

"be also awarded for the delaying of execution, and shall give notice thereof to the defendant in Error or his Solicitor."

Common Law Procedure Act, 1852, s. 152.

50. The 152nd Section of the English Act provides for the abolition of the assignment of Error and joinder in Error in law, and the substitution of a suggestion in lieu thereof, with a proviso that when the defendant in Error intends to rely on a plea that Error is barred by lapse of time, or release, or other matter of fact, Error is to be assigned after notice by the defendant, and the defendant is to plead in 8 days, and thereupon such proceedings are to be had as before the Act.

Suggestion of Error.

Now there is nothing to be gained—but a great deal of inconvenience must necessarily be produced—if the practice of New Zealand were to incorporate, by relation, the English practice before 1852; and it seems to be the more reasonable plan to adopt a simple suggestion of Error in all cases, and to provide—in case of the defendant wishing to plead pleas in fact—for the trial of such facts in the ordinary way, as incidental to the action; and inasmuch as great delay might be caused by waiting for the trial of such issues of fact till the next sittings, power might properly be given to the Court in its discretion, on the application of the party interested, to direct the Sheriff to summon a Jury at a given time to try the issues in the Court below. If the issues on the pleas should be decided substantially against the defendant in Error, then on payment of costs or security given by him within a certain time, the case might be set down for argument in the Appeal Court, in the same manner as if no pleas had been pleaded—otherwise at the expiration of that time the plaintiff in Error should be entitled to the reversal or other judgment which he asks for.

There seems to be no necessity for the memorandum in Section 148, and also the suggestion on the roll, except for the purpose of removing the roll into the Court of Error; but in our Supreme Court there is no judgment roll; and provision can be made for sending up all the proceedings to the Court of Appeal.

The 153rd Section provides for making up the roll and entering the suggestion by the plaintiff, otherwise for judgment of *non pros*.

Proposed clause.

51. It seems to us that the following Clause will provide sufficiently in New Zealand for all the matters covered by the 152nd and 153rd sections of the Common Law Procedure Act:—

Pleas and Joinder in Error.

8. "Within [14] days after the service of a copy of such note as in section "mentioned by the Plaintiff in Error on the defendant in Error, the defendant in Error "shall either deliver to the Registrar a joinder in Error which the said Registrar shall "then file, or shall deliver to the Plaintiff in Error or his Solicitor a plea or pleas to the "effect that the proceeding in Error is barred by lapse of time, or by release of Error, or "of some other like matter of fact; and in default of the defendant in Error delivering "such joinder or plea within such time as last aforesaid, the judgment shall be reversed "by the Supreme Court or a Judge at Chambers on application on behalf of the plaintiff "in Error, notice of such Application having been previously given to the defendant in "Error or his Solicitor: Provided always that such Court or Judge may enlarge the "time for delivering such joinder or plea on reasonable cause being shewn, or may, on "the hearing of such application for a judgment of reversal, on reasonable cause being "shewn, grant to such defendant in Error further time to deliver such joinder or plea, "on such terms as to costs or otherwise as to such Court or Judge shall seem fit."

This clause seems to preserve everything essential in the Common Law Procedure Act which is necessary in the Colony, and at the same time to give a little more of that elasticity in operation which is desirable for the circumstances of the Colony. The defendant in Error, if conscious of a bad case, ought not to be allowed to put the plaintiff to the expense of going to the Court of Appeal to get the judgment reversed; and the provision here is in accordance with the English rule of *H. T. 4 W. 4, r. 13*.

Finding of issues of fact on Pleas in Error.

52. It is now necessary to provide for the trial of the issues of fact raised on pleas in Error, and the judgment founded on it, should the verdict be for the defendant; and moreover it would seem to be required by the general spirit of our practice that the defendant, if he should fail in establishing his pleas, should be allowed to go on to dispute the matters of law relied on by the plaintiff in Error. The following clauses seem to supply these *desiderata*:—

Disposing of issues of law and fact in a plea in error.

9. "After the delivery by the defendant in Error of a plea in Error as hereinbefore "last mentioned, the pleadings thereupon shall proceed as in the ordinary course of an "action, and if in such pleadings an issue of law be raised by demurrer, the case shall be "set down for argument as hereinafter is provided for when there has been a joinder in "Error; but if in such pleadings an issue or issues of fact be raised, the Supreme Court "or a Judge shall, on the application of either party, settle the issue or issues to be tried, "and summon a Jury to try such issue or issues on such day as such Court or Judge may "think fit, and the said Judge or any other Judge of the Supreme Court shall preside at "such trial."

Result of verdict on pleas in error.

10. "If at the trial of such issues or issue of fact a verdict shall be found for the "defendant in Error, the Court shall forthwith, on motion by such defendant, direct that "the judgment already given by the Court shall be affirmed; and no further proceedings "in Error shall be taken on the judgment. But if the verdict be for the plaintiff in "Error on the issue, if there be but one, or on all the issues if there be several, then the "case shall be set down for argument as if there had been a joinder in Error."