

No. VI.

ACTIONS AGAINST
ABSENTEES &c.

An Act to consolidate and amend the Laws relating to Actions against Persons absent from the Colony and against Persons sued as Joint Contractors. [28th July, 1840.]

Preamble.

2 Wm. IV. No. 7.

Act of Parliament 3
and 4 Wm. IV c. 42
s. 8 9 and 10 as to
pleas in abatement.Foreign Attachment
Act 2 Wm. IV. No.
7 repealed.On return of *non est*
inventus and on
affidavit filed &c.
plaintiff may proceed
against an absent
defendant by foreign
attachment.Form of attachment
and how served.

WHEREAS an Act was passed by the Governor of New South Wales with the advice of the Legislative Council thereof in the second year of the reign of His late Majesty King William the Fourth intituled “*An Act for regulating Foreign Attachment in New South Wales*” and the same is in several particulars defective and there are certain cases not within the scope or object of that Act in which there is at present no provision for compelling appearance on behalf of defendants absent from the said Colony and whereas by an Act of Parliament passed in the third and fourth year of the reign of His said late Majesty intituled “*An Act for the further amendment of the Law and the better advancement of Justice*” certain provisions are made respecting pleas in abatement for the non-joinder of absent parties and it is expedient to introduce the same into practice in the said Colony and whereas for the purpose of remedying the defects and introducing the provisions aforesaid respectively it is expedient to repeal the said first recited Act and to consolidate the laws respecting absent defendants and joint contractors in one Act only Be it therefore enacted by His Excellency the Governor of New South Wales with the advice of the Legislative Council thereof That from and after the first day of September next ensuing the said first recited Act shall be and the same is hereby repealed except as to any writ of attachment issued under the said Act before such first day, of September and as to matters done or thereafter remaining to be done under any such writ in respect to which all such proceedings may be taken as might have been taken if this Act had not been passed.

2. And be it enacted That in every action at law which shall be hereafter commenced in the Supreme Court of New South Wales wherein the writ of summons or of *capias* shall (as to any defendant named therein) be returned *non est inventus* if upon or after such return an affidavit shall be filed on behalf of the plaintiff (in addition to a full affidavit of the cause of action) that such cause of action arose within the said Colony or its Dependencies and that to the best of the deponent’s belief such defendant does not reside within the said Colony or its Dependencies and is to the best of the deponent’s belief possessed of or entitled to or otherwise beneficially interested in any lands monies securities for money chattels or other property in the custody or under the control of any person or persons in the said Colony or its Dependencies (to be named in such affidavit) or that any such person or persons is or are indebted to such defendant the plaintiff may proceed against such defendant by process of foreign attachment in the manner hereinafter directed Provided that by leave of a Judge (where it shall appear that plaintiff may sustain injury by the delay) such affidavit may be filed before the return of such writ of summons.

3. And be it enacted That at any time after the filing of such affidavit as aforesaid a writ of foreign attachment may be issued at the plaintiff’s instance as of course and every such writ shall be in such form as the Supreme Court shall prescribe and be returnable into the said Court either in term or in vacation on some day not less than

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than fourteen days nor more than sixty days next after the date thereof and shall be served upon the several garnishees or persons therein named in whose hands it is intended thereby to attach any such lands monies chattels or debts by delivering a copy thereof to each such garnishee personally or by leaving the same at his or her then or last usual place of abode Provided always that final judgment shall in no case be signed in any such action until an entry shall have been made on the record of the issue of such writ of attachment with a suggestion of the fact that the cause or causes of action so rose as aforesaid and in case it shall at any time appear that the cause of action did not arise within the said Colony or its Dependencies the attachment shall be forthwith dissolved with costs to be paid by the plaintiff to such parties and in such manner as the Court or any Judge thereof shall direct.

Proviso as to proof where cause of action accrued.

4. And be it enacted That in addition to such service the plaintiff shall also cause a notice of the issue of such writ signed by him or his attorney to be published in the *New South Wales Government Gazette* and not less than twice in one other Sydney newspaper and if the defendant or any garnishee shall reside within the District of Port Phillip then not less than twice also in some newspaper published within such district and every such notice shall be in such form as the Court shall direct and the last of such publications thereof shall be one week at the least before the day on which the writ of attachment shall be made returnable.

Public notice to be given.

5. And be it enacted That from the time of the service of such writ upon any such garnishee or person as aforesaid all and singular the lands and other hereditaments monies and chattels bills bonds and other property of whatsoever nature in the custody or under the control of such garnishee then belonging to the defendant against whom such writ issued or to or in which such defendant shall then be legally or equitably entitled or otherwise beneficially interested (and whether solely or jointly with any person or persons) and all debts of every kind then due by any such garnishee to such defendant although the same or part thereof may be payable only at a future day shall to the extent of such defendant's right title and interest therein respectively be attached in the hands of such garnishee and (subject to any *bona fide* prior claims or liens thereon) be liable to the satisfaction of the particular demand or cause of action of which he or she shall by the said writ have had notice and if any such garnishee or person without the leave of the Court or one of the Judges shall at any time after such service and before the said attachment shall be dissolved sell or otherwise knowingly dispose of or part with any such property or pay over any such debt or any part thereof excepting only to or to the use of the plaintiff in such writ he or she shall upon the application in a summary way of such plaintiff to the Court or any Judge thereof and on proof of the facts pay such damages to the plaintiff as such Court or Judge shall in that behalf think fit to order.

Property and debts bound from the time attachment served.

6. And be it enacted That upon the return of every such writ of attachment as aforesaid or as soon after as conveniently may be and upon such other day or days of adjournment if any as shall in that behalf be directed the said Court or one of the Judges thereof shall proceed to inquire and determine whether in fact the plaintiff's cause of action arose within the said Colony or its Dependencies and if so then what lands monies chattels and other property as aforesaid (sufficient or not more than sufficient to satisfy the plaintiff's cause of action together with his costs of suit) then are or were at the time of the service of the said writ in the custody or under the control of any such garnishee or person as aforesaid belonging to the defendant or to or in which he was at that time entitled or interested as aforesaid and what debts

Inquiry as to property in garnishee's hand.

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debts were then due to such defendant from any such garnishee or person and the particulars thereof and whether such lands monies and other property and debts or any part or parts thereof are or can be made available for the purpose of making such satisfaction as aforesaid and to what amount respectively and for the purposes of such inquiry and determination it shall be lawful for the said Court or Judge in a summary way to examine or permit the said plaintiff to examine *vivá voce* upon oath every such garnishee or person together with such witnesses (if any) as the said Court or Judge may think proper to be so examined and for that purpose to make such orders and issue such summonses to the several garnishees and to any witness or witnesses as may in that behalf be deemed expedient and any such garnishee or person as aforesaid or witness who shall refuse or neglect to attend according to the exigency of any such writ of attachment or to obey any such order or summons or shall refuse to be so examined shall be liable to be summarily proceeded against as in cases of contempt of Court and to be punished accordingly Provided always that in any case where it shall under the circumstances appear to be reasonable or just so to do it shall be lawful for the Court or any Judge to dispense with the attendance of any such garnishee upon his submitting to be examined upon oath before a Commissioner of the Court or upon such other terms as such Court or Judge shall impose and where any such garnishee shall attend in obedience to any such writ or summons it shall be lawful for the Court or Sitting Judge to award him the reasonable expenses of such attendance to be paid by the plaintiff.

Attendance of parties.

Disposal of goods &c. by leave of Court.

7. And be it enacted That if any such garnishee or person in whose hands any such lands goods or property as aforesaid shall have been so attached shall be desirous of disposing of the same or any part thereof or of receiving or paying (as the case may be) the amount of any bill bond or debt or other chose in action or any part thereof pending such attachment and shall apply for that purpose to the Court or to one of the Judges it shall be lawful for the said Court or Judge (due notice having been given to the plaintiff of such intended application) to authorize such garnishee or person to sell or dispose of any such property or to receive or pay any such amount and the proceeds of such sale or disposal or the amount so received or paid (as the case may be) shall be thereafter held by such garnishee or person or be paid into Court or invested or otherwise be detained or appropriated subject to such attachment as aforesaid or otherwise for the satisfaction of the plaintiff as such Court or Judge shall think fit to order.

After attachment returned plaintiff may proceed in the action.

8. And be it enacted That at any time after the return day of any such writ of attachment it shall be lawful for the plaintiff to cause an appearance to be entered for the defendant against whom the same shall have so issued and to proceed thereon in the action as if such defendant resided in Sydney in the Colony aforesaid and had appeared to such action in person Provided that such bond as is hereinafter in that behalf prescribed shall have been first duly entered into.

Court to determine what property is to continue subject to attachment.

9. And be it enacted That so soon as upon any such examination or inquiry as aforesaid it shall be ascertained by the Court or Sitting Judge what lands monies or other such property and debts as aforesaid can (consistently with existing liens or prior claims thereon to be determined by the said Court or Judge) be made available for the purpose of making satisfaction to the plaintiff as aforesaid the said Court or Judge shall forthwith order the same (or such part or parts thereof respectively as such Court or Judge shall think proper in that behalf) to be thenceforward holden for that purpose and to continue

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continue subject to such attachment accordingly or to be sold or otherwise disposed of if such Court or Judge shall think fit and the proceeds or (in case of debts then payable) the amount of such debts to be paid into the hands of some officer of the Court subject to such attachment as the said Court or Judge may order and with respect to all and singular the lands monies and other property debts and other choses in action to which no such order as aforesaid shall be intended to apply or as to which no such order can be made it shall be lawful for the said Court or any of the Judges at any time to direct that the said attachment shall be dissolved Provided always that where more than one writ of attachment shall have issued against the same garnishee or person or the same property shall have been attached at the suit of more than one plaintiff it shall be lawful for the said Court or any Judge to award and determine how much and what parts of the property so attached or to what amount in value thereof shall be retained or holden under each of such writs or be paid into Court or disposed of (as the case may be) for the separate benefit of each plaintiff and as to writs lodged with the Sheriff on the same day the plaintiffs therein shall be entitled to satisfaction *pari passu* but if any of such writs shall have been lodged with the Sheriff on different days the plaintiffs shall be entitled to satisfaction respectively according to priority of each in such lodgment.

Proviso as to any second writ.

10. And be it enacted That within fourteen days next after any such writ of attachment shall have issued as aforesaid the plaintiff at whose suit the same shall have been issued or if absent some person on his behalf shall before one of the Judges or some Commissioner of the Supreme Court enter into a bond with two sufficient sureties to be approved of by such Judge or Commissioner acknowledging himself and themselves to be indebted to the defendant against whom such attachment shall have so issued in such sum as one of the Judges shall think fit to order conditioned amongst other things to repay all such sums as the said plaintiff shall recover in the action in case the judgment therein shall be thereafter vacated reversed or altered together with all costs sustained by the defendant which said bond and condition shall be in such form as the said Court shall prescribe and in case of any breach or alleged breach of such condition the defendant shall be at liberty to sue the parties to such bond thereon at any time and if such bond be not so entered into as aforesaid the attachment shall be *ipso facto* dissolved.

Plaintiff to enter into a bond to account &c.

11. And be it enacted That at any time after such bond shall have been so entered into and after final judgment in favour of the plaintiff shall have been obtained it shall be lawful for him to cause a writ or writs of *feri facias* upon such judgment to be from time to time issued as in any ordinary case for the amount of the debt or damages and costs thereby recovered and to cause to be taken in execution under any such writ (as against any defendant whose property shall have been so attached as aforesaid) not only all or any part of the lands goods monies and other property so attached and which shall then continue subject to such attachment as aforesaid in whose hands soever the same property shall then be (and whatever may be the nature of such property whether ordinarily liable to be taken in execution or not and although the same or part thereof may be of the nature of a chose in action) but also any other real or personal property of the defendant which the said plaintiff shall then be able to find and to receive any such goods monies or property in satisfaction or part satisfaction of such debt or damages and costs at an amount to be fixed by the Sheriff or to cause all such property (except as next mentioned) to be sold under such writ or writs as in ordinary cases Provided that with respect to any such debt or other

After judgment plaintiff may issue *feri facias*.

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Compelling payment of debts due to defendant under attachment.

chose in action as aforesaid no sale or other disposition thereof shall take place except by order of the Court or one of the Judges thereof and upon the application of the plaintiff it shall be lawful for the said Court or any Judge thereof at any time in a summary manner to authorize an action for the amount of any such debt to be brought in the name of the creditor being such defendant as aforesaid or to cause the debtor to be summoned to attend such Court or Judge to shew cause why he should not forthwith pay the amount of such debt to such plaintiff and if no sufficient cause be shewn to order such payment accordingly and to enforce such order together with all costs attending the same by an attachment for a contempt as in other cases.

Provision for dissolving foreign attachment.

12. Provided always and be it enacted That if pending any such writ of foreign attachment as aforesaid or at any time before final judgment obtained in the action in which such writ issued the defendant against whom such attachment shall have issued or any person on his behalf shall before one of the Judges of the said Court enter into a bond with two sufficient sureties to be approved of by such Judge acknowledging himself and themselves to be indebted to the plaintiff in such sum as the Judge shall think fit to order conditioned to pay the said plaintiff the amount of such debt or damages and costs as he shall at any time thereafter recover in such action then it shall be lawful for such defendant or person entering into the said bond upon entering an appearance (or if such appearance shall previously have been entered by the plaintiff then upon filing a plea or pleas therein) to defend such action and upon giving notice thereof to the said plaintiff to apply to the said Court by motion as of course that the said attachment may be dissolved and the same shall be dissolved accordingly and the action shall thereupon proceed to trial and judgment in the ordinary manner.

Provision enabling absent defendant to come in and defend notwithstanding judgment against him.

13. And be it enacted That if after any final judgment obtained as aforesaid an affidavit shall be made by the defendant against whom such process of foreign attachment shall have issued as aforesaid that such defendant had at the time of the obtaining of the said judgment and still hath a substantial ground of defence (either wholly or in part) to the plaintiff's action on the merits and such affidavit (sworn as next hereinafter mentioned) shall at any time before the expiration of three years next after such judgment be filed in the said Court then upon motion thereupon for that purpose made to the said Court on behalf of the said defendant and after due notice thereof given to the said plaintiff (and security being entered into for the payment to him of all costs by him at any time thereby sustained) it shall be lawful for the said Court to cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form either by a feigned issue between the parties or otherwise and at such time and under terms and conditions for the purpose of securing the substantial ends of justice as to the said Court shall seem meet and the said Court after such inquiry and determination had shall thereupon give such judgment in the matter for the reversal of the judgment in the original action either in the whole or in part or shall or lawfully may from time to time make such order or orders in the premises between the parties as the justice of the case shall appear to require and every such judgment and order may at any time (if the party succeeding shall think fit) be suggested upon or added to the record of the original action in which such final judgment shall have been so obtained as aforesaid and every such affidavit if made within the said Colony of New South Wales or its Dependencies shall be sworn before one of the Judges or some officer of the Court or person authorized to take affidavits to be used in the said Court or if made elsewhere shall

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shall be sworn before a Judge or Master of some Court of Law or Equity or the Chief Magistrate of some city or corporate town certified under the hand and seal of such Magistrate.

14. And be it enacted That the property of any such absent defendant as aforesaid may under the provisions of this Act be attached and taken in the custody or power of the defendant's wife or of any co-defendant and that no process of foreign attachment against any such absent defendant nor any lien intended to be thereby created upon the lands monies securities debts and chattels or other property of such defendant thereby attached shall be defeated by reason of such co-defendant or any other garnishee as aforesaid being or claiming to be jointly interested with such defendant therein either as partner or otherwise and in all cases it shall be sufficient for the purposes of this Act to attach property in the hands of the person or persons having the actual care custody or control thereof for the time being.

Property in possession of any co-defendant or wife.

15. Provided always and be it enacted That in all cases wherein two or more defendants shall be sued as co-partners and as to any of such defendants there shall be a return of *non est inventus* but as to any other of such defendants there shall be a return of personal service or of *cepi corpus* then if at any time after any such return an affidavit shall be filed that to the best of the deponent's knowledge and belief the defendant served or arrested did in fact when the cause of action accrued carry on business in the said Colony or its Dependencies as a co-partner jointly with the defendant or defendants as to whom there shall have been such return of *non est inventus* and that such last-mentioned defendant or defendants is or are absent from the Colony it shall be lawful for the plaintiff at his option to proceed against every such absent defendant (in case no appearance be entered for him) in the manner next hereinafter mentioned that is to say upon the filing of such affidavit or as soon after as conveniently may be the plaintiff shall cause a notice to every such defendant signed by himself or his attorney to be published in the *New South Wales Government Gazette* and in not less than one other Sydney newspaper in such form as the Court shall for that purpose direct requiring every such defendant to appear and if on the day named in such notice (such day not being less than ten days next after the day of the publication of the same in the said *Gazette*) no appearance be entered for the defendant or defendants so being absent from the Colony the plaintiff may cause such appearance to be entered and may proceed as if he or they resided in the said Colony and had appeared to the action in person.

Provision in case of absent defendants sued as co-partners.

16. And be it enacted That the like appearance may be entered and proceedings had where two or more defendants shall be sued although not as co-partners (where there shall be such return as last aforesaid) upon an affidavit by or on behalf of the plaintiff that the cause of action against all the defendants accrued within the said Colony or its Dependencies and that the defendant or defendants as to whom the return of *non est inventus* was made is or are absent from the Colony Provided that in addition to the publication of such notice as aforesaid the plaintiff shall give security by bond before any such appearance as aforesaid shall be entered by him to such amount and in such form as a Judge shall order conditioned to repay all such sums as he shall recover in the action against any such absent defendant together with all costs sustained by such defendant in the premises in case the judgment therein against him shall afterwards be vacated reversed or altered and every such defendant shall have the like remedy and the same proceedings may be taken on his behalf for procuring the reversal of such judgment so far as the same affects such

Similar provisions where defendants not sued as co-partners.

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such defendant as are hereinbefore provided with respect to defendants against whose property there shall have been issued as aforesaid any writ of foreign attachment.

Co-partnerships all of whose members are not known.

17. And whereas in some cases business is carried on in the said Colony by persons in co-partnership or by one individual or more assuming the style of a co-partnership or acting as agent or agents for a co-partnership and in some of those cases the names of the actual members of such co-partnership or of some of them are or may be unknown and in order to prevent any failure of justice in such cases Be it enacted That every such co-partnership and the several members thereof or the persons or person having carried on business under the style of any such co-partnership may be sued in any action at law in the name or names of any one or more of the members of such co-partnership on behalf of all the members composing the same or in the name or names of any such agent or agents for and on behalf of such co-partnership so as that in all cases wherein it would have been necessary if this Act had not been passed to mention the names of all the members composing any such co-partnership it shall be sufficient to mention only the name or names of such one or more member or members or of such agent or agents on behalf of such co-partnership and every judgment obtained in any such action shall have the same effect and operation upon the property both real and personal of such co-partnership and also upon the property and persons of the several members thereof when discovered whether such property be joint or separate as if every member of such co-partnership had been actually and in fact a defendant in the action.

Proviso.

18. Provided always and be it enacted That in every summons and other writ issued and declaration or other pleading filed on behalf of the plaintiff in any action brought under the provisions of the preceding section the style or firm of the co-partnership shall be specified and it shall distinctly appear that the defendant sued is so sued either as a member or as agent for and on behalf of a co-partnership And provided also that no agent sued on behalf of a co-partnership shall by reason only of his being so sued be incompetent as a witness in the action on behalf either of the plaintiff or of the co-partnership or be liable in person or in property to any judgment obtained in such action.

Where several sued as joint contractors the verdict may be against some of them only.

19. And be it enacted That after the passing of this Act in all cases where two or more persons shall be sued as joint contractors the plaintiff shall be entitled to a judgment (or to a verdict and judgment as the case may be) against such of the defendants as shall appear to be liable although one or more of the persons made a defendant or defendants shall appear not to be liable Provided that in every such case the defendant or defendants not liable shall have judgment and be entitled to costs against the plaintiff and to the like remedy for the same as a defendant hath in any ordinary case.

Pleas in abatement for non-joinder.

20. And be it enacted That no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any action unless it be stated in the plea that such person is resident within the jurisdiction of the Court and unless the place of his residence be stated with convenient certainty in an affidavit verifying such plea and to any such plea in abatement the plaintiff may reply that such person has been discharged by bankruptcy and certificate or under any Act passed or to be passed for the relief of insolvent debtors.

Provision for subsequent proceedings.

21. And be it enacted That if after any such plea in abatement the plaintiff shall without proceeding to trial commence another action against the original defendant or defendants and the person or persons named in such plea as a joint contractor or contractors and if thereafter it shall appear either by the pleadings in such subsequent action

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action or by the evidence at the trial that all the original defendants are liable but that any of the persons named in such plea is or are not liable and the defendant or defendants not so liable shall accordingly under the provisions of this Act obtain judgment for his or their costs against the plaintiff the amount of the costs payable to the defendant or defendants so succeeding shall be allowed to the plaintiff as costs in the cause against such of the defendants so appearing to be liable as shall have pleaded in abatement the non-joinder of such person or persons Provided that any defendant having so pleaded in abatement shall be at liberty at the trial to adduce evidence of the liability of the parties named by him in such plea.

22. And be it enacted That every writ of attachment upon which any order shall have been made as aforesaid where the same shall have been followed by execution levied may be pleaded in bar by any person or persons in whose hands any lands goods debts or effects as aforesaid shall be attached to any action brought by or on behalf of the defendant for the recovery of such property and if any such action shall be brought pending the attachment the same shall be stayed by order of the Court or a Judge until the attachment shall be dissolved or the proceedings thereupon be otherwise determined and in such plea it shall be necessary only to state shortly that such writ of attachment was issued and to set out the substance of the order finally made thereon and then to allege that the property sought to be recovered was taken under a writ of execution issued after such order.

Attachment and execution may be pleaded in bar.

23. And be it enacted That nothing in this Act contained shall extend to any action of trespass or other action in tort (trover or detinue excepted) but to actions on or arising out of contract only.

Act to extend only to cases of contract.

24. And be it enacted That absence from the said Colony or its Dependencies shall for the purposes of this Act be taken to mean absence for the time being whether the party shall ever have been within the said Colony or its Dependencies or not.

The term "absence."

25. And be it enacted That it shall be lawful for the Court or any of the Judges for the more satisfactory determination of any question of fact arising before such Court or Judge under this Act to direct the trial of any feigned issue or issues by a jury and for that purpose to make all necessary orders as to the form thereof and who shall be parties therein and otherwise and in all cases in which no provision or no sufficient provision is by this Act made it shall be lawful for the Supreme Court from time to time for the purpose of facilitating or more effectually carrying into execution any of the objects of this Act (either upon any application in a summary way made for that purpose by or on behalf of any person interested in any matter by this Act intended to be provided for or without any such application) to make and prescribe all such rules and orders either general or applicable to any particular case only touching any of the matters intended to have been hereby provided for and touching also the manner of proceeding before or applying to the Court and Judges respectively and also the execution of writs and orders and the allowance and taxation of costs under this Act as to the Court shall seem expedient and such rules and orders from time to time to revoke or alter as to the Court shall appear to be requisite and all rules and orders so made and prescribed shall be of the same force and effect as if they had been inserted in this Act and the said Court and each of the Judges thereof shall in all cases whatsoever of applications made to or proceedings had or taken before or by authority of the said Court or any Judge thereof or otherwise under this Act have full power to adjourn the case or proceedings from time to time and in all cases to award or refuse costs the same to be paid by and to such party or parties as the Court shall in each case think fit to order.

The Court may make rules and award costs and direct trials before a jury.