

*The Small Debts Ordinance, 1863, Amendment Act, 1894*

WESTERN AUSTRALIA

ANNO QUINQUAGESIMO OCTAVO

VICTORIÆ REGINÆ

No. 13

An Act to amend and extend the Law relating to the Recovery of Small Debts and Demands.

[Assented to 1st November, 1894.]

**W**HEREAS it is expedient to amend and extend the law, and to alter and regulate the manner of proceeding in the Courts for the Recovery of Small Debts and Demands: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Preamble

1. This Act may be cited as 'The Small Debts Ordinance, 1863, Amendment Act, 1894,' and shall be read and construed as one Act with 'The Small Debts Ordinance, 1863,' as if the several provisions in the said Ordinance contained, not inconsistent with the provisions of this Act, were repealed and re-enacted in this Act.

Short title  
27 Vic., 21

2. The several enactments specified in the Schedule to this Act are hereby repealed, to the extent mentioned in the third column of the said Schedule; but this repeal shall not affect the course of any proceeding taken before such repeal.

Enactments in  
schedule  
repealed

3. For every Local Court there shall be made a seal of the Court, and all summonses and other process issuing out of the said Court shall be sealed or stamped with the seal of the Court, and any person who shall forge the seal or any process of the Court, or who shall serve or enforce any such forged process knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said Court knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said Court, shall be guilty of a felony.

Seal of Court  
Imp. Act 9 and  
10 Vic., c. 95,  
s. 57

4. A plaint may be entered in the Local Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of the bringing of the action, or it may be entered by leave of the Magistrate in the Local Court within the district of which the defendant or one of the defendants dwell or carried on business, at any time within six calendar months next before the time of action brought, or with the like leave in the Local Court within the district of which the cause of action wholly or in part arose.

Where summons  
may issue  
Imp. Act 30 and  
31 Vic., c. 142,  
s. 1

5. With respect to all Common Law actions which may be brought in the Supreme Court, if both parties shall agree by a memorandum signed by them or their respective solicitors that any Local Court

Jurisdiction by  
consent

Imp. Act 19 and  
20 Vic., c. 108  
s. 23

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named in such memorandum shall have power to try such action, such Local Court shall have jurisdiction to try the same.

Magistrates may exercise jurisdiction like Judge of Supreme Court in Chambers

6. A Magistrate of a Local Court shall have jurisdiction to make any order or exercise on an *ex parte* application any authority or jurisdiction in any action or proceeding pending in any Court of which he is Magistrate which, if the same related to an action or proceeding pending in the Supreme Court might be given, made, or exercised by a Judge of the Supreme Court in Chambers.

Where no jurisdiction costs may be awarded  
Imp. Act 30 and 31 Vic., c. 142, s. 14

7. Whenever an action is brought in a Local Court, which the Court has no jurisdiction to try, the Magistrate shall order the cause to be struck out, and shall, unless the parties consent to the Court having jurisdiction to try the same, have power to award costs in the same manner, to the same extent, and recoverable in the same manner as if the Court had jurisdiction in the matter of such plaint, and the plaintiff had not appeared, or had appeared and failed to prove his demand.

Either party may appeal

8. If either party in any cause, action, or proceeding in a Local Court shall be dissatisfied with the determination or direction of the said Court in point of law or upon the admission or rejection of any evidence, such party may appeal to the Supreme Court; and such appeal shall be regulated by the Rules of the Supreme Court for the time being in force regulating proceedings on appeals from Local Courts.

Magistrate to make note of any question of law raised at any trial

At the trial or hearing of any action or matter in which there is a right of appeal, the Magistrate, at the request of either party before judgment is delivered, shall make a note of any question of law raised at such trial or hearing and of the facts in evidence in relation thereto, and shall state in writing his decision on such questions and facts, and his decision of the action or matter.

Any person who has given notice of appeal shall, upon payment of a sum not exceeding threepence per folio of seventy-two words, be entitled to a copy of the notes of evidence taken by the Magistrate, and of the note of any such questions and facts, and of his decision thereon.

Liberty to proceed where personal service has not been effected  
Imp. Act 38 and 39 Vic., c. 50, s. 1

9. Where personal service of any summons or other process of a Local Court cannot be effected, and the Magistrate is satisfied by affidavit or otherwise that reasonable efforts have been made to effect such service, and either that the summons has come to the knowledge of the defendant or that he wilfully evades service of the same, it shall be lawful for the Magistrate to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Magistrate may seem fit.

Service of process

10. Any summons or other process of a Local Court, not being a writ of execution, may be served by any member of the Police Force, the plaintiff, his solicitor or clerk, or by any other person authorised by the Magistrate, and such service may be proved by affidavit showing the fact and mode of the service, and shall be as valid as if the same had been made by a bailiff or officer of the Court out of which such summons or other process shall have issued.

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11. Section one hundred and seven of the said Ordinance is hereby amended by adding at the end of the said section the words 'or before a Commissioner for taking affidavits in the Supreme Court.'

Amendment of  
Section 107 of  
27 Vic., 21

12. Where any summons or other process is served by a bailiff of any Local Court, the service may be proved by endorsement on a copy of the summons or process under the hand of such bailiff, showing the fact and mode of the service of such summons or process; and any such bailiff wilfully and corruptly endorsing any false statement on the copy of a summons or other process shall be guilty of a misdemeanour, and on conviction thereof shall be removed from his office or employment, and shall incur the same penalties as are or may be incurred by persons convicted of wilful and corrupt perjury.

How service by a  
bailiff may be  
proved  
Imp. Act 38 and  
39 Vic., c. 50, s. 3

13. If in any action for a debt or liquidated money demand on the day named in the summons or at any continuation or adjournment of the Court or cause in which the summons was issued, the plaintiff shall appear either in person or by some person duly authorised on his behalf, and the defendant shall not appear in person or by some person duly authorised on his behalf, or shall not sufficiently excuse his absence, or shall neglect to answer when called in Court, the Court upon due proof of service of the summons may proceed to enter up judgment for the plaintiff, and such judgment shall be as valid as if both parties had attended the Court: Provided always, that the Court may, upon sufficient cause shown in any such case, either at the same or any subsequent sitting set aside any judgment so given in the absence of the defendant and the execution thereupon, and may grant a new trial of the cause upon such terms (if any) as to the payment of costs, giving security for the debt or costs or such other terms as it may think fit.

Proceedings if  
no appearance  
Imp. Act 9 and  
10 Vic., c. 35,  
s. 80  
Imp. Act 30 and  
31 Vic., c. 142,  
s. 16

14. (1) Wherever by the provisions of the said Ordinance any costs and charges are required to be taxed by the Magistrate, the same may be taxed by the Clerk of the Court.

Taxation of  
costs

(2) And with respect to proceedings in actions where the debt or damage claimed exceeds Twenty pounds, the following provisions shall apply,—

(a) All costs and charges between party and party shall be taxed by the Clerk of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the Magistrate of the Court on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force under the provisions of section thirty-two of the said Ordinance.

Costs as between  
party and party  
Imp. Act 19 and  
20 Vic., c. 108,  
s. 34

(b) All costs between attorney and client shall, on the application of either the attorney or client but not otherwise, be taxed by the Clerk of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the Magistrate of

Costs as betw  
attorney and  
client  
Imp. Act 19 and  
20 Vic., c. 108,  
s. 35

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the Court on the application of either party; but no costs or charges shall be allowed on such taxation which are not sanctioned by the said scale then in force, unless the Clerk shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no attorney shall have a right to recover from his client any costs or charges in respect of such proceedings unless they shall have been allowed on such taxation or on the taxation of the Master of the Supreme Court.

(c) No costs shall be taxed by either party unless notice has first been given to the other side.

Judge of  
Supreme Court  
may order  
attendance of  
witness

15. (1) A Judge of the Supreme Court may, upon the application of any party in any action or proceeding in a Local Court for good cause shown upon affidavit, order the attendance as a witness in the Local Court of any person in legal custody, subject to the payment into the Supreme Court by the party applying of a sum sufficient in the opinion of the Judge to defray the expenses of the attendance and return of such prisoner and of the gaoler in charge, and every such order shall be directed to and served upon the Sheriff and the gaoler in whose custody such prisoner may be.

(2) The sum so deposited, or so much thereof as shall suffice, shall be paid out of Court to the Sheriff on his application and lodging with the Registrar of the Supreme Court a memorandum of the expenses occasioned by the compliance with such order, and any surplus of such sum shall be paid out to the party depositing the same.

Action of tort  
brought in  
Supreme Court  
may be removed  
to Local Court in  
certain cases

16. Any person against whom an action of tort within the jurisdiction of a Local Court is brought in the Supreme Court may make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a Judge of the Supreme Court may make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of the Registrar of the Supreme Court, or satisfy a Judge of the Supreme Court that he has a cause of action fit to be prosecuted in the Supreme Court, all proceedings in the action shall be stayed, and in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy a Judge as aforesaid, that the action be remitted for trial before a Local Court to be named in the order, and thereupon the plaintiff shall lodge the original writ and pleadings, if any, which have been delivered and the order with the Clerk of such Local Court, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the clerk to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such Court as if the action had originally been commenced therein; and the costs of the parties in respect of the proceedings subsequent to the order of the Judge of the Supreme Court shall be allowed according to the scale of costs for the time being in use in the Local Courts, and the cost of the order and all proceedings previously thereto shall be

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allowed according to the scale of costs for the time being in use in the Supreme Court. In the event of any action being so remitted before the pleadings have been closed, the Magistrate of the Local Court may, on application, order particulars, or further particulars, of the claim or defence to be delivered.

17. Any statement under section thirty-eight of the said Ordinance may be signed before the Clerk of any Local Court.

Confession may be signed before Clerk of any Local Court

18. An interpleader summons, issued under section sixty-five of the said Ordinance, shall be returnable within five days of the service thereof, and if no Court be then sitting the same shall be adjudicated upon by the Magistrate sitting in Chambers.

Interpleader summons to be returnable within five days of service

19. A Magistrate proposing to sue any person dwelling or carrying on business in any district of the Local Court of which he is the Judge may bring his action in the Court of any adjoining district of which he is not the Judge; and any person proposing to sue a Judge may bring his action in any Court of a district adjoining the district of the Local Court of which the defendant is Judge.

Magistrate of Local Court may sue or be sued in adjoining district

20. Section ninety-nine of the said Ordinance is hereby amended by striking out, in the second line, the words 'neither the value of the premises nor the rent payable in respect thereof shall have exceeded,' and inserting in lieu thereof the words 'the rent payable in respect thereof shall not exceed.'

Amendment of Section 99 of Ordinance

21. Two or more persons claiming or being liable as partners may sue or be sued in the name of their respective firms, if any, and the opposite party may in such case apply for the names of the persons who are partners in any such firm, and the Court may order an affidavit to be filed stating the names and addresses of such partners. Provided that no execution shall be issued against any person not served with the plaint or summons.

Partners may sue or be sued in firm's name

Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

22. Every defendant may set off, by way of defence, any claim or demand whatsoever that he may have in the capacity in which he is sued against the plaintiff in the capacity in which he sues, and which the Court would have jurisdiction to hear and determine if the same were a claim or demand by a plaintiff in such Court.

Defendant may counter-claim

The defendant shall file a statement of such counter-claim, giving such particulars thereof as would be necessary in case of a claim by a plaintiff.

(1) Such statement shall be headed with the word 'Counter-claim,' but shall in all other respects conform to the provisions of the said Ordinance as to particulars of claims.

(2) A copy of such counter-claim shall be filed in the office of the Court, and served upon the plaintiff at least five clear days before the time appointed for the hearing, and all further proceedings thereon shall be taken in the same manner as if the defendant had commenced an independent action against the plaintiff, and the said counter-

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claim shall be tried at the same place as the claim in the original action, together with or immediately after the trial of the original action. The Court may adjourn the hearing of a counter-claim if it be made to appear that the plaintiff will be prejudiced by the hearing taking place as hereinbefore provided. A counter-claim cannot be set up against any one of two or more joint plaintiffs.

Removal of judgment into Supreme Court

23. Whenever in any Local Court a judgment has been recovered or an order made for the payment of an amount of Ten pounds or upwards, the Clerk of such Court, upon the application of the person entitled to enforce such judgment or order, or his solicitor, shall deliver a certificate in the form contained in the Second Schedule to this Act, and shall make a record thereof in the books of the Court.

No such certificate shall be granted before the expiration of the time allowed for giving notice of appeal, or before the time at which execution could be issued out of the Local Court, and if any execution against the goods and chattels shall have been issued, no such certificate shall be granted until after the return of the warrant of execution.

The person obtaining the certificate may file the same, or cause it to be filed, in the Supreme Court, and thereupon, without any further process, sign final judgment (on which judgment no appeal shall lie in that Court) in the form contained in the Third Schedule to this Act, for the sum stated in such certificate to be unpaid, together with interest thereon at Six pounds per cent. per annum, from the date of the said certificate, and the sum of One pound eleven shillings and sixpence for costs, and together also with all fees paid in obtaining such certificate and signing such final judgment, and upon such final judgment execution may be forthwith issued, and all the proceedings taken as on any other judgment of the Supreme Court; Provided that after any such certificate shall have been granted no further proceedings shall be had or taken in the Local Court other than by way of judgment summons.

Magistrate may order an attachment of debts  
Imp. Act 17 and 18 Vic., c. 125, s. 61

24. The Magistrate of any Local Court may, upon the *ex parte* application of any person who has obtained a judgment or order for payment of money in any Local Court, and upon affidavit by himself or his solicitor, stating the fact of such judgment or order, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the debtor be attached to answer the judgment or order, and may, by the same or any subsequent order, summon the garnishee to attend before him, on a day to be named, to show cause why he should not pay the creditor the debt due from him to the debtor, or so much thereof as may be sufficient to satisfy the judgment or order: Provided, however, that no order for the attachment of the wages of any servant, labourer, or workman shall be made by the Magistrate of any Local Court.

And summon garnishee  
Imp. Act 33 and 34 Vic., c. 50, s. 1

Order for attachment to bind debts

25. Service of an order that debts due or accruing to the debtor liable under a judgment or order shall be attached, or notice thereof

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- to the garnishee, in such manner as the Magistrate shall direct, shall bind such debt in his hands. Imp. Act 17 and 18 Vic., c. 125, s. 62
26. If the garnishee does not forthwith pay into Court the amount due from him to the debtor, or an amount equal to the judgment or order, and does not dispute the debt due or claimed to be due from him to the debtor, or if he does not appear upon the said summons, then the Magistrate may order execution to issue, and it may be sued for accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment or order. Proceedings to levy amount due from garnishee  
Imp. Act 17 and 18 Vic., c. 125, s. 63
27. If the garnishee disputes his liability, the Magistrate shall, on the return of the said summons, try and determine all questions necessary for determining the liability of such garnishee to pay such debt in the same manner in which an action is tried and determined. On return of summons Magistrate may determine liability
28. Whenever in proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the Magistrate may order such third person to attend before him, and state the nature and particulars of his claim upon such debt. Proceedings where third party has a lien  
Imp. Act 23 and 24 Vic., c. 126, s. 29
29. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Magistrate may think fit to call before him, or in case of such third person not appearing before him upon such summons, the Magistrate may order execution to issue to levy the amount due from such garnishee, and he may bar the claim of such third person or make such other order as he may think fit, upon such terms in all cases with respect to the lien or charge, if any, of such third person, and as to costs, as he shall think just and reasonable. Magistrate may bar claim of third person, and may make orders  
Imp. Act 23 and 24 Vic., c. 126, s. 30
30. Payment made by or execution levied upon the garnishee, under any such proceedings as aforesaid, shall be a valid discharge to him as against the debtor liable under a judgment or order to the amount paid or levied, although such proceedings may be set aside or the judgment or order reversed. Garnishee discharged  
Imp. Act 17 and 18 Vic., c. 125, s. 65
31. The Magistrate may in his discretion refuse to interfere where from the smallness of the amount to be recovered or of the debt sought to be attached or otherwise the remedy sought would be worthless or vexatious. Magistrate may refuse to interfere in certain cases  
Imp. Act 23 and 24 Vic., c. 126, s. 28
32. The Clerk of the Court shall keep a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amounts recovered or otherwise, and copies of any entries made therein may be taken by any person upon application to the clerk. Attachment book to be kept by the Clerk of the Court  
Imp. Act 17 and 18 Vic., c. 125, s. 66
33. The costs of any application for an attachment of debt under this Act, and of any proceedings arising from or incidental thereto, shall be in the discretion of the Magistrate. Costs of application  
Imp. Act 17 and 18 Vic., c. 125, s. 67
34. A vacation shall be observed in every Local Court from the twentieth day of December to the eighteenth day of January both inclusive, during which period the Court shall not sit: Provided always, that every Court shall always be open for the entry of plaints, Vacation

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the issue of process, and the receipt and payment out of money due under any order of the Court, pursuant to the rules and orders in force for the time being.

Sittings of Court falling on any Bank holiday

35. In the event of any sitting of a Local Court falling upon a Bank holiday, the Court shall not sit upon such day, but upon the day next following.

ALEX. C. ONSLOW,  
GOVERNOR'S DEPUTY.

FIRST SCHEDULE

Session and Number	Title	Extent of Repeal
Section 2 27 Vic., No. 21	'The Small Debts Ordinance, 1863'	Sections 10, 33, 34, 41, 42, 44, 55, 56, 64, 76, and 77. In Section 87 the words, 'exceeding twenty pounds.'

SECOND SCHEDULE

This is to certify to the Supreme Court that at the Local Court of holden at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_ (name and address of person entitled to execution) obtained a (judgment or order against) \_\_\_\_\_ for the sum of £ \_\_\_\_\_ ; and the sum of £ \_\_\_\_\_ is still due upon the said judgment or order.  
Given under my hand and the seal of the said Local Court this \_\_\_\_\_ day of \_\_\_\_\_ 189 .  
Clerk of Court.

THIRD SCHEDULE

In the Supreme Court.  
Between (person entitled to execution) \_\_\_\_\_ Plaintiff,  
and \_\_\_\_\_ Defendant.  
The \_\_\_\_\_ day of \_\_\_\_\_  
It appearing by the certificate of the Clerk of the Local Court of \_\_\_\_\_ holden at \_\_\_\_\_ and dated the \_\_\_\_\_ day of \_\_\_\_\_, 189 , that the above-named defendant is indebted to the above-named plaintiff in the sum of £ \_\_\_\_\_ on a judgment recovered or order made in the said Local Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ . It is this day adjudged that the plaintiff do recover against the said defendant the said sum of £ \_\_\_\_\_ and also £ \_\_\_\_\_ for interest, costs, fees, and charges.