is liable to be imprisoned, with or without hard labour, for any period not exceeding six months.[1]

There is nothing to prevent any person seeking redress for trespass in a Court of law, but no person who has submitted his claim to arbitration under the statute can subsequently apply to a Court to fix the damages; nor can a person who has laid the matter before a Court afterwards elect to adopt the mode of assessment fixed by the statute. When a complainant determines to go to law, the owner of impounded animals can release them upon paying the Pound fees and giving security. He can also tender an amount as damages, and, if the Court eventually give less, the complainant will have to pay costs.[2]

Pigs, poultry, and pigeons, found trespassing in inclosed property can be killed. Dogs found trespassing, between the 1st December and 1st April, in any inclosed vineyard or garden, in which grapes are growing, and doing damage therein, may also be destroyed. The owner of stallions about two years old, which trespass, becomes liable to a penalty not exceeding five pounds nor less than one pound. If a stallion trespass among mares, the fine becomes not greater than thirty pounds or less than six pounds. For bulls and rams the penalty is not above two pounds, nor less than ten shillings—double if among cows or ewes. Penalties incurred under the Pound Statute, not expressly provided for, must not exceed five pounds. Any fine not incurred by any act or omission affecting the property of any particular person, may be proceeded for by any person whomsoever, and, when recovered, must be paid to him. Imprisonment can be inflicted on non-payment of penalties, and in case of frivolous and vexatious proceedings, the Court may adjudge double costs. *Mileage* is payable to any person who may bring animals to a Pound at the rate of *four-pence* for each mile, not exceeding ten of the

[1] Ordinance 16, 1847, Section 45. [2] Section 46.

distance to the Pound and back to the place from which the animals have been brought, or to his own residence —whichever shall be nearer. For every mile above ten, as well in coming as returning, the rate is *three-pence*. Mileage is only payable to those necessarily and properly employed to convey the animals to the Pound.[1]

Divisional Councils have the power of altering mileage rates and tariff of Poundmasters' fees, but they cannot establish any rate of mileage greater than six-pence, or less than two-pence, for each mile; nor have they the power to increase the Poundmasters' fees payable on delivery of animals, under the Statute; but they can reduce them to such an extent as not to be less than half the specified rate. They can fix herding and grazing fees at not more than six-pence, or less than four-pence, per diem for every animal (not being a sheep or goat), and not greater than one half-penny or less than one farthing per diem for every sheep or goat. Divisional Councils cannot appoint holders of wine and spirit licences to the office of Poundmaster without the consent of His Excellency the Governor.[2]

Poundmasters' fees, under the Statute, are—

	s.	d.
For each horse received into the Pound	1	0
For every other animal not being a sheep or goat	0	6
For each sheep or goat	0	0½
For the grazing of every animal not being a sheep or goat, per diem	0	4½
For the grazing of every sheep or goat, per diem	0	0½
For each stallion (above 2 years), requiring to be fed separately, per diem	1	6
For each bull (above 1 year old), requiring to be fed separately, per diem	1	0
For each boar (above 9 months), requiring to be fed separately, per diem	0	9
For each ram or he-goat, requiring to be fed separately, per diem	0	3
For each inspection of the Pound-book at Poundmaster's residence	0	6
For each certified copy of an entry	1	0

[1] Ord. No. 16, 1847, Secs. 50, 51, 52, 54, 55, 56, and Sec. 17.
[2] Ord. No. 16, 1847, Sec. 2, Sec. 8, and Act No. 1, 1857.

CHAPTER V.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A Bill of Exchange is a written order by A (the *drawer*) upon B (the *drawee*) for the payment of money to C (the *payee*). This order should be presented to the drawee for assent. If he refuse to assent the bill is dishonoured. If he give his assent he writes "accepted" across the bill, and then ceases to be merely the *drawee*, and becomes the acceptor. A person can transfer his interest in a bill by writing his name on the back, in which case he becomes an *indorser*. The person to whom his rights are transferred becomes an *indorsee*. Bills are either payable to bearer or to "order." In the latter case indorsation is absolutely necessary. The *holder* is the person in actual or constructive possession of the bill, and entitled at law to recover its contents from the parties to it.

2. A Promissory Note is a written promise by A, the *maker*, to pay to B, or his order, a specified sum on demand or at a stated time. An ordinary bank note is a specimen of a note payable on demand. The terms *indorser*, *indorsee*, and *holder* are applicable with reference to promissory notes.

3. If an indorsement be simply made, in the usual manner, by writing the indorser's name, the bill is then payable to the bearer, and the right in it passes by delivery.

4. The *acceptor* of a bill of exchange and the *maker* of a promissory note are the persons primarily liable. When the *drawer* of a bill indorses it he becomes liable, with the *acceptor*, to the *holder*. Each *indorser* of a bill or note becomes liable to the *holder*. The *drawer* is liable upon an unaccepted draft.

5. A *joint* note is one which, although signed by more

than one person, contains only one promise, "We promise to pay, &c." In this case both joint makers must be sued together, and a discharge of one is a discharge of the other. A *joint and several note* is when, in addition to the joint promise of the two makers, the words express a separate or several promise of *each* maker, as "We and each of us," or, "We jointly and severally promise to pay." In this case both makers may be sued together, or either separately.

6. No particular form is necessary for either bills or notes; but the former should contain a distinct order to pay, and the latter a distinct promise to pay. Forms will be found at the end of this chapter.

No person can make a note payable to himself and another man; but he may make a note payable to himself and indorse it. It is absolutely necessary that a bill or note should be made payable either at some fixed date, or on the occurrence of an event which is sure to happen. Acceptances must be in writing, and *unconditional*. In case of a difference between the sum stated in figures and the written amount, the latter is to be considered the sum contracted for. When an instrument is silent as to the time of payment, the amount becomes payable on demand. The words "after sight" invariably mean after sight testified by acceptance. The words "value received" are not essential, as the consideration may be stated in any other way, or altogether omitted. Where notes and bills are not payable to the drawer, or his order, but to a third party as payee, the payee should be particularly described; but if the instrument get into the hands of a wrong payee, he can neither sue nor confer a title by transfer. A person meant by the drawer to be the payee may fill up with his own name a blank left for the payee's name. A drawee cannot object to a mistake in direction after having accepted the bill.

Bills and notes for less than seventy-five shillings are forbidden under a penalty and are void.

The name of the place where drawn, and the date, are not absolutely necessary. In the latter case time counts from the day of drawing or making of which the payee should make a memorandum on the back of the bill.

Indorsements should be made on the back of bills or notes, but are not invalid if made on the face. If any place of payment is stated in the body of a note, it is payable there only. A note may be signed by the maker in the body of the instrument as "I. C. D. promise to pay."

7. Stamps required—

	s.	d.
On every bill, note, or bank bill of £10 or upwards	0	6
Bills of £10 or upwards drawn in sets of three or more, for every bill of each set.....	0	6
Every cheque upon a bank.....	0	1

Bills and notes for any sum under £10 need not be stamped.

8. The following descriptions of persons cannot bind themselves by a bill or note :—

(1). Persons under age (unless for the price of necessaries, and bearing no interest).

(2). Married women, unless they carry on business as sole traders or have a separate estate.

(3). Insane persons, and those who are drunk, or whose mental faculties are materially impaired.

9. People under age, as well as married women, can act as agents and thus bind others. If a supposed agent act without, or exceed his real authority, and have no presumptive authority, he alone is liable. The most important kind of agency is that which one partner exercises for another. It is held in England that in every mercantile undertaking each partner is an agent capable of binding his co-partners by becoming a party to bills or notes in the name of the firm, but that this rule does not hold good where the partnership is for other purposes, as for instance, connected with medicine, law, or farming. It has been even held that

a partner in a cost-book mine could not bind his co-partner by bills or notes. If a bill be accepted by a partner in his own name the firm will not be liable to the holder, although the proceeds may have been applied to purposes of the firm. A man who is really a partner becomes liable, although his partnership was unknown, and he who has given others to believe that he was a partner, becomes liable whether he was one or not.

10. Although it is a general rule that a plaintiff suing on a contract is required to prove a consideration to have been given, bills and notes form exceptions to this rule, as in these cases a consideration is invariably presumed, and the *onus* of proving the contrary rests with the person sued on the bill or note. In spite of the continual presumption of consideration a defence may, under certain circumstances, be made by showing either (1), the absence of consideration, or (2), that the bill or note was obtained by *fraud*, or (3), that it was given on an illegal consideration. It is worthy of note that, when "accommodation bills" are indorsed to another person for value, he is entitled to recover, both against the accommodating and accommodated parties. With reference, therefore, to "the absence of consideration," it is necessary, where a person has gratuitously drawn, accepted, or indorsed a bill, not only to prove that it was an accommodation bill, but that the plaintiff, and those through whom he deduces his title, gave no value for it. *Fraud* can only be successfully used as a defence in cases where the contract has been repudiated on discovery of the fraud, and no benefit has been retained under it.

11. A bill or note is only transferable when it contains a direction to pay, either to the payee's order or to bearer. In the former case indorsement is required, in the latter delivery merely. In all cases indorsements, like acceptances, are never completed without delivery. An agent or other person who does not want to become

personally liable, should add to his name the words "without recourse to me." An indorsement is looked upon as a warranty that the bill has properly come into the indorser's hands, so that he cannot afterwards, when sued, deny that the signatures on it are not what they purport to be. An indorsement, "Pay A. B.," is considered equivalent to "Pay A. B. or order." All bills or notes payable to bearer circulate as money, and the *bonâ fide possessor of them is the true owner.* This rule even applies to the pledging of bills and notes, in which case the honest pawnee obtains a property in them, and cannot be made to return them as in the case of goods improperly pledged. If a bill or note be paid before maturity, it is still good in the hands of a *bonâ fide* indorsee for value, who has taken it without having received notice of payment.

12. Where a bill is taken for an immediate consideration, such as the sale of goods, the bill is taken to be exchanged for the goods, and the buyer cannot be sued if the bill turns out worthless. Of course, a bill may also be taken in the same way by agreement for a pre-existing debt, but where a bill or note made or become payable to bearer is given, though without endorsement for a *past consideration,* the creditor may still sue the debtor if the bill be dishonoured. Whenever a *renewal* bill becomes dishonoured, a right to sue on the old bill revives.

13. Acceptances may be *general,* as "Accepted, payable at Port Elizabeth Bank;" *special,* as "Accepted, payable at Port Elizabeth Bank, and there only;" *qualified,* as where a bill drawn at three months be "Accepted, payable at the end of four months." Although in England there used to be *conditional* acceptances—as where a bill is made payable upon the occurrence of a certain event—it is now believed to be necessary to make them unconditional. If a holder be entitled to a "general acceptance" he can refuse any other one proffered by the drawee and treat the bill as dishonoured. If the drawee

be incompetent to contract, as by being a married woman or an infant, the bill may be considered dishonoured. If some other person writes an acceptor's name, and the acceptor afterwards treats the bill as his own, or ratifies the act, he becomes liable.

14. Although every bill should be presented for acceptance without delay, and in case of refusal notice of dishonour at once be given, which notice must be given by a notary in all cases where the bill amounts to £20 or upwards, and though upon *non* acceptance prior parties are always chargeable, yet presentment for acceptance is only *absolutely* necessary in case of bills payable at sight, or a certain period after sight.

15. Presentment for payment need not be personal, like presentment for acceptance, as it is considered sufficient if it be shown to a wife, clerk, or servant, at the residence or place of business of the acceptor. Although the acceptor is always liable after the bill is due, whether it be presented or not; still, to retain the liability of the *other parties*, it is absolutely necessary that it should be presented to the acceptor on the day it falls due. When a bill is due on a Sunday, or public holiday, the bill must be presented on the day *after*. This arrangement, which is different from the rule in England, has been specially fixed by an Act of the Colonial Legislature.

16. When a bill is dishonoured it is absolutely necessary that the drawer and indorsers receive notice of dishonour. A verbal notice is sufficient, but it is much better that it should be written. The following is the form given by Mr. Justice Byles :—

Place. Date.

SIR,—I hereby give you notice that the Bill of Exchange, dated the , drawn by A. B., of , on C. D., of , for £ , payable one month after date, to A. B., or his order, and indorsed by you, has been duly presented for payment, but was dishonoured, and is unpaid. I request you to pay me the amount thereof.

I am, &c., G. H.

To Mr. E. F., of

The holder of a dishonoured bill ought to give immediate notice to all the indorsers, and also (in case of a bill) to the drawer. All parties are entitled to receive notice except the maker of a note and the acceptor of a bill. Notice of dishonour must be given so as to be received the next day after dishonour in cases where they both live in the same place; and in cases where they both live in different places, the notice must arrive as early as a letter would arrive if posted the next day after dishonour. Where a letter miscarries through the post, the sender does not lose his rights, but has merely to prove the posting of the notice.

17. As no payment discharges the maker or acceptor unless it be made to the true holder, it is a very necessary precaution to have the bill given up when the claim is settled. An acceptor or maker ought always to satisfy himself that an indorsement, by means of which a bill has become the property of the holder, is genuine—because if it be a forgery, then payment will not free them from liability. It is worthy of special note that there is an exception to the above rule of fraud, in those cases where bills and notes are payable to *bearer*. A person who has taken such documents for value from a thief is entitled to recover on them, and a payment made *bonâ fide*, and without negligence, discharges the party paying, although the finder or thief could not recover in a court of law. It is the rule in England, that after the lapse of twenty years, a promissory note payable on demand is presumed to have been paid.

18. If C be liable to D for three bills of £50 each, and pay £50 on account, D may wait till he sues on the other bills, and then appropriate the amount to the discharge of any one he pleases of the three bills. On the principle that the discharge of the principal always effects the discharge of the surety, whenever the acceptor or maker of a bill or note ceases to be liable, all the other parties are discharged. It ought to be explained that, although the acceptor of a bill

and the maker of a note are the principals, and all the other parties are sureties to them, yet each is a principal to those who follow him. In England it is held that issuing execution against either the body or goods of one party does not discharge the others, but discharging a party whose body has been taken in execution, will operate as a discharge to all those parties to the instrument who stand as his sureties. If a holder parts with, *for valuable consideration*, or suspends the right of suing to judgment so as to prejudice the sureties, those liable as sureties are discharged. The taking a new bill or note from the person primarily liable is held to discharge the sureties because it interferes with the sureties' right to pay off the debt at any time and recover against the principal.

19. Where it is expressed on the face of the bill or note that interest is to be paid, it is then counted from the date of the drawing or making; when there is nothing said about interest, it is then counted from maturity. Six per cent. is the amount of usual interest in this Colony.

20. In this Colony bills and notes become prescribed after the lapse of eight years from their date, or the date of the Act, if the note is due at a previous date. The Prescription Act was passed in 1861.

21. (See Forms.)

FORMS.

BILL WITHOUT INDORSEMENT, PAYABLE ONLY TO THE PAYEE, WHO IS ALSO THE DRAWER. WHEN INDORSED IN BLANK IT BECOMES PAYABLE TO BEARER.

£150

Port Elizabeth, 1st *July*, 1868.

Six Months after date, pay to me, or my Order, the Sum of One Hundred and Fifty Pounds sterling. Value received.

JAMES DUNN.

To
MR. JOHN SMITH,
Cape Town.

Accepted. *JOHN SMITH.*

BILL PAYABLE ONLY TO THE PAYEE, AND IF INDORSED BY HIM TO BEARER, IT MAY OF COURSE BE ALSO INDORSED BY ANY NUMBER OF PERSONS WHO ALTERNATELY BECOME ITS HOLDERS.

£500

Cape Town, 1st *July*, 1868.

Six Months after date, pay to JOHN JONES, *or Order, the Sum of Five Hundred Pounds sterling, Value received.*

WILLIAM MOORE.

To
MR. JOHN ROBINSON,
Port Elizabeth.

Accepted. *Payable at the Cape of Good Hope Bank.* *JOHN ROBINSON.*

PROMISSORY NOTE.

£500

Port Elizabeth, 1*st July*, 1868.

On demand I promise to pay (*at the* PORT ELIZABETH BANK) *to* JAMES LEISHMAN, *or Order, Five Hundred Pounds sterling, Value received.*

JOHN KIRKMAN.

JOINT AND SEVERAL PROMISSORY NOTE.

£300

Graham's Town, 1*st July*, 1868.

Three Months after date, we, and each of us (or we jointly and severally), promise to pay to MATHEW SIMONS, *or Order, the Sum of Three Hundred Pounds sterling.*

Payable at the FRONTIER, COMMERCIAL, AND AGRICULTURAL BANK.
GRAHAM'S TOWN.

JAMES IRVINE.
JOHN DIVINE.

CHAPTER VI.

INSOLVENT ESTATES.

We propose in this chapter briefly to notice, first, the proceedings necessary for placing an estate under sequestration; second, the effect of the sequestration on the insolvent; third, trustees and their duties; and fourth, the rehabilitation of the insolvent. These matters have been made the subjects of statutory provision, and rules with regard to the first three will be found fully laid down in Ordinance No. 3, of 1843, while the last—namely, the rehabilitation of insolvents—is regulated by Act No. 15, of 1859.

SECTION I.

Sequestration of Estates.

The surrender of an estate may be either voluntary, by the insolvent himself, or compulsory, at the instance of one or more of his creditors. In the case of a voluntary surrender, a petition to one of the Judges of the Supreme or Eastern Districts' Courts must be drawn up and signed, setting forth that the petitioner is insolvent, and is desirous of surrendering his estate for the benefit of his creditors, and praying that the surrender be accepted. The petitioner must annex a full and complete statement of the whole of his assets and liabilities, in the form of five separate schedules, respectively known as Schedules A, B, C, D, and E.

Schedule A is the balance sheet, showing the deficiency of the estate, compiled from the other Schedules, and accompanied by an affidavit to its accuracy sworn by the insolvent before a Justice of the Peace.

Schedule B is a statement of the immoveable property of the insolvent, together with its value, and must show its situation, extent, &c., and further state whether it is mortgaged or not, and, if so, to what amount.

A sworn valuation, by an impartial appraiser, of this property, must be annexed to this Schedule, and a similar valuation to Schedule C, which Schedule must contain a full inventory and description of the insolvent's stock-in-trade, implements of husbandry, and all his moveable property of every description.

Schedule D is a list of the outstanding book and other debts due to the insolvent, and which must be classified under the respective headings of "Good" and "Bad or Doubtful Debts."

Schedule E must be a complete list of all the insolvent's liabilities, giving the names and places of abode of his creditors, and should show how such liabilities arose, whether by bond, promissory note, or open account; and whether they are admitted or disputed. Should any judgment have been obtained by any creditor against the insolvent, it ought also to be stated.

In compiling Schedule A from the remaining Schedules, the amounts of the first three must be entered under their respective denominations on the credit side of the sheet, while the amount of liabilities is placed on the debit side, and the balance "Cr." is the deficiency of the estate.

In the addition of the amounts contained in Schedule D the good debts only should be taken into account and carried into the balance sheet, the entry of bad and doubtful debts being more with the object of showing the losses of the insolvent than of swelling the credit side of the account, as they cannot justly be considered as available assets in any way.

In addition to the petition and accompanying Schedules the Judges now require an affidavit of the insolvent to the effect that it is his first or second surrender (as the case may be), and, also, that he has not presented the

petition and schedules to any other Court or Judge. The former requirement has been made in consequence of there being no record of insolvencies in the Eastern Districts' Court, and the latter is, no doubt, deemed necessary in consequence of surrenders of estates having been accepted by the Supreme Court after having been refused by the Judges of the Eastern Districts' Court for some sufficient cause, with which the former tribunal had no opportunity of becoming acquainted.

Where there are any peculiar circumstances connected with the surrender, as, for instance, if the insolvent be in gaol under a decree of civil imprisonment, or is even summoned to show cause why such a decree should not be granted against him, it is advisable to state these circumstances also in the before-mentioned affidavit.

It is also in the power of any Judge to whom a petition is presented, before accepting the surrender, either to appoint a commissioner to examine the petitioner, or to direct the petitioner to appear before him, to be examined touching his insolvency.[1]

Every petition and accompanying schedules of an insolvent must be presented either by the party in person or by an attorney, and must be lodged at the office of the Judge's Registrar.

On the granting of the order for the sequestration, the Schedules must be lodged with the High Sheriff or the Deputy Sheriff of the district in which the order has been granted, for registration, for which a fee of one shilling is charged. Should the schedules be lodged with the Deputy Sheriff he transmits them to the High Sheriff, who delivers them, as well as those which he may have received directly from the insolvent or his attorney, to the Master of the Supreme Court in Cape Town, who advertises the order for the sequestration in the *Government Gazette*, together with a notice appointing the first and second meetings of creditors.

[1] Ordinance No. 6, 1843, Section 2. [2] Section 3

Immediately on receipt by the Master of the order for sequestration, he lays an attachment upon all the estate, under inventory, and any creditors, either in person or by agent, may attend the messenger of the Master at the making of the inventory. Should the surrender take place elsewhere than in Cape Town, the attachment and inventory is made on behalf of the Master, either by the Deputy Sheriff, or the Messenger of the Court of the Resident Magistrate for the district.[1]

A copy of the inventory and a notice of attachment must be left by the Messenger making such attachment with the person in whose possession the property may be found, and any person, knowing the same to have been attached, who shall dispose of, remove, conceal, or receive the same, or any part thereof, with intent to defeat the attachment, is liable on conviction to imprisonment, with or without hard labour, for any period not exceeding five years.[2]

In order to obtain the compulsory sequestration of an estate, at the instance of one or more creditors, it is necessary—*first*, that the debtor should have committed an act of insolvency, and, *second*, that the petitioning creditor's debt should be above a certain amount.

As to acts of insolvency, the following are laid down by the statute to be sufficient causes to support a petition for compulsory sequestration :—A person is deemed to have committed an act of insolvency who, having any property, moveable or immoveable, personal or real, within the Colony, shall depart therefrom, or being out of the Colony, shall remain absent therefrom, or shall depart from his house or otherwise absent himself with intent to defeat or delay his creditors in obtaining payment of their debts. Likewise, any one having against him the sentence of any competent Court, who, upon being thereunto required, shall not satisfy the same, or shall not point out to the officer charged with

[1] Ordinance No. 6, 1843, Sections 12 and 13. [2] Section 14.

the execution thereof sufficient disposable property to satisfy the same; if it shall appear from the return made by such officer, or his affidavit, that he has not found sufficient disposable property of such person to satisfy such sentence; or who shall make or cause to be made, either in this Colony or elsewhere, any alienation, transfer, gift, cession, delivery, mortgage, or pledge, of any of his goods or effects, moveable or immoveable, personal or real, with intent to defeat, or in such manner as to defeat or delay his creditors in obtaining payment of their debts, or with intent to prefer one creditor before his other creditors, shall be deemed thereby to have committed an act of insolvency.[1]

No estate can be placed under compulsory sequestration unless the debt of a single creditor petitioning amounts to fifty pounds, or unless the debts of two or more creditors petitioning shall jointly amount to one hundred pounds.

This does not merely include debts already due, but extends to promissory notes or bonds also, although these may not be due at the time when the act of insolvency was committed.

Application for the compulsory sequestration of an estate, may be made either to the Supreme or Eastern Districts Courts, or to any Circuit Court, and the order granted is in the first place provisional only.[2] The debtor is then summoned to appear before the Court on a certain day, to be appointed by the Judge, to show cause why his estate should not by the said Court be adjudged to be sequestrated for the benefit of his creditors, when the Court, after hearing the petitioner and insolvent, if he appear, may either make the order final (when the proceedings are the same as in cases of voluntary surrender), or dismiss it.[3]

Before presenting a petition for the compulsory sequestration of an estate, the petitioning creditor must give

[1] Ordinance No. 6, 1843, Sec. 4 [2] Sec. 6 [3] Secs. 17 and 18.

security to the satisfaction of the Master or of the Resident Magistrate of the district in which the petition is presented, for the due payment of fees and charges until the appointment of a trustee, and must at his own cost prosecute all the proceedings in the sequestration until such appointment of a trustee, when he is entitled to reimbursement of his taxed bill of costs out of the first moneys received by the trustee.[1]

Where the assets of the estate consist of perishable goods or otherwise, in either case, whether voluntary or compulsory, it is competent for the Judge or Court granting the order, on cause being shown by the Master or by any person interested in the estate, to appoint a provisional trustee to take charge of the estate until the election of a permanent trustee at the second meeting of creditors; and, if necessary, to grant power to such provisional trustee to sell the perishable property of the estate, or to do such other acts as may be requisite to prevent the interest of the creditors being affected by delay. On the election and confirmation of a permanent trustee, however, the provisional trustee must hand over all the estate to him, and is entitled to remuneration for his services.[2]

SECTION II.

Effect of Sequestration on the Insolvent.

Immediately on the making of the order for sequestration, the whole of the property and estate of the insolvent becomes vested in the Master of the Supreme Court; but on the appointment of any provisional trustee, or the election and confirmation of a permanent trustee, such appointment or confirmation has the effect in law of divesting the Master of the estate, and placing it in the hands of such trustee.[3]

[1] Ordinance No. 6, 1843, Secs. 7 and 8. [2] Section 43.
[3] Sections 46, 47, and 48.

Any execution of any judgment obtained against the insolvent is immediately stayed upon the petition and order for sequestration being lodged with the Sheriff, or Deputy Sheriff, for registration; and the insolvent, if in prison under a decree of civil imprisonment, may be released by order of the Supreme, Eastern Districts, or any Circuit Court, in so far as the imprisonment is occasioned by any such decree. In case such Court or Judge shall not see cause to refuse to make such order, the insolvent must be discharged from prison.[1]

All actions pending against the insolvent, for any demand or debt provable upon his estate, are also stayed, and if the insolvent be in prison under any arrest granted in security of any debt, in regard to which debt action shall have been instituted, he may be discharged by the authority and under the same conditions as above mentioned with regard to civil imprisonment.[2]

Actions, however, against the insolvent for unliquidated damages are stayed only until the appointment of a trustee, and the plaintiff, after calling on the trustee to take up the defence, may proceed to judgment and prove the same with costs against the estate.

Where any property of the insolvent has been attached under a warrant of execution, and not sold at the making of the order, or having been sold, the proceeds remain undistributed in the hands of the Sheriff, such property is brought into the estate, and the party at whose instance the execution was carried out must prove on the estate for his debt and costs; the costs of the execution, however, being a preferent claim.[3]

All actions commenced by the insolvent for any debt or demand are also stayed by the order for sequestration until the trustee thereafter appointed elects to prosecute or discontinue the same, which election he must make within six weeks after notice to that effect has

[1] Ordinance No. 6, 1843, Sec. 22. [2] Sec. 23. [3] Sec. 22.

been served upon him by the defendant, otherwise he will be deemed to have abandoned the action. This does not apply to an action for damages, in which case the insolvent is permitted to continue in his own name and for his own benefit such action, and any damages recovered by him do not belong to the estate, neither does any property proved to have been purchased or obtained by the insolvent with any such damages.[1]

From and after the order for the sequestration of his estate, until it is distributed by the trustee, so long as the insolvent shall remain without his certificate, he is incapable of acquiring or possessing, as against the trustee, any property of whatever description, and is also disqualified from ceding or transferring, so as to bind the trustee, any property; and should he do so, such transfer or cession is void. But he is allowed to act as an agent for any person, and also to complete the delivery of any moveable property sold by him. He may also work for hire, and, if necessary, bring an action of damages claimable by reason of any personal wrong or injury done to himself or any of his family.[2]

He may also enter into business for himself, provided that the trustee grant to him a certificate to trade.

An insolvent is bound to attend at the first, second, and third meetings of his creditors, unless authorised to absent himself by the Master or the Resident Magistrate, as the case may be, and he is also bound to attend every other meeting of creditors whenever he shall be required to do so by notice in writing, signed by the Master or the Resident Magistrate before whom such meeting is to be held. He is also obliged to answer at any meeting all such lawful questions as shall be put to him by the Master or Magistrate touching and concerning his affairs and estate, and the cause of his insolvency. He must further produce and hand over to the Master or Magistrate, at the second

[1] Ordinance No. 6, 1843, Section 24 [2] Section 40.

meeting, all the books, papers, documents, bills, vouchers, &c., relating to his estate, which may be in his custody or power.[1]

An insolvent may also be summoned before the Supreme or any Circuit Court, or a Special Commissioner, for the purpose of examination at the instance of the trustee, and if he fail to attend, without sufficient cause, can be arrested on a warrant and imprisoned until a further day appointed for his examination, and if he abscond with the intent to evade appearing at such examination, may be tried on a charge of fraudulent insolvency, and on conviction be imprisoned for any term not exceeding five years, with or without hard labour.[2]

Should an insolvent refuse to surrender his books, papers, &c., at the second meeting, or at any meeting or examination before a Court or Commissioner, refuse to be sworn, or refuse to answer any lawful question put to him by the Master or Magistrate, or by the Court or Commissioner, touching his estate, or shall refuse to subscribe his examination when reduced to writing, then such Master, Magistrate, or Court, or Commissioner, as the case may be, may, by warrant, commit such insolvent to prison, there to remain without bail until he complies with his directions.[3]

Where an insolvent is summoned to appear for examination before any Court or Commissioner, he is entitled to his expenses, which he may also claim if called upon to appear before the Master or Magistrate at any meeting of his creditors other than the first, second, or third, or some adjournment of the second meeting.

Insolvents are bound at any examination to answer every question relative to their estates lawfully put to them, and cannot claim the privilege enjoyed by witnesses of not replying to a question for the reason that the

[1] Ordinance No 6, 1843 Sec 60 [2] Secs. 62 and 63 [3] Sec 60

answer might tend to criminate themselves. Wilfully making false answers is perjury, and may be punished as such, as well as being among the acts which constitute fraudulent insolvency.[1]

Any insolvent who shall either before or after the making of the order for sequestration, have alienated, transferred, given, ceded, mortgaged, or pledged, or shall have embezzled, concealed, or removed any part of his estate or effects, of the value of ten pounds or upwards, or shall have concealed, removed, destroyed, falsified, or mutilated any books of account, papers, writings, documents, bills, or vouchers relating thereto, *with intent to defraud his creditors*, or shall have fraudulently contracted any debt, or shall wilfully make any false statement in his schedules, or produce at any of his meetings any books, documents, bills, or vouchers which are false, or on which any erasure has been made, or caused to be made by him, or with his knowledge, *with the intent* to defraud his creditors, or if any insolvent shall, when under examination, wilfully make any false answers to any lawful questions that may be put to him, *with the intent* to defraud his creditors, or shall have connived at or concealed from the trustee his knowledge of the proof by any person of a false debt against his estate, he shall be deemed to be guilty of the crime of *fraudulent insolvency*, and on conviction thereof shall suffer imprisonment, with or without hard labour, for any period not exceeding five years.[2]

The following acts constitute the crime of *culpable insolvency*, and are punishable by imprisonment, with or without hard labour, for any period not exceeding six months; namely,

The failure of an insolvent to appear at the first, second, or third meeting, or at any adjournment of the second meeting, unless duly authorised to absent himself by the Master or Magistrate, as the case may be, or

[1] Ordinance No 6, 1843, Section 67 [2] Section 70

the failure of an insolvent, without good and lawful cause, to attend at any meeting to which he shall have been summoned by notice from the Master or Magistrate. In case an estate is deficient to the amount of five hundred pounds or upwards, for not having kept or caused to be kept, such reasonable or proper books or accounts containing all such entries belonging to, and exhibiting the nature of, his dealings or transactions as, regard being had to his particular trade or calling, might reasonably be expected or required. The failure of an insolvent, when thereunto required by the Master or Magistrate at any meeting of his creditors, to account for or discover what has become of any money or valuable security or other property or effects which shall have been proved to have been in his possession so recently before the sequestration as to make it his duty so to do. The failure of an insolvent, when thereunto required by the Master or Magistrate, to give a true and sufficient explanation of the cause or causes of his insolvency. Giving to any of his creditors an undue preference, or having contracted any debt without any reasonable or probable expectation at the time of contracting the same of being able to pay it, or incurring any debt by reason of any breach of trust, or having, between the time of the making of the order for sequestration and the distribution of the estate by the trustee, entered into any dealings or business without the authority of the trustee; or granted, made, or promised any gratuity, payment, or security, or any other undue consideration, in order to procure or obtain the concurrence of any creditor to any offer of composition or to his rehabilitation.[1]

It is competent for the trustee, with the consent of the greater part in number and value of the creditors (who shall have proved) present at any meeting, of which twenty-eight days' notice shall have been given in the

[1] Ordinance No 6, 1843, Section 71

Government Gazette, to allow the insolvent to retain the whole or such part of his wearing apparel, bedding, household furniture, and tools of trade, as the creditors shall agree to allow, such permission, however, being subject to the review of the Supreme, Eastern Districts', or any Circuit Court, on the application of any person interested in the due administration of the estate.[1]

An insolvent may at the third meeting, or any special meeting convened for the purpose, make an offer of composition with his creditors, and should nine-tenths in number and value of the creditors present at such meeting agree to accept such offer, the trustee must call a special meeting for the purpose of deciding on the offer, of which meeting forty-two days' notice must be given by advertisement in the *Government Gazette*. And if at such special meeting nine-tenths in number and value of the creditors present also agree to accept the offer, upon such acceptance being certified to the Supreme Court by the Master, and upon the oath of the insolvent that he has made a full and fair surrender of his estate, and that he has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to the said offer of composition, the Court may, under certain provisions, discharge the insolvent from all claims and demands proved or provable on the estate, and declare the sequestration at an end, and the insolvent re-invested with his estate, but reserving, however, always the claims of the creditors for such composition as may have been agreed upon and be still unpaid.[2]

[1] Ordinance 6, 1843, Section 99. [2] Section 106.

SECTION III.

Duties of Trustees.

The trustee or trustees of an insolvent estate are elected at the second meeting of creditors, or any adjournment thereof; but where the assets of the estate are under £75, at the first and only meeting.

They are not to exceed three in number, and all creditors who have proved their debts are entitled to vote at the election, the choice being made by the votes of the greater part in number and value of the creditors, or their agents, present and entitled to vote.[1]

In computing the value of votes, all creditors are admitted, but in computing the number, only those whose debt amounts to thirty pounds and upwards.[2]

After the election, it is competent to any person interested in the estate, or its due administration, who may have a cause to complain of the election, upon giving two days' notice, in writing, of the particulars of such complaint to the Master or Magistrate, at any time before the election is confirmed, to bring the same under the review of the Supreme Court; and, also, any person interested in the estate, or its due administration, may, at any time after the confirmation of the election, apply to the Court to recall the confirmation, and set aside the election, on the grounds that it was fraudulently or unduly made.[3]

None of the following persons are eligible for election as trustees; namely, the insolvent himself, or any person related to him by consanguinity within the fourth degree, minors, attorneys, unrehabilitated insolvents, persons not resident within the jurisdiction of the Supreme Court, nor any person having an interest opposed to the general interests of the creditors.[4]

[1] Ordinance No. 6, 1843, Sections 25 and 40. [2] Section 38.
[3] Section 40 [4] Section 41.

Any person who may be proved to have used unfair means to influence any creditor to give him his vote, or in any way to procure his election, may be removed from the office of trustee, and the Court to which application has been made, may declare such person ineligible to hold the office of trustee for life.[1]

On the election of a trustee, the Master reports the same to the Supreme Court, by which Court the election is confirmed.[2]

As soon as the election is confirmed, the trustee must immediately call in and collect all debts due to the estate, and for that purpose he must, by advertisement in the *Government Gazette*, summon all debtors to pay, at such time or place as shall be therein appointed for that purpose; and must also proceed to set aside (if necessary, by legal process) all undue preferences.[3]

He must also proceed to sell all the moveable property of the estate, excepting only the wearing apparel, bedding, household furniture, and tools of trade of the insolvent, which cannot be sold without the consent of the creditors at the third or any other meeting of which twenty-eight days' notice has been given.[4]

At the election of the trustee, the creditors make choice of a bank, with which bank it is the duty of the trustee to open an account, and pay in all amounts he may receive belonging to the estate exceeding twenty pounds, and to make all payments on behalf of the estate by cheques on the bank. Should, however, the creditors neglect or omit to make choice of a bank, the trustee may select any bank he may please to open an account with.[5]

Any trustee retaining in his own hands, without just cause, any sum above twenty pounds longer than the first day after receiving it upon which it is possible for him to pay it into the bank, or employing it for his

[1] Ordinance No 6, 1843, Sec. 42. [2] Sec. 45 [3] Sec. 82
[4] Section 98 [5] Section 100

own benefit, may be adjudged to forfeit, for the benefit of the estate, double the amount of the sum so retained or employed.[1]

The Master, as soon as the election is confirmed, appoints a third meeting, to be held at such time or place as he may deem expedient, and notifies the same to the trustee, who must advertise the same in the *Government Gazette*. At this third meeting he must lay before the creditors, in writing, a report of the condition of the estate, showing the amounts of debts already proved, and what assets he has realised, and any other circumstances connected with the estate that he may think desirable to acquaint the creditors with. At this meeting it is usual also for the trustee to take the directions of the creditors as to the retention by the insolvent of his wearing apparel, furniture, &c., or any portion of it, and, further, as to the disposal of the landed property of the insolvent, and any other matters that he may require instructions on.[2]

The trustee must keep regular accounts of all transactions in the estate, which accounts every creditor who has proved may inspect at all reasonable times, and the Master at any time can summon the trustee to produce the books in which such accounts are kept for his inspection.[3]

Not later than six months after his appointment, unless, upon application to the Supreme Court, a further time be granted, the trustee must frame and file an exact account and balance of the estate, containing the proceeds of all sales and debts then collected, and an account of all debts still outstanding, together with an inventory of all property still unsold, and also all debts due by the said estate; and must further form a plan for distribution of the assets of the estate, specifying first such creditors as are preferent by law in the order of their legal preference, and secondly, the concurrent

[1] Ord No. 6, 1843, Sec. 101 [2] Secs. 77 and 98. [3] Sec 102.

creditors, and as nearly as may be the probable balance which will remain for division amongst them.[1]

Should the place of residence of the insolvent be in any district other than that of Cape Town, the account must be lodged with the Magistrate of the division in which the insolvent resides, for at least seven days, for inspection of the creditors, before lodging it with the Master. At the expiration of the seven days, the account must be forwarded to the office of the Master, where it lies for inspection for a further period, not being less than fourteen days, and must be advertised in the *Government Gazette*, after the lapse of which time the Supreme Court may be moved to confirm the account, and order it for distribution.[2]

There is further provision made by the Insolvent Ordinance, for the hearing and disposal of any objections which may be made to the liquidation or distribution account, which will be found laid down on reference to the 110th and 111th sections of the Ordinance, and which the limits of this work will not allow us to allude to more fully, especially as these matters are transacted through the medium of a professional man, a trustee being allowed to charge against the estate any reasonable fees paid by him for professional services or legal advice.

A trustee is also permitted to charge for his trouble and services in respect of the administration of an estate, the rate usually allowed being five per cent. on all moveable property realised and debts collected, and two and a half per cent. on all fixed property sold by him, and he can also charge all reasonable outlay or disbursements incurred by him in the winding up of the estate. All attorneys' bills of costs, however, paid by the trustee, must be taxed, or they will not be accepted by the Master as vouchers for the payments.

Should the estate not have been wholly realised when the first account was drawn up, the trustee must, within

[1] Ordinance No. 6, 1843, Section 108. [2] Section 109.

six months of the date of the said first account, frame and lodge in the like manner as before a second account, and so on at intervals not exceeding six months, until the whole estate has been distributed.

SECTION IV.

Rehabilitation.

Any insolvent may, after the third meeting and after his examination (should such examination have been applied for and ordered), apply to the Supreme Court for his rehabilitation. No such application, however, can be made within six months from his surrender, and where, in consequence of the assets of the estate being within £75, one meeting of creditors only was called, within six months from the date of such meeting.[1]

It is not absolutely necessary that the creditors, or a majority of them, sign a certificate testifying their consent to an insolvent's rehabilitation, although such a certificate may be used in support of the application.[2]

Due notice by advertisement must be given to the creditors, and also a special notice to the Master, of the insolvent's intention to apply for his rehabilitation, and on the day of hearing such application the trustee or any creditor may appear to oppose the discharge of the insolvent, and the Court shall judge of any objection, and may either grant the discharge, or suspend it, or annex such conditions thereto as the justice of the case may require.[3]

The proceedings for an application for the discharge of an insolvent will be found in the rules of the Supreme Court, made under the provisions of the Insolvents' Rehabilitation Act, and dated 20th June, 1860.

The order for the rehabilitation of an insolvent has the effect of discharging the insolvent from all debts due

[1] Act 15 1859 Section 2. [2] Section 4 [3] Section 7.

by him at the time his estate was surrendered, and from all claims or demands proved or provable upon his estate, and such order may be pleaded as a bar to any action brought against the insolvent for any debt, claim, or demand, due by him before his surrender, and proved or provable on his estate; and, further, should any insolvent be arrested upon any judgment obtained against him before the making of said order, he must be released upon his producing it.[1]

[1] Ordinance No. 6, 1843, Sections 120 and 123.

CHAPTER VII.

PRACTICE OF THE RESIDENT MAGISTRATES' COURTS IN CIVIL CASES.

SECTION I.

Agents.

The proceedings of the various Resident Magistrates' Courts of the Colony are regulated by Act No. 20 of 1856 (which has been amended in one or two particulars by Act No. 9 of 1857), and under this Act the Resident Magistrates have authority to admit and enrol as agents in their respective Courts as many persons as may desire to be so admitted and enrolled, on payment of the required fee, the only qualification being that they be of full age and of good fame and character.

In the respective Courts of Cape Town, Port Elizabeth, Graham's Town, and King William's Town, the fee for enrolment is £20, and in any other Court of Resident Magistrate, £10.

It is further provided that any agent enrolled in any Court may be enrolled in any other without further fee, except an agent enrolled in any Court other than either of the four above mentioned, who, if he shall desire to be enrolled in any of the said four Courts, shall be liable to pay a further sum of ten pounds.

Every Court has the same powers and authorities over its agents as the Supreme Court possesses in respect of attorneys, and may summarily inquire into any charge of misconduct preferred against any agent, and may either remove his name from the roll or suspend him from practice. Such removal or

suspension, however, is open to review (if so desired by the agent) by the Supreme, or Eastern Districts', or any Circuit Court, and in case the agent should not take proceedings for the review of any such removal or suspension, a certified record of the evidence on which the Magistrate has acted must be by him forwarded to the Registrar of the Supreme Court, which Court may rescind or confirm the removal or suspension as it may deem fit.[1]

The fees allowed to enrolled agents are also regulated by the Magistrates' Court Act, and are seven shillings and sixpence in liquid cases, and ten shillings and sixpence in all other cases. This rule does not invalidate any special written agreement between an agent and his client for the payment of any other sum as a fee.[2]

All attorneys are entitled to practice in any Resident Magistrate's Court without enrolment, but are only entitled to the same fees as agents.[3]

SECTION II.

Jurisdiction.

The jurisdiction of the Courts of Resident Magistrates is as follows :—In all liquid cases to the extent of *forty pounds*, and in all cases (with the exceptions hereafter mentioned) in which the debt or damages demanded does not exceed *twenty pounds*.[4]

No Magistrate, however, can adjudicate on any matter where the title to any lands or tenements, or the title to any fee, duty, or office is in question, or in any action to try the validity of a will, or in any action whereby rights in future may be bound; provided that in any action for damages for criminal conversation, or for necessaries supplied to the wife of the plaintiff, the Magistrate may determine upon the fact of the marriage, or in an action for the maintenance of a child,

[1] Act No. 20, 1856, Sec. 37. [2] Sec. 38. [3] Sec. 41. [4] Sec 8

may determine upon the question of affiliation, without thereby binding or being deemed to bind rights in future.

Where an action is brought on a liquid document of a higher amount than £20, the Magistrate may try any claim in reconvention, or set off, not exceeding the amount of the liquid document, although such claim in reconvention may exceed £20.

A liquid document is a written undertaking or acknowledgment of debt signed by the debtor, and may be either in the form of a bill of exchange, promissory-note, or otherwise, the essentials being that the document should be *prima facie* evidence of an amount due by the debtor, and bearing his signature. A check has been held to be a liquid document, and so has an account current signed by the debtor as correct, as also a good-for. A lease may also be sued on as a liquid document for any amount of rent, up to forty pounds, that may be due in respect of it.[1]

An acknowledgment of debt, with a promise of payment on a contingency, is not a liquid document; neither is a bill or order payable on a contingency, respecting which extrinsic proof would be required; and the same applies to the acceptance of a bill payable on a contingency of a similar nature.[2]

A promissory-note also, payable as soon as a bill of exchange referred to in it should be discounted, has been held to be an illiquid document.[3]

Where there is any doubt of the liquid nature of a document, the better plan is to sue on the consideration, and put in evidence the document as a proof of debt.

In any action on a bill of exchange or promissory-note for any sum under £20, it is not necessary to prove the dishonour or notice to endorsers by notarial protest,

[1] *Menzies' Reports*, pp. 11, 13, 25, and 30
[2] ,, pp. 57, 62, and 65.
[3] ,, p. 80.

but such dishonour or notice may be proved by any competent witness, and no costs are allowed between party and party for any notarial protest, if made.

But should it be necessary to prove the dishonour of a bill or note, the reasonable horse-hire or other expenses of the witness giving notice is allowed, provided that the notice was given at a greater distance than two miles from the residence of the party at whose instance such notice was given.

The Resident Magistrates have also jurisdiction in cases of ejectment, under certain regulations, which will be found more particularly stated in the chapter on "Landlord and Tenant."

SECTION III.

Plaint.

In strict accordance with the rules of Court, as laid down in the Schedule of the Magistrates' Court Act, all summonses are made out by the Clerk of the Court; but the practice of most of the Resident Magistrates' Courts is, that the agent for the plaintiff makes out the summons, and deposits it with the clerk, together with any accounts, bills, or documents on which he founds his claim, and also his power of attorney to sue. This is in cases where an agent is employed; but where the plaintiff intends conducting his case in person, he must state his cause of action, either personally or in writing, to the Clerk of the Court, who enters the plaint in a book kept for the purpose, and draws the summons. The former course, however, is much preferable, as, however competent a clerk may be, his time is usually so taken up with the various duties that devolve upon the clerks to Resident Magistrates, that a plaintiff may often run the risk of losing his case through the insufficiency of the summons, or he may be delayed from day to day

[1] Act No. 20, 1856, Section 9.

until the defendant has either left the district or has no longer any moveable property to attach.

SECTION IV.

Plaintiffs.

Care should be taken in drawing the summons that (1), the plaintiff is correctly described; (2), that he sues in his proper capacity; and (3), that a good cause of action is alleged in the summons. If these requisites are not attended to strictly, the probability is that the defendant's agent will take exception to the summons, and have it dismissed or amended, with costs.

As to the description and capacity of the plaintiff, in all cases the full Christian name and surname should be given, and also the place of residence and occupation. If he sue as executor or trustee of an estate, his capacity as such must be stated, together with the title of the estate of which he is such trustee or executor. Where the action is instituted by a firm, the names of the partners at length should be given, as A. B. and C. D. &c., trading at E., under the style or firm of B. and D., or B. and Co., as the case may be. Married women and minors are entitled to sue for any cause of action accruing to them, without being assisted by their husbands or guardians, as the case may be, unless the defendant shall show to the Court that any such minor or married woman has a guardian or husband resident within the district; provided that, if after such proof by the defendant, the plaintiff shall make it appear that the assistance of such guardian or husband, as the case may be, has been solicited, and has, without just and reasonable grounds, been refused, in which case the Magistrate may disallow the objection of the defendant, and permit the action to proceed precisely as if such minor were of full age, or such woman were unmarried.[1]

[1] Act No. 20, 1856, Section 51.

Under all other circumstances, married women and minors cannot sue unless assisted by their husbands or guardians, and the plaintiff in that case would be A. B. of E., married out of community to and assisted by her husband, C. B.; or A. B., a minor, assisted by his guardian, C. B. This, as far as concerns married women, applies to women married out of community of property, and trading in their own names.

Should a woman be married in community of property, the action should be brought in the name of the husband alone, as marriage lawfully contracted, by the Roman-Dutch law, and not preceded by an antenuptial contract, creates a partnership between husband and wife, under the sole administration of the husband, and the wife cannot sue or be sued.[1]

SECTION V.

Defendants.

The rule that applies to plaintiffs as to their correct description and capacity equally applies to defendants. The defendant must be named by his full Christian and surname, and described in such a manner and so particularly that the Messenger may know where to find him. A partnership firm must be fully described as before stated with respect to plaintiffs, but it is not necessary to serve a copy of the summons on each of the partners, service on one of them being sufficient.[2]

Where a woman, married out of community, is sued, assisted by her husband, it is necessary that a copy of the summons be served on both husband and wife.[3]

As before stated, a woman married in community cannot be sued, assisted if need be by her husband, but in cases of contract debt, the action must be against the husband alone; and in an action to recover damages

[1] *Menzies' Reports*, p. 114. [2] Act No. 20, 1856, Rule 11, Sch. B.
[3] *Menzies' Reports*, p. 200.

arising from some act of the wife's, the husband and wife should be made joint defendants; and in this case also should a copy of the summons be served on each.

A married woman, however, carrying on a trade or business on her own account, and in her own name, and whose husband is out of the Colony, may be sued as a single woman. Where a trustee or executor is sued as such, the summons must allege his capacity and also the title of the estate of which he is trustee or executor, and where there are joint trustees or executors, both must be named in the summons, although the rule as to partners will apply, and the service of a copy of the summons on one of them would appear to be sufficient.

No misnomer in a summons, however, in regard to the name of any person or place, vitiates the summons in case the person or place be therein described so as to be commonly known.[1]

SECTION VI.

Powers of Attorney.

All agents or parties acting for either plaintiff or defendant must, before appearing in Court, file a properly executed power of attorney with the Clerk of the Court. This power must be signed by the plaintiff, and duly witnessed. In the case of a married woman suing or defending, assisted by her husband, and also in case of a minor and guardian, the power to sue or defend must be signed by both wife and husband, or minor and guardian, as the case may be. Where joint trustees or executors sue or defend, the power must be executed by both or all the trustees or executors,[2] as the case may be, but a power to sue or defend actions instituted by or against a firm does not require the signature of each partner, but merely that of the firm generally.

[1] Act No. 20, 1856, Section 50. [2] *Menzies' Reports*, p. 140

SECTION VII.

Summons.

Not only should the names of the parties to the cause be correctly stated, but the summons should show the nature of the claim or demand, and also a distinct cause of action.

In liquid cases, the document upon which the action is grounded should be set forth and described distinctly and correctly.

For instance, if the action be on a bill or promissory-note, it should be described as such, and the date, amount, to whom payable, and when due stated; also whether the party sued is maker or indorser.

Where action to recover rent is brought by virtue of a lease, it is necessary to set forth the fact, and particulars of the lease in the summons, and in every case where judgment is prayed for on a liquid document, a copy of such document must be served on the defendant, together with a copy of the summons.

In illiquid cases for debt, the summons should set forth the nature of the action, whether for goods sold and delivered, for goods bargained and sold, for money lent, for rent or whatever cause the debt may arise from, and also the date of the contracting of such debt, as nearly as may be, and a copy of the account must be served on defendant with the summons.

Where the action is of the nature of a claim for damages, the facts and circumstances from which the claim arises should be alleged, and care should be taken that these facts are those which will be borne out by the evidence adduced on the part of the plaintiff.

It may be, however, observed that a Magistrate has power to allow the amendment of any summons in regard to the mis-description therein of any written instrument relating to the action, or of any contract or of any other particular or particulars, provided that

such amendment be not material to the merits of the case and cannot prejudice the defence, and also provided that such amendment shall be made upon the payment of such costs to the other party, if any, as the Magistrate shall judge to be reasonable.[1]

In case of an action brought to recover possession of any property, it is necessary in the summons to allege the value of such property and to claim the restoration of the property or payment of the value.

SECTION VIII.

Conduct of Cases in Court.

On the day appointed for the hearing of any case in Court, the Clerk of the Court reads the summons, and calls on defendant or his agent, if he appear by one, to plead. Should the defendant admit the debt or claim, final judgment is recorded at once against him; but should he deny it or make default, the plaintiff's agent proceeds to prove his case. Where, however, the defendant admits the plaintiff's claim, but pleads a set-off or claim in reconvention, he becomes plaintiff in reconvention, and it is his place to begin by proving his demand. Before pleading, however, should the defendant see fit, he can take exception to the summons as being bad or defective in any material point, and state his exceptions to the Court.

These may be replied to by the plaintiff, and the Court may either sustain or dismiss the exceptions, or, in case it shall see fit, reserve judgment on them.

After the plaintiff has gone through his evidence and closed his case, the defendant proceeds with his witnesses, and when they have all been heard, the agents on both sides have the right to address the Court, the plaintiff beginning and also having the right to reply.

[1] Act No. 20, 1856, Section 50

Should no appearance be entered for the defendant, either in person or by agent, the Magistrate, upon the request of the plaintiff, and being satisfied by the return of the Messenger that the summons has been duly served, shall proceed to hear the plaintiff's case, and shall give provisional judgment, upon which execution may be issued under security, and which judgment becomes final after the lapse of one month from the levy made under such writ of execution, and the security becomes, *ipso facto*, null and void.[1]

After closing the case, the Magistrate proceeds to give judgment, and may, if he see fit, make orders concerning the time or times, and by what instalments, any debt or costs for which judgment has been given by him, shall be paid.[2]

Should the defendant appear, and the plaintiff make default, the Court may dismiss the suit, and give costs against the plaintiff; but absolution from the instance given in this manner is no bar to any further action, although a final judgment for defendant is a perpetual bar to any other suit or action arising from the same cause.[3]

When a case has been dismissed by the Magistrate on exceptions, or when the defendant is absolved from the instance by reason of the default of appearance of the plaintiff, or from any other cause, the plaintiff cannot proceed again with the suit until he pays the costs of the former action.[4]

SECTION IX.

Evidence.

All witnesses required by either plaintiff or defendant may be subpœnaed, and any person being so subpœnaed, and his reasonable expenses being paid or offered to

[1] Act No. 20, 1856, Rule 28, Sch. B. Act No. 9, 1857, Sec. 5.
[2] Act No. 20, 1857, Sec. 11. [3] Rule 32, Sec. B. [4] Rule 32, Sch. B.

him, and having no sufficient excuse, who shall neglect or refuse to attend, is liable to a penalty not exceeding five pounds, or in default of payment, imprisonment.[1]

The Magistrate may also, if he have reason to believe that a witness absents himself for any other than a lawful cause, issue a warrant for his apprehension in order that he may be brought up to give evidence, and to be otherwise dealt with according to law. Should the plaintiff or defendant require at the hearing of a case the production of any record, entry, or document of the Court, the Clerk of the Court must produce and show, or refer to, the original.[2]

A witness may also be called upon in the subpœna to bring with him and produce any document or instrument in writing that the party requiring his evidence is desirous of producing, and if he wilfully fail in this he is liable to the same penalties as he would incur by wilful non-attendance.[3]

No witness can be objected to on the ground of relationship to the plaintiff or defendant. The husband or wife of either party is a competent witness in civil cases.

Where a witness resides out of the district in which the case is tried, or to be tried, he may be subpœnaed in the same manner as if he resided within the district, upon the endorsement of the subpœna by the Magistrate of the district in which he resides; but the less expensive and more usual course is to obtain his evidence by means of interrogatories framed by the party desiring the evidence, and transmitted to the Magistrate of the district in which the witness resides; and such Magistrate is required to summon such witness to appear at his Court, and take his evidence in writing in reply to such interrogatories, which evidence

[1] Act No. 20, 1857, Sch. B, Rule 18. [2] Rule 23, Sch. B
[3] Rule 17, Sch. B.

is received (subject to all lawful exceptions) in the case.

If it appear to the Court, upon oath, on the hearing of any case, that any person who is a material witness for either party, having been duly subpœnaed, makes default, the Magistrate may at his discretion either postpone the hearing of the case to another day, or take the evidence of the witnesses present, and suspend the further hearing of the case to another day.[1]

Every witness may be cross-examined by the opposing party, and re-examined, if necessary, by the party by whom he was called, but such re-examination must only be on matter that may have arisen out of his cross-examination.

Where the books of a tradesman are necessary for the proof of the sale of goods, the day-book which contains the entry made by the party who sold the goods at the time of the sale, should be produced in preference to a ledger containing only abstracts or copies of entries.

SECTION X.

Judgment.

As before stated, judgment may be either final or provisional only. In the latter case, the defendant may, at any time within one month after the levy made under the writ of execution, take out a summons calling upon the plaintiff to show cause why the judgment should not be reversed. And if it shall be made to appear to the Court, by oath, that defendant was absent from home at the time when the summons in the original action was served, and that he did not receive it a sufficient time before the day appointed for the hearing of the case to be able to attend, and that he did not absent himself from home for the purpose of avoiding

[1] Act 20, 1857, Rule 19, Schedule B

the service of the summons, or that, having been duly summoned, he was by just and reasonable causes prevented from attending the Court, then the Magistrate shall order the provisional judgment to be reopened and allow the defendant to answer the suit or action—he paying all costs occasioned by his default.[1]

The plaintiff's evidence is then read from the records of the Court, and if he require it, he is at liberty to bring further evidence, and the case is then conducted in the same manner as if the defendant had appeared upon the original summons.

Where a Magistrate is of opinion that the plaintiff's case is not sufficiently proved, and that it would be most in accordance with justice to allow him an opportunity of bringing on the case at a future time, he may absolve defendant from the instance in the same manner as he would have done had the plaintiff made default.

SECTION XI.

Execution.

Whenever any Magistrate has given judgment for the payment of any money or costs, the amount is recoverable forthwith or at the time or times ordered by the Court, by means of execution against the moveable property of the debtor.[2]

Should the debtor not have sufficient moveables in the district of the Court in which judgment was given, the writ of execution may be made available in any other district, on being endorsed by the Magistrate of that district.[3]

The wearing apparel and bedding of any defendant, as well as his tools of trade, to the value of five pounds in all, are protected from attachment, but all other moveable property can be attached and sold.[4]

[1] Act No. 20, 1857, Rule 29, Sch. B., amend. by Ordinance No. 9, 1857, Sec. 5. [2] Act No. 20, 1857, Sec 12. [3] Sec. 13 [4] Sec. 15

A writ of execution must be taken out within a year from the date of judgment, otherwise the judgment becomes superannuated, and it will be necessary to sue for its revival.

SECTION XII.

Interpleader.

Where goods have been seized by the Messenger, and are claimed by a third party, the Court is empowered, upon the application of the Messenger, to issue a summons, calling on the plaintiff in the action, and the claimant, to appear on a certain day, when the Magistrate investigates such claim, and makes such order as he may see fit, both as regards the claim and the costs of process. Such order has the same effect, and may be enforced or appealed from in the same manner, as any judgment.[1]

It will be remembered, however, that when the property of a defendant is attached under a judgment for rent, all the moveables found on the premises in respect of which the rent is due, are liable to attachment, whether the property of the defendant or of third parties.

SECTION XIII.

Civil Imprisonment.

In the event of the Messenger of the Court not being able to attach any moveable property of the defendant, or insufficient to satisfy the entire debt and costs, the plaintiff may sue the defendant to show cause why a decree of civil imprisonment should not be granted against him in respect of the debt or balance not recovered by the Messenger; and the defendant, upon a warrant granted by the Magistrate, may be committed to prison. He can only be detained in prison, however,

[1] Act No. 1856, Section 53.

for one month, if the amount due, together with costs, does not exceed five pounds, and for no longer than three months for a larger amount.[1]

During the time he is in prison he must be supported at the expense of the plaintiff, who for that purpose must lodge with the gaoler a sum of money, out of which the gaoler must pay to his prisoner subsistence money at the rate of one shilling per day, payable weekly in advance.

Should the gaoler neglect to pay this when due, or the plaintiff not furnish the necessary funds, the defendant can claim his liberation.

It is in the discretion of the Magistrate to grant or withhold a decree of civil imprisonment, or to make terms as to the payment of the debt by instalments.[2]

The cost of proceedings for a decree of civil imprisonment must be borne by the plaintiff, and cannot be recovered from the defendant, unless it be made to appear to the Magistrate, on granting the decree, that the non-payment of the debt and costs is vexatious, and does not arise from defendant's inability to pay.

The law with regard to the arrest of a defendant upon a warrant of civil imprisonment has not been very clearly defined, but it is considered that the decision of the Supreme Court in 1832, in the case of *Nesbit and Dickson vs. Richardson*,[3] never having been overruled, may be quoted in support of the dictum that a man cannot be legally taken on a civil warrant from his dwelling-house (including certain of the premises connected with it). In this case the arrest was made in a fenced-in garden, adjoining the defendant's dwelling-house, and was declared illegal. There appears to be no objection to an arrest made on a Sunday, or after dark.

A defendant is privileged from arrest while going to,

[1] Act No. 20, 1856, Sections 16, 7, and 20. [2] Section 19.
[3] *Menzies' Reports*, p. 562.

and returning from, a Court of Justice, provided he attend the Court for the purpose of giving evidence; and a reasonable time must be allowed him for the purpose. He is not, however, protected from arrest when returning from a Court in which he has been summoned to answer a criminal charge, even should he be acquitted, unless it can be shown that such charge was brought without cause, and merely for the purpose of effecting the arrest of the defendant.[1]

SECTION XIV.

Service of Summons.

The question of the sufficiency or otherwise of the service of a summons is often raised in cases where the defendant makes default, and even where defendant appears and takes exception to the service on the ground that he did not receive it in sufficient time or otherwise. The rule for the service of a summons is, that a copy of the summons, together with any copies of documents, account, or bill upon which the complaint is founded, shall be served either personally on the defendant, or left for him at his dwelling-house with some one of his household, at least forty-eight hours before the time specified for his attendance, provided he reside within five miles of the place of holding the Court.[2]

Where the defendant resides at a greater distance than five, and not exceeding ten miles, he must have three days' notice, and so on, one day in addition to forty-eight hours for every ten miles of distance.

In reckoning the number of days, Sundays are included: thus a summons to require the attendance of a defendant residing in town, at Court to be held on Monday, at 10 a.m., must be served before 10 a.m. on the Saturday previous.

[1] *Taylor on Evidence*, 4th Edition, p. 1126, *et seq.*
[2] Act No. 20, 1856, Rule 10, Sch. B.

There is no objection to the service of a summons after 9 o'clock in the evening, neither is there to personal service on a debtor confined in gaol.[1]

As before mentioned, when a partnership firm is summoned, it is not necessary to serve a copy on each of the partners, but the copy served must be served at the place of business of the firm, and not at the private dwelling-house of any partner; but on the other hand, where one partner of a firm is sued individually, the service is not good at the place of business of the firm.[2]

The service of a summons on the next-door neighbour of a defendant, in the absence of defendant, has been held to be bad, and so also is service in the country on the defendant's nearest neighbour.[3]

In one instance, service at the last known residence of the defendant, by posting the summons on the door of the house, has been sustained, and in a subsequent case, it was held that in every case in which a summons was left at defendant's dwelling-house, when neither defendant nor any of the inmates were at the dwelling-house, and where, from the circumstances stated in the return, or from evidence produced when a question as to the sufficiency of the service was raised, it was made to appear to the Court as probable that that copy had not reached the defendant, the Court ought not to sustain the sufficiency of the service in respect of the return, unless the plaintiff be able to satisfy the Court that the summons left had reached the defendant.[4]

It is held that where there are no circumstances mentioned in the return, and no evidence produced by the defendant or others, to make it appear to the Court probable that the copy had not reached the defendant,

[1] *Menzies' Reports*, pp. 136 and 138.
[2] ,, p. 135.
[3] ,, pp. 130, 133, and 132.
[4] ,, pp. 131 and 134

service made by affixing a copy of the summons on the door of the dwelling-house, in the absence of the defendant and all the inmates, is sufficient.

SECTION XV.

Ejectment.

The proceedings of the Resident Magistrates' Courts in cases of ejectment have been noticed in a previous chapter (page 26), and it is not necessary, therefore, to recur to them in this portion of the work.

It may be well, however, to mention that where a decree of delivery of possession to the landlord is prayed for, by reason that the Messenger has made a return of no effects, in respect of a warrant of execution for rent, no costs are given against defendant.[1]

SECTION XVI.

Appeal.

An appeal to the Supreme, Eastern Districts', or any Circuit Court may be made against any final judgment of a Magistrate's Court; and such appeal must be noted by the Clerk of the Court, on the Court day next ensuing that on which the judgment was given, and the party appealing must deposit with the Clerk the sum of one pound seventeen and sixpence as security for the cost of the appeal. Should he abandon the appeal and not take any further proceedings within fourteen days, he is entitled to receive back his deposit; but should he not take any further proceedings, and not give notice of his abandonment of his appeal within the fourteen days, the deposit is forfeited, and applied to the payment of any costs the opposite party may have incurred, the balance, if any, being disposed of in the same manner as fines.[2]

[1] Act No. 20, 1856, Sec. 24. [2] Rule 33, Schedule B, Rule 35.

The record of the case is, in cases of appeal, transmitted by the Magistrate to the Registrar of the Court before which the appeal is to be heard; and on the day appointed, the case is argued in the Superior Court, which may reverse or alter the judgment, or return the record to the Magistrate with instructions to take further evidence.[1]

The Court hearing the appeal has also power to order the parties, or either of them, to appear before it, and produce at some convenient time such further proof as shall seem necessary or desirable.

Pending an appeal, the Magistrate is empowered either to stay execution or direct the judgment to be carried out.

In the former case, the Magistrate may require, from the party against whom judgment is given, security for the due performance of the judgment; and in the latter case, the party in whose favour judgment was given must, before its execution, also give security for the full restitution of the amount to be levied and raised upon the judgment, should the same be reversed on appeal, and also for the due execution of any further judgment or order that may be afterwards pronounced in respect of the appeal.

SECTION XVII.

Stamps.

Every power to sue or defend must be stamped with a stamp of the value of sixpence, and every summons, if for £10 or under, with a sixpenny stamp also. Summonses for an amount over £10 and not exceeding £20, require a stamp of one shilling; over £20 and under £30, one shilling and sixpence; and over £30 up to £40, two shillings.

Subpœnas do not require to be stamped, neither do

[1] Act No. 20, 1856, Section 33.

copies of summonses for service. Every account or bill on which a case is founded, and of which a copy must be served on the defendant, must bear a stamp of the value of sixpence, and every liquid document must also be stamped in accordance with the same scale as that laid down for summonses. Should, however, the document be a promissory note or other liquid document, already bearing the stamp required by law for instruments of that nature, no further stamp is requisite.

Every warrant of execution and writ of arrest also requires a stamp of the value of sixpence.

Where a document is sued on which already bears a stamp, it is desirable that before making use of it in evidence, the plaintiff, or his agent, ascertain that it bears a stamp of the proper value, and that such stamp has been duly cancelled by the party whose duty it was to have done so.

SECTION XVIII.

Costs.

The question of costs in a suit is in the discretion of the Magistrate, and he may either award costs to the successful party, or adjudge that each party shall pay his own costs, as he may see fit. Witnesses are entitled to remuneration, and, if from a distance, travelling expenses also; and the allowance to witnesses is also in the Magistrate's discretion. The following is, as near as may be, the scale usually adopted by Resident Magistrates:—

	£	s.	d.
To professional men, as attorneys, notaries, Government land surveyors, and medical men, per diem	1	1	0
To merchants, agents, shopkeepers, &c.....	0	10	6
To clerks and mechanics	0	7	6
To labourers and natives	0	5	0

Interpreters are allowed to charge four shillings and sixpence for each case, or if their services are required