of himself or some other person or persons shows to the satisfaction of a Judge of the Court that such plaintiff has a cause of action against the defendant or defendants to the amount of Twenty pounds or upwards or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to remove or is or are making preparations to remove out of the jurisdiction of the Court, and that such action will be defeated unless he or they is or are forthwith apprehended, such Judge may order that such defendant or defendants so about to remove or abscond shall be arrested and imprisoned until further order of the Court or a Judge or until he or they gives or give security as herein-after mentioned.<sup>(b)</sup>

*The Common Law Procedure Stat. 1865 s. 331.*  
1 & 2 Vict. c. 110 s. 1.  
No person to be arrested or held to bail unless on proof to the satisfaction of a Judge that he is about to remove out of the jurisdiction of the Supreme Court.  
*Ib. s. 147.*  
*Ib. s. 332.*  
*See 32 & 33 Vict. c. 62 s. 6.*  
1 & 2 Vict. c. 110 s. 3.

defendant's two brothers in Victoria, whom he had appointed his attorneys under power to manage the property in Victoria which was the subject-matter of the action, with authority to settle the dispute as to it. The brothers had declined to inform plaintiff of defendant's whereabouts, but had threatened that if an action were commenced they would warn him of it, and would use every effort to prevent service on him of the writ.

On proof of these facts by affidavit, an order was made for substituted service of the writ by serving it on the two attorneys under power in Victoria.—*Rosenbaum v. Rosenbaum*, 1926 V.L.R., 280.

An originating summons is a "writ of summons" within the meaning of section 4 of the *Service and Execution of Process Act 1901-1924*, and therefore may be served on a defendant in any part of the Commonwealth. Section 27 of the same Act makes the rules referred to in this section applicable to such service, as far as practicable.—*In re Boyd deceased. Woods v. Boyd*, 1927 V.L.R., 132.

For cases under the former sections, see notes to section 141 *et seq.* of the *Supreme Court Act 1915* and *Bear v. S. L. Jones and Co.*, 1922 V.L.R., 816.

(a) This was the date of the passing of the Act 3 Victoria No. 15 which first abolished arrest on mesne process. Compare the *English Debtors Act 1869*, section 6, and the notes to that section and to Order 69 in the *English Books on Practice*.

(b) In an application under this section the plaintiff, in order to succeed, must not only show that there is a debt due and that the defendant is about to leave the State, but he must also satisfy the Court that the action will be defeated unless the defendant be arrested.—*Moss and Co. v. Johnston*, 22 V.L.R., 530.

An order was made under the corresponding section of the *Supreme Court Act 1890* holding a defendant to bail, though he had no immediate intention of leaving the colony, it being shown that circumstances might arise under which he would probably soon leave. The section was not intended to apply only to persons absconding.—*Slattery v. Slattery*, 5 A.L.R. (C.N.), 45.

On an application for an order to hold the defendant to bail, under the corresponding section of the *Supreme Court Act 1890*, it was held that it must be shown that the defendant was about to leave the jurisdiction in such a manner that the plaintiff would be deprived of the fruits of a judgment if the defendant was not arrested, and it was not sufficient to show merely that the defendant was leaving the jurisdiction.—*Gannon v. Clifford*, 2 A.L.R., 241.

It was held in an application under the corresponding section of the *Supreme Court Act 1890* (No. 1142) to hold to bail a person about to leave the State, that it was not sufficient merely to show that there was a cause of action against the defendant, and that he was about to leave the State; but that it must further appear that the action would

*Supreme Court Act 1915 s. 148.*

Order may be made at any stage of the proceedings before final judgment.

*The Common Law Procedure Stat. 1885 s. 331.*

1 & 2 Vict. c. 110 s. 5.

Form of application and order to arrest.

*Supreme Court Act 1915 s. 149.*

Sixth Schedule.

Indorsement on order to arrest.

*Id. s. 150.*

Sheriff &c. not to execute process unless the order be delivered by a solicitor &c. and indorsed with his name and place of abode.

*Id. s. 151.*

*The Common Law Procedure Stat. 1865 s. 388.*

7 & 8 Geo. IV. c. 71 s. 8.

142. Any special order may be made and the defendant arrested in pursuance thereof at any time after the commencement of such action and before final judgment has been obtained therein; and a defendant in custody upon any such arrest and not previously served with a copy of the writ of summons may be lawfully served therewith.

143. An order to arrest under the provisions aforesaid (which shall be in the form in the Sixth Schedule with such variations as circumstances may require) shall be made upon affidavit and *ex parte*; but the defendant may at any time apply to the Court or a Judge to rescind or vary the order or to be discharged from custody, or for such other relief as is just.

144. An order to arrest shall before delivery to the sheriff be indorsed with the address for service of the plaintiff and of his solicitor (if any) as required by the Rules of the Court in relation to writs of summons.

145. No sheriff deputy sheriff or other officer having the execution of the order shall arrest the person of any defendant upon an order taken out by any plaintiff in his own person, unless the same at or before the time of making such arrest is delivered to such sheriff deputy sheriff or other officer by some solicitor of the Court or by the clerk of such solicitor or an agent authorized by such solicitor in writing, and unless the said order is indorsed by such solicitor or his clerk or such agent as aforesaid in the presence of such sheriff deputy sheriff or other officer having the execution thereof with the name and place of abode of such solicitor.

he defeated, as, for example, that the defendant has realized his assets and was about to leave, taking with him the proceeds of realization. And held, further, that a writ of *capias* should not be granted in cases where it merely appeared that the defendant had no property in the State which could be seized upon in execution of the judgment. — *O'Connor v. Picaire*, 27 V.L.R., 2.

It was held that in an application under the corresponding section of the *Supreme Court Act 1890* for an order to hold a defendant to bail the Judge must in each case in the first place be satisfied that the defendant is about to remove, or preparing to remove out of the jurisdiction of the Court, and then he should carefully consider the whole circumstances in order to be reasonably sure that the action will be defeated unless the order is made, and these circumstances involve a consideration of the amount involved in the action, and the costs incurred in the attempt to recover it.

Held, further, that it was not necessary that an order for a writ of *capias* should state that the defendant was held to bail at the suit of the plaintiff. — *Chester v. Varty*, 23 V.L.R., 28.

*Per Cur.*—"We think it right to express our opinion that affidavits for the purpose of obtaining a *capias* should state facts and materials to satisfy the Judge that the action would probably be defeated if the defendant should not be held to bail. The inference to be drawn is partly of law and partly of fact, and is to be drawn by the Judge from the materials furnished by the affidavits;

it is not for the deponent to draw it, merely deposing that he believes the action will be defeated if the order is not made. . . . The words 'and that such action will be defeated' have been advisedly inserted in our Act, and cannot be rejected or ignored." — *Ivey v. Cavanagh*, 4 V.L.R. (L.), at page 278; see also *Price v. Santley*, 11 A.L.T., 147; *Paterson v. Marshall*, 16 V.L.R., 418.

*Barry, J.*, set aside a *capias* on the ground that the affidavit upon which it had been granted did not contain the facts from which it might be inferred that the action would be defeated unless the defendant were forthwith apprehended. — *Lordan v. Huston*, 1 A.L.T., 54.

*Quere*, whether the fact that the defendant is about to leave the State permanently is a ground sufficient to satisfy a Judge that an action will be defeated unless the defendant be apprehended. — *Paterson v. Marshall*, 16 V.L.R., 418.

A married woman having separate estate may be arrested under this section. — *Long v. Gwyther*, 2 A.L.R. (C.N.), 319.

The fact that a defendant is about to remove himself permanently from the jurisdiction is not in itself sufficient to warrant the making of an order under this section directing the arrest of such defendant; it must also be shown that there is probable ground that the action will be defeated unless the defendant be apprehended. — *Lundgren v. O'Brien*, 1921 V.L.R., 200.



146. The order may be made or executed upon a Sunday in like manner as upon any other day.

*Supreme Court Act 1915 s. 162.*

Order may be executed on Sunday.

147. No person shall be subject to arrest who by reason of any privilege usage or otherwise is by law exempt therefrom.

Privilege from arrest.

*Ib. s. 163.*

148. When the defendant is described in the writ of summons or order by initials or by a wrong name or by a name other than his full name he shall not by reason thereof be discharged out of custody if it appears to the Court or Judge that due diligence has been used to obtain knowledge of the proper name.<sup>(a)</sup>

Misdescription of defendant.

*Ib. s. 154.*

149. The security to be given by a defendant may be a deposit in Court of the amount mentioned in the order not exceeding the amount claimed in the action, or a bond to the plaintiff by the defendant and two sufficient sureties (or, with the leave of the Court or a Judge either one surety or more than two) that if judgment in the action is entered for the plaintiff on the sum named in the bond or any lesser sum the sum for which judgment is so entered shall forthwith be paid to the plaintiff or, with the plaintiff's consent, any other form of security. The plaintiff may, within four days after receiving particulars of the names and addresses of the proposed sureties, give notice that he objects thereto, stating in the notice the particulars of his objections. In such case the sufficiency of the security shall be determined by the Prothonotary, who shall have power to award costs to either party and such order as to costs may be enforced as if it was an order of a Judge. It shall be the duty of the plaintiff to obtain an appointment for the purpose of determining the sufficiency of the security and unless he does so within four days after giving notice of objection, the security shall be deemed sufficient.

Security to be given by defendant.

*Ib. s. 155.*

150. The money deposited, and the security, and all proceedings thereon, shall be subject to the order and control of the Court or a Judge.

Control of the Court.

*Ib. s. 156.*

151. Unless otherwise ordered the costs of and incidental to an order for arrest shall be costs in the cause, and in all proceedings under this Division the Court or Judge may make such order as to costs as it or he thinks fit.

Costs.

*Ib. s. 157.*

152. Upon payment into Court of the amount mentioned in the order, a receipt shall be given; and upon receiving the bond or other security, a certificate to that effect shall be given, signed or attested by the plaintiff's solicitor if he has one, or by the plaintiff, if he sues in person. The delivery of such receipt, or a certificate to the sheriff or officer executing the order, shall on payment of the sheriff's fees and allowances entitle the defendant to be discharged out of custody.

Discharge of defendant.

*Ib. s. 158.*

153. The sheriff or other officer named in an order to arrest shall, within two days after the arrest, indorse on the order the true date of such arrest.

Date of arrest.

*Ib. s. 159.*

(a) It was held that the affidavit in support of an application for a writ of *capias* must contain the full and proper Christian names and surname of the defendant, unless the plaintiff, after the

exercise of due diligence, was unable to obtain them.—*Bazler v. Hill and Christie*, 2 A.L.R., 158; and see *Chester v. Varty*, 23 V.L.R., 28.

*Supreme Court Act 1915 s. 160.*  
Fees to be as heretofore.

154. The sheriff or other officer executing the order shall be entitled to the same fees and allowances as heretofore.

#### DIVISION 10.—FOREIGN ATTACHMENT.

On return of *non est inventus* and on affidavit filed &c. plaintiff may proceed against an absent defendant by foreign attachment.  
*Id.* s. 161.  
*The Common Law Procedure Stat. 1855 s. 211.*

155. In every action at law in the Court on or arising out of contract and in every action in such Court for the conversion or detention of goods wherein the writ of summons or of *capias* (as to any defendant named therein) is returned *non est inventus*, if upon or after such return an affidavit is filed on behalf of the plaintiff (in addition to a full affidavit of the cause of action) that such cause of action arose within Victoria and that to the best of deponent's belief such defendant does not reside within Victoria and is to the best of deponent's belief possessed of or entitled to or otherwise beneficially interested in any lands moneys securities for money chattels or other property in the custody or under the control of any person or persons in Victoria hereinafter called the garnishee or garnishees (to be named in such affidavit) or that any such person or persons is or are indebted to such defendant, the plaintiff may proceed against such defendant by process of foreign attachment in the manner hereinafter directed: (a) Provided that by leave of a Judge (where it appears that the plaintiff may sustain injury by the delay) such affidavit may be filed before the return of such writ of summons.

Form of attachment and how served.  
*Id.* s. 162.  
*Id.* s. 212.

156. At any time after the filing of such affidavit as aforesaid a writ of foreign attachment may be issued at the plaintiff's instance as of course; and every such writ shall be returnable into the said Court or before a Judge thereof as the plaintiff thinks fit on some day not less than fourteen days nor more than sixty days next after the date thereof, and shall be served upon the several garnishees or persons therein named in whose hands it is intended thereby to attach any such lands moneys chattels or debts by delivering a copy thereof to each such garnishee personally or by leaving the same at his or her then or last usual place of abode: Provided always that final judgment shall in no case be signed in any such action until an entry has been made on the record of the issue of such writ of attachment with a suggestion of the fact that the cause or causes of action so

Proviso as to proof where cause of action accrued.

(a) The conditions prescribed by this section as precedent to the issue of a writ of foreign attachment must be strictly complied with.

The affidavit must set forth the facts on which the plaintiff relies as showing he has a good cause of action, and that it arose in Victoria. It is not sufficient for the affidavit to state generally the cause of action, and that it arose in Victoria.—*Henderson v. Ward*, 1912 V.L.R., 289.

Separate affidavits need not be made, one of the cause of action, and the other that such cause arose in Victoria, but the two statements may be joined in one affidavit.—*Wilson v. Threlkeld*, 3 W.W. & A.B. (L.), 159.

A return, "He cannot be found" is sufficient.—*Id.* Compare *R. v. Kent*, 2 M. & W., 316, where a return "not to be found" was held insufficient.

It was said in *Bank of New South Wales v.*

*Fenton*, 1 V.L.T., 64, that the proper course for the plaintiff to adopt was to make a special application to the Court or a Judge founded upon affidavit that the sheriff may be directed to serve the writ and return *non est inventus* if he is unable to serve the defendant. Compare *Kenny v. Teal*, Legge, 329, and *Ex parte Smith*, Legge, 945.

*Per Holroyd, J.*—"Where the writ of foreign attachment was addressed to the garnishee in the wrong name, the writ cannot be amended, but the application must be commenced *de novo*."—*Bailey v. Barclay*, 6 A.L.T., 66.

If any portion of the subject-matter of the suit fail it fails altogether. *Semble*, where the person concerned is not subject to the jurisdiction of the Court, he may apply to have the proceedings set aside without appearing.—*Ford v. Clark*, A.R., 13th September, 1860.

arose as aforesaid;<sup>(a)</sup> and in case it at any time appears that the cause of action did not arise within Victoria or its dependencies, the attachment shall be forthwith dissolved with costs to be paid by the plaintiff to such parties and in such manner as the Court or any Judge thereof shall direct.

*Supreme Court Act 1915.*

157. In addition to such service the plaintiff shall also cause a notice of the issue of such writ signed by him or his solicitor<sup>(b)</sup> to be published in the *Government Gazette* and not less than twice in one other Melbourne newspaper, and the last of such publications thereof shall be one week at the least before the day on which the writ of attachment is made returnable.

Public notice to be given.  
*Id.* s. 163.  
*The Common Law Procedure Stat. 1866 s. 213.*

158. Every writ of foreign attachment and every notice thereof to be published as aforesaid and the condition of every bond to be entered into by the plaintiff as hereinafter provided shall be in the respective forms contained in the Seventh Eighth and Ninth Schedules to this Act; and in every such writ and copy thereof the place of residence or supposed residence of the garnishee or wherein the garnishee is or is supposed to be shall be mentioned; and it shall not be necessary to mention any form or cause of action in any such writ; and every such writ shall contain the names of all the defendants and shall not contain the name or names of any defendant or defendants in more actions than one; and every such writ may be served by any person who may by law serve a writ of summons; and the service of such writ shall and may when necessary be proved by the affidavit of the person who served the same; and for the purpose of issuing such writ the return of *non est inventus* to the writ of summons shall and may be made by the plaintiff or his solicitor suing out the same (as the case may be); and where there is more than one garnishee, it shall not be necessary to issue more than one writ of foreign attachment, notwithstanding that the property intended to be attached is in the several custody or control of such garnishees respectively.

Writ of foreign attachment.  
*Id.* s. 164.  
*Id.* s. 214.  
Seventh Eighth and Ninth Schedules.  
Return of the summons.  
2 Will. IV. c. 39 s. 10.

159. From the time of the service of such writ upon any such garnishee or person as aforesaid all and singular the lands and other hereditaments moneys and chattels bills bonds and other property of whatsoever nature in the custody<sup>(c)</sup> or under the control of such garnishee then belonging to the defendant against whom such writ issued or to or in which such defendant then is legally or equitably entitled or otherwise beneficially interested (and whether solely or jointly with any person or persons), and all debts of every kind then due by any such

Property and debts bound from the time attachment served.  
*Id.* s. 165.  
*Id.* s. 215.

(a) An action was commenced against two joint debtors. A writ of foreign attachment was issued, and an order made attaching property of E., one of the defendants. A verdict was found for the plaintiffs, but before judgment was signed E. became insolvent. A suggestion, in accordance with this section, was subsequently entered upon the roll, and judgment signed; on the application of the official assignee and E., the entry of the suggestion and signing of judgment were ordered to be set aside, with costs, on the ground that the property attached, passed, in the insolvency, to

E.'s official assignee.—*Lauratet v. McCracken*, 3 V.R. (L.), 41.

(b) The notice required by this section should be shown to have been signed by the plaintiff or his solicitor. The signature of the name of the plaintiff's solicitor by a clerk in his employ is not sufficient.—*Fraser and Co. v. Rochelle*, 15 A.L.T., 95.

(c) Service on one of the members of a firm was held to be sufficient where he had the custody of the goods.—*Fisher v. Wilson, Legge*, 155.

*Supreme  
Court Act 1916.*

garnishee to such defendant although the same or part thereof may be payable only at a future day, shall to the extent of such defendant's right title and interest therein respectively be attached in the hands of such garnishee and (subject to any *bona fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which he or she has by the said writ had notice; and if any such garnishee or person without the leave of the Court or one of the Judges at any time after such service and before the said attachment is dissolved sells or otherwise knowingly disposes of or parts with any such property or pays over any such debt or any part thereof excepting only to or to the use of the plaintiff in such writ, he or she shall upon the application in a summary way of such plaintiff to the Court or any Judge thereof and on proof of the facts pay such damages to the plaintiff as such Court or Judge thinks fit to order.<sup>(a)</sup>

*Inquiry as to  
property in  
garnishee's  
hand.  
Id. s. 186.  
The Common  
Law Procedure  
Stat. 1885 s. 216.*

160. Upon the return of every such writ of attachment as aforesaid or as soon after as conveniently may be and upon such other day or days of adjournment (if any) as are in that behalf directed, the said Court or one of the Judges thereof shall proceed to inquire and determine whether in fact the plaintiff's cause of action arose within Victoria, and if so then what lands moneys chattels and other property as aforesaid (sufficient or not more than sufficient to satisfy the plaintiff's cause of action together with his costs of suit) then are or were at the time of the service of the said writ in the custody or under the control of any such garnishee or person as aforesaid belonging to the defendant or to or in which he was at that time entitled or interested as aforesaid, and what debts were then due to such defendant from any such garnishee or person and the particulars thereof, and whether such lands moneys and other property and debts or any part or parts thereof are or can be made available for the purpose of making such satisfaction as aforesaid and to what amount respectively; and for the purposes of such inquiry and determination the said Court or Judge may in a summary way examine or permit the said plaintiff to examine *visâ voce* upon oath every such garnishee or person together with such witnesses (if any) as the said Court or Judge thinks proper to be so examined, and for that purpose may make such orders and issue such summonses to the several garnishees and to any witness or witnesses as in that behalf are deemed expedient; and every such garnishee or person as aforesaid or witness who refuses or neglects to attend according to the exigency of any such writ of attachment, or to obey any such order or summons, or refuses to be so examined, shall be liable to be summarily proceeded against as in cases of contempt of Court and to be punished accordingly: Provided always that in any case where in the circumstances it appears to be reasonable or just so to do, the Court or Judge may dispense with the attendance of any such garnishee upon his submitting to be examined upon oath before a commissioner or examiner to be named by such Court or Judge for the purpose, or

*Plaintiff may  
examine  
garnishee.*

*Attendance  
parties.*

(a) In proceeding by writ of foreign attachment against a garnishee who has parted with property that had been attached, it is essential that the property should actually and not merely constructively belong to the defendant in the action;

and being satisfied of that fact, it was held that the granting an issue to try the question of property or making an order against the garnishee in respect thereof was a matter for the discretion of the Court.—*Wilson v. Trail*, L.R., 3 F.C., 33.

upon such other terms as such Court or Judge imposes; and where any such garnishee attends in obedience to any such writ or summons, the Court or Judge may award him the reasonable expenses of such attendance to be paid by the plaintiff.

*Supreme Court Act 1916.*

161. If any such garnishee or person in whose hands any such lands goods or property as aforesaid have been so attached is desirous of disposing of the same or any part thereof or of receiving or paying (as the case may be) the amount of any bill bond or debt or other chose in action or any part thereof pending such attachment and applies for that purpose to the Court or to one of the Judges, the Court or Judge (due notice having been given to the plaintiff of such intended application) may authorize such garnishee or person to sell<sup>(a)</sup> or dispose of any such property or to receive or pay any such amount; and the proceeds of such sale or disposal or the amount so received or paid (as the case may be) shall be thereafter held by such garnishee or person or be paid into Court or invested or otherwise be detained or appropriated subject to such attachment as aforesaid, or otherwise for the satisfaction of the plaintiff as such Court or Judge thinks fit to order.

*Disposal of goods &c. by leave of Court. Ib. s. 167. The Common Law Procedure Act 1865 s. 217.*

162. At any time after the return day of any such writ of attachment, the plaintiff may proceed in the action as if such defendant resided in Victoria and had appeared to such action in person: Provided that such bond as is hereinafter in that behalf prescribed has been first duly entered into.

*After attachment returned plaintiff may proceed in the action. Ib. s. 168. Ib. s. 218.*

163. So soon as upon any such examination or inquiry as aforesaid it shall be ascertained by the Court or Judge what lands moneys, or other such property and debts as aforesaid can (consistently with existing liens or prior claims thereon to be determined by the said Court or Judge) be made available for the purpose of making satisfaction to the plaintiff as aforesaid, the said Court or Judge shall forthwith order the same (or such part or parts thereof respectively as such Court or Judge thinks proper) to be thenceforward held for that purpose and to continue subject to such attachment accordingly or to be sold or otherwise disposed of if such Court or Judge thinks fit, and the proceeds or (in case of debts then payable) the amount of such debts to be paid into the hands of some officer of the Court subject to such attachment as the said Court or Judge orders; and with respect to all and singular the lands moneys and other property debts and other choses in action to which no such order as aforesaid is intended to apply or as to which no such order can be made, the said Court or any of the Judges may at any time direct that the said attachment shall be dissolved: Provided always that where more writs of attachment than one have issued against the same garnishee or person or the same property has been attached at the suit of more than one plaintiff, the said Court or any Judge may award and determine how much and what parts of the property so attached or to what amount in value thereof shall be retained

*Court to determine what property is to continue subject to attachment. Ib. s. 169. Ib. s. 218.*

*Provisions as to any second writ.*

(a) *Seem*, that an application for sale is necessary to the validity of the Judge's order for sale under this section, and that if an order were made

by consent without such application it would be set aside.—*Wilson v. Threlkeld*, 3 W.W. & A.R. (L.), 153.

Supreme  
Court Act 1915.

or held under each of such writs or be paid into Court or disposed of (as the case may be) for the separate benefit of each plaintiff; and as to writs issued on the same day the plaintiffs therein shall be entitled to satisfaction *pari passu*; but if any of such writs has been issued on different days, the plaintiffs shall be entitled to satisfaction respectively according to the priority of issue.

Plaintiff to enter  
into a bond to  
account &c.  
Ib. s. 170.  
The Common  
Law Procedure  
Stat. 1805  
s. 220.

164. Within fourteen days next after any such writ of attachment has been issued as aforesaid, the plaintiff at whose suit the same has been issued or if absent some person on his behalf shall before one of the Judges or the Prothonotary of the Court enter into a bond,<sup>(a)</sup> with two sufficient sureties to be approved of by such Judge or Prothonotary, acknowledging himself and themselves to be indebted to the defendant against whom such attachment has so issued in such sum as one of the Judges thinks fit to order, conditioned amongst other things to repay all such sums as the said plaintiff recovers in the action in case the judgment therein is thereafter vacated reversed or altered together with all costs sustained by the defendant; and in case of any breach or alleged breach of the condition of such bond, the defendant shall be at liberty to sue the parties to such bond thereon at any time; and if such bond is not so entered into as aforesaid the attachment shall be *ipso facto* dissolved.

Provision for  
dissolving  
foreign  
attachment.  
Ib. s. 171.  
Ib. s. 221.

165. If, pending any such writ of foreign attachment as aforesaid or at any time before final judgment obtained in the action in which such writ issued, the defendant against whom such attachment has issued or any person on his behalf before one of the Judges of the said Court enters into a bond, with two sufficient sureties to be approved of by such Judge, acknowledging himself and themselves to be indebted to the plaintiff in such sum as the Judge thinks fit to order, conditioned to pay the said plaintiff the amount of such debt or damages and costs as he at any time thereafter recovers in such action, then such defendant or person entering into the said bond may, upon entering an appearance<sup>(b)</sup> or after the return day of such writ then delivering an answer or defence therein defend such action and upon giving notice thereof to the said plaintiff apply to the said Court by motion as of course that the said attachment may be dissolved, and the same shall be dissolved accordingly; and the action shall thereupon proceed to trial and judgment in the ordinary manner.

(a) By sections 162 and 164, proceedings in an action, after the return of the writ of attachment, are made dependent upon the plaintiff duly entering into a sufficient bond within the time limited by this section, namely, fourteen days, and not only are those proceedings taken subsequently to the execution of an insufficient bond irregular, but those which precede it are inoperative.—*Nicholson v. Robertson*, 1 W. & W. (L.), 27.

The word "enter" includes filing, and all the plaintiffs must enter into the bond, and the defendant need not before taking an objection to the proceedings enter an appearance under

section 165.—*Sandford v. Howell*, A.R., 27th December, 1858.

(b) A defendant whose property has been attached by process of foreign attachment has a right to come in and enter an appearance in the action and plead without entering into a bond, where he does not seek to dissolve the attachment.—*Fogarty v. Dennis*, 5 V.L.R. (L.), 479.

And a defendant, without entering an appearance or giving a bond, may claim to be present and to be heard by counsel on the assessment of damages.—*Beeby v. Wieland*, A.R., 30th June, 1859.

... 166. If after any final judgment obtained as aforesaid an affidavit is made by the defendant against whom such process of foreign attachment is issued as aforesaid that such defendant had at the time of the obtaining of the said judgment and still has a substantial ground of defence (either wholly or in part) to the plaintiff's action on the merits, and such affidavit at any time before the expiration of three years next after such judgment filed in the said Court, then upon motion thereupon for that purpose made to the Court on behalf of the defendant and after due notice thereof given to the plaintiff (and security being entered into for the payment to him of all costs by him at any time thereby sustained), the Court may cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form and at such time and under terms and conditions for the purpose of securing the substantial ends of justice as to the Court seems meet; and the Court after such inquiry and determination had shall thereupon give such judgment in the matter for the reversal of the judgment in the original action either in the whole or in part, or from time to time make such order or orders in the premises between the parties as the justice of the case appears to require; and every such judgment and order may at any time (if the party succeeding thinks fit) be suggested upon or added to the record of the original action in which such final judgment has been so obtained as aforesaid.<sup>(a)</sup>

*Supreme Court Act 1913 s. 172.*  
 Provision enabling absent defendant to come in and defend notwithstanding judgment against him.  
*The Common Law Procedure Stat. 1865 s. 222.*

167. The property of any such absent defendant as aforesaid may be attached and taken in the custody or power of the defendant's wife or of any co-defendant; and no process of foreign attachment against any such absent defendant nor any lien intended to be thereby created upon the lands moneys securities debts and chattels or other property of such defendant thereby attached shall be defeated by reason of such co-defendant or any other garnishee as aforesaid being or claiming to be jointly interested with such defendant therein either as partner or otherwise; and in all cases it shall be sufficient for the purposes of this Act to attach property in the hands of the person or persons having the actual care custody or control thereof for the time being.

Property in possession of any co-defendant or wife.  
*Ib. s. 172.*  
*Ib. s. 222.*

168. Every writ of attachment upon which any order has been made as aforesaid where the same has been followed by execution levied may be pleaded in bar by any person or persons in whose hands any lands goods debts or effects as aforesaid were attached to any action or other claim brought by or on behalf of the defendant for the recovery of such property;<sup>(b)</sup> and if any such action or other claim is brought pending the attachment, the same shall be stayed by order of the Court or a Judge until the attachment is dissolved or the proceedings thereupon are otherwise determined. And in such plea it shall be necessary only to state shortly that such writ of attachment was issued and

Attachment and execution may be pleaded in bar.  
*Ib. s. 174.*  
*Ib. s. 224.*

(a) See *Croker v. Barnes*, N.C., 16, as to procedure under the section. An absent debtor is not in all cases bound to comply with the provisions of this section before he can be heard, but may on proper grounds claim the protection of the Court to set aside proceedings which have been improperly taken against him.—*Nicholson v. Robertson*, 1 W. & W. (2), 27.

(b) A judgment creditor, who has obtained a writ of foreign attachment, has only an inchoate right, it may be rendered complete by levy; such a levy, to perfect title against an official assignee of the debtor who becomes insolvent after the writ is issued, is necessary under this section.—*Lauriat v. McCracken*, 3 V.R. (L.), 41.

*Supreme  
Court Act 1913.*

to set out the substance of the order finally made thereon, and then to allege that the property sought to be recovered was taken under a writ of execution issued after such order.

*The term  
"absence."*  
*Id. s. 176.*

*The Common  
Law Procedure  
Stat. 1868 s. 225.*

*The Court may  
make rules and  
award costs and  
direct trials  
before a jury.*  
*Id. s. 176.*  
*Id. s. 226.*

169. Absence from Victoria shall with reference to foreign attachment be taken to mean absence for the time being, whether the party ever has been within Victoria or not.<sup>(a)</sup>

170. The Court or any of the Judges, for the more satisfactory determination of any question of fact arising before the Court or Judge under this Act with reference to foreign attachment, may direct the trial of any issue or issues by a jury; and for that purpose may make all necessary orders as to the form thereof and who shall be parties therein and otherwise; and in all cases in which no provision or no sufficient provision is made, it shall be lawful for the Court from time to time, for the purpose of facilitating or more effectually carrying into execution any of the objects of this Act with reference to foreign attachment (either upon any application in a summary way made for that purpose by or on behalf of any person interested or without any such application), to make and prescribe all such rules and orders either general or applicable to any particular case only touching any of the matters intended to have been hereby provided for, and touching also the manner of proceeding before or applying to the Court and Judges respectively, and also the execution of writs and orders and the allowance and taxation of costs as to the Court seems expedient; and such rules and orders from time to time to revoke or alter as to the Court appears to be requisite; and all rules and orders so made and prescribed shall be of the same force and effect as if they had been inserted in this Act; and the said Court and each of the Judges thereof shall, in all cases whatsoever of applications made to or proceedings had or taken before or by authority of the said Court or any Judge thereof or otherwise with reference to foreign attachment, have full power to adjourn the case or proceedings from time to time, and in all cases to award or refuse costs the same to be paid by and to such party or parties as the Court or Judge in each case thinks fit to order.

*Foreign  
attachment  
extended.*  
*Id. s. 177.*  
*Id. s. 227.*

171. In actions where the plaintiff sues in respect of the breach of any contract made or to be wholly or in part performed within Victoria, the writ of foreign attachment shall lie, and may and shall be issued and proceeded on as fully and effectually to all intents and purposes as such writ may and can now be issued and proceeded on in actions where the cause of action arose in Victoria.

*Proof of claim  
on proceedings  
by foreign  
attachment.*  
*Id. s. 178.*  
*Id. s. 228.*

172. The plaintiff in any action when he proceeds by a writ of foreign attachment shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action either before a jury upon an inquiry or before the Prothonotary in the manner in this

(a) Though a defendant had his place of business in Melbourne, and was not shown to have a residence anywhere else, the Court refused to set aside a writ of foreign attachment issued in an action commenced in his absence in an adjoining colony, his departure having been accompanied

with circumstances justifying a suspicion that he had left without any intention to return. An error in the name of a garnishee is no ground for setting a writ aside.—*Synott v. Ray*, 1 V.L.R. (L.), 70.



Act provided according to the nature of the case as the Court or a Judge directs; and the making such proof shall be a condition precedent to his obtaining judgment.

*Supreme Court Act 1913.*  
15 & 16 Vict.  
c. 76 s. 18.

#### DIVISION 11.—JUDGMENT AND EXECUTION.

173. All rules and orders of the Court in its various jurisdictions whereby any sum of money or any costs charges or expenses shall be payable to any person shall have the effect of judgments at law; and such person shall and may have execution thereon for the moneys so payable; and the Judges of the Court may from time to time cause writs of execution to be framed accordingly and to issue as they think fit and all such writs shall be enforced in the same manner as writs of execution are in ordinary cases.<sup>(a)</sup>

*Rules and orders to pay money to have effect as judgments.*  
*Ib. s. 179.*  
*Equity Practices Statute 1865 s. 7.*  
1 & 2 Vict.  
c. 110 s. 18.

174. Every judgment debt shall carry interest at the rate of Eight pounds per centum per annum from the time the judgment was entered or made; and the amount of such interest shall be stated in the body of and may be levied under a writ of execution on such judgment.<sup>(b)</sup>

*Interest on judgment.*  
*Supreme Court Act 1913 s. 181.*  
*The Common Law Procedure Stat. 1865 s. 287.*

175. In cases of an assessment of further damages pursuant to any Statute now or hereafter to be in force relating to actions upon bonds or on any penal sum for the non-performance of any covenants or agreements, it shall be stated in the body of the writ of execution that the sheriff or other officer or person to whom the writ is directed is to levy the amount in such writ mentioned to be due for interest on the damages assessed and costs taxed in that behalf at the rate aforesaid; and such interest shall be computed from the day on which the inquiry was had.

*Ib. s. 17.*  
*Execution in action on bonds.*  
*Ib. s. 182.*  
*Ib. s. 294.*  
8 & 9 Will. III.  
c. 11.

176. Every writ of *scire facias* issued out of the Court against bail on a recognisance, or for restitution after a reversal in error, or upon a suggestion of further breaches after judgment for any penal sum pursuant to any Statute now or hereafter to be in force relating to actions upon bonds, shall be directed to the party called upon to show, cause and shall bear teste on the day of its issuing and shall call upon the party to whom it is directed to appear within such time as is directed in the case of an ordinary action and give notice that in default

*Proceedings on scire facias.*  
*Ib. s. 183.*  
*Ib. s. 302.*  
15 & 16 Vict.  
c. 76 s. 182.  
8 & 9 Will. III.  
c. 11.

(a) It was held that, under the combined effect of the corresponding repealed section and section 18 of Act No. 379 (now section 27 of the *Insolvency Act 1928*), the Court of Insolvency had jurisdiction to issue a writ of *fi. fa.*—*Slack v. Winder*, 5 A.J.R., 72.

A sheriff cannot seize and sell property out of the jurisdiction of the Court.—*Herrick v. United Claude Silver Mining Company*, 13 A.L.T., 252.

Patent rights cannot be seized or sold under a writ of *fi. fa.*—*Wilfley Ore Concentrator Syndicate Ltd. v. N. Guthridge Ltd.*, 11 A.L.R., 333; *Brown v. Cooper*, 1 V.R. (L.), 210.

The sheriff is entitled to poundage upon the execution of a writ of possession by him, the

Statutes 28 Eliz., c. 4, and 3 Geo. I., c. 15, not having been repealed by *The Common Law Practice Statute 1856* (19 Vict., No. 19), section 174. The party issuing execution is primarily liable to pay poundage to him. The sheriff may levy for poundage without being directed to do so, but he need not do so if not required by the execution creditor.—*McRoberts v. Johnson*, 16 V.L.R., 725.

(b) Where on appeal to the High Court of Australia a plaintiff obtains judgment for a debt, interest under this section runs from the date of the judgment given in the action in the Supreme Court.—*Keogh v. Dalgety*, 1917 V.L.R., 309; *Craine v. Colonial Mutual Fire Insurance Co.*, 1923 V.L.R., 623.

*Supreme Court Act 1915.*

of appearance the party issuing such writ may proceed and the rules relating to appearance pleading and all proceedings thereupon shall so far as they are applicable be the same as in an ordinary action.

Payment may be pleaded in bar to action on judgment.  
*Ib.* s. 60.  
4 & 5 Anne  
c. 2 s. 12.

177. Where an action of debt or *scire facias* is brought upon a judgment if the defendant or his representative has paid the money due upon such judgment such payment may be pleaded in bar of such action.

Entry of satisfaction.  
*Ib.* s. 184.  
*The Common Law Procedure Stat. 1856 s. 306.*  
Tenth Schedule.

178. In order to acknowledge satisfaction of a judgment it shall be requisite only to file a satisfaction piece in the form contained in the Tenth Schedule to this Act; and such satisfaction piece shall be signed by the party or parties acknowledging the same or their personal representatives; and such signature or signatures shall be witnessed by a practising solicitor of the Court expressly named by him or them and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and such solicitor shall declare himself in the attestation thereto to be the solicitor for the person or persons so signing the same and state he is witness as such solicitor: Provided that a Judge at Chambers may make an order dispensing with such signature under special circumstances if he thinks fit; and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Prothonotary directs.

#### DIVISION 12.—RECIPROCITY IN THE ENFORCEMENT OF JUDGMENTS.

Interpretation.  
*Supreme Court Act 1923 s. 2.*  
*Judgments (Reciprocity) Act 1928 ss. 2, 4.*  
"Certified copy."  
Comp. 10 & 11  
Geo. V. c. 33  
s. 10.  
"Judgment."

179. (1) In this Division unless inconsistent with the context or subject-matter—

"Certified copy" in relation to a judgment of a Court means a copy of the judgment certified by the proper officer of the Court to be a true copy.

"Judgment" means any judgment or order given or made by a superior Court as hereinafter defined or by the Supreme Court of the State of Victoria (as the case may be) in any civil proceedings whether before or after the commencement of this Act whereby any sum of money is made payable and includes an award in proceedings on an arbitration if the award has in pursuance of the law in force in the place where it was made or in Victoria (as the case may be) become enforceable in the same manner as a judgment given by a superior Court in that place or by the Supreme Court (as the case may be).

"Judgment creditor."

"Judgment creditor" means the person by whom the judgment was obtained and includes the legal representatives and the assigns of that person.

"Judgment debtor."

"Judgment debtor" means the person against whom the judgment was given and includes any person against whom the judgment is enforceable in the place where it was given.

"Original Court."

"Original Court" in relation to any judgment means the Court by which the judgment was given.

"Proclamation" means proclamation of the Governor in Council published in the *Government Gazette*. Supreme Court Act 1928.

"Reciprocating State" means any part of His Majesty's dominions outside the United Kingdom and the Commonwealth of Australia which part has been declared under any Act to be a reciprocating State for the purposes of the Judgments (Reciprocity) Acts or declared under this Division to be a reciprocating State for the purposes of this Division. "Proclamation," "Reciprocating State."

"Superior Court" means: in England His Majesty's Court of Appeal and His Majesty's High Court of Justice; in Scotland the Court of Session; and in Northern Ireland or in any reciprocating State any Court which may from time to time by the Governor in Council be declared to be a superior Court within the meaning of this Division. "Superior Court." See 38 and 37 Vict. c. 66, s. 4; 40 and 41 Vict. c. 57, s. 6; 10 and 11 Geo. V. c. 67, ss. 39, 40; 18 Geo. V. c. 1, Sch. Arts 64, 75; 19 Geo. V. c. 2, First Schedule cl. 6. Power to make &c. proclamations.

(2) The Governor in Council may from time to time by proclamation declare any Court in Northern Ireland or in any reciprocating State to be a superior Court within the meaning of this Division; and any such proclamation may be rescinded revoked amended or varied by like proclamation of the Governor in Council published as aforesaid.

180. (1) Where the Governor in Council is satisfied that reciprocal provisions have been made by the Legislature of any part of His Majesty's dominions outside Great Britain and Northern Ireland and the Commonwealth of Australia for the enforcement within that part of His Majesty's dominions of judgments as hereinbefore defined so far as such definition relates to Victorian judgments orders and awards the Governor in Council may by proclamation declare— Application of this Division to reciprocating parts of British dominions. Judgments (Reciprocity) Act 1925 s. 3. Comp. (S.A.) No. 1461 s. 5; (N.S.W.) 1923 No. 4 s. 12.

(a) such part of His Majesty's dominions to be a reciprocating State for the purposes of this Division; and

(b) that this Division shall extend and apply with respect to that part of His Majesty's dominions;

and thereupon such part of His Majesty's dominions shall become a reciprocating State within the meaning of this Division and this Division shall extend and apply to such part accordingly.

(2) The Governor in Council may by proclamation declare that this Division shall extend and apply with respect to any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions (not including the Commonwealth of Australia) as if that territory were part of His Majesty's dominions and on the making of any such proclamation this Division shall subject to the provisions of the proclamation have effect accordingly. As to protected and mandated territories. Comp. (S.A.) No. 1461 s. 5.

(3) The Governor in Council may by proclamation rescind revoke amend or vary any proclamation made under this section. Revocation &c. of proclamations. Ib.

181. (1) Where a judgment has been obtained in a superior Court the judgment creditor may apply to the Supreme Court of the State of Victoria at any time within twelve months after the date of the judgment or such longer period as is allowed by the Supreme Court to have the judgment registered in the Supreme Court and on any such application the Supreme Court may if in all the circumstances of the case it thinks it is just and convenient that the judgment should Enforcement in Victoria of judgments obtained in superior Courts in England Scotland or Northern Ireland. Supreme Court Act 1928 s. 3.

*Supreme  
Court Act 1928.  
Comp. 10 & 11  
Geo. V. c. 81  
s. 9.*

be enforced in Victoria and subject to the provisions of this section order the judgment to be registered accordingly.

(2) No judgment shall be ordered to be registered under this section if—

- (a) the original Court acted without jurisdiction; or
- (b) the judgment debtor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court; or
- (c) the judgment debtor being the defendant in the proceedings was not duly served with the process of the original Court and did not appear notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court; or
- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the Supreme Court either that an appeal is pending or that he is entitled and intends to appeal against the judgment; or
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the Supreme Court.

(3) Where a judgment is registered under this section—

- (a) the judgment shall as from the date of registration be of the same force and effect and proceedings may be taken thereon as if it had been a judgment originally obtained or entered on the date of registration in the Supreme Court; and
- (b) the Supreme Court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself but in so far only as relates to execution under this section; and
- (c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original Court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment.

(4) Rules of the Supreme Court shall provide—

- (a) for service on the judgment debtor of notice of the registration of a judgment under this section; and
- (b) for enabling the Supreme Court on an application by the judgment debtor to set aside the registration of a judgment under this section on such terms as the Court thinks fit; and
- (c) for suspending the execution of a judgment registered under this section until the expiration of the period during which the judgment debtor may apply to have the registration set aside.

*Judgments  
(Reciprocity)  
Act 1925 s. 4.*

(5) In any action brought in any Court in Victoria on any judgment which might be ordered to be registered under this section the plaintiff shall not be entitled to recover any costs of the action unless an application to register the judgment under this section has previously been refused or unless the Court otherwise orders.

*Supreme Court Act 1923.*

182. Where a judgment has been obtained in the Supreme Court against any person the Court shall on an application made by the judgment creditor and on proof that the judgment debtor is resident in England Scotland or Northern Ireland or any reciprocating State issue to the judgment creditor a certified copy of the judgment.

*Issue of certificates of judgments obtained in Victoria.*

*Ib. s. 4.*

*Comp. 10 & 11 Geo. V. c. 81 s. 10.*

*Judgments (Reciprocity) Act 1925 s. 4.*

*Power to make rules and regulations.*

*Supreme Court Act 1923 s. 6.*

*Ib. s. 11.*

183. Provision may be made by Rules of Court or regulations in accordance with Part II. of this Act for regulating the practice and procedure (including scales of fees and evidence) in respect of proceedings of any kind under this Division and the provisions of the said Part II. with respect to Rules of Court and to regulations (as the case may be) shall apply to the making of such rules or regulations and to such rules or regulations when made.

184. Subject to Rules of Court any of the powers conferred by this Division on the Supreme Court may be exercised by a Judge of the Court.

*Powers of Judge of Supreme Court.*

*Ib. s. 8.*

185. A copy of the *Government Gazette* purporting to contain a copy of any proclamation or Order in Council under this Division shall be conclusive evidence of the validity contents making and publication of such proclamation or Order in Council and of the fulfilment of all conditions precedent to the valid making thereof.

*Evidence &c. of proclamation or Order.*

*Judgments (Reciprocity) Act 1925 s. 6.*

*Comp. (S.A.) No. 1461 s. 6.*

#### DIVISION 13.—CHARGING STOCK AND SHARES.

186. If any person against whom any judgment has been entered up in the Court has any Government stock funds or annuities or any stock or shares of or in any public company<sup>(a)</sup> in Victoria (whether incorporated or not) standing in his name in his own right or in the name of any person in trust<sup>(b)</sup> for him, a Judge on the application of any judgment creditor may order<sup>(c)</sup> that such stock funds annuities or shares or such of them or such part thereof respectively as he thinks fit shall stand charged with the

*Stock and shares may be charged.*

*Supreme Court Act 1916 s. 188.*

*The Judicature Act 1883 s. 64.*

*1 & 2 Vict. c. 110 s. 14.*

(a) A syndicate was formed with a capital consisting of 60 shares of £25 each, of which 30 fully paid-up shares were issued to the promoters. The other shares were disposed of to friends of the promoters, and all the shares were transferable. The syndicate was never registered or incorporated anywhere; it had no deed of settlement, or memorandum or articles of association, or rules or regulations, but it had a chairman and a secretary.

Held, that the syndicate was not a public company within the meaning of this section, but merely a partnership.—*Schaefer v. Schrieber*, 25 V.L.R., 254.

(b) There is no power under this section to charge shares standing in the name of the judgment debtor, but of which he is only a trustee.—*Deane v. Gillespie*, 8 A.L.T., 140, approved; *Fatorini v. Hill*, 8 A.L.T., 87, overruled; *Pryor*

*v. Powell*, 23 V.L.R., 512.

See *Long Tunnel Gold Mining Company v. Zimmier*, 6 A.L.T., 25, cited in note (a) to section 61 (1).

(c) An order under this section charging shares is a final as distinguished from an interlocutory order, and affidavits on information and belief are inadmissible on an application therefor.

An affidavit on information and belief which does not set out the grounds on which the deponent bases such information and belief is inadmissible in support of any application.—*Manson and others v. Ponninghaus*, 1911 V.L.R., 239.

A charging order cannot be given except for an ascertained sum, and not for costs until such costs have been taxed.—*Wilkie v. Wilkie and McCalla*, 1906 V.L.R., 80.

*Supreme  
Court Act 1915.*

payment of the amount for which judgment has been so recovered and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: Provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six months from the date of such order.

*Order to charge.  
Ib. s. 129.  
The Judicature  
Act 1883 s. 65.  
1 & 2 Vict.  
c. 110 s. 15.*

187. In order to prevent any person against whom judgment has been obtained from transferring receiving or disposing of any stock funds annuities or shares hereby authorized to be charged, every order of a Judge charging any Government stock funds or annuities or any stock or shares in any public company under this Act shall be made in the first instance *ex parte* without any notice to the judgment debtor, and shall be an order to show cause only; and such order (if any Government stock funds or annuities standing in the name of the judgment debtor in his own right or in the name of any person in trust for him is to be affected by such order) shall restrain the officer or person having the registry control or management of such stock funds or annuities, or of the transfers thereof from permitting a transfer thereof in the meantime and until such order is made absolute<sup>(a)</sup> or discharged; and (if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right or in the name of any person in trust for him is or are to be affected by any such order) shall in like manner restrain such public company from permitting a transfer thereof; and if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order is discharged or made absolute such corporation or person or persons permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred or such part thereof as is sufficient to satisfy his judgment; and no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, unless the judgment debtor within a time to be mentioned in such order shows to a Judge sufficient cause to the contrary, the said order shall after proof of notice thereof to the judgment debtor his attorney or agent be made absolute: Provided that any such Judge shall upon the application of the judgment debtor or any person interested have full power to discharge or vary such order and to award such costs upon such application as he thinks fit.

*Power of  
charging stock  
defined.  
Ib. s. 190.  
Ib. s. 66.  
3 & 4 Vict.  
c. 82 s. 1.*

188. The two last preceding sections shall be deemed and taken to extend to the interest of any judgment debtor whether in possession remainder or reversion and whether vested or contingent as well in any such stocks funds annuities or shares as in the said sections mentioned as also in the dividends interest or annual produce of any such stock funds annuities or shares; and whenever any such judgment debtor has any estate right title or interest vested or contingent

(a) On the order being made absolute there is power to give costs against the defendant.—*Shels v. Harding*, 6 A.L.R. (C.N.), 17.

in possession remainder or reversion in to or out of any such stocks funds annuities or shares as aforesaid which are standing in the name of any officer of the Court, or in to or out of the dividends interest or annual produce thereof, a Judge may make any order as to such stock funds annuities or shares or the interest dividends or annual produce thereof in the same way as if the same had been standing in the name of a trustee of such judgment debtor. Provided always that no order of any Judge as to any stock funds annuities or shares standing in the name of any such officer as aforesaid or as to the interest dividends or annual produce thereof shall prevent the Treasurer of Victoria or any public company from permitting any transfer of such stocks funds annuities or shares or payment of the interest dividends or annual produce thereof in such manner as the Court directs, or shall have any greater effect than if such debtor had charged such stock funds annuities or shares or the interest dividends or annual produce thereof in favour of the judgment creditor with the amount of the sum to be mentioned in any such order.

*Supreme  
Court Act 1916.*

#### DIVISION 14.—QUASHING BY-LAWS ETC.

189. Any person who pays into the Court the sum of Fifteen pounds as security for the costs of the proceedings hereinafter mentioned may apply to the Court for a rule calling upon the corporation by or on whose behalf any by-law has been made to show cause why such by-law should not be quashed either wholly or in part for the illegality thereof; and the said Court may make such rule absolute or discharge the same with or without costs as to the Court seems meet.<sup>(a)</sup>

*Proceeding to  
test legality of  
by-laws.  
Ib. s. 203.  
Act No. 521  
ss. 1 & 2.*

In this section—

“By-law” includes articles of association regulations and rules.

“Corporation” includes the Board of Land and Works and every corporation howsoever created and whether the same exists for municipal trading mining charitable, or other purposes.

#### PART IX.—OFFICERS.

##### DIVISION 1.—GENERAL PROVISIONS. FEES.

190. All officers of the Court shall, subject to the *Public Service Act 1928* in so far as the said Act applies, be appointed by the Governor in Council. The Court shall have a Master-in-Equity who shall be a practising barrister of England or Ireland or advocate of Scotland of not less than five years' standing, or a barrister or solicitor or barrister and solicitor of the Court of not less than five years' standing and shall be entitled as such Master-in-Equity to such annual salary as is

*Master-in-  
Equity  
Prothonotary  
Registrar  
Taxing Master  
and  
other officers  
of Court.  
Supreme  
Court Act 1913  
s. 204.*

(a) This section provides a means of testing the legality of a by-law on the ground that it is for any reason, contrary to law or beyond the powers of the body that made it.—*Ex parte Coleman*, 14 V.L.R., 271.

Proceedings may be taken under this section to quash a by-law made by a council under the *Health Act 1928*.—*Ex parte Steel, In re Borough of Oakleigh*, 19 V.L.R., 94.

For proceedings brought under this section,

see *In the matter of the City of Richmond, ex parte Collins*, 25 V.L.R., 623.

*In re the Borough of Flemington and Kensington, ex parte Fairbairn*, 27 V.L.R., 7.

*Mayor, etc., of Melbourne, ex parte The Melbourne Tramway, etc., Co.*, 10 A.L.R., 1; 1905 A.C., 358.

*Gunner v. Holding*, 28 V.L.R., 303.

*President, etc., of the Shire of Charlton v. Ruse*, 14 C.L.R., 220.

*Supreme Court Act 1915.*  
*Supreme Court Act 1916 s. 2.*  
*Master-in-Equity's Salary Act 1916.*  
 15 Vict. No. 10 s. 7.

determined by the Governor in Council and no more, a Prothonotary a Registrar and Keeper of the Records a Taxing Master, and such and so many other officers<sup>(a)</sup> as appear to the Judges for the time being of the Court to be necessary for the administration of justice and the due execution of all the powers and authorities of the Court.

Such Master Prothonotary Registrar Keeper Taxing Master and other officers shall respectively draw up prepare and settle all such and the like orders rules decrees reports and proceedings as are usually drawn up prepared and settled by persons holding similar offices in the superior Courts of law and equity in England without any charge whatsoever for so doing.

No new office shall be created in the Court unless the Judges thereof certify by writing under their hands to the Governor in Council that such new office is necessary.

Duties of officers.  
*Supreme Court Act 1915 s. 205.*  
*The Judicature Act 1883 s. 55.*

191. The business to be performed in the Court shall be distributed among the several officers attached to the Court in such manner as directed by Rules of Court; and such officers shall perform such duties in relation to such business as directed by Rules of Court; with this qualification, that the duties required to be performed by any officer shall be the same as or analogous to those which he performed previously to the commencement of this Act; and subject to such Rules of Court all such officers respectively shall continue to perform the same duties as nearly as may be in the same manner as if this Act had not passed.

Fees &c. that may lawfully be demanded by officers.  
*Supreme Court Act 1915 s. 206.*  
 Eleventh Schedule.  
 Fees &c. to be paid to sheriff.  
 Twelfth Schedule.

192. (1) Except so far as is otherwise expressly provided the fees dues and expenses which may lawfully be demanded taken and received by officers of the Court other than the sheriff under this or any other Act shall be those set out in the Eleventh Schedule.

(2) The allowances and fees set out in the Twelfth Schedule shall be paid to the sheriff or his deputy and the party on whose behalf the proceeding is or has been taken or is being had shall pay the same in the first instance before or at the time of issuing or before the service or execution of any writ notice warrant summons order bond or other document or before the performance of any other act specified or referred to in the said Schedule; and save so far as it is otherwise expressly provided by such Schedule or by regulations to be made as hereinafter provided the sheriff officers shewers jurymen and appraisers shall be entitled to take and retain for their own use the allowances set out in such Schedule.<sup>(b)</sup>

Regulations.

(3) The Governor in Council may make regulations altering abolishing or adding to any of the provisions of either of the said Schedules or for altering or abolishing any of such fees sums expenses

(a) As to these officers, see *R. v. Pettybridge*, 6 W.W. & A.B. (L.), 66; and *Casey v. Chandler*, 5 A.J.R., 99.

(b) The Order in Council of 15th July, 1895, which was made under the authority of section 4 of the *Supreme Court Act 1895*, and which provides that there "shall be paid to the sheriff for each man left in possession when absolutely necessary the actual and reasonable expenses to be settled by the sheriff," empowers the sheriff to

make a general rule fixing the amounts proper to be allowed for such expenses, and the sheriff is not under any obligation to decide the reasonableness of the charges in each particular instance.

*Sed, semble*, that where the sheriff is of opinion in any particular instance that it would be unreasonable to allow the amounts for expenses fixed by such general rule he may deviate therefrom.—*Williams v. Jones*, 28 V.L.R., 721. See Twelfth Schedule to this Act.



or allowances or for adding any new fee sum expense or allowance as a fee sum expense or allowance which may lawfully be demanded taken received or retained as aforesaid. Supreme Court Act 1915.

(4) All regulations made pursuant to this section shall be published in the *Government Gazette* and when so published shall be of the same effect as if they were contained in this Act and shall be judicially noticed, and shall be laid before each House of Parliament within fourteen days after the same have been made if Parliament is then sitting and if Parliament is not then sitting then within ten days after the next meeting of Parliament. Regulations to have force of law.

193. Every officer of the Court and every person employed in any of the offices thereof or in the chambers of any Judge thereof and every sheriff officer or minister acting in the execution of process directed to the sheriff or engaged or concerned therein who extorts demands takes accepts or receives from any person any fee or fees gratuity or reward not allowed by and mentioned in the Eleventh and Twelfth Schedules to this Act or greater in amount than as allowed by and mentioned in the said Schedules as aforesaid, upon complaint thereof made against him to the Court and on proof being made thereof upon oath either by the examination of witnesses *visâ voce* or on affidavits or on interrogatories to the satisfaction of the said Court, shall be adjudged guilty of a contempt of such Court and punished by such Court accordingly. Extortion. Ib. s. 207. The Common Law Procedure Stat. 1885 s. 373. 1 Vict. c. 65 s. 3. Eleventh and Twelfth Schedules.

194. Every person not being such officer or minister as aforesaid who assumes or pretends to act as such and extorts demands takes accepts or receives any fee or fees gratuity or reward under colour or pretext of such office, shall on like complaint and proof be in that respect dealt with by the Court in like manner. Taking fees under pretext of being officer sheriff &c. Ib. s. 208. Ib. s. 374. Ib. s. 3.

195. In all cases of summary complaints as in either of the two last preceding sections the Court may at its discretion award the costs of or occasioned by such complaint to be paid by either party to the other such costs to be taxed by the Taxing Master: Provided always that no such complaint shall be entertained unless made within two months of the act whereof complaint is made. Court may award costs. Ib. s. 209. Ib. s. 375. Ib. s. 4.

#### DIVISION 2.—THE SHERIFF.

196. It shall be lawful for the Governor in Council, subject to the provisions of the *Public Service Act* 1928, to appoint a sheriff who shall hold office during pleasure and who within Victoria in addition to all other acts and duties required to be done by him by this or any other Act shall execute and return<sup>(a)</sup> all writs to him directed and (except where it is otherwise provided by law) shall do all other acts and duties required by the common law<sup>(b)</sup> to be done by a sheriff in the same manner as such writs are executed and returned and such Sheriff. Appointment and duties. Supreme Court Act 1915 s. 210. Imperial Acts Application Act 1922 s. 7. Act No. 502 s. 5.

(a) A sheriff's return should state what has been done under the writ, or allege some reason if no steps have been taken. Where it is impossible to levy by reason of the shortness of time at the disposal of the sheriff, the return ought to state so.—*Burk, Francart, and Co. v. Taylor*, 12 A.L.T., 74.

(b) Apart from express statutory enactment, the sheriff seems to have in Victoria no judicial functions such as the sheriff had in England. He was originally in his county the ministerial officer of the King's Courts (now represented in Victoria by the Supreme Court) for the execution of all process original mesne and final issuing from

*Supreme Court Act 1915.*

acts and duties are done by the sheriff of a county in England. Such officer shall be styled "the sheriff" and shall in and for every part of Victoria by that style and without express reference to any particular bailiwick do and perform all acts and duties and exercise all powers by law required or permitted to be done performed or exercised by the sheriff or by the sheriff of any bailiwick. The officer appointed before the commencement of this Act to be the sheriff shall be deemed during the pleasure of the Governor in Council to be the sheriff appointed as aforesaid.

*Powers.*

Every sheriff appointed by or under this Act may assign bail and replevin bonds and do all things appertaining to the office to which he has been appointed which the person he succeeds if he had continued in office might or should have done, with the exception of bringing in the body of a defendant theretofore arrested.

*Security.*

Every sheriff shall give such security to His Majesty as the Governor in Council thinks fit.

*Powers of the sheriff.  
Id. s. 211.*

197. (1) Where in any Act or in any Order in Council regulation rule by-law writ summons rule order warrant precept command process or document any express or implied reference is made to the sheriff or to any sheriff or to the sheriff of any bailiwick such reference shall be construed to mean and refer to the sheriff.

*Direction of process.*

(2) All writs summonses rules orders warrants precepts commands processes or documents such as before the commencement of the *Supreme Court Act 1895* were in pursuance of any authority directed to the sheriff of a bailiwick shall from and after the commencement of the said Act be directed to "The sheriff," and shall be lodged at the sheriff's office in Melbourne or at such other place or places as the Governor in Council directs.

*Sheriff empowered to appoint deputies.  
Id. s. 212.  
Act 16 Vict.  
No. 31 s. 1.  
3 & 4 Will. IV.  
c. 42 s. 20.*

198. The sheriff may from time to time by any writing under his hand and seal appoint a deputy or several deputies either for any bailiwick or bailiwicks or for the whole of Victoria as to him seems fit, for whose acts and deeds the said sheriff shall be responsible and accountable; and the said sheriff may from time to time revoke every such appointment.

*Powers of deputies.  
Id. s. 213.*

199. Every such deputy may execute any writ summons rule order warrant precept command or process of any court in Victoria directed to the sheriff, and make return of the same together with the manner of the execution thereof, and receive and detain in prison all such persons as are committed to the custody of the sheriff, and do and perform all such other acts as the said sheriff would be bound to do and perform :

those courts, and is still in theory the chief executive officer for the execution of criminal process. He was in England the person to call out the *posse comitatus* (compare section 207 of this Act), but this power is rarely if ever used owing to the establishment of the police. His functions as to the ordinary prisoners in gaol have in most cases ceased. See the *Gaols Act 1928*, and particularly sections 13 and 14, except as to persons sentenced to death (see *Crimes Act*, section 550). He still has certain duties with regard to attendance on the Judges of the

Supreme Court, and may be fined for disregarding them. He is the proper officer to summon juries, but this is now provided for by the *Juries Act 1928*. As stated in the section he is to execute all writs directed to him, and if he is guilty of misconduct relating thereto is liable for misconduct under section 217 of this Act and at common law. The above statement adapted to Victoria is to a great extent taken from the article in the *Encyclopædia of the Laws of England* under the title "Sheriff."

Provided that such sheriff may for his own security cause every such deputy to enter into and execute such bond or recognisance conditioned for the due payment of any moneys which come to his hands and for the due performance of all the duties of his office and for the indemnity of such sheriff against the consequences of any default of such deputy therein as to such sheriff seems meet.

*Supreme Court Act 1915.*  
*Security.*

200. Where the sheriff before his going out of office arrests any defendant and makes return of *cepi corpus*, he shall and may within the time allowed by law be ordered by the Court or a Judge to bring in the body, notwithstanding he may be out of office before such order is made.

*Rule on sheriff out of office.*

*Id. s. 214.*

*The Common Law Procedure Stat. 1855*

*s. 294.*

201. In all cases where by reason of the sheriff being a party to or interested in or affected by any cause or proceeding any writ would formerly have been directed to or any duty would formerly have been performed by the coroner, such writ shall be directed to and such duty shall be performed by elisors or by an elisor to be appointed by the Court or a Judge in that behalf in the same manner to all intents and purposes as if the sheriff and coroner were respectively such parties or so interested or affected as aforesaid: Provided always that by consent of the opposite party his solicitor or agent such writs and duties respectively may in all cases be directed to and be performed by the sheriff in the same manner as if he were not such party or so interested or affected as aforesaid.

*When sheriff interested elisors to be appointed.*

*Supreme Court Act 1915*

*s. 216.*

*19 Vict. No. 19*

*s. 348.*

*Act 19 Vict.*

*No. 19.*

*Sheriff may act by consent.*

202. All actions brought against the sheriff for anything done by him in the intended execution of his duty shall be commenced and sued within three years next after the cause of such actions and not after.

*Limitation of actions against sheriff.*

*Id. s. 216.*

*The Common Law Procedure Stat. 1855 s. 349.*

*21 Jac. I. c. 16*

*s. 3.*

*Sheriff may sell property without taking out an auctioneer's licence.*

203. It shall be lawful for the sheriff by himself or his deputy to sell by auction all property of whatever nature which may be taken by him in execution without having taken out an auctioneer's licence, anything in any law now in force, to the contrary notwithstanding.

204. Notwithstanding anything to the contrary contained in the *Police Regulation Act 1928* or any other Act a member of the police force may lawfully be appointed to act as bailiff.

*Supreme Court Act 1915*

*s. 217.*

*Power to appoint police as bailiffs.*

*Id. s. 220.*

205. In the succeeding sections of this Division the expression "writ" includes any process.

*Interpretation.*

*Imperial Acts Application Act 1922 s. 72.*

*Neglect to aid sheriff.*

*Id. s. 73.*

*3 Edw. I. c. 9.*

*50 and 51 Vict.*

*c. 55 s. 8.*

*Queensland Code s. 203.*

206. Every person who having reasonable notice that he is required to assist the sheriff or any deputy sheriff in arresting any person or in preserving the peace omits without reasonable excuse so to do shall be liable to a penalty of not more than One hundred pounds and if a bailiff or assistant of the sheriff or a member of the police force shall be guilty of a misdemeanour and liable to a fine of not more than One hundred pounds or to imprisonment for a term of not more than one year or to both such fine and imprisonment.

207. If the sheriff or any deputy sheriff finds any resistance in the execution of a writ he shall take with him such assistants as he thinks desirable and shall go in person to do execution and may arrest the resisters and bring them before a justice of the peace to be dealt

*Powers of sheriff.*

*Id. s. 74.*

*50 and 51 Vict.*

*c. 55 s. 8 (2).*

*13 Edw. I. c. 39*

*Imperial Acts  
Application Act  
1922.*

*Duties as to  
execution of  
writs.*

*Id. s. 75.*

*50 and 51 Vict.*

*c. 55 s. 10.*

*cf. 13 Edw. I.*

*c. 39.*

*2 Edw. III.*

*c. 5.*

*Duties on  
receipt of debt  
to Crown.*

*Id. s. 76.*

*50 and 51 Vict.*

*c. 55 s. 11.*

*3 Geo. I. c. 15*

*s. 13.*

*Duties on arrest  
of civil debtors.*

*Id. s. 77.*

*50 and 51 Vict.*

*c. 55 s. 14.*

*cf. 22 Geo. II.*

*c. 23 ss. 1-4.*

with according to law and every such resister shall be guilty of a misdemeanour.

208. The sheriff at the request of a person delivering a writ to him for execution shall give a receipt for that writ stating the day of its delivery.

209. (1) Where the sheriff or any officer or other person employed in collecting by process from any Court any debt due to the Crown receives from any person a sum as being due to the Crown he shall give a receipt to such person for that sum and the sheriff shall forthwith take all necessary steps to procure in respect of that sum the effectual discharge of the debtor paying the same.

(2) An officer receiving any such sum shall account for it to the sheriff and the sheriff shall give a receipt for such sum.

(3) In the case of any default under this section the sheriff and his representatives shall be liable to pay any damage suffered by a debtor in consequence of such default.

210. (1) Where an officer being a sheriff deputy sheriff bailiff or other officer whatsoever arrests or has in custody any person in the course of a civil proceeding whether at the suit of the Crown or otherwise such officer shall not—

- (a) convey such person without his free consent to any house licensed for the sale of intoxicating liquor or to the private house of such officer or any tenant or relative of such officer ;
- (b) charge such person with any sum for or procure him to call or pay for any liquor food or thing whatsoever except what he freely asks for ;
- (c) take such person to any gaol within twenty-four hours of his arrest unless such person fails to name or refuses to be carried to some safe and convenient house of his own nomination being within three miles of the place at which he was arrested and not being the private dwelling-house of such person,

but shall during such twenty-four hours permit such person to send for and have brought to him at reasonable times in the day and in reasonable quantities any food or liquor from what place he thinks fit and also to have and use such bedding linen and other necessary things as he has occasion for or is supplied with and shall not parloin or detain the same or require any payment for the use thereof or restrict the use thereof.

(2) For the purpose of making known the provisions of this section a printed copy thereof shall be delivered by the sheriff or other person entrusted with causing the execution of any writ order or attachment to the bailiff officer or other person employed to execute the same, and such bailiff officer or other person after making an arrest shall forthwith show a printed copy of such section to the person arrested or if such person is unable to read shall forthwith make known the provisions of such section to the person arrested.

(3) Subject to the foregoing provisions any person so arrested shall be lodged in the gaol nearest to the place of his arrest or with his consent in any other gaol and shall be there detained until the

Supreme Court or a Judge thereof shall order his discharge or until he is otherwise discharged by due course of law.

*Imperial Acts Application Act 1922 s. 77.*

(4) In this and the next succeeding section the expression "gaol" has the meaning assigned to it in the *Gaols Act 1928*.

211. A person unlawfully imprisoned by the sheriff or any of his officers shall have an action against the sheriff in like manner as against any other person that should imprison him without warrant. The Judges of the Supreme Court may make rules providing that in such circumstances as may be specified in such rules security for costs shall be given by the plaintiff.

*Liability for wrongful imprisonment. Ib. s. 78. 50 and 51 Vict. c. 55 s. 15. 13 Edw. I. c. 13.*

212. If a person in the custody of the sheriff or any of his officers or of any other person either in execution or for non-performance of a judgment or order of the Supreme Court or for contempt of that Court or otherwise in the course of a civil proceeding escapes out of legal custody such sheriff or other person shall be liable to pay the damages sustained by the person at whose suit such prisoner was taken into custody and all costs of any action or other proceeding to recover the same but not any further sum:

*Liability for escape. Ib. s. 79. 50 and 51 Vict. c. 55 s. 16. 6 Anne c. 12 s. 6. cf. 5 and 6 Vict. c. 98. cf. 40 and 41 Vict. c. 21.*

Provided that there shall be no liability under this section for the escape of any prisoner when confined in any gaol.

213. The sheriff or any officer concerned in the execution of any process directed to the sheriff may demand take and receive such poundage as may be fixed by rules made by the Judges of the Supreme Court.

*Fees and poundage. Ib. s. 80. 29 Eliz. c. 4. 3 Geo. I. c. 15 s. 3. 50 and 51 Vict. c. 55 s. 20. Sheriff's accounts. Ib. s. 81. cf. 50 and 51 Vict. c. 55 s. 21.*

214. All accounts of the sheriff or any deputy sheriff shall be transmitted examined verified and audited in such manner and at such times as is or are provided by law or as the Governor in Council may by order from time to time direct.

All sums received by a sheriff and not fully accounted for shall be answered for by himself or his representatives or otherwise in due course of law.

215. When the sheriff dies any person nominated by a Law Officer pending the appointment of a sheriff may execute the office of sheriff in the name of the deceased sheriff and be answerable for the execution of the said office as the deceased sheriff would have been by law if living and the security given to the sheriff so deceased by any deputy sheriff shall remain and be a security to the Crown and to all persons whomsoever for such deputy sheriff's due execution of the office of deputy sheriff.

*Execution of office on death of sheriff. Ib. s. 82. Ib. s. 25. 3 Geo. I. c. 15 s. 3.*

216. (1) Every sheriff shall at the expiration of his term of office make out and deliver to the incoming sheriff a correct list and account of all prisoners in his custody or lodged in gaol by him and of all writs and attachments in his hands not wholly executed by him with all such particulars as may be necessary to explain to the incoming sheriff the several matters intended to be transferred to him and shall thereupon turn over and transfer to the custody of the incoming sheriff all such prisoners so in custody and all such writs and attachments and all records books and matters appertaining to the office of sheriff.

*Outgoing sheriff to turn over prisoners and process to incoming sheriff. Ib. s. 83. 50 and 51 Vict. c. 55 s. 28. 20 Geo. II. c. 37. 4 Geo. IV. c. 37 s. 1.*

*Imperial Act.  
Application.  
Act 1922.*

(2) The incoming sheriff shall thereupon sign and give to the outgoing sheriff a duplicate of such list and account which shall be a good and sufficient discharge to him of and from all the prisoners therein mentioned and the execution of the writs and other matters therein contained and thereupon the incoming sheriff shall stand charged with the said prisoners so in custody and with the execution and care of the said writs and attachments and other matters contained in the said list and account.

*Punishment for  
misconduct.  
Ib. s. 84.  
50 and 51 Vict.  
c. 65 s. 29.  
3 Edw. I. c. 9.  
23 Henry VI.  
c. 9.*

217. (1) If any person being a sheriff deputy sheriff or bailiff or other such officer or being employed in levying or collecting debts due to the Crown by process of any Court or being an officer to whom the return or execution of writs belongs does any of the following things (that is to say):—

- (a) unlawfully lets go at large a prisoner or unlawfully withholds a prisoner entitled to be released; or
- (b) grants a warrant for the execution of any writ before he has actually received that writ; or
- (c) is guilty of an offence against or breach of the provisions of this Division or of any wrongful act or default in the execution of his office or of any contempt of the Supreme Court,

he and any person procuring the commission of any such offence shall without prejudice to any other punishment under the provisions of this Division but subject as hereinafter mentioned be liable—

- (i.) to be punished by the Supreme Court as hereinafter mentioned; and
- (ii.) if any person is aggrieved to forfeit Two hundred pounds and to pay all damages suffered by such person;

and such forfeiture and damages may be recovered by such person as a debt by an action in the Supreme Court.

(2) The Supreme Court or any Judge thereof may on complaint made of any such offence as aforesaid having been committed and on proof on oath given by the examination of witnesses or by affidavit or on interrogatories of the commission of the alleged offence and after hearing anything which the alleged offender may urge in his defence (which evidence and hearing may be taken and had in a summary manner) punish the offender or cause proceedings to be taken for his punishment in like manner as a person guilty of contempt of the said Court may be punished.

*3 Geo. I. c. 15  
s. 15.*

(3) The Supreme Court or Judge may order the costs of or occasioned by any such complaint to be paid by either party to the other and an order by the Supreme Court or Judge to pay any costs damages or penalty shall be of the same effect as a judgment of such Court and may be enforced accordingly.

(4) The said Court may also proceed for and deal with such offence in like manner as for any contempt of such Court.

5) Every person not being a deputy sheriff bailiff or other such officer who assumes or pretends to act as such or demands or takes any fee or reward under colour or pretext of such office shall be guilty of contempt of the Supreme Court and be liable to be punished in manner

provided by this section as if he were a deputy sheriff guilty of a contempt of such Court. Imperial Acts Application Act 1922.

(6) Any proceeding in pursuance of this section against a sheriff deputy sheriff or any other person to whom this section applies shall except as provided in the next succeeding sub-section be taken within six months after the alleged offence was committed and not subsequently.

(7) Nothing in this section shall render a person liable to be punished twice for the same offence but if any proceeding within such period of six months is taken against a person under this section for any offence the Supreme Court or any Judge thereof may whether such period of six months has expired or not postpone or stay such proceeding and direct any other available proceeding for punishing such offence to be taken.

**218.** (1) Nothing in this Division shall affect—

(a) any such power right privilege obligation liability or duty of any sheriff or officer of a sheriff as exists by common law at the commencement of this Act; Saving. Id. s. 86. 50 and 51 Vict. c. 55 s. 39.

(b) any legal proceeding or remedy in respect of any such power right privilege obligation liability or duty and any such legal proceeding or remedy may be carried on or had as if this Act had not been passed.

(2) Any fees or poundage authorized to be taken by or in pursuance of any enactment in force at the commencement of this Act may continue to be taken until altered in pursuance of this Division.

### DIVISION 3.—MASTER-IN-EQUITY.<sup>(a)</sup>

**219.** In case of the absence on leave illness or temporary incapacity of the Master-in-Equity the Governor in Council may appoint some other person being a practising barrister of the Court of not less than five years' standing to act in his stead; and every person so appointed shall during the time for which he is so appointed be styled the Acting Master-in-Equity and have perform and execute all the powers authorities and duties of the Master-in-Equity. Governor in Council may appoint Acting Master. Supreme Court Act 1916 s. 221. Act No. 425 s. 1. Lunacy Act 1923 s. 2.

**220.** The Master-in-Equity shall be deemed to be a Collector of Imposts under any Act now or hereafter to be in force relating to the collection and audit of the public moneys and accounts, and unclaimed balances to the credit of "The Sutors' Fund" shall be dealt with in the manner that unclaimed moneys are or shall be by such Act directed to be dealt with. Master to be a Collector of Imposts under Audit Act. Supreme Court Act 1916 s. 222. Act No. 436 s. 2.

**221.** The Master-in-Equity shall from time to time pay to the Receiver of Revenue at Melbourne all moneys held by him by virtue of his office of Master and all moneys paid to him under or by virtue of any order of the Court, and all such moneys shall be placed to the credit of "The Sutors' Fund"; and every payment to be made by the Master-in-Equity as aforesaid shall be accompanied by a declaration that such payment includes all moneys received on account of any estate since the date of the last payment made by him, and such declaration shall be in the form in the Thirteenth Schedule hereto. Master to pay all moneys received to credit of "The Sutors' Fund." Id. s. 223. Id. s. 3. Thirteenth Schedule.

(a) As to the functions assigned by the Lunacy Act 1928 to the Master-in-Equity, see *In re D.* (No. 2), (1926) V.L.R., 467, noted to section 131 of that Act.

*Supreme Court Act 1916 s. 224.*  
Manner in which claimants on estates are to be paid.  
*Act No. 435 s. 4.*

222. When any person is entitled to receive any money out of "The Suitors' Fund," the Master-in-Equity shall certify to an account in favour of such person upon the person so claiming subscribing a declaration that such account is true and just in every particular and that the estate upon which such claim is made is legally liable to satisfy such claim; and thereupon the Treasurer shall forthwith satisfy such claim to the extent of the fund standing to the credit of the estate upon which such claim is made.

False declarations punishable as perjury.  
*Ib. s. 225.*  
*Ib. s. 5.*  
Fourteenth Schedule.

223. Such declaration shall be in the form prescribed by the Fourteenth Schedule hereto, and every person who makes and subscribes any declaration required by this Division to be made or subscribed knowing the same to be false shall be liable to the penalties of perjury.

Moneys when ordered to be invested in Government securities to be invested in name of Treasurer.  
*Ib. s. 226.*  
*Ib. s. 6.*

224. When any moneys are by any order or decree of the Court ordered to be invested in Government securities such moneys shall be invested in the purchase of Victorian Government stock in the name of the Treasurer, and the Treasurer shall from time to time sell or transfer such stock for the purpose of giving effect to any order or decree of the Court in that behalf.

In all transfers of the said stock by the Treasurer he shall be so styled without any name addition or other description, and he shall not sign any such transfer unless an order of the Court directing such transfer and specifying the amount of stock and the name description and addition of the person to whom it is to be transferred, or directing a sale of such stock and specifying the amount of money to be raised by such sale and the person to whom such money is to be paid, shall be left in his office, nor in the latter case until a receiver of revenue appointed in that behalf has certified that he has received the purchase money of the stock to be transferred; the interest on the said stock standing in the name of the Treasurer as aforesaid and all principal moneys payable under this section shall be placed to the credit of "The Suitors' Fund."

Master to give security and accounts to be audited.  
*Ib. s. 227.*  
*Ib. s. 7.*

225. The Master-in-Equity shall give such security for the due performance of his duties as the Governor in Council from time to time requires, and the annual charge or premium for such security and the expense (if any) of the review and audit next hereinafter mentioned shall be paid out of such public moneys as are appropriated for that purpose.

The general accounts of the Master-in-Equity shall be reviewed and audited by or under the superintendence and direction of the Auditor-General in the manner provided and by virtue and in exercise of the powers conferred by any law now or hereafter in force relating to the audit of the public accounts.

#### DIVISION 4.—CHIEF CLERK.

Power to appoint a chief clerk.  
*Ib. s. 228.*  
*The Judicature Act 1863 s. 43.*  
*15 & 16 Vict. c. 60 s. 61.*

226. The Governor in Council may appoint a chief clerk to be attached to the Court for the purpose of assisting in the general business of the Court and the causes and matters depending therein, and on any vacancy in such office of chief clerk supply such vacancy.



227. No person shall be appointed chief clerk under the last preceding section unless he has been a practising barrister of the Court of not less than five years' standing, or has been admitted as a solicitor of the Court and practised as such barrister or solicitor for the period of five years at the least immediately preceding his appointment or is a chief clerk in any office of the Court.

*Supreme Court Act 1916 s. 229.*  
Qualification of chief clerk.  
*The Judicature Act 1883 s. 44.*

#### DIVISION 5.—DEPUTY PROTHONOTARIES.

228. The Governor in Council, subject to the provisions of the *Public Service Act 1928*, may appoint Deputy Prothonotaries to discharge the duties of Prothonotaries at such places as he thinks fit, and the Judges of the Court may direct by any Rules of Court to be made or for the time being in force under this Act what process may be issued by such Deputy Prothonotaries and what duties shall be discharged by them, and such Deputy Prothonotaries shall be deemed to be officers of the Court.<sup>(a)</sup>

*Deputy Prothonotaries.*  
*ib. s. 230.*  
*ib. s. 42.*

#### DIVISION 6.—TAXING MASTER.

229. (1) It shall be lawful for the Governor in Council to appoint a fit and proper person to be the Taxing Master for the Court.

*Taxing Master.*  
*Supreme Court Act 1916 s. 231.*

(2) Such Taxing Master shall not be subject to the provisions of the *Public Service Act 1928*.

*Not under Public Service Act.*  
*Qualification.*

(3) He shall be a practising barrister and solicitor of the Court of not less than five years' standing or a person who has been for at least ten years managing clerk in the office of any barrister and solicitor of the Court or a clerk who has for at least ten years performed the duties usually transacted and performed by a managing clerk.

(4) He shall tax and settle bills of costs and for such purpose shall have and may exercise all the powers and authorities possessed immediately prior to the seventeenth day of October One thousand nine hundred by all or any of the Taxing Officers of the Court.

*Duties.*

(5) In case of the illness suspension or absence of the Taxing Master the Governor in Council may appoint some other person qualified as aforesaid to act as the Deputy of such Taxing Master during such illness suspension or absence and every such person shall during the time for which he acts as such Deputy have all the powers and perform all the duties of such Taxing Master.

*Deputy.*

(6) If at any time there is a vacancy in the office of Taxing Master or the Taxing Master is unable to act, and no Deputy has been appointed the Chief Justice may authorize some officer or officers of the Court to fulfil temporarily all the duties of Taxing Master and every person so appointed shall while he is so authorized have all the powers of the Taxing Master and may do all acts matters and things which the Taxing Master may do and the same consequences shall follow as if such acts matters and things had been done by the Taxing Master.

*Vacancy.*

(a) A Judge sitting in chambers at Melbourne has power to hear an application for final judgment under Order XIV., rule 1, where the writ

was issued out of a Deputy Prothonotary's office, and appearance entered there.—*O'Farrell v. Cairns*, 12 A.L.T., 45.

Supreme Court Act 1915 s. 232.

Appeal in certain cases amounting to £1,000.

Act 15 Vict. No. 10 s. 33.

# PART X.—APPEAL TO PRIVY COUNCIL.<sup>(a)</sup>

**230.** If any person feels aggrieved by any decision<sup>(b)</sup> of the Court<sup>(c)</sup> in any civil proceeding of any nature depending in the Court in which the matter in issue amounts to One thousand pounds sterling in value<sup>(d)</sup> by which decision the merits of the case may be concluded<sup>(e)</sup> it shall be lawful for such person within thirty days<sup>(f)</sup> after such decision

(a) See Order in Council of the 23rd January, 1911, regulating appeals to the Privy Council, and which revokes the Order in Council of the 9th June, 1860. The first-mentioned order will be found at the end of this Act.

Where a litigant, having the option of appealing to the Privy Council or to the High Court of Australia, elects to go to the High Court, the Privy Council will not grant special leave to appeal from the High Court, unless under very special circumstances.—*Victorian Railways Commissioners v. Brown*, 12 A.L.R. (C.N.), 25.

(b) *Per Molesworth, J.*—"The meaning of the Act 15 Vict. No. 10 is that, before an appeal can be allowed, the Court must do something by which the rights of the parties may be concluded; not merely intimate an opinion upon an interlocutory application, which, being applied to the case at the hearing, would determine the rights of the parties. The Court must do some curial act which would determine the rights of the parties."—*The Melbourne and H.B. Railway Co. v. The Mayor of Prahran*, 6 W.W. & A.B. (E.), at page 239.

An appeal was held to lie from an order confirming the Master's report.—*Heape v. Hawthorne*, 2 W.W. & A.B. (E.), 76.

An interlocutory decision is not the subject for appeal under the Act to the Privy Council.—*Crotty v. Clarke*, 3 A.L.R. (C.N.), 2.

Leave to appeal to the Privy Council from the judgment of the Full Court on a reference from the primary Judge allowed.

No costs allowed to one of the parties served with notice of motion for leave to appeal, where there was no necessity for such party to appear.—*Swan and others v. The Perpetual Executors and Trustees Association*, 3 A.L.R., 191.

Leave to appeal to the Privy Council from a decision of the Full Court will not be granted when the effect of the decision of the Full Court is to remit the case for re-hearing on its merits, and where the merits of the case have not been finally determined by such decision.—*In re Cromie*, 20 V.L.R., 131.

(c) No appeal lies from the decision of a single Judge direct to the Privy Council; the appellant must first appeal to the Full Court.—*The Australian Smelting Co. Ltd. v. The British Broken Hill Proprietary Co. Ltd.*, 23 V.L.R., 643.

(d) *Quere*, whether the Court may, on motion for leave to appeal to the Privy Council, consider matters such as pleadings and evidence outside the affidavits filed upon the motion in order to ascertain if the matter in issue amounts to £1,000 in value.—*Commercial Bank of Australia v. McCaskill*, 23 V.L.R., 343.

The Court may, in order to determine whether the matter in issue amounts to £1,000 sterling in value, hear both sides and examine the

evidence, but the Court must be satisfied that such value exists.—*Brown v. Higgins*, 25 V.L.R., 691.

H. applied for registration as a trade mark of a pictorial label bearing the word "Maizo" in respect of a certain article of food. Though N. did not dispute that the label as a whole was not calculated to deceive, the application was opposed by him on the ground that "the word 'Maizo' had such a resemblance, both in appearance and sound, to the word 'Maizena' (the trade mark and trade name of N.), as to be calculated to deceive and create confusion in trade by causing the applicant's goods to be passed off or mistaken for goods of N.'s manufacture"; and he relied upon section 17 of the *Trade Marks Act 1890* (No. 2). The matter eventually came before the Full Court, which ordered the trade mark to be registered. N. sought leave to appeal to the Privy Council from this order.

*Held*, by the Full Court (*Holroyd, A.C.J., a Beckett and Hodges, J.J.*), that in order to determine what was the "matter in issue" within the meaning of this section, the Court had to assume not only that the actual decision appealed from was erroneous, but also that N.'s grounds of opposition to the application were correct; and on the uncontradicted affidavit on behalf of N. containing the statements (*inter alia*) that "the average sales of 'Maizena' in Victoria amounted to about £3,000 per annum," and that "the matter in issue—namely, whether H.'s trade mark should be registered, and whether the opposition thereto should be allowed—amounted to more than the sum of £1,000," granted leave to appeal to the Privy Council.—*In re "Maizo" and "Maizena" Trade Marks, Robert Harper and Co. v. National Starch Co.*, 1906 V.L.R., 246.

(e) The discharge by the Full Court of an order nisi to enforce payment of an amount awarded by arbitrators is a decision by which the merits of the case are concluded within the meaning of this section, and an appeal will lie therefrom to the Privy Council.—*Graham and another v. The Victorian Railways Commissioners*, 18 A.L.T., 162.

An order granting a rule absolute for a new trial was held not to be a "decision by which the merits of the case may be concluded," but refusing such a rule was such a decision.—*Crooks v. Ormerod*, 3 W.W. & A.B. (L.), 132.

(f) Where a summons for leave to appeal to the Privy Council had been taken out for a day within the 30 days, and had on that day been adjourned by the Judge to a day without the 30 days, the application for leave to appeal having been originally made within the 30 days was deemed sufficient.—*The Attorney-General v. Prince of Wales Co.*, 6 W.W. & A.B. (E.), 4.

has been pronounced to apply to the Court for leave to appeal therefrom to His Majesty in His Privy Council.<sup>(a)</sup> *Supreme Court Act 1916.*

In case any such person has been by such decision directed to pay any sum of money or perform any duty it shall be lawful for the Court to direct that such decision be carried into execution, or that execution thereof shall be stayed, as to the Court appears most consistent with real and substantial justice. *Decision may be carried into execution or stayed.*

In case the Court directs that such decision be carried into execution, it shall be lawful for the Court to require that the person in whose favour it was pronounced shall before the execution thereof enter into sufficient security to be approved of by the Court for the due performance of such sentence as His Majesty's Privy Council may pronounce thereon, or in case the Court shall direct that the execution upon such decision be stayed pending such appeal, it shall be lawful for the Court to direct that the person against whom such decision has been given shall in like manner enter into sufficient security to be approved of as aforesaid for the due performance on his part of such sentence as His Majesty's Privy Council may pronounce thereon. *Security, in what cases.*

It shall be lawful to the Court if it sees fit so to do to continue pending any such appeal any injunction before that time granted or the appointment of any receiver appointed by the Court in such proceedings or to grant an injunction to restrain the party in possession of the property from disposing thereof, and to appoint a receiver to manage the same pending such appeal: And in all cases to require that the person appealing from such decision shall give such sufficient security as aforesaid for payment of all costs previously incurred and to be incurred by reason of such appeal.<sup>(b)</sup> *Injunctions and receiver.*  
*Security for costs.*

(a) Where leave to appeal to the Privy Council is given under this section and not under the Order in Council, a motion for final leave and liberty to appeal is unnecessary.—*Mulholland v. Smith*, 16 A.L.T., 130.

The Privy Council having reversed a judgment of the Supreme Court, such Court ordered that judgment should be entered therein in accordance with the order of the Privy Council.—*Falkingham v. National Bank*, 8 A.L.R. (C.N.), 81.

C., in May, 1899, obtained, on appeal to the Full Court, a rule for a writ of mandamus against the East Loddon Shire Council, together with an order for costs.

A. and B., as trustees of an estate affected by the order against the council, obtained leave to take part in the proceedings, although they were not originally parties to the writ.

A. and B. obtained leave to appeal from the judgment of the Full Court to the Privy Council, but the shire council took no part in such appeal, and took no steps to appeal. Final leave to appeal was given to A. and B. in September, 1899.

In October, 1899; C. died, and probate was granted to his executors in December, 1899. In January, 1900, the solicitors who had been acting for C. demanded payment of their taxed costs under the order of the Full Court, and the shire council then paid the same under protest. The executors of C. received no formal notice of the appeal to the Privy Council, and did not appear on that appeal.

The Privy Council in July, 1900, allowed the appeal of A. and B., and reversed the order of the

Full Court, and ordered the respondent to pay the costs of the appeal to the Privy Council. The shire council then applied for the repayment of the costs of the proceedings paid to C.'s solicitor in respect of the order of the Full Court.

*Held*, that inasmuch as the shire council was not a party to the appeal to the Privy Council, and further, as the executors of C. had not been made parties thereto, the Court had no power to order the repayment of such costs, so as to give due effect to the order of the Privy Council.—*Cheyne v. Shire of East Loddon*, 28 V.L.R., 503.

(b) In all cases the Court must require security for costs.—*Davis v. The Queen*, 1 V.R. (E.), 33; see also *Webster v. Power*, L.R., 1 P.C., 160; *In re The Attorney-General of Victoria*, L.R., 1 P.C., 147; *Hassell v. Moore*, A.R., 3rd October, 1868; *Stevenson v. Bear*, 3 A.J.R., 30; *The Mayor, &c., of Ballarat v. The Bungaree Road Board*, 1 V.R. (E.), 166; *Johnson v. Colclough*, 1 V.L.R. (E.), 31.

The security required by this section does not mean security for the costs of the action, but merely security for the costs of the appeal.—*Speight v. Syme*, 21 V.L.R., 530.

By this section, in an application for leave to appeal to the Privy Council, the Court shall "require that the person appealing from such decision shall give such sufficient security as aforesaid for payment of all costs previously incurred and to be incurred, by reason of such appeal." *Held*, following *Speight v. Syme* (21 V.L.R., 530, *supra*) and the former practice of the Court, that the "costs" referred to are the costs of the appeal to the Privy Council, and not the costs of the trial

*Supreme Court Act 1915. Evidence &c. to be transmitted.*

In every case of appeal so allowed to be made the Court shall transmit to His Majesty's Privy Council a true copy certified under the seal of the Court of all the evidence and proceedings in the cause relating to the matter of the said appeal.<sup>(a)</sup>

*Right of appeal waived if security not given in time.*

*Id. s. 233.*

*15 Vict. No. 10 s. 34.*

231. If such security as is required by the Court be not entered into within three months from the date of the order made upon such application for leave to appeal, the person applying for such leave shall be held to have waived the benefit of such order, unless the time for entering into such security is enlarged by the said Court.<sup>(b)</sup>

previously incurred. But *quære, per Hood, J.*, whether such decision and such former practice are not in contravention of the terms of this section.—*Healy v. Bank of New South Wales* (No. 3), 24 V.L.R., 733.

An order giving the defendants leave to appeal to the Privy Council directed that the defendants should give security to the satisfaction of the Prothonotary within three months, and it was ultimately agreed that a registered mortgage would be sufficient.

The defendants lodged a mortgage, executed in duplicate, at the Titles Office within the specified time, but did not offer a registered mortgage to the plaintiffs or to the Prothonotary until after such time. Upon the face of the mortgage it appeared to have been registered within the required time. Upon a motion to have it declared that the defendants had lost the benefit of the order giving them leave to appeal on the ground of non-compliance with the terms of the order, it was sought by the plaintiffs to show that, although the mortgage was lodged within the time, it had not been registered until several days after such time had elapsed.

*Held*, that the indorsement on the duplicate mortgage made under section 61 of the *Transfer of Land Act 1890* was conclusive evidence that the instrument had been duly registered, and that due registration included the time of registration.

*Held*, also, that delivery to the Registrar of Titles for registration of such mortgage enabled that official to hold the same on behalf of the plaintiffs, and was a sufficient delivery.—*The Great Central Freehold Mines Ltd. v. Chapman*, 29 V.L.R., 940.

Where the parties to a cause or matter have exhausted their litigant possibilities in this State, the Court will not interfere with the right of the successful party to carry off all the fruits of his victory unless special circumstances are shown; the fact that the plaintiff, a limited company, is in such pecuniary difficulties that the defendant, if successful on appeal to the Privy Council, might not be able to get his costs from it is not such a special circumstance; and, therefore, money paid by such company into Court as security for costs should be ordered to be paid out to it.

*Per Hood, J. (dissenting)*, that the Court should not order the money to be paid out of Court, on the ground that the Court acting in analogy with the provisions relating to appeals to the Privy Council, ought to do its best to retain matters in such a position that, in the event of the Privy Council allowing the appeal, complete justice might be done between the parties, but that the

money should be retained in Court, on the plaintiff undertaking to pay 5 per cent. interest thereon.—*The Goulburn Valley Butter Factory Company Proprietary Limited v. Bank of New South Wales* (No. 2), 26 V.L.R., 365.

Defendants obtained an order for liberty to appeal to the Privy Council from a decision of the Supreme Court, and deposited £500 to abide the appeal under the order. On rule *nisi* obtained by the defendants to rescind their own order for appeal: *Held*, that the Court had no jurisdiction to interfere, and rule discharged, but without costs.—*Byrnes v. Clough*, 2 W.W. & A.B. (L.), 17.

After leave to appeal has been granted, the Supreme Court has no jurisdiction over the case.—*Goldsbrough v. McCulloch*, 2 A.J.R., 1.

Where an appeal to the Privy Council has been instituted, and security given, and such appeal is afterwards abandoned, the Full Court has no power to direct the Prothonotary to pay the money lodged as security out to the appellant.—*In re Wyatt*, 2 A.L.R. (C.N.), 330. But see the next two cases.

The defendant in an action had obtained leave to appeal to the Privy Council upon the usual terms as to lodging security in Court to the satisfaction of the Prothonotary, the plaintiff entering into a similar bond for the repayment of certain costs. Instead of entering into the usual bonds, and lodging security, the parties by agreement paid the amount into a bank in the name of the Prothonotary, with whom the deposit receipt was lodged. The appeal to the Privy Council was abandoned, and both parties applied to have the money paid out to them.

Order made directing Prothonotary to be at liberty to pay the moneys out to the respective parties.

The payment of moneys into a bank in lieu of lodging the securities under the order of the Court said to be irregular, and not in accordance with the order of the Court.—*Australian Gold Recovery Co. Ltd. v. Gray*, 25 V.L.R., 677.

After delivery of notice of appeal an action was settled, and the Court made an order for payment out to the appellant of the money lodged in Court by him as security for the prosecution of the appeal to the Privy Council.—*Monash v. Shire of Corio*, 9 A.L.R. (C.N.), 27.

(a) The Court or Judge has power from time to time to extend the time for delivering the transcript of the evidence and judgment in appeals to the Privy Council.—*Mulholland v. Smith*, 21 V.L.R., 97.

(b) A judge has no jurisdiction to enlarge the time for giving security for costs in an appeal to

232. Nothing in this Part contained shall be construed to affect the Royal Prerogative of His Majesty, or to abridge the power of His Majesty to allow any person aggrieved by any decision of the said Court to appeal to His Majesty at any time in such manner as His Majesty is graciously pleased to allow.<sup>(a)</sup>

*Supreme Court Act 1915 s. 234.*

*Prerogative of His Majesty saved.*

*15 Vict. No. 10 s. 35.*

## SCHEDULES.

### FIRST SCHEDULE.

Section 2.

No. of Act.	Title of Act.	Extent of Repeal.
2590 .. ..	<i>Supreme Court Act 1915 (No. 2) ..</i>	The whole.
2733 .. ..	<i>Supreme Court Act 1915 .. ..</i>	So much as is not otherwise repealed.
2778 .. ..	<i>Supreme Court Act 1915 (No. 3) ..</i>	The whole.
2868 .. ..	<i>Supreme Court Act 1916 .. ..</i>	The whole.
2897 .. ..	<i>Master-in-Equity's Salary Act 1916 ..</i>	The whole.
3264 .. ..	<i>Supreme Court Act 1922 .. ..</i>	The whole.
3270 .. ..	<i>Imperial Acts Application Act 1922 ..</i>	So much of Part III. as is not otherwise repealed, (except the Heading "Part III.—Consolidating Provisions" and sections 42, 43, 98–100), and in section 1 all the words and figures after the Heading "Part III.—Consolidating Provisions."
3286 .. ..	<i>Supreme Court Act 1923 .. ..</i>	The whole.
3395 .. ..	<i>Judgments (Reciprocity) Act 1925 ..</i>	The whole.
3540 .. ..	<i>Supreme Court Act 1927 .. ..</i>	So much as is not otherwise repealed.

### SECOND SCHEDULE.

Section 50.

#### PLACES AT WHICH THE COURT SHALL BE HELD.

Ballarat	Hamilton	St. Arnaud
Bendigo	Horsham	Wangaratta
Castlemaine	Maryborough	Warrnambool.
Echuca	Sale	
Geelong	Shepparton	

### THIRD SCHEDULE.

Section 57.

#### EASTERN BAILIWICK.

Commencing at Cape Howe; thence by the boundary line between Victoria and New South Wales to the crossing-place at Tom Groggin on the River Murray; thence south-westerly by the track (leading from Tom Groggin towards Omeo) to a point due east from Mount Gibbo; thence by a line due west to that mount; thence by the northern watershed of the Gibbo Creek to the Mitta Mitta River; thence crossing that river, by the northern watershed of the Wombat Creek to Mount Wills; thence by the northern and western watersheds of the Big River, the Bundarra River, and Cobungra Creek to

the Privy Council unless the application to enlarge time be made before the expiration of the original time prescribed for entering into such security.—*Pearson v. Russell*, 15 V.L.R., 89.

See *The Great Central Freehold Mines Company and others v. Chapman and others*, 29 V.L.R., 940, referred to on previous page.

(a) The Privy Council will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.—*In re Deeming*, 1892 A.C., 422; 14 A.L.J., 22.

## THIRD SCHEDULE—continued.

Mount Hotham, on the Great Dividing Range; thence by that range to the range which divides the waters of the River Yarra Yarra from the waters of the Thomson River; thence by that range and by the range which divides the waters of the River Yarra Yarra from the waters of the La Trobe and Buneep Rivers to the source of the Buneep River; thence by the eastern boundary of the county of Mornington (of which boundary the Buneep River forms part) southerly to the south angle of allotment 1 of section 5, township of Korumburra; thence by a direct line south-westerly to the north angle of allotment 18A of section 4; thence by the south side of South Railway-crescent south-easterly to Henry-street; thence by the west side of that street south-westerly and by the south side of Mine-road north-westerly to John-street; thence by the west side of that street south-westerly to Princea-street; thence by the south side of that street east to the Jumbunna and Outtrim Railway; thence again by the eastern boundary of the county of Mornington southerly to Cape Paterson; thence by the sea-coast to the point of commencement, including all bays and inlets, together with all the islands off the portion of the sea-coast above described.

## WESTERN BAILLWICK.

Commencing on the sea-coast at Curdie's Inlet; thence up the eastern shore of that inlet and Curdie's River to the south boundary of the town of Cobden; thence by that boundary and a line bearing west to Lake Elingamite; thence by the northern shore of that lake to the Elingamite Creek; thence down that creek to the Mount Emu Creek; thence up the Mount Emu Creek to the boundary between the counties of Hampden and Ripon; thence by that boundary bearing west to Fiery Creek; thence up that creek to its source in the Great Dividing Range; thence by that range easterly to the source of the River Avoca; thence down that river to Tyrrell Creek; thence down that creek to Lake Tyrrell; thence by the southern and western shores of that lake to the south boundary of mallee block 26B; thence west by that boundary and the south boundary of block 28A to the east boundary of block 35B; thence north by that boundary to the south-east angle of block 34B; thence west by the south boundaries of blocks 34B, 34A, 36A, 33A, 32A, and 37A to the boundary line between Victoria and South Australia; thence by that boundary south to the sea-coast; and thence by the sea-coast to the point of commencement, including all bays and inlets together with all islands off the portion of the sea-coast above described.

## MIDLAND BAILLWICK.

Commencing at the junction of the Rivers Goulburn and Murray; thence up the first-named river to a point due east of the centre of a road north of allotment 30C, parish of Mitchell; thence west by a line and that road to the north-west angle of the said allotment; thence south-westerly by a direct line to the south-east angle of allotment 1, parish of Puckapunyal; thence south-westerly by the south-east boundary of that allotment and of allotment 2 to the south-west angle of the latter allotment; thence south-westerly by a direct line to the south-east angle of allotment 3A of section 5, parish of Tooborac; thence west by a road to the south-east angle of allotment 2 of said section; thence south-westerly by a road to the south angle of allotment 6 of section 7; thence south-westerly by a road to the east angle of allotment 16 of same section; thence north-westerly by a road to a road forming the east boundary of allotment D2; thence south and south-westerly by that road to the westernmost angle of allotment D15; thence south-westerly by a road to the east boundary of the parish of Glenhope; thence south-westerly by part of that boundary to the south-east angle of allotment 4 of section C; thence southerly by a road to the north-east angle of allotment 73x, parish of Baynton; thence southerly by the eastern boundaries of allotments 73x and 73y to a road; thence south-westerly by that road to a road forming the western boundary of allotment 73q; thence southerly by that road to a road forming the south boundary of allotment 3A; thence easterly by that road to the west boundary of allotment 3 of section 1; thence south and east by the west and south boundaries of that allotment to a road forming the eastern boundary of allotment 4 of said section; thence southerly by that road to the south-east angle of the last-named allotment; thence westerly by a road to the north-west angle of allotment 78x; thence southerly and easterly by the western and part of the southern boundary of that allotment to the north-west angle of allotment 16B; thence south-east, south, and east to the south-east angle of allotment 16B; thence south-easterly by a road to the north angle of allotment 3 of section A, parish of Langley; thence south-easterly by a road to a road forming the eastern boundary of allotments 1 and 7 of same section to the north-east angle of allotment 8; thence south by the east boundary of that allotment to Bg

## THIRD SCHEDULE—continued.

Hill Creek; thence westerly by that creek to the northern angle of allotment 89, parish of Lancefield; thence south-westerly and south-easterly by part of the boundary of that parish to its intersection with the Great Dividing Range; thence by that range westerly to the source of the River Werribee; and thence by the same range to the road forming the eastern boundary of section 6, parish of Dean; thence by that road and by a line bearing north to the creek forming the south boundary of allotment 4 of section B, parish of Bullarook; thence up that creek to the eastern boundary of that allotment; thence north by that allotment and allotments 5, 6, 103, and 108, to the road forming the northern boundary of the said last-mentioned allotment; thence by that road bearing north-westerly and westerly to the southern angle of allotment 95; thence by the road forming the south-western boundary of that allotment, north-westerly to the north-eastern angle of allotment 24 of section A; thence by the road forming the northern boundary of that allotment westerly to the eastern boundary of the parish of Smeaton; thence north and west by the parish boundary and a line to the north-east angle of the parish of Beckworth; thence south by the eastern boundary of that parish to the road forming the south boundary of allotment 68; thence westerly by that road by the south boundaries of allotments 19, 17, and 16, parish of Caralulup by the north boundary of the parish of Lexton and by a line through the north boundaries of allotments 3, 2, and 1, parish of Lexton, to the Bet Bot Creek; thence up that creek to its source in the Great Dividing Range; thence by that range westerly to the source of the River Avoca; thence down that river to Tyrrell Creek; thence down that creek to Lake Tyrrell; thence by the southern and western shores of that lake to the south boundary of mallee block 26B; thence west by that boundary and the south boundary of block 28A to the east boundary of block 35B; thence north by that boundary to the south-east angle of block 34B; thence west by the south boundaries of blocks 34B, 34A, 36A, 33A, 32A, and 37A to the boundary line between Victoria and South Australia; thence north by that boundary to the River Murray aforesaid; and thence up that river to the point of commencement.

## NORTHERN BAILLIWICK.

Commencing at the junction of the Rivers Goulburn and Murray; thence up the first-named river to the Franjip or Muddy Creek; thence up that creek to Creighton's Creek; thence up that creek to its source in the Strathbogie Range; thence by that range easterly to the source of Monham's Creek; thence down that creek to Merton Creek; thence down that creek to Branket Creek; thence down that creek to the Delatite River; thence down that river to the River Goulburn aforesaid; thence up that river to the Jerusalem River; thence up that river to its source; thence by a line south-westerly to the Mount Torbreck Trigonometrical Survey Station; thence by a range southerly to Mount Arnold; thence by the Great Dividing Range northerly and easterly to Mount Hotham; and thence by the northern boundary of the Eastern Bailiwick as hereinbefore described to the crossing place at Tom Groggin on the River Murray; and thence down that river to the point of commencement.

## SOUTHERN BAILLIWICK.

Commencing in Port Phillip Bay at the mouth, and thence up the stream to the source of the River Werribee in the Great Dividing Range; thence southerly and westerly along the south boundary of the Midland Bailiwick as hereinbefore described to the source of the River Avoca; thence southerly along the east boundary of the Western Bailiwick as hereinbefore described to the sea-coast; thence by the sea-coast to Port Phillip Bay; and by the western shore of that bay to the point of commencement.

## FOURTH SCHEDULE.

Section 187.

No.

GEORGE by the Grace of God &c. to the Sheriff Greeting—Whereas one A.B. has lately in our Supreme Court at Melbourne commenced an action against C.D. of &c. [as in the writ of summons] and intends to prosecute the same against him for a return of certain cattle goods and chattels of the said A.B. which the said C.D. hath taken and unjustly detains. We do therefore command you that you forthwith cause to be replevied to the said A.B. the said cattle goods and chattels if they shall be found and in what manner you shall have executed this writ make appear to our said Court immediately after the execution hereof and have there then this writ.

Witness Sir William Hill Irvine, Knight, &c., at Melbourne the  
One thousand nine hundred and

day of





## SEVENTH SCHEDULE.

Section 158.

No.

George by the Grace of God &amp;c. to A.B. of

and M.O. of

Greeting—Whereas an action is now pending in  
 our Supreme Court at between C.D. Plaintiff and E.F. of, &c.  
 and O.P. of &c. [as in the writ of summons] Defendants and in order that the plaintiff  
 may proceed in the said action We command you that you and each of you do retain  
 and keep all and singular lands and other hereditaments moneys and chattels bills bonds  
 and other property of whatsoever nature in the custody or under the control of you or  
 either of you at the time of the service of this writ belonging to the above-named O.P.  
 or to or in which such defendants shall at the time be legally or equitably entitled or  
 otherwise beneficially interested (and whether solely or jointly with any person or  
 persons) and all debts of any kind then due by you or either of you to such defendants  
 although the same or part thereof may be payable only at a future day And we further  
 command you that you and each of you in your own proper persons be and appear  
 before our said Court [or such Judge of our said Court as shall be sitting at chambers]  
 on [Monday] the day of next [or instant] at  
 o'clock in the noon then and there to be examined touching the premises  
 and to do and receive what shall then and there be considered of you in that behalf and  
 this you shall in nowise omit.

Witness Sir William Hill Irvine, Knight, &amp;c.

(To be indorsed.)

This writ was issued by X.Y. of &c., solicitor for the within-named plaintiff [or agent  
 for O.K., of &c., solicitor for the within-named plaintiff].

If you part with any of the defendant's property or pay him any debts due to him  
 you will become personally responsible to the plaintiff.

## EIGHTH SCHEDULE.

Section 158.

No.

In the Supreme Court

C.D. plaintiff

and

O.P. defendant.

Notice is hereby given that an action has been commenced in this Court by the above-  
 named plaintiff against the above-named defendant for that &c. [state the cause of action]  
 and a writ of foreign attachment has been issued directed to S.T. of &c. and U.X. of  
 &c. for the purpose of attaching in the hands of the said S.T. and U.X. all and singular  
 the lands and other hereditaments moneys and chattels bills bonds and other property of  
 whatsoever nature in the custody or under the control of the said S.T. and U.X. or either  
 of them at the time of the service of the said writ belonging to the above-named O.P.  
 or to or in which such defendant shall at the time be legally or equitably entitled or other-  
 wise beneficially interested (and whether solely or jointly with any person or persons)  
 and all debts of every kind then due by the said S.T. and U.X. or either of them to such  
 defendant although the same or part thereof may be payable only at a future day and if  
 at any time before final judgment in this action the said O.P. or any person on his behalf  
 will give the security required by law the said O.P. upon entering an appearance and  
 upon giving notice thereof to the plaintiff may apply to the Court and have the said  
 attachment dissolved.

Dated this day of  
 nine hundred and

in the year of our Lord One thousand

J.H.

[residence]

Plaintiff's solicitor.

## NINTH SCHEDULE.

Section 158.

Whereas an action is now pending in the Supreme Court at between  
 the above-bounden C.D. plaintiff and the above-named O.P. defendant and a writ of  
 foreign attachment directed to S.T. and U.X. was on the day of  
 last issued therein. Now the condition of the above-written bond or obligation is such  
 that if the plaintiff his executors or administrators shall repay to the said O.P. his

## NINTH SCHEDULE—continued.

executors or administrators all such sums as the plaintiff shall recover and actually receive in the said action in case the judgment therein shall be vacated reversed or altered together with all costs sustained by the defendant and which the said Court shall adjudge to be paid by the plaintiff his executors or administrators to the said O.P. his executors or administrators by reason of or in relation to the said action and writ or either of them then this obligation shall be void but otherwise shall remain in full force.

N.B.—Where the plaintiff is absent and a third person is bound for him the condition must be altered accordingly. The obligatory part will be as in common money bonds.

Section 178;

## TENTH SCHEDULE.

In the Supreme Court  
Between  
and  
The day of 19 .  
plaintiff  
defendant

Satisfaction is acknowledged between A.B. plaintiff (or as the case may be) and C.D. defendant (or as the case may be) in (here describe the cause matter or liability in respect of which satisfaction is acknowledged) And I do hereby expressly nominate and appoint E.F. solicitor of the Supreme Court to witness and attest my execution of this acknowledgment of satisfaction.

Judgment entered on the day of 19  
Signed by the said A.B. in the presence of me E.F. of &c. one of the solicitors of the Supreme Court of Victoria and I hereby declare myself to be solicitor for and on behalf of the said A.B. expressly named by him and attending at his request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by him) and I also declare that I subscribe my name hereto as such solicitor.

Signature  
of the Plaintiff.  
Date.

Sections 192  
and 193.

## ELEVENTH SCHEDULE.

## COURT FEES, PERCENTAGES, ETC.

## SUMMONSES, WRITS, COMMISSIONS, AND WARRANTS.

## Subject-matter.

	Fee.
	£ s. d.
On sealing a writ of summons for commencement of an action .. .. .	0 15 0
On sealing a concurrent, renewed, or amended writ of summons for commencement of an action .. .. .	0 5 0
On sealing a notice for service under Order XVI., Rules 48 and 55 .. .. .	0 5 0
On sealing a writ of <i>mandamus</i> , <i>habeas corpus</i> , <i>certiorari</i> , or prohibition .. .. .	0 15 0
On sealing a writ of subpoena .. .. .	0 3 0
On sealing every other writ .. .. .	0 10 0
On signing and sealing every citation .. .. .	0 7 6
On sealing copy petition .. .. .	0 7 6
On sealing an originating summons .. .. .	0 15 0
On sealing transcript on appeal .. .. .	1 0 0
On issuing summons to attend Judge's Chambers .. .. .	0 5 0
On sealing or issuing any other summons or warrant .. .. .	0 5 0
On sealing or issuing a commission to take oaths or affidavits in the Supreme Court .. .. .	1 0 0
Every other commission .. .. .	1 0 0
On affixing seal of Court to any other document .. .. .	1 0 0
On marking a copy of a petition of right for service .. .. .	0 5 0
On amending any originating summons .. .. .	0 5 0
On amending appearance .. .. .	0 1 0
On amending indorsement on writ, pleading or other document .. .. .	0 2 6

## ELEVENTH SCHEDULE—continued.

*Appearances.*

	Fees.
	£ s. d.
On entering an appearance .. .. .	0 5 0
On entering an appearance for each person after the first .. .. .	0 1 0

*Copies.*

For a copy of a written deposition of a witness to enable a party to print the same, for each folio .. .. .	0 0 4
For examining a written or printed copy, and marking same as an office copy, for each folio .. .. .	0 0 2
For making a copy and marking same as an office copy, for each folio .. .. .	0 0 3
For a copy in a foreign language, the actual cost.	
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.	
For a printed copy of an order not being an office or certified copy, for each folio .. .. .	0 1 0

## ATTENDANCES AND PRODUCTION OF PAPERS.

*Subject-matter.*

On a notice to produce any record or document on the trial or hearing of a cause, suit, or matter .. .. .	0 5 0
On a notice to produce any record or document in the Judge's Chambers, or Practice Court .. .. .	0 2 6
On an application, with or without a subpoena, for any officer, not being the Associate of the Judge presiding at the Court, to attend with any record or document at any Court or place out of the Court building, in addition to the just charges and expenses of the officer, for each day or part of a day he shall necessarily be absent from his office .. .. .	1 0 0
The officer may require a deposit on account of any further fees, charges, or expenses which may probably become payable beyond the amount paid for fees, charges, and expenses on the application, and the officer or his clerk taking such deposit shall thereupon make a memorandum thereof on the application.	
The officer may also require an undertaking in writing to pay any further fees, charges, and expenses which may become payable beyond the amounts so paid and deposited.	

*Filing.*

On filing a special case, case on appeal, or petition of right .. .. .	0 15 0
On filing any other petition .. .. .	0 7 6
On filing a caveat in the probate jurisdiction .. .. .	0 7 6
On filing notice of appeal .. .. .	0 7 6
On filing answer, reply or other pleading .. .. .	0 7 6
On filing any other document .. .. .	0 2 6
Provided that no fee shall be payable on the filing of any document under the Administration and Probate Acts where the whole estate does not exceed £200 in value.	

*Certificates.*

For a certificate of appearance, or of a pleading, affidavit, or proceeding having been entered, filed, or taken, or of the negative thereof .. .. .	0 5 0
For a certificate that a decree nisi has been made absolute or discharged .. .. .	0 10 0

*Searches and Inspections.*

On an application to search for an appearance, affidavit, or caveat, and inspecting the same, or to search index for prior grant of probate or letters of administration .. .. .	0 2 6
On an application to search to ascertain whether a decree nisi in the divorce jurisdiction has been made absolute or discharged .. .. .	0 1 0
On an application to search an index, and inspect a pleading, judgment, decree, order, or other record, unless otherwise expressly provided for by an Act of Parliament or Rule of Court, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied .. .. .	0 5 0
Not exceeding on one day .. .. .	1 0 0

## ELEVENTH SCHEDULE—continued.

<i>Hearing.</i>		Fee. £ s. d.		
For entering or setting down, or re-entering or resetting down, an appeal to the Full Court, or a cause, suit, or matter for trial or hearing, or assessment of damages, including a special case, motion to the Court, interpleader and other issues, re-hearing, new trial and further directions, order to review decision of Justices, and petitions, but not a summons adjourned from Chambers..		0	15	0
For a certificate of the Associate or other proper officer of the result of a trial		1	0	0
<i>Judgments, Decrees, and Orders.</i>				
For entering a judgment by default ..		0	10	0
For drawing up and entering any other judgment, or a decree or decretal order, whether on the original hearing of a cause or on further consideration including a cause commenced by summons at Chambers, and an order on the hearing of special case or petition, and any order by the Full Court, and any order of the Court under the Companies Act, or in its Probate, Insolvency, Lunacy, or Divorce and Matrimonial Causes Jurisdictions (except an order granting probate or administration and except the special fees in probate matters hereinafter specified) ..		1	0	0
For drawing up and entering any other order, whether made at Court or in Chambers (except the special probate fees hereinafter specified) ..		0	5	0
On signing a note or memorandum of an order pursuant to Order 52, Rule 14, where no order is drawn up ..		0	5	0
<i>Special Fees in the Master-in-Equity's Office.</i>				
On a grant of probate by the Registrar where the estate is sworn to exceed £500 in value ..		2	0	0
On every exemplification ..		1	0	0
On every order of the Registrar other than an order for probate or administration		0	5	0
On every master's certificate of transfer of executorship or administration ..		1	0	0
On every master's certificate under seal of Court verifying copy probate or administration or other document ..		1	0	0
On sealing foreign probate or administration, Scotch confirmation, or exemplification, Ten shillings per £500 or fraction of £500 in value.				
On payment of money into Court, Five shillings for the first £100 or less, and thereafter Two shillings and sixpence per cent.				
On each application for probate or letters of administration where a solicitor is not employed, an additional fee of Ten shillings per £1,000 in estates of the value of £5,000 or less, and in estates of the value of over £5,000 a further fee of Ten shillings for each additional £5,000 or fraction thereof.				
<i>Taking Accounts.</i>				
On passing accounts of a committee or receiver, in the lunacy jurisdiction ..		0	5	0
In all other jurisdictions, on taking an account of a receiver, guardian, consignee, bailee, manager, provisional official, or voluntary liquidator, or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200 ..		0	2	0
Where such amount shall exceed £200, for every £50, or fraction of £50 ..		0	0	6
In the case of any such receiver, guardian, consignee, bailee, manager, liquidator, sequestrator, or execution creditor, the fees shall, upon payment, be allowed in the account, unless the Court or Judge shall otherwise direct, and in the case of taking the accounts of such other accounting parties, the fees shall be paid by the party having the conduct of the order under which such account is taken, as part of his costs of the cause or matter (unless the Court or a Judge shall otherwise direct), and in such a case shall be taken upon the certificate of the result of any such account, but the fees shall be due and payable, although no certificate is required, on the account taken, or on such part thereof as may be taken, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the account.				
The officer taking the account may require a deposit of stamps on account of fees before taking the account, not exceeding the fees on the full amount appearing by the account to have been received, and the officer or his clerk taking such deposit shall make a memorandum thereof in the account.				

## ELEVENTH SCHEDULE—continued.

	Fee. £ s. d.		
The fees shall not be payable twice on the same money in the same cause or matter, but only upon sums of money for the first time received or collected by the party accounting.			
For taxing a bill of costs, where the amount allowed does not exceed £8 ..	0	2	0
Where the amount exceeds £8, for every £2 or fraction thereof allowed ..	0	0	6
These fees, except where otherwise provided, shall be taken on signing the certificate, or on the allowance of the bill of costs, as taxed, but the fees shall be due and payable if no certificate or allocatur is required on the amount of the bill as taxed, or on the amount of such part thereof as may be taxed, and the solicitor or party suing in person shall in such case cause the proper stamps (the amount thereof to be fixed by the officer) to be impressed on or affixed to the bill of costs.			
The taxing officer may require a deposit of stamps on account of fees before taxation not exceeding the fees on the full amount of the costs as submitted for taxation and the officer or his clerk taking such deposit shall make a memorandum thereof on the bill of costs.			
For a certificate or allocatur of the result, not being a judgment ..	0	10	0

*Miscellaneous.*

On a fiat of a Judge ..	0	5	0
On signing an advertisement ..	0	5	0
Upon a reference to the Master-in-Equity, Chief Clerk or Prothonotary, for the purpose of any investigation or inquiry, other than the taking of an account for which a special fee is herein provided, for every hour or part of an hour the Master-in-Equity, Chief Clerk or Prothonotary is occupied—			
For the first hour ..	1	0	0
For each subsequent hour or part of an hour ..	0	10	0
A deposit on account of fees before proceeding with such reference, or at any time during the course thereof, may be required, and a memorandum thereof shall be delivered to the party making the deposit.			
Signing allowances of any account or other document not otherwise herein specially provided for ..	0	5	0
Drawing reports or certificates of Master-in-Equity, Master in Lunacy, Chief Clerk, per folio ..	0	1	0
Engrossing same ..	0	0	6
Signing same ..	1	0	0
On taking a recognisance or bond ..	0	10	0
On taking bail, and taking same off the file and delivering ..	0	2	0
On a commitment ..	0	5	0
On administering the oaths of office to a Justice of the Peace ..	1	0	0
On sealing a writ of <i>dedimus potestatem</i> ..	1	10	0
On signing precept to Sheriff ..	0	5	0
On sealing shorthand writer's licences ..	0	10	0
On appointment to settle skeleton transcript on appeal to High Court or Privy Council ..	0	10	0

*Abstracts.*

Perusing every three sheets ..	0	6	8
Conditions of sale, settling, ordinary form ..	0	5	0
Long and special, according to circumstances ..	1	1	0
	to	3	3
Attending any sale ..	1	1	0

*Deeds.*

Perusing and settling, not exceeding 30 folios ..	1	0	0
Exceeding 30 and not exceeding 50 ..	1	10	0
Exceeding 50 and not exceeding 100 ..	2	10	0
Exceeding 100 ..	3	0	0
Examining engrossment, not exceeding 10 folios, per folio ..	0	3	4
For every folio beyond 10 ..	0	0	3
Signing allowance ..	0	5	0
Comparing books, papers, &c., with schedule, when deposited or delivered out ..	0	10	6

Sections 192  
and 193.

# TWELFTH SCHEDULE.

## FEEs ETC. TO BE PAID TO THE SHERIFF.

### Allowances for Expenses on a View.

	£	s.	d.
To the sheriff, actual and reasonable travelling expenses for himself, shewers, and jury men.			
To the same, for actual and reasonable expenses for refreshments not to exceed per diem for each person .. .. .	0	5	0
To each of the shewers upon a view, for each day .. .. .	1	0	0
To each jurymen upon a view, for each day .. .. .	1	0	0
Any juror paid "upon a view" as provided by this Schedule shall not be entitled to any compensation under the <i>Juries Act 1928</i> for the same day or days.			

### Office Fees (payable by fee stamps).

For every copy of a jury panel .. .. .	0	5	0
For every warrant upon a writ or process .. .. .	0	3	6
Precept to bailiff .. .. .	0	2	6
Notice for service on defendant .. .. .	0	2	6
Assigning bail or replevin bond .. .. .	0	2	6
Writ <i>de retorno habendo</i> .. .. .	0	5	0
Sheriff's fee on a view, when the distance does not exceed five miles ..	0	10	0
Exceeding five miles, but not exceeding ten miles .. .. .	1	0	0
For every mile beyond ten, per mile (one way only) .. .. .	0	2	0
For every day (if necessary) after the first .. .. .	1	0	0
For furnishing an office copy of a writ of <i>feri facias</i> .. .. .	0	3	0

### Bailiff's Fees and Allowances.

Executing each warrant if the distance from the sheriff's or bailiff's office does not exceed one mile .. .. .	0	10	0
Where the amount to be levied exceeds Two hundred pounds, additional fee ..	0	5	0
Delivering goods in replevin .. .. .	0	10	0
Each arrest within one mile of the sheriff's or bailiff's office .. .. .	1	0	0
For an undertaking to give a bail bond .. .. .	0	5	0
For bail bond, inclusive of filing .. .. .	1	0	0
For receiving money upon deposit on arrest and paying it into court ..	0	10	0
If the money upon deposit received exceeds Two hundred pounds, an additional fee of .. .. .	0	10	0
For a replevin bond .. .. .	1	0	0
For serving any writ, notice, order, summons, or other document not hereinbefore provided for when within one mile of the sheriff's or bailiff's office ..	0	10	0
Mileage on executing each warrant, delivering goods in replevin, making each arrest, serving any writ, notice, order, or summons, or conveying any person to gaol when the distance from the sheriff's or bailiff's office is over one mile, for each extra mile (one way) .. .. .	0	2	0
Advertising—the actual and reasonable cost.			
For each man left in possession or to assist in arrest—when absolutely necessary—the actual and reasonable expenses to be settled by the sheriff.			
For conveying any person to gaol, the actual and reasonable expenses for such person's train or coach fare, horse, buggy, motor car, or boat hire, and refreshments when absolutely necessary.			
Appraiser, where the sum demanded and due in replevin exceeds Twenty pounds, and does not exceed Fifty pounds, for appraisement and affidavit of value .. .. .	1	1	0
Where it exceeds Fifty pounds .. .. .	1	10	0
Travelling expenses of appraiser, train or coach fare, or horse or buggy or motor car hire, if necessary, but not to exceed per mile (one way) .. .. .	0	2	0
Salaried bailiffs shall receive the bailiff's fees and allowances above set out.			

Should any question arise as to the sheriff's or bailiff's office from which mileage is to be computed under these Regulations, the Minister shall finally decide.

## THIRTEENTH SCHEDULE.

Section 221.

Statement of moneys paid by me to the Receiver of Revenue at Melbourne to be carried to the credit of the public account to the account of "The Suitors' Fund," and of the particular suit matter or estate in respect of which the same were received.

Date.	Name of Suit Matter or Estate.	Amount.			Total.		

I do solemnly and sincerely declare that the above statement of moneys includes all moneys received by me or coming into my control between the day of and the day of on account of any suit matter or estate by virtue of my office as Master-in-Equity.

Master-in-Equity.

## FOURTEENTH SCHEDULE.

Section 223.

The estate of

Dr. to A.B.

Date.	Suit Matter or Estate.	Name of Claim and date of Order under which Claimant entitled.	Amount.		

I, A.B., being a claimant as above stated do solemnly and sincerely declare that the particulars above given of the claim made by me are true and just in every particular.