

RULES OF COURT IN THE TIME OF CHIEF JUSTICE FRANCIS FORBES

John P Bryson

Final 2 March 2013

Outline of Chapters

1 Introduction – 1

Introduction and scope 1, Forbes produced simplicity 3, application of English legislation 3, sources of legislation affecting practice 4, Equity practice 5, Ecclesiastical Jurisdiction (probate) 7, arrest imprisonment and debt 8.

2 Commentary on Imperial Acts and subordinate legislation – 11

NSW Debts Act 1813 11, New South Wales Act 1823 12, Charter of Justice 13 October 1823 14, Order in Council 19th October 1824 17, Australian Courts Act 1828 18.

3 Commentary on adopted legislation – 23

Reception of English statutes 23, adoption by local legislation 23, list of adopted English Acts and comment 23.

4 Commentary on local legislation -26

Recurring subjects 26, short titles and numbering 26, arrest imprisonment of debtors and insolvency 27, jury trial in civil litigation 28, libel and defamation 29, other local legislation 29, **Table** Short titles of Acts of Council 31.

5 Commentary on Rules of Court -33

Many alterations 33, draftsmanship and errors 33, little of high principle 34, following changes in English practice 34, disposition to simplify 34, recurring concerns 36, Division of the Profession 36, Terms 36, matters now obsolete 37, sources of rules, publication 38, publications, Sydney Gazette 38, Forbes' note book 39, Australian Almanack 39, Government Gazette 40, 1834 rules 40, Sheriff rules 1834 41, 1838 rules 42, admission of attornies, articulated clerks 42, drafting by Willis J 43, new rules in 1840 43 **Table** of publications of rules of court from 1825 to 1839 44, 1825 44, 1826 45, 1827 1828 48, 1829 49, 1830 1831 50, 1832 55, 1834 56, 1835 65, 1838 66.

Appendix - 66 Publications and Sources of Rules

List of documents and Index - 72

The Hon John P Bryson QC is a retired Judge of the Court of Appeal of New South Wales. Contact: growlybr@bigpond.net.au

Chapter 1. Introduction

This paper establishes the terms of the Rules of Court of the Supreme Court of New South Wales while (Sir) Francis Forbes was its Chief Justice from 13 October 1823 until he retired on 1 July 1837, and until the end of 1839. The paper provides a guide to those Rules and their context in legislation regulating civil litigation. There was no practice book for the Supreme Court in the period before 1840. This paper does not examine the new and comprehensive rules of court made by Forbes' successors which took effect on 1 January 1840.

This paper has not surveyed the court's decisions on practice. This large further task may be attempted by the author at a later time. This paper does not deal with criminal practice.

Forbes' duties as Chief Justice included preparing rules of court, and the Order in Council which empowered him to make rules also made directions in considerable detail on what he was to do. The procedures he devised were markedly more simple than those then followed in London. An inconspicuously important, indeed radical change was made by Forbes' Rule 26/11, which provided one simple originating process, a Summons, for actions at Law: this replaced a maze of originating process, so that when in 1832 the Uniformity of Process Act 1832 made a similar reform there was no need to adopt that Act in New South Wales. The main claims of Forbes' Rules for continuing historical interest are two: the simple provisions he made for Common Law pleadings, avoiding wide terrains of technicality which Parliament and the profession in England were then only beginning to reform; and his provisions for separate administration and procedure in different jurisdictions, notably Common Law and Equity. His provisions for pleadings are considered in Chapter 5. Eminent modern lawyers have rebuked Forbes for continuing the separation between Common Law and Equity, which became so entrenched that it continued until 1972. The rebukes are unjust: Forbes acted under legislation which prescribed different modes of trial, and the Order in Council which empowered him required his rules to be consistent with and similar to the law and practice of the Courts at Westminster. His rules greatly simplified two complex subjects; the manner of commencing proceedings and the manner in which the issues were established in Common Law litigation.

While Forbes held office reform initiatives in London changed the procedure of the courts there in many ways, and the changes made in London on those two subjects were less simple than his. The English reforms began to take effect with the Rules of Hilary Term 1832 made by the Judges of the Common Law Courts and continued in several later stages, notably rules of Hilary Term 1834 which reformed the system of pleading. The reformed procedures appear in retrospect to have been highly complex and based on obscure principles; but in their own time they were radical improvements. After about 40 years they were replaced in England, but not in New South Wales, by far more complete reforms under the Judicature Acts.

Most barristers and solicitors who practised in Sydney in Forbes' time had previously been admitted in London. Some had practised in Dublin, and there may possibly have been some who had been admitted in Edinburgh. An English or Irish practitioner would bring with him knowledge of the practice there; the practice here was based on the practice of the superior courts in London, and the courts in Dublin had generally similar procedure. Scottish practitioners would have faced unfamiliar practice and procedure. There was provision for practitioners who had not previously been admitted in the United Kingdom to be admitted as attorneys here, and rules of court made in 1838 by Forbes' successors provided in detail for their qualification. There was no corresponding provision for barristers, who must first be admitted in the United Kingdom.

The simplicity which Forbes produced probably reflected his experience, most of which had not been in London but in colonies where there were few judges, few lawyers, few resources, less interest in creating complexity and less ability to do so. Forbes' successors had trained later than he, and their minds were more closely directed to the reforms which began to take effect in England late in his career. In 1840 their rules of court adopted the reformed pleading system by then in effect in England, although they continued some of Forbes' simplifying measures. After 1840 practice books began to appear; the first written by Alfred Stephen J, soon to become the third Chief Justice.

In Forbes' time there were marked differences among the practices of the three superior courts in London. To have one Common Law court and not

three was a law reform in itself. In ways which it would not now be practical to trace and relate, the practice of each court in London was affected by many pieces of legislation which each dealt with small aspects of its business; this legislation had accumulated over some centuries, and was soon to be repealed and replaced. Some of this maze was in effect in New South Wales, as Forbes' first rule adopted English practice where his rules did not alter it. Arguments that English legislation on points of practice in the English courts had effect here do not seem to have had much influence; they have occasionally come to the surface, as in *Young v Campbell* 49 SR (NSW) 103, but in his own time Forbes' rules of court were largely accepted as comprehensively dealing with practice. It was and is not always possible to be confident about whether particular English legislation was in effect in New South Wales under the Common Law rule which gave effect to such of the law of England, including its legislation, as was applicable to the circumstances of a new settled colony. On 1 March 1829 this Common Law rule and its obscurities were replaced (Australian Courts Act 1828 s 24) by legislated Reception of the laws and statutes in force in England on 25 July 1828, when New South Wales had institutions of government, still rudimentary, to which it was far easier to decide whether English law was applicable than to those at the time of settlement in 1788. The terms of s. 24 seem to make the new rule one of practicability: "...so far as the same can be applied..." and not a rule of suitability. Outcomes in the application of s. 24 were far from certain, and debates as the applicability of pre-Reception English legislation arose, even in the second half of the Twentieth Century.

This paper deals with four sources of legislation affecting practice.

Three United Kingdom statutes dealt specifically with New South Wales and affected the procedure and remedies available. The principal United Kingdom statutes affecting practice were the New South Wales Act 1823, 4 Geo 4 c 96 and the Australian Courts Act 1828, 9 Geo 4 c 83. The New South Wales (Debts) Act 1813, 54 Geo 3 c 15 made real property available for satisfaction of judgment debts as fully as personal assets. In Chapter 2 of this paper there are observations on these Acts and the subordinate legislation under them.

The subordinate United Kingdom legislative instruments affecting practice were the Charter of Justice of 13 October 1823 which created the Supreme Court and appointed Forbes to be Chief Justice, and the Order in Council of 18 October, 1824 which conferred rule-making power on Forbes, who was then the only judge of the court: the power was conferred with extensive qualifications. Most (but not all) of these provisions were superseded by the Australian Courts Act 1828. The Australian Courts Act 1828 again conferred rule-making power on the judges of New South Wales, less encumbered than before with qualifications and procedural requirements.

Acts of Council of the Legislative Council of New South Wales were a third source of legislation affecting practice. The author has collected in Chapter 4 the Acts of Council which had relatively close bearing on practice. Some were drafted in the Colony and made specific provisions for practice in the court. Some Acts of Council adopted legislation enacted for England and made it applicable in New South Wales: these included some important and comprehensive law reforms, and are considered in Chapter 3. Other Acts of Council affected practice by brief provisions authorising applications to the court for remedies under the legislation: the author has not collected these.

The fourth source was the Rules of Court, which are considered at length in Chapter 5.

Equity practice. Forbes' main concern was with Common Law and Criminal business: these dominated the work of the Court from day to day. The New South Wales Act 1823 section 9 provided that the court was to be a court of equity and "...shall have power and authority to administer justice and to do exercise and perform all such acts matters and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of Great Britain can or lawfully may within England..." The Act of 1823 authorised the Crown to empower the judges to make and prescribe rules concerning the forms and manner of proceedings and the practice and pleadings in actions, suits and other matters. The Order in Council gave the judge authority to make and prescribe rules and orders dealing with practice and procedure and imposed qualifications, but made no provision in detail and no specific reference at all to practice in Equity.

Legislation which provided for Trial by a Judge and Assessors, or by Jury, related only to Common Law actions. Equity and probate cases were heard and determined by the Court: a single judge or the Full Court. Rules of court made while Forbes was in office said very little about practice in Equity. Rule 25/2 required that proceedings in equity be commenced and continued in a distinct and separate form. Rule 25/1 provided that practice in Chancery be adopted and followed so far as the circumstances and condition of the colony required. The rules which followed were largely directed to Common Law business, and rule 26/10 stated how litigation was to be commenced in terms limited to actions at Law. Until 1831 there was no further express reference to Equity business in rules of court, although some provisions such as those relating to setting proceedings down for trial could be adapted to Equity and probate business.

The Australian Courts Act 1828 section 11 again conferred on the court the jurisdiction of the Lord Chancellor, in slightly wider terms than in 1823 and extending to the Common Law jurisdiction of the Lord Chancellor. Section 16 gave the judges power to make rules of court. Again the Act made no specific provision for equity practice, which continued to be Chancery practice under the general words of rule 25/1.

The next rules which specifically relate to equity practice appear unnumbered as the 84th and the 85th Rules of October 1831. The 84th rule had the side-note Costs in Equity and provided that no higher costs were to be allowed in Equity than at Common Law. The rule made further provisions disallowing dilatory proceedings, limiting one month for filing pleas, answers and demurrers after service of the subpoena and limiting the grant of further time. (In Chancery terminology the initiating process which directed the defendant to appear and answer the bill was a subpoena; at later stages subpoenas were used to summon witnesses and for other purposes, and a subpoena to hear judgment was a notice to attend the hearing and participate in it, as well as to hear the judgment at the end of the hearing.)

The unnumbered 85th rule side-noted Examining Witnesses in Equity established process under which witnesses were to be examined *viva voce* before the Master, with provisions for appointing the hearing and recording the evidence. Depositions taken in this way were to be good and

competent evidence at any hearing between the parties in the suit. This was a significant alteration to classic Equity practice, in which witnesses were not examined in the presence of the parties, and were required to answer written interrogatories before a Master. The 85th rule appears to have opened up the possibility of cross-examination, the absence of which was a great deficiency. However the office of Master was abolished soon after the 85th Rule was made, and in the 1834 Rules the 84th and 85th Rules were not continued.

Some English statutes adopted by the Debts Act 1834 had effects on Equity practice in rather abstruse circumstances.

The Rules of Court were extensively re-ordered in the Rules of 2 June 1834, and some significant innovations were not continued. Comment on these changes appears in Chapter 5.

The rules published in the Government Gazette 16 May 1838 page 392-395 were in addition to, not in amendment of earlier Rules and took a completely different course. The 23 rules of 10 May 1838 dealt in considerable detail with Equity business, while providing that Chancery practice was to be followed except as altered. There were detailed provisions for the manner of commencing proceedings and for business in the Master's office, for the manner of claiming injunctions and other special equitable remedies, for proceeding in default of appearance, with times for demurrers, pleas and answers, for interlocutory references, amendments, dismissal for want of prosecution and setting down for hearing. Rule 17 made a significant provision and radical change from Chancery practice; if a party desired to examine witnesses they were to be summoned to appear and give evidence at the hearing and were to be examined in open court and give evidence in the same manner as in a trial at Law. This brought the witnesses to the hearing before the Judge. This was a great simplification and must have produced far more effective evidence than Chancery practice had done. A number of rules dealt with interlocutory steps, for references to the Master for enquiry, settling decrees and applications to the court to discharge an order of a single Judge. Some aspects of Common Law practice were adopted.

Ecclesiastical Jurisdiction. The provisions for practice in the Ecclesiastical Jurisdiction took a different course. Ecclesiastical Jurisdiction referred to litigation relating to wills, probate and administration of estates, which in England was heard by courts of the Established Church in each Diocese; in London, the Consistory Court of the Diocese of London. The Church courts had other jurisdictions, including in matrimonial causes, and these were not conferred on the Supreme Court while Forbes was in office. The New South Wales Act 1823 did not confer Ecclesiastical Jurisdiction but empowered the Crown to do so, and the Charter of Justice conferred Ecclesiastical Jurisdiction in probate business and dealt in detail with the practice to be followed. Clauses 14 to 17 of the Charter operated as the only rules of court for Probate business until 1838. The Australian Courts Act 1828 again conferred this Ecclesiastical Jurisdiction on the court, and left everything which had been done under the Charter of Justice to continue in effect, including its detailed provisions for probate business. The rules of 8 May, 1838, Government Gazette 18 May 1838 page 388-392 dealt comprehensively with applications for probate and letters of administration and the practice to be followed, including caveats against grant of administration and defended proceedings. Under rule 9 proceedings at the trial were to be in the same manner as a trial at law; that is to say, witnesses were to be examined orally and could be cross-examined. There were also rules governing the administration of deceased estates by the Registrar and Administrators.

Arrest, Imprisonment and Debt. Almost two centuries of rapid legal and social change have made some of the primary claims on the court's time and on Forbes' time seem markedly strange, almost incomprehensible. Among the strangest are the ready use of arrest on mesne process, before any consideration, let alone decision, on the merits of the claim, and of imprisonment for debt. In proportion to the population there were far more arrests in civil process in New South Wales than in London. According to the Sydney Gazette of 12 July 1831 page 2, 251 Writs for Arrest on Mesne Process, Ca Re, were issued in the 10 months to 31 October 1829: about one each working day. Probably many paid their debts when the Sheriff arrived to arrest them: but many must have been detained. The Judges found this tiresome: it conflicted with an important ideal of the Common Law and gave litigation a penal aspect. Enforcement of debts was the subject of recurring

attention in legislation and rules of court. Much judicial time and attention were directed to details about the sufficiency of bail, enforcement of the obligations of sureties and committal to and release from the Debtors' Prison: none of it with much connection with the merits of disputes. Arrest on mesne process was abolished in 1839, after Forbes had retired.

The frequent use of imprisonment as means of enforcing judgment debts should be understood in the context that only limited means of enforcement were available before Nineteenth Century reforms, and that the alternatives to imprisonment were not very effective. To imprison the debtor deprived him of his earning capacity, and to the modern mind this defeats the exercise. In effect the creditor held the debtor to ransom until he organised his affairs and assets so as to be able to pay. Once the debtor was imprisoned, the creditor and the Sheriff could do nothing to force the debtor's hand except to hold him in custody. If the creditor elected for imprisonment no other means of execution were available. As an alternative to imprisonment, goods and chattels could be seized and sold by the Sheriff, but this did not often raise a large sum. Intangible assets such as bank notes, cheques, shares in companies, income from government funds and trust estates and debts due to the debtor could not be seized by the Sheriff, and could only be reached by holding the debtor in prison. It was left to the debtor to arrange his affairs while in prison and raise money. Some obstinately remained in custody, sometimes outside prison under a keeper appointed by the court. The choice of imprisonment as a means of execution could have drastic impacts on the creditor as well as on the debtor. If the creditor decided to stay in prison the creditor could not have any other remedies; this enhanced his motivation for severity. At Common Law the creditor had not been obliged to provide for the debtor's maintenance, so that he must support himself, seek charity or starve; from Charles II's time statutes gave the debtor an opportunity to claim maintenance from the creditor, and a similar provision was made by the Debtors Act 1825. The creditor could be ordered to pay for the debtor's maintenance if after some months the debtor established that he had no resources.

Under the Common Law the creditor could issue a Writ of *Ca Sa, Capias ad Satisfaciendum*, for the arrest and imprisonment of the judgment debtor. There were several alternative means of enforcement: a Writ of *Fi Fa, Fieri*

Facias under which the Sheriff could seize and sell the debtor's movable property, or *Levari Facias* under which the Sheriff could hold the debtor's land and seek to recover income such as rent. A later remedy, *Elegit*, enabled the creditor to have half the debtor's land held and sold, leaving the debtor with the other half. In some cases where the debt was evidenced in an unusually formal way the remedies extended to all the debtor's lands. In 1813 Imperial legislation which applied only to New South Wales extended this remedy to all the debtor's interests in lands. The debtor might have no more than a life interest, meaning that no more than an interest for his lifetime could be sold. Bankruptcy was only available for a restricted class of traders and bankers. Imperial and local precursors of bankruptcy legislation created means for releasing imprisoned debtors, usually after a period of imprisonment, if they co-operated in realising their assets. These began with Clauses 22 and 23 of the Charter of Justice, dealt with in Chapter 2, and continued with local and adopted English legislation considered in Chapter 3.

Creditors' remedies were improved by legislation for trustees to collect assets and distribute them among creditors, a precursor of bankruptcy, and by the Creditors Remedies Act 1839 which followed then recent English legislation and enabled the Sheriff to seize, realise or sell intangible assets. As the Nineteenth Century proceeded, reforms in the law including the extension of bankruptcy laws diminished the need for crude coercion by imprisonment: eventually it was abolished.

Chapter 2 Imperial Acts and subordinate legislation.

The New South Wales (Debts) Act 1813, 54 Geo 3 c 15 was a rare instance of Parliament legislating for New South Wales in the first 35 years after settlement when there was no local legislature. Its subject is fully indicated by its long title *An Act for the more easy Recovery of Debts, in his Majesty's Colony of New South Wales*. Its most important provision was section 4 which made lands in New South Wales available to satisfy debts. In England land owned by a judgment debtor was not usually available to be seized and sold by the Sheriff to raise money to pay a judgment debt. It was available in some cases where debts had been created in a formal way by a bond or specialty. Otherwise execution extended only to half the debtor's landholding.

Section 4 made land in New South Wales liable to and chargeable with all debts and assets for the satisfaction of debt, in the same way as land in England was liable to satisfaction of debts on bonds or other specialties, and in the same way as personal assets. These provisions gave judgment creditors in Australia better remedies than were then available in England. Similar law reforms were made for England later in the Nineteenth Century.

The principle of this legislation has always continued in effect in Australia, and reflects the concept of land as primarily a commodity which can readily be traded, and not as primarily an inheritance which should be protected, in the interests of heirs, against debts incurred by the person who happens currently to be the owner. The structure of society differed from that in England, everyone was newly arrived, there were no land-owning classes and there were few who had inherited land, and the standing and social significance of land ownership were markedly different. Although entails and other elaborately structured land titles could be created in New South Wales, and sometimes were, they have been rare at all times. There was room for uncertainty in land titles, but significantly less than had been created in England by complex dealings and settlements over centuries.

Sections 1, 2 and 3 enabled evidence in support of debt claims to be given on affidavit where the plaintiff resided in Britain; and this extended to claims by the Crown. This overcame the severe difficulty that in the

ordinary course of Common Law trials it was necessary to produce the witnesses in person and make them available to be cross-examined; if the witnesses were in the United Kingdom it was usually impractical to sue for debt at all.

By the **New South Wales Act 1823** 4 Geo 4 c 96 Parliament dealt for the first time since 1787 with constitutional arrangements for New South Wales. The Act opened with a preamble referring to the need to provide for the administration of justice in the colonies (which is the concern of this paper), but several further preambles signal other subject matters. This temporary Act was to be in force only until the Parliamentary Session current on 1 July, 1827; it was extended by 7 & 8 Geo 4 c 73.

The short title is conventional, and the Act has never been given a short title by statute. In the style of the times, it had one long sentence without punctuation or section numbers. Where these are given, as here and in Bennett "History of the Supreme Court of New South Wales" Law Book Co Sydney 1974 page 201, they have been added by editing. The Act dealt with both New South Wales and Van Diemen's Land. In some ways the Governor of New South Wales had authority over Van Diemen's Land. In this paper the language of the Act is sometimes adapted to refer only to New South Wales.

Section 1 provided for the court to be held before one judge or Chief Justice and empowered the Crown to create the Supreme Court of New South Wales by charter or letters patent, to appoint and remove judges and to determine their salaries. Section 18 provided for transition of business and documents from the earlier civil and criminal courts.

Section 2 provided for the court to have the powers which the Common Law courts at Westminster had for England. By section 6 actions at law were to be tried by a judge and two Assessors who were to be magistrates or justices of the peace; or by a jury of 12 if both parties concurred. There was a property qualification for jurors: section 7. By section 8 the Crown could extend trial by jury. These provisions for Jury Trial were not implemented and there was no local legislation for jury trial in civil cases until 1829: see Chapter 4. Concurrence of both parties in seeking jury trial seems to have been rare, and there were few jury trials before 1829.

Section 9 conferred on the court the equitable jurisdiction of the Lord Chancellor in England. Section 10 empowered the Crown to confer Ecclesiastical Jurisdiction on the court.

Sections 12, 13, 14 and 15 dealt in detail with the Court of Appeals of the Colony of New South Wales, to be held by the Governor. There was a right of appeal on limited grounds where the claim exceeded £500, and in smaller claims the judge could give leave to appeal. A record of the evidence was to be made where the claim exceeded £500. The Crown could provide for further appeals to the Privy Council (section 16).

Section 17 empowered the Crown to confer power on the judge, under limitations to be prescribed, to make "... rules and orders touching ... the forms and manner of proceedings and the practice and pleadings..." and many other matters touching on practice.

There were provisions extending the available means for enforcing claims for debts. Section 11 extended the means available for enforcement of debts evidenced in writing, with provisions under which, if process could not be served on the debtor, debts due to be debtor could be attached, that is, frozen and set aside so as not to be available to the debtor, pending determination and enforcement of the principal claim.

Another preamble: "whereas it is expedient to make provision for an equal distribution of the effects of insolvent debtors ... among their creditors" introduced section 22 which created a regime for administration of the assets of insolvent persons if ordinary processes of execution did not produce full payment. There were provisions to summon creditors, appoint trustees, collect assets and make a rateable distribution. Under section 23 an insolvent person who complied could receive a certificate of discharge; the conditions for a second discharge were more stringent and a third discharge was not possible.

There were provisions for the Legislative Council. A further preamble stated the need to create a legislature and sections 24 and 25 did so. Section 26 enabled the Crown to establish a law which the Legislative Council had rejected. By section 27 the power to tax trading vessels and imports was limited to taxes and duties necessary for local purposes, which were to be stated in the enactment.

A further preamble referred to earlier Acts relating to taxation in New South Wales, and by section 28 an earlier Act dealing with imposing duties in New South Wales was made perpetual. (This was a curious provision to find in a temporary Act.)

Section 29 required, before enactment of a local law, a certificate of the Chief Justice that the "... proposed law is not repugnant to the laws of England but is consistent with such laws so far as the circumstances of the... colony will admit.."

By section 30 local laws were to be transmitted to London and could be disallowed within three years, and by section 31 laws were to be laid before the Houses of Parliament.

Section 32 prescribed the qualifications and the oath of office for members of the Legislative Council, and section 33 provided for their death, absence and incapacity.

There were also provisions for criminal jurisdiction. Section 3 provided for jurisdiction over crimes by British subjects in the Pacific. Section 4 provided for criminal trial by the judge and a jury of seven commissioned officers; fewer in transportation stations (section 5).

Other provisions also dealt with matters outside the present subject of civil practice and procedure. Sections 19, 20 and 21 empowered the Governor to establish courts of general quarter sessions and courts of requests. A long preamble referring to previous enactments relating to remittal of sentences and pardons introduced sections 34, 35 and 36 which prescribed in detail their manner and effects. Section 37 related to discipline of persons on ship under transportation. A further preamble relating to the power to appoint places of transportation introduced section 38 which enabled the Crown to make orders dealing with access to such places. Section 39 penalised escapes. Some miscellaneous provisions followed, section 40 extending a statute relating to merchant seamen to New South Wales, and sections 41, 42 and 43 regulating employment under indentures.

Section 44 empowered the Crown to make Van Diemen's Land a separate colony. Section 45 related to the time for which the Act was to be in force.

The Charter of Justice of 13 October, 1823 exercised powers given to the Crown by the New South Wales Act. Forbes had embarked and sailed for Sydney late in August 1823 and he arrived on 5 March 1824. The Charter was proclaimed on 17 May 1824. It was expressed in one long unpunctuated sentence, the clauses were not numbered, and where clause numbers and punctuation are found they are products of editing. The Charter was made in exercise of powers granted by the Act of 1823; when that Act was repealed the Charter was given continuing effect by section 2 of the Act of 1828. Almost all the Charter's provisions were superseded by the Act of 1828 which dealt comprehensively with the same subjects. Some things for which the Charter provides are still in effect: the Court created by clause 1 still exists, its continuance confirmed by the Supreme Court Act 1970 section 22. Clause 10 relating to the admission of barristers and solicitors continued to have some effect until revoked by the Legal Profession Act 1987 section 4.

After reciting provisions of the Act of 1823, the Charter (clause 1) created the Supreme Court of New South Wales as a court of record, to be held (clause 2) by one judge, the Chief Justice who must be a barrister of England or Ireland of not less than five years standing and was to hold office during the Crown's pleasure. The Chief Justice was given rank and precedence over everyone in the colony except the Governor (clause 3). The court was to have a seal bearing the Royal Arms (clause 4). The Chief Justice was (clause 5) to have a salary of £2000 a year to commence on the day of embarkation. There were to be no other fees or perquisites, but (clause 7) it was to be lawful for the Chief Justice to occupy an official house without paying rent or being obliged to repair. The Chief Justice was to hold no other office (clause 7). Forbes was appointed first Chief Justice (clause 8).

The court was to have other officers including a Registrar, a Prothonotary, a Master and a Keeper of Records (clause 9). The Chief Justice could (clause 9) create other offices with the approval of the Governor, and the Chief Justice was to appoint all officers. All officers would hold office at the pleasure of the Crown, but could be removed by the court upon reasonable cause.

The court was authorised (clause 10) to admit and enrol persons who had been admitted as barristers at law or advocates in England, Scotland or Ireland, or writers attorneys solicitors or proctors in the courts at Westminster, Dublin, Edinburgh or in any ecclesiastical court in England. Persons admitted were to act in all those characters and authorised to appear plead and act for suitors; but could be removed by the court upon reasonable cause. No other person was to be allowed to appear, plead or act for suitors. If there should not be a sufficient number of United Kingdom practitioners competent and willing to appear and act for suitors, the court was authorised to admit other fit and proper persons according to general rules and qualifications which the court was to make, but the court was not to admit any person who had been convicted of a crime which would disqualify that person in any of the courts at Westminster.

The Governor was (clause 11) to appoint a Sheriff for New South Wales each year and there were provisions (clauses 11 and 13) regulating the office and the duties of sheriffs and deputies, including executing all orders and imprisoning persons committed to custody. Another person could be appointed to act when the Sheriff himself was interested (clause 12).

The Charter granted Ecclesiastical Jurisdiction to the Supreme Court (clause 14) with power to grant probates and letters of administration, and there were extensive provisions regulating probate jurisdiction (clauses 15, 16 and 17). There was no reference to any Ecclesiastical Jurisdiction other than in probate; no reference to matrimonial causes or clergy discipline.

The Charter (clause 18) also authorised the court to appoint guardians and keepers of infants and their estates, and guardians and keepers of the persons and estates of "... natural fools and of such as are or shall be deprived of understanding or reason by act of God, so as to be unable to govern themselves and their estates..."

The Charter then dealt (clauses 19 to 22) with appeal to the Privy Council from the Court of Appeals in the Colony of New South Wales and gave a right of appeal where the thing in issue was valued at £2000, and there were procedural provisions for applications for leave to appeal and stays of proceedings. The power of the Crown to grant leave to appeal from the Court of Appeals in cases where there was no right of appeal was reserved.

(There were no references to appeals from the Supreme Court itself to the Privy Council; a prerogative right to hear such appeals existed but was not expressly referred to.)

Governors and civil powers were commanded (clause 23) to aid the execution of the Charter. The right of the Crown to make further provision was reserved (clause 24).

The Order in Council of 19 October 1824. When the court began to function on 17 May 1824 no rules of court had been made by an Order in Council, and Forbes' power to make rules had not been enlivened by an Order in Council as section 17 of the New South Wales Act required. On 13 December 1824 Forbes made a brief oral announcement to the Bar that until instructions were received from England the English practice would be adopted, so far as applicable. What he then said, reported only in *The Australian* of 16 December 1824 page 3, seems to show that until then he had followed the practice of the previous Supreme Court. An Order in Council was made on 19 October 1824, a full year after the Charter of Justice and 14 months after Forbes' departure, and the Colonial Secretary Earl Bathurst sent the order to the Governor by a despatch dated 24 December, 1824; exhibiting no precipitancy. However Forbes had received a copy by 13 January 1825 as he then made some Rules under it, referring to the Order in Council in the Preamble. The Order in Council made procedural requirements for confirmation or disallowance by the Colonial Office in London, and imposed limitations on the rule-making power. The Order in Council also related to Van Diemen's Land, and this paper refers only to New South Wales.

The Order in Council first recited the effect of section 17 of the Act of 1823 and set out at length the subjects with which rules of court could deal, and also recited clause 10 of the Charter of Justice relating to the admission of barristers, attorneys and solicitors. The third recital stated that rules and orders could not be conveniently or effectually framed except in the colony.

Clause 1 empowered the judge to make rules and orders on the matters mentioned in the Act and to alter, amend or revoke them.

Clause 2 required that such rules “...shall be in no manner repugnant to or inconsistent with any of the provisions of the...”[Act, Charter and Order in Council].

Clause 3 provided that the rules “...shall be consistent with and similar to the law and practice of his Majesty's Supreme Courts at Westminster, as far as the condition and circumstances of the said colony will admit. And that, as far as conveniently may be, the appropriate Language and technical terms of the Law of England shall be adopted and observed in framing such Rules and Orders.”

Clause 4 ordered “...that the said rules and orders shall be so framed as to promote, as far as possible, œconomy and Expedition in the Dispatch of the business of the said Court. And that, as far as conveniently may be, the same shall be plain, simple and compendious, avoiding all unnecessary, dilatory or vexatious forms of proceeding...”

Clause 5 ordered that the judge of the Supreme Court of New South Wales should alone frame the rules of that court; while the judge in Van Diemen's Land was to obtain the approval of the Governor of New South Wales for his rules.

Clause 6 required that all such rules “... shall be published and made known... in the most effectual manner...” and should be transmitted to the Colonial Secretary, and that allowance or disallowance by the Crown was to be notified to the Governor.

Clause 7 required the Governor to announce that he had transmitted rules to the Colonial Secretary by a notice in “...the public Gazette or in some other Public Newspaper of New South Wales...” From and after publication of notice, and not before, the rules would have effect until notice of disallowance was published. So publication of notice of transmission was a precondition for rules to take effect.

The Australian Courts Act 1828 9 Geo 4 c 83 comprehensively restated constitutional provisions for the Australian Colonies and took the place of the New South Wales Act 1823. The Act repealed the Act of 1823, which was shortly to expire, made some new provisions, replaced some of its provisions with new provisions to similar effect and gave continuing effect

to actions taken under it. Many provisions were the same or to similar effect as those of the Act of 1823. Some were not continued.

This paper is concerned with practice and the Rules of Court, and other subjects are given only passing attention. Once again the Act dealt with both New South Wales and Van Diemen's Land and this paper is concerned with New South Wales. The Act was expressed as one long sentence and has since been edited to show punctuation and numbered sections. It received Royal Assent on 25 July, 1828 and this (it would seem) is the time of its passing referred to in section 24. Section 39 provided that the Act was to commence and take effect in New South Wales on 1 March, 1829, and that on that day the New South Wales Act 1823 would be repealed. So there was an interval between 25 July, 1828 as of when laws and statutes in force in England were to be applied, and 1 March, 1829 when that provision took effect. The time which had to elapse before information could arrive from England required such an interval. Section 41 provided that the Act was to continue in force until the end of the session current on 31 December, 1836. Later legislation continued it in effect until its place was taken by the Australian Constitutions Act 1842, 5 & 6 Vic c76, which made some of its provisions permanent.

Section 24 provided for Reception of the laws and statutes in force in England on 25 July, 1828. This new provision was of primary importance and has continuing significance today. The opening words were "...That all Laws and Statutes in force within the Realm of *England* at the Time of the passing of this Act, (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof,) shall be applied in the Administration of Justice in the courts of New South Wales... so far as the same can be applied..." Doubts were to be resolved by local legislation and (until that happened) by the Supreme Court. There had been no earlier statutory provision for Reception, which had taken place under the Common Law rule for settled colonies and received the law in effect in January 1788. The Common Law rule was not well defined but probably related to suitability to the conditions of the colony in 1788. Section 24 did not refer to suitability and required the laws and statutes of England to be applied so far as the same could be applied within the colony, a test of practicality and not of suitability.

Section 1 again (as the Act of 1823 had done) empowered the Crown to erect and establish a Supreme Court of New South Wales. There were provisions for appointment of judges by the Crown, for their salaries and for their removal. There was also express provision, which had not been made in 1823, for the Governor to fill vacancies caused by absence, resignation or death until a successor was appointed by the Crown. In a departure from the Act of 1823, ministerial and other officers of the court were to be appointed in the manner which the Crown was to direct.

The power to establish the Supreme Court of New South Wales again has never been exercised. Section 2 provided that the existing Supreme Courts were to continue under their Charters of Justice of 13 October, 1823 until further Charters were issued, and that all things done under the Act of 1823 were to continue to have effect as if done under the Act of 1828. No further Charter has ever been issued for the Supreme Court of New South Wales; one was later issued for Van Diemen's Land. The Act of 1828 did not continue the Court of Appeals which the Act of 1823 had created: it went out of existence on 1 March 1829.

There were some changes to the law relating to civil jurisdiction. Jurisdiction at Common Law was conferred on the Supreme Court by section 3, in ample terms as before. Section 8 provided as before for the trial of actions at law by a judge and two Assessors, but also provided that either party could apply to the court for a trial by jury, which the court could award or refuse in its discretion. Jurors' qualifications and other requirements for jury trial were to be fixed by local legislation.

Section 11 conferred jurisdiction in equity on the court, and went on to confer the Common Law jurisdiction of the Lord Chancellor, with which the Act of 1823 had not dealt. Section 12 conferred Ecclesiastical Jurisdiction in probate business, in more ample terms than the Charter of Justice. Once again there was no reference to Ecclesiastical Jurisdiction in matrimonial causes or clergy discipline. Section 13 provided for institution of circuit courts; this had little if any effect.

Section 14 required that at the trial of an action at law without a jury, where the matter in issue exceeded £500, the judge was to cause the evidence to be taken down in writing and entered on the record. There was

provision for certification of the documents and papers in evidence if there were an appeal to the Privy Council. Section 15 provided that the Crown could allow a person aggrieved by a judgment of the court to appeal to the Privy Council, and enabled the Crown to prescribe rules governing appeals. No such rules were made. The provisions of the Charter of Justice relating to Privy Council appeals had referred only to appeals from the Court of Appeals and had no further effect when the law which created that court was repealed. The Charter of Justice did not provide for or refer to appeals from the Supreme Court. Many years passed before the first appeal from the Supreme Court was brought in 1845; see Bennett "History of the Supreme Court..." at pages 169-170.

Section 16 in ample terms conferred power on the judges (and no longer on the Chief Justice alone) to make rules of court, listing at length matters with which rules of court could deal. Section 16 also enabled the Crown to disallow such rules, which would have no effect when disallowance was signified through the Governor. Section 16 is imperfectly drafted, because although its opening provision empowers the judges to make rules of court, later phrases speak as if the Crown were to make them, and to alter, amend or revoke them. This deficiency does not seem to have caused any practical difficulty.

As the Order in Council no longer had effect, publication of rules of court in New South Wales was no longer a condition for their validity. Of course there was a practical necessity to publish rules of court when made. There was still room for disallowance by the Colonial Office; it seems that no rules of court were ever disallowed.

There were also provisions for criminal jurisdiction, with some small changes. Section 4 again conferred criminal jurisdiction over British subjects in the Pacific. Section 5 made extensive provision for trials of criminal cases, to be held before a judge and seven commissioned officers. The officers were not referred to as a jury, as they had been in the Act of 1823. Section 6 provided for prosecutions by private persons if the leave of the court was first obtained. Section 7 created machinery under which the Governor could constitute a court with a smaller number of commissioned officers at a transportation station.

The Act of 1828 also dealt with the Legislative Council and its powers. Sections 21, 22 and 23, in terms as if there were not already a Legislative Council, empowered the Crown to constitute a Legislative Council; sections 20, and 21, 22 and 23 made detailed procedural provisions. Public notice before consideration of bills was required; this was an innovation.

The certificate of the Chief Justice that there was no repugnancy with English law was no longer a precondition for enactment. Section 22 created procedure under which after enactment the judges were to have an opportunity to represent to the Governor that the law was repugnant; such a representation would lead to a review by the Legislative Council; if the Legislative Council decided that the law was to take effect the judges were required to state the grounds of their opinions for transmission to the Colonial Secretary.

Sections 25 and 26 created limits, much as before, on powers to impose taxation by local legislation. Section 27 provided for the Governor's control over revenue and for accounting to the Treasury. Section 28 created machinery under which local legislation could be disallowed within four years. Section 29 required local legislation to be laid before the Houses of Parliament. Sections 30 and 31 related to office-holding of members of the Legislative Council.

Other sections also dealt with subjects outside this paper. Section 9 dealt with a detail of the law relating to transportation, preventing a person to whom an offender had been assigned from transferring the assignment without the Governor's consent. Section 10 made provisions for grand juries in New South Wales; these were not carried out, and Grand Juries existed only tentatively and briefly. Sections 17, 18 and 19 in much the same terms as earlier deal with creation by the Governor of courts of general and quarter sessions and courts of requests and with the rules of practice and proceeding in the courts. Sections 32, 33 and 34 made provision much the same as before relating to remission of sentences and abetting escapes. Section 35, 36, 37 and 38 again made provisions relating to service under indentures. Section 40 extended references to the Governor to officers administering in place of a Governor.

Some provisions of the Act of 1823 were not continued or repeated. There were no provisions to the effect of the repealed section 11 relating to attachment of debts due to absent debtors, or section 22 relating to administration of assets of insolvent persons. Later local legislation dealt with those matters in different terms.

Chapter 3. Commentary on adopted legislation.

The Australian Courts Act 1828 provided for Reception of laws and statutes in force in England at the time of the passing of that Act, 25 July 1828: and took effect on 1 March 1829. (Curiously the terms of the Supreme Court Act 6 Wm 4 No 12, 1835 seem to assume that 1 March 1829 was the date of Reception.) For English statutes given effect by the Act of 1828 the question how far the legislation “...can be applied...” in New South Wales had to be considered, there was room for uncertainty where a statute referred to institutions and places in England, and adoption of later statutes could raise a similar difficulty. Before 1829 and for some years afterwards, statutes which had been enacted for England were sometimes adopted and given effect in New South Wales by local legislation. English statutes which bore on the practice of the Court and were adopted by 1840 are considered here. Some significant English statutes were adopted in this way in the years from 1829 to 1840, but from then on English legislation was appropriately redrafted before re-enactment.

The Arrest for Debt Act 9 Geo 4 No 2, 1828 adopted 7 & 8 Geo 4 c 71 which dealt with arrest on mesne process. This is dealt with further in Chapter 4.

The Debts Act 5 Wm 4 No 8, 1834 adopted eight Acts which had reformed English law in important ways and on subjects much wider than the short title “Debts” would indicate, some relating to the practice of the courts and others dealing with the law of property. The Acts dealt with

Commitments by courts of Equity for contempts and taking bills *pro confesso* -11 Geo 4 & 1 Wm 4 c 36.

Undisposed-of residues of the effects of testators – 11 Geo 4 & 1 Wm 4 c 40.

Illusory appointments -11 Geo 4 & 1 Wm 4 c 46.

Payment of debts out of real estate -11 Geo 4 & 1 Wm 4 c 47.

Conveyances and transfers of estates and funds vested in trustees and mortgagees and for enabling courts of Equity to give effect to their decrees and orders -11 Geo 4 & 1 Wm 4 c 60.

Property belonging to Infants Females Coverts Idiots Lunatics and Persons of unsound mind- 11 Geo 4 & 1 Wm 4 c 65.

Proceedings in Prohibition and on writs of Mandamus- 1 Wm 4 c 21.

Interpleader - claims made upon persons having no interest in the subject of such claims 1 & 2 Wm 4 c 58.

The Written Memoranda Act 4 Wm 4 No 17, 1834 adopted the English Act 9 Geo 4 c 14 known as Lord Tenterden's Act which altered several requirements for written memoranda under the Statute of Limitations and the Statute of Frauds. The most significant alteration required writing for an acknowledgement to extend a time limit for action.

The Dower Act 7 Wm 4 No 8, 1836 adopted two English Acts. 3 & 4 Wm 4 c 105 related to Dower and made a number of amendments; its principal effect was to make it altogether easy for a husband to bar dower. 3 & 4 Wm 4 c 106 made some highly technical amendments to the law relating to inheritance (meaning descent of land to heirs).

The Oaths Act 8 Wm 4 No 2, 1837 adopted four English statutes. 3 & 4 Wm 4 c 49 allowed Quakers and Moravians, who had religious objections to taking oaths, to give evidence on affirmation. The other adopted Acts related to criminal law.

The Limitations Act 8 Wm 4 No 3, 1837 adopted 3 & 4 Wm 4 c 28 which related to remedies for disputes about title and to limitation of actions to recover real property. The English Act created a general limitation period of 20 years for actions to recover land and provided in detail for exceptions and consequences, with an ultimate time limit of 40 years. Section 36 named and abolished many ancient writs and procedures for disputes about land title. This left disputes about land title to be determined only by the strange process of ejectment, which employed legal fictions and the fictitious litigants John Doe and Richard Roe behind whom were the litigants whose rights were truly involved; ejectment was itself progressively reformed over the next 20 years, and the fictitious elements were removed. The English Act is important in the history of English law, but its practical effect in New South Wales was probably quite limited, first because rules of court had already enabled litigation to be commenced by

far simpler process, and secondly because there had been little time to develop the elaborate titles with which the abolished processes dealt.

The Wills (Adopting) Act 3 Vic No 5, 1839 adopted the Wills Act 1837 1 Vic c 26 which extensively restated and reformed the law relating to Wills.

Chapter 4. Commentary on local legislation.

Three subjects received recurring attention from the Legislative Council in the years to 1840. The first was a large and loosely related group dealing with arrest on mesne process, imprisonment of debtors and relief and discharge of insolvent debtors, and the means of enforcement available to judgment creditors: enhancement of other remedies diminished the significance of arrest and imprisonment. The second was Jury trial in civil litigation, which was enabled by the Australian Courts Act 1828 but required local implementation. The third was the wide subject of libel and defamation, which gave rise to much litigation in colonial society, including prosecutions for Criminal Libel. Prosecutions for Criminal Libel have now been unheard of for generations, but they were frequent in Forbes' time. This legislation is noted here because these prosecutions were a vehicle for disputes between private persons.

The fourth group was other local legislation dealing with the Court, its practice and procedure.

Early Acts of Council did not state their own short titles, and they were not numbered by Calendar Years, and not at first by Regnal Years. The author has used the short titles long used by the Government Printer, which became conventional and were used in the Alphabetical and Chronological Tables printed by the Government Printer in 1969. The practice in enumerating Acts has been difficult; the Acts of 1824 and 1825 were numbered in one series, but from then until 1897 a new series began each Regnal Year. George IV became King on 29 January 1820, so Regnal Years and Calendar Years were effectively the same until in 1830 one Act was passed before the new Regnal Year began on 29 January. William IV and Victoria acceded midyear and until 1897 the same number was often used twice in the same Calendar Year. From 1897 a new series of numbers began each Calendar Year. The author has used the original numbers and has shown Calendar Years of enactment as well as Regnal Years. AustLII uses the side notes to the Acts of Council as short titles, and renumbers the Acts by Calendar Years; these confusing innovations give each Act a different short title and number to those widely used for well over a century and create difficulties in referring to sources. This Chapter concludes with a

table showing the short titles and the side-notes of the Acts of Council mentioned in this paper.

Arrest, imprisonment of debtors and insolvency.

The Arrest for Debt Act 9 Geo 4 No 2, 1828 adopted 7 & 8 Geo 4 c 71, which extensively reformed earlier statutes about arrests on mesne process, prevented arrest on mesne process where the claim was under £20 and to some extent simplified process, including process for obtaining bail on larger claims. It was required that an attorney sign the application for a warrant, so that arrest was not available to plaintiffs in person. Complexity remained.

The Insolvency Act 11 Geo 4 No 7, 1830 was a further step, after the repealed section 22 of the Act of 1823, towards legislation dealing comprehensively with insolvency administration of the estates and effects of insolvent debtors, appointment of trustees and distribution of proceeds. This Act provided for enquiry into the affairs of persons alleged to be insolvent, for controlling their dealings with their estates and effects, for declaring insolvency and for rateable distribution among creditors. The process was more formal if the debts exceeded £250. If the insolvent person made a full and true disclosure, discovery and surrender of effects and complied with the court's controls he was exempt from imprisonment, and could obtain a certificate to bar further claims. There were some striking exceptions. Debts to the Crown and damages for malicious injury could not be discharged. There could be no second discharge: the protection was only available once. There was provision for assignment of the estates of debtors who chose to remain in prison rather than apply for relief or pay their debts, and for relief of debtors who could not pay their debts but had been in prison for three months. The Act was given effect only until 3 April 1832.

The Debtors' Relief Act 2 Wm 2 No 11, 1832 again provided for the release of insolvent debtors, in the place of the Act of 1830 which was to expire. This Act made somewhat more comprehensive provisions than the Act of 1830 and its primary focus was on an application to be made by a debtor who had been imprisoned for three months or more. If the debt had been incurred fraudulently or on a cause of action involving malice the

application could only be made after two years imprisonment. This Act was to have effect until 1 May 1834, and was continued in effect until 31 August 1836 by the Insolvency Act 5 Wm 4 No 4, 1834. The Debtors Act 6 Wm 4 No 18, 1836 again continued this legislation until 31 August, 1838. The Insolvency Act 2 Vic No 14, 1838 again continued this legislation, with many significant amendments and further provisions.

The Debt Imprisonment Act 3 Vic No 15, 1839 abolished arrest on mesne process except on a judge's order based on proved intention to leave New South Wales or abscond to remote parts. This followed a then recent English reform.

The Creditors Remedies Act 3 Vic No 18, 1839 improved the remedies available to judgment creditors. This should have reduced the need or wish of judgment creditors to arrest debtors and keep them in prison. The Sheriff was given power to deal with assets such as bank notes, cheques, promissory notes and negotiable instruments, to sue to enforce them and to pay the proceeds to the judgment creditor: a simpler and more effective process than sale of goods under writs of *Fieri Facias*, and means to overcome the obstinacy of judgment debtors who preferred to remain in prison rather than realise assets. There were also provisions for obtaining a court order charging stock and shares in companies.

Jury Trial in Civil litigation.

Trial by jury was highly valued by the community. The Juries Act 10 Geo 4 No 8, 1829 made detailed provisions to carry out the authorisation in s.8 of the Australian Courts Act 1828 of trial by jury in civil cases at Common Law. A party could apply for trial by jury, and the court could order jury trial in its discretion: otherwise trial was before a Judge and two Assessors, as before. (In 1835 a rule of court made trial by jury the prima facie outcome, although that conclusion could be displaced.) The jury was to be of 12 persons. There were provisions for qualifications, exemptions and disqualifications, and for preparation and correction of jury lists. Persons who had been convicted of felony or misdemeanours designated as infamous were not qualified unless they had obtained a pardon, and persons who had been convicted again after being transported could not be qualified. There were detailed provisions for summoning juries and

selecting jurors in civil trials and also in criminal trials. This Act was to have effect until 31 December 1831. There were consequential amendments to the rules of court.

The Jury Act 11 Geo 4 No 2, 1830 restated the disqualification of persons repeatedly convicted, and dealt with machinery for compiling jury lists. This Act was temporary and was to be in effect only until 31 December 1831.

The Juries Act 2 Wm 4 No 3, 1832 dealt with civil jury trials in a more comprehensive way. This Act was to have effect until 1 March 1834. Sections 40 and following carried out an extension of jury trial in criminal cases which had been authorised by an Order in Council of 28 June, 1830 under the Australian Courts Act 1828.

The Juries Act 4 Wm 4 No 12, 1833 continued this Act until 30 June, 1835; and also made detailed provisions for criminal trial by jury in the Supreme Court and in Courts of General and Quarter Sessions. The Juries Act 5 Wm 4 No 25, 1835 again extended the Act of 1832 until 30 June, 1836, and made some amendments to the law relating to special juries. The Jury Act 6 Wm 4 No 15, 1836 again extended this legislation until 30 June, 1837. The Jury Act 7 Wm 4 No 9, 1837 again extended this legislation until 30 June, 1838. The Juries Act 1 Vic No 1, 1838 again extended this legislation until 30 June 1840.

The Jury Lists Act 4 Wm 4 No 8, 1834 overcame a temporary problem by extending the time for preparing the Sydney jury lists that year. The Juries Act 1 Vic No 4, 1838 dealt with administrative problems in preparing that year's Maitland Jury Lists.

Libel and Defamation.

The Newspapers Act 8 Geo 4 No 2, 1827 opened the historically frequent attention which legislators in New South Wales have given to libel and defamation. The Newspapers (Libel) Act 11 Geo 4 No 1, 1830 imposed some severe restrictions and penalties, and the following year the Newspapers (Libel) Act 2 Wm 2 No 1, 1831 relieved one of them by abolishing banishment on a second conviction for criminal libel. The Newspapers Act

2 Vic No 20, 1838 made minor amendments to the law relating to criminal libels.

Other local legislation.

Two Acts of Council dealt with enforcement of promissory notes and other instruments expressed in Spanish dollars and not in sterling: the Notes and Bills Act 5 Geo 4 No 1, 1824 and the Bills of Exchange Act 7 Geo 4 No 3, 1826.

The Additional Judge Act 6 Geo 4 No 16, 1826 enabled the Governor to appoint an additional judge of the Supreme Court. John Stephen J was appointed under this Act and not initially by the Government in London. After doubts were expressed about its validity he was again appointed by the Crown. (Later the Australian Courts Act 1828 section 1 gave the Governor the power to appoint acting judges pending appointment by the Crown.)

The Foreign Attachment Act 2 Wm 4 No 7, 1832 made a large innovation by introducing the process of foreign attachment, in which claims against a debtor could be pursued and enforced against property situated within New South Wales without service of process on the debtor, where the debtor was absent or kept out of the way to evade service. The effect was that debt claims could be brought and enforced against the property of an absent defendant. This process had its origin in the custom of the City of London and had a markedly different basis to that upon which the courts at Westminster exercised jurisdiction, based on service of process on the defendant. (In the language of London custom a person who was not a Citizen of London was a foreigner.)

The Usury Act 5 Wm 4 No 10, 1834 declared that the English laws and statutes relating to usury were not in force in New South Wales, and limited interest to 8% unless a rate had been expressly agreed.

The Supreme Court Act 6 Wm 4 No 12, 1835 resolved a possible doubt about whether the Supreme Court could exercise a power which an English Act in force on 1 March, 1829 conferred on the courts at Westminster.

The Intestate Estates Act 1 Vic No, 1838 authorised investment of moneys belonging to intestate estates in the New South Wales Savings' Bank at Sydney.

The Arbitration Act 3 Vic No 4, 1839 enhanced the effectiveness of references to arbitration by the court.

The Aboriginals Act 3 Vic No 16, 1839 enabled evidence of aboriginal natives to be received on affirmation or declaration (and not on oath) in criminal cases. However this Act was disallowed in 1840 and lost effect.

Table. Short Titles of Acts of Council.

1824	5	Geo 4	No 1	Short Title: Notes and Bills.	Sidenote: Currency
1825	6	Geo 4	No 16	Short Title: Additional Judge.	Sidenote: Puisne Judge
1825	6	Geo 4	No 8	Short Title: Debtors.	Sidenote: Imprisoned Debtors
1827	8	Geo 4	No 2	Short Title: Newspapers.	Sidenote: Blasphemous and Seditious Libels
1828	9	Geo 4	No 2	Short Title: Arrest for Debt.	Sidenote: English Arrests Act Adoption
1829	10	Geo 4	No 8	Short Title: Juries.	Sidenote: Juries for Civil Issues
1830	11	Geo 4	No 1	Short Title: Newspapers (Libel).	Sidenote: Blasphemous and Seditious Libels
1830	11	Geo 4	No 2	Short Title: Jury.	Sidenote: Civil Juries
1830	11	Geo 4	No 7	Short Title: Insolvency.	Sidenote: Debtors' Estates Distribution
1831	2	Wm 4	No 1	Short Title: Newspapers (Libel).	Sidenote: Slander and Libel
1832	2	Wm 4	No 3	Short Title: Juries.	Sidenote: Jury Trials
1832	2	Wm 4	No 7	Short Title: Foreign Attachment.	Sidenote: Foreign Attachments
1832	2	Wm 2	No 11	Short Title: Debtors' Relief.	Sidenote: Debtors' relief
1833	4	Wm 4	No 12	Short Title: Juries.	Sidenote: Jury Trials
1834	4	Wm 4	No 13	Short Title: Jury Lists.	Sidenote: Sydney Jury Lists
1834	4	Wm 4	No 17	Short Title: Written Memoranda.	Sidenote: Imperial Acts Adoption
1834	5	Wm 4	No 4	Short Title: Insolvency.	Sidenote: Debtors' Relief
1834	5	Wm 4	No 8	Short Title: Debts.	Sidenote: Imperial Acts Adoption

1834 5 Wm 4 No 10 Short Title: Usury. Sidenote: English Usury Laws Non-Application

1835 5 Wm 4 No 25 Short Title: Juries. Sidenote: Jury Trials

1835 6 Wm 4 No 12 Short Title: Supreme Court. Sidenote: Supreme Court Powers Definition

1836 6 Wm 4 No 15 Short Title: Jury. Sidenote Jury Trials

1836 6 Wm 4 No 18 Short Title: Relief of Debtors. Sidenote: Debtors' Relief

1836 7 Wm 4 No 8 Short Title: Dower. Sidenote: Imperial Acts Adoption

1837 7 Wm 4 No 9 Short Title: Jury. Sidenote: Jury Trials

1837 8 Wm 4 No 2 Short Title: Oaths. Sidenote: Imperial Acts Adoption

1837 8 Wm 4 No 3 Short Title: Limitations. Sidenote: Imperial Acts Adoption

1838 1 Vic No 1 Short Title: Juries. Sidenote: Jury Trials

1838 1 Vic No 4 Short Title: Intestate Estates. Sidenote: Intestates' Estates

1838 2 Vic No 4 Short Title: Juries. Sidenote: Maitland Jury Lists

1838 2 Vic No 14 Short Title: Insolvency. Sidenote: Debtors' Relief

1838 2 Vic No 20 Short Title: Newspapers. Sidenote: Blasphemous and Seditious Libels

1839 3 Vic No 4 Short Title: Arbitration. Sidenote: Arbitration

1839 3 Vic No 5 Short Title: Wills (Adopting). Sidenote: Imperial Act Adoption

1839 3 Vic No 15 Short Title: Debt Imprisonment. Sidenote: Arrest on Mesne
Process Abolition

1839 3 Vic No 16 Short Title: Aborigines. Sidenote: Aborigines Competent Witnesses (Disallowed: Government Gazette 23/12/1840)

1839 3 Vic No 18 Short Title: Creditors Remedies. Sidenote: Creditors' Remedies Extension

Chapter 5. Commentary on Rules of Court.

Forbes' Rules did not state the practice of the Court exhaustively: they did not teach the practice to the reader. The starting point for comprehension is the adoption of King's Bench practice (and also Exchequer practice, a minor part of the Supreme Court's business.) Forbes' Rules modified this practice, and except as modified, King's Bench practice was to be followed.

Forbes, and his colleagues when he came to have colleagues, were industrious draftsmen and showed no reluctance to make alterations. He made some rules in January 1825, reworked them in June 1825, made more comprehensive rules in September 1826, revoked some of them later that year, made further rules every few months in 1827 and 1828, many in 1829, and a comprehensive reworking and some further rules in October 1831. Those too were comprehensively reworked and consolidated and a number were discarded by Rules made on 2 June 1834. There were a few further rules and amendments before Forbes left office on 1 July 1837. His successors made comprehensive further provisions in April and May 1838, and then replaced all existing rules with a complete reworking which took effect on 1 January, 1840.

Forbes was not a tight draftsman. It appears that when he saw a problem he made a rule about it. For some things in daily practice there were a number of revisions, and practitioners cannot have welcomed their frequency. His terminology was sometimes various and he was not good with numbers. At first he used Arabic numerals but later he used Roman numerals: sometimes he forgot to give numbers to his rules. He did not use consistent dating systems, and sometimes seems to have referred to Regnal Years not Calendar Years. Sometimes he gave a different date for a rule in his notebook to the date given for it in a published notice, and used the date from the notebook in a later publication. Sometimes he gave the wrong Term as the date: sometimes he did not give a date at all. There were variations in punctuation and setting-out. Rules published on 18 February 1835 were headed Third Term 1835 and bore no other date, yet that Term did not begin until 15 September 1835: perhaps he meant Third Term 1834, or the third Term in the Regnal Year 5 Wm. 4. There were delays in transmitting rules to London when that was required for validity by the Order in Council, and then after 1 March 1829 when the Order in Council

no longer had effect it was referred to in published notices as the reason for transmission to London. Sometimes he called a rule “Regula Generalis”, and it is not clear for what he thought this name appropriate. Sometimes it is difficult to know whether a rule is a temporary provision relating to the current Term or current business or was intended to operate indefinitely. In the consolidation of 1831 part of the earlier rule which rule 48 was intended to continue was left out by mistake, and was restored in the Rules of 1834.

The main subject of Forbes’ Rules was practice at Common Law, and they said little about other jurisdictions. Some of his measures had long-term importance. Those of the highest significance are the rules which established his simple form of pleading and repressed some of the more prominent sources of inefficiency, and his first and second rules which provided for the practice of the King’s Bench and Exchequer courts at Westminster to be followed unless otherwise specifically provided, and for proceedings in different jurisdictions to be kept distinct. (Common Pleas practice was not adopted.) A marked simplification was his provision for Common Law actions all to be commenced by a Summons: this made it unnecessary to adopt the Uniformity of Process Act 1832, 3 Will. IV c.3, which reduced many and strange originating processes theretofore used in England to one, the Writ of Summons. Whatever the rules did not deal with was left to English practice. The mark which these provisions put on the practice of the court continued until 1972. Otherwise there is little of high principle or lasting importance in Forbes’ rules; they prescribed many matters which it was useful to prescribe, mostly for practice day to day, not lofty themes.

The question asks itself whether the practice adopted by the first Rule was that at the time of making the rule or whether the rule followed changes in practice in England. On a first reading it seems that the practice was fixed at the time of adoption; an acute draftsman would have dealt with this expressly. An Addendum to the 1834 Rules shows clearly that Forbes did not think that the date was fixed, but regarded the adoption of the practice of the English Courts as ambulatory, so that changes in practice there had effect here. The Addendum explained how the changes to practice in England made by the Rules of Hilary Term 1832 operated in New South Wales.

Forbes' rules show a disposition to simplify English Common Law practice and to reduce and limit technicality. He provided (26/21) for a short declaration setting forth in a plain, simple and compendious manner the true cause in which the plaintiff brought his action. This was a marked reform, and was continued in Forbes' later Rules. (The declaration was the plaintiff's statement of what he claimed and his grounds: its place is now taken by the Statement of Claim, a very different document.) Instead of a declaration an account of particulars of demand could be filed, where such particulars were required by the practice of the King's Bench. This refers to the Common Money Counts, where the declaration was no more than a brief formula and Kings Bench practice enabled the real claim to appear in particulars; Forbes simplified that by dispensing with the declaration and letting the particulars take its place.

There were other simplifying provisions which looking backwards are notable for their modernity. He allowed (26/24) a plea of the general issue, which communicated very little about what the defence really was, to be accompanied by a notice of the special matter relied on, instead of the much more detailed special plea which practice in England would have required. Forbes' Rules also (26/26) limited costs to those of the general form of pleading.

The Rules of Hilary Term 1834 dealt with pleadings in England, including the form of declarations and pleading the general issue, in ways quite different to Forbes' Rules. He did not mention these provisions in the Addendum, which deals with many reforms made in 1832 at a lower level of importance. Plainly he did not think that the practice in New South Wales or the operation of his Rules were altered on aspects of pleading with which his Rules dealt expressly.

Forbes dispensed (26/34) with the *Nisi Prius* record, into which every significant document was copied for the conduct of the trial; he had the original documents in court and did not require a copy. A striking reform (26/22) disallowed nonsuit or demurrer for mistake between actions of trespass and case. Argument about this long continued to raise unuseful technical debates in England. Surprisingly this rule was not continued when the rules were consolidated in 1834. Another rule (26/57) showed modernity; the court under particular circumstances could make particular

rules; could adapt ordinary process to the needs of a particular case. Such a provision became commonplace in the Twentieth Century and is acted on daily, but in Forbes' time it was seen as an anomaly, and it was not continued when the rules were revised in 1834. Rule 26/18 adopted the simplifying device, sometimes used in England, for default judgment when the defendant was duly served and did not enter an appearance: the plaintiff could enter an appearance in his name and then go on with the proceedings. This too was not continued in 1834; rules 34/22 and 23 authorised more elaborate procedures on default of appearance, and a fictitious or notional appearance was not part of them.

Practical concerns which repeatedly attracted attention and alterations included the manner of commencing litigation and the records to be made when it was commenced; the manner in which process was to be served and the consequences of default of appearance; details of managing court business and arranging lists; when writs were returnable, and relating their return to the commencement of Terms; setting proceedings down for trial after pleadings had been completed or it had been established that there was to be no defence at trial, and (after legislation in 1829 enabled civil jury trial) applying for an order for jury trial, which would otherwise be trial by a judge with Assessors. In 1835 a rule made civil jury trials the ordinary course.

In 1829 a rule dealt with the large subject of Division of the Profession, preventing solicitors from appearing as advocates. The Charter of Justice enabled this division to be made, and the court had earlier declined to make it. This would have been a familiar concern, as lower courts in England such as Quarter Sessions decided at the beginning of each session whether solicitors could appear at that session, and usually decided that if two or more barristers attended only barristers could appear. After an earlier refusal, the court decided in 1829 to divide the profession, but Forbes cannot have been an enthusiast, for by its own terms the rule required allowance by the King, and it was not sent to London for allowance for more than 18 months. The Colonial Office also delayed, and allowance was not announced until 1 November, 1834. This caused great controversy because solicitors, who according to the terms of the order were entitled to elect whether to be advocates or practice only as solicitors, were not given a real opportunity to make the election.

Some things for which rules made extensive provisions are now obsolete and difficult to follow. In a Common Law Court Terms were periods, several times each year and usually for about a month, when the court heard civil business and did not attend to criminal business. Some important steps had to wait until the next Term to be attended to: some others proceeded with little regard to Terms. At first there were four Terms; Forbes changed the dates, and in 1831 changed to three Terms. These changes probably responded to practical needs now difficult to establish. Terms had been kept in the courts in England since time immemorial, and whatever purpose they once had was no longer important. In our Age each year has only one long Term.

Some rules and orders dealt with the places where debtors were to be detained. Arrest on mesne process, where the defendant was arrested and held in custody or given bail by the Sheriff at the beginning of a civil claim, was common until 1839 and generated business for the court which must have required more time and attention than seemed justified; deciding whether the defendant was to be allowed bail or kept in custody, the terms of bail, the sufficiency of the sureties, when where and how the defendant was to be detained and how he was to be maintained. In the rules the word "bail" usually referred to the sureties, the persons who gave bail. Rules dealt with "rendering" the defendant, a word which has gone out of use and become confusing, and refers to the right of the sureties to surrender the defendant, bring him to court, deliver him into custody and escape further risk of his default. There were complexities if the defendant was concurrently in custody on more than one claim. The rules also dealt with *Scire facias*, which summarily enforced the liability of the sureties if bail was forfeited.

Forbes' rules dealt with admission of attorneys who qualified locally and had not been admitted in the United Kingdom. Forbes' rules said little about qualification, but in 1838 his successors dealt in exacting detail with requirements for local admission. There was no provision for local qualification of barristers, who had to be admitted in the United Kingdom if they were to practise in New South Wales.

The word "attorney" causes difficulties. One is spelling the plural; "attorneys" and "attornies" both appear and both seem to have been

acceptable. A greater difficulty is that “attorney” is ambiguous and can refer either to a solicitor practising in a Common Law Court or to a person empowered to act in the place of another. Some rules dealt with Warrants of Attorney, which do not refer to lawyers and need explanation. In the Eighteenth Century it was common for a borrower to give the lender a warrant of attorney, written authority to accept service of process, enter an appearance and confess judgment. In this way the borrower enabled the lender to send the borrower to the debtors’ prison without notice to the borrower. Forbes’ rules imposed technical requirements on this process and gave borrowers some protection against themselves. These Warrants incurred judicial disfavour, and lost their significance when imprisonment for debt was abolished.

Forbes’ rules deal with many matters important to daily practice in his time which do not have continuing importance.

Some explanation is needed of the sources where the rules of court mentioned in this paper have been found. All these sources are reproduced in the Appendix to this paper: some are not highly legible. Modern practices in which rules of court and other subordinate legislation are published in the New South Wales Government Gazette were not followed in a reliable way while Forbes was Chief Justice. Before 1 March, 1829 Clause 7 of the Order in Council made it necessary if rules of court were to take effect that the Governor should publish notice in a newspaper that he had transmitted them to London for confirmation. What the Governor was required to publish in a newspaper was the fact that he had transmitted the rules, not their terms. Clause 6 required the Governor to publish the Rules and make them known, but this was not a condition of their taking effect. It can reliably be assumed that all rules of court made in that period can be traced from published notices, although there were sometimes significant delays. After 1 March, 1829 there was no legal requirement to publish rules of court or notice of transmitting them to London, and publication was not a condition of their validity, although there was a strong practical need to publish them so that the public would know what they required. (As rules could be disallowed in London, good administration required that they be transmitted to the Colonial Office.) Circumstances make it seem likely that some rules of court made after 1829 were not actually published in a newspaper.

Until 1832 the obvious newspaper in which to publish was the Sydney Gazette, which appeared several times a week and had been published since 1803. It was not published by the Government, but it functioned as an official publication and for many years bore the Royal Arms and the words “Published by Authority” on its front page. It was routine to publish proclamations and notices by Government officers in the Sydney Gazette. Governor Macquarie gave it a small subsidy.

A notice published in the Sydney Gazette after 1 March 1829 that a rule of court had been made reliably establishes that it truly was made. However it is possible that other rules of court were made. There were other newspapers and available ways of publishing information. At times rules were voluminous, and it would have been impractical to publish them in the newspapers of those times, which only had five or six pages. It is a fair surmise that if rules of court were not published in the Sydney Gazette or some other newspaper they were published by the Government in an official pamphlet, perhaps displaying the Royal Arms. Until 1832 Government notices were sometimes published in this way, and (so far as the author knows) were printed by the firm which published the Sydney Gazette. That firm had been established by George Howe and in 1824 when Forbes took office was carried on by his son Robert Howe; Robert Howe died in a boating accident on 29 January 1829 and the firm was carried on by Anne Howe his widow and executrix. It was a sheer necessity to make new rules known to the public and to the legal profession, and official pamphlets were the most likely means available.

The first rules of court were 8 rules dated 13 January, 1825 and published on the first page of the Sydney Gazette of Thursday, 13 January, 1825. They took less than two columns. They were replaced by Forbes’ rules of 22 June, 1825, published in the Sydney Gazette on 22 June 1825.

Forbes’ next rules of 9 September 1826 were not published in the Sydney Gazette, although the Sydney Gazette referred to their having been made. They were published in an official pamphlet bearing the Royal Arms and a facsimile of Forbes’ signature. The pamphlet opens with the rules of 22 June 1825 and at page 3 and following sets out the Rules of 9 September 1826. A copy is bound up in Forbes’ notebook (State Library of New South Wales call number PAM Q82/79, electronically accessible.) Some entries in

the notebook are signed by him, and some may have been written by him. There is no doubt that the notebook is authentic. It contains notes of orders and rules of court up to Saturday 4 September 1830. It can confidently be assumed that all rules of court made until then are in Forbes' notebook. The notebook agrees, with minimal variations, some renumbering and rearrangement, with the pamphlet and with notices and references to rules of court in the Sydney Gazette from time to time.

The Australian Almanack for 1828 at pages 25 to 46 published a compilation of the rules published in 1826 and others made until late in 1827. This also agrees with the notebook. The Almanacks were published yearly by the same printing house as the Sydney Gazette, it seems from about 1809 onwards, and contained much information about officials and official business, and much else. The 1828 Almanack is probably reliable on such information.

The Almanack for 1832 at pages 40 to 78 published "Rules and Orders of the Supreme Court of New South Wales October 1831". The only date shown was the heading "October 1831". A news item in the Sydney Herald of 7 November 1831 stated that the judges promulgated rules on 29 October 1831. The Almanack is the only published source which the author has seen, and it has been treated as authentic. Professor Castle's "Annotated Bibliography of printed materials on Australian law, 1788-1900" refers to Rules and Orders of the Supreme Court of New South Wales and Local Laws, published in Sydney in 1832, in which the Rules and Orders appear at pages 40 to 78, but the author has not located this publication.

By 1831 the Sydney Gazette was losing its grip on Government publishing. It did not publish the consolidation of October 1831, and made incidental references to it in items of news. Some Rules of minor importance dated 13 April 1832 were published in the Sydney Gazette on 26 April page 1, reassigning duties as there was no longer a Master. The Sydney Gazette's official status came to an end; it was still published for about 10 more years. The Colonial Secretary gave attention to producing the Government's own newspaper, and the New South Wales Government Gazette was first published on 7 March, 1832, and has been published continuously since then. The Government Gazette has routinely published significant

Government notices, with supplements for unusually long documents. The Government Gazette of 14 March 1832 page 11-12 published rules of court "Process of foreign attachment" and a new form of the Writ Venire Facias; these new rules were required by then recent changes in the law. The next reference to rules of court which can be found in the indices to the Government Gazette was published on 18 February 1835 at pages 95 and 96.

A further consolidation of the Rules of Court took effect on 2 June 1834. The changes made were extensive and some significant earlier rules were not continued. These rules were a comprehensive revision of the rules of 29 October 1831. New provisions were added and old provisions were omitted, some of them quite significant. There were renumbering and reordering. Addenda at pages 30 to 35 contain the portion of the rules of the courts of Westminster made in Hilary Term 1832 which formed part of the practice adopted under Rule 12. Some of the alterations made in drafting the 1834 rules may be explained as consequences of provisions in the Addenda. The reforms in the principles of pleading made by the rules of Hilary Term 1834 are not mentioned in the Addenda, and this suggests that the principles of pleading in New South Wales were not changed.

On 2 June 1834 the judges also made "Rules and Orders for the Regulation of the Sheriff's Office, in certain respects". These rules made provisions dealing with the Sheriff's duties, including some things which had earlier been dealt with by Rules of Court; and defined places and circumstances in which persons arrested were to be imprisoned. The Sheriff's Rules contain little of continuing interest. Sheriff's Rule 15 defined the Rules of the Prison in Sydney; another use of the word "Rules" meaning the boundaries of the area to which (Rule 16) prisoners on mesne process or after judgment were restricted: not only within prison walls, but also, if the prisoner had a keeper, within several nearby streets and a number of houses where they might lodge if they could afford it; two churches were included and licensed premises were excluded.

These rules were not published in the Government Gazette or in any other newspaper; no reference to them in the Government Gazette has been found. They were printed in a pamphlet headed "Rules and Orders First Term 1834." The print concludes "Printed at the Gazette Office, by Anne

Howe." This refers to the Sydney Gazette, not the Government Gazette. No copy has been located in Australia, although the print is mentioned in Professor Castles' Annotated Bibliography at page 295 entry 1990. A copy was obtained by search in the National Archives, London, of Despatches relating to transmittal of these Rules for confirmation or disallowance (CO 201/240 folio 54 and following). Rules and Orders for the Regulation of the Sheriff's Office were also transmitted. Each set of rules concluded with an endorsement "By the Court" signed by Forbes as Chief Justice. These Rules were made on 2 June 1834; they do not bear that date, but two newspapers reported the event – Sydney Monitor, Wednesday 4 June 1834 page 2 and Sydney Herald, Thursday 5 June 1834 page 2. Earlier there were occasional newspaper references over many months to new rules in preparation. The date First Term 1834 cannot be correct because the First Term ran from 15 February to 31 March 1834 and 2 June was the first day of the Second Term; this error suggests that the draft had been under consideration for some months.

Another version of these rules exists. The Australian Almanack 1834 at pages 17 to 49 published "Rules and Orders of the Supreme Court of New South Wales October 1831." The text is not the rules of October 1831, differs significantly from the Rules made on 2 June 1834, and was probably based on a draft circulated to the legal profession for comment. The editor of the 1834 Almanack stated in his Preface that he completed the editing task on 24 December 1833. Although many of the rules in the 1834 Almanack eventually appeared in the Rules of 2 June 1834, the purported Rules are spurious and the publication is unreliable and should be disregarded.

Notices of new rules of court and their provisions next appear in the Government Gazette on five occasions in 1835. No further rules were published until extensive rules made by Forbes' successor Dowling CJ and by Burton and Willis JJ appeared in the Supplement to the Government Gazette of 18 May 1838 at pages 385 to 395. The Court was clearly in new hands. These rules were full of detail and meticulous drafting, and dealt with important subjects on which earlier rules had said very little.

Rules of 28 April, 1838 dealt at length with articles of clerkship and examination of articulated clerks, with appointment of examiners and the

manner of conducting examinations, and with establishing that the clerk's training had been completed satisfactorily. Some of the requirements for entry into articles seem surprisingly exacting; a new articulated clerk must be 17 years of age and proficient in the Classics, able to translate any of the first six books of the Aeneid from Latin and the Gospel of St John from Greek, and competent in the first six books of Euclid. The articulated clerk was not to be paid salary or emolument other than board and lodging and was not to pursue any trade or business. The requirements for admission as an attorney included production of a certificate of regular attendance at Divine Service, but there was room for excuses for absence. Attorneys who had earlier been admitted in the United Kingdom were required to explain fully the circumstances in which they had left practice there.

Rules of 8 May 1838 dealt in detail with applications for probate and letters of administration, in greater detail than the Charter of Justice and going well beyond adopting the practice of the Consistory Court in London in general terms. These rules also prescribed in great detail what was required of the Registrar and Administrators when collecting the effects of intestates. Detailed rules of 10 May 1838 prescribed the practice in Equity, to which earlier rules had made little reference.

It seems likely that the meticulous detail and exhaustive prescriptions of the rules of 1838 were largely the work of Willis J, a Chancery lawyer of significant skill and experience, with a past personal and judicial of being a source of considerable trouble for anyone associated with him, a past which his future was to continue. His distinctions included a commended text on Interrogatories, an earlier removal by the Privy Council from a superior court in Upper Canada, and a Private Act of Parliament divorcing his aristocratic wife who had run off with an Army officer. However for Willis the worst was yet to be, again to be removed from judicial office by the Privy Council; no-one else achieved this twice.

The author has accepted these as the only further alterations to rules of court before all were replaced. The rules which took effect on 1 January 1840 were a complete redraft and restatement, changing much while continuing some significant matters: over all, a move closer to London and to the practices there as reformed in 1834, with a little greater flexibility. The colonial simplicity created by Forbes CJ not many years before began

to slip into a past where the economy had been simpler, there had been soldiers and convicts everywhere, the population had been smaller and judges and lawyers had been few.

Table of publications of rules of court from 1825 to 1839.

13 January, 1825. Sydney Gazette 13 January, 1825, page 1 rules 1 to 8. These rules dealt with:

1. Practice in the Courts at Westminster and Consistory Court in London, to be followed in the Supreme Court unless specifically provided for. Became 31/1, 34/13
2. Proceedings to be kept distinct. Became 31/2, 34/14
3. Same fees to be received as in England without Stamps. Altered: see 31/39, 34/80
4. Appointing the Terms. Revoked 25/9. Replaced by 25/3, 26/14, 31/16 (Three Terms), 34/10
5. Office to be open every day. Replaced by 31/4, 13/4/32, 34/4
6. Filing complaints &c. Revoked 9/9/26. See 26/10, 31/10, 34/17
7. Time allowed between issuing and returning process. Part revoked 26/4. See 31/9, 15, 34/21.
8. Setting down causes for trial. Part revoked 26/29: see 26/28, 29, in turn revoked on 31/7/28. See later 31/44, 34/33.

22 June, 1825. Sydney Gazette 23 June, 1825.

These rules were largely the same as those of 13 January, 1825, with a longer preamble and with these changes:

(The dates of the four Terms were altered.) Replaced by 26/14, 31/16 (Three Terms), 34/10.

(Provision for dating and returning process was altered.) See 26/13, 31/9, 15, 34/19, 21

24 December, 1825. Regula Generalis "Admission of attorneys &c." This rule was published with notification that it had been transmitted to London in the Sydney Gazette of 10 September 1828. This rule was made under clause 10 of the Charter of Justice, and clause 7 of the Order in Council did not make publication a condition for it to take effect. See 7/3/29, 31/7, 8, 34/7, 8.

9 September, 1826. Public notice dated 19 September, 1826 published in the Sydney Gazette on 23 September, 1826 page 1 notified that rules had been made on 9 September 1826 and would take effect on 1 October, 1826, and that prints would be available on 30 September, 1826. In the Sydney Gazette of 20 September, 1826 the Colonial Secretary notified that the Governor had transmitted the rules to London for confirmation. The print showed the rules of 23 June, 1825 as altered and further rules 9 to 60 made on 9 September 1826. These rules dealt with:

4. (Rule 4 was revoked by rule 9.)

5. (Part of rule 5 dealing with dates of process was revoked by rule 9.)

6. (Rule 6 was revoked by rule 9.)

7. (Part of rule 7 was revoked by rule 9.)

8. (Rule 8 was in part revoked by rule 9.)

9. Certain rules of June 22nd, 1823, revoked. Following Rules to take effect from Oct. 1, 1826.

Not in 1831 or later rules.

10. Actions at Law to be entered in Clerk's Book. See 31/10, 34/16.

11. Form of summons. See 31/11, 14, 34/17, 19

12. Form of Warrant of Arrest. See 31/12, 34/18, 20

13. Time of returning Writs. Proviso in certain cases. See 31/9, 15, 34/21.

14. Four Terms in each year. Replaced by 31/16 (Three Terms), 34/10

15. Form of bail. Revoked 11/11/26. See 31/20, 34/26.

16. Sheriff to return names and description of such Bail. Manner of excepting thereto. Revoked 11/11/26. See 31/20, 34/26.

17. Defendant may be rendered at any time after return of Writs. Not in 1831 or later rules. See 34/59

18. Form of appearing. Not in 1831 or later rules. See 34/23.

19. Manner of proceeding where some Defendants cannot be found. See 31/19, 34/24.
20. Time of filing Declarations. See 31/22, 34/28, 29
21. Account of particulars, instead of a Declaration, in certain cases. In other cases, a short declaration. See 31/23, 34/27.
22. Nonsuit or demurrer not allowed for mistake between actions of trespass and case. Became 31/34. Not continued in 1834.
23. Time of filing pleas. Proviso for allowing further time to plead. Became 31/24, 34/30
24. General issue and notice of special matter, instead of a special plea. Became 31/25, 34/31
25. Time of filing replications &c. Proviso allowing further time for replying &c. Became 31/26, 34/32
26. Where a general form of pleading sufficient, no more costs allowed. Became 31/58. See 34/81
27. Parties bound to take notice of days appointed for pleading. Became 31/27. Not continued in 1834.
28. Time and manner of entering causes for hearing or trial. Revoked 31/7/28. See 31/45, 34/33, 34
29. Clerk of Court to prepare a list of issues for trial, and fix the same in the Office of the Court. Revoked 31/7/28. See 34/33
30. Time and manner of moving to put off trial. Proviso. See 31/31, 34/35, 42
31. Motions to put off trial to be heard first day of Term. See 31/32, 34/35, 42
32. Manner of examining witnesses about to depart from the Colony. See 31/28, 34/68, 69
33. Witnesses not able to attend to be examined *de bene esse*. See 31/29, 34/69
34. Original pleadings instead of *Nisi Prius* record. Became 31/33, 34/36
35. Issues in law to be heard in first week of Term. Not continued in 1831. See 34/47

36. Issues in fact to be tried in second and third weeks of Term. Not continued in 1831. See 34/43, 44
37. Verdicts to be immediately noted down and settled. Became 31/36, 34/45
38. Time and manner of moving for a new Trial or in arrest of judgment. Altered 5/12/29. See 31/51, 34/46
39. Such motions to be heard in last week of term. Proviso for postponing such motions. See 5/12/29. Not continued in 1831. See 31/52
40. Judgment to be immediately entered in the Clerk's Book. Judgment roll to be filed, before execution. See 31/54, 34/51, 52
41. Costs may be taxed at any time after nonsuit &c. See 31/49, 34/48
42. Execution at any time after Judgment, unless in case of appeal. Became 31/50. See 34/55
43. Writs of execution not returnable within a month. Became 31/61. See 34/55.
44. Sum *bona fide* due to be endorsed. Became 31/63, 34/56.
45. In judgment for penalty, the Plaintiff before execution, to file an account. Became 31/64. See 34/52
46. Defendant may point out the lands he desires to be first sold. Became 31/65. See 34/57
47. *Scire-facias* manner of proceeding in and effect of. Became 31/66. See 34/63, 64, 65
48. No declaration necessary in *Scire-facias*. Became 31/67. See 34/63, 65
49. Proceedings on bail bond. Not continued in 1831. See 31/66.7, 34/63, 64, 65
50. Court to enquire into judgment by default in certain cases. Became 31/55, 34/53
51. (Judgment by default against infant or non-compos mentis.) Became 31/56, 34/54
52. No judgment to be entered on warrants of attorney, unless executed in presence of some attorney of court &c. Became 31/57. See 31/57, 34/71, 72

53. Party to any cause dying, representatives of such party may be made parties to such cause. Became 31/68, 34/77
54. *Feme-sole* intermarrying pending a cause, husband may be made party. Became 31/69, 34/78
55. Suits not to abate on account of the absence of the judge. Became 31/70. Not continued in 1834.
56. Motions and rules of course disallowed. Became 31/71, 34/15.
57. Court under particular circumstances to make particular rules. Became 31/75. Not continued in 1834.
58. Fees and costs of certain proceedings. Became 31/72. See 34/80
59. Time of holding Criminal Sessions. Became 31/73, 34/11
60. Certiorari. Became 31/74. Not continued in 1834.
- 11 November 1826.** Sydney Gazette 10 September 1828. In Forbes' notebook this rule is dated 14 September 1826. This rule was not transmitted to London until 10 September 1828 and its date is there given as 14 September 1826. This rule revoked the rules which dealt with bail to the Sheriff and adopted the practice in England. The rules revoked were presumably rules 15 and 16.
- 2 May 1827.** Sydney Gazette 10 September 1828 page 4. Debtors' Rooms.
- 31 July 1827.** Sydney Gazette 3 August 1827 page 1. Western Wing of Court House.
- 7 December 1827.** Writs of Execution. Became 31/62. See 34/55, 56, 57, 58
- 8 December 1827.** Attendance of Master and Registrar in Court. Became 31/76. (Master abolished) See 34/5, 6
- 16 February 1828.** Criminal Informations. Became 31/80. See 34/79
- 1 March 1828.** Insolvents. Not continued in 1831.
- 13 May 1828.** Signing of Writs. Became 31/13, 34/19.
- 5 June 1828.** Summoning Assessors by Sheriff. Became 31/30, 34/37

31 July 1828. These five rules dealt with:-

Revocation of rules 28 and 29.

Notice of Trial in defended Cases. Became 31/44, 34/34

Entering Causes for Trial in the Supreme Court Office. Became 31/45, 34/33

Notice of Trial in undefended Cases. Revoked 19/12/28. See 34/34, 43

Sheriff's Attendance in the Court. Became 31/77, 34/6.

10 September 1828. Sydney Gazette page 1. Notification by Colonial Secretary of transmission to London of the Regula Generalis of 24 December 1825 "Admission of Attornies" and the terms of the rules made from 11 November 1826 (referred to as 14 September 1826) to 31 July 1828, with Forbes' certificate dated 5 August 1828. The need to transmit and publish notice had been overlooked and this postponed the latter rules' taking effect.

19 December 1828. Sydney Gazette 3 February 1829 page 1, notification of transmission to London. These three rules dealt with:-

(Revoke rule of 31 July 1828 Notice of Trial in undefended Cases.)

(Notice endorsed on Summons – effect of failure to appear.) Became part of 31/14. See Form in 34/7

(Where Summons cannot be served personally.) Became part of 31/14: 34/22.

7 March 1829. Bills of Exchange and Promissory Notes. Became 31/35. Not continued in 1834

7 March 1829. Admission of Attornies. Became 31/7. See 34/8

30 September 1829. Division of the Profession. This rule provided in its own terms that it was not to take effect until confirmed by the King, and allowance was announced on 1 November 1834. Became 31/8, 34/7.

30 September 1829. Division of Business. (Separate offices: Registrar's Office, Master's Office, Chief Clerk's Office.) Became 31/6. See 34/2: (Master abolished)

- 5 December 1829.** Jury cases. Became 31/46, 34/44
- 5 December 1829.** Entry of Jury cases for trial. Became 31/48. See 3/38, 39
- 5 December 1829.** (Form of Venire Facias.) Became part of 31/48, 34/40, amended to show Wm 4.
- 5 December 1829.** Prisoners of the Crown detained in Sydney as witnesses. Became 31/78. See 34/70
- 5 December 1829.** Term Book entry of cases. Became 31/53. Not continued in 1834; see 34/47.
- 5 December 1829.** Special cases. Became 31/50. See 34/47
- 5 December 1829.** Judgment of *non pros*. Became 31/40. Not continued in 1834.
- 5 December 1829.** Judgment by default. (Assessment of damages) Became 31/41. See 34/43
- 5 December 1829.** Trial of issues. Became 31/42. See 34/33, 44
- 5 December 1829.** Hearing arguments. Became 31/52. See 34/47
- 5 December 1829.** Motions for new trial and in arrest of judgment. Became 31/51. See 34/46
- 5 December 1829.** Bringing money into Court. Became 31/17. See 34/25
- 5 December 1829.** Rendering Defendant already in custody. Became 31/21. See 34/59
- Third Term, 11th Geo IV (i.e. June 1830).** (Allowance for attendance of Special Jurors.) Became 31/49. Not continued in 1834.
- 4 September 1830.** Order of hearing defended causes. Not continued in 1831. See 34/33
- 9 April 1831.** Sydney Gazette page 1 published notice dated 6 April 1831 by Colonial Secretary of transmission to London for confirmation, supported by certificate of Chief Justice dated 17 February 1831, of rules from 7 March 1829 to 4 September 1830; republished on 12 April and in the Sydney Herald on 18 April. The Colonial Secretary referred to transmission for confirmation and allowance under the Order in Council (which was no longer in effect). These rules took effect when made, except

for the order Division of the Profession, which was to take effect only on allowance by the King, and had not been transmitted for confirmation for over 18 months.

29 October 1831. These Rules were announced by the Judges on 29 October 1831: Sydney Herald 7 November 2031. They were published in the 1832 Almanack pages 40 to 78 and bear the date October 1831. They compiled and consolidated the earlier rules. The Preamble was amended. Most earlier rules appeared again, often with drafting changes, many were amended significantly, some were not continued, there were new provisions; the order was changed and they were renumbered. These rules dealt with:-

1. Practice in the Courts at Westminster and Consistory Court in London, to be followed in the Supreme Court unless specifically provided for. Was 25/1, became 34/13
2. Proceedings to be kept distinct. Was 25/2, became 34/14
3. Same fees to be received as in England without stamps. See too 31/39. Replaced by 34/80
4. Office to be open every day. See 25/5. Replaced by 34/4.
5. New Court House. Replaced by 34/1.
6. Division of Offices and Business. See 30/9/29. Replaced by 34/2 (Master abolished)
7. Admission of Attornies. Replaced by 34/7, 8
8. Division of the Profession. See 30/9/29. Replaced by 34/7.
9. Time allowed between issuing and returning Process. See 25/7, 22/6/25-4, 26/13. Not continued in 1833. See 31/15, 34/21.
10. Actions at Law to be entered in Clerk's Book. See 26/10. Became 34/16.
11. Form of Summons. Was 25/11, modified to refer to Wm 4. See 31/14. Replaced by 34/17, 19
12. Form of Warrant of Arrest. Was 25/12, modified for Wm 4. Became 34/18, 20
13. Signing of Writ. Became 34/19.

14. Service of Summons. Not continued in 1834. See 34/22
15. Time of returning Writs. See 25/7, 22/6/25 – 4, 26/13, 31/9. Replaced by 34/21.
16. Alteration of the number of Terms. Rule 14 revoked. See 25/4, 26/14. Replaced by 34/10
17. Bringing Money into Court. Became 34/25.
18. Proceedings for default of appearance. Not continued in 1834. See 34/24
19. Manner of proceeding where some of defendants cannot be found. See 26/19. Replaced by 34/24.
20. Bail to the Sheriff: Replaced by 34/26.
21. Rendering Defendant already in custody. Became 34/59.
22. Time of filing Declarations. Replaced by 34/28, 29
23. Account of particulars, instead of Declaration, in certain cases. See 26/21. Became 34/27.
24. Time of filing pleas. Proviso for allowing further time to plead. See 26/25. Became 34/30
25. General issue and notice of special matter, instead of a special plea. See 26/24. Became 34/31
26. Time of filing replications, &c. Proviso allowing further time for replying, &c. See 26/25. Became 34/32
27. Parties bound to take notice of days appointed for pleading. See 26/27. See 34/68, 69
28. Manner of examining witnesses about to depart from the Colony. See 26/32. See 34/68, 69
29. Witnesses not able to attend, to be examined *de bene esse*. See 26/33. See 34/69
30. Summoning Assessors by the Sheriff. Became 34/37
31. Time and manner of moving to put off trial. Replaced by 34/42

32. Motions to put off trial to be heard first day of term. Not continued in 1833.
See 34/42
33. Original pleadings instead of *Nisi Prius* record. See 26/34. Became 34/36
34. Nonsuit or demurrer not allowed for mistake between actions of trespass and case. See 26/22. Not continued in 1834.
35. Bills of Exchange and Promissory Notes. Not continued in 1834.
36. Verdicts to be immediately noted down and settled. See 26/37. Became 34/45
37. At any time after verdict & before judgment, Defendant may settle the Plaintiff's demand, and save further expense. Not continued in 1834.
38. Service of Notice before taxing Costs. Became 34/50
39. Table of fees. Became 34/80
40. Judgment of *non pros*. Not continued in 1834.
41. Judgment by default. Not continued in 1834.
42. Trial of Issues. Replaced by 34/44, 45
43. Trial of Issues joined before Term. Not continued in 1834.
44. Notice of Trial. Replaced by 34/34
45. Entering causes for Trial in the Supreme Court Office. Became 34/33
46. How motion for trial by jury to be made. Became 34/46. Varied by rule of Third Term 1835.
47. Time application to be made. Replaced by 34/46
48. Entry of jury cases for trial. Replaced by 34/38, 39
(Form of Venire Facias.) Became 34/40
49. Special juror's allowance. Not continued in 1834.
50. Special cases. Became 34/47
51. Motions in arrest of judgment and new trials. Replaced by 34/46

52. Hearing arguments. Not continued in 1834. See 34/46, 47
53. Term book, entry of cases. Not continued in 1834.
54. Judgment to be immediately entered in the Clerk's Book. Judgment roll to be filed before execution. Replaced by 34/51
55. Court to enquire into judgment by default in certain cases. Became 34/53
56. (Judgment by default against infant or *non compos mentis*.) Became 34/54
57. No judgment to be entered on Warrants of Attorney, unless executed in presence of some Attorney of Court, &c. See 31/81. 31/57 replaced by 34/71, 72
58. Where general form of pleading sufficient, no more costs allowed. Became 34/81
59. Costs may be taxed at any time after nonsuit. Replaced by 34/61
60. Execution at any time after Judgment, unless in case of Appeal. See 26/42. Replaced by 34/55
61. Writs of execution not returnable within a month. Replaced by 34/55.
62. Writs of Execution. Became 34/58.
63. Sum *bona fide* due to be indorsed. Became 34/56.
64. In judgment for penalty, the plaintiff before execution to file an account. See 26/45. Replaced by 34/56
65. Defendant may point out the lands he desires to be first sold. See 26/46. Became 34/57.
66. *Scire facias* manner of proceeding and effect of. See 27/47. Replaced by 34/63
67. No declaration necessary *scire facias*. See 26/48. See 34/63
68. Party to any cause dying, representatives of such party may be made parties to such cause. See 26/53. Became 34/77
69. *Feme-sole* intermarrying pending a cause, husband may be made party. See 26/54. Became 34/78

70. Suits not to abate on account of the absence of the Judge. Not continued in 1834.

71. Motions and rules of course disallowed. See 26/56. Became 34/15.

72. Fees and costs of certain proceedings. Replaced by 34/80

73. Time of holding Criminal Sessions. Became 34/11

74. Certiorari. Not continued in 1834.

75. Court under particular circumstances to make particular rules. See 26/57. Not continued in 1834.

76. Attendance of Master and Registrar. See 8/12/27. Replaced by 34/5 (Master abolished)

77. Sheriff's attendance in Court. See 8/12/27. Became 34/6.

78. Prisoners of the Crown detained in Sydney as witnesses. Replaced by 34/70

79. Debtor's room. Replaced by Sheriff's Rule 34/15

80. Criminal informations. Replaced by 34/79

81. Recording Warrants of attorney. Became 34/71.72

82. Proceedings to be written in a legible hand on foolscap paper. See 34/14

83. Proceedings against Attorneys. See 34/67

Unnumbered (84). Costs in Equity. Not continued in 1834. See 34/80

Unnumbered (85). Examining witnesses in Equity. Not continued in 1834.

14 March 1832. Government Gazette March 1832 page 11-12.

Process of Foreign Attachment. Became 34/73, 74, 75, 76

Form of General Venire Facias. Became 34/40

13 April 1832. Sydney Gazette 13 April 1832 page 1.

(Registrar to attend Criminal Sittings)

(Chief Clerk to perform duties of Master)

(Court offices to be open from 10 am to 4 pm)

13 April 1832. Sydney Gazette 26 April 1832 page 1.

(Registrar to attend Criminal Sittings)

(Chief Clerk to perform duties of master.)

(Court Offices to be open from 10.00 am to 4.00 pm)

2 June 1834. Rules and Orders First Term 1834.

1. SUPREME COURT. To be holden at the Court-house, King-street, Sydney.

Replaces 31/5

2. OFFICES OF THE COURT. Two separate Offices of the Court. Registrar's Office. Chief Clerk's Office. Replaces 31/6.

3. Records in each Office. Replaces 31/2 in part.

4. Offices hours from 10 to 4 in Term, and 10 to 3 in vacation. Replaces 31/4, 13/4/32

5. Registrar to act as Clerk of Arraigns. New.

6. Sheriff to attend during the sitting of the court. Was 31/77.

7. ATTORNIES OF THE COURT. Profession to be divided as in England.

Practitioners already admitted to make their election. Barristers. Attornies.

Was 31/8. Allowance notified 1/11/34. Admission of Attornies replaced by 28/4/38.

8. Attornies applying for admission, to give notice. Was 31/7. Replaced by 28/4/38.

9. Notice to be written on Attorney's Bills delivered.

10. ROUTINE OF BUSINESS OF THE COURT. Three Terms of the Court.

Proviso. Was 31/16.

11. Times of holding Criminal Sessions. Was 31/73.

12. Motion days. New.

13. PROCEEDINGS OF THE COURT. Practice of His Majesty's superior

Courts at Westminster to be followed except as hereby altered. Was 25/1, 31/1.

14. Proceedings in the several jurisdictions to be kept distinct. Was 25/2, 31/2.

To be written on foolscap paper. Was 31/82.

15. Motions, &c. of course disallowed. Was 31/71.

16. COMMENCEMENT OF ACTION. Actions to be entered in the Clerk's Book. Was 31/10.

17. Form of summons. Was 31/11. See 31/14.

18. Form of Warrant of Arrest. Was 31/12.

19. Process to be tested, signed, and sealed. Was 31/13.

20. Debt and costs to be indorsed. New. See 31/14.

21. Return days of ordinary proceedings. Proviso in actions upon bail bonds. Replaces 31/15.

22. If defendant cannot be personally served with process, it may be left at residence. Replaces part of 31/14. See 31/19.

23. APPEARANCE. To be entered in Clerk's book. New. See 31/10.

24. Where some of the defendants cannot be found suggestion may be entered. New. See 31/19.

25. Defendant upon notice may pay money into Court at any time. Was 31/17.

26. BAIL. To be put in within 8 days after the return of writ. Exception within 12 days. Justification within 16 days. Notice of more than two not regular. If affidavit of justification accompany bail-piece, and bail allowed after exception, plaintiff shall pay the costs of justification. If bail are rejected, defendant shall pay the costs. [*Vide* addenda p.32] New. See 31/20.

27. DECLARATION. Particulars of demand may be filed instead of declaration. In other cases a short declaration. Was 31/23.

28. Declaration to be filed on the return day. If not filed, defendant may sign judgment of *non pros*. If defendant in custody, at return, notice to be served on gaoler. Form of. Was 31/22.

29. Declaration in ejectment to be served before first day of term. New.

30. PLEA. Plea to be filed within ten days after return day. Defendant shall abide thereby without rule. If defendant fails, plaintiff may set his cause down for assessment. Judge may allow further time to plead. After declaration amended, plea to be filed within four days. Was 31/24.
31. Defendant may plead the general issue, and give notice of special matter. Was 31/25.
32. REPLICATION. Replication to be filed within fourteen days after return day. Rejoinder within sixteen days. If further pleading necessary, to be delivered *ore tenus*. Either party failing, judgment may be signed. Judge may allow further time for pleading. Was 31/26.
33. SETTING DOWN CAUSES FOR TRIAL. After issue, plaintiff shall set down cause for trial 8 days before day of trial. Twelve causes to be entered for each day. Replaces 31/45. Proviso revoked Third Term 1835.
34. NOTICE OF TRIAL. Plaintiff to give eight days notice of trial. Plaintiff failing defendant may apply for judgment as in case of a nonsuit. Was 31/44.
35. COUNTERMAND OF NOTICE OF TRIAL. Plaintiff shall give four days notice of countermand or continuance. New.
36. RECORD. Original pleadings instead of record. Was 31/34.
37. SUMMONING ASSESSORS. Sheriff to summon three or more Magistrates as Assessors. Form of Was 31/30.
38. MOTION FOR A JURY. Motion to be made on affidavit. Was 31/46. See February 1835
39. Application to be made on the first day of term. Notice to be given to the adverse party. Special Jury to be applied for on the same day. Was 31/47.
40. Form of *venire facias* for trial of civil issues. Replaces part of 31/48 and adds missing passage.
41. Form of *Venire facias* for trial of criminal issues. New. See 31/48.
42. MOTION TO POSTPONE TRIAL. Motion to postpone trial to be made 4 days before the day appointed for trial. Notice to be filed. Affidavit of materiality of witness to be filed. Provided that if circumstances not known, application may be made afterwards. New. See 31/31 and 32.

43. TRIAL OF UNDEFENDED CASES. Undefended cases to be tried on the third day of term. Was 31/42.
44. TRIAL OF ISSUES. When issues to be tried before Assessors. Before a Jury. Common Jury to be tried first. New.
45. Verdicts to be immediately noted down. Was 31/36
46. MOTION FOR NEW TRIAL. Motion for new trial to be made within 4 days after trial. Notice and affidavits to be filed. Notice to be given to the Judge. Party neglecting, final judgment may be signed. Was 31/45.
47. Special cases to be entered for the first motion day in Term after that in which case was tried. Copy to be delivered to Judge. Was 31/50.
48. TAXING COSTS. Defendant may tax costs at any time after judgment in certain cases. Replaces 31/59.
49. Defendant to save expence may settle plaintiff's debt and demand bill of costs. If defendant shall settle costs within 48 hours after taxation, he shall not be charged further costs. New.
50. Party taxing costs shall first serve notice on adverse party. Was 31/49.
51. ENTERING FINAL JUDGMENT. Party obtaining final judgment shall file judgment roll. Replaces 31/54.
52. Party obtaining judgment in debt shall file affidavit of what is due. Replaces 31/64.
53. Judgment by default against absent parties may be enquired into. Was 31/55.
54. Judgment by default against an infant or person being *non compos* may be enquired into. Was 31/56.
55. SUING OUT EXECUTION. Execution may be sued out at any time after final judgment. Replaces 31/60.
56. Sum *bona fide* due to be endorsed. Was 31/63.
57. Defendant may direct what land he will first have sold. Was 31/65.
58. May be returned into the office at any time. Was 31/62.

59. RENDER. Of a defendant already in custody. Was 31/21.
60. Of a defendant not in custody.
61. DISCONTINUANCE. Plaintiff may discontinue at any stage of the cause, without rule. New.
62. SUPERSEDEAS. Plaintiff shall proceed to final judgment within one month after term, in which trial had. New.
63. PROCEEDINGS ON *SCIRE FACIAS*. *Scire facias* shall be made returnable on the day for the return of process. If defendant cannot be found, notice to be inserted in the *Government Gazette*. Replaces 31/66
64. No declaration necessary.
65. Motion necessary, if more than ten years old.
66. RETURNING WRITS AND BRINGING IN THE BODY. Sheriff to return writ after notice. New.
67. PROCEEDINGS AGAINST ATTORNIES. Bill to be filed on the same day that all declarations are filed. Notice to be served on the defendant. Form of New
68. EXAMINING WITNESSES. In certain cases witnesses may be examined under a commission. See 31/28
69. In certain cases may be examined de bene esse. By Judge's summons. Notice thereof shall be served on adverse party. Examinations to be sealed up and endorsed. If opposite party neglect to attend, may proceed *ex parte*. See 31/28
70. Mode of examining prisoners of the crown as witnesses. New. Replaces 31/28
71. WARRANTS OF ATTORNEY. To be executed in the presence of an Attorney or Justice of the Peace. Replaces 31/81
72. Shall be recorded in the Supreme Court. Fees thereon. Replaces 31/57.
73. PROCEEDINGS BY FOREIGN ATTACHMENT. Writ to be issued in same manner as other process. Form of. Continues rule of 14/3/32.

74. Mode of service.

75. When returnable.

76. Precept of appraisement. Form of

77. ADDING PARTIES TO SUIT. Party dying after commencement of suit and before final judgment, heir to be made party. Suggestion of the death of party may be entered. Was 31/68.

78. *Feme-sole*, marrying after commencement of suit, husband to be made party. Suggestion to be entered. Was 31/69.

79. CRIMINAL INFORMATIONS. Not *ex officio* to be distinguished by endorsement. Replaces 31/80.

80. COSTS. Table thereof established. Replaces 31/39

81. Where general form of pleading necessary, no more costs allowed. Was 31/58

82. Costs of a witness called to prove only a public document not allowed, unless adverse party refuse to admit it. New.

83. Costs of a witness called to prove only handwriting of any instrument stated on the pleadings not allowed. New

84. Costs of first trial not allowed to successful party without mention thereof in Rule for new trial. New

85. Application for security for costs to be made before issue. New

ADDENDA

AFFIDAVIT.

Of service of process.

If sworn before a Judge.

Deponent's addition.

Not to be sworn before Agent or Attorney, or clerk, except affidavit of debt.

To hold to bail for work and labor, &c.

Supplemented not allowed.

Of justification.

ARREST.

Not allowed after non-suit, &c., without Judge's order.

ATTORNEYS.

Order to deliver bill to be made at the return of one summons.

One appointment only to tax.

Lien for costs.

BAIL.

Practising attorney or clerk not allowed, except for render.

Exception to, after assignment taken.

Each of the bail to make an affidavit to accompany notice.

Form of affidavit.

May render though rejected

Liability of.

May render on the last day.

BAIL BOND.

Shall not be proceeded on pending a rule to bring in body.

Signing judgment on.

Several actions stayed on paying costs in one.

COMPOUNDING PENAL ACTIONS.

Where part of the penalty goes to the crown.

COSTS.

What costs are allowed on taxation.

To be paid by pauper though not dispaupered.

DEMURRER.

Making up demurrer books when part only of declaration, &c. is demurred to.

DISCONTINUANCE.

Plaintiff may without defendant's consent.

JUDGMENT AS IN CASE OF NONSUIT.

Not allowed after motion for costs for not proceeding to trial.

NOTICE OF TRIAL.

Short notice of

PARTICULARS OF DEMAND.

May be obtained before appearance.

PAYMENT OF MONEY INTO COURT.

Upon actions which are consolidated costs to be allowed up to that time.

PLEADING.

Which concludes to the country not to be signed by counsel.

May be withdrawn by defendant in person on confession.

SETTING ASIDE PROCEEDINGS.

Where defendant is described by initials or wrong name, &c.

Application must be made within a reasonable time.

SERVICE OF RULES, NOTICES, AND ORDERS.

Before 9 at night

Original rules need not be shown except in cases of attachment.

WARRANTS OF ATTORNEY. How judgment to be entered up.

SHERIFF'S OFFICE RULES. RULES AND ORDERS FOR THE *Regulation of the Sheriff's Office*, IN CERTAIN RESPECTS.

1. Sheriff to appoint deputies in certain places.
2. Appointment of deputies to be notified in *Government Gazette*, &c. C
3. Limits beyond which Sheriff not compelled to execute process. Proviso for the nomination of deputies beyond these limits Transmission of process to special deputies.
4. Expenses of executing process at a distance from Sydney.
5. Copy of process to be delivered to party arrested.
6. Sheriff only to suspend execution of process upon absolute order, signed by plaintiff or attorney.
7. Sheriff to cause personal property to be first sold.
8. Defendant may point out what property he will have first sold.
9. Sheriff may allow the Defendant, after levy, to make sale. and may apply to enlarge return.
10. Property to be sold as early as possible after levy. Provided it be without sacrifice of the value.
11. Sheriff to inform himself as to the best place for sale; and to sell accordingly.
12. Sales to be notified in *Government Gazette*, if in Sydney, or within 20 miles.
13. Either party may desire sale by auction.
14. Party taken in execution to be lodged in the nearest prison to where arrested, unless he shall desire otherwise.
15. Limits of the rules of the prison in Sydney.
16. Who shall be entitled to rules.

February 1835. These rules were published in the *Government Gazette* page 96 and 97 on 18 February 1835 but are headed "Third Term 1835:"

that term ran from 15 September to 31 October 1835. The rules were probably made in First Term 1835, from 15 February to 31 March, which was the third term in the regnal Year 5 Wm 4.

(Fines and Forfeited Recognizances.)

(Hearing Motions in Banco.)

(Grant of Trial by Jury when required.)

(Entering Defended Causes for trial. Proviso to rule 33 revoked.)

21 April 1835. Government Gazette 27 April 1835 pages 253 and 254.

Particulars of Demand. (where the Declaration did not give particulars.)

Particulars of Set-Off.

Entry of Jury Causes for Trials.

In Equity. (verifying Pleas and Answers.)

27 June 1835. Government Gazette 1 July 1835 page 461

(Attorney to file Warrant to prosecute before issuing process.)

31 October 1835. Government Gazette No 192 4 November 1835 page 784.

(Debtors' prison at Carter's Barracks: rule relating to Prison in George-street revoked.

28 April 1838. Government Gazette No 334 8 and 10 May 1838 pages 385 to 388.

Articled Clerks. - Admission of Attornies.

Appointment of Examiners. (persons applying to be admitted as Attornies.)

8 May 1838. Government Gazette No 334 18 May 1838 pages 388 to 392.

Ecclesiastical Jurisdiction. Granting of Probates and Letters of Administration.

Collection of effects of deceased persons.

Equity procedure.

APPENDIX Publications and Sources

This Appendix shows sources for legislation of the Parliament of the United Kingdom and statutory instruments, Acts of Council of New South Wales and Rules of Court. Most of the sources referred to are accessible on the Internet. Some are not readily accessible, or are poorly legible, and transcripts of some are attached to this Appendix.

Acts of the Parliament of United Kingdom. New South Wales (Debts) Act 1813, 54 George III c 15, as first enacted was printed in full in the Sydney Gazette of 17 September 1814 page 1: document 1. The New South Wales Act 1823 and the Australian Courts Act 1828 were temporary Acts and are not usually printed in full in compilations of United Kingdom statutes. These Acts are set out in full, edited to show section numbers, in Dr J.M. Bennett's "History of the Supreme Court of New South Wales" Law Book Co Ltd Sydney 1974 Appendix A page 201 and Appendix B page 218: this is the best source. As first enacted each comprised one long sentence, and copies found on the Internet are sometimes unsatisfactory as they have not been edited to show conventional sections and section numbers.

The Charter of Justice of 13 October 1823 is published in Historical Records of Australia Series 4 Section A volume 1 pages 509 to 520.

The Order in Council of 19 October 1824 is published in 11 Historical Records of Australia series 1 page 426.

Acts of Council of New South Wales are accessible on AUSTLII. However, as discussed in the principal paper at page 26, AUSTLII does not use the original enumeration or the conventional short titles. Cross-references are shown in the table at page 31 of the paper.

The documents in this Appendix include copies of all Rules of Court in effect until 1 January 1840, when comprehensive new Rules took effect.

Practices in publishing Rules of Court are discussed in the principal paper at page 38.

Until 1832 Rules were notified or published in the Sydney Gazette and New South Wales Advertiser, sometimes after delays. Notices published

included some of short-term significance, such as sitting times and places, and some notices were republished several times. The Sydney Gazette is electronically accessible on Trove, an internet resource of the National Library of Australia.

The New South Wales Government Gazette was first published on 7 March 1832. Rules of Court were published in the Government Gazette on 14 March 1832 and in the Sydney Gazette on 2 April; and from then on they were usually (and not always) published or notified in the Government Gazette. The Government Gazette is not electronically accessible without subscription before 1836: from then until 1851 it is accessible at State Library of Victoria\Victoria Government Gazette.

There are other sources for some Rules of Court. Forbes made an oral announcement to the Bar on 14 December 1824 about practice, and this was reported in The Australian (newspaper) on 16 December 1824 – document 2. Forbes' first Rules of Court were published in the Sydney Gazette on 13 January 1825 – document 4. These were incorporated, with some changes, in Rules made on 22 June 1825 and published in the Sydney Gazette on 23 June 1825. These in turn were incorporated with some changes in Rules made on 9 September 1826. A printed pamphlet published on 30 September 1826 contained all Rules then in effect. The pamphlet is extremely rare; a copy was bound up in Forbes' notebook and a transcript is document 5.

A Regula Generalis of 24 December 1825 dealt with Admission of Attornies: this did not appear in the 1826 pamphlet and was not published in the Sydney Gazette until 10 September 1828 – document 7.

The Australian Almanack 1828 at pages 25 to 46 published a compilation of the Rules made until late in 1827 and is probably reliable, as discussed in the principal paper at page 39.

The Sydney Gazette of 10 September 1828 published notification of transmission and the terms of the Regula Generalis of 24 December 1825 and of several Rules made from 11 November 1826 to 31 July 1828: - document 7.

Rules of Court made from 22 June 1825 to 4 September 1830 are set out in Forbes' notebook, discussed in the principal paper at page 39. The notebook is accessible electronically at the State Library of New South Wales Call Number PAM Q82/79. A transcript of the handwritten passages is document 11.

The Rules made from 7 March 1829 to 4 September 1830 were published in the Sydney Gazette of Saturday 9 April 1831 at page 1 - document 9.

Publication of the Rules made on 29 October 1831 is discussed in the principal paper at page 40. The printed pamphlet is rare and has not been located. These Rules were reprinted in the Australian Almanack 1832 accessible at the National Library of Australia Call Number FRM F1506, and this has been treated as reliable. A copy of this reprint is document 12.

Rules of Court made in March 1832 were published in the New South Wales Government Gazette of 14 March 1832 pages 11-12. This is not electronically accessible and a copy is document 12.

Rules of Court made on 13 April 1832 were published in the Sydney Gazette on 26 April 1832 page 1 - document 13.

Rules of Court and Sheriff Rules of 2 June 1834 were published in an official pamphlet: see principal paper pages 40 and 41. This pamphlet is extremely rare and a copy obtained by search in the National Archives at Kew – Call Number CO 201/240 - is document 14.

The version of the Rules and Orders of the Supreme Court published in the Australian Almanack 1834 is spurious and should be disregarded.

Rule of Court made in 1835 and 1838 were published in the Government Gazette – documents 15 to 19. Those published in 1835 are not accessible by internet search. Those published in 1838 are accessible by internet search of the New South Wales Government Gazette.

INDEX. The documents in this Appendix are:-

- 1.New South Wales Debts Act 1813 (Imp.) SG 17 September 1814 page 74
- 2.Practice Announcement 14 December 1824
Australian 16 December 1824 page 80
- 3.Rules 13 January 1825 SG 13 January 1825 p. 1 page 81
- 4.Rules 22 June 1825 SG 23 June 1825 p.1 page 86
(Regula Generalis 24 December 1825
printed SG 10 September 1828 p.1)
- 5.Rules 22 June 1825 and 9 September 1826 transcript page 91
(Rule 11 November (or 14 September) 1825
printed SG 10 September 1828)
- 6.Rules 31 July 1827 SG 27 August 1826 p.1 page 111
- 7.Rules 24 December 1825 and 14 September 1826
to 31 July 1828SG 10 September 1828 p.1 page 112
- 8.Rules 19 December 1828 SG 3 February 1829 p. 1 page 119
- 9.Rules 7 March 1829 to 4 September 1830 SG 9 April 1831 p.1 page 121
- 10.Forbes' Notebook with Rules to 4 September 1830 transcript page 132
- 11.Rules 29 October 1831 reprinted in 1832 Almanack page 164
- 12.Rules March 1832 GG 14 March 1832 p.11-12 page 204
- 13.Rules 13 April 1832 SG 13 April 1832 p.1 page 207
- 14.Rules First Term 1834 (2 June 1834) pamphlet page 208
- 15.Rules Third Term 1835 GG February 1835 pp. 96-97 page 254
- 16.Rules 21 April 1835 GG 29 April 1835 pp.253-254 page 256
- 17.Rules 29 June 1835 GG 1 July 1835 p.461 page 257
- 18.Rules 31 October 1835 GG 4 November 1835 p, 784 page 258
- 19.Rules 28 April and 8 and 10 May 1838
GG 18 May 1838 pp.385 to 395 page 259

These documents are too large for the site. Anyone interested in copies of them should contact: acunneen@bigpond.net.au