

Act No. 24, 1902.

An Act to consolidate the enactments relating to arrest on mesne process. [31st July, 1902.]

ARREST ON MESNE
PROCESS.

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

Preliminary.

1. This Act may be cited as the "Arrest on Mesne Process Act, 1902," and is divided into Parts, as follows:—

PART I.—*Preliminary*—ss. 1-3.

PART II.—*Arrest and Bail*—ss. 4-10.

PART III.—*Discharge*—ss. 11-14.

PART IV.—*Commissioner at Newcastle*—ss. 15-35.

2. (1) The Acts mentioned in the Schedule to this Act are to the extent therein expressed hereby repealed.

(2) All persons appointed under any Act hereby repealed, and holding office at the time of the passing of this Act, shall remain in office as if this Act had been in force at the time they were appointed and they had been appointed hereunder, and this Act shall apply to them accordingly.

(3) All rules made under the Acts hereby repealed, and in force at the time of the passing of this Act, shall be deemed to have been made hereunder.

3. In this Act, unless the context or subject-matter otherwise indicates or requires,—

Interpretation.
24 Vic. No. 14, s. 17.

"Capias" means *capias ad respondendum*.

"Court" means the Supreme Court.

"Defendant" in Part IV includes a person against whom an action is about to be brought.

"Judge" means a Judge of the Court.

"Plaintiff" in Part IV includes a person about to commence an action.

PART II.

Arrest and bail.

No arrest on mesne process except under this Act.

3 Vic. No. 15, s. 1.

Order to hold to bail.

Ibid. s. 2.

37 Vic. No. 11, s. 1.

4. No person shall be arrested upon mesne process in any civil action in any court except in the cases and in the manner hereinafter provided.

5. In any action in the Court in which the defendant, under the law in force before the passing of the Act third Victoria number fifteen, would have been liable to arrest, whether upon the order of a Judge, or without such order, if a Judge is satisfied by affidavit disclosing the facts constituting the ground of the plaintiff's claim, or by evidence on oath before such Judge,—

(a) that the plaintiff has *primâ facie* a good cause of action in respect of his claim against the defendant, and if such Judge is also satisfied by the affidavit of the plaintiff or some other person—

(b) that such cause of action is to the amount of twenty pounds or upwards, or that the plaintiff has sustained damage to that amount; and

(c) that any defendant is about to remove or is making preparations to remove out of the jurisdiction of the Court; and

(d) that such action will be defeated unless such defendant is forthwith apprehended; and

(e) that the application is made within a reasonable time after the fact of the defendant's intention so to remove came to the knowledge of the plaintiff or might have become known to him by reasonable diligence on his part,

such Judge may by a special order direct that such defendant shall be held to bail for such sum as such Judge thinks fit, not exceeding the amount of the debt or damages.

Issue of writ of *capias*.

3 Vic. No. 15, s. 2.

6. (1) Thereupon the plaintiff, within the time expressed in such order but not afterwards, may sue out one or more writ or writs of *capias* against such defendant.

(2) Every such writ shall be in the form prescribed by the Judges.

Execution of writ.

Ibid. s. 3.

7. (1) The sheriff or other officer to whom any such writ is directed shall, before the return of the said writ but not afterwards, proceed to arrest such defendant thereupon.

(2) Such writ may be lawfully executed upon a Sunday.

13 Vic. No. 12, s. 1.

Order and arrest to be during pendency of action.

3 Vic. No. 15, s. 4.

8. Such order may be made and the defendant arrested in pursuance thereof at any time after the commencement of the action and before final judgment is obtained therein.

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9. The defendant when arrested shall remain in custody until he has given a bail bond to the sheriff or other officer, or has made deposit of the sum endorsed on such writ of *capias*, together with ten pounds costs.

Defendant to remain in custody until he finds bail or makes deposit.

3 Vic. No. 15, s. 3.

10. All subsequent proceedings as to putting in and perfecting special bail shall be subject to the Rules of the Court made for the practice of the Court in such cases.

Subsequent proceedings subject to Rules of Court.

Ibid.

PART III.

Discharge.

11. Any person arrested upon a writ of *capias* may apply to a Judge at any time after such arrest for an order on the plaintiff to show cause why such person should not be discharged out of custody.

Application for order nisi for discharge.

Ibid. s. 5.

12. Any Judge may make absolute or discharge such order, and may direct the costs of the application to be paid by either party, and may make such other order therein as he thinks fit.

Proceedings upon order nisi.

Ibid.

13. Upon the application of either party dissatisfied with any such order, the Court may discharge or vary the same.

Appeal.

Ibid.

14. (1) Any person in the custody of any sheriff, gaoler, or officer under any such writ shall upon the sequestration of his estate in pursuance of the law in force for the time being relating to bankruptcy, be entitled to his discharge from such custody on the order of the Judge in Bankruptcy, and shall be forthwith discharged from such custody either absolutely or on such conditions as the said Judge may impose.

Discharge on bankruptcy.

37 Vic. No. 11 s. 5.

1898, No. 25 s. 133

(3).

(2) No such sheriff, gaoler, or officer shall incur any liability in respect of such discharge to any person for anything done by him under this section.

37 Vic. No. 11, s. 4.

PART IV.

Commissioner at Newcastle.

15. The Chief Justice may by commission under his hand and the seal of the Court appoint some fit person residing at Newcastle or within five miles thereof to be a commissioner of the Court for the purposes of this Act.

Appointment of Commissioner.

24 Vic. No. 14, s. 1.

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Issue of writs of
summons and capias.
24 Vic. No. 14, s. 1.

16. (1) Such commissioner shall at the instance of any plaintiff have power to issue writs of summons and of capias in the Court against any defendant about to depart out of New South Wales from the said port of Newcastle in cases where by law an arrest upon mesne process is allowed in an action under this Act.

(2) Every such writ of capias shall (except where hereby otherwise provided) have the same force and effect as an ordinary writ of capias issued out of the Court at Sydney directed to the sheriff.

Requisites to obtain
capias.

Ibid. s. 2.

17. (1) No writ of summons shall be issued under this Part except to ground a writ of capias to be issued hereunder.

(2) No writ of capias shall be issued under this Part unless proof by affidavit is first given to the commissioner that the defendant is about to depart out of New South Wales from the said port of Newcastle, and of all such other facts and matters which are necessary to be given and established to obtain an order from a Judge for the issue of an ordinary writ of capias out of the Court at Sydney.

Plaintiff to give bond
as security against
abuse of process.

Ibid.

18. (1) No such writ of capias shall be issued under this Part unless the plaintiff, shall first give a bond of two sufficient persons (of whom the plaintiff, if of sufficient ability in the opinion of the commissioner, may be one) to the satisfaction of the commissioner to the defendant, in a sum of money to be fixed by such commissioner not being less than double the amount for which the defendant is liable to be arrested or held to bail under such writ, conditioned to be void on payment to the defendant of all damages costs and charges which may be adjudged to him in any action by him against the plaintiff and the bailiff to whom such writ of capias is directed or either of them for or by reason of such writ having been issued, or of his being arrested thereunder, or of any wrong or damage sustained by him on account thereof, or of any wrongful act or omission of such bailiff in or about the execution thereof, or otherwise in relation thereto, and of all costs charges and expenses which upon any application by the defendant to the Court or a Judge for any rule or order to set aside any such writ or to discharge the defendant from custody thereunder or to cancel any bail bond given thereunder or otherwise in relation to or connected with such writ or anything done thereunder may be adjudged or ordered to be paid to the defendant.

(2) Provided always that the amount for which such bond shall be given shall in no case exceed the sum of four hundred pounds.

(3) The commissioner shall forthwith transmit such bond to the Prothonotary of the Court, who shall, upon demand, deliver such bond to the defendant or any one applying for the same on his behalf.

Bond not to be for
more than four
hundred pounds.

To be sent to
Prothonotary
for delivery to
defendant.

No order necessary
for capias.

Ibid. s. 3.

19. It shall not be necessary for any order to be made to warrant the issuing of any writ of capias under this Part; but the commissioner shall by memorandum thereon under his hand certify on whose application

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application and on what affidavit or affidavits and when it was issued, and the amount for which the defendant is to be arrested or held to bail thereunder, in the form or to the effect following:—

“This writ was issued this day of 19 under the provisions of the Arrest on Mesne Process Act, 1902, on the application of the therein named A B [*naming the plaintiff*], and upon reading the affidavit of [*naming the deponent*] sworn on the day of 19 [*describing each affidavit if more than one*]. And the defendant C D [*naming the defendant*] is to be arrested or held to bail hereunder for or in the sum of pounds [*specifying the amount*]. E F [*here to be signed by the Commissioner*], Commissioner under the said Act.”

20. (1) Every writ of capias issued under this Part shall instead of being directed to the sheriff be directed to some person to be specially named by the plaintiff as a bailiff to execute the same. Capias directed to special bailiff. 24 Vic. No. 14, s. 4.

(2) Such bailiff shall have all the authority thereunder which the sheriff has under an ordinary writ of capias issued out of the Court at Sydney directed to him, save only that such bailiff shall not have power to appoint a deputy to execute the same, but shall execute it personally with such assistant or assistants (if any) as he may require in that behalf. Powers of bailiff. Ibid.

21. (1) No person shall be bound to accept the office of or to act as a bailiff under any writ issued in pursuance of this Part unless he consents or agrees so to do. Persons not bound to act as bailiffs without first agreeing. Ibid. s. 5.

(2) Every person who consents or agrees so to do shall be bound to act as such bailiff under the writ directed to him until his whole duty as such bailiff under such writ is fully performed.

22. Every writ of summons and of capias issued under this Part shall be issued under the signature and seal of the commissioner issuing the same, but in all other respects (except where other provision is hereby made) shall be in the same form and shall have all such notices and endorsements thereon respectively as are required in respect of ordinary writs of summons and of capias issued out of the Court at Sydney. Form of writs. Ibid. s. 6.

23. It shall not be requisite to file or deliver any præcipe for or in respect of any writ of summons or of capias issued under this Part. No præcipe required. Ibid. s. 7.

24. Every writ of summons issued under this Part shall be the commencement of an action in the Court by the plaintiff against the defendant. Summons to be commencement of action. Ibid.

25. The commissioner upon issuing any such writ of summons or capias shall forthwith transmit copies thereof and of every endorsement thereon and the original affidavits upon which any such writ of capias was issued by him to the office of the Prothonotary of the Court to be there filed and kept. Copy of writs to be sent to Supreme Court Office. Ibid.

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Commissioner's fees.
24 Vic. No. 14, s. 8.

26. The commissioner shall be entitled to receive and retain for his own use for issuing any writ of summons under this Part the sum of five shillings, and for issuing any writ of capias the sum of one pound, and to no other fees, payment, or remuneration whatsoever.

Plaintiff's costs.
Ibid.

27. Every plaintiff issuing or obtaining any such writ of summons or of capias shall be entitled to the same costs thereupon as he would be entitled to upon issuing or obtaining a similar writ out of the Court at Sydney in the ordinary way.

No action against
commissioner except
in case of corruption.
Ibid. s. 9.

28. No action shall lie against the commissioner for issuing any writ of capias under this Part unless the plaintiff in such action shall allege and prove that the commissioner knowingly and wilfully issued the same without reasonable proof being given to him to warrant the issuing thereof, and also that in issuing the same he acted corruptly.

Bailiffs to return
writs of capias.
Ibid. s. 10.

29. Every bailiff to whom a writ of capias issued under this Part is directed, and who consents and agrees to act as such bailiff to execute the same, shall make a due return thereto to the Court in like manner as the sheriff is bound to make a return to an ordinary writ of capias issued out of the Court at Sydney directed to him, and shall be subject to attachment and action in respect of the execution of such writ or incident thereto, and to an action at the suit of the plaintiff or defendant for any wrongful act or omission by him in or about the execution of such writ and incident thereto, in like manner as the sheriff is liable under the same circumstances in respect of an ordinary writ of capias issued out of the Court at Sydney and directed to him.

Liabilities of bailiffs.

Bailiffs to take bail.
Ibid. s. 11.

30. (1) The bailiff, acting under any writ of capias issued under this Part shall have authority and shall be bound to take bail by bond of the defendant and sureties to himself for the appearance and rendering of the body of the defendant according to the exigency of such writ and the practice of the said Court of the same kind and in like manner in all respects as the sheriff is bound to take bail from a defendant arrested under an ordinary writ of capias issued out of the Court at Sydney directed to himself.

Release of defendant
thereon.

(2) Such bailiff upon such bail bond being entered into and given to him shall release the defendant from his custody under such writ.

Bail bond assignable.

(3) Every such bail bond shall be assignable by such bailiff to the plaintiff, and such bailiff upon being required so to do shall assign the same to the plaintiff, and the plaintiff upon such assignment thereof may sue thereon in like manner in all respects as if it were an ordinary bail bond to the sheriff.

Bailiffs to take
deposit in lieu of
bail.
Ibid. s. 12.

31. (1) The bailiff acting under any writ of capias issued under this Part shall be bound to receive from the defendant as a deposit

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deposit in lieu of bail the amount for which he is to be arrested or held to bail thereunder and the sum of ten pounds for costs in like manner as the sheriff is bound to do under an ordinary writ of capias issued out of the Court at Sydney directed to and executed by him.

(2) Upon receipt of such deposit such bailiff shall release the defendant from his custody under such writ, and shall forthwith pay or cause to be paid over to the Prothonotary of the Court the money so deposited by such defendant as aforesaid, to be held and disposed of by such Prothonotary according to law. Release of defendant thereon.

32. Every bailiff serving any writ of summons or executing any writ of capias issued under this Part shall be entitled to the same fees, mileage, and other remuneration for everything done by him as such bailiff under the provisions of this Act as the sheriff and his bailiff are, or is, or may be entitled to for the same or similar acts done by them or either of them in serving or executing or otherwise in relation to any ordinary writ of summons or of capias issued out of the Court at Sydney or taking bail thereunder, and to no other payment or remuneration whatever. Bailiff's fees. 24 Vic. No. 14, s. 13.

33. Every plaintiff obtaining any such writ of capias under this Part, and the bailiff to whom the same is directed, shall be jointly and severally liable to the defendant for any wrongful act or omission by such bailiff in or about the execution of such writ or incident thereto. Plaintiff and bailiff to be jointly and severally liable for misfeasance of bailiff. Ibid. s. 14.

34. All proceedings in any action commenced by any writ of summons and under any writ of capias issued under the provisions of this Part shall (except as herein otherwise directed) be taken and had in like manner as if such action had been commenced by ordinary writ of summons issued out of the Court at Sydney, and the Court and any Judge thereof shall have all such and the same powers to set aside any writ of summons or capias issued under the provisions hereof or the service of any writ of summons, or to discharge from custody any defendant arrested under any such writ of capias, and to order any bail bond given thereunder to be cancelled, and in every other respect as such Court or Judge has or may have in case of ordinary writs of summons or capias issued out of the Court at Sydney. Proceedings in actions commenced by writs under this Part. Ibid. s. 15.

35. The Judges, or any two of them, may make all such rules as they think necessary or proper for carrying this Part of this Act into execution. Judges to make rules. Ibid. s. 16.

Act No. 25, 1902.

Consolidated Revenue Fund.

SCHEDULE.

Reference to Act.	Title.	Extent of repeal.
9 Geo. IV No. 2	An Act for adopting a certain Act of Parliament passed in the seventh and eighth years of His Majesty King George the Fourth to regulate the practice of arrests.	The whole.
3 Vic. No. 15 ...	An Act for abolishing arrest on mesne process in civil actions except in certain cases in New South Wales and the dependencies thereof.	The whole.
13 Vic. No. 12 ...	An Act to prevent the escape from the Colony of fraudulent debtors.	The unrepealed portion.
24 Vic. No. 14 ...	An Act to authorise the appointment of a commissioner to issue writs of summons and arrest at the port of Newcastle.	The whole.
37 Vic. No. 11 ...	An Act to amend the law of arrest and imprisonment on civil process.	The unrepealed portion except section 6.