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Interlocutory Proceedings and Amendment
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(a) DEFAULT JUDGMENT

(i) Introduction

[325-6920] **Introduction** As an incident of the power of every superior

court of record to control and to ensure its processes matters without trial. The two most common without trial are orders judgment.³ Proceedings without trial where the p (1) disclose no reason (2) are scandalous, fri (3) might prejudice, e Extraordinary or inord without trial, for want of process is being used imp

Notes

1. As to inherent power
2. An order for default to enter an appearance to default judgment see [325-2500]-[325-2505].
3. Summary judgment if defendant has no defence see [325-7020]-[325-7025].
4. As to pleadings that
5. As to pleadings that
6. As to pleadings that see [325-3680].
7. As to dismissal for v
8. As to dismissal for

[325-6925] **General n** of the court for the defa or orders of the court.¹ without a trial. However the power to set aside o of default judgment is a n bound to carry out necessary procedural rul default judgment and a judgment if it is of the judgment has been ent it confers the usual righ entered after a trial.⁷

Notes

1. It is in effect an [1937] AC 473 ; is that, unless ar

Para
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[325-7115]

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[325-7125]

[325-7130]

[325-7135]

[325-7140]

[325-7145]

[325-7150]

[325-7155]

[325-7160]

[325-7165]

power of record to control its own process, to protect its processes from abuse and to ensure its processes are complied with¹ the court may dispose of certain matters without trial.

The two most common forms of orders leading to the disposition of a matter without trial are orders for default judgment² and orders for summary judgment.³ Proceedings may also be stayed or dismissed or judgment entered without trial where the pleadings:

- (1) disclose no reasonable cause of action or defence;⁴
- (2) are scandalous, frivolous or vexatious;⁵ or
- (3) might prejudice, embarrass or delay the fair trial of the action.⁶

Extraordinary or inordinate delay may lead the court to dismiss a claim, without trial, for want of prosecution,⁷ and if the court is persuaded that its process is being used improperly it may dismiss the action.⁸

Notes

1. As to inherent power generally see [325-10].
2. An order for default judgment may be made where the defendant defaults by failing to enter an appearance, or by failing to comply with a relevant procedural rule. As to default judgment generally see [325-6925]-[325-7015]. As to appearance generally see [325-2500]-[325-2585].
3. Summary judgment may be ordered where the plaintiff can demonstrate that the defendant has no defence to the plaintiff's claim. As to summary judgment generally see [325-7020]-[325-7165].
4. As to pleadings that disclose no reasonable cause of action or defence see [325-3680].
5. As to pleadings that are scandalous, frivolous or vexatious see [325-3680].
6. As to pleadings that might prejudice, embarrass or delay the fair trial of the action see [325-3680].
7. As to dismissal for want of prosecution see [325-7095]-[325-7145]. See also [325-10].
8. As to dismissal for abuse of process see [325-7150]-[325-7165]. See also [325-10].

[325-6925] **General nature and effect** A default judgment is a sanction of the court for the default of a party to an action in complying with the rules or orders of the court.¹ A default judgment effectively disposes of the action without a trial. However, as it is not a judgment 'on the merits'² the court has the power to set aside or vary a default judgment.³ In general terms, the entry of default judgment is an administrative or ministerial act which a court officer is bound to carry out provided there has been strict compliance with the necessary procedural rules.⁴ Nevertheless, there is no absolute entitlement to a default judgment and a court always has the discretion to refuse to give default judgment if it is of the view that it may result in an injustice.⁵ When a default judgment has been entered it creates a limited estoppel⁶ and, while it stands, it confers the usual rights to execution in the same way as if it were a judgment entered after a trial.⁷

Notes

1. It is in effect an expression of the coercive powers of the court: see *Evans v Bartlam* [1937] AC 473 at 480; [1937] 2 All ER 646 at 650 per Lord Atkin ('the principle... is that, unless and until the court has pronounced a judgment upon the merits or

by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure'). The policy behind procedural rules which allow the party who is in default to apply for judgment is to encourage settlement and compromise of actions without recourse to a trial. They permit a party who genuinely does not wish to contest a claim to refrain from taking any steps in the proceedings while they give a remedy to the party pursuing the claim. See also *Kostokanellis v Allen* [1974] VR 596 at 603, SC(VIC), Full Court.

2. *L. Oppenheim and Co v Haneef* [1922] 1 AC 482; [1922] All ER Rep 305; (1922) 127 LT 196; *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646 at 650 per Lord Atkin. However, compare the effect of summary judgment, as to which see [325-7024].
3. See note 1 above. If it becomes apparent that a default judgment may result in some injustice, a court may, of its own motion, relieve a party from its consequences: *Johnson v Duks* [1963] NSWLR 730 at 732; (1962) 80 WN (NSW) 272; *Lombank Ltd v Cook* [1962] 3 All ER 491 at 496, 498; [1962] 1 WLR 1133. See further [325-7010], [325-7020].
4. *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 at 469 per McInerney J; *Lombank Ltd v Cook* [1962] 3 All ER 491 at 496; [1962] 1 WLR 1133; *Armitage v Parsons* [1908] 2 KB 410 at 417 per Gorell Barnes P, at 419 per Fletcher Moulton LJ; (1908) 77 LJKB 850; 99 LT 329.
5. *Charles v Shepherd* [1892] 2 QB 622 at 624 per Lord Esher MR, at 625 per Bowen LJ, (1892) 67 LT 67; *Terrijtelen v Van Arkel* [1974] 1 NSWLR 525 at 534-5. Nor will a court make a declaration of invalidity of documents pursuant to a statute without hearing evidence and argument: *Grant v Knaresborough Urban District Council* [1928] Ch 310 at 317; (1928) 138 LT 488. As to the usual rule relating to applications for default judgment where a declaration is sought: see *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821 at 822-3; [1991] 1 WLR 541 per Millett J.

In some jurisdictions, the rules oblige a judicial officer to exercise a discretion as to whether default judgment ought to be entered:

- (CTH) Federal Court Rules O 35 r 7
 - (ACT) Court Procedures Rules 2006 r 1128
 - (NT) Supreme Court Rules r 21.03
 - (NSW) Uniform Civil Procedure Rules 2005 Pt 16
 - (QLD) Uniform Civil Procedure Rules 1999 r 283
 - (SA) Supreme Court Civil Rules 2006 r 228
 - (TAS) Supreme Court Rules 2000 r 352
 - (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 21.03
 - (WA) Rules of the Supreme Court O 13 r 5.
6. See, for example, *Kok Hoong v Wong Cheong Kweng Mines Ltd* [1964] AC 993 at 1011-12; [1964] 1 All ER 300 at 305-6; [1964] 2 WLR 150 per Viscount Radcliffe, where the Privy Council noted that a default judgment could be treated as a form of consent judgment or as a true default due to the ignorance or neglect of the defendant. While it acknowledged that default judgments could give rise to an estoppel per rem judicatum, they 'must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they most necessarily have decided... they can estop only for what must necessarily and with complete precision have been thereby determined' (at 1012). See also *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1 at 21; [1938] 4 All ER 747; (1938) 160 LT 137; *Chamberlain v DCT* (1988) 164 CLR 502; 78 ALR 271; 62 ALJR 324; 19 ATR 1060; 88 ATC 4323. Compare the effect of an order to dismiss an action for want of prosecution: see [325-7095]. See also *Rogers v Legal Services Commission of South Australia* (1995) 64 SASR 572 (default judgment compared with summary judgment for failure to show cause of action, where no res judicata applied).
 7. As to execution generally see [325-9850]-[325-10090].

(ii) Jud

[325-6930] Available judgment in default of effect of obtaining a judgment is deemed to have admitted although the plaintiff claimed in the original a party who has not applied for judgment on one has failed to enter an application must first apply to the disabled person.⁵ Whether the judgment is entered or by application to the that may be entered.⁶ to judgment, the plaintiff defendant who is served by failing to enter an application to a plaintiff even where The rules relating to execution to a plaintiff who has counterclaim.¹⁰

Notes

1. The procedure matters which (CTH) High Court (CTH) Federal (ACT) Court (NT) Supreme (NSW) Uniform (QLD) Uniform (SA) Supreme (TAS) Supreme (VIC) Supreme (WA) Rules Judgment in has been wrong to comply with *Pry Ltd* (1986 [325-2520]). As
2. *Cribb v Freyberg* 38 WR 326; *Lee* if the claim is not as to amount 93-4 per Lee J [325-1025]. As:

(ii) Judgment in Default of Appearance

(A) General

[325-6930] Availability All jurisdictions permit a plaintiff to apply for judgment in default of appearance by a defendant or defendants.¹ The general effect of obtaining a judgment in default of appearance is that the defendant is deemed to have admitted all of the allegations in the originating process,² although the plaintiff cannot claim more in the default judgment than was claimed in the originating process.³ Where alternative claims are made against a party who has not appeared, the usual rule is that the plaintiff must elect to take judgment on one claim and abandon any others.⁴ Where the person who has failed to enter an appearance is a person who is under a disability, the plaintiff must first apply to the court for an order appointing a representative for the disabled person.⁵ Where the defendant has not entered an appearance within the prescribed time, the nature of the plaintiff's claim usually determines whether the judgment is then entered administratively (by ministerial action) or by application to the court for leave, as well as affecting the type of judgment that may be entered.⁶ If a defendant is in default of appearance but consents to judgment, the plaintiff may nevertheless enter judgment in default.⁷ A defendant who is served out of the country does not submit to the jurisdiction by failing to enter an appearance.⁸ Judgment in default of appearance is open to a plaintiff even where the defendant is being sued in a representative capacity.⁹ The rules relating to entry of judgment in default of appearance apply equally to a plaintiff who defaults in the filing and serving of a defence to a counterclaim.¹⁰

Notes

- The procedure applies only to actions which proceed by way of pleadings, meaning matters which are commenced by a writ or a statement of claim. See: (CTH) High Court Rules 2004 r 27.09.1 (CTH) Federal Court Rules O 32 r 2(1)(c) (ACT) Court Procedures Rules 2006 rr 1117, 1118 (NT) Supreme Court Rules r 21.01 (NSW) Uniform Civil Procedure Rules 2005 rr 16.1, 16.2(1) (QLD) Uniform Civil Procedure Rules 1999 rr 280, 281 (SA) Supreme Court Civil Rules 2006 r 228(1) (TAS) Supreme Court Rules 2000 Pt 11 Div 2 (VIC) Supreme Court (General Civil Procedure) Rules 2005 O 21 (WA) Rules of the Supreme Court O 13 r 8.
Judgment in default of appearance cannot be entered where the originating process has been wrongfully endorsed with a time limited for appearance which is too short to comply with the rules of court: *Fadelli Transport Industries Pty Ltd v Timor Transport Pty Ltd* (1986) 39 NTR 10. As to time limits for entering an appearance see [325-2520]. As to appearances generally see [325-2500]-[325-2585].
- Cribb v Freyberger* [1919] WN 22; *Faithfull v Woodley* (1889) 43 Ch D 287; 61 LT 808; 38 WR 326; *Lombank Ltd v Cook* [1962] 3 All ER 491; [1962] 1 WLR 1133. However, if the claim is unliquidated, the admission is deemed to be only as to liability and not as to amount: *Watson Specialised Tooling Pty Ltd v Stevens* [1991] 1 Qd R 85 at 93-4 per Lee J. As to the distinction between liquidated and unliquidated claims see [325-1025]. As to originating process see [325-1000]-[325-1015].

3. *Wickham v Tacey* (1985) 36 NTR 47 at 50-1. See also *Kok Hoong v Leong Cheong Kuey Mines Ltd* [1964] AC 993; [1964] 1 All ER 300; [1964] 2 WLR 150 (comments relating to res judicata).
4. *Currie v May* [1914] VLR 17 at 19.
5. (ACT) Court Procedures Rules 2006 rr 279, 280
 (NT) Supreme Court Rules r 15.04
 (QLD) Uniform Civil Procedure Rules 1999 Ch 3 Pt 4 (persons under a legal incapacity)
 (SA) Supreme Court Civil Rules 2006 r 78
 (TAS) Supreme Court Rules 2000 r 345
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 15.04
 (WA) Rules of the Supreme Court O 70 r 5(1).
- There are no equivalent provisions in the High Court, the Federal Court and New South Wales.
- If no personal representative or guardian is appointed before the plaintiff enters judgment in default, the judgment will be irregular: *Gore-Booth v Gore-Booth* [1954] P 1 at 6; [1953] 2 All ER 1000 at 1002 per Lord Merriman P; *John v John* [1965] P 289; [1965] 2 All ER 222. The court has inherent power to set aside an irregular judgment: *Ford v Gray* (1988) 50 SASR 425 at 431 per Bollen J. As to setting aside default judgments see [325-6980]. As to appearance by persons under a disability generally see [325-2535].
6. As to the different types of claims see [325-6940] (liquidated claims and interest), [325-6945] (liquidated claims against several defendants), [325-6950] (unliquidated claims), [325-6955] (detention of goods), [325-6960] (possession of land), [325-6965] (mixed claims), [325-6970] (other claims).
7. *Green v Rowe* (1897) 23 VLR 349 (suggests that this is the proper course to take rather than to apply to the court for a consent judgment).
8. *Re Dulles' Settlement (No 2); Dulles v Vidler* [1951] Ch 842 at 850; [1951] 2 All ER 69 per Denning LJ. A successful objection to the jurisdiction will mean that the court will set aside a judgment in default of appearance: see *Hewitson v Fabre* (1888) 21 QBD 6; 58 LT 856; *Trade Practices Commission v Gillette Co (No 1)* (1993) 45 FCR 366; 118 ALR 280. As to submission to a jurisdiction in the context of entering an appearance see further [325-2555], [325-2560].
9. *Brown v Fraser* (1896) 22 VLR 337. As to representative actions generally see [325-1420]-[325-1435].
10. See, for example:
 (ACT) Court Procedures Rules 2006 rr 1116(b), 1117(1)(b)
 (NT) Supreme Court Rules r 21.06
 (QLD) Uniform Civil Procedure Rules 1999 r 280
 (SA) Supreme Court Civil Rules 2006 r 228(1)
 (VIC) Supreme Court (General Civil Procedure) Rules 2005 r 21.06
 (WA) Rules of the Supreme Court O 22 r 8.

In those jurisdictions where the plaintiff is not required to plead to a counterclaim, the defendant may seek default judgment on a motion for judgment; *Jones v Macdonald* [1891] 1 QB 221; (1891) 64 LT 621; *Shanks & Co Pty Ltd v Holnie* [1963] VR 198.

[325-6935] Pre-conditions to default judgment Whether the plaintiff seeks to enter judgment in default of appearance by administrative action or with the leave of the court, he or she must first be able to prove due service of the relevant originating process¹ and the plaintiff must observe strictly the relevant rules for the entry of default judgment.² Where the defendant is not, to the knowledge of the plaintiff's solicitor, represented by a solicitor and has not entered an appearance, an affidavit of proof of service must be prepared and filed.³ Where the plaintiff's solicitor knows that the defendant is represented by

a solicitor, that solicitor should enter judgment in default of process for the plaintiff if he or she knows the company if he or she knows the company's registered office and that the service on corporations is proved by inference from a ground for setting aside of the court's discretion.⁷

Notes

- (CTH) High Court
 (CTH) Federal Court only
 (ACT) Court Procedures Rules
 (NT) Supreme Court Rules
 (NSW) Uniform Civil Procedure Rules
 (QLD) Uniform Civil Procedure Rules
 (TAS) Supreme Court Rules
 (VIC) Supreme Court Rules
 (WA) Rules of the Supreme Court
 In South Australia, an affidavit of service must be filed with the judgment to be entered: *see* para [6R 229.60]. See also *see* Queensland *see* a.
- Johnsen v Duks* [196] *Tooling Pty Ltd v Ste Ltd* [1982] Qd R 60; for appearance has effect 353. Likewise where process default judgment *Abbenwood Pty Ltd* (
- Coburn v Brotchie* (1949) 49 ILT 213. One view of information and proceeding for final (1981) 147 CLR 1; *Pty Ltd* [1991] 2 Qd R 1; served identified his inadmissible if relief (1965) 7 FLR 101.
 As to the position swearing the affidavit originating process do not depose to compliance As to substituted service [325-2205]. As to service where service judgment must process was left act may not be prepar

Service on corporations proved by inference from posting, but non-receipt of the originating process is a ground for setting aside the judgment in default of appearance in the exercise of the court's discretion.⁷

Notes

1. (CTH) High Court Rules 2004 r 27.09.2
(CTH) Federal Court Rules O 35A r 3(3) (claims for debt or liquidated damages only)
(ACT) Court Procedures Rules 2006 r 1119
(NT) Supreme Court Rules r 21.01(3)(a)
(NSW) Uniform Civil Procedure Rules 2005 r 16.3(2)(a)
(QLD) Uniform Civil Procedure Rules 1999 r 282
(TAS) Supreme Court Rules 2000 r 346(1)
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 21.01(3)(b)
(WA) Rules of the Supreme Court O 13 r 1(1).

In South Australia, there is no equivalent in the rules but the practice is to require an affidavit of service before consideration will be given to allowing a default judgment to be entered. See *Lunn's Civil Procedure South Australia*, LexisNexis, Vol 1, para [6R 229,60]. See also *Coburn v Brotchie* (1890) 16VLR 6; 11 ALT 123. In relation to Queensland see also see *Bratic v Toohey* [1988] 2 Qd R 140.

2. *Johnsen v Duks* [1963] NSWLR 730; (1962) 80 WN (NSW) 272; *Watson Specialised Tooling Pty Ltd v Stevens* [1991] 1 Qd R 85; *Ezi-Frame Pty Ltd v Al-Cote (Aust) Pty Ltd* [1982] Qd R 602. A judgment which has been entered before the prescribed time for appearance has expired is irregular and may be set aside: *Daly v Silley* [1960] VR 353. Likewise where there is or has been an irregularity with service of the originating process default judgment will usually be set aside: *Deputy Commissioner of Taxation v Abbenwood Pty Ltd* (1990) 19 NSWLR 530; 2 ACSR 91; 8 ACLC 528
3. *Coburn v Brotchie* (1890) 16VLR 6; 11 ALT 123; *Crane & Sons Ltd v Wallis* (1915) 49 ILT 213. One view is that proof of service cannot be established by statements of information and belief because obtaining judgment in default of appearance is a proceeding for final relief: see, for example, *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248; 34 ALR 449; 55 ALJR 397; *Elders Finance Ltd v Inaway Pty Ltd* [1991] 2 Qd R 398. Thus, if the affidavit of service deposes that the person served identified himself or herself, without more, the deposition is hearsay and inadmissible if relied on for its truth: *Re Williams; Ex parte Whatmore's Sports Centre* (1965) 7 FLR 101 at 102 per Gibbs J.

As to the position where the bailiff who served the originating process died before swearing the affidavit see *ANZ Bank Ltd v Carseldine* [1969] QWN 26. Where the originating process was served by substituted service, the affidavit of service should depose to compliance with all of the requirements of the order for substituted service. As to substituted service of originating process generally see [325-2090]-[325-2115]. As to substituted service of originating process generally see [325-2020]. There may be difficulty proving service where service was informal because the plaintiff who desires to enter judgment must prove where, when and how the person with whom the originating process was left actually gave the document to the person to be served. The court may not be prepared to infer that the person to be served actually received the

Judgment and Execution

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document: see, for example, *Johnsen v Duks* [1963] NSWLR 730 at 731; (1962) 80 WN (NSW) 272; *Pino v Prosser* [1967] VR 835 at 837, 839. As to informal service see [325-2155].

4. *Coburn v Brotchie* (1890) 16 VLR 6; 11 ALT 123; *Bushby v MacKenzie* (1919) 19 SR (NSW) 104; *Australian Musical Distributors Pty Ltd v Wheelbell* [1969] QWN 40; *Pope v Aberdeen Transport Co Pty Ltd* [1965] NSWLR 1550.
5. *Deputy Commissioner of Taxation v Abbenwood Pty Ltd* (1990) 19 NSWLR 530; 2 ACSR 91; 8 ACLC 528.
6. (CTH) Service and Execution of Process Act 1992 s 9. See also (CTH) Corporations Act 2001 ss 109X, 601CX.
7. *A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 QB 314; [1972] 2 All ER 538 at 543-4 per Roskill LJ.

(B) Types of Claims

[325-6940] **Liquidated claims and interest** A plaintiff who enters judgment in default of appearance in relation to a debt or liquidated claim obtains a final judgment.¹ The judgment may include interest payable pursuant to a contract, and costs, provided that both are claimed in the originating process.²

In all jurisdictions, legislation gives plaintiffs the right to interest as part of the judgment.³ Interest pursuant to this legislation is a statutory right and can be claimed in a default judgment even though no agreement to pay it is alleged in the originating process.⁴ However, as it is in the nature of damages, and only granted at the court's discretion, it is usually not allowed to be included in a default judgment until it is adjudged to be payable by the court.⁵ Default judgment must only be entered for the amount properly due⁶ with credit being given for any payments received since the originating process was issued.⁷ If there are alternative claims against the defendant and only one of those claims relates to a liquidated claim, the plaintiff may elect to enter default judgment with respect to the liquidated claim and abandon the others.⁸ If all defendants are sued in the alternative and all fail to enter an appearance, a default judgment must be entered against each defendant.⁹

Notes

1. (CTH) Federal Court Rules O 35A r 3(2)(b)
(ACT) Court Procedures Rules 2006 r 1120
(NT) Supreme Court Rules r 21.03
(NSW) Uniform Civil Procedure Rules 2005 r 16.6
(QLD) Uniform Civil Procedure Rules 1999 r 283
(SA) Supreme Court Civil Rules 2006 r 229(1)(a)
(TAS) Supreme Court Rules 2000 r 347
(VIC) Supreme Court (General Civil Procedure) Rules 2005 r 21.03
(WA) Rules of the Supreme Court O 13 r 2.

There are no equivalent provisions in the (CTH) High Court Rules 2004. As to when a claim is a liquidated claim see *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436 at 445; [1956] ALR 1077 per Sholl J; *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 at 142; 29 ALR 311 per Knox CJ and Starke J. See also [325-1025] and Williams N, *Civil Procedure Victoria*, LexisNexis, Vol 1, para [21.03.15]. A claim for damages may be treated as a claim for a debt or liquidated demand if a contract or a statute declares that damages are liquidated damages.

Robertson v National Mayo J. See, for example, Act 1986 s 76(3). As

2. A plaintiff is generally amount which includes the interest is claimed period: see, for example, 304. The alternative amount (the principal amount (the interest) *Injection Moulds Ltd v Debruyts* [1977] because it was not the distinction between *Apple Computer I v Cambewell v Cambridge* 76 LGRA 26 per

In the absence not carry interest: *Insurance Co of North America v Companhia Navagac*

3. (CTH) High Court (CTH) Federal Court (ACT) Court of Appeal (NT) Supreme Court (NSW) Civil Procedure (QLD) Supreme Court (SA) Supreme Court (TAS) Supreme Court (VIC) Supreme Court (WA) Supreme Court

4. *Melbourne & Meade* (dealing with an *Trustee* (1978) 1 *Gardner Steel Ltd* 916.

5. *Coane v Thomas Ltd v Giannarello Poretzky* [1980]

There are differences in Victoria, the made to the common good cause is:

Service Pty Ltd Industries Hold

abandon the claim 1, para [15.15].

VR 504; *Will* (1985) 157 CL

v English [1986] 574; *Bischof v* 2 VR 382 (d).

In New South judgment for (NSW) Unif

6. *Hodges v Cambridge* judgment entered have it set as